UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**
AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendants-Intervenors.	

MEMORANDUM IN SUPPORT OF TWS PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

President Clinton established the Grand Staircase-Escalante National Monument ("the Monument") more than two decades ago, conferring protection on a magnificent landscape of stair-stepping sandstone cliffs and plateaus that showcase millennia of geologic, evolutionary, and human history. The Monument includes irreplaceable paleontological sites, biodiversity, and cultural and historical resources protected as monument objects. *See* Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) ("1996 Proclamation"). In the ensuing years, Congress added nearly 200,000 acres of land to the Monument. Yet, in December 2017, President Trump issued an unlawful proclamation revoking monument status and protection from approximately half of the Monument—roughly 900,000 acres—and exposing the excised lands and objects to permanent damage. *See* Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017) ("Trump Proclamation"). This proclamation, together with President Trump's contemporaneous proclamation dismantling Bears Ears National Monument, effected the single largest roll-back of federal public land protections in American history.

The Constitution assigns to Congress, not the President, the sole authority to manage federal public lands. The President has only such power in this field as Congress chooses to delegate. The Antiquities Act, a narrow delegation of Congress's exclusive Property Clause power, authorizes Presidents to "declare" national monuments to protect objects of scientific or historic interest, and to "reserve" federal public lands as part of those monuments for the "proper care and management of the objects to be protected." 54 U.S.C. § 320301(a), (b). Congress thereby authorized Presidents to act swiftly to create national monuments and protect certain irreplaceable resources on federal land. But Congress did not authorize the President to reduce or revoke those monuments: Congress preserved that power for itself. In issuing his proclamation

dismantling the Monument, President Trump arrogated that exclusive congressional power. He removed nearly 900,000 acres of land from the Monument—including roughly 80,000 acres of land plus additional mineral interests that Congress itself had added to it—and revoked monument protections for countless objects of scientific and historic interest located on those excised lands. There is no constitutional or statutory authority for the President's action.

Plaintiffs The Wilderness Society *et al*. ("TWS Plaintiffs") hereby move for partial summary judgment on their First, Second, and Third Claims for Relief, which turn on legal issues and require no factual discovery. *See* TWS Plaintiffs' Amended and Supplemented Complaint ¶¶ 199-212, ECF No. 119 ("Compl."). Summary judgment on any of these claims would invalidate the Trump Proclamation and redress Plaintiffs' injuries, making it unnecessary for the Court to reach Plaintiffs' remaining claims.

BACKGROUND AND FACTS

I. The Antiquities Act

The Antiquities Act is one of this country's oldest and most important conservation statutes. Despite its brevity, it forms "a major part of the legal foundation for archeological, historic, and natural conservation and preservation in the United States." *Mass. Lobstermen's Ass'n v. Ross*, --- F.3d ----, 2019 WL 7198513, at *1 (D.C. Cir. Dec. 27, 2019). Congress enacted the statute in 1906 as part of a nascent effort to preserve America's remaining public lands for public benefit. Until the late 1800s, divestiture and privatization of federal land was the norm: a variety of general land laws left unallocated federal land open to extractive uses and private sale with few restrictions. Recognizing that much of this land contained natural and historic resources that merited protection, Congress began designating national parks by statute in the late 1800s. *See, e.g.*, Act of March 1, 1872, ch. 24, 17 Stat. 32 (establishing Yellowstone National Park).

The legislative process was slow, however, and public lands remained vulnerable in the meantime to looting, development, and conversion to private property through homesteading. *See* Ronald F. Lee, Nat'l Park Serv., *The Story of the Antiquities Act*, ch. 4 (2001), https://www.nps.gov/archeology/pubs/lee/index.htm.

Therefore, the Interior Department and its General Land Office (a precursor to today's Bureau of Land Management, or BLM) lobbied Congress to enact legislation that would authorize the Executive Branch to confer protected status—similar to national park designations by Congress—on worthy public lands. *See infra* at 31-32 & n.12. These efforts culminated in the Antiquities Act of 1906, which delegated to the President a discrete part of Congress's exclusive Property Clause power to preserve federal lands. Congress intended for national monuments, like "parks," to serve as "a perpetual source of education and enjoyment for the American people, as well as for travelers from foreign lands." H.R. Rep. No. 59-2224, at 2-3 (1906) (JA077-78).[1]

Presidents have used the Antiquities Act to establish more than 150 national monuments since 1906, preserving them for the benefit and edification of current and future generations. *Mass. Lobstermen's*, 2019 WL 7198513, at *1. Among those monuments are paleontological and geological wonders, extraordinary ecosystems, and landmarks of the United States' history and diverse cultural heritage ranging from less than an acre to millions of acres in size.[2]

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[1] For the Court's convenience, Plaintiffs have reproduced certain legislative history materials and other older sources not readily available on Westlaw in Plaintiffs' Joint Appendix, ECF No. 131. This brief cites the Plaintiffs' Joint Appendix as JA___.

[2] *See, e.g.*, Proclamation No. 793, 35 Stat. 2174 (1908) (Muir Woods National Monument); Proclamation No. 794, 35 Stat. 2175 (1908) (Grand Canyon National Monument); Proclamation No. 1713, 43 Stat. 1968 (1924) (Statue of Liberty/Fort Wood); Proclamation No. 4616, 43 Fed. Reg. 57,035 (1978) (Denali National Monument); Proclamation No. 8031, 71 Fed. Reg. 36,443 (2006) (Northwestern Hawaiian Islands Marine National Monument); Proclamation No. 8943, 78 Fed. Reg. 18,763 (2013) (Harriet Tubman Underground Railroad National Monument); Proclamation No. 9465, 81 Fed. Reg. 42,215 (2016) (Stonewall National Monument).

A President's monument designation immediately confers legal protection upon "objects of historic or scientific interest" and the reserved federal lands where they are located. 54 U.S.C. § 320301(a), (b). Once declared a monument, those reserved lands are set aside for the "proper care and management of the objects to be protected." *Id*. § 320301(b). "An essential purpose of monuments created pursuant to the Antiquities Act . . . is 'to conserve . . . the natural and historic objects . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'" *Alaska v. United States*, 545 U.S. 75, 103 (2005) (quoting former 16 U.S.C. § 1).[3] To this end, a presidential monument proclamation typically imposes restrictions on various uses of the public lands as deemed necessary to ensure the objects' long-term protection—for example, the President may "withdraw" the reserved lands from disposition under the mining and leasing laws. *See, e.g.*, *Cameron v. United States*, 252 U.S. 450, 455 (1920). A presidential proclamation may also identify a federal agency (such as BLM) to implement the proclamation's purposes, including by developing land-management plans to protect the monument's objects. And, as discussed below, once a monument has been established, it is permanently protected unless and until Congress says otherwise.

II. President Clinton's Designation of the Monument

In 1996, President Clinton used his authority under the Antiquities Act to establish the Grand Staircase-Escalante National Monument in southern Utah. *See* 1996 Proclamation, 61 Fed. Reg. at 50,225. The 1996 Proclamation details the Monument's "value for scientific study," explaining that it "presents exemplary opportunities for geologists, paleontologists,

[3] The former 16 U.S.C. § 1, now codified at 54 U.S.C. § 100101(a), relates to national monuments managed by the Park Service. Congress has described monuments managed by BLM (such as Grand Staircase) in similar terms. *See* 16 U.S.C. § 7202(a), (b)(1)(A) (recognizing "national monuments" managed by BLM as a type of protective land designation meant "to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations").

archeologists, historians, and biologists." *Id.* at 50,223. The Monument's many objects of scientific and historic interest include exposed geologic formations interlaced by a maze of canyon systems, which offer a fascinating window into the area's early history. *Id.* at 50,223-25. Its "world class paleontological sites" represent "one of the best and most continuous records of Late Cretaceous terrestrial life in the world," including "[e]xtremely significant fossils" of "dinosaurs, fishes, and mammals." *Id.* at 50,223-24. The Monument also features rich archaeological resources, including "rock art panels, occupation sites, campsites and granaries"—evidence of the area's history as a point of contact for different Native American cultures. *Id.* at 50,224. And it contains outstanding biological resources that represent "perhaps the richest floristic region in the Intermountain West." *Id.*

Prior to the Monument's designation in 1996, BLM had managed these lands in accordance with the "multiple use, sustained yield" principle that applies to most federal public land—a principle that allows for a range of uses, including mining, oil and gas drilling, off-highway vehicle use, and wilderness protection. *See* Plaintiffs' Statement of Undisputed Facts ("SUF") ¶ 16; *see also* 43 U.S.C. §§ 1702(c), 1712, 1732(a). Much of the future Monument was open to mining and cross-country motorized vehicle use, which damaged the fragile ecosystem and jeopardized cultural sites and fossils.

The 1996 Proclamation "set apart and reserved" 1.7 million acres of federal land "for the purpose of protecting the objects identified [in the Proclamation]," explaining that this was "the smallest area compatible with the proper care and management of the objects to be protected." 61 Fed. Reg. at 50,225. The 1996 Proclamation immediately prohibited any new mining claims for hardrock minerals (e.g., uranium, alabaster, copper, and cobalt) and withdrew the lands from coal, oil, and gas leasing. *See id.* It also directed BLM to "manage the [M]onument" consistent

with "the purposes of this proclamation" and to prepare a management plan to that effect. *Id.* The 1996 Proclamation thus ended BLM's multiple-use approach to the management of these lands and required the agency to prioritize preservation and protection over all other uses. *See id.* (making the Monument "the dominant reservation" on the land); SUF ¶ 21.

In 1999, BLM issued a management plan to safeguard the Monument's undeveloped character and allow the study of its scientific and historic resources. SUF ¶ 20. Since then, research in the Monument has flourished, facilitating study of a previously unknown fossil record, the history and interaction of Native American cultures, and desert biota. SUF ¶ 22.

