No. 19-35460
(consolidated with Nos. 19-35461 and 19-35462)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF CONSERVATION VOTERS, et al.,
Plaintiffs-Appellees,

v.

DONALD TRUMP, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA, ANCHORAGE DIVISION

BRIEF OF NATURAL RESOURCES LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF LEAGUE OF CONSERVATION VOTERS, ET AL., SUPPORTING AFFIRMANCE

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TABLE OF CONTENTS

INTEREST OF *AMICI* 1
SUMMARY OF ARGUMENT 1
ARGUMENT 2
I. Administration of Federal Public Lands is Vested in Congress by the Property Clause of the Constitution, and Delegations of Congressional Authority Determine the Scope of Executive Power. 2
A. Federal authority over public lands. 2
B. Federal authority over the Outer Continental Shelf. 6
II. The Limited Delegation of Withdrawal Authority in the Antiquities Act Parallels the Limited Power Delegated to the President under OCSLA § 12(a). 8
A. The plain text of the Antiquities Act, like that of OCSLA, does not authorize Presidential revocations or reversals. 8
B. Legislative History, Administrative Interpretations, and Contemporaneous Legislation further support the absence of Presidential power to revoke or modify National Monuments or OCSLA withdrawals. 10
1. Text and Legislative History of the Antiquities Act. 10
2. Other contemporaneous public land statutes authorized establishment and revocation of reserved or withdrawn areas. 11
III. OCSLA Delegated Leasing Authority to the Secretary of the Interior, and Included Presidential Power to Withdraw Areas for Conservation Purposes. 14
A. Background on OCLSA Section 12(a) and its use prior to President Obama. 14
B. The Obama 12(a) withdrawals. 19
CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Buford v. Houtz, 133 U.S. 320 (1890) 3

Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) 13

Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973) 15

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) 9

Massachusetts Lobstermen's Association v. Ross, 945 F.3d 535, 538–539 (D.C. Cir. 2019) 7, 15

Medellin v. Texas, 552 U.S. 491 (2008) 14

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) 9

Russello v. United States, 464 U.S. 16 (1983) 13

Union Oil Co. of Cal. v. Morton, 512 F.2d 743 (9th Cir. 1975) 15

United States v. Grimaud, 220 U.S. 506 (1911) 3

United States v. Midwest Oil Co., 236 U.S. 459 (1915) 3

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 14

Constitution, Statutes, Legislative Materials, and Regulations

29 Cong. Rec. 2677 (1897) (statement of Rep. Lacey) 12

Act of June 4, 1897, ch. 2 §1,Stat. 34, 36 (1897), *repealed in part by* National Forest Management Act of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949, 2957 (1976) (codified at 16 U.S.C. § 1609(a)) 12

Act of March 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956) 11, 14

Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* Pub. L. No. 94–579, 90 Stat. 2791 (1976) 11

Act to Authorize the Exchange of Certain Lands at Black Canyon of the Gunnison National Monument, Colorado, Pub L. No. 85–391, 72 Stat. 102 (1958) 11

Act to Establish Grand Canyon National Park, in the State of Arizona, Pub. L. No. 65–277, 40 Stat. 1175 (1919) 11

Antiquities Act of 1906, Pub. L. 59–20, 34 Stat. 225, 54 U.S.C. § 320301, et seq. (1906) 2, 4, 8

Colonial National Monument, Act of July 3, 1930, ch. 837, §2, 46 Stat. 855 (1930) 12

Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655 (Mar. 26, 1969) 19

Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 28, 1952) 19

Federal Land Policy and Management Act (FLPMA) of 1976, Pub. L. No. 94–579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. ch. 35 § 1701-1782) 5, 6

Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101–605, 104 Stat. 3089 (1990) 18

Forest Service Organic Act of 1897, Pub. L. No. 375, 30 Stat. 11, 24 (1897) .. 22

