IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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| MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al., | ) | No. 1:17-cv-00406-JEB |
| Plaintiffs, | ) | |
| v. | ) | |
| WILBUR J. ROSS, JR., in his official capacity as Secretary of Department of Commerce, et al., | ) | |
| Defendants, | ) | |
| NATURAL RESOURCES DEFENSE COUNCIL, et al., | ) | |
| Defendant-Intervenors. | ) | |

**PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS**

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## Introduction

The Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance (collectively, the Fishermen) challenge the creation of a nearly 5,000-square-mile national monument in the Atlantic Ocean. The monument, which is roughly the size of Connecticut, contains no land owned or controlled by the federal government but consists exclusively of ocean beyond the nation's territorial sea. Therefore, the monument exceeds the President's authority under the Antiquities Act. *See* 54 U.S.C. § 320301.

Federal Defendants move to dismiss the complaint. In urging dismissal, they do not challenge Plaintiffs' standing or this Court's jurisdiction to hear the case. Instead, they argue the merits, claiming the Antiquities Act authorizes the monument. They are supported by Intervenors and amici who make a variety of policy arguments in favor of the monument.

This case is not about whether protecting the ocean environment is a good idea or even whether Congress has the authority to regulate to achieve that goal. Other statutes regulate sustainable fishing in the area and authorize the establishment of marine sanctuaries (protected areas of the marine environment). The question for this case is whether, when Congress enacted the Antiquities Act in 1906, it authorized the establishment of ocean monuments beyond the limits of the nation's territorial sea.

It did not. This is a clear case of the Executive Branch's claim to have "discover[ed] in a long-extant statute an unheralded power." *See Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). A full century passed between the Antiquities Act's enactment and presidents' assertion of the power to designate ocean monuments. Such novel claims of broad and previously unnoticed power should be met with serious skepticism. *See id*.

That skepticism is well placed here as the ocean is not "land owned or controlled by the Federal Government," 54 U.S.C. § 320301, and the novel reinterpretation of the Antiquities Act conflicts with the limits Congress imposed on the designation of marine sanctuaries, *see* 16 U.S.C. § 1431, *et seq*. The only court to consider whether the Antiquities Act extends beyond the nation's territorial sea correctly held that it does not. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337-40 (5th Cir. 1978).

For these and other reasons, the motion to dismiss should be denied.

**Background**

Responding to the looting of Native American artifacts in the Southwest, Congress enacted the Antiquities Act of 1906, providing for the protection of such objects through the designation of national monuments. The statute authorizes the President to declare historic landmarks, historic structures, and other objects of historic or scientific interest "situated on land owned or controlled by the Federal Government" to be national monuments. 54 U.S.C. § 320301(a). Once these objects are identified and declared national monuments, the President is authorized to

reserve "parcels of land . . . confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b).

Presidential action under the Antiquities Act is not subject to the Administrative Procedure Act. *See Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1135-36 (D.C. Cir. 2002). Thus, this statute is a rare example where significant executive action is permitted without any procedural protections to guarantee public participation or input. *See* Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 Pub. Land & Resources L. Rev. 153, 166-69 (2011) (noting that the Antiquities Act has long been criticized for its lack of public process). The statute also grants the President discretion to designate monuments—or not—based on any policy or political factors he wishes. *See* 54 U.S.C. § 320301(a) ("The President may, in the President's discretion . . . ."); *see also Mountain States*, 306 F.3d at 1135-38. So long as the President designates a proper "object" that is "situated on land owned or controlled by the Federal Government" and restricts the monument's boundaries to the "smallest area compatible," anything goes.[1] 54 U.S.C. § 320301.

On September 15, 2016, President Obama declared a 5,000-square-mile area of the Atlantic Ocean—more than 100 miles from the nation's coast—to be the Northeast Canyons and Seamounts Marine National Monument. Compl. ¶ 52. That monument consists of nearly 1,000 square miles of ocean surrounding three underwater canyons and nearly 4,000 square miles surrounding four seamounts. *Id.*

[1] Of course, the President also cannot exercise this authority in a manner that would violate any provision of the Constitution.

The proclamation cites the canyons and seamounts, as well as the ocean ecosystem, as "objects of historic and scientific interest" under the Antiquities Act. Compl. ¶¶ 53-56. The proclamation does not explain how this vast ocean area is "land owned or controlled by the federal government" or the smallest area compatible with the protection of any object of historic and scientific interest covered by the Antiquities Act. Compl. ¶¶ 57-58.

Within the boundaries of the monument is a lucrative fishery. Compl. ¶¶ 34-39. Historically, the New England Fishery Management Council and the Atlantic States Marine Fisheries Commission have regulated commercial fishing in this area to ensure sustainability and minimize environmental impacts. Compl. ¶¶ 43-44. The Fishermen have worked with the Council and Commission in this effort, helping to retire excess fishing permits and shift the industry to more environmentally friendly practices. Compl. ¶¶ 7-13, 47, 49.

When the monument was proposed, commercial fishermen, the Atlantic States Marine Fisheries Commission, the eight Regional Fishery Management Councils, and the Governor of Massachusetts all expressed concern that the monument would be illegal, would frustrate efforts to sustainably manage the fishery, or both. Compl. ¶¶ 47-51. For example, the eight Regional Fishery Management Councils, charged with regulating fisheries under the federal Magnuson-Stevens Fishery Conservation and Management Act, explained that "[m]arine monument designations can be counterproductive as they may shift fishing effort to less sustainable practices . . . ." Compl. ¶ 50.

Despite these concerns, the President proclaimed the monument and prohibited most commercial fishing in the 5,000-square-mile area beginning on November 14, 2016. Compl. ¶¶ 61-63. Lobster and red crab fishermen may continue working in the area, but only for seven years. Compl. ¶ 62. The proclamation directs the Secretaries of Commerce and Interior to enforce the fishing ban, without any additional steps required before it goes into effect. Compl. ¶¶ 62-63.

The Fishermen filed this challenge to the monument, raising two claims. First, they claim the monument exceeds the President's power under the Antiquities Act because the ocean is not "land owned or controlled by the federal government." Compl. ¶ 71. To support that claim, the Fishermen allege that the monument consists exclusively of ocean and contains no dry land. *See* Compl. ¶ 52 (reproducing a map of the monument). They further allege that the entire monument is beyond the territorial sea, with its nearest point 130 miles from the nation's coast. *Id*. ¶ 2. Because the federal government has only limited authority to regulate this area, the proclamation forbids regulations that exceed these limits "even if necessary to protect the monument." Compl. ¶ 60.

Second, the Fishermen claim that this 5,000-square-mile monument is not "the smallest area compatible" with the protection of any object covered by the Antiquities Act. Compl. ¶¶ 72-75. To support this claim, they allege that the proclamation provides no justification for the boundaries set. Compl. ¶ 58. They also specifically allege that the monument's boundaries bear little relation to the canyons and seamounts for which it was created, noting that it includes areas dozens of miles from

these objects while simultaneously excluding areas much closer to them. Compl. ¶¶ 73-74; *see* Compl. ¶ 52. Consequently, they allege that the monument's boundary is not "the smallest area compatible" with the protection of these canyons and seamounts. Compl. ¶ 72. They also allege that the marine species cited in the proclamation are not objects of historic or scientific interest for purposes of the Antiquities Act. Compl. ¶ 75.