In 2004, a district court rejected a legal challenge to the Monument's legality and size. In particular, the court found it "undisputed" that "the President complied with the Antiquities Act[]" by "setting aside, in his discretion, the smallest area necessary to protect the objects" of historic or scientific interest. *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

III. Congressional Acts Relating to the Monument

In the twenty-three years since President Clinton designated the Monument, Congress has played an active role in managing Grand Staircase. Through a series of legislative enactments, Congress has carefully adjusted the Monument's boundaries, resolved resource disputes, and affirmed its intention that the entire, integrated Monument and its scientific and historic objects remain protected for the "benefit of current and future generations." 16 U.S.C. § 7202(a).

First, in 1998, Congress enacted two statutes adding roughly 180,000 acres to the Monument, bringing its total area up to 1.9 million acres. SUF ¶ 12. Most significantly, Congress ratified a land-exchange agreement between the federal government and the State of Utah, which Congress found would "resolve many longstanding environmental conflicts and further the interest of . . . the[] [Monument's] conservation resources." Utah Schools and Lands Exchange

Act of 1998, Pub. L. No. 105-335, § 2(14), 112 Stat. 3139, 3141 (1998) ("Lands Exchange Act"); *see* SUF ¶¶ 7-10. As part of the agreement, the State of Utah exchanged "approximately 176,600 acres of land" and additional mineral interests located "within the exterior boundaries of the Grand Staircase–Escalante National Monument" for equivalent federal lands and interests outside the Monument's boundaries. Lands Exchange Act §§ 2(1), 3(a). Congress noted that "the inholdings to be acquired by the Federal Government include properties within the boundaries of some of the most renowned conservation land units in the United States," *id.* § 2(14), and it found that "[d]evelopment of surface and mineral resources" on such lands "could be incompatible with the preservation of these scientific and historic resources for which the Monument was established," *id.* § 2(3). Later that year, Congress enacted another statute making additional, smaller adjustments to the Monument's size, excluding certain parcels and adding roughly 5,500 acres along the Monument's southern boundary. *See* Automobile National Heritage Area Act, Pub. L. No. 105-355, § 201, 112 Stat. 3247, 3252-53 (1998); SUF ¶ 11.

Two years later, to further safeguard the Monument's integrity and protect it from development, Congress appropriated $19.5 million to buy back existing coal leases within the Monument. Pub. L. No. 106-113, tit. VI, § 601, 113 Stat. 1501, 1501A-215 (2000); SUF ¶ 13.

Finally, as part of the 2009 Omnibus Public Land Management Act ("2009 Omnibus Act"), Congress incorporated the Monument and all other BLM-managed national monuments within a "National Landscape Conservation System" and made one more small modification to the Monument's boundaries. SUF ¶¶ 14-15; 2009 Omnibus Act, Pub. L. No. 111-11, §§ 2002, 2604, 123 Stat. 991, 1095, 1119-20 (2009) (removing roughly 25 acres from the Monument to exclude an existing ranch). Congress's purpose in establishing the National Landscape Conservation System was to "conserve, protect, and restore nationally significant landscapes that

have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." *Id*. § 2002, 123 Stat. at 1095 (codified at 16 U.S.C. § 7202(a), (b)(1)(A)).

IV. President Trump's Proclamation Dismantling the Monument

In April 2017, President Trump issued an unprecedented executive order directing the Secretary of the Interior to "review" certain national monuments that had been designated or expanded since 1996—the same year that President Clinton designated Grand Staircase. Exec. Order 13,792, 82 Fed. Reg. 20,429, 20,429 (Apr. 26, 2017). Opining as a matter of "[p]olicy" that national monuments "may . . . create barriers to achieving energy independence . . . and otherwise curtail economic growth," *id.*, the President directed the Interior Secretary to make "recommendations for . . . Presidential actions . . . to carry out the policy set forth in . . . this order," *id.* at 20,430. During the public comment period that followed, members of the public submitted comments that were "overwhelmingly in favor of maintaining existing monuments," including Grand Staircase. SUF ¶ 27. Nevertheless—even though no President had purported to reduce the size of a national monument for more than fifty years, and no court has ever held that the President has such authority—the Interior Secretary recommended eliminating portions of Grand Staircase. *Id*.

On December 4, 2017, President Trump issued a proclamation purportedly "Modifying the Grand Staircase-Escalante National Monument." 82 Fed. Reg. at 58,089. The Trump Proclamation revoked monument status from nearly half the Monument and carved the remaining area into three smaller, fragmented "units." *Id.* at 58,091. In total, the proclamation stripped monument status from nearly 900,000 acres of the Monument—including roughly 80,000 acres of land plus an additional 16,600 acres of mineral interests that Congress had added to the Monument through the 1998 Lands Exchange Act, as described above. SUF ¶¶ 29-30.

And, as the Trump Proclamation acknowledged, the excised lands include objects of scientific and historic interest that the 1996 Proclamation identified as deserving of protection. SUF ¶ 33.

The Trump Proclamation had the immediate effect of dismantling and re-drawing the Monument's boundaries. SUF ¶ 36; *see* 82 Fed. Reg. at 58,093 ("Any lands reserved by [the 1996 Proclamation] not within the boundaries identified on the accompanying map are hereby excluded from the monument."). It also, by its terms, allowed hardrock mining activities to commence in the excised lands after a sixty-day waiting period. 82 Fed. Reg. at 58,093 (lands excluded from the Monument "shall be open to . . . location [and] entry . . . under the mining laws"). The Proclamation further directed BLM to develop new land-management plans consistent with the President's Proclamation. *Id*. at 58,094; *see also* Partners' Br. at 15-17.[4]

The unlawful removal of nearly 900,000 acres of land from the Monument harms Plaintiffs' members, as discussed below, and threatens irreversible damage to the scientific and historic resources for which the Monument was designated more than two decades ago.

STANDARD OF REVIEW

As the D.C. Circuit has repeatedly held, "[judicial] review is available to ensure that the [President's] Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *accord Mass. Lobstermen's*, 2019 WL 7198513, at *3; *Tulare County v.*

[4] Where appropriate, to minimize repetition, TWS Plaintiffs have incorporated by reference the plaintiffs' briefs in *Grand Staircase Escalante Partners v. Trump*, No. 17-cv-02591 (D.D.C. Jan. 9, 2020) ("Partners' Br."), and *Utah Diné Bikéyah v. Trump*, No. 17-cv-02605 (D.D.C. Jan. 9, 2020) ("UDB Br."). As described in the Partners' brief, BLM released its final environmental impact statements and proposed management plans in August 2019, and it could release its final records of decision at any time. *See* 84 Fed. Reg. 44,326 (Aug. 23, 2019). BLM's plans propose that vast areas of the former Monument will be opened to new development, including new off-road vehicle roads and trails, and oil, gas, and coal leasing and development. Partners' Br. at 15-17; *see also* SUF ¶¶ 65-66.

Bush, 306 F.3d 1138, 1141 (D.C. Cir. 2002). The D.C. Circuit has recognized two categories of Antiquities Act claims: "those justiciable on the face of the proclamation and those requiring factual development." *Mass. Lobstermen's*, 2019 WL 7198513, at *3. The claims on which Plaintiffs seek summary judgment here belong to the former category: they "turn on questions of statutory interpretation" and thus may be "resolved 'as a matter of law.'" *Id.* (quoting *Tulare County*, 306 F.3d at 1140).

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

ARGUMENT

I. Plaintiffs Have Standing to Challenge President Trump's Proclamation.

TWS Plaintiffs have standing to challenge the Trump Proclamation because, as "'set forth' by affidavit [and] other evidence," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), they meet all three elements of associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). First, safeguarding the Monument from destructive activities is undeniably "germane" to the Plaintiffs' organizational purposes of protecting public lands and their resources. *Id.* at 343; *see* SUF ¶ 64. Second, Plaintiffs' members need not participate in this litigation because none of the claims asserted or the relief sought requires individualized proof. *Hunt*, 432 U.S. at 343. Third, the Plaintiff organizations have members who would "have standing to sue in [their] own right," *id*., because, as explained below, (1) they have suffered "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3)

it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).[5]

A. Plaintiffs have demonstrated injury in fact.

Plaintiffs' members value the Monument's natural beauty, its undeveloped character, and its extraordinary cultural, paleontological, and ecological resources. They enjoy hiking, camping, taking photographs, and studying and learning from the cultural sites and historic objects found throughout the excluded lands. SUF ¶¶ 62. It is well settled that injuries to aesthetic, educational, and scientific interests like these—such as the ability to "view and enjoy" a landscape or to "observe it for purposes of studying and appreciating its history"—are cognizable for standing purposes. *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014); *see also In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016); *Friends of the Earth*, 528 U.S. at 183.

Plaintiffs' members have already been harmed by the Trump Proclamation, and they face ongoing and future injuries as well—in particular, from hardrock mining activity.[6]

[5] To satisfy Article III, Plaintiffs "need only demonstrate that one or more of [their] members would have standing" to sue. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 314 (D.C. Cir. 1987) (quotation marks omitted); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (once a court finds standing for one party, it "need not consider the standing of the other" parties to decide the claim in question). For purposes of this motion for partial summary judgment, Plaintiffs focus on the harms certain members face from hardrock mining. Plaintiffs' complaint alleges other types of compelling injuries as well. *See* Compl. ¶¶ 145-61 (motorized vehicle use), ¶¶ 162-67 (damage to paleontological resources), ¶¶ 168-89 (mineral leasing), and ¶ 193 (procedural harm). Plaintiffs do not seek summary judgment based on those other injuries at this time, but they may seek to prove those injuries later in the course of the litigation, if necessary.

[6] Standing is evaluated as of the date on which Plaintiffs filed their amended and supplemented complaint. *See* Fed. R. Civ. P. 15(d) (supplemental pleadings may "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented"); *see also Scahill v. Dist. of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018).

