ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5353

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

WILBUR ROSS, et al.,

Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Defendants-Intervenors-Appellees.

On appeal from the U.S. District Court for the District of Columbia,
Case No. 17-cv-406 (Hon. James E. Boasberg)

BRIEF OF DEFENDANTS-INTERVENORS-APPELLEES NATURAL RESOURCES DEFENSE COUNCIL, CONSERVATION LAW FOUNDATION, CENTER FOR BIOLOGICAL DIVERSITY, AND R. ZACK KLYVER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and this Court are listed in Plaintiffs-Appellants' Opening Brief.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for Defendants-Intervenors-Appellees certify that Natural Resources Defense Council, Inc., Conservation Law Foundation, and Center for Biological Diversity are non-profit environmental advocacy organizations dedicated to the protection and enjoyment of the environment. They have no parent companies, and no publicly-held company has an ownership interest in any of them.

B. Rulings Under Review

References to the ruling at issue appear in Plaintiffs-Appellants' Opening Brief. The district court's opinion is published at *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48 (D.D.C. 2018).

C. Related Cases

This case has not previously been before this Court or any other court. Defendants-Intervenors-Appellees are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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INTRODUCTION

The Northeast Canyons and Seamounts Marine National Monument protects a dramatic and rich undersea landscape. It encompasses three canyons that cut into the continental shelf; four extinct volcanoes (or seamounts) that rise thousands of meters from the ocean floor; and the natural resources and fragile, interconnected ecosystems found in and around these geologic features. Fed by ocean currents and upwellings of nutrients, the Monument is a three-dimensional biologic hotspot. From the ocean surface to its deepest crevices, the area offers habitat to over a thousand different species, including endangered whales, sea turtles, seabirds, and ancient deep-sea corals that have been found nowhere else on earth.

In 2016, President Obama exercised his authority under the Antiquities Act to declare this extraordinary landscape a national monument. Describing the intense scientific interest in the area and its extreme sensitivity to extractive activities, the President protected the Monument from oil and gas development, mining, and commercial fishing, thereby safeguarding a national treasure for generations to come.

Although it is offshore, the Monument shares many characteristics with other landscapes that prior Presidents protected as national monuments. Like the iconic Grand Canyon, for example, the Monument is an area of great abundance and diversity, as well as stark geographic relief. Indeed, the Monument's three underwater canyons rival the depth of the Grand Canyon, and the four seamounts rise higher than any mountains east of the Rockies.

This case—brought by industry groups opposed to commercial fishing restrictions in the Monument—echoes unsuccessful attempts to undo earlier national monument designations. Nearly a century ago, the Supreme Court rejected mining claims in the Grand Canyon, concluding that the Antiquities Act empowered Theodore Roosevelt to protect the area for its scientific interest. *Cameron v. United States*, 252 U.S. 450, 455-56 (1920). As the district court correctly recognized in this case, "just as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908, so President Obama could establish the Canyons and Seamounts Monument in 2016." APP56 (citing *Cameron*).[1]

[1] This brief cites the Appendix as APP, and the Opening Brief as OB.

This Court should affirm the Monument's designation and the district court's judgment, just as it did in prior cases upholding the President's authority under the Antiquities Act to protect special landscapes and ecosystems for the benefit of future generations. *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002).

There is "no serious question" that the Antiquities Act authorizes the President to protect submerged lands and waters in the ocean. *United States v. California* (*California II*), 436 U.S. 32, 36 (1978). The Act applies to all land—including submerged land—where the federal government exercises control for purposes of managing and conserving natural resources. Presidents have repeatedly protected marine ecosystems as national monuments since the 1930s; Congress itself has approved and expanded monuments in the ocean; and the Supreme Court has unequivocally endorsed that understanding. Further, since at least 1983, when President Reagan established the U.S. Exclusive Economic Zone, the federal government has exercised substantial and unrivaled control over this part of the ocean. The Monument here is

consistent with the Act and all three branches' settled understanding of its reach.

Plaintiffs are therefore wrong to portray monuments in the ocean as "novel" or somehow in conflict with marine sanctuaries, which serve different, although sometimes overlapping, purposes. Nor do Plaintiffs acknowledge the sweeping implications of their arguments, which could invalidate all or parts of numerous national monuments in the ocean, including some dating back more than half a century. And their conclusory claim that the Monument is too large fails to account for this Court's precedent that the Antiquities Act authorizes the protection of ecosystems, even large ones.

The district court's judgment should be affirmed. The President acted well within his authority to protect this exceptional landscape and its fragile ecosystems as a national monument.

STATEMENT OF THE ISSUES

1. Did the district court correctly hold that the President had authority under the Antiquities Act to designate the Monument, where its submerged lands and waters are in an area where the federal

government has, since at least 1983, exercised substantial and unrivaled control?

2. Did the district court correctly dismiss Plaintiffs' claim contesting the Monument's size, where that claim is premised on an erroneous argument that the Act does not authorize the protection of ecosystems, and where Plaintiffs' complaint otherwise lacked non-conclusory factual allegations to support the claim?

STATUTES AND REGULATIONS

Except for pertinent provisions of the U.N. Convention on the Law of the Sea and Presidential Proclamation No. 5030—which are set forth in an addendum to this brief—all applicable statutes and legal authorities are contained in an addendum to Plaintiffs' Opening Brief.

STATEMENT OF THE CASE

I. The Antiquities Act authorizes the designation of national monuments in the ocean

The Antiquities Act empowers the President to preserve federal areas of scientific or historic value as national monuments. 54 U.S.C. § 320301(a)-(b). As the Supreme Court has explained, an "essential purpose of monuments created pursuant to the Antiquities Act" is to conserve the "natural and historic objects and the wild life therein … for

the enjoyment of future generations." *Alaska v. United States*, 545 U.S. 75, 103 (2005) (quotation marks omitted).

