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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

PATRICK FEHILY and DAVID T. MALLEY,

Plaintiffs,

v.

JOSEPH R. BIDEN JR., in his official capacity as
President of the United States; GINA
RAIMONDO, in her official capacity as Secretary
of United States Department of Commerce; and
DEB HAALAND, in her official capacity as
Secretary of the United States Department of the
Interior,

Defendants,

and

CONSERVATION LAW FOUNDATION,
NATURAL RESOURCES DEFENSE COUNCIL,
INC., CENTER FOR BIOLOGICAL
DIVERSITY, and R. ZACK KLYVER,

Defendant-Intervenor Applicants.

Case No. 3:22-cv-02120

**Judge Georgette Castner
Magistrate Judge
Tonianne J. Bongiovanni**

**BRIEF IN SUPPORT OF
DEFENDANT-
INTERVENOR
APPLICANTS' MOTION
TO INTERVENE**

Motion Day: July 18, 2022

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INTRODUCTION

Conservation Law Foundation (62 Summer Street, Boston, Massachusetts 02110), Natural Resources Defense Council (40 West 20th Street, Floor 11, New York, New York 10011), Center for Biological Diversity (378 North Main Avenue, Tucson, Arizona 85701), and R. Zack Klyver (120 French Street, Bangor, Maine 04401) (collectively, “Applicants”) seek to intervene as defendants in this case to protect their interests in the Northeast Canyons and Seamounts Marine National Monument. Pursuant to Local Civil Rule 7.1(f)(1), Applicants’ counsel contacted Plaintiffs’ counsel and Federal Defendants’ counsel to ascertain their positions on this motion prior to filing. Counsel for Plaintiffs stated that they could not take a definitive position on the motion until they have had an opportunity to review it. Counsel for Federal Defendants stated that they take no position on this motion.

This case involves a challenge to the Northeast Canyons and Seamounts Marine National Monument (“the Monument”), an area off the coast of Cape Cod with extraordinary scientific, geologic, and ecological importance. The Monument encompasses a system of underwater canyons and seamounts, and the associated habitats that sustain a wide array of sea life—including endangered whales and sea turtles, Atlantic puffins and other seabirds, and ancient deep-sea corals. Scientists have documented exceptionally abundant biodiversity here, making it “one of science’s greatest oceanic laboratories.” U.S. Dep’t of the Interior, *Administration*

Leaders Applaud President Biden's Restoration of National Monuments (Oct. 7, 2021).¹ Recognizing its scientific importance, President Obama declared it a national monument in 2016. With this designation, the Monument was set to become the only “highly protected” marine area—once commercial fishing is entirely phased out—in the U.S. Atlantic Ocean. *See infra* at 7.

The Monument has already survived one legal challenge nearly identical to this one. That prior lawsuit was brought by commercial fishing groups in the U.S. District Court for the District of Columbia, represented by the same law firm that represents Plaintiffs here. If the present Plaintiffs succeed where previous litigation has failed, their lawsuit would reopen this area to commercial fishing and expose the Monument’s fragile marine resources to irreversible damage. Applicants and their members have an interest in preventing that outcome, and ensuring the continued protection of this national treasure. For the reasons set forth below, Applicants’ motion to intervene should be granted.

¹ Available at <https://www.doi.gov/pressreleases/administration-leaders-applaud-president-bidens-restoration-national-monuments> (accessed June 7, 2022); *see also* U.S. Fish & Wildlife Serv., *Northeast Canyons and Seamounts Marine National Monument: About Us*, <https://www.fws.gov/national-monument/northeast-canyons-and-seamounts-marine/about-us> (accessed June 7, 2022) (describing “exceptional” biodiversity).

BACKGROUND

I. The Northeast Canyons and Seamounts Marine National Monument

Approximately 130 miles off the coast of Cape Cod, Massachusetts, lie three underwater canyons that cut into the continental shelf break, rivaling the Grand Canyon in depth. Beyond the canyons lies a cluster of four extinct undersea volcanoes, known as seamounts. This dramatic, rugged terrain and the ocean-current patterns shaped by its landforms combine to create an unusual, three-dimensional biologic hotspot that provides food, shelter, and nursery habitat to an exceptional range of sea life in an otherwise harsh environment. *See* Proclamation No. 10287, 86 Fed. Reg. 57,349, 57,349 (Oct. 8, 2021) (“2021 Proclamation”); *see also* U.S. Fish & Wildlife Serv., *Northeast Canyons and Seamounts Marine National Monument: About Us*, *supra* at 2 n.1.

The canyons and seamounts area has attracted significant scientific attention and study over the last decade, thanks to the wealth of biodiversity found there. Proclamation No. 9496, 81 Fed. Reg. 65,161, 65,163 (Sept. 15, 2016) (“2016 Proclamation”). Scientists have found and continue to find species in the area that have been observed nowhere else on Earth. *Id.* at 65,162. Benthic (or bottom) fauna—including deep-sea corals, sponges, and anemones—create the foundation for deep-sea ecosystems, providing food, spawning habitat, and shelter for complex communities of creatures that live on and around them. *Id.* at 65,161.