1. The Trump Proclamation opened the excluded lands to mining.

The Trump Proclamation revoked the 1996 Proclamation's mineral withdrawal and opened previously protected Monument lands to hardrock mining under the General Mining Law of 1872. *See* 82 Fed. Reg. at 58,093 (opening excluded lands to "location [and] entry . . . under the mining laws"); SUF ¶ 37. This termination of the mineral withdrawal was self-executing. It became effective on February 2, 2018—i.e., "60 days after" President Trump's signature, 82 Fed. Reg. at 58,093—with no need for a new management plan or any other implementing agency action. Thus, by its terms, the Trump Proclamation allows prospectors to engage in hardrock mining in areas and in a manner that previously would have been unlawful, as explained in detail below. BLM has complied with the President's direction: it is no longer observing the 1996 Proclamation's mineral withdrawal on the excluded lands. Instead, BLM now records mining claims located by private parties on the excised lands, and reviews and processes claimants' exploration and development proposals on claims located on those lands, in accordance with the General Mining Law of 1872. SUF ¶ 38.

The 1872 Mining Law aims "[t]o encourage mining" on federal public lands in the western United States. *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 699 (D.C. Cir. 2009). It is extraordinarily permissive: it allows private citizens to enter onto federal land and "stake, or 'locate,' claims to extract minerals without prior government permission." *Id.*; *see* 30 U.S.C. §§ 22-54 (1872 Mining Law); 43 C.F.R. part 3800 (BLM regulations). Private parties have broad latitude to prospect, explore, develop, and extract minerals on public lands, *see* 43 C.F.R. § 3802.0-6, all of which can disturb or destroy public lands and resources. They may establish hardrock mining claims simply by "locating" the lands they wish to claim—that is, marking the ground with wooden stakes, flags, or other signage—and they may "record" the

claim by filling out simple forms and filing them with the local county recorder and BLM offices, along with a small fee. *Id*. §§ 3832.1(a), 3832.11(c). Claimants need no permits or prior authorization from BLM before prospecting for minerals or locating and recording a claim; nor do those activities undergo any review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*.; *see Orion Reserves*, 553 F.3d at 699.

Once a claimant has located a claim on non-withdrawn (e.g., non-Monument) land, she may undertake a variety of mining activities there. *First*, she may undertake "[c]asual use" activities at any time, and she "need not notify BLM" before doing so. 43 C.F.R. § 3809.10(a). "Casual use" activities are those that "ordinarily result[] in no or negligible disturbance," such as collecting samples without mechanized earth-moving equipment. *Id*. § 3809.5.

Second, a claimant may undertake more extensive "notice"-level activities—i.e., those "causing surface disturbance" of up to five acres or removing up to a thousand tons of presumed ore—simply by sending BLM a "notice" of planned operations and waiting fifteen calendar days after BLM receives it. *Id*. §§ 3809.10(b), 3809.11(b), 3809.21(a). Notice-level activities may include road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment. *See id*. §§ 3809.5, 3809.21(a). Unless BLM requests additional information or takes other specific actions within that fifteen-day window, the claimant may proceed with ground-disturbing work. *Id.* §§ 3809.312(a), 3809.313. BLM conducts no NEPA review, and no affirmative approval from BLM is required. *See id*. § 3809.301; SUF ¶¶ 42-43.

Third, a claimant may engage in even more extensive "plan of operations"-level mining activities—e.g., removing a thousand tons or more of presumed ore, or disturbing more than five acres. *See* 43 C.F.R. §§ 3809.10(c), 3809.11, 3809.21(a). For these activities, BLM conducts a

NEPA analysis and requires detailed information about the proposed disturbance, including mitigation measures. *See id*. §§ 3809.401, 3809.411, 3809.412; SUF ¶ 44.

There are deposits of several hardrock minerals—including uranium, vanadium, gypsum (alabaster), and copper—in the lands that President Trump carved out of the Monument. SUF ¶ 19; 43 C.F.R. § 3830.11 (defining locatable, i.e. hardrock, minerals). Indeed, removing barriers to the extraction of such resources was one of President Trump's stated policy considerations in launching his 2017 monuments review. *See* 82 Fed. Reg. at 20,429 (asserting that monument protections "may . . . create barriers to achieving energy independence" and "curtail economic growth"). During the agency review that followed, Interior officials specifically collected information on the mineral resources and development potential in Grand Staircase. SUF ¶ 25. According to BLM, hardrock mining occurred in Grand Staircase before the Monument's designation in 1996, including active alabaster mines that produced 300 tons of alabaster a year. SUF ¶ 26. BLM found it "likely" that these mining operations would have continued, and that "additional alabaster mining claims may have been filed," if the Monument had never been designated. *Id*. Secretary Zinke concluded that "mining [has been] . . . unnecessarily restricted" in landscape-scale national monuments like Grand Staircase, and he recommended that the President "revise[]" the Monument's boundary. SUF ¶ 27. And that is what the President did.

2. Hardrock mining activity in the Monument presents ongoing and imminent future injuries to Plaintiffs' interests.

President Trump's action has had immediate and predictable results. Between February 2, 2018 (when the Trump Proclamation's revocation of the mineral withdrawal took effect) and November 7, 2019 (the date of Plaintiffs' supplemental complaint), private claimants located at least nineteen new mining claims in the excised lands, including "Creamsicle 1-3," "Mesa 1-10," "Berry Patch 3 and 4," "Vulcan 1-3," and "Rasberry 1." SUF ¶ 49.

As described above, once a claim has been located and recorded, mining claimants may begin notice-level surface-disturbing activity with no more than fifteen days' notice to BLM. They need no prior authorization from BLM to proceed; nor does BLM conduct any environmental analysis that NEPA would normally require. And the harms associated with notice-level surface-disturbing activities can be substantial. They can gouge scars into the landscape, produce unsightly waste and debris, disturb native vegetation and wildlife habitat, increase erosion, and harm water quality. SUF ¶ 45. They can also destroy fragile cultural, archaeological, and paleontological resources, which are widely dispersed throughout the excised lands. SUF ¶ 46; *see also* Desormeau Decl., Exh. C at 215, 219 (BLM maps depicting density of cultural sites and fossils throughout the Monument). And even if such exploratory activity never leads to more extensive plan-level development, it will leave long-lasting impacts on the land—including mine pits, waste piles, disturbed vegetation, and vehicle tracks in the fragile desert soils—that will continue to harm Plaintiffs' aesthetic interests for years to come. SUF ¶ 48.[7]

Moreover, the auditory and visual effects of these mining activities can extend well beyond the boundaries of the mining claims themselves. Dust and haze, mechanical noise, light pollution, and increased traffic can impact neighboring areas that would otherwise be quiet and pristine. SUF ¶ 47. These impacts threaten the unique character of the Monument, described in the 1996 Proclamation as a "high, rugged, and remote region, where bold plateaus and multi-hued cliffs run for distances that defy human perspective" and where the "unspoiled natural area remains a frontier." 61 Fed. Reg. at 50,223; *see also* SUF ¶ 4 (BLM describing the Monument as

[7] Even before surface-disturbing activity begins, the staking of new claims can also harm Plaintiffs' members' enjoyment of the affected areas. A claimant generally must mark her claim with some "conspicuous and substantial" markers, making it easily visible to others. SUF ¶ 40. *See* Harrington Decl. ¶ 12 (seeing mining claim markers when hiking "jolts me out of the peaceful feeling of being in nature, far away from human disturbance").

"one of the most naturally dark outdoor spaces left in the lower 48 States," with so little development that, at night, the "interior . . . is literally as dark as can be measured"). Visual and auditory disturbances can have far-reaching impacts in this desert landscape, especially on mesas and slickrock expanses where there is little vegetation to dampen sound or to obstruct viewsheds. SUF ¶ 47; *cf. WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 62 (D.D.C. 2019) (describing far-reaching visual impacts from oil and gas drilling in "open, undeveloped landscape").

Mining activity has already begun on the so-called "Creamsicle" claims. In September 2018, a company called Penney's Gemstones staked these claims for alabaster mining near Upper Slick Rock and Wiggler Bench, on land carved out of the Monument's northern boundary. SUF ¶ 50. In August 2019, Penney's Gemstones sent BLM a notice of intent to conduct exploration activity (i.e., notice-level activities), which BLM subsequently deemed complete. *Id*. As of October 2019, surface disturbance on and around Creamsicle shows the claimant has already begun exploring for and quarrying alabaster. SUF ¶ 51. There are gouges in the exposed faces of pale pink and orange cliffs where mechanized equipment has removed rock, and there are visible vehicle tracks leading to the site. *Id*.

Mining activity at Creamsicle is already causing harm to Plaintiffs' members, including Ms. Marienfeld and Mr. Bloxham, who use the surrounding lands for hiking and photography. SUF ¶¶ 53-54. Ms. Marienfeld, for example, plans to return this spring and summer to Bryce Canyon National Park and the Skutumpah Road—both nearby areas from which mining activities at Creamsicle will be visible. Marienfeld Supp. Decl. ¶¶ 12-13; *see also* Mason Supp. Decl., Exh. B (projecting that mining at Creamsicle will be visible from Bryce Canyon overlooks and parts of the Skutumpah Road). Mr. Bloxham visits the lands surrounding Creamsicle frequently, and this year he plans to return to Bryce Canyon National Park, which lies "west of

the Creamsicle mine site and has commanding, uninterrupted views of the area[] as it sits several thousand feet above it." Bloxham Supp. Decl. ¶ 16. The visual impacts of hardrock mining in this wide-open landscape will "harm [his] ability to . . . find solitude in these wild lands" and to "escape the si[ght] and sound of industrial activity." *Id*. So long as mining activity continues, Plaintiffs' members' aesthetic enjoyment of these areas will be diminished, or they will be forced to curtail their use of those areas altogether. SUF ¶¶ 47-48, 50-63.

