THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, *et al.*, *Plaintiffs*, v. WILBUR ROSS, *et al.*, *Defendants*, and NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, *Defendant-Intervenors.*	Case No. 17-cv-00406 (JEB)

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Presidential Proclamations Establishing National Monuments

Other Authorities

INTRODUCTION

The Antiquities Act authorizes the President, in his discretion, to establish national monuments for the protection of irreplaceable public resources. The Act applies, by its terms, to all "land owned *or controlled* by the Federal Government." 54 U.S.C. § 320301(a) (emphasis added). That includes submerged land in the U.S. Exclusive Economic Zone (EEZ), where the U.S. government has broad and unchallenged control as a matter of both domestic and international law.

Plaintiffs barely acknowledge, much less grapple with, the fact of the federal government's control over the EEZ. Instead, they ask the Court to re-write the Act: they contend that "land" means only "*dry* land," and "controlled" means "controlled *absolutely*." Plaintiffs' arguments disregard not only the statutory text, but also the long history of monuments established in the ocean with the approval of the U.S. Supreme Court, Congress, and the Justice Department's Office of Legal Counsel (OLC). Plaintiffs never address the OLC's detailed opinion on the question at issue here, and they incorrectly shrug off the Supreme Court's interpretations of the Act as "dicta." But the long history of agreement among all three branches of government makes the answer clear: The designation of Northeast Canyons was a straightforward, lawful application of the Antiquities Act to an area where the federal government's control is extensive and well settled. Like previous unsuccessful attempts to curtail the Act's protective scope, *see Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), Plaintiffs' complaint should be dismissed.

ARGUMENT

I. The Antiquities Act applies to submerged lands and waters.

Plaintiffs' first argument—that "[t]he monument contains no 'land,'" Pls.' Opposition 11 (ECF 41) (Opp.)—ignores both physical reality and settled law. The Monument contains submerged land, and the Supreme Court has recognized, repeatedly, that the Antiquities Act authorizes the President to reserve submerged lands as national monuments. Moreover, even setting aside the Supreme Court's decisions, other contemporaneous uses of the word and a long history of executive and legislative practice confirm that "land" includes submerged land. Plaintiffs' attempt to limit national monuments to dry land fails as a matter of law.

A. The Supreme Court has foreclosed Plaintiffs' attempt to limit the Antiquities Act to dry land.

The Supreme Court has repeatedly confirmed that the Antiquities Act authorizes the reservation of submerged lands and waters as national monuments. *See Alaska v. United States*, 545 U.S. 75, 103 (2005) ("It is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands."); *United States v. California (California III)*, 436 U.S. 32, 36 (1978) ("There can be no serious question . . . that the President . . . ha[s] power under the Antiquities Act to reserve . . . submerged lands and waters . . . ."); *id.* at 36 n.9 ("Although the Antiquities Act refers to 'lands,' . . . it also authorizes the reservation of waters located on or over federal lands."); *Cappaert v. United States*, 426 U.S. 128, 147 (1976) (affirming reservation in national monument of subterranean pool and "appurtenant water"). Plaintiffs' efforts to discount and distinguish these pronouncements are unavailing.

First, Plaintiffs' contention that the Supreme Court's statements are mere "dicta," Opp. 35, is incorrect. In *Alaska*, the question before the Court was whether "the submerged lands underlying the waters of Glacier Bay National Monument," 545 U.S. at 96, qualified as "lands . . . set apart as . . . reservations for the protection of wildlife" that did not pass to Alaska at statehood, *id.* at 105 (quoting Alaska Statehood Act, 72 Stat. 341, § 6(e)). The Court concluded that the President's monument proclamation reserved the submerged lands in part to protect wildlife, and thus, the federal government retained title over them. *Id.* at 105-06, 109. Had the monument not lawfully included those submerged lands, the result would have been different: title over the submerged lands would have passed to Alaska. The Court's conclusion that the Antiquities Act "empowers the President to reserve submerged lands" as a national monument, *id.* at 103, was therefore—as the Court itself explained—a "necessary part of the reasoning," *id.* at 101. As such, it constitutes binding precedent. *See United States v. Windsor*, 570 U.S. 744, 758-59 (2013) (statement "not dictum" where "[i]t was a necessary predicate to the Court's holding"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"); *accord Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye*, 828 F.3d 969, 974-75 (D.C. Cir. 2016).[1]

[1] Likewise, in *Cappaert*, the Court explained that Devil's Hole National Monument includes a deep subterranean pool "situated on *land* owned by the United States." 426 U.S. at 131 (emphasis added). The submerged land's status as "land" under the Act was a necessary predicate to the Court's holding that, having

In any event, it is well settled that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003)). This is particularly true where, as here, the Court's language is "expressed so unequivocally." *Bangor Hydro-Elec. Co. v. Fed. Energy Regulatory Comm'n*, 78 F.3d 659, 662 (D.C. Cir. 1996). Thus, the Court's emphatic pronouncement in *California III* that there was "no serious question" that the Antiquities Act applies to "submerged lands and water," 436 U.S. at 36, is authoritative, irrespective of its necessity to that case's result. Indeed, such an unequivocal pronouncement is "especially" authoritative where, as here, "the Supreme Court has repeated [it]." *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 212 (D.C. Cir. 2013), *aff'd*, 135 S. Ct. 2076 (2015); *see Alaska*, 545 U.S. at 103 (citing *California III*, 436 U.S. at 36).