Corals found at these depths grow very slowly, sometimes over hundreds or even thousands of years, making them acutely vulnerable to damage caused by disruptive extractive activities. *Id.* at 65,161, 65,162.

The Monument’s biological, geological, and oceanographic features make it an important feeding ground for many other species, too, including seabirds like puffins, gulls, shearwaters, storm petrels, gannets, skuas, and terns; large predatory fish like tuna and sharks; and multiple species of whales, dolphins, and sea turtles, including endangered sperm, sei, and fin whales, and leatherback sea turtles. *Id.* at 65,162-63. For example, the Monument area is a critical winter feeding ground for “Maine’s vulnerable Atlantic puffin.” *Id.* at 65,163. Using geolocation devices, scientists recently discovered that the birds spend several months each winter at sea, in and around the Monument. *Id.* As the effects of climate change stress these species, the Monument plays an especially important role in bolstering their resilience. *See id.* at 65,161. And, as the Secretary of the Interior recently observed, “research suggest[s] that the Northeast Canyons and Seamounts Marine National Monument possesses an extraordinarily high potential for scientific discoveries”

still to come. U.S. DEP’T OF THE INTERIOR, REPORT ON RESTORING NATIONAL MONUMENTS 14 (June 2021) (“Interior Report”).²

There has historically been little commercial fishing activity within the Monument, *see* Proposed Answer ¶ 8, but even minimal commercial fishing “has the potential to significantly degrade the [M]onument’s objects of historic and scientific interest,” Proclamation No. 10287, 86 Fed. Reg. at 57,351. Deep-sea organisms tend to have longer lifespans and slower growth rates than their shallow-water counterparts, making these habitats “extremely sensitive to disturbance from extractive activities.” Proclamation No. 9496, 81 Fed. Reg. at 65,161. Bottom-contact fishing gear, like traps and weighted trawl nets, can crush coral colonies that have been growing for hundreds of years. *See* Proposed Answer ¶ 52. Higher in the water column, pelagic long-line gear used to catch tuna and swordfish, and the lines used with traps, can entangle and kill whales, dolphins, seabirds, sea turtles, and other non-target species. *Id.* Derelict fishing gear can crush, entangle, or kill marine creatures. *Id.* Extractive commercial fishing also reduces fish abundance and disrupts fish behavior, resulting in a range of adverse ecological

² Available at <https://www.doi.gov/sites/doi.gov/files/department-of-the-interior-report-on-restoring-national-monuments-co-13990.pdf> (accessed June 7, 2022); *see also id.* at 14 n.56 (citing P. Auster et al., *A Scientific Basis for Designation of the Northeast Canyons and Seamounts Marine National Monument*, FRONTIERS IN MARINE SCIENCE (2020)).

effects, such as altering the balance of predator and prey species, with ripple effects up and down the food chain. *Id.*

Recognizing the scientific importance and fragility of this area, the federal government began evaluating the area for permanent protection as a national monument in 2015. The White House, *Fact Sheet: Creating the First Marine National Monument in the Atlantic Ocean* (Sept. 15, 2016).³ The Obama administration undertook an extensive public process that included several rounds of regional stakeholder meetings, including with commercial fishing interests. *Id.* One hundred forty-five prominent marine scientists sent a letter to the administration in support of the Monument. *Id.* Applicants CLF, NRDC, and Mr. Klyver spoke publicly and/or sent letters to the administration in support of the Monument, as detailed in the attached declarations. Mahoney Decl. ¶ 10; Sewell Decl. ¶¶ 15-16; Klyver Decl. ¶ 6.

On September 15, 2016, pursuant to his authority under the Antiquities Act, 54 U.S.C. § 320301, the President issued a proclamation designating the Northeast Canyons and Seamounts Marine National Monument. *See* Proclamation No. 9496, 81 Fed. Reg. at 65,161. The 2016 Proclamation described in detail “the canyons

³ Available at <https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate> (accessed June 7, 2022).

and seamounts themselves, and the natural resources and ecosystems in and around them,” which it identified as “objects of historic and scientific interest.” *Id.* at 65,161. To ensure the protection of these objects, the 2016 Proclamation prohibited oil and gas exploration and commercial fishing within the Monument. *Id.* at 65,164-65. (It allowed fishing for American lobster and red crab to phase out over seven years, providing a transition period for participants in these fisheries. *Id.* at 65,165.) The President defined the Monument as consisting of two units separated by a transit corridor—the Canyons Unit, covering approximately 941 square miles, and the Seamounts Unit, covering approximately 3,972 square miles—which the President determined to be “the smallest area compatible with the proper care and management of the objects to be protected.” *Id.* at 65,161, 65,163. With that, the Monument became the first and only marine national monument off the eastern continental United States.

In March 2017, five commercial fishing industry groups filed a lawsuit in the U.S. District Court for the District of Columbia challenging the 2016 Proclamation. Those plaintiffs sought to enjoin the President, the Secretary of Commerce, and the Secretary of the Interior from enforcing the 2016 Proclamation’s commercial fishing prohibition. Their complaint—in terms strikingly similar to this one—asserted that the Antiquities Act did not apply to submerged lands in this part of the ocean, that living resources and ecosystems

could not qualify for protection under the Act, and that the Monument was too large. Complaint ¶¶ 71-75, *Mass. Lobstermen's Ass'n v. Ross*, No. 17-cv-00406-JEB (D.D.C. Mar. 7, 2017), ECF No. 1.