Creamsicle is not the only site where mining activity threatens Plaintiffs' members' interests. In September 2018, Alpine Gems LLC located the "Berry Patch 4" claim on excluded lands near Grosvenor Arch, a well-known scenic landmark that the Trump Proclamation cut from the Monument. SUF ¶ 56. Alpine's filings with BLM describe its plans to open up a new "pit quarry located on top of the hill," and to improve a "[r]oad up the hill to access [that] future pit." SUF ¶ 57. Ultimately, Alpine proposes to extract "50-100 ton[s] [of alabaster] per year," with no specified end date, using a "backhoe or trackhoe" and potentially "explosives." *Id*. BLM deemed Alpine's proposal "complete" and stated that it would issue a decision on the plan-of-operations proposal after November 2019. *Id*. In the meantime, Alpine may commence with *notice*-level surface-disturbing activity at Berry Patch, even while awaiting BLM's approval of the pending *plan*-level proposal. *See supra* at 13.

Given Alpine's claim and its "concrete plans to proceed" with development, some level of surface-disturbing activity is now certainly impending at Berry Patch—or at the very least, there is a "substantial risk" of surface-disturbing activity occurring. *Idaho Conservation League*, 811 F.3d at 509. And, given Berry Patch's hilltop location and its proximity to Grosvenor Arch, mining activity here will have significant visual and auditory impacts. *See* SUF ¶ 58; Mason Supp. Decl. ¶¶ 14, 16 & Exhs. C, D (viewshed and sound impact maps projecting that mining

activities will be visible and audible from Grosvenor Arch). For Plaintiffs' members who enjoy visiting Grosvenor Arch and surrounding areas, mining activity will dramatically alter their experience. For example, Mr. Bloxham "plan[s] to return to . . . the southern Cockscomb near Grosvenor Arch to hike, camp and take photos in the spring of 2020 when the weather cooperates." Bloxham Supp. Decl. ¶ 14; *see also* Welp Decl. ¶ 17 (similar). If mining activity is underway, it will impair their ability to enjoy this place.

Other claimants have staked the "Mesa 1-10" mining claims at Colt Mesa, near Silver Falls Canyon and Moody Canyon, also in the excluded lands. SUF ¶ 59. The claimants sent BLM a "notice to hold" their claims for 2019, indicating their intent to retain them for future exploration. *Id*. Mining activity in this scenic area near the Circle Cliffs will harm Plaintiffs' members, including Ms. Harrington, who returns here frequently to backpack through the sinuous canyons of the lower Escalante River. In March or April 2020, Ms. Harrington plans to return to backpack in and around the nearby Chop Rock Canyon. SUF ¶ 60. To reach her trailhead, she "will need to drive or walk near or through the Mesa mining claims." *Id*. If mining activity is underway, it will "change the whole character" of this remote place—a refuge from the sights and sounds of industrial activity where Ms. Harrington can "experience the rare feeling of being in a peaceful, unspoiled wilderness." Harrington Decl. ¶ 13 The noise, dust, and traffic from mining trucks will also negatively impact Ms. Harrington's use of the Burr Trail, the small, scenic road that she uses to access the canyons. SUF ¶ 60; *see also* SUF ¶ 61 (describing Ms. Marienfeld's, Mr. Allen's, Mr. Bloxham's, Ms. Heyn's, and Ms. Welp's plans to return to nearby Moody and Silver Falls Canyons and Colt Mesa).

The D.C. Circuit has repeatedly recognized these sorts of harms as cognizable injuries in fact. *See, e.g.*, *Sierra Club*, 764 F.3d at 5-6 (plaintiffs injured where their members enjoy

learning from and "observing the landscape from surrounding areas," where mining would mar those vistas); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305-06 (D.C. Cir. 2013) (similar); *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 715 (D.C. Cir. 1988) (similar); *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 62 (plaintiffs injured where oil and gas drilling would create "haze and dust in the air" visible "up to a hundred miles" away, impacting areas their members intended to visit). It is well settled, too, that plaintiffs suffer injury in fact if they curtail their use of certain areas because of aesthetic degradation. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 184 (plaintiffs injured where "continuous . . . discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway"); *Sierra Club v. FERC*, 827 F.3d 59, 66 (D.C. Cir. 2016) (similar).

Plaintiffs have thus demonstrated both *ongoing* and imminent *future* injuries to their interests in enjoying and learning about the Monument in its pristine, natural state and protecting the innumerable objects of historic and scientific interest found there. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("future injuries" may be "imminent" "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur"). The D.C. Circuit routinely draws on common sense to find standing where, as here, plaintiffs challenge government action that will injure them by removing barriers to harmful third-party activity. *See, e.g., Air All. Houston v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (per curiam) ("When challenging [a] failure to regulate, a petitioner need demonstrate only a substantial probability that local conditions will be adversely affected, and thus will harm members of the [plaintiff] organization." (quotation marks and citation omitted)); *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (deeming it "'a hardly-speculative exercise in naked capitalism' to predict that facilities would take advantage of" a challenged rule loosening regulatory restrictions); *Idaho*

Conservation League, 811 F.3d at 510 (similar, regarding agency's failure to finalize hazardous waste regulations for hardrock mining facilities); *Sierra Club*, 764 F.3d at 7-8 (finding "substantial probability" of injury to plaintiffs' aesthetic interests due to likelihood of resumed coal mining); *cf. Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (applying "[c]ommon sense and basic economics" to find standing).

Here, it was entirely "predictable" that mining activity would commence in the excluded monument lands because of President Trump's proclamation. *Dep't of Commerce*, 139 S. Ct. at 2566 (finding standing based on "the predictable effect of Government action on the decisions of third parties"); *see also* SUF ¶¶ 24-26 (describing purpose of monument "review"). It is no surprise that new mining claims are now proliferating in the lands stripped of monument protection. And because mining activity is *already* occurring on the excluded lands, it is "predictable," too, *Dep't of Commerce*, 139 S. Ct. at 2566, that claimants will continue to locate and develop mining claims on the excluded lands, seeking to exploit the hardrock resources that BLM has determined are present, SUF ¶ 19. *See Idaho Conservation League*, 811 F.3d at 509 (finding standing where member lived near two mine sites, one "currently operating" and one where operator had "concrete plans" to proceed); *Sierra Club*, 764 F.3d at 7-8 (similar). Given these new mining claims and activity since February 2018, the demonstrated industry interest in developing those claims, and the fact that mining claimants do not need any affirmative approval from BLM before certain surface-disturbing operations can begin, Plaintiffs have demonstrated ongoing and imminent injuries that will continue, absent an order from this Court.

B. Plaintiffs' injuries are traceable to the Trump Proclamation and would be redressed by a favorable decision.

It is "well-established" that traceability and redressability are satisfied where a plaintiff challenges government action authorizing third-party conduct "that allegedly caused the

plaintiff's injuries" if "that conduct would allegedly be illegal otherwise." *NRDC*, 755 F.3d at 1017 (quotation marks omitted); *accord Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc). Here, on the lands excised from the Monument, the Trump Proclamation expressly allows mining activities that would have been illegal under the 1996 Proclamation. 82 Fed. Reg. at 58,093. Plaintiffs' injuries are thus directly traceable to the Trump Proclamation, and they would be redressed by the relief Plaintiffs seek. *See Sierra Club*, 764 F.3d at 5 (traceability and redressability are "two sides of a causation coin," and depend on whether the requested relief "would afford . . . protections from surface mining").

Specifically, Plaintiffs ask this Court to declare the Trump Proclamation unlawful and to enjoin its implementation. To be sure, "injunctive relief against the President *personally* is an extraordinary measure not lightly to be undertaken," *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (emphasis added), but Plaintiffs seek injunctive relief only "against Agency Defendants," Compl. 58 (prayer for relief). It is well settled that "courts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quotation marks omitted); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 588 (1952) (affirming injunction prohibiting Commerce Secretary from carrying out President's steel seizure order).

Here, the relief Plaintiffs seek—a declaration that the Trump Proclamation is unlawful, and an injunction prohibiting the Agency Defendants from implementing it, *see* Compl. 58—would eliminate future harm to Plaintiffs' members by reinstating monument protections for the entire 1.9-million-acre Monument. *See Swan*, 100 F.3d at 980-81 (injunctive relief against subordinate officials charged with carrying out President's decision "is sufficient to satisfy the redressability requirement of standing"). BLM could no longer accept and process new mining

claims on those lands; such claims would again be prohibited by the 1996 Proclamation's mineral withdrawal. *See* 61 Fed. Reg. at 50,225.

That alone suffices to establish redressability. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[T]he relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision," not "that a favorable decision will relieve his *every* injury." (citation omitted)). But in addition, an order reinstating the Monument's boundaries would meaningfully limit—and perhaps halt—the development of claims located since the Trump Proclamation took effect, including Creamsicle, Berry Patch 4, and Colt Mesa. Those claims, being located within a national monument, would be subject to more restrictive requirements: no surface-disturbing activity could go forward without a validity determination, a full plan of operations, and a NEPA analysis (subject to public review and comment) of the operation's impact on environmental, cultural, and paleontological resources. *See* 43 C.F.R. §§ 3809.11(c)(7), 3809.100(a), 3809.411(a)(3)(ii); (iii). Any hardrock mining activity on these claims would therefore be limited, if it were allowed to occur at all. And no mining activity could occur that would be inconsistent with "the proper care and management of the [Monument] objects to be protected." 54 U.S.C. § 320301(b). In a national monument, as BLM has recognized, "[a]ll other considerations are secondary to that edict." SUF ¶ 21.

In sum, it is likely that injunctive relief directed at the Agency Defendants would redress Plaintiffs' injuries, and such relief is well within the Court's power.