H.R. 1031, 83rd Cong. (1953) 16

H.R. 11021, 56th Cong. (1900) 10

H.R. 8195, 56th Cong. (1900) 10

H.R. 9245, 56th Cong. (1900) 10

Key Largo Coral Reef Marine Sanctuary, 41 Fed. Reg. 2378, 2379 (Jan. 13, 1976) 18

National Forest Management Act (NFMA) of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949 (1976) (codified at 16 U.S.C. § 1609(a) 5, 6, 12

National Park Service Organic Act, Pub. L. No. 64–23539 Stat. 535, 54 U.S.C. §§ 100101, *et seq*. (1916) 4, 6

Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, § 102, 92 Stat. 629, 631 (codified at 43 U.S.C. § 1802) 16

Outer Continental Shelf Lands Act, (OCSLA), Pub. L. No. 83–212, § 4, 67 Stat. 462 (1953) (codified as amended *at* 43 U.S.C. § 1331 et seq.) . passim

Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910), *repealed by* Pub. L. No. 94–579,§ 704(a), 90 Stat. 2743, 2792 ..... 12, 17

S. Rep. No. 83-411 (1953) 17

Submerged Lands Act of 1953 (SLA), Pub. L. No. 83–31, § 3(a)–(b), 67 Stat. 29, 30 (1953) (codified as amended at 43 U.S.C. § 1311(a)) 4

Taylor Grazing Act of 1934, Pub. L. 73–482, 38 Stat. 1269, 43 U.S.C. ch. 8A § 315 et seq (1934) 4

U.S. Const. art. IV, § 4, cl. 2 2

Wildlife Refuge Improvement Act, Pub. L. No. 105–57, 111 Stat. 1252, 16 U.S.C. §§ 668dd, *et seq*. (1997) 6

Scholarly Authorities

George Coggins, Charles F. Wilkinson, John D. Leshy and Robert L. Fischman, Federal Public Land and Resources Law (7th ed. 2014) 3

John Ruple, *The Trump Administration and Lessons Not Learned from Prior Presidential National Monument Modifications*, 43 HARV. ENVT'L. L. REV. 32 (2019) 11, 13

Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003) 10

Robin Kundis Craig, *Treating Offshore Submerged Lands as Public Lands, a Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51 (2013) 4

Ronald F. Lee, The Antiquities Act of 1906 (1970) 10

Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953) 5

Other Authorities

Carol Hardy Vincent, et al., *Federal Land Ownership: Overview and Data* 21, Table 5 (Cong. Res. Serv. (2017) 5

Dep't of the Interior, Office of the Solicitor, *Authority to Issue Outer Continental Shelf Mineral Leases in the Gorda Ridge Area*, 92 Interior Dec. 459, 487 (May 30, 1985) 7

Key Largo Coral Reef Preserve, U.S. Presidential Proclamation No. 3339, 25 Fed. Reg. 2352 (Mar. 15, 1960) 18

Memorandum on Withdrawal of Certain Areas of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) 21

Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Doc. 1111 (June 12, 1998) 19, 20

Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016) 20

Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185 (1938) 13

Public Land Law Review Commission, *One Third of the Nation's Lands: A Report to the President and Congress* (U.S. Gov't Printing Office 1970) 5

U.S. Presidential Proclamation No. 2055, 48 Stat. 1706 (Aug. 22, 1933) 12

U.S. Presidential Proclamation No. 2667 (Sept. 28, 1945), 10 Fed. Reg. 12,303 (1945) 7

INTEREST OF *AMICI*

Amici are law school professors who are experts in the fields of public land law and natural resources law. Most have written and published extensively in these fields. Through our teaching and scholarship, we promote understanding of the law governing management of federal public lands, and the history of the law's development. This case presents a fundamental question about the administration of the Outer Continental Shelf Lands Act (OCSLA), Pub. L. No. 83-212, § 4, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. § 1331 et seq.). Central to the resolution of this case is an understanding of the history of public land law and the manner in which Congress has delegated its constitutional power over public lands to the executive branch. The undersigned professors and those listed in the appendix are uniquely situated to assist the court in resolution of the case. This Brief is filed pursuant to FRAP 29.[1]