Applicants intervened in *Massachusetts Lobstermen's Association* to defend the Monument's legality. The district court granted Applicants' intervention motion and ultimately dismissed the fishing groups' complaint, holding that the Monument's designation was a valid exercise of the President's Antiquities Act authority. *See Order, Mass. Lobstermen's Ass'n v. Ross*, No. 17-cv-00406-JEB (D.D.C. Mar. 20, 2018) (granting intervention motion); *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48 (D.D.C. 2018) (dismissing complaint). “[J]ust as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908,” the district court concluded, “so President Obama could establish the Canyons and Seamounts Monument in 2016.” *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 51.

The D.C. Circuit affirmed. It held that the Antiquities Act applies to submerged land in the ocean and can protect natural resources of scientific interest there, and that the fishing groups had failed to offer non-conclusory allegations supporting their claim that the Monument was too large. *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 540-41, 542, 544 (D.C. Cir. 2019). The U.S. Supreme Court denied the fishing groups' petition for a writ of certiorari. *Mass. Lobstermen's*

Ass'n v. Raimondo, 141 S. Ct. 979 (2021). The fishing groups did not seek leave to amend their complaint, and their litigation came to an end.

While the *Massachusetts Lobstermen's Association* litigation was pending, however, in June 2020, President Trump issued a proclamation purporting to “amend[]” the 2016 Proclamation by revoking the commercial fishing prohibition. Proclamation No. 10049, 85 Fed. Reg. 35,793, 35,795 (June 5, 2020) (“2020 Proclamation”). Never in the Antiquities Act’s century-long history had a President opened an entire national monument up to commercial extractive use, as the 2020 Proclamation purported to do. Applicants filed a lawsuit in the U.S. District Court for the District of Columbia challenging the President’s action as unlawful. Complaint, *Conservation Law Found. v. Trump*, No. 20-cv-01589-JEB (D.D.C. June 17, 2020), ECF No. 1. The same fishing industry groups litigating in *Massachusetts Lobstermen's Association* moved to intervene. Mot. to Intervene, *Conservation Law Found. v. Trump*, No. 20-cv-01589-JEB (D.D.C. Oct. 5, 2020), ECF No. 21. Proceedings in *Conservation Law Foundation v. Trump* were stayed before the resolution of any dispositive motions, in part because of the fishing groups’ pending petition for certiorari in *Massachusetts Lobstermen's Association*. See Order, *Conservation Law Found. v. Trump*, No. 20-cv-01589-JEB (D.D.C. Sept. 11, 2020).

In 2021, President Biden took office and issued an executive order initiating a review of the prior administration's rollbacks of national monuments, including Northeast Canyons and Seamounts. Exec. Order No. 13990, 86 Fed. Reg. 7037, 7039 (Jan. 20, 2021). Applicants publicly called on the Biden administration to restore the Monument's protections. *See* Mahoney Decl. ¶ 26; Sewell Decl. ¶ 30; Sakashita Decl. ¶ 9; Klyver Decl. ¶ 8. The Secretary of the Interior issued a report to the President recommending restoration of the Monument and other national monuments diminished by the prior administration. Interior Report, *supra* at 5 & n.2, at 14-15. Finally, on October 8, 2021, the President issued a proclamation reinstating the ban on commercial fishing within the Monument. Proclamation No. 10287, 86 Fed. Reg. 57,349, 57,352 (Oct. 8, 2021). As a result, Applicants voluntarily dismissed their lawsuit challenging the revocation of the commercial fishing ban. Notice of Voluntary Dismissal, *Conservation Law Found. v. Trump*, No. 20-cv-01589-JEB (D.D.C. Nov. 10, 2021), ECF No. 36.

II. Plaintiffs' complaint

On April 12, 2022, Plaintiffs filed their complaint in the above-captioned case. Plaintiffs are two commercial fishermen who allege their economic interests will be harmed by the Monument's prohibition on commercial fishing. Complaint ¶¶ 19-23, ECF No. 1. Just like the *Massachusetts Lobstermen's Association* plaintiffs, they seek a declaration that the President lacked the authority under the

Antiquities Act to designate the Monument or that the Monument is too large, and they seek an injunction barring Federal Defendants from enforcing the commercial fishing prohibition. *Id.* at 38-39 (Request for Relief).

The litigation is currently in its earliest stage. As of the date of this filing, no responsive pleadings or dispositive motions have been filed.

III. Applicants for intervention

Three of the undersigned Applicants for intervention are environmental non-profit organizations whose interests and whose members' interests would be harmed if the Court were to grant Plaintiffs the relief they seek. The fourth Applicant for intervention is a professional naturalist whose own interests would be harmed if the Court granted the relief Plaintiffs seek.