The Fishermen's complaint requests a declaration that the proclamation establishing the monument is unlawful and an injunction against the enforcement of the proclamation's fishing ban by the President, Secretary of Commerce, and Secretary of Interior. *See* Compl. at 16.

**Standard of Review**

A complaint is only required to set forth a short and plain statement of the claim to give the defendant fair notice and the grounds upon which the claim rests. *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003); Fed. R. Civ. P. 8(a).

To survive a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing that the court has jurisdiction by a preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court must accept as true the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff, but the court need not "accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001).

A Rule 12(b)(6) motion, by contrast, "tests the legal sufficiency of a complaint: dismissal is inappropriate unless the 'plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Here, too, "a judge must accept as true all of the factual allegations contained in the complaint." *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)). The court must give the plaintiff the "benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). If a plaintiff makes out a plausible claim for relief, the motion to dismiss should be denied. *See Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

**Argument**

Federal Defendants argue that the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). In support of that argument, they press an exceedingly broad understanding of the Antiquities Act that conflicts with the statute's text, 100 years of presidential practice, the statute specifically directed to protecting special marine areas, and judicial precedent. The Fishermen have alleged sufficient facts to state a claim for violation of the Antiquities Act. Therefore, the motion to dismiss should be denied.

Federal Defendants also move to dismiss several individual defendants under Federal Rule of Civil Procedure 12(b)(1), primarily arguing that any claims against them are unripe. That argument should also be rejected. Although a claim against

the Secretaries of Interior and Commerce over their creation of a management plan for the monument would be premature, the Fishermen have appropriately sued the Secretaries for their current and ongoing enforcement of the proclamation's fishing ban. That claim is ripe and Federal Defendants make no argument to the contrary.

## I. Courts must review monument designations for consistency with the Antiquities Act

When the President exercises delegated power under a statute that "places discernible limits on the President's discretion[,]" courts are "obligated to determine whether statutory restrictions have been violated." *Mountain States*, 306 F.3d at 1136. The D.C. Circuit has specifically held that the Antiquities Act is such a statute. *See id*. Thus, courts must review whether monument designations violate constitutional principles or exceed the statute's limits. *Id*.

Out of due regard for the separation of powers, courts should not scrutinize the President's policy decisions when acting within this statutory authority. *Id*. However, "these concerns bar review for abuse of discretion[,]" not whether the President's actions violate the Constitution or statutory limits *See id*. at 1135.

The Fishermen claim that the President exceeded his authority under the Antiquities Act and allege facts to support that claim. *See infra* Part II. Thus, under *Mountain States*, the Court is "obligated to determine whether statutory restrictions have been violated." 306 F.3d at 1136.

Federal Defendants' motion argues that the President's mere reference to the Antiquities Act's standards is all that's required for any monument to satisfy the statute.[2] That argument must be rejected as inconsistent with D.C. Circuit precedent and the Constitution's separation of powers. "It would be 'untenable . . . to conclude that there are no judicially enforceable limitations on presidential actions . . . so long as the President *claims* that he is acting pursuant to' a statutory directive." *Id.* (quoting *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996)); *see* Intervenors' Br. at 9-14.

Just as it would be improper for a court to interfere with the President's exercise of discretion expressly entrusted to him, the President would arrogate to himself the Judiciary's role if his mere say-so rendered his actions lawful. Whatever discretion the President may have under the Antiquities Act, "'[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress[.]'" *Mountain States*, 306 F.3d at 1136 (quoting *Reich*, 74 F.3d at 1327, and *Stark v. Wickard*, 321 U.S. 288, 310 (1944)). Similarly, the President intrudes on Congress' power when he stretches statutes beyond their ordinary terms. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

[2] For ease of readability, the Fishermen will describe arguments raised by all of Federal Defendants, Intervenors, and amici as Federal Defendants' arguments. In the few instances where these parties raise different arguments, those differences are noted.

Federal Defendants' argument that monument proclamations can only be judged on their face must be similarly rejected. The D.C. Circuit has held that the Antiquities Act does not require the President to include any particular level of detail in a proclamation. *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002). As Intervenors' note, several proclamations have contained no description of the objects to be protected. *See* Intervenors' Br. at 12 n.8. Hence, courts must consider the allegations contained in a complaint and may not be limited to the face of the proclamation. *See Wyoming v. Franke*, 58 F. Supp. 890, 894 (D. Wyo. 1945).

While no court has yet declared a monument to exceed the limits of the Antiquities Act, there must be some situation where a court would do so. This extreme case calls for that result, as the monument conflicts with the ordinary meaning of the statute, 100 years of presidential practice, another statute specifically directed at protecting important marine areas, and judicial precedent.

## II. The Northeast Canyons and Seamounts Marine National Monument proclamation exceeds the President's power under the Antiquities Act

The Antiquities Act allows the President to declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). To protect those objects, the President may also reserve "parcels of land" around the designated object, so long as the land is "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b).

Although the statute gives the President broad discretion, monument designations made outside the statute's limits are unlawful. *See Mountain States*, 306 F.3d at 1136. There are at least three ways that a monument designation could be unlawful:

(1) The President could declare a monument for an object other than an historic landmark, historic or prehistoric structure, or other object of historic or scientific interest;

(2) The President could declare a monument that is not on "land owned or controlled by the Federal Government;" or

(3) The President could set a monument's boundaries beyond the smallest area required for the object's protection.

This case principally concerns the second type of violation, but the other two are also implicated. As explained below, the Fishermen's complaint alleges sufficient facts to support those claims.

### A. The ocean is not "land owned or controlled by the Federal Government"

#### 1. The ordinary meaning of "land" excludes the ocean

The Northeast Canyons and Seamounts Marine National monument consists of 5,000 square miles of the Atlantic Ocean, all of which lie outside the nation's territorial sea. The monument contains no "land" and is thus beyond the President's power under the Antiquities Act. 54 U.S.C. § 320301(b).

The Fishermen agree with Federal Defendants that, because the Antiquities Act does not define "land," the term must be given its ordinary meaning. Mot. to

Dismiss at 10. However, the key question is what was the ordinary meaning at the time the statute was enacted. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]ords will be interpreted as taking their ordinary, *contemporary*, common meaning." (emphasis added)).

Contemporaneous dictionaries confirm that the ordinary meaning of "land" is the dry surface of the earth, specifically excluding the ocean. Webster's International Dictionary, published in 1890 and 1900, defines "land" as "the solid part of the surface of the earth; — opposed to water as constituting a part of such surface, especially to oceans and seas[.]" Webster's International Dictionary 827 (1900). Webster's New International Dictionary, published in 1909, similarly defines land as "the solid part of the surface of the earth, as distinguished from water constituting a part of such surface, esp. from oceans and seas[.]" Webster's New International Dictionary 1209 (1909) (Webster's First). Webster's Second Edition, published a few decades later, defines "land" the same way and further illustrates the distinction by noting that the Earth contains roughly 55,000,000 square miles of "land" compared to 142,000,000 square miles of ocean. Webster's Second New International Dictionary 1398 (1934).