SUMMARY OF ARGUMENT

The Constitution provides Congress with complete authority over the management of federal public lands, which includes the Outer Continental Shelf. Congress has most often delegated its management authority to executive branch

[1] No party or counsel for a party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief.

agencies with instructions to follow substantive directions and carefully-delineated procedures. In other situations, like the case before this court, Congress delegated conservation authority directly to the President in the form of power to withdraw areas for protective purposes. The history of public land law demonstrates that when Congress intends such withdrawal or reservation authority to be revocable, it explicitly provides such power. Two statutes—the Antiquities Act of 1906 and the Outer Continental Shelf Lands Act—provide the President with power to withdraw or reserve public lands (and waters) from disposition. In neither case, however, did Congress grant the President the power to revoke a protective action taken under either the Antiquities Act or OCSLA, and no court has ever upheld such an action. For the reasons set out below, the district court's decision should be affirmed.

ARGUMENT

I. Administration of Federal Public Lands is Vested in Congress by the Property Clause of the Constitution, and Delegations of Congressional Authority Determine the Scope of Executive Power.

A. Federal authority over public lands.

The Constitution provides that the "[t]he Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]" U.S. Const. art. IV, § 4, cl. 2. For most of the 19th century, congressional policy encouraged the disposal of

federal property to states, private homesteaders, timber companies, miners, and railroads. At the same time, Congress left the remaining public lands largely unregulated such that the public was permitted to make use of the so-called "public domain lands" without any need of federal permission. *See Buford v. Houtz*, 133 U.S. 320, 326–27 (1890). In the absence of federal legislation, the President sometimes took it upon himself to reserve, or withdraw, land from the operation of disposal statutes for Indian reservations, military forts, bird refuges, and other purposes. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 469–74 (1915).

Around the turn of the 19th century, Congress began to more directly assert its broad power over federal public lands for various conservation as well as development purposes. *See generally*, George Coggins, Charles F. Wilkinson, John D. Leshy & Robert L. Fischman, Federal Public Land and Resources Law 108–29 (7th ed. 2014). Congress most often delegated authority to the executive branch to administer land set aside for various purposes, but necessarily left federal agencies with the task of filling in the details of day-to-day regulation. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911) (leaving the Secretary of Agriculture with discretion to set the terms for use of National Forests). After establishing the National Forest system in the late 1890s, *see id.* at 507–09, Congress provided the framework for National Park management, National Park

Service Organic Act, 39 Stat. 535 and established a regulatory framework for grazing on public domain lands in 1934. Taylor Grazing Act of 1934, 38 Stat. 1269. Another key statute, which is central to the argument set forth below, is the Antiquities Act of 1906, 34 Stat. 225, (*codified as amended* at 54 U.S. C. §§ 320301, *et seq*.), which authorized the President to proclaim national monuments on lands "owned or controlled by the United States." While there were many other statutes passed during the late 19th and early 20th century that affected public lands, the foregoing statutes provided the early foundation of modern, federal public-lands management.

It was not until 1953 that Congress turned its attention to offshore marine resources in the Outer Continental Shelf (OCS): first by granting the coastal states ownership of the submerged lands in the three-mile belt offshore, Submerged Lands Act of 1953 (SLA), Pub. L. No. 83–31, § 3(a)–(b), 67 Stat. 29, 30 (1953) (codified as amended at 43 U.S.C. § 1311(a)); and second by asserting jurisdiction over roughly 1.7 billion acres of federal submerged lands and waters in the Outer Continental Shelf Lands Act (OCSLA), Pub. L. No. 83–212, § 4, 67 Stat. 462, 462 (1953) (codified as amended at 43 U.S.C. § 1331); *See generally*, Robin Kundis Craig, *Treating Offshore Submerged Lands as Public Lands, a Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51 (2013); Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*,

6 STAN. L. REV. 23 (1953). OCSLA set out the foundation for mineral exploitation as well as conservation of the resources in the OCS.