The Conservation Law Foundation (“CLF”) is a not-for-profit membership organization dedicated, *inter alia*, to protecting marine wildlife and their habitats as well as other coastal and ocean resources in New England. Mahoney Decl. ¶¶ 3-5. To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests; educates its members on conservation issues and on threats, challenges, and solutions regarding New England's oceans so that they can exercise their rights and protect their interests in those resources; promotes public awareness, education, and citizen involvement in the conservation of marine

wildlife and resources; and supports programs for the conservation of marine wildlife and their habitats. *Id.* ¶¶ 5-7, 10-11, 18.

CLF has thousands of members in New England coastal states. *Id.* ¶ 3. CLF's members use and enjoy fish and other marine resources off the New England coast for recreational, educational, and scientific purposes. *Id.* ¶¶ 31, 33. CLF and its members have a particular interest in the protection of scientifically important places in the ocean off New England, such as the Monument, because such areas increase the ocean's resilience to the stresses and changes associated with excessive human carbon emissions and serve as scientific reference sites. *Id.* ¶¶ 30-32. CLF's members include a scientist who studies habitats and species within the Monument, and others who use, view, study, and enjoy Monument resources outside its boundaries that benefit from its protection as a feeding ground, migratory route, or overwintering area. *Id.* ¶¶ 31-33. CLF began advocating for the creation of the Monument in 2015. *Id.* ¶ 9. Since that time, it has continued to engage through public comment to the Obama, Trump, and Biden administrations, event planning, educational outreach, and litigation to defend the Monument from industry challengers and unlawful government rollbacks. *Id.* ¶¶ 9-11, 14-16, 18, 20-24, 26.

The Natural Resources Defense Council ("NRDC") is a non-profit environmental membership organization with tens of thousands of members in

states along the northeastern Atlantic seaboard. *See* Sewell Decl. ¶ 3. NRDC’s mission is to safeguard the Earth—its people, its plants and animals, and the natural systems on which all life depends. *Id.* ¶ 4. Ensuring the protection and long-term sustainability of ocean resources is a core part of that mission. *Id.* ¶¶ 4-5. NRDC began advocating for the protection of Northeast Canyons and Seamounts as a national monument in 2015, *id.* ¶¶ 11, 15-16, and it has remained actively engaged in supporting and defending the Monument since its establishment in 2016, *see id.* ¶¶ 14, 18-30. Over the years, NRDC staff have created numerous reports, blogposts, videos, and science updates to share the Monument’s wonder and beauty with NRDC’s members and the general public. *Id.* ¶¶ 8-9, 11-14, 18, 21-27. NRDC has been a vocal proponent of the Monument on behalf of its members—including scientists, educators, and recreational bird- and whale-watchers—who study, use, and enjoy the Monument area, and who benefit from its protections. *Id.* ¶¶ 32-35.

The Center for Biological Diversity (“CBD”) is a non-profit environmental membership organization whose primary mission is to preserve, protect, and restore biodiversity, native species, ecosystems, and public lands. Sakashita Decl. ¶ 4. CBD has worked for years to ensure the conservation and sound management of numerous marine species threatened by destructive activities in our oceans, including unsustainable fishing practices. *Id.* ¶¶ 5, 10-15. CBD members and staff

use the northwest Atlantic Ocean, including areas within and near the Monument, to view and study marine wildlife. *Id.* ¶¶ 4, 16. CBD publicly opposed the revocation of Monument protections during the previous administration, and CBD publicly advocated for their reinstatement in 2021. *Id.* ¶¶ 7-9.

R. Zack Klyver is the Science Director at Blue Planet Strategies, LLC, a consulting firm he co-founded in 2019 that uses science and law to help its clients solve ocean conservation problems around the world. Klyver Decl. ¶ 2. Prior to this, for 30 years he was the Lead Naturalist for Bar Harbor Whale Watch Co., located in Bar Harbor, Maine, where he continues to guide trips as a naturalist on a part-time basis. *Id.* ¶ 3. Mr. Klyver has guided over 3,000 trips and taken over 600,000 passengers to see the whales, seabirds, and other marine wildlife of the northwest Atlantic Ocean. *Id.* ¶ 4. He regularly uses the waters of the northwest Atlantic Ocean to view, study, and educate others about marine wildlife, including wildlife that depends upon the Monument as habitat and feeding ground, such as humpback, sperm, fin, and sei whales, and many seabirds, including the Maine population of Atlantic puffins that nest in the summer on six islands near Bar Harbor and overwinter in the Monument area. *Id.* ¶ 5. Mr. Klyver actively supported the creation of the Monument, including by speaking at a public hearing in Providence, Rhode Island, in September 2015, as well as at several educational events. *Id.* ¶ 6.

All four Applicants have gone to court to defend the Monument twice before: first, by successfully intervening to defend the Monument against a fishing industry challenge in *Massachusetts Lobstermen's Association v. Ross*, and second, by challenging the presidential rollback of protections in *Conservation Law Foundation v. Trump*. See *supra* at 8-9. Applicants now seek to intervene to defend the Monument for a third time.

ARGUMENT

All four Applicants meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b).

I. Applicants are entitled to intervene as of right

To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), prospective intervenors must (1) make a timely motion, (2) have “a sufficient interest in the litigation,” (3) show “a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action,” and (4) be inadequately represented by existing parties. *Pennsylvania v. President, United States of Am.*, 888 F.3d 52, 57 (3d Cir. 2018) (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998)); see Fed. R. Civ. P. 24(a)(2). Applicants satisfy all four elements.