Starting with Theodore Roosevelt, who signed the Act into law, Presidents have used this authority to protect a wide array of scientifically and historically valuable public resources. These include geological wonders like Devils Tower and the Grand Canyon, historic sites like the Statue of Liberty and the Birmingham Civil Rights Monument, and vibrant ecosystems like Misty Fjords and Giant Sequoia. *See* Nat'l Park Serv., *Antiquities Act: Maps, Facts, & Figures*, https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited May 29, 2019).

By its terms, the Antiquities Act applies broadly to all "land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). This includes not only dry land, but also submerged land, as all three branches have long understood. Some of the nation's earliest and most iconic monuments have included reservations of submerged lands and waters. *See, e.g.*, Proclamation No. 1733, 43 Stat. 1988, 1989 (1925) (establishing Glacier Bay National Monument, encompassing "tract of land" that included bay and inlet areas); Proclamation No. 3656, 30

Fed. Reg. 6571 (1965) (expanding Statue of Liberty National Monument to include "submerged lands" around Ellis Island).

As early as the 1930s, Presidents used their Antiquities Act authority to protect marine ecosystems off the coast in national monuments. *See* Proclamation No. 2330, 53 Stat. 2534 (1939) (expanding Glacier Bay monument to include submerged lands up to three nautical miles from Alaska's coast); Proclamation No. 2112, 49 Stat. 3430, 3431-001 (1935) (establishing Fort Jefferson National Monument off Florida's coast); *see also* 4 Fed. Reg. 4958 (1939) (prescribing fishing restrictions to protect marine life within Fort Jefferson). This practice continued, unquestioned, in the following decades. *See, e.g.*, Proclamation No. 2825, 63 Stat. 1258 (1949) (expanding Channel Islands National Monument off California's coast to include area within one nautical mile of islands' shorelines).

Congress enacted the Antiquities Act in 1906, at a time of significant territorial expansion.[2] As the United States' authority

[2] In 1898, for example, the United States annexed the Hawaiian Islands, *see* Joint Resolution, July 7, 1898, 30 Stat. 750, and acquired Puerto Rico, Guam, and the Philippines from Spain, *see* Treaty of Paris, Dec. 10, 1898, 30 Stat. 1759. In 1900, the United States acquired parts

expanded into new areas, so did scientific interest in the resources found there, and thus Presidents designated monuments in these areas after they came within the federal government's ownership or control. For example, some forty years after the United States acquired the U.S. Virgin Islands from Denmark, *see* 39 Stat. 1706 (1917), President Kennedy designated Buck Island Reef National Monument there to protect coral reefs of "great scientific interest," Proclamation No. 3443, 27 Fed. Reg. 31 (1961). Presidents Ford and Clinton later expanded that monument to encompass additional coral reefs and marine habitats. *See* Proclamation No. 4346, 40 Fed. Reg. 5127 (1975) (adding thirty acres of submerged land); Proclamation No. 7392, 66 Fed. Reg. 7335 (2001) (adding another 18,135 acres of submerged land). President Clinton also designated Virgin Islands Coral Reef National Monument to protect a "tropical marine ecosystem" off the island of St. John. Proclamation No. 7399, 66 Fed. Reg. 7364 (2001).

The Supreme Court has had multiple occasions to consider the President's authority to protect submerged lands as national

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of American Samoa. *See* Convention between the United States, Germany, and Great Britain, 31 Stat. 1878 (1900).

monuments—including lands in the ocean. Each time, the Court affirmed that "the Antiquities Act empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 103; *see California II*, 436 U.S. at 36 & n.9 ("There can be no serious question" that the President had authority to reserve "submerged lands and waters" off Channel Islands in Pacific Ocean); *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976) (President had authority to reserve subterranean pool and appurtenant waters in Death Valley National Monument).

Congress, too, has acted repeatedly to protect marine ecosystems as national monuments. In 1968, Congress specifically authorized establishing Biscayne National Monument, comprising a cluster of islands and surrounding submerged lands off Florida's coast, "to preserve and protect … a rare combination of terrestrial, marine, and amphibious life." Pub. L. No. 90-606, § 1, 82 Stat. 1188 (1968). Congress later expanded the monument with additional "acres of land and water." Pub. L. No. 93-477, § 301(1), 88 Stat. 1445, 1446 (1974).[3] In

[3] *See also* U.S. Dep't of the Interior, Final Environmental Statement for General Management Plan: Biscayne National Monument 33 (Sept. 1978), https://tinyurl.com/y7mghdlj ("The total area [of the monument] is 103,701 acres, 99,398 acres of which are submerged.").

1974, Congress also expressly retained federal title to "all submerged lands within the Buck Island Reef National Monument," Pub. L. No. 93-435, § 1(b)(xi), 88 Stat. 1210, 1211 (1974), which President Kennedy had designated to protect "undersea coral reef formations" and "rare marine life" in the Caribbean Sea, 27 Fed. Reg. at 31. And in 1980, Congress fine-tuned the boundaries of Fort Jefferson National Monument off Florida's coast, "recogniz[ing] the need" for protecting the monument's "marine environments," including "coral formations, fish and other marine animal populations." Pub. L. No. 96-287, § 201, 94 Stat. 599, 600-01 (1980).[4]

II. The federal government expands its control in the ocean

The United States' maritime boundaries, just like its terrestrial boundaries, have expanded over time. The United States historically claimed a "territorial sea" encompassing the submerged lands and waters three nautical miles off its coast. *See United States v. California*

[4] *Compare* 49 Stat. at 3431-1 (map depicting original monument), *with* S. Rep. No. 96-665 at 15 (1980) (map depicting revised boundaries); *see also* U.S. Dep't of the Interior, General Management Plan, Environmental Assessment: Fort Jefferson National Monument 1-2 (1983), https://tinyurl.com/yccurz97 (revised monument encompassed 64,657 acres, of which only 85 acres were islands).