II. President Trump Had No Authority to Dismantle the National Monument.

"The President's power, if any," to issue a proclamation dismantling a national monument "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585; *accord Medellín v. Texas*, 552 U.S. 491, 524 (2008). Here, the President had neither

constitutional nor statutory authority to dismantle the Monument. As explained below, Plaintiffs are entitled to summary judgment on their First, Second, and Third Claims for Relief.

A. The President has no independent constitutional authority to manage federal lands.

The Property Clause of the Constitution grants exclusive power over the nation's public lands to Congress, not the President. U.S. Const. art. IV, § 3, cl. 2 (empowering Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Congress's "complete power" over federal lands is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (quotation marks omitted). When it comes to managing or disposing of federal lands, then, the President may exercise only such power as Congress has delegated to him. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) (President's power to dispose of public lands "must be traced to Congressional delegation of [such] authority").

The Constitution thus does not confer any free-standing presidential power over national monuments. Defendants have acknowledged as much: "No authority has been asserted by the President to support the Proclamation in the event the Antiquities Act is held not to authorize it." Mem. in Support of Defs.' Mot. to Dismiss at 41, ECF No. 43-1 (Oct. 1, 2018); SUF ¶ 35. Because the Trump Proclamation relies "entirely upon authority said to be delegated by statute, and makes no appeal to constitutional powers of the Executive," the "central issue in this case" is whether the Antiquities Act "indeed grants to the President the powers he has asserted." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). As explained below, it does not.

B. The President has no statutory authority to dismantle Grand Staircase.

The Antiquities Act does not grant the President authority to dismantle national monuments; that power resides exclusively in Congress. The Act's text, protective purpose,

legislative history, and numerous other congressional enactments all confirm that Congress delegated to the President a limited power to *create* national monuments, but not to abolish them in whole or in part.

1. The text of the Antiquities Act delegates the power to create national monuments, not to remove monument protections.

"[T]he starting point for [a court's] interpretation of a statute is always its language," *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016) (quotation marks omitted), and here, the statutory language is straightforward. The Antiquities Act authorizes the President to take two actions: to "*declare* . . . objects of historic or scientific interest . . . to be national monuments," and, when doing so, to "*reserve* parcels of land as a part of the national monuments" to protect the historic and scientific objects. 54 U.S.C. § 320301(a), (b) (emphases added).[8] Nothing in the Antiquities Act authorizes the President to *remove* parcels of land *from* a national monument, or otherwise to diminish or dismantle an existing monument. Thus, by its terms, the Act is a delegation of one-way protective authority. The President may confer protections, but it remains Congress's prerogative to undo them.

Had Congress intended to authorize Presidents to undo monuments or to remove lands from them, it would have said so. It is "a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Rotkiske v. Klemm*, No. 18-328, 2019 WL 6703563, at *4 (U.S. Dec. 10, 2019) (quotation marks and brackets omitted); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (courts do not "add words to [a statute] to produce what is thought to be a desirable result"). Courts "do not start from the

[8] *See* Webster's Int'l Dictionary 377 (1907) ("declare" means "[t]o make known by language" or "to proclaim"); *id.* at 1225 ("reserve" means "[t]o keep back; to retain").

premise that [a statute's] language is imprecise," but rather "assume that . . . Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

In particular, when interpreting the scope of a statutory delegation of authority, courts take Congress at its word, and generally do not assume that the express conferral of one power silently includes its *opposite*. *See, e.g.*, *North Dakota v. United States*, 460 U.S. 300, 312-13 (1983) (statute authorizing acquisition of lands with state consent does not authorize states to revoke consent, for "[n]othing in the statute authorizes the withdrawal of approval previously given"); *United States v. Seatrain Lines*, 329 U.S. 424, 432-33 (1947) (agency's grant of certificate "is not subject to revocation in whole or in part except as specifically authorized by Congress"); *Cochnower v. United States*, 248 U.S. 405, 407-08 (1919), *as modified*, 249 U.S. 588 (1919) (statute delegating authority to "increase and fix" compensation did not impliedly delegate the "opposite power" to decrease compensation; had Congress intended to confer two-way authority, "it would have been at equal pains to have explicitly declared it"); *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (rejecting Attorney General's argument that "the power to denaturalize is 'inherent'" in statutory grant of "the power to naturalize").[9]

Congress in 1906 plainly knew how to delegate two-way authority both to reserve land for protection, and to undo those reservations, when it wanted to do so. The Forest Service Organic Administration Act of 1897, enacted shortly before the Antiquities Act, is particularly telling. The Organic Act amended an earlier statute that authorized the President to "declare the

[9] *Cf. Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (where "the Constitution expressly authorizes the President to play a role in the process of enacting statutes, [but] is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes," such unilateral action to repeal or amend is "prohibit[ed]"); *In re Aiken County*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.) (noting that statutes authorizing President to spend funds do not authorize President to "refuse to spend the funds").

establishment of [forest] reservations and the limits thereof." 26 Stat. 1095, 1103 (1891). Recognizing that the delegation of power to "declare" a forest reservation did not give the President the authority to undo such reservations, Congress subsequently passed the 1897 Organic Act, which specifically authorized the President "at any time to modify any Executive order . . . establishing any forest reserve, and by such modification [to] reduce the area or change the boundary lines of such reserve, or [to] vacate altogether any order creating such reserve." 30 Stat. 11, 36 (1897) (JA013). In fact, during congressional deliberations over the Organic Act, Representative Lacey—the same legislator who later sponsored the Antiquities Act—affirmed that without an express delegation of revocation and modification authority, the President had no power to revoke or modify forest reservations. 29 Cong. Rec. 2677 (Mar. 2, 1897) (JA002).

Other contemporaneous statutes similarly demonstrate that when Congress wanted to grant authority to reduce or revoke land reservations, it did so expressly. *See, e.g.*, Pickett Act, Pub. L. No. 61-303, § 1, 36 Stat. 847 (1910) (authorizing President to "temporarily withdraw" public lands, and stating that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress"); Reclamation Act of 1902, Pub. L. No. 57-161, § 3, 32 Stat. 388 (1902) (providing that "[t]he Secretary of the Interior . . . shall restore to public entry any of the lands so withdrawn when, in his judgement, such lands are not required for the purposes of this Act.").

The Antiquities Act conspicuously lacks any such grant of revocation or modification authority. Reading such authority into the Antiquities Act is thus "particularly inappropriate" given that "Congress has shown that it knows how to adopt the omitted language or provision," but declined to do so here. *Rotkiske*, 2019 WL 6703563, at *4; *accord Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994); *cf. League of*

Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 1024-30 (D. Alaska 2019), *on appeal*, No. 19-35460 (9th Cir.) (concluding that statute authorizing President to withdraw areas on continental shelf from oil and gas leasing did not authorize President to revoke prior withdrawals, based in part on contrast with other public land statutes granting express revocation authority). The Court should not "second-guess" Congress's choice. *Rotkiske*, 2019 WL 6703563, at *4.

2. The President has no implied authority to dismantle monuments.

Finding no express revocation authority in the Antiquities Act, Defendants have previously urged the Court to find an implied grant of authority to diminish monuments in Congress's instruction that a President's monument reservation "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). Defendants' interpretation violates the "fundamental canon of statutory construction that the words of a statute must be read in their context." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016).

In the Antiquities Act, both today and as originally enacted, the phrase "shall be confined" follows directly after the grant of power to "reserve" parcels of land:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation . . . 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, *and 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 . . . .

Pub. L. No. 59-209, ch. 3060, § 2, 34 Stat. 225 (1906) (emphasis added); *accord* 54 U.S.C. § 320301(a), (b).[10] Read in context, it is clear that the "shall be confined" language is not a separate, free-standing *grant* of power that allows Presidents to perpetually revisit and diminish monument reservations already established. Rather, it is a *limiting condition* on the President's authority to "reserve . . . parcels of land" when making the initial, "discretion[ary]" decision to "declare" a monument in the first instance. *Id*.; *cf. Nestor v. Hershey*, 425 F.2d 504, 516 (D.C. Cir. 1969) ("The last sentence of paragraph 6(i)(2) is not a grant of authority, but is merely a clarification . . . intended to limit the authority already granted . . . .").

Nor does the President have any free-floating, inherent power to undo prior monument designations. "There is no general principle that what one can do, one can undo." *Gorbach*, 219 F.3d at 1095; *see also North Dakota*, 460 U.S. at 312-13. If such a principle existed, there would have been no reason for Congress to expressly grant modification authority, as it did, in other turn-of-the-century public land statutes described above: those express grants of authority—including the Forest Service Organic Act's amendment of an earlier statute—would have been entirely superfluous. *See supra* at 25-26; *see also Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Nor is there a presumption that Congress, having delegated one specific power, must also have delegated its opposite. *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power." (quotation marks omitted)).

[10] The relevant statutory language has remained substantively unchanged since Congress enacted it in 1906. In 2014, Congress re-codified the Act (along with other land preservation statutes) at its current place in the U.S. Code, making minor wording changes to ensure that the statutory language "conform[ed] to the understood policy, intent, and purpose of Congress in the original enactments." Pub. L. No. 113-287, § 2, 128 Stat. 3094 (2014).

In short, the Court need look no further than the text of the Antiquities Act, which does not confer the authority that President Trump now asserts. Congress delegated to the President the limited authority to declare national monuments and to reserve federal lands as part of those monuments. The opposite power—to abolish existing monuments or remove lands from them—Congress retained for itself. If Congress had intended to delegate the power to reduce or rescind national monuments, "it would have used the words . . . in the statutory text." *Cent. Bank of Denver*, 511 U.S. at 177. "But it did not." *Id.* The Court should reject the Defendants' invitation to read such an authority into the Act where Congress has chosen not to provide it.

3. President Trump's attempt to remove monument protections is inconsistent with the Act's protective purpose and legislative history.