A. Applicants' motion to intervene is timely

In determining whether an intervention motion is timely, courts consider:

“(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay.” *Wallach v. Eaton Corp.*, 837 F.3d 356, 371 (3d Cir. 2016) (quoting *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005)).

Applicants' motion to intervene is timely because the present case is still in its earliest stages, and Applicants' participation will not prejudice existing parties or delay the resolution of this litigation.

Applicants are filing this motion roughly two months after Plaintiffs filed their complaint. *Cf. id.* at 377 (holding as timely motion to intervene filed two months after movant intervenors learned of risk to their rights); *Michaels Stores, Inc. v. Castle Ridge Plaza Assocs.*, 6 F. Supp. 2d 360, 364 (D.N.J. 1998) (holding that intervention was timely where “this case was filed less than three months ago and is now only in its preliminary stages”). The existing parties have not yet filed any responsive pleadings, substantive motions, or briefs. Granting Applicants' motion at this early stage will not prejudice any party. If the Court grants intervention, Applicants intend to support the efficient adjudication of this case.

B. Applicants have cognizable legal interests at stake in this litigation

Rule 24(a) next requires that intervenors demonstrate “a cognizable legal interest” in the outcome of the litigation. *Pennsylvania*, 888 F.3d at 58 (quoting

Brody ex rel. Sugzdinis v. Spang, 957 F.2d 1108, 1116 (3d Cir. 1992)); *see* Fed. R. Civ. P. 24(a)(2). That interest must be one that is “specific to [intervenors],” that is “capable of definition,” and that “will be directly affected in a substantially concrete fashion by the relief sought.” *Pennsylvania*, 888 F.3d at 58 (quoting *Kleissler*, 157 F.3d at 972). Organizational Applicants—CLF, NRDC, and CBD—have cognizable interests based on their past advocacy and litigation in support of the Monument’s protections, for the benefit of their members and the general public, and consistent with their conservation-focused missions. Mr. Klyver has a cognizable interest based on his own use of Monument resources as a whale-watch naturalist.⁴

1. Organizational Applicants

Organizational Applicants have specific, cognizable legal interests in defending the Monument’s legality and preserving its protections against commercial fishing, for the benefit of their members and the general public. *See Kleissler*, 157 F.3d at 970, 972 (applying “pragmatic considerations” when

⁴ Applicants expect to seek the same relief as Federal Defendants: dismissal of the complaint or summary judgment affirming the legality of Proclamation No. 10287. Applicants therefore do not need to separately show standing. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (Intervenors who satisfy Rule 24(a)(2) need not “independently demonstrate Article III standing” unless they seek “relief that is broader than or different from” the relief sought by another party with Article III standing).

analyzing intervenor interests in environmental litigation). Specifically, as described in the attached declarations, all three Organizational Applicants are non-profit membership organizations whose missions include the goals of preserving healthy ocean ecosystems for the edification and enjoyment of their members and all people, preventing the harmful effects of extractive industries on fragile ocean resources, and protecting especially ecologically valuable marine areas as refugia where wildlife can recover and thrive. *See* Mahoney Decl. ¶¶ 3-7; Sewell Decl. ¶¶ 4-7; Sakashita Decl. ¶¶ 4-5, 10. Organizational Applicants’ “overall objectives” and past “advocacy efforts,” as well as the aesthetic, recreational, and scientific interests of their members, demonstrate a direct and substantial interest in defending the Monument. *Shipyards Assocs., L.P. v. City of Hoboken*, No. 14-cv-01145-CCC, 2014 WL 6685467, at *3 (D.N.J. Nov. 26, 2014) (granting public interest organization’s motion to intervene).

Consistent with their missions, Organizational Applicants have engaged in many years of “advocacy efforts,” *id.*, to establish and defend the Monument. Applicants CLF and NRDC called on the President to designate Northeast Canyons and Seamounts as a national monument starting in 2015, including by submitting written public comments, participating in stakeholder meetings, and/or publishing blogs and reports to inform their members. Mahoney Decl. ¶¶ 9-11; Sewell Decl. ¶¶ 11-16. After the Monument’s creation, all three Organizational Applicants

intervened in the first fishing industry lawsuit, *Massachusetts Lobstermen's Association v. Ross*, and successfully defended the Monument's legality there. *See supra* at 8-9. During the Trump administration, all three Organizational Applicants submitted public comments, published op-eds, and/or published blogs and reports opposing the revocation of Monument protections. Mahoney Decl. ¶¶ 18, 20-21; Sewell Decl. ¶¶ 21, 25-26; Sakashita Decl. ¶ 8. When the President did issue a proclamation revoking protections, they filed a new lawsuit, *Conservation Law Foundation v. Trump*, challenging the legality of the President's action. *See supra* at 9. All three Organizational Applicants continued to call on the White House to restore the Monument's protections, including by submitting written public comments, participating in stakeholder meetings, and/or publishing online materials to help their members, the administration, and the general public understand the necessity of safeguarding this special area. Mahoney Decl. ¶¶ 23, 26; Sewell Decl. ¶ 30; Sakashita Decl. ¶ 9.