(*California I*), 332 U.S. 19, 32-34 & n.16 (1947), *as supplemented*, 332 U.S. 804 (1947). During the twentieth century, however, the federal government extended its authority into new ocean areas.

The United States' early assertions of authority beyond the territorial sea focused primarily on oil and gas resources in the submerged lands of the continental shelf. *See, e.g.*, Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945) (asserting U.S. jurisdiction over submerged lands and subsoil of continental shelf for purposes of managing disposition of natural resources); Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331 *et seq.*) (asserting U.S. control over continental shelf and authorizing Interior Secretary to lease these submerged lands for oil and gas development).

In the decades that followed, the United States increasingly began to manage natural resources and regulate other activities in the water column above those submerged lands as well. *See, e.g.*, Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended at 16 U.S.C. §§ 1431 *et seq.*; 33 U.S.C. §§ 1401 *et seq.*); Fishery Conservation and Management Act of

1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801 *et seq.*).

These developments led to international negotiations that culminated, in 1982, with the United Nations Convention on the Law of the Sea. *See* U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (hereinafter UNCLOS). Codifying the emergent international consensus, the Convention delineated three principal zones in the ocean: territorial seas, exclusive economic zones, and the high seas. *Id.*, arts. 2, 55, 86; *see* Restatement (Third) of Foreign Relations Law of the United States § 511 (1987) (hereinafter Restatement). While the United States did not ratify the Convention, these provisions are now accepted as binding customary international law. *See, e.g.*, Restatement § 514 cmt. a.

First, the Convention allowed coastal nations to extend their territorial seas from three to twelve nautical miles. UNCLOS, art. 3. A coastal nation's authority over its territorial sea is substantial, but not plenary: it must allow foreign vessels the right of innocent passage under international law. *Id.*, arts. 17-26; Restatement §§ 512-13.

Second, beyond the territorial sea, the Convention recognized a new area of coastal-state control—called the exclusive economic zone—that may extend out to 200 nautical miles. UNCLOS, arts. 55-57. Within its exclusive economic zone, a coastal nation has "sovereign rights" for a wide range of purposes, including "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil." *Id.*, art. 56(1)(a). The coastal nation also has "jurisdiction" in this zone over "the protection and preservation of the marine environment," among other things. *Id.*, art. 56(1)(b).[5]

Third, beyond the exclusive economic zone lies the high seas, where no nation exercises sovereign rights. *Id.*, arts. 86-89.

Shortly after the Convention was finalized, President Reagan incorporated these concepts into federal law. He extended the U.S. territorial sea to twelve nautical miles, *see* Proclamation No. 5928, 54 Fed. Reg. 777 (1988), and he established a U.S. Exclusive Economic

[5] The Convention also affirmed the concept of the "continental shelf," which overlaps geographically with the exclusive economic zone, but applies only to the seabed and subsoil. UNCLOS, arts. 76-77; *see* Restatement § 515(1).

Zone extending 200 nautical miles out to sea, *see* Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983). Most importantly, within this newly established Exclusive Economic Zone, President Reagan's proclamation declared that the United States has:

> (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 establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

Id. These "sovereign rights" and "jurisdiction" extend as far as permitted by international law, while not displacing other nations' traditional rights to navigation, overflight, and laying submarine cables. *Id*. at 10,605-06.

Since at least 1983, then, the U.S. Exclusive Economic Zone—including the seabed, the water column above it, and the living and non-living natural resources within it—have been subject to the United States' jurisdiction and control.

III. The Office of Legal Counsel affirms the Antiquities Act's application in the U.S. Exclusive Economic Zone, and Presidents of both parties establish monuments there

As the United States' control in the ocean expanded, so did its "understanding of ocean ecosystems" and its national interest in preserving special places for scientific study and the benefit of future generations. APP42. Thus, in 2000, the Department of Justice's Office of Legal Counsel considered the Antiquities Act's application in the ocean in light of President Reagan's proclamations. *See* Memorandum from Randolph Moss, Assistant 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, 185-200 (2000), https://www.justice.gov/file/19366/download.

The Office of Legal Counsel concluded that, given the expansion of U.S. control in the ocean in the 1980s, the federal government "control[s]" the extended territorial sea and the U.S. Exclusive Economic Zone for purposes of protecting the marine environment under the Antiquities Act, 54 U.S.C. § 320301(a). The Office concluded, first, that the federal government's authority in the extended territorial sea "easily satisfied" the Act's requirement of "control," even though it

was qualified by certain international obligations. 24 Op. O.L.C. at 186-87 & nn.2, 6 (citing *California II*, 436 U.S. at 36 & n.9). For similar reasons, although the question was "closer" than in the territorial sea, the Office also concluded that the federal government "controlled" the U.S. Exclusive Economic Zone. *Id.* at 196-97. The Office explained that the United States has a "significant amount of overall authority to exercise restraining and directing influence" in the area—indeed, more than "any other sovereign entity"—including "substantial authority" to regulate "for the purpose of protecting the marine environment." *Id.* These factors, taken together, "give the United States sufficient 'control' over the [area] for the President to invoke the Antiquities Act for the purposes of protecting the marine environment." *Id.* at 197.

Following the Office of Legal Counsel's opinion, Presidents of both parties designated national monuments in the U.S. Exclusive Economic Zone, safeguarding some of the most scientifically significant, rare, and vulnerable ecosystems and species in U.S. waters.

In 2006, President George W. Bush designated the Northwestern Hawaiian Islands national monument to protect a "dynamic reef ecosystem with more than 7,000 marine species." Proclamation No.