Congress undertook sweeping reform of federal public land laws in the 1970s, passing the Federal Land Policy and Management Act (FLPMA) of 1976, Pub. L. No. 94–579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701-1782), and the National Forest Management Act (NFMA) of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949 (1976) (codified at 16 U.S.C. § 1600-1614). These statutes were heavily influenced by the recommendations of the Public Land Law Review Commission and its final report, *One Third of the Nation's Lands: A Report to the President and Congress* (U.S. Gov't Printing Office 1970). The Commission was tasked with reviewing all of the natural resources owned by the federal government "to assure that no facet of public land policy was being overlooked." *Id.* at ix. The reform effort was a response to changing views about priorities for the nation's public lands in the post-World War II period, including heightened interest in recreation and conservation. *See id.* In response, Congress mandated comprehensive management for the vast majority of federal lands. Together, Bureau of Land Management and Forest Service lands comprise over 440,000,000 acres of the 621,000,000 total acres of uplands owned by the United States. Carol Hardy Vincent, et al., *Federal Land Ownership: Overview and Data* 21, Table 5 (Cong. Res. Serv. (2017)). To manage those lands, FLPMA and

NFMA vest the Bureau of Land Management and Forest Service with broad management directives to be implemented through a detailed process that provides for ample public participation. Congress reserved for itself other decisions about modifying protective status and required that management decisions be made in a tiered process emphasizing long-term planning. *See* 43 U.S.C. § 1701(a)(2) ("national interest will be best realized if the public lands and their resources are . . . inventoried and their present and future use is projected through a land use planning process[.]");16 U.S.C. §§ 1602—1604 (mandating comprehensive forest land resource inventories and land and resource management plans). Through these comprehensive reform statutes for the largest land management agencies, as well at the 1916 National Park Service Organic Act, 39 Stat. 535, 54 U.S.C. §§ 100101, *et seq*. (1916), and the 1997 Wildlife Refuge Improvement Act, Pub. L. No. 105–57, 111 Stat. 1252, 16 U.S.C. §§ 668dd, *et seq*. (1997), Congress provided various land management agencies with comprehensive guidance for most federal land management. Untouched in these comprehensive revisions was Presidential withdrawal authority under the Antiquities Act and OCSLA.

B. Federal authority over the Outer Continental Shelf.

As noted above, it was not until the mid-twentieth century that the federal government turned its attention to offshore marine resources. Similar to the

evolution of public land law described above, initial assertions of control through the executive branch were soon displaced by broad congressional legislation that delegated only specific protective powers to the President.

Federal power over the OCS was initially asserted in the "Truman Proclamation" to solidify United States control over natural resources in offshore areas. Proclamation No. 2667 (Sept. 28, 1945), 10 Fed. Reg. 12,303 (1945). Congress responded in 1953 when it passed OCSLA and asserted control over the OCS to advance the development of natural resources for various purposes and to provide for their conservation. The OCS is coextensive with the Exclusive Economic Zone ("EEZ") and reaches 200 nautical miles off the nation's coasts where the United States exercises dominion. *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 538–39 (D.C. Cir. 2019) (citing Dep't of the Interior, Office of the Solicitor, *Authority to Issue Outer Continental Shelf Mineral Leases in the Gorda Ridge Area*, 92 Interior Dec. 459, 487 (May 30, 1985)) (explaining that the statutory definition of "outer Continental Shelf" includes the submerged lands within the EEZ). A key provision in OCSLA authorized the President to remove areas from oil and gas leasing or other disposition. OCSLA, § 12(a), 43 U.S.C. 1341(a) ("The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.").

In the case of both the Antiquities Act, and OCSLA, Congress did not grant the President authority to modify or revoke prior withdrawals. Both statutes include only very specific and one-way authorizations of presidential power to protect federal lands and resources. Thus, President Trump's revocation of President Obama's OCSLA 12(a) withdrawals are invalid—only Congress may alter them.