B. Dictionary definitions and historical practice confirm that "land" encompasses submerged land and waters.

Because the Supreme Court has foreclosed Plaintiffs' argument, this Court need go no further. But contrary to Plaintiffs' contentions, the Supreme Court's conclusion that the Act applies to submerged land is also a matter of straightforward statutory construction. Dictionary definitions of "land," Congress's use of the word in contemporaneous statutes, and historical practice all confirm that the Act applies to both dry and submerged land.

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reserved the pool, President Truman's proclamation also reserved sufficient water to maintain the pool's level as habitat for the desert pupfish. *Id.* at 141, 147.

Plaintiffs rest their contrary argument—that "land" means only "the dry surface of the earth"—on selective snippets of early twentieth-century dictionaries. Opp. 12-13. In fact, however, those dictionaries also support the Supreme Court's interpretation that "land" includes submerged land. Webster's New International Dictionary in 1909 specifically included "land under water" as an appropriate use of the word "land." Webster's New Int'l Dictionary 1209 (1909) (third of twelve definitions). And although Plaintiffs fault Federal Defendants for citing the current edition of Black's Law Dictionary, *see* Opp. 13, Black's first edition also supports the Supreme Court's interpretation. *See* Black's Law Dictionary 684 (1st ed. 1891) (defining "land" "in the most general sense" as "any ground, soil, or earth whatsoever," including "everything attached to it . . . [such] as trees, herbage, and *water*") (emphasis added).[2] Notably, Black's first edition defined "sea-bed" as "that portion of *land* under the sea that lies beyond the sea-shore." *Id.* at 1068 (emphasis added).[3]

Indeed, at the turn of the twentieth century, the Supreme Court recognized the "general principle" that the term "lands" includes "waters of every description by which such lands, or any portion of them, may be submerged." *Ill. Cent. R.R. Co. v. City of Chicago*, 176 U.S. 646, 660 (1900). As the Court explained: "Lands are not

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[2] The Oxford English Dictionary, on which Plaintiffs also rely, Opp. 12, includes a similar legal definition of "land." *See* 6 Oxford English Dictionary 47 (1st ed. 1908) ("In its more wide legal signification land extends also to . . . waters . . . .").

[3] Contrary to Plaintiffs' assertion, Opp. 13 n.3, the term "parcel" can refer to both emergent and submerged land. *See, e.g., Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014); *see also* Webster's New Int'l Dictionary 1566 (1909) (defining "parcel" in legal usage as "[a] part; portion; piece").

the less land for being covered with water." *Id.*; *see also, e.g.*, *United States v. California* (*California I*), 332 U.S. 19, *passim* (1947) (using "lands" to include submerged lands); *United States v. Oregon*, 295 U.S. 1, *passim* (1935) (similar). Consistent with this general principle, other contemporary federal statutes also included submerged lands within the term "land." *See, e.g.*, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) (interpreting "body of lands known as Annette Islands" in 1891 statute to include submerged lands and adjacent waters); *N. Side Canal Co. v. Twin Falls Canal Co.*, 12 F.2d 311, 314 (D. Idaho 1926) (interpreting "lands" in Judicial Code of 1911 to "include[] waters upon the land").

Historical practice in the national monuments context specifically confirms that all three branches of government have long recognized the Antiquities Act's application to submerged land. In 1908, two years after the Act's passage, President Teddy Roosevelt included submerged land of the Colorado River within the Grand Canyon National Monument. *See* Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908), https://catalog.archives.gov/id/28894539. Starting in 1935, Presidents began including submerged ocean land in national monuments off the coasts of Florida, Alaska, California, and the U.S. Virgin Islands.[4] And Congress itself endorsed the

[4] *See, e.g.*, Proclamation No. 2112, 49 Stat. 3430 (1935) (Fort Jefferson); Proclamation No. 2330, 53 Stat. 2534 (1939) (Glacier Bay expansion); Proclamation No. 2825, 63 Stat. 1258 (1949) (Channel Islands expansion); Proclamation No. 3443, 76 Stat. 1441 (1961) (Buck Island Reef); Proclamation No. 4346, 40 Fed. Reg. 5127, 5127 (Feb. 4, 1975) (Buck Island expansion); Proclamation No. 7392, 66 Fed. Reg. 7335, 7336 (Jan. 22, 2001) (Buck Island expansion); Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001) (Virgin Islands Coral Reef).

establishment of monuments in the ocean when it created Biscayne National Monument in 1968 and adjusted the boundaries of Fort Jefferson National Monument in 1980—both monuments off Florida's coast comprised largely of submerged land.[5] It was around this time, too, that the Supreme Court determined there was "no serious question" that the President could establish national monuments in the ocean. *California III*, 436 U.S. at 36 (decided 1978).