8031, 71 Fed. Reg. 36,443 (2006); *see* Proclamation No. 8112, 72 Fed. Reg. 10,031 (2007) (renaming the monument Papahānaumokuākea). In 2009, he designated three more monuments: Marianas Trench, protecting the "deepest known points in the global ocean" and the "greatest diversity of seamount and hydrothermal vent life yet discovered," Proclamation No. 8335, 74 Fed. Reg. 1557 (2009); Pacific Remote Islands, protecting "endemic species including corals, fish, shellfish, [and] marine mammals," Proclamation No. 8336, 74 Fed. Reg. 1565 (2009); and Rose Atoll, protecting a "reef ecosystem that is home to a very diverse assemblage of terrestrial and marine species, many of which are threatened or endangered," Proclamation No. 8337, 74 Fed. Reg. 1577 (2009).

President Obama later expanded two of those monuments to the limits of the U.S. Exclusive Economic Zone. *See* Proclamation No. 9173, 79 Fed. Reg. 58,645 (2014) (expanding Pacific Remote Islands); Proclamation No. 9478, 81 Fed. Reg. 60,227 (2016) (expanding Papahānaumokuākea). He also established a new monument in the Atlantic Ocean: Northeast Canyons and Seamounts. *See* Proclamation No. 9496, 81 Fed. Reg. 65,161 (2016) (APP42-51). This designation was

supported by a broad and diverse coalition, including state and federal elected officials, and it incorporated public and stakeholder input, including from commercial fishermen. D. Ct. Dkt. No. 19-2 at 15.

IV. The Monument protects a dramatic and fragile undersea landscape

Following in the tradition of other national monuments, Northeast Canyons and Seamounts protects a "region of great abundance and diversity as well as stark geological relief." APP42. Located roughly 130 miles southeast of Cape Cod, the Monument lies entirely within the U.S. Exclusive Economic Zone. *Id.* The proclamation designating the Monument specifies that the "canyons and seamounts themselves, and the natural resources and ecosystems in and around them," are "objects of historic and scientific interest." APP43.

The area has long been the subject of "intense scientific interest" because of its unusual geological phenomena, its biodiversity, and the complex ecological relationships found there. APP45. Yet only recently—using aerial surveys, research vessels, and submersibles—have researchers been able to study the area closely. *Id.* "Much remains to be discovered about these unique, isolated environments" in and around the canyons and seamounts. *Id.*

The canyons and seamounts are themselves important geological features, but they also create a dynamic and ecologically rich marine environment. The steep slopes of the canyons and seamounts generate strong currents that lift nutrients up to the ocean surface, fueling phytoplankton and zooplankton growth, which in turn support abundant fish populations and animals further up the food chain. APP43. Marine mammals (including rarely seen beaked whales and endangered sperm whales), sea turtles, seabirds, and numerous fish species congregate in the area. APP43-45. It is also home to cold-water corals and other invertebrates, including "rare and endemic species, several of which are new to science and not known to live anywhere else on Earth." APP45. Some corals here "are hundreds or thousands of years old," APP44, and their slow growth rates make them acutely vulnerable to disturbance.

To protect these "vibrant ecosystems" and "vulnerable ecological communities," the President designated the Monument, encompassing the three canyons and four seamounts as well as the ecosystems in and around them. APP42-51. To ensure the "proper care and management of the objects to be protected," APP46, and in light of their "extreme[]

sensitiv[ity] to disturbance from extractive activities," APP43, the proclamation prohibited commercial extractive activities within the Monument, including "[e]xploring for, developing, or producing oil and gas or minerals," and "[f]ishing commercially," APP48-49.[6] The President explained that the Monument reservation is the "smallest area compatible" with the protection of the designated objects. APP46.

V. The district court upholds the Monument's designation

Plaintiffs, five commercial fishing trade associations, challenged the Monument's designation as a "[v]iolation of the Antiquities Act." APP23. They advanced two arguments: first, that the Monument does not contain "'lands owned or controlled' by the federal government," and second, that it is not "'the smallest area compatible with proper care and management' of the canyons and seamounts." APP24. Three conservation groups and a naturalist who leads whale-watching trips intervened to defend the Monument. *See* APP59-60.

The district court upheld the Monument's designation and dismissed Plaintiffs' complaint. It explained that "Supreme Court

[6] To give fishermen transition time, the proclamation specified that American lobster and red crab fishing could continue for seven years. APP49.

precedent, executive practice, and ordinary meaning" all confirmed that national monuments may protect submerged lands and water in the ocean, and that while both the Sanctuaries Act and Antiquities Act "address environmental conservation in the oceans," they "do so in different ways and to different ends." APP64-71. The court also concluded that the federal government controls the Monument area for purposes of the Antiquities Act, emphasizing the United States' substantial overall authority in its Exclusive Economic Zone, its specific authority over managing and conserving natural resources, and the fact that no private person or sovereign entity rivals its control in this area. APP78-82. Finally, the district court dismissed Plaintiffs' challenge to the Monument's size because Plaintiffs offered "no factual allegations explaining why the entire Monument, including not just the seamounts and canyons but also their ecosystems, is too large." APP84-86.

Plaintiffs did not attempt to amend their complaint, and instead filed this appeal.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal of Plaintiffs' complaint. *Tulare County*, 306 F.3d at 1140. In *Mountain*

States and *Tulare County*, this Court set out a framework for judicial review in Antiquities Act cases like this one. *See* APP62-63.

Specifically, to the extent a plaintiff's claim turns on a question of statutory interpretation—e.g., whether a monument area constitutes "land owned or controlled by the Federal Government," 54 U.S.C. § 320301(a)—the court may resolve that question "as a matter of law." *Mountain States*, 306 F.3d at 1137; *see Tulare County*, 306 F.3d at 1141-42 (holding that ecosystems qualify as "objects of interest" under the Act, and that designating them for protection "did not contravene the terms of the statute").

To the extent a plaintiff's claim involves a factual component—e.g., whether a monument is not the "smallest area compatible" with protection of the designated objects, 54 U.S.C. § 320301(b)—it can survive a motion to dismiss only if the complaint includes plausible, non-conclusory factual allegations that the President acted beyond statutory limits. *See Mountain States*, 306 F.3d at 1137; *Tulare County*, 306 F.3d at 1142 (rejecting claim that a monument "includes too much land" because the complaint "does not make the factual allegations sufficient to support its claim[]").