Further, the Monument's protections benefit Organizational Applicants' members in specific and direct ways. Organizational Applicants have members—including scientists, educators, and whale- and bird-watchers—who have traveled to areas in and around the Monument to research, view, and appreciate its wildlife in the past, and who wish to continue doing so in the future. Mahoney Decl. ¶ 31; Sewell Decl. ¶¶ 32-34; Sakashita Decl. ¶¶ 4, 16. The Monument's protections

benefit them by shielding this area from the disruption and damage caused by commercial fishing and other extractive activities; preserving the health, beauty, and unusually high research value of the ecosystems and wildlife found there; and enabling them to study, view, and enjoy the Monument area as the only highly protected marine area off New England's coast. Mahoney Decl. ¶¶ 29-31; Sewell Decl. ¶¶ 35-36; Sakashita Decl. ¶ 17. Organizational Applicants also have members who view, study, and enjoy wildlife that depends on the Monument as a feeding ground, migration route, or overwintering area. Mahoney Decl. ¶ 33; Sewell Decl. ¶ 34; Sakashita Decl. ¶¶ 4, 16. The Monument's protections help ensure the health and stability of the whale, seabird, and other populations that members enjoy observing. Mahoney Decl. ¶ 34; Sewell Decl. ¶ 35; Sakashita Decl. ¶ 17.

Organizational Applicants' multi-year record of advocacy to protect and defend the Monument, in keeping with their organizational missions and for the benefit of their members, demonstrates that they satisfy Rule 24's "interest" requirement. Fed. R. Civ. P. 24(a)(2). Since 2017, Organizational Applicants have been involved in litigation to defend "the protection conferred" by the Monument. *Pennsylvania*, 888 F.3d at 58; *cf. Shipyards Assocs.*, 2014 WL 6685467, at *3 (granting intervention for public interest group that intervened in prior litigation involving same property). And their advocacy and litigation provided "one

impetus” for the President’s restoration of the Monument’s protections.

Pennsylvania, 888 F.3d at 58; *see* Interior Report, *supra* at 5 & n.2, at 14 (observing that Applicants’ litigation “raise[d] serious and fundamental questions” about President’s authority to revoke monument protections). Organizational Applicants’ longstanding “advocacy efforts” and demonstrated commitment to safeguarding the Monument supply the requisite “interest” for purposes of Rule 24(a)(2). *Shipyard Assocs.*, 2014 WL 6685467, at *3; *see also Am. Farm Bureau Fed’n v. U.S. E.P.A.*, 278 F.R.D. 98, 106-07 (M.D. Pa. 2011) (holding environmental organizations had sufficient interest to intervene under Rule 24(a)(2) given their “core missions” and member use and enjoyment of waters at risk).

2. Mr. Klyver

As a naturalist who observes, studies, and educates others about the ecology and sea life in the northwest Atlantic Ocean as it exists in nature, Mr. Klyver has a direct and specific interest in maintaining the Monument’s protections—particularly because of their importance to the whales and puffins on which he focuses his professional and recreational activities. *See* Klyver Decl. ¶¶ 2-5, 10-14. The Monument’s protections benefit Mr. Klyver’s interests in viewing, studying, and educating others about whales and seabirds by providing those species with a stable, protected source of food, shelter, and passage for their migrations and

movements, reducing the negative effects of commercial fishing and other extractive activities, and helping to ensure that healthy populations are maintained year after year. *Id.* ¶¶ 15-17. The Monument’s protections also facilitate scientific investigation and therefore provide Mr. Klyver with information to use when educating the public, commenting on agency decisions, and advising agency decision-makers about marine life in the northwest Atlantic Ocean, as he does frequently in his capacity as a naturalist and as a member of the Atlantic herring advisory panel for the New England Fishery Management Council. *Id.* ¶ 16.

Like the Organizational Applicants, Mr. Klyver has a long, demonstrated record of advocacy “for the protection conferred” by the Monument. *Pennsylvania*, 888 F.3d at 58. Mr. Klyver actively supported the creation of the Monument, including by speaking at public and press education events and at the September 2015 public hearing in Providence, Rhode Island. Klyver Decl. ¶ 6. He later opposed the revocation of Monument protections and, in 2021, advocated for their reinstatement. *Id.* ¶¶ 7-8. Mr. Klyver, along with Organizational Applicants, intervened to defend the Monument in *Massachusetts Lobstermen’s Association v. Ross*, *see supra* at 8, and challenged the presidential rollback of protections in *Conservation Law Foundation v. Trump*, *see supra* at 9. As with Organizational Applicants, these facts are sufficient to establish Mr. Klyver’s interest for purposes of Rule 24(a)(2).

C. If successful, Plaintiffs’ action would impair Applicants’ interests in protecting the Monument from harm

An applicant for intervention as of right must be “so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a)(2). Applying this requirement, courts inquire whether movant intervenors’ interests “will be impaired or affected, as a practical matter, by the disposition of the action.” *Pennsylvania*, 888 F.3d at 57 (quoting *Kleissler*, 157 F.3d at 969).