Plaintiffs ignore this long history when they suggest, incorrectly, that President George W. Bush's creation of the Northwestern Hawaiian Islands Marine National Monument in 2006 (later renamed Papahānaumokuākea) represented some "novel claim that his [Antiquities Act] power extends to the ocean." Opp. 23-24. There is nothing novel about the Antiquities Act's application to submerged lands. Nor do Plaintiffs ever grapple with the sweeping implications of their argument. If "land" in the Antiquities Act meant only "dry land," as they contend, then not only would the Supreme Court have been wrong in *Alaska*, *California III*,

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[5] *See* Pub. L. No. 90-606, § 1, 82 Stat. 1188 (1968) ("authoriz[ing] the establishment of the Biscayne National Monument," comprising a cluster of islands and submerged lands, "to preserve and protect . . . a rare combination of terrestrial, marine, and amphibious life"); U.S. Dep't of the Interior, Final Environmental Statement for General Management Plan: Biscayne National Monument at 33 (Sept. 1978), https://tinyurl.com/y7mghdlj ("The total area [of the monument] is 103,701 acres, 99,398 of which are submerged."); *see also* Pub. L. No. 96-287, § 201, 94 Stat. 599, 600 (1980) (adjusting boundaries of Fort Jefferson National Monument to "protect[]" the Dry Tortugas islands "and their associated marine environments," including "coral formations, fish and other marine animal populations"); U.S. Dep't of the Interior, General Management Plan, Environmental Assessment: Fort Jefferson National Monument at 1-2 (Mar. 1983), https://tinyurl.com/yccurz97 (describing monument area as 64,657 acres, of which 85 acres were islands).

and *Cappaert*, but numerous national monuments around the country would have been designated improperly.[6]

Plaintiffs gesture toward a fallback position that national monuments might lawfully include submerged land so long as they *also* include dry land, Opp. 25 & n.15, but they never explain why that would be lawful under their interpretation of the Act. The President's power to reserve "land" either includes submerged land, or it does not. For all the reasons explained above, it is "clear" that the Act "empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 103.

C. The National Marine Sanctuaries Act does not impliedly limit the Antiquities Act's reach.

Finally, Plaintiffs argue that limiting the Antiquities Act to dry land is necessary to avoid a "conflict" with the National Marine Sanctuaries Act. Opp. 26. There is no such conflict. Plaintiffs' argument "misconceives federal laws as not providing overlapping sources of protection." *Mountain States*, 306 F.3d at 1138. In fact, the Antiquities Act and the Sanctuaries Act serve different (albeit overlapping)

[6] Plaintiffs' argument would apparently invalidate the five national monuments in the U.S. EEZ (Northeast Canyons, Pacific Remote Islands, Marianas Trench, Rose Atoll, and Papahānaumokuākea); all or parts of the monuments that include submerged land in the territorial sea (e.g., Buck Island Reef, Virgin Islands Coral Reef, and World War II Valor in the Pacific); and even monuments that include internal waters (e.g., Misty Fjords and the Statue of Liberty). *See* Law Profs.' Amicus Br. 12-14 (ECF No. 39) (listing monuments located entirely or partly in the ocean); Proclamation No. 3656, 30 Fed. Reg. 6571 (May 13, 1965) (adding "submerged lands" around Ellis Island to Statue of Liberty National Monument).

sets of purposes, and Congress has recognized that monuments and sanctuaries can (and do) coexist and complement one another in the ocean.

Unlike the Antiquities Act, which is singularly focused on preservation, the Sanctuaries Act serves a variety of goals and uses. The Sanctuaries Act authorizes the Secretary of Commerce, through the National Oceanographic and Atmospheric Administration (NOAA), to designate marine sanctuaries that meet certain criteria. Pub. L. No. 92-532, § 303(a) (1972) (codified as amended at 16 U.S.C. § 1433(a)). Specifically, a marine area may qualify as a sanctuary by virtue of a range of qualities, including not only "ecological" and "scientific" values, but also "recreational" qualities and "resource or human-use values." 16 U.S.C. § 1433(a)(2). And while the Sanctuaries Act's "primary objective" is "resource protection," its purposes include facilitating "all public *and private uses* of the resources of these marine areas not prohibited pursuant to other authorities." *Id*. § 1431(b)(6) (emphasis added).

Compared with the Antiquities Act, the Sanctuaries Act's different—and broader—purposes manifest in different procedures and different protections. To facilitate multiple uses, the Sanctuaries Act requires the agency to solicit input from a variety of interested parties, *id.* § 1433(b)(2), and to assess the "present and potential uses of the area," *id.* § 1434(a)(2)(B)(i), before designating a sanctuary. Commercial fishing is generally allowed in sanctuaries, *id*. § 1434(a)(5), but

prohibited in marine monuments, including Northeast Canyons.[7] Thus, contrary to Plaintiffs' argument, the Antiquities Act's application to submerged lands does not render the Sanctuaries Act "completely redundant." Opp. 27. Instead, the two statutes use different mechanisms to serve different sets of purposes.