On appeal, Plaintiffs recharacterize their sole statutory claim for relief as a constitutional one. *Compare* APP23 ("Claim for Relief: Violation of the Antiquities Act"), *with* OB23 ("The monument violates the separation of powers."). Whatever rhetorical advantage Plaintiffs hope to gain by this reframing, it does not change the standard of review, or the outcome. *See Mountain States*, 306 F.3d at 1136 (judicial review is available to ensure consistency with "constitutional principles" and "statutory authority"). Plaintiffs' arguments about the reach of the Antiquities Act fail as a matter of law, and their conclusory allegations about the Monument's size are insufficient to state a claim for relief.

SUMMARY OF ARGUMENT

The President lawfully exercised his authority under the Antiquities Act to designate the Monument and protect its natural resources for future generations. As the district court correctly held, the Monument's submerged lands and waters are controlled by the federal government, and this Court's precedent forecloses Plaintiffs' challenge to the Monument's size.

First, all three branches have long understood that the Antiquities Act authorizes the President to reserve submerged "land" and

appurtenant waters in national monuments, including in the ocean. § I.A, *infra*. Presidents have protected submerged ocean lands in monuments since the 1930s; Congress itself has approved and expanded monuments in the ocean; and the Supreme Court has repeatedly and unequivocally endorsed the practice. Plaintiffs bury the controlling Supreme Court cases at the end of their brief, and they attempt to manufacture a conflict with the National Marine Sanctuaries Act. But Congress has explicitly recognized that monuments and sanctuaries can—and do—coexist and complement each other in the ocean.

Second, the federal government exercises substantial, unrivaled "control" over the submerged lands and waters of the Monument, including for the specific purpose of managing natural resources and protecting the marine environment. § I.B, *infra*. The Antiquities Act thus authorized the President to designate the Monument there because the federal government's control is sufficient to accomplish the purpose of the Monument—that is, protecting its natural resources for future generations. Plaintiffs' contrary arguments ignore Supreme Court caselaw, the ordinary meaning of the word "control," and the modern reality of U.S. authority in this part of the ocean—which has

been settled since at least 1983, when President Reagan established the U.S. Exclusive Economic Zone.

Finally, Plaintiffs' conclusory challenge to the Monument's size suffers from the same pleading deficiency this Court identified in prior cases. § II, *infra*. Even if Plaintiffs were correct (which they are not) that the Monument's boundaries bear little relation to the canyons and seamounts, that still would not state a claim for relief because the Monument expressly protects not just the canyons and seamounts themselves, but also the natural resources and ecosystems in and around them. Plaintiffs try to avoid this result by reframing their argument on appeal, but their complaint unambiguously rested on the erroneous premise that the Antiquities Act does not authorize the protection of ecosystems. This Court's precedent squarely forecloses any such argument. Plaintiffs' complaint must be dismissed.

ARGUMENT

I. The President had authority to establish the Monument

The President lawfully exercised his authority under the Antiquities Act to designate the Monument—and to protect its unique and fragile resources for the benefit of future generations—because its

submerged lands and waters are controlled by the federal government. Submerged lands qualify as "land" under the Act, 54 U.S.C. § 320301(a), and the federal government has substantial and unrivaled "control[]" over these lands and waters, *id.*, including for the specific purpose of managing natural resources and protecting the marine environment.

A. The Antiquities Act authorizes the reservation of submerged "land" in the ocean

Plaintiffs' lead argument—that the word "'land' excludes the ocean," and so only sanctuaries, not monuments, can exist there, OB25-39—need not detain the Court for long. The Supreme Court, Congress, and the Executive Branch have long and consistently affirmed that the Antiquities Act's reference to "land" includes submerged land in the ocean.

1. All three branches agree that the Antiquities Act applies to submerged land in the ocean

Forty years ago, considering President Truman's 1949 expansion of Channel Islands National Monument, the Supreme Court observed that there is "no serious question" the President had "power under the Antiquities Act to reserve the submerged lands and waters" off California's coast. *California II*, 436 U.S. at 36. The Antiquities Act's

reference to "land" encompasses *submerged* lands, the Court explained, and thus "also authorizes the reservation of waters located on or over federal lands." *Id.* at 36 n.9; *see also Cappaert*, 426 U.S. at 138-42 (concluding that subterranean pool and fish species were protectable objects situated on "lands owned or controlled by the Government"). The Supreme Court later reaffirmed that unequivocal interpretation, this time considering President Franklin Roosevelt's 1939 expansion of Glacier Bay National Monument to include bay waters and extend the monument three nautical miles out to sea. "It is clear," the Supreme Court explained, "that the Antiquities Act empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 103.

It is not surprising that the Supreme Court saw no serious question on this point. The widely accepted legal definition of "land," including at the time of the Antiquities Act's passage, encompassed submerged land. *See, e.g.*, Black's Law Dictionary 694 (2d ed. 1910) (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)). Other statutes enacted around the time of the Antiquities Act also used the term "land" to

encompass submerged lands under navigable waters, including in the ocean. *See, e.g.*, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) ("body of lands known as Annette Islands" in 1891 statute included adjacent submerged lands and waters); *N. Side Canal Co. v. Twin Falls Canal Co.*, 12 F.2d 311, 314 (D. Idaho 1926) ("land" in Judicial Code of 1911 "includes waters upon the land"). As these contemporaneous authorities confirm, "[l]ands are not the less land for being covered with water." *Ill. Cent. R.R. Co. v. City of Chicago*, 176 U.S. 646, 660 (1900); *see also, e.g.*, *California I*, 332 U.S. at 22-39 (repeatedly using the term "land" to describe submerged ocean lands); *United States v. Texas*, 339 U.S. 707, 709-17 (1950) (same).[7]

[7] Contrary to Plaintiffs' suggestion, OB38, *Illinois Central* recognizes the "general principle" that the term "land" encompasses submerged land. 176 U.S. at 660. To be sure, because navigable riverbeds are owned by the state, *see PPL Montana, LLC v. Montana*, 565 U.S. 576, 590-91 (2012), they are generally not included in an "ordinary *grant* of land," *Ill. Cent.*, 176 U.S. at 660 (emphasis added). And because the state holds title in its public trust capacity, a "grant of lands by the state does not pass title to submerged lands" absent some contrary indication. *Id.* at 659-60. This does not affect the general meaning of "land," however, especially when used "not in the nature of a private grant," *Alaska Pac. Fisheries*, 248 U.S. at 88, but rather in a federal statute—like the Antiquities Act—that authorizes the preservation of federal land for future generations. *California II*, 436 U.S. at 36 & n.9.