II. The Limited Delegation of Withdrawal Authority in the Antiquities Act Parallels the Limited Power Delegated to the President under OCSLA § 12(a).

A. The plain text of the Antiquities Act, like that of OCSLA, does not authorize Presidential revocations or reversals.

The Antiquities Act of 1906, Pub. L. 59–20, 34 Stat. 225, 54 U.S.C. § 320301 (1906) constitutes a narrow delegation of Congress's constitutional authority over federal lands. The Act provides: "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). The Act further authorizes the President to "reserve parcels of land as a part of the national monuments." 54 U.S.C. § 320301(b). By its plain language, the Antiquities Act authorizes the President only to "declare . . . national monuments," and "reserve parcels," not to

un-declare monuments or reverse the reservation of lands included within monuments. *Id.*

Likewise, OCSLA § 12(a) provides that "[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." OCSLA, Pub L. No. 83-212, § 12(a), 67 Stat. 462, 469 (1953) (codified at 43 U.S.C. § 1341(a)). When statutory language is plain and unambiguous, as in the case of both the Antiquities Act and OCSLA, there is no need to look further to discern congressional purpose. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (It is "never [the court's] job to rewrite a constitutionally valid statutory text under the banner of speculation. . ."). The Acts' plain text could therefore be the beginning and end of the question whether Presidents have the power to revoke or otherwise undermine previous monument proclamations or OCSLA 12(a) withdrawals. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010) ("[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language . . . ."). Nonetheless, we include the legislative history and principal administrative interpretations of both statutes because they provide even further support for the conclusion that neither act authorizes Presidential revocations or repeals. We begin with the Antiquities Act.

B. Legislative History, Administrative Interpretations, and Contemporaneous Legislation further support the absence of Presidential power to revoke or modify National Monuments or OCSLA withdrawals.

1. Text and Legislative History of the Antiquities Act.

The initial impetus for the Antiquities Act was extreme looting and destruction of Native American archeological sites, particularly in the Southwest and four corners region. *See* Ronald F. Lee, The Antiquities Act of 1906 at 47 (1970); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 479 (2003) (citing H.R. 8195, 56th Cong. (1900) and H.R. 9245, 56th Cong. (1900)). Some early versions of proposed legislation included acreage limitations. H.R. 8195, 56th Cong. (1900); H.R. 9245, 56th Cong. (1900). Department of the Interior officials responded with a broad proposal to authorize the President to set aside lands for expansive landscape protection purposes. *Id.*; Squillace, at 479–80 (citing H.R. 11021, 56th Cong. (1900)); *see* Lee, *supra* at 52–55. The bill that ultimately became the Antiquities Act reflected the more expansive view; it included authority to protect not only archeological sites, but also "objects of historic or scientific interest," and did not include any acreage limitations. 54 U.S.C. § 320301(a).

Devoid from the Act's text and history is any indication that Congress authorized the President to revoke or modify monuments. Those powers were reserved by Congress to itself and have been exercised by Congress on several

occasions. *See, e.g.*, Act of March 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956) (revoking Castle Pinckney National Monument); An Act to Authorize the Exchange of Certain Lands at Black Canyon of the Gunnison National Monument, Colorado, Pub L. No. 85–391, 72 Stat. 102 (1958); An Act to Establish Grand Canyon National Park, in the State of Arizona, Pub. L. No. 65–277, 40 Stat. 1175 (1919); *see also*, John Ruple, *The Trump Administration and Lessons Not Learned from Prior Presidential National Monument Modifications*, 43 HARV. ENVT'L. L. REV. 1, 31–32 (2019) (discussing Congress's rejection of various bills that would have authorized the President to modify Monument Proclamations).