This understanding of "land" is not unique to Webster's dictionaries. The Oxford English Dictionary similarly defines "land" as "the solid portion of the earth's surface, as opposed to *sea, water*," a definition that it traces from circa 900 AD to the twentieth century. *See* Oxford English Dictionary 617 (2d ed. 1989). Such consistency across many contemporaneous dictionaries is convincing evidence of the ordinary

meaning of a term. *See MCI Telecomms. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994).[3]

Although Federal Defendants argue that the ordinary meaning of "land" is far broader than this, they offer no support for that claim.[4] They cite only the 2014 edition of Black's Law Dictionary, which defines "land" as "an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it."[5] That definition is doubly unhelpful—it comes more than 100 years too late and does not clearly answer whether "land" is ordinarily understood to include the ocean. At best, this definition is ambiguous on how the term "land" is used today.

As Federal Defendants acknowledge, the Court should give "land" its ordinary meaning. The term's ordinary meaning is the earth's dry surface, specifically

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[3] This understanding is also reinforced by the statute's reference to the reservation of "parcels of land" to protect monuments. 54 U.S.C. § 320301(b). Dry land is divided into parcels and referred to as such. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020-32 (1992). The term "parcel" also has a use in the nautical context, but one very different from the meaning of "parcels of land." *See* Webster's International Dictionary 1042 (1890) (refers to the wrapping of rope in narrow slips of canvas dipped in tar to protect it from deteriorating in water).

[4] Intervenors and amici offer no competing definition of "land," arguing instead that dicta from several Supreme Court cases has effectively eliminated the statute's land requirement. *See infra* Part II(a)(v).

[5] Congress recently recodified the Antiquities Act, moving it to a different Title of the U.S. Code and slightly modifying its language—from "land owned or controlled by the government of the United States" to "land owned or controlled by the Federal Government," for instance. However, Congress made clear that the recodification was not intended to change the meaning of any provision. Pub. L. No. 113-287, § 2(b), 128 Stat. 3094 (2014). Thus, the relevant year for assessing the statute's ordinary meaning is 1906.

excluding the ocean. The Northeast Canyons and Seamount Marine National Monument consists entirely of ocean beyond the limits of the territorial sea and includes no land. Therefore, this designation is beyond the President's authority under the Antiquities Act.

### 2. "Control" denotes the same degree of dominion as ownership and requires more than mere power to regulate an area

The Northeast Canyons and Seamounts Marine National Monument exceeds the President's Antiquities Act power for another, independent reason: this area is not "owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). Federal Defendants concede that the federal government does not own the area within the Northeast Canyons and Seamounts Marine National Monument. Instead, they argue that it is "controlled" by the federal government because it asserts the power to regulate some activities in the area. But "controlled," in the context of the Antiquities Act, requires greater dominion than this.

As with "land," the Antiquities Act does not define "controlled." Therefore, it should be given its ordinary meaning, consistent with the rules of statutory construction. Webster's First, published in 1909, defines "control" as "To exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb; subject; overpower." Webster's First at 490. This definition suggests that the ordinary meaning of control is to exercise complete dominion. Admittedly, the definition includes the term "regulate" but "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily*

understood in that sense." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012).

This narrower understanding of "controlled" is reinforced by the rule that "a word is known by the company it keeps[.]" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Under the canon *noscitur a sociis*, "words grouped in a list should be given related meaning[.]" *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (citations omitted). The Antiquities Act groups "owned" and "controlled" together, with both modifying "by the Federal Government." 54 U.S.C. § 320301(a). Thus, "controlled" for purposes of the statute refers to the same degree of control as the government enjoys over the land it owns.

Additionally, interpreting "controlled" in this way avoids rendering "owned" redundant. Statutes should be read to avoid redundancies. *See Gustafson*, 513 U.S. at 574-75. If "controlled" merely requires that the government have authority to regulate an area, there would be no need for the word "owned" to be included in the provision, since the government obviously has the authority to regulate any area it owns. *See Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976). By reading the two terms consistent with *noscitur a sociis*, this redundancy is avoided: "owned" provides the context needed to interpret "controlled."

The Antiquities Act's legislative history confirms this understanding. The statute was the culmination of a years-long effort to authorize federal protection of antiquities. Earlier versions of the legislation would have authorized protection of "public lands," rather than the final bill's "lands owned or controlled by the Federal

Government." *Compare* 54 U.S.C. § 320301 *with* S. 5603 (1904). This change was precipitated by a colloquy between the Commissioner of Indian Affairs and the Senate Committee on Public Lands on whether the narrower phrase would encompass Indian lands:

> Senator Fulton: "I suppose the public lands would include these Indian reservations?"
>
> Commissioner Jones: "No; I think not."
>
> Senator Fulton: "They are public lands, although the Indians have possession. . . . Still the government has *control absolutely*."

Hearing Before the Subcomm. of the Senate Committee on Public Lands, 58th Cong., Doc. No. 314, 24 (Apr. 28, 1904) (emphasis added).[6]

When antiquities legislation was proposed again in 1906, the language had been changed to "lands owned or controlled by the United States." "Controlled" allowed national monuments to be designated in any area that the federal government controls absolutely, as Senator Fulton explained. Confirming this understanding, the House Report accompanying the Antiquities Act distinguished between federally owned lands and those the government controls for the benefit of Indian tribes, noting that the statute would apply to lands in "the public domain *or in Indian reservations*." H. Rep. No. 2224, at 2 (1906).

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[6] *Available at* https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Hearing_Committee%20%20on%20Public%20Lands%20Apr.%2028%2C%201904.pdf.

Subsequent scholars have also recognized that this is what Congress intended by the inclusion of "controlled." The National Park Service's Ronald F. Lee, in a widely cited history of the Antiquities Act, explained that the statute includes "'lands owned or controlled by the Government of the United States'" because "[p]revious bills applied only to the public lands, leaving their applicability to forest reserves, Indian lands, and military reservations uncertain." Ronald F. Lee, *The Story of the Antiquities Act*, ch. 6 (2001).[7]

In 1906, it would have been obvious to Congress that this language did not authorize the creation of a national monument more than 100 miles from the nation's coast. That area was the high seas and beyond the nation's authority to regulate, aside from punishing piracy, other felonies, and offenses against the law of nations. *See* U.S. Const. art. I, § 8, cl. 10. The ocean would have been understood as excluded from the areas "owned or controlled by the Federal Government" because it was categorically ineligible for federal ownership or control.