Moreover, as to the Antiquities Act specifically, both Congress and the Executive Branch have uniformly shared the Supreme Court's view. Presidents have protected submerged ocean lands as national monuments consistently since 1935, *see supra* 7-8 (discussing, e.g., Fort Jefferson, Buck Island Reef, and Virgin Islands Coral Reef monuments), and not simply "ponds and bays" within "land-based monuments," as Plaintiffs would have it, OB13. Congress, likewise, has expressly—and repeatedly—approved and expanded national monuments comprised of submerged land off the nation's coasts. *See supra* 9-10 (discussing, e.g., Biscayne, Buck Island, and Fort Jefferson monuments).

As Plaintiffs acknowledge, OB24, "the meaning of one statute" may be illuminated "by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Here, Congress's subsequent statutes regarding these monuments confirm the three branches' shared understanding that the Antiquities Act, by its terms, encompasses submerged lands, and that monuments may protect natural resources in the ocean. Plaintiffs' arguments about

congressional acquiescence are therefore beside the point, OB31-35, as they fail to address these confirmatory enactments.

2. Plaintiffs' efforts to side-step the Supreme Court's decisions are unavailing

Plaintiffs ignore the long history of inter-branch agreement that national monuments may protect submerged lands in the ocean, erroneously characterizing this Monument as based on some "novel interpretation" that "broke from a century of presidential practice." OB21. Their characterization is unmoored from historical fact, *see supra* 7-10, and, tellingly, they bury the Supreme Court's pronouncements on the Antiquities Act's scope near the end of their brief, OB54-57. But there is no escaping the Supreme Court's repeated and unequivocal conclusion that the President's authority to reserve submerged land is "clear." *Alaska*, 545 U.S. at 103.

Plaintiffs first try to shrug off the Supreme Court's conclusion as dicta. OB55. But as the district court observed, the Supreme Court in *Alaska* "went out of its way," APP65, to explain that the President's reservation of submerged lands and waters in the monument was a "necessary part of the reasoning" in that case, 545 U.S. at 101. Had the President lacked authority to reserve submerged lands in the

monument, the result would have been different. *Id.* at 105, 109-10 (holding that the submerged lands did not pass to Alaska at statehood because they were "set apart as … reservations for the protection of wildlife").[8] The Supreme Court's admonition about the President's "statutory authority" "is, therefore, not dictum," because it was a "necessary antecedent" to the Court's resolution of the case. *In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019); *see also United States v. Windsor*, 570 U.S. 744, 758-59 (2013) (legal conclusion "not dictum" where "[i]t was a necessary predicate to the Court's holding").

In any event, the Supreme Court's "carefully considered language" generally "must be treated as authoritative," even if it were "technically dictum." *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) (quotation marks omitted). This is "especially" so 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). Courts are also

[8] Plaintiffs suggest the only thing necessary to the Supreme Court's holding was "the *fact*" that the President had reserved submerged lands pursuant to the Antiquities Act. OB55 n.15. But Plaintiffs do not explain how that necessary "fact" could exist unless the President had authority to reserve such lands in the first place. To the extent the parties did not contest such authority, that is because the answer is—and already was—"clear." *Alaska*, 545 U.S. at 103.

"particularly" respectful of the Supreme Court's "reading of [a] statute" when its interpretation is "expressed so unequivocally." *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996). Accordingly, the Court should "decline [Plaintiffs'] invitation to flout the Supreme Court's" repeated, unequivocal pronouncements. *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009).

Plaintiffs' various attempts to distinguish the Supreme Court's decisions are equally unavailing. For example, Plaintiffs note that the monuments in those cases included some dry land in addition to submerged lands, OB55-56, but, as the district court observed, Plaintiffs offer no explanation "[w]hy this would make a difference for the purpose of construing the word 'land' in the Antiquities Act," APP67. Those cases did not involve any "blurred line" or "potential gray area," as Plaintiffs falsely suggest, OB56, but rather addressed monument expansions that extended as far as "three nautical miles out to sea." *Alaska*, 545 U.S. at 101; *see id.* app. C (map depicting Glacier Bay monument expansion); *California II*, 436 U.S. at 34 (noting Channel Islands monument extended "one nautical mile" offshore). Nor does it matter, for this purpose, that the monuments in those cases

included submerged land in the territorial sea and not elsewhere in the ocean. OB57. Plaintiffs erroneously suggest the territorial sea qualifies as "inland waters," *id.*, but that is incorrect. *See United States v. Maine*, 469 U.S. 504, 512-13 (1985) (defining "inland waters"). The monuments in *Alaska* and *California II* included ocean, not just inland, submerged lands and waters.[9] Thus, just as the submerged lands at issue in *Alaska* and *California II* "are 'lands' under the Antiquities Act, so are the submerged canyons and seamounts in the Atlantic Ocean." APP67.