It is true that *some* of the Sanctuaries Act's objectives might be accomplished by designating a national monument in the ocean. But no rule of statutory interpretation prohibits overlapping objectives. In the national monuments context specifically, the D.C. Circuit has rejected the argument that "the Antiquities Act must be narrowly construed" to avoid "overlap[]" with "other statutes enacted to protect various archeological and environmental values." *Mountain States*, 306 F.3d at 1138; *see also Cameron v. United States*, 252 U.S. 450, 455 (1920) (recognizing that preexisting "forest reserve remained effective after the creation of the monument reserve," even where "both embraced the same land"); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) (although Antiquities Act and Wilderness Act provide certain overlapping protections, "such overlap is neither

[7] *See* Proclamation No. 9496, 81 Fed. Reg. 65,161, 65,165 (Sept. 21, 2016) (Northeast Canyons); Proclamation No. 9478, 81 Fed. Reg. 60,227, 60,231 (Aug. 31, 2016) (Papahānaumokuākea expansion); Proclamation No. 9173, 79 Fed. Reg. 58,645, 58,648 (Sept. 29, 2014) (Pacific Remote Islands expansion); Proclamation No. 8337, 74 Fed. Reg. 1577, 1579 (Jan. 12, 2009) (Rose Atoll); Proclamation 8336, 74 Fed. Reg. 1565, 1568 (Jan. 12, 2009) (Pacific Remote Islands); Proclamation No. 8335, 74 Fed. Reg. 1557, 1559 (Jan. 12, 2009) (Marianas Trench); Proclamation No. 8031, 71 Fed. Reg. 36,443, 36,446 (June 26, 2006) (Northwestern Hawaiian Islands).

novel nor illegal, and in no way renders the President's [monument designation] invalid."), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).[8]

Moreover, Congress clearly did not intend marine sanctuaries to be the only type of protective designation in the ocean. To the contrary, an express purpose of the Sanctuaries Act is to "*complement*[] existing regulatory authorities." 16 U.S.C. § 1431(b)(2) (emphasis added). Thus, as the OLC observed, the Act "specifically envisions" that other protected areas still apply in the ocean. Memorandum from Randolph D. Moss, Ass't Att'y Gen., U.S. Dep't of Justice Office of Legal Counsel, Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 2000 WL 34475732, at *19 (Sept. 15, 2000) (OLC Memorandum). Nor do Plaintiffs point to anything in the legislative history—either from the Sanctuaries Act's 1972 enactment, or from its amendments and reauthorizations between 1980 and 2000—evincing congressional intent to supplant the Antiquities Act in the ocean, despite numerous national monuments there. *See supra* at 6-7 & n.4. Plaintiffs cite a provision of the Sanctuaries Act amendments of 1984 observing that other protective designations were "almost exclusively" directed at terrestrial land, Opp. 27-28 (citing 16 U.S.C. § 1431(a)(1)), but "almost" does not mean "entirely." If

[8] Overlapping protections are common and clearly authorized by Congress in the terrestrial context. Like marine sanctuaries, "areas of critical environmental concern" (ACECs) are agency-created protective areas, designated by the Bureau of Land Management (BLM) pursuant to certain procedures. *See* 43 U.S.C. § 1702(a) (authorizing ACECs to "protect . . . important historic, cultural, or scenic values" or "fish and wildlife resources"); 43 C.F.R. § 1610.7-2(b) (requiring notice and comment). Yet Presidents clearly retain authority also to designate national monuments on lands administered by BLM. *See* 16 U.S.C. § 7202(b)(1)(A); H.R. Rep. No. 94-1163, at 29, 35 (1976) (referencing both Antiquities Act and ACECs).

anything, this statement illustrates that Congress recognized other protective designations *are* available in the ocean.

In fact, both before and after the Sanctuaries Act's passage, the federal government has used a variety of statutes other than the Sanctuaries Act to confer protections on marine areas. *See, e.g.*, 43 U.S.C. § 1341(a) (authorizing the President to withdraw areas of the outer continental shelf from offshore oil leasing); 16 U.S.C. § 668dd(a)(2) (authorizing creation of national wildlife refuges). For example, when Congress itself established the Florida Keys National Marine Sanctuary in 1990, it expressly recognized that the Fort Jefferson National Monument and two national parks already existed in that area of the ocean—and Congress drew the sanctuary's boundaries to complement, rather than displace, the existing monument and other protected areas. *See* Pub. L. No. 101-605, § 5(b)(1), (2), 104 Stat. 3089, 3090 (1990).[9]

Congress's express recognition of complementary protections in the ocean contradicts Plaintiffs' attempt to portray the establishment of national monuments as somehow "circumvent[ing]" the process for marine sanctuaries. Opp. 29, 32. Plaintiffs' attempt to blame presidential monument designations for the lack of new

[9] In addition, Congress re-codified the Antiquities Act in 2014, making minor wording changes to "remove ambiguities" and to "conform to the understood . . . intent . . . of Congress in the original enactment[]." Pub. L. No. 113-287, § 2(b) 128 Stat. 3259 (2014). Yet Congress did not change the word "land," despite decades of ocean monuments, the OLC opinion, and the Supreme Court's decisions on point. *See supra* at 3, 6-7 & nn.4-5, 11. That Congress left "land" unchanged in light of these consistent interpretations confirms that the Act applies to submerged ocean lands. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

marine sanctuaries, *see* Opp. 32, is disingenuous. In 1995, NOAA stopped accepting nominations for new sanctuaries so that it could focus on managing the existing sanctuaries, and it only recently—in 2014—reopened the sanctuary nominating process. *See* 79 Fed. Reg. 33,851, 33,852 (June 13, 2014).