Consequently, the reliance of amici on the Antiquities Act's application to lands that came under federal ownership after 1906, like the U.S. Virgin Islands, is misplaced. *See* Law Professors' Br. at 12. The Antiquities Act demonstrates that Congress anticipated the federal government obtaining additional lands within the categories covered by the Act. *See* 54 U.S.C. § 320301(c) (authorizing the relinquishment to the federal government of private land to be included within a

[7] *Available at* https://www.nps.gov/archeology/PUBS/LEE/Index.htm.

monument). But there's no indication that Congress intended to allow the President to expand his power to areas that were categorically ineligible for federal ownership or control in 1906.[8]

Not only was this area of ocean categorically beyond the federal government's ownership or control in 1906, it remains so to this day. Although modern international law recognizes a limited authority for coastal nations to regulate the ocean within 200 miles of their coastline—an area referred to as the Exclusive Economic Zone—that authority falls far short of the control required by the Antiquities Act.

The United States does not enjoy sovereignty over this area, but only has a limited authority to regulate there. *See* Restatement (Third) of Foreign Relations Law § 514 cmt. c (1987) (Third Restatement) ("The coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose[.]"); *see also* Statement on United States Oceans Policy, 1 Pub. Papers of Ronald Reagan at 379 (Mar. 10, 1983) (statement accompanying President Reagan's proclamation asserting the Exclusive Economic Zone, explaining that it "enable[s] the United States to take *limited* additional steps to protect the marine environment." (emphasis

[8] Concluding otherwise could lead to absurd results. For instance, federal interest in the universe beyond our planet has increased substantially since 1906. Congress has even enacted legislation regulating the exploitation and disposition of "space resources." *See* SPACE Act of 2015, Pub. L. No. 114-90, 129 Stat. 704. However, it would nonetheless be absurd for the President to claim that Congress intended to authorize the designation of space monuments when it enacted the Antiquities Act in 1906.

added)). Exercising this limited authority, Congress has enacted several statutes regulating this area, including to protect the marine environment. *See infra* Part II(a)(iii). But Congress has never extended the President's power under the Antiquities Act to this area.[9] *Cf. infra* Part II(a)(iv).

Federal Defendants acknowledge that there are limits to federal authority to regulate in the Exclusive Economic Zone. For instance, the government can only regulate for a set of defined purposes, principally resource extraction and to manage the fishery. Third Restatement § 514. Even when regulating for these purposes, Congress cannot interfere with the right of ships to navigate through the area, planes to fly over it, or the installation of cables and pipelines. *Id*. The government also cannot regulate the salvage of historic artifacts and objects within this zone. *See id.* cmt. c. This is not the degree of control required by the Antiquities Act.

Such limited regulatory authority is also inconsistent with the Antiquities Act's requirement that regulations be enacted to protect the objects designated as a monument. 54 U.S.C. § 320301(c). The federal government's power to regulate land that it owns or controls is complete, making it possible to comply with this inflexible requirement. *See Cal. Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572, 580 (1987) (Congress' "power over the public land thus entrusted to [it] is without limitation"

[9] The Magnuson-Stevens Fishery Conservation and Management Act, which authorizes federal fishery regulation in the Exclusive Economic Zone, specifically provides that it "maintain[s] without change" government authority in the zone "for all purposes other than" implementing the statute. 16 U.S.C. § 1801(c)(1). Yet, Federal Defendants argue that this law implicitly extends the President's power under the Antiquities Act. *See* Mot. to Dismiss at 14.

(quoting *Kleppe*, 426 U.S. at 539)).[10] But it does not enjoy the same degree of control over the Exclusive Economic Zone, as shown by the proclamation's prohibition on regulations exceeding these limits even if necessary to protect the monument. Compl. ¶ 60. Consequently, the federal government does not control the Exclusive Economic Zone to the extent required by the Antiquities Act. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 135-37 (2000) (concluding that FDA lacks authority to regulate cigarettes under the Food, Drug, and Cosmetic Act because that statute would require the agency to ban them, despite other statutes forbidding it from doing so).

Federal Defendants do not dispute that the federal government does not control the Exclusive Economic Zone to the same extent as federally owned land. Instead, they argue that "control" should be interpreted much more broadly, to include any area that the federal government has authority to regulate. This exceedingly broad interpretation of the Antiquities Act would lead to anomalous results. It would extend to all private property within the United States (and perhaps areas in foreign countries).[11] For instance, Federal Defendants' argument that the

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[10] Congress generally accommodates states by allowing them to also regulate federal lands, unless state regulations conflict with federal law. *See Granite Rock,* 480 U.S. at 580-81. But there's no question that Congress could completely preempt state regulations on federal land. *See id*. It has no similar authority to override the limits on regulation of the Exclusive Economic Zone.

[11] *See* Joseph Briggett, Comment, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 Tul. Envtl. L.J. 403, 415 & n.116 (2009) (noting that several federal environmental statutes apply extraterritorially).

Antiquities Act applies to any area the federal government regulates and where "no other sovereign entity possesses or asserts influence" would apply to all private land in the country. *See* Mot. to Dismiss at 14. The United States, and not Mexico, may impose environmental regulations on a private farm in Nebraska. *See, e.g.*, 16 U.S.C. § 1531, *et seq.* (Endangered Species Act); 33 U.S.C. § 1251, *et seq.* (Clean Water Act). But this does not render the private property "land owned or controlled by the Federal Government."

Similarly, amici's argument that the Antiquities Act extends to any area regulated by the Department of Interior, *see* Law Professors' Br. at 10, would apply to private land, which the Department of Interior regulates under the Endangered Species Act. Congress' exercise of regulatory power over privately owned land does not mean that the federal government "controls" private land in the sense required by the Antiquities Act. *See* Intervenors' Br. at 24 n.14 (acknowledging that the Antiquities Act does not authorize monuments on private land but offering no interpretation of "control" to resolve this problem).

Finally, there is nothing to support Federal Defendants' theory that "controlled" in the Antiquities Act can be interpreted so broadly. The legislative history only discusses Indian reservations and other lands that Congress controls to the same extent as the land it owns. *See, e.g.*, H. Rep. No. 2224. If Congress intended to allow a much broader authority to establish national monuments, it would have said so. *Cf. Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 265 (2010) (for a statute to apply extraterritorially, there must be a clear indication of congressional

intent). In arguing to the contrary, Federal Defendants effectively claim that Congress hid an elephant in a mousehole by sneaking in an exceedingly broad power through apparently limited statutory terms. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

### 3. Presidential practice confirms that the ocean is beyond the President's Antiquities Act power

As explained, the ordinary meaning of the phrase "land owned or controlled by the Federal Government" is limited to federally owned land and other land the federal government controls to a similar extent. Importantly, this language categorically excludes the ocean beyond the nation's territorial sea. A century of presidential practice confirms this understanding.

Between 1906 and 2005, Presidents designated 92 national monuments on federal land, Indian land, and other land controlled by the federal government, covering a total area of 72 million acres. *See* Nat'l Park Serv., *Antiquities Act: 1906-2006: maps, facts, & figures*.[12] But they designated *none* beyond the limits of the territorial sea.