Plaintiffs' selective quotations from certain dictionary definitions, OB36-37, cannot avoid this "inescapable" conclusion either. APP67. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486-87 (2006) (affording precedent "decisive weight" in interpreting statute, rather than relying on the "definition of words in isolation"). Some of the dictionaries on which Plaintiffs rely specifically include "land under water" as an appropriate use of the word "land," Webster's New Int'l Dictionary 1209 (1909) (third of twelve definitions), and recognize that "land," in "its

[9] Plaintiffs' other effort to distinguish those cases as purportedly involving only submerged land "owned" by the federal government, OB57, is also wrong, *see infra* 55-56, and—in any event—irrelevant to the meaning of the word "land."

more wide legal signification," "extends also to … waters," 6 Oxford English Dictionary 47 (1st ed. 1908). The Act's reference to "parcels of land" does not help Plaintiffs' cause either. 54 U.S.C. § 320301(b); *see* Webster's New Int'l Dictionary 1566 (1909) (defining "parcel" in legal usage as "[a] part; portion; piece"). Contrary to Plaintiffs' suggestion, OB37, the term "parcels" can—and does—describe areas of submerged land in the ocean. *See, e.g., Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 492-93, 502-04 (9th Cir. 2014) (describing "parcels" of submerged ocean land available for oil and gas leasing); 43 U.S.C. § 1313(a) (using "parcels of land" in Submerged Lands Act).

The many Supreme Court opinions and contemporaneous statutes discussed above (at 26-28) demonstrate that using the term "land" to encompass submerged lands is not some "specialized" usage, as Plaintiffs characterize it. OB38. Plaintiffs try to make something of the fact that Congress, when providing an express definition in another statute many decades later, defined the term "land" as "lands, waters, and interests therein." OB38-39 (discussing Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 102(1), 94 Stat. 2371, 2375 (1980) (hereinafter ANILCA)). But that statutory definition

merely reaffirms the general principle that "land" includes submerged lands and appurtenant waters. And Plaintiffs notably neglect to mention that this same statute used the term "land" in describing national monuments that contain submerged land and coastal waters. *See* ANILCA §§ 201(3), 503(a), 94 Stat. at 2378, 2399 (describing Cape Krusenstern and Misty Fjords monuments).[10] Indeed, other monument-related legislation around this same time also confirmed Congress's understanding that national monuments may include "lands, waters, and interests therein." Pub. L. No. 96-287, § 201, 94 Stat. at 600-01 (describing Fort Jefferson monument); *see also, e.g.*, Pub. L. No. 90-606, § 2(a), 82 Stat. at 1188 (describing Biscayne monument).

3. The Sanctuaries Act does not limit the Antiquities Act's reach

Because the Antiquities Act itself does not support Plaintiffs' interpretation of "land," they resort to another argument—also

[10] While Plaintiffs note this statute "rescinded" certain monuments, OB8, it also established four large national monuments and expanded and re-classified others. ANILCA §§ 201(1), (3), 503(a)-(b), 94 Stat. at 2378, 2399 (establishing Aniakchak, Cape Krusenstern, Misty Fjords, and Admiralty Island monuments, together comprising roughly 4 million acres); *id.* § 202, 94 Stat. at 2382 ("expand[ing]" Glacier Bay and Katmai monuments and re-designating them as parks).

foreclosed by the caselaw and history described above—that the National Marine Sanctuaries Act somehow precludes designating national monuments in the ocean. OB24-30. Plaintiffs' argument "misconceives federal laws as not providing overlapping sources of protection." *Mountain States*, 306 F.3d at 1138.

Indeed, this Court rejected a nearly identical argument in *Mountain States*. The plaintiffs in that case argued that "the Antiquities Act must be narrowly construed" to avoid conflict with subsequently enacted statutes—there, the Wilderness Act and Endangered Species Act—that purportedly provided the "sole means" for protecting various environmental values. *Id.* This Court recognized that several statutes serve these "overlapping" purposes, but none displaced the Antiquities Act. *Id.*; *accord Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1192-93 (D. Utah 2004) (rejecting similar argument and observing that "the Antiquities Act and the Wilderness Act may provide overlapping sources of protection to land that fits within the parameters of both acts," but "nothing in either [statute] prevents such lands from being part of a national monument"), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

In other words, that Congress later "expanded the Executive's tools to protect the environment"—even in arguably more "targeted way[s]"—does not negate "Congress's prior authorization to the Executive to designate national monuments." APP69-70; *see* 24 Op. O.L.C. at 207 ("Nothing in [the Antiquities] Act precludes the President from … designating monuments on lands … reserved under other statutes." (citing examples)); *cf. Cameron*, 252 U.S. at 455 (recognizing that preexisting "forest reserve remained effective after the creation of the monument," even where "both embraced the same land"). Rather, when Congress wishes to constrain the President's delegated authority to designate monuments, it knows how to do so expressly. *See* OB8 (discussing congressional limitation on withdrawals in Alaska).

Plaintiffs try to distinguish this Court's holding in *Mountain States* by observing that the Endangered Species Act applies to private as well as public land, whereas "[a]ny area that could be designated as a marine sanctuary could be more easily designated as an ocean monument." OB28-29. Yet this Court's holding also addressed the Wilderness Act, which Plaintiffs do not even attempt to distinguish here. *See Mountain States*, 306 F.3d at 1138. Wilderness designations

apply only to "federally owned areas" and require congressional action to complete. 16 U.S.C. § 1131(a). Thus, in Plaintiffs' parlance, "[a]ny area that could be designated as [wilderness] could be more easily designated as [a] monument." OB28-29.[11] Because *Mountain States* found no conflict between the Wilderness Act and the Antiquities Act, it squarely forecloses Plaintiffs' argument here.