In short, there is no "conflict" between monuments and marine sanctuaries, Opp. 26, that would require the Court to restrict the Antiquities Act to dry land.

II. The Antiquities Act applies to the U.S. Exclusive Economic Zone.

Plaintiffs argue in the alternative that, even if Presidents have the authority to establish national monuments in the ocean, they may not do so in *this* part of the ocean—the U.S. EEZ—because the United States does not "exercise complete dominion" there. Opp. 14. This argument also fails. The Antiquities Act authorizes the President to establish national monuments on "land owned *or controlled* by the Federal Government." 54 U.S.C. § 320301(a) (emphasis added). The United States exercises broad control over its EEZ. Plaintiffs' proffered test requiring "absolute" control departs from the statute's text and is inconsistent with Supreme Court caselaw, and thus fails as a matter of law.

A. The federal government controls the U.S. EEZ.

The federal government's control over the U.S. EEZ is broad and unchallenged. *See* Gov't Br. 13-15 (ECF No. 32-1); Intervenors' Br. 17-24 (ECF No. 33); Rieser Amicus Br. 3-9 (ECF No. 38); Law Profs.' Amicus Br. 4-9. Consistent with customary international law, the U.S. government has far-reaching "sovereign rights" and "jurisdiction" within its EEZ, including "(a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both

living and non-living, of the seabed and subsoil and the superjacent waters . . . ; and (b) jurisdiction with regard to . . . the protection and preservation of the marine environment." Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (Reagan EEZ Proclamation); *accord* United Nations Convention on the Law of the Sea art. 56(1)(a)-(b), Dec. 10, 1982, 1833 U.N.T.S. 397, 418, 21 I.L.M. 1245, 1280 (UNCLOS). In this area, no state, foreign nation, or private party has any "proprietary [or] administrative interest[]" that comes close to rivaling the U.S. government's. *California III*, 436 U.S. at 41; *cf. United States v. Maine*, 420 U.S. 515, 522-23 (1975) (federal government has paramount rights in outer continental shelf).

Based on this authority, the OLC concluded almost 20 years ago that "U.S. 'control' over the EEZ is sufficient to allow the President to establish a national monument." OLC Memorandum, 2000 WL 34475732, at *9. The OLC highlighted two factors supporting its conclusion. First, the United States "exerts greater restraining and directing influence over the EEZ than any other sovereign entity, and that influence, as an overall matter, is extensive." *Id.* "Second, the United States possesses substantial authority under international law to regulate the EEZ for the purpose of protecting the marine environment." *Id.* at *10. These factors, the OLC concluded, "give the United States sufficient 'control' over the EEZ for the President to invoke the Antiquities Act for the purposes of protecting the marine environment." *Id.* Plaintiffs never so much as acknowledge the OLC's detailed analysis or conclusion.

As the OLC correctly determined, the federal government's extensive and superior authority in the U.S. EEZ is sufficient to constitute "control" under the ordinary meaning of that term. *Id.*; *see also id.* at *3 & nn.4-5. Indeed, it fits comfortably within Plaintiffs' own dictionary definition, which defines "control" to mean, inter alia, "exercise restraining or directing influence over," "dominate," "regulate," or "hold from action." Opp. 14 (quoting Webster's New Int'l Dictionary 490 (1909)). The federal government does all those things in the U.S. EEZ.

Tellingly, Congress itself has used "control" to describe the federal government's role in this area. *See, e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a) (submerged lands of outer continental shelf "appertain to the United States and are subject to its jurisdiction and *control*" (emphasis added)); *see also id.* § 1332(1) (similar). So have the federal courts. *See, e.g.*, *Native Vill. of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1091 (9th Cir. 1998) (recognizing "the sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast"); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (the federal government, within the EEZ, exercises "exclusive control over economic matters involving fishing, the seabed, and the subsoil").

B. "Control" does not mean "control absolutely."

Because the federal government's authority over the U.S. EEZ fits within the ordinary meaning of "control," Plaintiffs again resort to rewriting the statute. As with their unsuccessful attempt to insert the word "dry" before the word "land," Plaintiffs seek to insert the word "absolutely" to change the meaning of "controlled." Opp. 16. They contend that an area is "controlled" for Antiquities Act purposes only

if it is an area the federal government "controls *absolutely*." *Id.* (emphasis added). But as the OLC explained, "[n]othing in the language of the statute requires that the Government maintain absolute control over the area." OLC Memorandum, 2000 WL 34475732, at *3 n.6.