Many of these designations were controversial, some so controversial that Congress amended the Antiquities Act to further limit the President's power. *See* 16 U.S.C. § 3213; 54 U.S.C. § 320301(d). This controversy is unsurprising; the area

[12] *Available at* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm.

included within national monuments over this period exceeded Congress' expectation, as demonstrated by this exchange between Congressman Stephens and Congressman Lacey, the Antiquities Act's author:

> Mr. Stephens of Texas: "How much land will be taken off the market in the Western States by the passage of the bill?"
>
> Mr. Lacey: "Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved."
>
> Mr. Stephens: "Would it be anything like the forest-reserve bill, by which seventy or eighty millions acres of land in the United States have been tied up?"
>
> Mr. Lacey: "Certainly not."

*See* 40 Cong. Rec. S7888 (daily ed. June 5, 1906).

Although Presidents included a larger area within monuments than Congress anticipated, they respected the Antiquities Act's limit to federally owned or controlled lands. For 100 years, no President designated a monument on the ocean. Thus, even as Presidents pushed the limits of their power, they recognized that the statute's clear textual limit to "land owned or controlled by the Federal Government" could not stretch beyond the nation's territorial sea.

That changed in 2006, when the President designated an ocean monument for the first time. Presidential Proclamation No. 8031 (2006). This novel reinterpretation of "land owned or controlled by the Federal Government" has led to a sea change in the Antiquities Act, with 37 additional monuments designated between 2006 and

2017 covering 760 million acres.[13] That is more than a tenfold increase over the previous 100 years combined.

This order-of-magnitude change is tied directly to the President's novel claim that his power extends to the ocean. As amici note, expanding the Antiquities Act's reach to include the Exclusive Economic Zone increases the area eligible for monument designation by 1.7 *billion* acres. *See* Law Professors' Br. at 7; *but see* 40 Cong. Rec. S7888 (Antiquities Act would "certainly not" affect more than 70 million acres). Many of the ocean monuments greatly exceed the size of land-based monuments. The Northeast Canyons and Seamounts Marine National Monument, at 5,000 square miles, is roughly the size of Connecticut. Compl. ¶ 52. The Papahanaumokuakea Marine National Monument, northwest of Hawaii, at more than 580,000 square miles, is twice the size of Texas. *See* Papahanaumokuakea Marine National Monument Expansion Proclamation (Aug. 26, 2016).[14] Prior land-based monuments, controversial as some have been, do not come close to this scale.

Clearly, the power to designate such huge monuments is a great power. Courts are, appropriately, skeptical when the executive branch claims to discover a great and previously unheralded power in an old statute. *See Util. Air Reg. Grp.*, 134 S. Ct.

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[13] *See, e.g.*, Press Release, Department of Interior, *Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments* (May 5, 2017), *available at* https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal (describing each monument established between 1996 and 2017).

[14] https://obamawhitehouse.archives.gov/the-press-office/2016/08/26/presidential-proclamation-papahanaumokuakea-marine-national-monument.

at 2444. Novel executive reinterpretations of such statutes to reach a major new issue not originally encompassed by them sidesteps Congress and conflicts with the Constitution's bicameralism and presentment process. *See id.* at 2446 (the court "would deal a severe blow to the Constitution's separation of powers" if it allowed the Executive Branch "power to revise clear statutory terms"). Because the President's argument that the ocean is "land owned or controlled by the United States" conflicts with the ordinary meaning of the text and is inconsistent with 100 years of presidential practice, serious skepticism is warranted. *See id.* at 2444.

Federal Defendants stress that Presidents included waters within monument designations prior to 2006, some of which have come before the courts. *See infra* Part II(a)(iv) (discussing those cases). However, these examples are easily distinguished on two grounds. First, they all involved some amount of federal land, in addition to related water bodies. For instance, the designation of Devil's Hole within the Death Valley National Monument concerned 40 acres of federal land. *See* Death Valley National Monument Proclamation 2961 (Jan. 17, 1952). That land contained a unique subterranean pool, which was also included within the monument and protected under the reserved water rights doctrine. *See Cappaert v. United States*, 426 U.S. 128 (1976). Federal Defendants have identified no monument prior to 2006 that included no dry land.[15]

[15] Even the California Coastal National Monument, proclaimed in 2000, included "thousands of islands, rocks, exposed reefs, and pinnacles"—all dry land. *See* California Coastal National Monument Proclamation 7264 (Jan. 11, 2000).

Second, no pre-2006 monument extended beyond the nation's territorial sea. *See, e.g.*, Enlarging the Channel Islands National Monument Proclamation 2825 (Feb. 9, 1949) (establishing the Channel Islands National Monument, including a belt around each island). The federal government exercises a much greater degree of control over the territorial sea than it does the Exclusive Economic Zone. Consequently, monument designations consisting of both federal land and adjoining areas of the territorial sea, whatever their legality, provide no support for the President's power to designate monuments consisting exclusively of ocean beyond the territorial sea.

No President declared a monument consisting exclusively of ocean beyond the territorial sea during the Antiquities Act's first century. This is powerful evidence that the statute has long been understood to exclude this area. The President's newfound discovery of this great, unheralded power in a 100-year-old statute should be met with serious skepticism. *See Util. Air Reg. Grp.*, 134 S. Ct. 2444.

#### 4. Federal Defendants' argument also conflicts with the Marine Sanctuaries Act

Interpreting the Antiquities Act's reference to "lands owned or controlled by the Federal Government" to include the ocean would conflict with the Marine Sanctuaries Act—the statute specifically directed at authorizing the Executive Branch to designate and protect important areas of the marine environment. The President's interpretation of the Antiquities Act conflicts with this statute for at least three reasons.

First, as the Marine Sanctuaries Act shows, when Congress wishes to authorize federal regulation of the ocean, it does not refer to the area as "land owned or controlled by the Federal Government." The Marine Sanctuaries Act permits the designation of marine sanctuaries anywhere in the "marine environment," which the statute defines as "coastal and ocean waters . . . including the exclusive economic zone[.]" 16 U.S.C. § 1432(3). The disparate language between the two statutes further reinforces the ordinary meaning of the Antiquities Act's reference to "land owned or controlled by the Federal Government." *See supra* Part II(a)(i)-(ii).

Second, the President's interpretation of the Antiquities Act to include the ocean renders the Marine Sanctuaries Act completely redundant.[16] Congress has explained that the purpose of the Marine Sanctuaries Act was to provide protection to "areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archeological, scientific, education, or esthetic qualities[.]" 16 U.S.C. § 1431(a)(4). This legislation was necessary, Congress explained, because, although federal law "has recognized the importance of protecting special areas of its public domain," those laws "have been directed almost exclusively

[16] In *Mountain States*, the D.C. Circuit held that mere overlap between the President's interpretation of the Antiquities Act and the Endangered Species Act does not suggest that the interpretation is invalid. 306 F.3d at 1138. However, in that case, the interpretation of the Antiquities Act would not have rendered any statute entirely redundant. Each retained some independent function: for instance, the Endangered Species Act applies to private land. Interpreting the Antiquities Act to apply to the ocean would completely eclipse the Marine Sanctuaries Act, as the last decade of presidential practice has shown.

to land areas[.]" 16 U.S.C. § 1431(a)(1).[17] The Antiquities Act, as its plain text shows, is one of those statutes directed "exclusively to land."