2. Other contemporaneous public land statutes authorized establishment and revocation of reserved or withdrawn areas.

Several public lands statutes from the same era as the Antiquities Act, by contrast, do authorize the President to reverse previous withdrawals. The first statute authorizing the President to establish forest reserves, passed in 1891, did not contain modification or revocation authority. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, repealed by Pub. L. No. 94- 579, 90 Stat. 2791 (1976). But in 1897 Congress amended the statute when it passed the Forest Service Organic, which authorized the President "at any time to modify any Executive order [establishing a forest reserve] and . . . reduce the area or change the

boundary lines of such reserve" Act of June 4, 1897, ch. 2 §1, Stat. 34, 36 (1897), repealed in part by National Forest Management Act of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949, 2957 (1976) (codified at 16 U.S.C. § 1609(a)). Representative John Fletcher Lacey, the advocate for the quoted language and the primary sponsor of the Antiquities Act, explained that express delegation of revocation/modification authority was necessary because Congress previously delegated only the power to create forest reservations. 29 Cong. Rec. 2677 (1897) (statement of Rep. Lacey). Representative Lacey observed: "[t]he Act of 1891 gave him the power to create a reserve, but *no power to restrict it or annul it*, and there ought to be such authority vested in the President of the United States." *Id.* (emphasis added).

Similarly, the Pickett Act of 1910 authorized the President to withdraw land for public purposes with "such withdrawals . . . [to] remain in force *until revoked by him or by an Act of Congress*." Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910), repealed by Pub. L. No. 94–579,§ 704(a), 90 Stat. 2743, 2792 (emphasis added). In another instance, Congress directed the creation of Colonial National Monument, Act of July 3, 1930, ch. 837, §2, 46 Stat. 855 (1930), and included a proviso explicitly granting authority to enlarge or diminish the Monument's boundaries. Proclamation No. 2055, 48 Stat. 1706 (Aug. 22, 1933) (changing boundaries as authorized by congress); *See also*

Ruple, *supra*, at 28–29 (canvassing a number of other similar laws).

These examples demonstrate that when Congress intended to authorize revocations of or changes to protected status, it provided that authority to the President explicitly. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (courts "presume[] that where words differ . . . "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'")(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Antiquities Act contains no such authorization.

Further supporting this view, the Attorney General in 1938 concluded that the Antiquities Act did not authorize the President to revoke a monument. *See* Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185, 185–86 (1938). In this Attorney General's Opinion, Homer Cummings evaluated the recommendation from the Acting Secretary of the Interior that President Roosevelt revoke the 3.4-acre Castle Pinckney National Monument, which had been established by President Coolidge in 1924. Castle Pinckney was the site of the first takeover of Union property by the Confederacy in the Civil War, but apparently few supported its designation as a monument. *Id*. at 186. Cummings noted, "My predecessors have held that if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such

reservation." *Id*. Because Congress only authorized the creation of monuments in the Antiquities Act, Cummings advised the Secretary of the Interior that an act of Congress would be required to remove the Monument's status. *Id*. The Monument designation was eventually extinguished by Congress and the property transferred to the State of South Carolina. Act of Mar. 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956).

The historical backdrop of the Antiquities Act and other federal public land laws of that era clarifies that the President may not supplement the narrow congressional delegation of power to create national monuments with an unmoored assumption of authority to eliminate or modify them. "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

III. OCSLA Delegated Leasing Authority to the Secretary of the Interior, and Included Presidential Power to Withdraw Areas for Conservation Purposes.

A. Background on OCLSA Section 12(a) and its use prior to President Obama.

In OCSLA, Congress asserted the federal government's exclusive jurisdiction and control over the seabed, subsoil, and natural resources of the