The Antiquities Act's purpose—to *protect* scientific and historic resources—further confirms what the text states: Presidents may create national monuments and protect federal land, but they may not remove such protections. The "Antiquities Act is entirely focused on preservation." *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 59 (D.D.C. 2018), *aff'd*, 2019 WL 7198513 (D.C. Cir. 2019). It speaks of the "reserv[ation]" of land and the "proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). Monuments are meant to protect objects that, once destroyed, can never be restored. Congress therefore intended monuments to be enduring, not ephemeral. As the Supreme Court has observed, an "essential purpose of monuments created pursuant to the Antiquities Act . . . is 'to conserve . . . the natural and historic objects . . . and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'" *Alaska*, 545 U.S. at 103 (quoting what is now 54 U.S.C. § 100101(a)). Congress therefore chose to confer one-way authority on the President—making continued preservation the default, unless and until Congress

says otherwise—because enabling swift protection, while requiring deliberative *legislative* action before protections may be revoked, was central to achieving Congress's preservation goal.

The President's assertion of authority to eliminate monument protections is wholly incompatible with the Act's "essential purpose" of providing stable, long-term protection for irreplaceable scientific and historic objects. *Alaska*, 545 U.S. at 103. If the President had unilateral authority to dismantle existing monuments, a future President could still reinstate this Monument's boundaries, and then the next President could cut them in half again, setting in motion an endless see-sawing of monument protections with each change of presidential administration. Indeed, based on Defendants' sweeping assertion of "inherent" authority, a President presumably could even, with the stroke of a pen, declare *all* national monuments to be abolished—from the Statue of Liberty to Muir Woods, *see supra* note 2—unilaterally revoking century-old protections for some of America's most treasured public places. Congress did not intend such a disorderly and disruptive result.

That Congress chose to delegate one-way protective authority in the Antiquities Act is no anomaly. Unlike "multiple-use" land designations (such as forest reserves, *see supra* at 25-26) where Congress expressly authorized the President to revoke or modify prior withdrawals to balance competing interests over time, "categorically protected" land designations like national monuments cannot be moved into and out of protected status without risking irrevocable damage to the resources that warranted protection in the first place. *See* Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump's National Monument Proclamations*, 45 ECOLOGY L.Q. 921, 927 (2018). Congress therefore tightly restricted the power to remove such protections, recognizing that conservation resources, once lost, can never

be recovered. *See id.* at 942-43, 945-46 (discussing national wildlife refuges, *see* 16 U.S.C. § 668dd(a)(6), and wilderness areas, *see* 43 U.S.C. § 1782,[11] as similar one-way ratchets).

The legislative history of the Antiquities Act confirms that Congress intended national monuments to provide such enduring protection. "Until the Antiquities Act was passed in 1906, the chief weapon available to the [f]ederal [g]overnment for protecting antiquities on public land was the [Interior Department's] power to withdraw specific tracts from sale or entry for a *temporary* period." Lee, *supra*, ch. 5 (emphasis added). This existing, stop-gap authority proved insufficient to ensure meaningful protection of important scientific and historic sites, as both Interior officials and academics agreed. For years leading up to the Act's passage, Interior's General Land Office lobbied Congress to grant the Executive Branch a permanent protection power. *See, e.g.*, Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 117 (1902) (JA163) (advocating for legislation "empowering the President to set apart, as national parks, tracts of public land which . . . it is desirable to protect and utilize in the interest of the public"); *see also* Lee, *supra*, ch. 6.

Similarly, Professor Edgar Hewett, a chief proponent of the Act, called for the "prompt exercise of the authority lodged in . . . the Interior Department" to temporarily protect ruins

[11] In FLPMA, Congress directed the Interior Secretary to inventory BLM-managed lands for "wilderness characteristics," 43 U.S.C. § 1782(a), and directed the President to make recommendations to Congress by 1993 about whether to classify those lands as "wilderness," *id*. § 1782(b). Congress retained for itself the final decision whether to classify those areas (called "wilderness study areas") as "wilderness" or return them to multiple use. The Executive Branch had discretion in deciding whether to establish a wilderness study area in the first place, but once it did so, its hands were tied until Congress acted. *See id*. § 1782(c) (Interior must manage wilderness study areas "until Congress has determined otherwise . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness"); U.S. Dep't of Justice, Off. of Legal Counsel, *Presidential Authority Over Wilderness Areas Under the Federal Land Policy and Management Act of 1976*, 6 Op. O.L.C. 63, 65 (1982) (concluding that, once the President has recommended wilderness study areas to Congress, "the President does not have the authority to return lands to multiple use management without congressional action").

under immediate threat of looting. H.R. Rep. No. 59-2224, at 2 (1906) (JA077). "This done," he further called on Congress to pass "*legislation* to the end that these regions may be made a *perpetual* source of education and enjoyment for the American people, as well as for travelers from foreign lands." *Id*. at 2-3 (JA077-78) (emphases added); *see also id*. at 7-8 (JA082-83) (emphasizing the "need for general legislation" authorizing the Executive to create "*permanent* national parks" "for the purpose of protecting" objects of interest (emphasis added)). The House Committee "incorporated" Professor Hewett's memorandum into its report on the final bill that would become the Antiquities Act, *id.* at 2 (JA077), demonstrating that the Act fulfilled this need for permanent protective authority.[12]

4. Since 1906, Congress has not acquiesced to prior presidential diminishments, but rather has reaffirmed its exclusive power to reduce or rescind monuments.

Because the Antiquities Act's text, purpose, and history all confirm that Congress delegated only the power to create national monuments, but not the power to rescind or reduce them, the Trump Proclamation is unlawful. Defendants have previously urged the Court to expand the President's power beyond statutory limits, pointing to a small number of sporadic presidential proclamations purporting to shrink national monuments over a half century ago. It is axiomatic, however, that "[p]ast practice does not, by itself, create power." *Medellín*, 552 U.S. at 532 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). And as described below, those scattered, conflicting examples—which stopped more than fifty years ago, and none of which was ever reviewed by a court—come nowhere near the sort of "systematic, unbroken,

[12] *See also* Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 47-48 (1906) (JA 178-79) (describing the failure of an earlier bill "authorizing the President to establish national parks," and the subsequent passage of the Antiquities Act "relating to the same subject-matter").

executive practice, . . . never before questioned," that might support an argument that Congress has acquiesced in such an interpretation. *Id.* at 531 (quoting *Dames & Moore*, 453 U.S. at 686).

In fact, from 1906 to today, the Executive Branch's own interpretations of the President's authority under the Antiquities Act have been ad hoc and inconsistent: at times acknowledging that the President had no power to diminish monuments, and at other times taking the opposite position. Presidents evidently abandoned the idea that they had unilateral modification authority after 1963. And Congress in 1976 definitively closed the door on such assertions of authority with the passage of the Federal Land Policy and Management Act (FLPMA). In the ensuing decades, no President purported to shrink a national monument—until now.

a. The Executive Branch's contemporaneous interpretation

At the time of the Antiquities Act's passage, the Executive Branch's contemporaneous understanding of the Act was fully consistent with the statutory text and purpose, as described above. The Interior Department explicitly understood the Antiquities Act to authorize permanent reservations, just like national parks. *See supra* at 31-32 & n.12. So did President Theodore Roosevelt, who signed the Act into law, and who credited the Antiquities Act with enabling the "preserv[ation]" of some of America's national treasures "for all time." THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 460 (1913), https://bit.ly/2ytAjQs.

b. The Executive Branch's conflicting positions from 1911 to 1963

From 1911 to 1963, the Executive Branch asserted conflicting interpretations of the Antiquities Act. As Defendants have previously argued, there are several scattered examples of presidential proclamations reducing the size of existing monuments during this period. *See* UDB Br. at 40. Yet during this same period, Solicitors of the Interior Department took the position that the President *lacked* such authority. *See* U.S. Dep't of the Interior, Solicitor's Opinion M-12501 and M-12529 at 2 (June 3, 1924) (JA190) ("After . . . establishment by proclamation," a

monument "becomes a fixed reservation subject to restoration to the public domain only by legislative act."); *see also* U.S. Dep't of the Interior, Solicitor's Opinion M-27025 at 4 (May 16, 1932) (JA194) (noting "in the absence of authority from Congress, the President may not restore to the public domain lands which have been reserved for a particular purpose").

Indeed, on numerous occasions throughout this period, the Executive Branch asked *Congress* to reduce specific national monuments by legislation, demonstrating the Executive Branch's recognition that the President had no power to do so himself.[13] And during the 1920s, the Executive Branch repeatedly (and unsuccessfully) asked Congress for legislation that would empower the President to reduce monuments himself—a power that, the Interior Secretary told Congress, the President lacked under existing law. *See* H.R. Rep. No. 69-1268, at 2 (1st Sess. 1926) (JA100) (incorporating letter of Interior Secretary, asking Congress to pass legislation that would remove 160 acres from Casa Grande National Monument and authorize the President to "tak[e] . . . similar action in the future where conditions require"); *accord* S. Rep. No. 69-423, at 2 (1st Sess. 1926) (JA097); *see also* H.R. Rep. No. 68-1119, at 2 (1925) (JA089) (incorporating letter of Interior Secretary, recognizing that "after . . . establishment by proclamation [a monument] becomes a fixed reservation subject to restoration only by legislative act"); *accord* S. Rep. No. 68-849, at 2 (1925) (JA093). Congress rejected these requests for a presidential

[13] *See, e.g.*, S. Rep. No. 69-423, at 1-2 (1926) (JA096-97) (Interior Secretary asking Congress to reduce Casa Grande); Pub. L. No. 69-342, ch. 483, 44 Stat. 698 (1926) (reducing Casa Grande); S. Rep. No. 74-2140, at 1 (1936) (JA101) (Interior Secretary asking Congress to reduce Craters of the Moon); Pub. L. No. 74-668, ch. 527, 49 Stat. 1484 (1936) (reducing Craters of the Moon); S. Rep. No. 77-1128, at 1-2 (1942) (JA102-03) (Acting Interior Secretary asking Congress to reduce Cedar Breaks); Pub. L. No. 77-486, ch. 162, 56 Stat. 141 (1942) (reducing Cedar Breaks); S. Rep. No. 81-2166, at 3-4 (1950) (JA106-07) (Interior Secretary recommending reduction of Joshua Tree); Pub. L. No. 81-837, ch. 1030, 64 Stat. 1033 (1950) (reducing Joshua Tree); S. Rep. No. 89-766, at 2-3 (1965) (JA109-10) (Assistant Interior Secretary recommending reduction of Jewel Cave); Pub. L. No. 89-250, 79 Stat. 971 (1965) (reducing Jewel Cave).

revocation power, *see* 67 Cong. Rec. 6805 (1926) (JA098) (noting that the Senate Committee "str[uck] out" language that would have authorized the President "'to eliminate lands from national monuments by proclamation'"), choosing to exercise its own authority to modify national monuments instead, *see* Pub. L. No. 69-342, ch. 483, 44 Stat. 698 (1926) (reducing Casa Grande by legislation).