Statutes "cannot be construed in a vacuum." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Instead, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* For the Antiquities Act, part of that context is the need to reconcile any interpretation with the Marine Sanctuaries Act.

"When statutes intersect, the specific statutes trump the general." *Loving v. I.R.S.*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013) (citations omitted). "This is particularly true where . . . 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996)); *see Loving*, 917 F. Supp. 2d at 77.

The Marine Sanctuaries Act does for the ocean, including the exclusive economic zone, what the Antiquities Act does for federal lands: it sets up a process for the Executive Branch to identify and protect special areas. If the Antiquities Act

[17] This language was added to the statute in 1984, after President Reagan issued his proclamation establishing the Exclusive Economic Zone. *See* Pub. L. No. 98-498, 98 Stat. 2296 (1984). This shows that, even after that proclamation, Congress understood that additional legislation was necessary to authorize marine sanctuaries because the existing statutes directed to land do not apply to this area. Presidents apparently agreed, as they designated no ocean monuments for more than two decades after President Reagan's proclamation.

is interpreted to reach this same area, the Marine Sanctuaries Act would have no independent effect but would be entirely redundant.

Thus, the Marine Sanctuaries Act is "a more specific statute" that must "be given precedence over a more general one . . . ." *Busic v. United States*, 446 U.S. 398, 406 (1980). Even if the Antiquities Act could potentially be read to reach the ocean—which it cannot—the Court should nonetheless reject the interpretation to avoid needlessly rendering redundant a later statute that is specifically directed to the protection of marine areas. *See Brown & Williamson Tobacco*, 529 U.S. at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."); *see also Loving*, 917 F. Supp. 2d at 77.

Third, the President's novel reinterpretation of the Antiquities Act to reach the ocean is a transparent end-run around the limits Congress imposed on the power to designate marine sanctuaries. As amicus Professor Robin Kundis Craig has written, ocean monument designations circumvent the public process required to designate a marine sanctuary and the limits Congress has imposed on the regulation of those sanctuaries. *See* Robin Kundis Craig, *Are Marine National Monuments Better Than National Marine Sanctuaries?*, 7 Sustainable Dev. L. & Pol'y 27, 31 (2006). Indeed, the first ocean monument was proposed originally as a marine sanctuary. *See id.* at

30-31. But, frustrated with the procedural and substantive limits of the Marine Sanctuaries Act, the President "reached for the Antiquities Act." *Id*. at 31.[18]

It is easy to see why reinterpreting the Antiquities Act to greatly expand his own power would be attractive to the President. The Marine Sanctuaries Act imposes much more significant procedural and substantive limits on the designation of a marine sanctuary than apply to land-based monuments under the Antiquities Act.

For instance, the Antiquities Act requires no process; areas can be designated by mere proclamation without any public notice or input. 54 U.S.C. § 320301. The Marine Sanctuaries Act, in contrast, requires the Secretary of Commerce to provide broad public notice of any sanctuary proposal, to prepare and publicize environmental studies and management plans, and to hold a public hearing. 16 U.S.C. § 1434(a)(1)-(3). Congress also required the Secretary of Commerce to allow the appropriate Regional Fishery Management Council to draft regulations allowing fishing to continue in the area subject to appropriate limits (which the Secretary "shall accept" unless he can show a particular deficiency). 16 U.S.C. § 1434(a)(5). And, finally, it required the Secretary of Commerce to submit the marine sanctuary proposal to Congress and any affected states, allowing each to object to the plan. 16 U.S.C. § 1434(b)(1) (providing, for instance, that if the relevant Governor certifies that the

[18] To be clear, Professor Craig views this as a good outcome. But, whatever the merits of her policy views, the issue should be directed to Congress to amend the Marine Sanctuaries Act, rather than allowing the President to freely circumvent the limits of a statute specifically directed at the protection of marine areas. *See Loving*, 917 F. Supp. 2d at 77.

designation "is unacceptable," the designation "shall not take effect in the area of the sanctuary lying within the seaward boundary of the State").

The Marine Sanctuaries Act also imposes more significant substantive limits on Executive Branch action than applies to land-based monuments under the Antiquities Act. The Marine Sanctuaries Act establishes a five-part test to determine whether a marine sanctuary can be established. 16 U.S.C. § 1433(a). It further identifies 12 explicit factors that must guide the application of this test. 16 U.S.C. § 1433(b). The Antiquities Act, in contrast, leaves to the President's discretion what factors to consider when designating land-based monuments. 54 U.S.C. § 320301(a).

The Marine Sanctuaries Act also acknowledges that federal authority over the ocean is limited, and directs that regulations for marine sanctuaries "shall be applied in accordance with generally recognized principles of international law." 16 U.S.C. § 1435(a). Because the Antiquities Act concerns federal lands for which federal power is not subject to such restrictions, that statute contains no similar provision but compels the adoption of rules and regulations to protect national monuments. 54 U.S.C. § 320301(c).

Congress deemed it appropriate to make it more difficult to establish a protected area of ocean than federal land. The President may disagree with that policy decision, but he has no authority to thwart Congress' will by circumventing those limits. Yet that's precisely what has occurred.

Prior to 2006, thirteen marine sanctuaries were established under the Marine Sanctuaries Act. *See* NOAA, *National Marine Sanctuary System* (2016).[19] *None* have been established since the President "discovered" he could accomplish the same thing through the Antiquities Act, without complying with the Marine Sanctuaries Act's procedural and substantive requirements. Thus, the concern that Presidents might use this novel interpretation of the Antiquities Act to circumvent the limits Congress imposed under the Marine Sanctuaries Act is not merely theoretical. It is confirmed by Presidents completely forsaking the establishment of marine sanctuaries since they purportedly discovered this great—and previously unheralded—power to designate ocean monuments.

Finally, this circumvention of the limits imposed under the Marine Sanctuaries Act poses significant separation of powers concerns. Allowing the President to adopt a novel interpretation of an old statute to circumvent the limits Congress imposed under a statute specifically directed at the same problem would undermine Congress' exclusive authority to legislate over the exclusive economic zone. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 585-89; *id.* at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]"). Any authority to regulate the marine environment in the exclusive economic zone flows from Congress' constitutional power, not the President's. Thus, any executive action that

[19] https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/docs/2016-national-marine-sanctuary-system-brochure.pdf.

is inconsistent with or attempts to circumvent the Marine Sanctuaries Act is unlawful. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

**5. The only court to consider whether the Antiquities Act reaches beyond the territorial sea squarely held that it does not**

Because Presidents long accepted that their monument-designating power does not extend beyond the territorial sea, there is little judicial precedent on the question. The only court to consider it held, correctly, that the ocean beyond the nation's territorial sea is not "land owned or controlled by the Federal Government."