OCS. Federal jurisdiction extended to the OCS "as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." OCSLA § 4(a)(1); *see Massachusetts Lobstermen's Ass'n*, 945 F.3d at 540–541 (OCS is an area owned or controlled by the government within the meaning of the Antiquities Act). OCLSA provides for leasing "at the discretion of the Secretary [of the Interior]" for terms of up to five years, or so long as oil and gas are produced in paying quantities. OSCLA § 8(b). When passed in 1953, OCSLA provided no detailed provisions dealing with environmental protection, but it did authorize the Secretary of the Interior to provide regulations for "the prevention of waste and conservation of the natural resources of the outer Continental Shelf." *Id.* § 5(a)(1). Congress's grant of authority to promulgate regulations thus included the general power to protect environmental values. *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 749 (9th Cir. 1975) ("The Secretary is responsible for conserving marine life, recreational potential, and aesthetic values, as well as the reserves of gas and oil."). In the only decision considering the Secretary's power to take actions suspending leases in aid of environmental protection, the Ninth Circuit noted that "the Act speaks of 'conservation of the natural resources of the outer Continental Shelf,' not just of conservation of oil, gas, sulphur and other mineral resources." *Gulf Oil Corp. v. Morton*, 493 F.2d 141, 145 (9th Cir. 1973).

Major amendments to OCSLA in 1978 added more detail to the actual leasing process and also included explicit environmental protections to the leasing process. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, § 102, 92 Stat. 629, 631 (codified at 43 U.S.C. § 1802) (stating the purpose is to develop oil and natural gas resources in the OCS "in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments"). The revisions set out four distinct stages that could lead to the production of oil and gas in the OCS, and added environmental provisions in keeping with the modernization of environmental law. Amendments of 1978 § 208 (codified at 43 U.S.C. § 1344).

Unchanged from the original 1953 enactment is section 12(a), which provides simply: "[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." OCSLA, § 12(a). This provision was added by the Congressional Conference Committee to supplement withdrawal authority delegated to the President for defense and other national security concerns. *See* H.R. 1031, 83rd Cong. (1953), at 9–10. Before the amendment, the section was captioned "National Emergency Reservations" and provided, "[t]he President may, from

time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf *and reserve them for the United States in the interest of national security*." S. Rep. No. 83-411, at 22 (1953). In a letter to the Senate Committee, the Department of Justice's Office of Legal Counsel opined that the italicized language was unnecessary because the bill did not require that any particular area be leased and limiting the President's withdrawal authority to national security "may imply that [national security] constitutes the only permissible reason for refusing to lease." *Id.* at 39. In apparent response, the language was dropped before the bill passed. *Id.* at 22. The same Report described section 12(a) as authorizing "the President to withdraw from disposition under the act any of the unleased areas of the outer shelf. Such a provision is similar to authority given to the President on the public domain." *Id.* at 14.

As shown in section II, *supr*a, congressional authority over public lands is very broad. In 1953, the primary laws regarding administrative withdrawals from unreserved federal lands consisted of the Pickett Act of 1910, 54 U.S.C. § 320301, the Antiquities Act, and the Forest Reserve Act, 1891, ch. 561, § 24, 26 Stat. 1095, 1103. These examples show that when Congress wishes to grant the power to withdraw areas and then modify or revoke them, it does so explicitly. That revocation authority is lacking in OCSLA, just as it is in the Antiquities

Act. While Presidents may be free to make a withdrawal for time-limited period by so providing in the text, a withdrawal for a period without limitation precludes subsequent executive revocation of the order—leaving further management decisions with Congress.

President Eisenhower, who signed OCSLA into law in 1953, was the first to make use of section 12(a) withdrawal authority when he established the Key Largo Coral Reef Preserve to protect the "scenic and scientific values of [the] area unimpaired for the benefit of future generations." Key Largo Coral Reef Preserve, Proclamation No. 3339, 25 Fed. Reg. 2352 (Mar. 15, 1960). The proclamation explicitly relied on section 12(a) for authority, and did not have an expiration date. The Preserve was designated as part of a marine sanctuary in 1975 and was subsequently incorporated into the Florida Keys National Marine Sanctuary in 1990. Key Largo Coral Reef Marine Sanctuary, 41 Fed. Reg. 2378, 2379 (Jan. 13, 1976)*;* and Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990).