Plaintiffs' argument incorrectly conflates control with ownership. They contend that, because the Antiquities Act groups the two terms together, "controlled" must mean "the same degree of control as the government enjoys over the land it owns." Opp. 15. "Control and ownership, however, are distinct concepts." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). Here, Congress highlighted the distinction by separating the two terms with "or," authorizing national monuments on land "owned *or controlled*" by the federal government. 54 U.S.C. § 320301(a) (emphasis added)). Because the term "or" is "almost always disjunctive, . . . the words it connects are to be given separate meanings." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). Indeed, the D.C. Circuit has emphasized the importance of the disjunctive "or" when interpreting the very same phrase in the Surface Mining Control and Reclamation Act, which prohibits the issuance of a permit when an operation "either 'owned *or controlled* by the applicant'" is in violation of the Act. *Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1, 5 (D.C. Cir. 1999) (quoting 30 U.S.C. § 1260(c); emphasis in *Nat'l Min. Ass'n*).

Plaintiffs' attempt to require "absolute[]" control, Opp. 16, has no basis in the text of the Antiquities Act. Plaintiffs find the word "absolute" only in the remark of a single legislator, as he was espousing his view on the government's power over

tribal lands and whether they would be encompassed by an earlier, unenacted bill that would have applied to "public lands." Opp. 16. Of course, a single legislator's statement "falls far short of providing evidence of an agreement among legislators on the subject." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 308-09 n.8 (1994). And here, to the extent the legislator meant to opine that the U.S. government exercised "absolute[]" control over tribal lands (the transcript phrasing is awkward), it is far from clear that he was correct,[10] or that Congress as a whole shared his view.

Regardless of the status of tribal lands, if Congress wanted the Antiquities Act to apply only to land owned by the federal government and tribal lands, as Plaintiffs appear to suggest, it could have said so in the statute. Instead, having abandoned the term "public lands" from earlier bills, Congress ultimately chose the more capacious and flexible phrase "land owned or controlled by the Government of the United States." 34 Stat. 225 (1906); *see* Intervenors' Br. 17 n.10. This phrase left room for national monuments in areas where the federal government exercised—or would in the future exercise—control.

The Supreme Court's decision in *California III* demonstrates the application of this pragmatic, commonsense reading of the word "control." In *California III*, the Court affirmed that the President could establish national monuments in the territorial sea because that area was then "controlled by the Government of the United States." 436 U.S. at 36. But this control over the territorial sea was not

[10] *See* 1-5 *Cohen's Handbook of Federal Indian Law* § 5.04 (2012) ("Federal power to regulate Indian affairs is plenary and exclusive, but *not* absolute." (emphasis added; quotation marks omitted)).

absolute: states still exercised their local police powers there, *California I*, 332 U.S. at 36, and the federal government was bound by obligations of international law, *id.* at 34-35. *See, e.g.*, *United States v. Louisiana* (*Louisiana II*), 394 U.S. 11, 22 (1969) (while federal government "may exercise extensive control" in territorial sea, it "cannot deny the right of innocent passage to foreign nations."). Despite these limitations, the Court saw "no serious question" that the federal government's less-than-absolute control in the territorial sea was sufficient for purposes of the Antiquities Act. *California III*, 436 U.S. at 36. The federal government had "paramount" rights there, including the right to "determine in the first instance when, how, and by what agencies, foreign or domestic," oil resources "may be exploited," *California I*, 332 U.S. at 29, and those rights were sufficient to establish "control," *California III*, 436 U.S. at 36 (relying on *California I*).

The same analysis applies to the U.S. EEZ, with the same result. Today, the U.S. government has exclusive sovereign rights to authorize or prohibit commercial fishing, mineral exploration and extraction, and marine scientific research in the U.S. EEZ; it has jurisdiction over protecting the natural environment; it even has authority to construct artificial islands there. *See* Reagan EEZ Proclamation, 48 Fed. Reg. at 10,605; UNCLOS arts. 55-62. The difference between the federal government's control over the territorial sea and the EEZ is one of degree, not one of kind. *Cf. United States v. Louisiana* (*Louisiana I*), 339 U.S. 699, 704 (1950) (extending *California I*'s holding beyond the territorial sea). Plaintiffs are therefore wrong when they suggest that the federal government does not "control" the U.S.

EEZ merely because it recognizes others' rights to navigation, overflight, laying cables, and salvage. Opp. 19. Just as with the right of passage in the territorial sea, *see Louisiana II*, 394 U.S. at 22, these other rights may limit, but do not negate, the federal government's broad control over the U.S. EEZ.

Giving the term "control" its plain meaning would not allow Presidents to designate national monuments on private property. *Contra* Opp. 20-21. First, the Antiquities Act carves out private property, specifying that it may be reserved as part of a national monument only if the owner "relinquishe[s]" the land to the federal government. 54 U.S.C. § 320301(c). Second, even setting that statutory limitation aside, the Act contemplates the designation of monuments only where the federal government has sufficient control to "manage[]" the land to protect the identified objects of interest. 54 U.S.C. § 320301(b); *see* Intervenors' Br. 24 n.14. In the EEZ, unlike on private property, the federal government has the power to directly "manag[e] the natural resources" for the "protection and preservation of the marine environment." Reagan EEZ Proclamation, 48 Fed. Reg. at 10,605; *accord* UNCLOS art. 56(1)(a)-(b). These are precisely the powers invoked to ensure the "proper care and management of the objects to be protected" in the Northeast Canyons Proclamation. 54 U.S.C. § 320301(b); *see* 81 Fed. Reg. at 65,163-65.