Applicants satisfy this element. If the Court awards Plaintiffs the relief they seek—a judgment nullifying the Monument’s designation and eliminating its protections as *ultra vires* and unlawful—the protections that Applicants have worked extensively to realize and defend, and that directly benefit Applicants and their members, would be lost. As Applicants have consistently explained in their past advocacy, allowing commercial fishing in the Monument threatens to alter the area’s ecology, impairing its value as a scientific reference site and as a biodiversity hotspot, and jeopardizing the Monument’s objects. Mahoney Decl. ¶ 34; Sewell Decl. ¶¶ 11-13; Sakashita Decl. ¶¶ 8, 13; Klyver Decl. ¶¶ 15, 17. Organizational Applicants’ members who are scientists would be harmed by no longer being able to study the Monument as a closed marine area—the only highly protected area in the U.S. Atlantic—free of the confounding influence of and damage from commercial fishing activity. Mahoney Decl. ¶¶ 32, 34; Sewell Decl.

¶¶ 7, 33, 35-36. Similarly, Mr. Klyver would be harmed by the loss of valuable, high-quality scientific research conducted here, on which he relies on to educate the public and advise officials on governance matters in the northwest Atlantic Ocean. Klyver Decl. ¶¶ 16-17. And Applicants and their members who use the Monument and surrounding areas for whale- and bird-watching and other wildlife viewing would lose their ability to enjoy this area without the disruption and damage caused by commercial fishing activity. Mahoney Decl. ¶¶ 31, 33-34; Sewell Decl. ¶¶ 34-35; Sakashita Decl. ¶¶ 16-17; Klyver Decl. ¶ 15.

Thus, because Plaintiffs' lawsuit has the "potential to declare" the Monument's protections a nullity, Applicants "may be 'practically disadvantaged by the disposition of the action.'" *Pennsylvania*, 888 F.3d at 60 (quoting *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012)); see also *Am. Farm Bureau*, 278 F.R.D. at 109 (finding potential impairment based on "practical consequences" of adverse ruling on environmental intervenors). Under similar circumstances, the Tenth Circuit held that conservation groups could intervene as of right in litigation challenging the legality of Grand Staircase-Escalante National Monument in Utah, recognizing that the Monument "provide[d] greater protection for the intervenors' interests than prior" land management plans did. *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253-54 (10th Cir. 2001). Just so here: because the disposition of this action may, as a practical matter, impair

Applicants’ and their members’ interests in the Monument, Applicants satisfy Rule 24(a)’s impairment-of-interest requirement.

D. Applicants’ interests may not be adequately represented by Federal Defendants

Finally, applicants for intervention as a matter of right must show that their interests may not be adequately represented by the existing parties. Fed. R. Civ. P. 24(a)(2). The burden for that showing is “generally treated as minimal.”

Pennsylvania, 888 F.3d at 60 (internal citations omitted). Applicants must show only that existing parties’ “representation of [their] interest ‘*may be*’ inadequate”—not that it certainly will be. *Id.* (emphasis in original) (internal citations omitted).

None of the existing parties adequately represent Applicants’ specific interests in this matter. Applicants seek to defend the challenged Proclamation’s legality; Federal Defendants will likely defend the Proclamation’s legality as well.

Yet Applicants’ and Federal Defendants’ interests are not identical; as the Third Circuit has recognized, environmental cases “frequently pit private ... and federal interests against each other.” *Kleissler*, 157 F.3d at 971 (discussing NEPA

lawsuits). Here, Applicants have a single, straightforward goal: to ensure the maximum protection for the wildlife and ecosystems of Northeast Canyons and Seamounts. *See supra* at 11-14 (describing Organizational Applicants’ missions and advocacy). The Federal Defendants’ interests, in contrast, are less

“straightforward” and “parochial,” *Pennsylvania*, 888 F.3d at 61 (quoting *Kleissler*,

157 F.3d at 972, 973), because in addition to defending the Proclamation’s legality, they have an institutional interest in maximizing presidential flexibility and balancing competing interests. *See, e.g.*, Proclamation No. 10049, 85 Fed. Reg. at 35,795 (purporting to revoke the prohibition on commercial fishing); Proclamation No. 9496, 81 Fed. Reg. at 65,165 (allowing fishing for American lobster and red crab to phase out over seven years).

Indeed, multiple courts have recognized that the federal government may inadequately represent environmental advocacy groups in Antiquities Act litigation—including with respect to these very Applicants and this very Monument. As noted above, the district court in *Massachusetts Lobstermen’s Association* granted Applicants intervention as of right, even though both Applicants and the federal government defended the legality of Northeast Canyons and Seamounts. *See Order, Mass. Lobstermen’s Ass’n v. Ross*, No. 17-cv-00406-JEB (D.D.C. Mar. 20, 2018). Similarly, in *Utah Association of Counties*, the Tenth Circuit concluded that the federal government’s defense of Grand Staircase-Escalante National Monument could be inadequate to represent the “individual parochial interest” of environmental intervenors, even though “both the government and the intervenors ha[d] the same objective—to sustain the creation of the monument.” *Utah Ass’n of Ctys.*, 255 F.3d at 1255-56.