The second use of the withdrawal authority occurred in the wake of the 1969 Santa Barbara oil spill. The Santa Barbara Channel Ecological Preserve, established by secretarial order in 1969, withdrew areas off of the coast of Santa Barbara and near the Channel Islands from "all forms of disposition, including mineral leasing, and reserved [the area] for use for scientific, recreational, and

other similar uses as an ecological preserve." Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655, 5655–56 (Mar. 26, 1969). This withdrawal was made by the Secretary of the Interior pursuant to a delegation of presidential authority, citing 43 U.S.C. § 1341 and Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 28, 1952). In 1998, President Clinton issued an order to "withdraw from disposition by leasing for a time period without specific expiration those areas of the Outer Continental Shelf currently designated Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972." Presidential Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Doc. 1111 (June 12, 1998). Like the prior two withdrawals without time limitation, these areas remain withdrawn from leasing under OCSLA.

B. The Obama 12(a) withdrawals.

President Obama exercised his authority under section 12(a) five times to withdraw approximately 160 million acres in the Arctic and Atlantic Oceans from future mineral leasing for an unlimited time period (only the Arctic withdrawals are discussed below). The first withdrawal by the Obama Administration was for the Bristol Bay area, and was made with "due consideration of the importance of Bristol Bay and the North Aleutian Basin Planning Area to subsistence use by Alaska Natives, wildlife, wildlife habitat,

and sustainable commercial and recreational fisheries, and to ensure that the unique resources of Bristol Bay remain available for future generations." Presidential Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition to the Secretary of the Interior 2014 Daily Comp. Pres. Doc. 1 (Dec. 16, 2014). The Bristol Bay withdrawal remains in effect. Just over a month later, President Obama withdrew from mineral leasing activity several carefully delineated areas in the Beaufort and Chukchi Seas (Hannah Shoal, Barrow Canyon, and a twenty-five-mile coastal buffer). Presidential Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition to the Secretary of the Interior 2015 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2015) (delineating those areas with a map of the withdrawn areas attached to the Memorandum). President Obama made the withdrawal "with due consideration of the critical importance of certain areas within the Beaufort and Chukchi Seas to subsistence use by Alaska Natives as well as for marine mammals, other wildlife, and wildlife habitat, and to ensure that the unique resources of these areas remain available for future generations . . . ." *Id*.

The third withdrawal was part of an executive order creating the Northern Bering Sea Climate Resilience Area. Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016). The final

area withdrawn from leasing off the Alaska coast encompassed almost the entire Arctic Ocean. Presidential Memorandum on Withdrawal of Certain Areas of the United States Arctic Outer Continental Shelf from Mineral Leasing to the Secretary of the Interior 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (designating a large Arctic withdrawal). The Obama OCSLA withdrawals were made in large part to protect the marine environment from the demonstrated and inherent dangers in oil and gas exploration and production in the Arctic, and to prevent a major oil spill in the Arctic. They were all explicitly made to continue indefinitely, "without expiration," reserving to Congress alone the power to reverse the withdrawals. The fact that the oil industry or the current Administration may disagree with President Obama's actions does not provide legal authority for the President to act. If the current Administration wants to open up these protected areas, Congress has the constitutional power to modify or revoke the withdrawals.

CONCLUSION

President Obama's withdrawal orders explicitly provided that they were "without specific expiration" and were issued pursuant to OCLSLA, a statute that authorizes withdrawals but not revocations. Unlike the 1897 Forest Service Organic Act, Pub. L. No. 375, 30 Stat. 11, 24 (1897), OCSLA does not contain an explicit grant of power to revoke the Presidential withdrawal. Similar to the

Antiquities Act—and in direct contrast to the Forest Service Organic Act—OCSLA includes only the one-way authority to withdraw lands for protective purposes. Accordingly, only Congress, exercising its plenary authority under the Property Clause of the Constitution, may revoke the permanent withdrawals made by President Obama.

APPENDIX

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above document was served on this 20th day of February, 2020, via the Court's CM/CF system on all counsel of record.

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