C. The Antiquities Act's geographic reach is not frozen in time, but is meant to expand along with U.S. ownership or control.

Plaintiffs protest that "[i]n 1906, it would have been obvious to Congress that [the Antiquities Act's] language did not authorize the creation of a national monument more than 100 miles from the nation's coast." Opp. 17. But the question

here is not whether the President in 1906—long before the EEZ came into being—could have designated Northeast Canyons as a monument. Rather, the question is whether the federal government controlled the area in 2016, when the President did in fact designate the Monument. *See California III*, 436 U.S. at 36 ("[T]he President *in 1949* had power . . . to reserve the submerged lands and waters . . . ." (emphasis added)). By referring generally to "all lands 'owned or controlled' by the U.S. Government[,]" Congress ensured the Act's geographic reach would "change[] as the U.S. Government's control changes." OLC Memorandum, 2000 WL 34475732, at *6; *see also* Law Profs.' Amicus Br. 11-12 (noting that Congress enacted the Antiquities Act at a time of dramatic expansion of U.S. territory and control, "making it impossible for Congress . . . to assume that the lands under the federal government's ownership and control would remain static into the future").[11]

The history of national monuments in the ocean, including in the EEZ, is straightforward and linear, not some radical departure from past practice as Plaintiffs contend. *See* Opp. 22-26. As discussed above, *see supra* at 6-7 & n.4, Presidents began designating national monuments in the ocean as early as the 1930s, and they did so consistently—with the approval of both Congress and the Supreme Court—for the next 80 years. These designations were, at first, solely

[11] Plaintiffs point to a colloquy between two legislators suggesting that the Antiquities Act would not take "very much" land "off the market in the Western States." Opp. 23. But Congress as a whole decided to leave the size of monument reservations to the President's discretion, and the Court "appl[ies] the statute as passed by Congress and signed by the President, not some legislator's gloss about what the statute should accomplish." *Raoof v. Sullivan*, No. 17-cv-01156-TNM, --F.Supp.3d ----, 2018 WL 1730292, at *7 (D.D.C. Apr. 10, 2018).

within the territorial sea; the concept of the EEZ was not formally codified into international law and domestic U.S. policy until the 1980s. *See* UNCLOS art. 56 (1982); Reagan EEZ Proclamation, 48 Fed. Reg. at 10,605 (1983). Meanwhile, "[t]hrough exploration," the federal government "continue[d] to make new discoveries and improve [its] understanding of ocean ecosystems," revealing new objects of scientific interest. Proclamation No. 9496, 81 Fed. Reg. at 65,161. The Executive Branch then sought the OLC's opinion about whether the Antiquities Act applied in the EEZ, and, after the OLC confirmed that it did in 2000, Presidents of both parties designated national monuments there. The timeline of these designations reflects the evolution of U.S. control, not the "discovery of a previously unheralded power in an old statute," as Plaintiffs erroneously suggest. *See* Opp. 24 (citing *Util. Air Res. Grp. v EPA*, 134 S. Ct. 2427, 2444 (2014)).

This timeline also undermines Plaintiffs' reliance on an outdated, out-of-circuit decision that, they contend, "squarely" addressed the question at issue here. Opp. 33. The Fifth Circuit in *Treasure Salvors*, *Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), did not review a President's decision to establish a national monument in the EEZ. In fact, unlike the several Supreme Court decisions that Plaintiffs attempt to disregard as "dicta," Opp. 35-38, *Treasure Salvors* did not involve a national monument at all. Rather, as its name suggests, the case was a quiet title action regarding a shipwreck, in which the United States intervened to assert a claim by virtue of other provisions in the Act.

Critically, *Treasure Salvors* was decided in 1978, *before* UNCLOS codified the concept of the EEZ in 1982 and President Reagan formally proclaimed the U.S. EEZ in 1983. *See* UNCLOS art. 56; Reagan EEZ Proclamation, 48 Fed. Reg. at 10,605. Because *Treasure Salvors* "was decided before President Reagan extended the EEZ to 200 miles," the Fifth Circuit's decision simply "does not govern"—or even address—whether the federal government owns or controls the U.S. EEZ for purposes of the Antiquities Act. OLC Memorandum, 2000 WL 34475732, at *10 n.18. Indeed, because the case predates UNCLOS, the Fifth Circuit never mentions the concept of the EEZ at all.