Attorney General opinions from this era also contradict any asserted revocation authority. In 1938, the Attorney General concluded that "the President is without authority" to "abolish" an existing national monument, and therefore declined to approve a draft proclamation that would have dismantled an existing monument. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188-89 (1938). The Attorney General observed, in dictum, that "the President from time to time has diminished the area of national monuments," but he did not analyze the legality of those diminishments. *Id.* at 188. In fact, the logic of his opinion compels the conclusion that they were unlawful. That is because, as the Attorney General put it, "[w]hen the President, in the exercise of the discretion vested in him by [statute]," reserves land for a specified purpose, "the power conferred by the act [i]s exhausted, and [the President] ha[s] no . . . authority to recall that reservation." *Id.* at 187 (quoting Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 364 (1862)); *see also* Disposition of Abandoned Lighthouse Sites, 32 Op. Att'y Gen. 488, 490 (1921) (similar). If the President's authority is exhausted, he can no more *partially* abolish a monument than he can *wholly* abolish it. *Accord* U.S. Dep't of the Interior, Solicitor's Opinion M-12501 and M-12529 at 1 (JA189) (relying on Lighthouse opinion to conclude that the President had no authority to reduce national monuments).

In sum, the scattered instances of presidential monument reductions between 1911 and 1963 did not establish anything like a "systematic, unbroken," or "[un]questioned" practice in

which Congress might be deemed to have acquiesced. *Dames & Moore*, 453 U.S. at 686. No court ever had occasion to rule on the legality of any of those proclamations. And given the Executive Branch's inability to maintain a consistent position over time, and its periodic representations to Congress that the President did *not* have the power to reduce monuments unilaterally, it is impossible to infer that Congress "kn[ew]" of "and acquiesced in" any "long-continued practice" of presidential monument reductions. *Id.*; *see also NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("Congress's failure to speak up" in response to 112 occasions of Executive Branch overreach "does not fairly imply that it has acquiesced in the [Executive's] interpretation"; it was "at least as plausible" to conclude that "[t]he Senate may not have noticed . . . , or it may have chosen not to [take corrective action] . . . just to make a point about compliance with the statute."); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (declining to "impute to Congress" endorsement of executive practice that did not evince a "consistent[] . . . pattern").

c. The Executive Branch's abandonment of Presidential monument modifications after 1963, and Congress's reaffirmation of its power

Finally, any acquiescence argument evaporates completely after 1963—the last occasion on which any President purported to diminish a monument until President Trump issued the proclamations challenged here. In other words, Presidents have now abandoned such claims of authority for a longer period than they ever claimed it. For more than fifty years preceding President Trump's action, no President asserted the authority to remove so much as a single acre of land from a national monument.[14] The practice is therefore not "unbroken." *Dames & Moore*,

[14] To be sure, Presidents have effectively *expanded* national monuments during this time period, but monument expansions (as opposed to rescissions or reductions) are wholly consistent with the Antiquities Act's text. A President may effectively expand a monument by "declar[ing]" and "reserv[ing] . . . as a part of the national monument[]" additional acres of land adjacent to the original monument. 54 U.S.C. § 320301(a), (b); *see, e.g.*, Proclamation No. 9478, 81 Fed. Reg. 60,227, 60,227 (2016) (establishing the Papahānaumokuākea Marine National Monument Expansion and reserving "[a]n area adjacent to the [original] Monument").

453 U.S. at 686. And even if the sporadic presidential reductions from 1911 to 1963 could have been sustained at the time as exercises of implied authority, Congress foreclosed any such argument in 1976 when it enacted FLPMA, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701 *et seq.*).

FLPMA consolidated a patchwork of existing public land laws and broadly reaffirmed Congress's paramount power over withdrawals and reservations, clarifying that delegations of such power to the Executive Branch must be express. Among other things, FLPMA was Congress's reaction to the Supreme Court's 1915 decision in *United States v. Midwest Oil*, which held that Congress had, through acquiescence, delegated to the President broad authority to make public land withdrawals without a statutory basis. 236 U.S. 459, 474 (1915). Invoking the so-called *Midwest Oil* doctrine, some subsequent administrations had asserted presidential power to make and reduce public land withdrawals at will, including national monuments. *See, e.g.*, U.S. Dep't of the Interior, Solicitor's Opinion M-27657 at 3-5, 7 (Jan. 30, 1935) (JA202-04, JA206).

Congress, when it enacted FLPMA in 1976, expressly "repealed" any "implied authority of the President to make withdrawals and reservations resulting from acquiescence" under *Midwest Oil*. Pub. L. No. 94-579, § 704(a), 90 Stat. at 2792. By repudiating *Midwest Oil*, Congress made clear that any delegations of its Property Clause power over land withdrawals must be express, not implied. *See* 43 U.S.C. § 1701(a)(4) (one purpose of FLPMA is to "delineate" executive withdrawal power); H.R. Rep. No. 94-1163, at 1-2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6175, 6175-76 (noting Congress's concern with executive gap-filling); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 856 (9th Cir. 2017) ("FLPMA eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority."). Consistent with this rule, Section 204(a) of FLPMA went on to confer

express authority on the Interior Secretary to "make, modify, extend, or revoke [certain types of] withdrawals," subject to various procedural and substantive limitations. 43 U.S.C. § 1714(a). Congress chose to leave the Antiquities Act unchanged, however, keeping the task of establishing national monuments—but not "modify[ing]" or "revok[ing]" them, *id.*—in the President's hands. *See* H.R. Rep. No. 94-1163, at 29, *as reprinted in* 1976 U.S.C.C.A.N. at 6203 (FLPMA "would repeal . . . , with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior. The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments) . . . .").

Not only did FLPMA leave the Antiquities Act (and its one-way delegation of authority) unchanged, it also listed "national monuments" as part of a group of land designations for which Congress retained tight control over the right to modify or undo protections. Following section 204(a), which expressly authorized the Interior Secretary to modify or revoke certain types of withdrawals, section 204(j) provided: "The Secretary shall *not* make, modify, or revoke any withdrawal created by Act of Congress [such as national parks]; . . . modify or revoke any withdrawal creating *national monuments* . . . ; or modify[] or revoke any withdrawal which added lands to the National Wildlife Refuge System . . . ." 43 U.S.C. § 1714(j) (emphases added). The accompanying House Report explained that FLPMA "specifically reserve[d] *to the Congress* the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act" so that "the integrity of the great national resource management systems will remain under the control of the Congress." H.R. Rep. No. 94-1163, at 9, *as reprinted in* 1976 U.S.C.C.A.N. at 6183 (emphasis added); *see also* UDB Br. at 33 (discussing section 204(j)).

Both Congress and the Executive Branch again confirmed this understanding in the years after FLPMA's passage. First, in 1978, Congress explicitly "reaffirm[ed]" that lands managed by

the Park Service (which include many national monuments) "shall not be [administered] in derogation of the values and purposes for which [they] have been established, *except as directly and specifically provided by Congress*." 54 U.S.C. § 100101(b)(2) (emphasis added); *see also id.* § 100501 (defining National Park System to include national monuments managed by the Park Service). Second, after President Carter designated a number of large national monuments in Alaska, Congress responded by enacting the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101 *et seq.*). The legislative history of ANILCA specifically recognized that national monuments "will be permanent unless . . . modified by Congress." H.R. Rep. No. 96-97, pt. 2, at 93 (1979) (JA151); *see also id.* pt. 1, at 142, 393, 653 n.1 (JA140, JA145, JA146 n.1) (similar). The Interior Secretary agreed, acknowledging that because "Congress retained ultimate authority for itself in FLPMA," monument "[p]roclamations can be repealed by Congress, but not by the Executive Branch." *The Antiquities Act and FLPMA Amendments of 1979: Hearing Before the Subcomm. on Parks, Recreation, & Renewable Res. of the S. Comm. on Energy & Nat. Res.*, 96th Cong. 29 (1979) (statement of Interior Sec. Cecil Andrus) (JA157).

And finally, as discussed above (at 7-8), Congress in 2009 established a "National Landscape Conservation System," which encompasses all BLM-managed "national monument[s]" (including Grand Staircase), and which is meant to "conserve, protect, and restore nationally significant landscapes . . . for the benefit of current *and future generations*." Pub. L. No. 111-11, § 2002(a)-(b)(1)(A), 123 Stat. at 1095 (emphasis added) (codified at 16 U.S.C. § 7202(a)-(b)(1)(A)). Again, Congress reaffirmed its understanding that monuments are permanent unless modified by statute.