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, a salvage crew sought to quiet title to the wreck of a Spanish ship—containing $6 million worth of gold, silver, and other artifacts—that had sunk off the coast of Florida in the seventeenth century. 569 F.2d 330 (5th Cir. 1978). The United States intervened, claiming the treasure under the Antiquities Act. *Id.* at 333, 337-40.

The Fifth Circuit, noting that the Antiquities Act is expressly limited to "land owned or controlled by the Federal Government," held that it does not extend beyond the nation's territorial sea. *See id.* 337-38. The court acknowledged that the federal government asserts some power to regulate the ocean beyond this limit. For instance, President Truman issued a 1945 proclamation declaring federal regulatory authority over the mineral resources of the continental shelf. *Id.* at 338; *see* Policy of the United

States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf Proclamation 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945). In 1958, an international convention recognized some authority for coastal nations to regulate the continental shelf. Convention on the Continental Shelf (1958). Exercising this authority, Congress enacted the Submerged Lands Act and Outer Continental Shelf Lands Act, dividing authority to regulate this area between the federal government and the states. *See Treasure Salvors*, 569 F.2d at 338-39.

However, the Fifth Circuit also noted that Congress' regulation of this area is limited. Congress could regulate the exploitation of resources in the seabed, but did not have authority to control all activities occurring beyond the limits of the territorial sea. *See id*. at 339. Because of the "limited scope of American control" over the area, the court "conclude[d] that the remains of the [ship] are not situated on lands owned or controlled by the United States under the Antiquities Act." *Id*. at 340. Consequently, the court rejected the federal government's argument that the Antiquities Act applies beyond the territorial sea, including to the shipwreck. *See id*.

Federal Defendants make no attempt to distinguish *Treasure Salvors*.

Intervenors argue that *Treasure Salvors* is distinguishable because President Reagan subsequently proclaimed that the United States has power to regulate the ocean beyond the nation's territorial sea. *See* Intervenors' Br. at 23 n.13. This argument fails for at least two reasons.

First, it doesn't distinguish *Treasure Salvors*. The Fifth Circuit considered a similar proclamation by President Truman asserting federal authority to regulate the

outer continental shelf, concluding that it does not change the analysis. *Treasure Salvors*, 569 F.2d at 338. The Fifth Circuit also considered federal statutes regulating some activities in the area. *Id.* at 338-39. But the Court nonetheless held that federal authority over the area fell short of the degree of control required by the Antiquities Act. *Id.* at 340. That remains the case today. Although Congress has enacted several statutes to regulate some activities occurring up to 200 miles from the nation's coast, its authority over the area falls short of the degree of control required under the Antiquities Act. *See supra* Part II(a)(ii).

Second, a presidential proclamation cannot expand the reach of the Antiquities Act. *Cf. Mountain States*, 306 F.3d at 1136 (the President's mere say-so cannot make his actions lawful). If it could, there would be no limit to that power.

Without any direct precedent supporting their position, Federal Defendants rely extensively on dicta in several Supreme Court decisions to suggest that the President has carte blanche to designate ocean monuments. Not only are the stray quotations dicta, but those cases are also easily distinguishable. Whatever the President's authority to include a pond or area of the territorial sea within a land-based monument, it shines no light on his ability to establish monuments that consist exclusively of ocean beyond the territorial sea. A close reading of the Supreme Court's cases provide no support for such power.

In *Cappaert*, the Supreme Court considered whether the federal reserved water rights doctrine applies to a unique cavern pool contained within the Death Valley National Monument. 426 U.S. at 135. A neighboring landowner contested the

federal government's claim to restrict groundwater pumping, arguing that the reserved water rights doctrine did not apply—not that the land wasn't owned or controlled by the federal government. *See id.* at 135-36. As the Supreme Court noted, the federal government had owned this land since 1848. *Id.* at 131. Finding that the pool and its inhabitants were objects of historic interest situated on federal land, the Court concluded that the reserved water rights doctrine applied. *Id.* at 142.

In *United States v. California*, the Court considered the Channel Islands National Monument in the context of deciding "whether California or the United States has dominion over the submerged lands and waters" within the three-mile territorial sea. 436 U.S. 32, 33 (1978). That monument, as noted above, consisted of two large islands and several smaller pieces of land, as well as a one-mile wide belt around the two larger islands. *Id.* at 35. In describing the dispute between the federal government and the state, the Supreme Court asserted that "[t]here can be no serious question . . . that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument, since they were then 'controlled by the Government of the United States.'" *Id.* at 36. In support of that dicta, the Supreme Court noted that it "has recognized that [the Antiquities Act] authorizes the reservation of waters located on or over federal lands[,]" citing *Cappaert*. *Id.* at 36 n.9. However, the case presented "a question only of Presidential intent, not of Presidential power." *Id.* at 36. The Court ultimately sidestepped that question, holding that, whatever the President's original intent, the Submerged Lands Act subsequently transferred dominion to the state. *See id.* at 37.

Similar to *United States v. California* is *Alaska v. United States*, in which the State of Alaska claimed title to Glacier Bay. 545 U.S. 75 (2005). In rejecting that claim, the Court noted that the Alaska Statehood Act generally transferred to the state the federal government's claims to the Alaska territory, except property "specifically used for the sole purpose of conservation . . . ." *Id.* at 104. Glacier Bay was part of the Glacier Bay National Monument established in 1925 and expanded several times. *Id.* at 101. Because conserving the bay and surrounding land was "an essential purpose" of the monument, the Court concluded that the Alaska Statehood Act's exception applies. *Id.* at 103. In explaining that result, the Court also remarked that "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands[,]" citing *California*. *Id.* at 103.

Although *California* and *Alaska* contain a few sentences suggesting that the Antiquities Act draws no distinction between land and water, that issue was not actually presented in either case. *See, e.g.*, Report of the Special Master on Six Motions for Partial Summ J., *Alaska v. United States*, 2004 WL 5809425, at *230 (U.S. Mar. 2004) (discussing no argument that the Glacier Bay National Monument violated the Antiquities Act). Thus, these sentences are dicta and not binding on this Court. Nor is the dicta persuasive for several reasons, including that they do not address any of the arguments raised above. *See, e.g.*, *supra* Part II(a)(iv) (discussing the conflict between the President's interpretation of the Antiquities Act and the Marine Sanctuaries Act). That dicta is also contrary to the Antiquities Act's explicit limit to "land." *See supra* Part II(a)(i).

However, the Court need not question the dicta in any of those cases to decide this one. In each of those prior cases, the Supreme Court considered a monument that included both federal land and adjoining waters. And, in none of them, did the President assert the power to designate a monument beyond the limits of the nation's territorial sea. *See supra* Part II(a)(iii). Thus, even if these cases cast some doubt on the meaning of "land" in the Antiquities Act, they do not suggest that the Exclusive Economic Zone or any other part of the ocean beyond the territorial sea is "owned or controlled by the Federal Government." *See supra* Part II(a)(ii). As *Treasure Salvors* correctly held, this area is beyond the President's Antiquities Act power.