The risk of inadequacy is not hypothetical. In fact, the litigating positions of Applicants and Federal Defendants have repeatedly diverged in past Antiquities Act litigation. For example, in *Conservation Law Foundation v. Trump*, Applicants and Federal Defendants disagreed over the meaning of the President’s power to “reserve” lands and the meaning of the “smallest area” clause, *see* 54 U.S.C. § 320301(b),⁵ and those statutory terms are once again at issue in this litigation. *See* Complaint ¶¶ 34, 113 & Count IV, ECF No. 1. Applicants NRDC and CBD have also been adverse to the federal government in litigation involving Bears Ears and Grand Staircase-Escalante National Monuments in Utah, where the meanings of those same statutory terms are at issue. *See The Wilderness Soc’y v. Trump*, No. 17-cv-02587-TSC (D.D.C. filed Dec. 4, 2017); *NRDC v. Trump*, No. 17-cv-02606-TSC (D.D.C. filed Dec. 7, 2017). And in *Massachusetts Lobsterman’s Association*, even though Applicants and Federal Defendants both defended the Monument’s legality, their litigating positions diverged in meaningful ways that may again become relevant here. For example, Applicants and Federal Defendants disagreed over the proper scope and standard of judicial review in Antiquities Act cases, and

⁵ *See* Fed. Defs.’ Mem. in Supp. of Mot. to Dismiss at 24, *Conservation Law Found. v. Trump*, No. 20-cv-01589-JEB (D.D.C. Aug. 31, 2020), ECF No. 12 (arguing that the Antiquities Act “grants the President substantial flexibility” and that “the decision to reserve lands for a monument is entirely discretionary”).

over questions of jurisdiction and justiciability⁶—questions that Plaintiffs’ complaint here squarely raises. *See* Complaint ¶¶ 16, 30, 97, ECF No. 1. These past divergences in litigating positions give “legitimate pause” to the notion of adequate representation by Federal Defendants of Applicants’ interests. *Am. Farm Bureau*, 278 F.R.D. at 111 (quoting *Kleissler*, 157 F.3d at 973).

In sum, Federal Defendants’ representation “*may*” again be inadequate to represent Applicants’ specific interests here. *Pennsylvania*, 888 F.3d at 60 (internal quotation marks omitted); *see* Fed. R. Civ. P. 24(a)(2). Applicants therefore satisfy this final criterion.

For the foregoing reasons, the Court should grant Applicants’ motion to intervene as of right, just as the district court did in *Massachusetts Lobstermen’s Association*.

⁶ *See* Intervenors’ Resp. in Supp. of Fed. Defs.’ Mot. To Dismiss at 9-14, *Mass. Lobstermen’s Ass’n v. Ross*, No. 17-cv-00406-JEB (D.D.C. Apr. 30, 2018), ECF No. 33 (agreeing with Federal Defendants that fishing groups’ complaint should be dismissed, but disagreeing over the availability and scope of judicial review, the applicability of Rule 12(b)(1) versus Rule 12(b)(6), and the nature of the President’s discretion under the Antiquities Act).

II. Alternatively, the Court should permit Applicants to intervene permissively

If the Court denies intervention as of right, Applicants request leave to intervene under Federal Rule of Civil Procedure 24(b). Permissive intervention is appropriate when an applicant’s timely defense “shares with the main action a common question of law or fact,” and where intervention will not “unduly delay or prejudice the adjudication of the original parties’ rights.” *King v. Governor of the State of New Jersey*, 767 F.3d 216, 246 (3d Cir. 2014) (quoting Fed. R. Civ. P. 24(b)), *abrogated on other grounds by Nat’l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018). Applicants satisfy the criteria for permissive intervention.

First, as discussed above, Applicants’ motion is timely. Fed. R. Civ. P. 24(b)(1). The case is at a preliminary stage, and no substantive motions or briefs have been filed. *See supra* at 16.

Second, Applicants do not intend to assert any cross- or counter-claims. They intend to oppose Plaintiffs’ claims and requests for relief and to raise affirmative defenses, each of which necessarily share “common question[s] of law or fact” with the main action. Fed. R. Civ. P. 24(b)(1)(B); *see* Proposed Answer at 30 (Affirmative Defenses).

Third, Applicants' involvement will cause no undue delay or prejudice to the existing parties. Fed. R. Civ. P. 24(b)(3). If the Court grants intervention, Applicants intend to support the efficient adjudication of the case. *See supra* at 16.

Given the Applicants' demonstrated interest in preserving the Monument's protections, the early stage of the litigation, and the lack of any prejudice to the existing parties, the Court should at a minimum allow permissive intervention.

CONCLUSION

For the reasons set forth above, Applicants Conservation Law Foundation, Natural Resources Defense Council, Center for Biological Diversity, and R. Zack Klyver request that the Court grant their motion to intervene as of right or, in the alternative, to intervene permissively. Pursuant to Local Civil Rule 7.1(f)(1), Applicants have lodged a proposed answer with this motion to intervene.

Dated: June 14, 2022

Respectfully submitted,

s/ Bradley Campbell

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** Applications to appear pro hac vice forthcoming*