Plaintiffs speculate that the Fifth Circuit would reach the same conclusion today because it determined the federal government's earlier assertion of mineral exploitation rights on the continental shelf did not give it sufficient "control" over the area. Opp. 34-35 (citing *Treasure Salvors*, 569 F.2d at 340). But U.S. control over the EEZ is much more extensive than—and different in kind from—the authority that the court considered in *Treasure Salvors*. Whether or not the right to *exploit* continental shelf mineral resources is alone sufficient to establish control for Antiquities Act purposes—which is all the Fifth Circuit considered, 569 F.2d at 338-40—the further EEZ rights of "conserving and managing natural resources" for the "protection and preservation of the marine environment" certainly do. Reagan EEZ Proclamation, 48 Fed. Reg. at 10,605; UNCLOS art. 56(1)(a)-(b); *see also* OLC Memorandum, 2000 WL 34475732, at *10 & n.18. After all, protection—not

exploitation—is the Antiquities Act's purpose. *See* 54 U.S.C. § 320301(b) (requiring "proper care and management of the objects to be protected").

III. Plaintiffs' conclusory allegations about the Monument's size fail to state a valid claim.

The D.C. Circuit's decisions in *Mountain States* and *Tulare County* require the dismissal of Plaintiffs' "smallest area" claim, and Plaintiffs offer no coherent argument otherwise. *See* Intervenors' Br. 24-32. To state a plausible claim, Plaintiffs' complaint "must"—at the very least—"allege specifically how a monument's boundaries are insufficiently related to a qualifying object" of interest under the Antiquities Act. Opp. 38 (citing *Tulare County*, 306 F.3d at 1142). It fails to do so. The Northeast Canyons Proclamation explains that the Monument's boundaries are drawn to encompass the "smallest area compatible with the proper care and management of the objects to be protected," 81 Fed. Reg. at 65,163, and that those objects include not only "the canyons and seamounts themselves," but also "the natural resources and ecosystems in and around them," *id.* at 65,161. Plaintiffs fail to explain how their complaint plausibly alleges that the Monument boundaries are insufficiently related to these objects of scientific interest.

Fatally, Plaintiffs never defend their complaint's assertion that "[a]n ecosystem is not an 'object' under the Antiquities Act." Compl. ¶ 75; *see* Opp. 38-41. Their concession is unsurprising, given that the Supreme Court and the D.C. Circuit have both concluded ecosystems *do* qualify as objects of scientific interest under the Act. *See* Intervenors' Br. 26-28 (citing cases); *see also*, *e.g.*, *Alaska*, 545 U.S. at 103; *Tulare County*, 306 F.3d at 1140, 1142. Nor have Plaintiffs alleged that

the Monument boundaries lack any relation to the ecosystems in and around the canyons and seamounts. The only factual allegation arguably on point—that the Monument's "boundary includes areas dozens of miles from the nearest canyon or seamount while excluding areas much closer," Opp. 39 (citing Compl. ¶¶ 73-74)—says nothing about the size or location of the *ecosystems* to be protected, and thus it does not state such a violation of the Act, even assuming that claim is true.[12] *See Tulare County*, 306 F.3d at 1142 ("Insofar as [plaintiff] alleges that the Monument includes too much land . . . [because] parts of the Monument lack scientific or historical value," plaintiff made "no factual allegations" supporting that claim).

Plaintiffs' only other argument is makeweight. Seizing on a snippet of legislative history from an unenacted 1938 bill, they argue that objects of historic or scientific interest must be "immobile and permanently affixed to the land" to qualify for protection under the Antiquities Act. Opp. 39-40. The statement of a single non-legislator, uttered thirty years after the Antiquities Act's passage, does not control the interpretation of the Act. Nor can Plaintiffs' reading survive Supreme Court precedent that the Antiquities Act does protect mobile objects like fish, *see*

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[12] Depending on where one looks, Plaintiffs also assert that the Monument boundaries bear either "no relationship," Opp. 39 (citing Compl. ¶¶ 52, 73-74), or "little relation," Compl. ¶ 73, to the canyons and seamounts. But the boundaries of the Monument's "canyons unit" and "seamounts unit"—as shown on the map attached to the proclamation—obviously *do* bear a relationship to the canyons and seamounts. *See* Compl. ¶ 52 & exh. 4; *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004) (courts need not accept as true "factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice"). And again, Plaintiffs offer no allegations about the boundaries' relationship to the *ecosystems* in and around the canyons and seamounts—an omission that is fatal to their claim.

Cappaert, 426 U.S. at 142, and other wildlife, *see Alaska*, 545 U.S. at 109.[13] Further, the Monument here protects species that *are* affixed to the seabed—objects of interest that, like the ecosystems themselves, Plaintiffs fail to acknowledge. *See* 81 Fed. Reg. at 65,161 (describing "at least 54 species of deep-sea corals," which, "together with other structure-forming fauna such as sponges and anemones, create a foundation for vibrant deep-sea ecosystems" that "are extremely sensitive to disturbance from extractive activities").

In short, as in *Tulare County*, Plaintiffs' "smallest area" claim fails because it offers no valid reason for the Court to second-guess the President's determination about where to place the Monument's boundaries.

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed.

Dated: June 12, 2018

Respectfully submitted,

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[13] Contrary to Plaintiffs' contention, Opp. 40, there is no requirement that monuments encompass entire ranges of protected species. *Cf.* Alaska, 545 U.S. at 98. Here, the Monument is compatible with the proper care and management of migratory species like whales because it protects a foraging hotspot, thus enhancing the species' condition and abundance. *See* 81 Fed. Reg. at 65,161-62.

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