In sum, post-enactment interpretations over the Antiquities Act's 113-year history support reading the statutory text as it is written: conferring one-way authority. The scattered instances of unilateral presidential monument reductions between 1911 and 1963 are anomalies, as explained in the UDB Plaintiffs' brief. *See* UDB Br. at 40-42. And even if these reductions might have been defensible at the time as an exercise of supposedly implied authority, the Executive Branch has abandoned any such claim and Congress has since foreclosed any such argument. For more than half a century, no President—until now—purported to remove land from a national monument. Over that same period, in FLPMA and elsewhere, Congress affirmed that the power to remove monument protections belongs to Congress alone.

5. The President's assertion of authority to dismantle Grand Staircase is incompatible with Congress's own modifications to the Monument.

Finally, President Trump's assertion of authority to remove land from the Monument is incompatible with Congress's own modifications to the Monument. As discussed above, in passing the Antiquities Act, Congress retained the power to modify or revoke national monuments when circumstances warrant. Over the Act's history, Congress has actively exercised that prerogative: through legislation, it has abolished some monuments, reduced the size of others, and converted still others to different land-management designations.[15] And with respect to Grand Staircase specifically, since 1996, Congress has modified the Monument's boundaries by adding some lands and removing others—in total, adding nearly 200,000 acres to President Clinton's initial 1.7-million-acre reservation. *See supra* at 6-7.

[15] *See, e.g.*, Pub. L. No. 71-92, 46 Stat. 142 (1930) (abolishing Papago Saguaro and transferring land to Arizona); Pub. L. No. 75-778, 52 Stat. 1241 (1938) (re-designating parts of Mount Olympus as a national park and transferring the rest to the Olympic National Forest); Pub. L. No. 84-891, 70 Stat. 898 (1956) (abolishing Fossil Cycad); Pub. L. No. 104-333, § 205(a), 110 Stat. 4093, 4106 (1996) (modifying Craters of the Moon boundaries).

Congress's deliberate additions and adjustments to the Monument's boundaries highlight the incongruity of President Trump's assertion of that same authority here. Most glaringly, the Trump Proclamation purports to eliminate from the Monument roughly 80,000 acres of land and 16,600 additional acres of mineral interests that *Congress itself* incorporated into the Monument in 1998. *See* SUF ¶ 30. As discussed above (at 6-7), the 1998 Lands Exchange Act ratified an agreement between the federal government and the State of Utah by which Utah transferred to the United States "[a]ll [State] lands within the exterior boundaries of the Monument, comprising approximately 176,698.63 acres of land," in exchange for federal lands outside the Monument's boundaries. SUF ¶ 8 (quoting Agreement to Exchange Utah School Trust Lands Between the State of Utah and the United States of America, § 2(E) (May 8, 1998) (JA232)). The agreement specified that the acquired lands "shall become a part of the Grand Staircase-Escalante National Monument." *Id*. (quoting Agreement at § 5(A) (JA234)). Congress ratified the agreement, concluding that "[f]ederal acquisition of State . . . lands within the Monument . . . would enhance management of the Grand Staircase-Escalante National Monument," and appropriating funds to pay the State of Utah $50 million in furtherance of the agreement. SUF ¶¶ 9-10 (quoting Pub. L. No. 105-335, § 2(3), 112 Stat. at 3139). Yet now, in derogation of Congress's decision to acquire these lands and incorporate them into the Monument, President Trump has unlawfully *removed* 80,000 acres of those same lands, plus additional mineral interests, from the Monument. SUF ¶ 30; *see* Murdock Decl., Exh. B (map showing location of federally acquired parcels).

The Trump Proclamation also excludes from the Monument large swaths of the Kaiparowits Plateau where Congress, in 2000, appropriated $19.5 million to buy back preexisting coal leases and thereby prevent their development. Pub. L. No. 106-113, app. C, tit. VI, § 601, 113 Stat. 1501, 1501A-215 (2000); SUF ¶ 13. By revoking monument status from

these parcels, President Trump purported to override duly enacted legislation with his own say-so, reopening to development land that Congress had specifically decided to protect. SUF ¶ 31; *see* Murdock Decl., Exh. C (map showing location of lease buy-backs). There can be no serious argument that the President has such authority. *Cf. Clinton*, 524 U.S. at 439 (President has no power to "repeal[] or amend[] parts of duly enacted statutes").

Congress surely would not have appropriated tens of millions of dollars to buy back coal leases or to acquire state inholdings and mineral interests inside Grand Staircase if it thought a subsequent President could carve up those lands and reopen them to mining with the stroke of a pen. To the contrary, Congress acted on the understanding that federal land, once included in a monument, would stay there unless and until Congress decided otherwise. For example, in the 1998 Lands Exchange Act, Congress explained that the "[d]evelopment of surface and mineral resources" on state inholdings within the Monument "could be incompatible with the preservation of the[] scientific and historic resources for which the Monument was established," and it acquired those lands and added them to the Monument to "*eliminate* th[e] potential incompatibility." Pub. L. No. 105-335, § 2(2)-(3), 112 Stat. at 3139 (emphasis added); *see also id.* § 2(14), 112 Stat. at 3141 (finding that adding lands to the Monument "will *resolve* many longstanding environmental conflicts" (emphasis added)). The Trump Proclamation, by removing some of those same lands from the Monument and reopening them to harmful mineral development, unlawfully upends Congress's carefully considered enactments.

Congress spent years and millions of dollars of public money to eliminate patchworks, protect against development, and secure the integrity of a 1.9-million-acre monument. Despite Congress's clear and longstanding expectation to the contrary, the President now claims the

power to eliminate roughly half of the Monument's land, leaving several radically diminished, fragmented "units" in its place. That is not how Congress intended the Act to work.

III. Plaintiffs Are Entitled to Summary Judgment on their First, Second, and Third Claims, and Injunctive Relief Is Warranted.

For the foregoing reasons, the Antiquities Act gives the President no authority to carve Grand Staircase in half. The Trump Proclamation is *ultra vires*. *See Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003); *cf. Mountain States*, 306 F.3d at 1136. Plaintiffs are therefore entitled to summary judgment on their First Claim for Relief. *See* Compl. ¶¶ 199-203 (*ultra vires* action).

In addition, the Trump Proclamation violates the 1998 Lands Exchange Act, Pub. L. No. 105-335, 112 Stat. 3139, by removing from the Monument roughly 80,000 acres of land and additional mineral interests that Congress itself added to the Monument in that statute. The Trump Proclamation unlawfully contravenes Congress's deliberate judgment that those lands merit inclusion within the Monument. The Trump Proclamation also violates the 2009 Omnibus Act, which incorporated all BLM-managed national monuments—including Grand Staircase-Escalante National Monument, as enlarged by Congress—within the National Landscape Conservation System. Pub. L. No. 111-11, § 2002, 123 Stat. at 1095 (codified at 16 U.S.C. § 7202(a)-(b)(1)(A)). Congress established the System to "conserve, protect, and restore" those "nationally significant landscapes . . . for the benefit of current and future generations," and it directed the Interior Secretary (and therefore BLM) to "manage the system . . . in a manner that protects the values for which the components of the system were designated." *Id*. (codified at 16 U.S.C. § 7202(a), (c)(2)). The President's decision to dismantle the Monument's boundaries and direct BLM to manage the excluded lands for multiple use, rather than for the primary purpose of protecting the objects of historic and scientific interest located there, violates the 2009 Omnibus

Act. Plaintiffs are therefore entitled to summary judgment on their Third Claim for Relief. *See* Compl. ¶¶ 211-12 (violation of 1998 and 2009 statutes); *cf. Reich*, 74 F.3d at 1323, 1332 (concluding that executive order was "in conflict with" the National Labor Relations Act).

Finally, President Trump's arrogation of Congress's exclusive Property Clause power violates the Constitution's separation of powers doctrine. When the President "takes measures incompatible with the . . . will of Congress" and has no inherent power of his own to act, his power is "at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). President Trump's proclamation revoking monument status from roughly half of the Monument—including lands that Congress itself added to the Monument by legislation years earlier—purported to do by executive fiat what only Congress can do. Plaintiffs are entitled to summary judgment on their Second Claim for Relief. *See* Compl. ¶¶ 204-10 (separation of powers).[16]

A grant of summary judgment on any of these claims would invalidate the Trump Proclamation, and an injunction barring the Agency Defendants from implementing the unlawful proclamation is the appropriate remedy. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). First, as described in detail above, *supra* at 14-20, Plaintiffs will suffer "irreparable injury" to their recreational and aesthetic interests from hardrock mining absent an injunction. *Id.* at 156. Second, "remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Id*. As the Supreme Court has observed, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

[16] The Court need not decide the constitutional question if it grants summary judgment to Plaintiffs on their *ultra vires* or statutory claims. *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 . . . , the Court will decide only the latter.").

Third, the "balance of hardships" between the parties favors an injunction. *Monsanto*, 561 U.S. at 157. Plaintiffs have demonstrated ongoing and future injuries caused by the Trump Proclamation, which will continue absent injunctive relief. Defendants, for their part, "cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). Finally, "the public interest" would be served by injunctive relief, *Monsanto*, 561 U.S. at 157, as it would restore the Monument's lawful boundaries and ensure its continued protection "for the benefit of current and future generations," 16 U.S.C. § 7202(a), as Congress envisioned. *See Nat'l Wildlife Fed'n*, 835 F.2d at 326 (district court did not abuse discretion in holding that "the injunction would serve the public interest in protecting the environment from any threat of permanent damage"). Injunctive relief is warranted.

CONCLUSION

In passing the Antiquities Act, Congress authorized the President to create national monuments, not to dismantle them. The President's proclamation subverts the Act's text and intrudes on Congress's sole authority by eliminating monument protections from nearly half of Grand Staircase—including areas that Congress itself added to the Monument through the years. No colorable reading of the statute supports the President's action. Because the law is clear, and there are no material facts in dispute, Plaintiffs ask that the Court grant them summary judgment as to their First, Second, and Third Claims for Relief, declare that President Trump's proclamation is unlawful and void, and enjoin the Agency Defendants from implementing that unlawful proclamation.

Dated: January 9, 2020

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