### B. Assuming that the Antiquities Act authorized ocean monuments, these 5,000 square miles would not be the "smallest area" compatible with protecting any objects "situated upon" federal land

Additionally, the Fishermen claim that the President exceeded his power by setting the boundaries of the monument beyond "the smallest area compatible" with protecting objects covered by the Antiquities Act. They have adequately alleged facts to support this claim. Consequently, the motion to dismiss should be rejected.

Under *Tulare County*, a challenger must allege specifically how a monument's boundaries are insufficiently related to a qualifying object; mere conclusory allegations are not enough. 306 F.3d at 1142. In that case, the complaint merely alleged legal conclusions, including that the proclamation failed to justify the boundary set, that the President did not meaningfully investigate the area, and that he "bowed to political pressure . . . in designating a grossly oversized Monument[.]" *Id*. The Court rejected these conclusions but did not suggest that a challenge to a

monument boundary should be dismissed when supported by sufficient factual allegations. *See id*.

The Fishermen's complaint includes those allegations. For instance, it explains that the monument boundaries bear no relationship to the canyons and seamounts for which they were purportedly set. *See* Compl. ¶¶ 52, 73-74. In addition to providing a map of the monument demonstrating this allegation, the Fishermen also explain that the boundary includes areas dozens of miles from the nearest canyon or seamount while excluding areas much closer. *See* Compl. ¶¶ 73-74. Thus, taking these allegations as true and drawing all reasonable inferences in support of them, the Fishermen have adequately alleged how the boundary does not comport with the Antiquities Act's "smallest area compatible" requirement.

Federal Defendants respond that the monument's boundary can be justified by the fish and marine life that swims within the boundary. Several of the species identified in the proclamation are highly migratory. Hence, Federal Defendants' argument would imply that the boundaries could have been set much wider.

This argument is inconsistent with the Antiquities Act. The Antiquities Act is limited to objects "situated" upon federal lands. 54 U.S.C. § 320301. In the 1930s, Congress considered amending this language to authorize monuments based on plants and animals but declined to do so. *See* H.R. 8912 (1938). In urging the adoption of that legislation, Harold L. Ickes, then Secretary of Interior, explained that it was necessary because the Antiquities Act's reference to objects "situated" upon the land "mean[s] objects which are immobile and permanently affixed to the land." *See* Letter

from Harold L. Ickes, Sec. of Interior, to Hon. Rene L. DeRouen, Chairman, House Committee on Public Lands (Apr. 12, 1938), *reproduced in* Report of the Committee on the Public Lands No. 2691 (June 10, 1938).

No court has considered whether highly migratory animals like those within the monument are objects "situated" upon federal lands. Federal Defendants emphasize the Supreme Court's reference, in *Cappaert*, to the fish contained in the cavern pool as objects of historic or scientific interest. 426 U.S. at 142. But that case did not consider whether these fish are "situated" upon the land. Even if it had, fish contained within an isolated 65-foot long pool present a closer question on this point than highly migratory species in the ocean.

For instance, the fin whale and sei whale, both species referenced in the proclamation, migrate annually between the artic and the tropics. *See* NOAA, *Fin Whale: About the Species*; [20] NOAA Fisheries, *Sei Whale (Balaenoptera borealis)*.[21] If a monument boundary could be set based on these species, the President could establish one monument encompassing the entire Exclusive Economic Zone. Such a power would clearly be inconsistent with the Antiquities Act's "smallest area compatible" requirement. *See* 40 Cong. Rec. S7888 (the Antiquities Act would "certainly not" affect more than 70 million acres).

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[20] https://www.fisheries.noaa.gov/species/fin-whale (last visited May 16, 2018).

[21] http://www.nmfs.noaa.gov/pr/species/mammals/whales/sei-whale.html (last visited May 16, 2018).

In context, a seemingly broad term like "object" may be narrower than it appears. In *Yates v. United States*, for instance, the Supreme Court held that a fish is not a "tangible object" in the context of the Sarbanes-Oxley Act. 135 S. Ct. 1074 (2015). Context similarly suggests that the Antiquities Act's reference to "objects of historic or scientific interest" cannot be interpreted to reach highly migratory species. If it could, it would lead to absurd results. By identifying a highly migratory bird, for instance, the President could designate a monument containing huge areas of federal land, including disconnected areas spread across dozens of states. Similarly, here, the President could justify a national monument containing hundreds of millions of acres of ocean based on a highly migratory marine species. There is nothing in the Antiquities Act's history to suggest that Congress intended this result.

### III. The federal officers charged with enforcing the monument's fishing prohibitions are properly included as defendants

Finally, Federal Defendants move to dismiss several of the defendants in this case for lack of jurisdiction. In particular, they argue that the Secretaries of Commerce and Interior have been sued prematurely because they have not yet developed the management plans required by the proclamation.[22] Federal Defendants misunderstand the basis of the Fishermen's inclusion of these

[22] Federal Defendants also object to the inclusion of a Jane Doe defendant for the currently vacant position of Director of the Council on Environmental Quality. As the Fishermen's complaint notes, this placeholder defendant was included based on the Council of Environmental Quality's role as the collector of evidence related to the monument, which could make her necessary to any discovery in the case. The Fishermen do not oppose dismissal of this defendant, if Federal Defendants will not raise her absence as an objection in discovery, should any occur in this case.

defendants. The Fishermen do not bring any claims related to the Secretaries' preparation of a management plan, which would be premature until such a plan is adopted.

Instead, the Fishermen name the Secretaries as defendants based on their current implementation of the proclamation's fishing ban. *See* Compl. ¶¶ 63, 68. That claim against the Secretaries is ripe, as Intervenors explain. Intervenors' Br. at 9 n.5. The proclamation unambiguously directs the Secretaries to implement the ban on commercial fishing within the monument's boundary, effective November 14, 2016. Compl. ¶¶ 63-68. They are currently enforcing that ban, causing harm to the Fishermen. *Id*. Thus, the Secretaries are necessary defendants to provide the Fishermen the relief requested in the complaint.

Federal Defendants have offered no argument for why this claim based on the Secretaries' current enforcement of the fishing ban is unripe. Consequently, the motion to dismiss the Secretaries as defendants should be denied.

**Conclusion**

As the D.C. Circuit has held, courts must scrutinize the President's designation of national monuments to ensure consistency with the limits of the Antiquities Act. *Mountain States*, 306 F.3d at 1136. Although no court has yet held that a monument exceeded these limits—a fact Federal Defendants stress—this case concerns a monument far beyond any previously considered. The statute's clearest limit, and one that courts can readily enforce, is that monuments must be on "land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). The ordinary meaning

of this phrase does not extend to the ocean beyond the nation's territorial sea—a limit that Presidents respected for the Antiquities Act's first 100 years. And the only court to consider whether the ocean is "land owned or controlled by the Federal Government" correctly held that it is not. *See Treasure Salvors*, 569 F.2d at 337-40. The Fishermen have properly alleged a violation of this requirement. Thus, the motion to dismiss should be denied.

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Respectfully submitted:

/s Jonathan Wood

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**Certificate of Service**

I hereby certify that on May 22, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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