Moreover, in the Sanctuaries Act itself, Congress clearly understood marine sanctuaries to be one of several types of protected areas in the ocean. *Contra* OB25. An express purpose of the Act is to "*complement*[] existing regulatory authorities." 16 U.S.C. § 1431(b)(2) (emphasis added). Thus, the Sanctuaries Act "specifically envisions" that other sources of protection may apply to areas eligible for designation as marine sanctuaries. 24 Op. O.L.C. at 210. Plaintiffs repeatedly quote the Act's finding that other protective designations are "almost exclusively" directed at terrestrial land, *e.g.*, OB25 (quoting 16

[11] Another example is "areas of critical environmental concern," which—like marine sanctuaries—are protective areas designated by a federal agency pursuant to specified procedures. *See* 43 U.S.C. § 1702(a); 43 C.F.R. § 1610.7-2. As with marine sanctuaries, however, the President clearly has authority to establish monuments in areas otherwise eligible for such designation. *See* 16 U.S.C. § 7202(b)(1)(A) (recognizing national monuments administered by the Bureau of Land Management).

U.S.C. § 1431(a)(1))—but of course, "almost" does not mean "entirely."[12] Both before and after the Sanctuaries Act's passage, Congress has continued to recognize many other protected areas in the marine environment, including: presidential mineral withdrawals on the outer continental shelf, 43 U.S.C. § 1341(a); national wildlife refuges, 16 U.S.C. § 668dd(a)(2); national seashores and other coastal national parks, 54 U.S.C. § 100501; and, as described below, national monuments. *See also* Cong. Research Serv., RL32154, Marine Protected Areas: An Overview 17-23 (2010), https://fas.org/sgp/crs/misc/RL32154.pdf (listing various federal laws that "allow designation of protected areas in the marine environment").

Thus, while the Antiquities Act and Sanctuaries Act may provide "overlapping sources of protection" in the ocean, *Mountain States*, 306 F.3d at 1138, that does not render either of them "entirely redundant," OB25. To the contrary, as the district court explained, the two statutes

[12] Plaintiffs also suggest, erroneously, that this provision supports their sharp distinction between "land" and "ocean." OB37. But Congress specified that, in this instance, it was referring to "land areas *above the high-water mark*," 16 U.S.C. § 1431(a)(1) (emphasis added), because, without such a qualification, the term "land" would naturally encompass submerged lands in the ocean as well. Plaintiffs repeatedly omit that critical language. *See* OB9, OB25, OB33, OB37.

use different mechanisms to serve overlapping (but not identical) goals, and to different ends. APP69-70. For example, only the President may establish national monuments under the Antiquities Act, 54 U.S.C. § 320301(a)-(b), whereas the National Oceanic and Atmospheric Administration (on behalf of the Secretary of Commerce) may designate sanctuaries, 16 U.S.C. § 1433(a).[13] And while the Antiquities Act is "entirely focused on preservation," APP70, the Sanctuaries Act's purposes broadly include facilitating "all public *and private uses* of the resources," 16 U.S.C. § 1431(b)(6) (emphasis added). Unsurprisingly, this purposive distinction tends to produce different levels of protection—e.g., commercial fishing is generally allowed in sanctuaries, but prohibited in marine monuments. Plaintiffs may dislike that distinction, among others, but that does not allow them to strip the President of his delegated authority under the Antiquities Act.

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[13] Plaintiffs complain about the absence of "procedural hoops" in the Antiquities Act, but it "should not surprise," OB26-27, that Congress imposed fewer procedural and substantive limits on the President than on a federal agency. *Cf. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (the President is not an "agency" subject to the Administrative Procedure Act). After all, the Antiquities Act's very purpose was to empower the President to *quickly* protect irreplaceable public resources as national monuments, which Congress may later adjust (or undo) if it so chooses. *Cf. supra* 10 n.4, 35 n.10.

Plaintiffs are also factually incorrect in suggesting that recent national monuments in the ocean have rendered the Sanctuaries Act a "nullity." OB27-28. The National Oceanic and Atmospheric Administration stopped accepting nominations for new sanctuaries in 1995 so it could focus on managing the existing sanctuaries, and it only reopened the sanctuary nominating process in 2014. *See* 79 Fed. Reg. 33,851, 33,852 (2014). Over the last few years, the agency has proposed designating two new sanctuaries, *see, e.g.*, 82 Fed. Reg. 2254 (2017) (Mallows Bay-Potomac River); 82 Fed. Reg. 2269 (2017) (Wisconsin-Lake Michigan); has significantly expanded the size of several existing sanctuaries, *see, e.g.*, 79 Fed. Reg. 52,960 (2014) (increasing nearly tenfold the size of Thunder Bay); 80 Fed. Reg. 13,078 (2015) (more than doubling the size of the Gulf of the Farallones and Cordell Bank); and has started the process to expand yet another, *see* 81 Fed. Reg. 37,576 (2016) (proposing to enlarge Flower Garden Banks).

Contrary to Plaintiffs' contention, then, national monuments and marine sanctuaries can—and do—coexist and "complement[]" each other in the ocean. 16 U.S.C. § 1431(b)(2). In 2012, for example, the National Oceanic and Atmospheric Administration expanded a marine

sanctuary off American Samoa to include the marine areas of Rose Atoll National Monument. 77 Fed. Reg. 43,942 (2012). The agency informed relevant House and Senate committees of its intent to expand the sanctuary to include the monument. *See* 158 Cong. Rec. H6065 (Sept. 18, 2012); 158 Cong. Rec. S7214 (Nov. 29, 2012). Neither committee raised objections. *See* 16 U.S.C. § 1434(a)(6).[14]

In fact, Congress itself has explicitly recognized monuments and sanctuaries as complementary. In 1980, several years after enacting the Sanctuaries Act, Congress "recognize[d] the need" for "protecting … marine environments"—including "significant coral formations, fish and other marine animal populations"—within Fort Jefferson National Monument off Florida's coast. Pub. L. No. 96-287, § 201, 94 Stat. at 600-01. Rather than replace these parts of the monument with a sanctuary, as Plaintiffs might prefer, Congress fine-tuned the monument's boundaries and left it in place. *Id.*; *see supra* 10 n.4. Then, in 1990, when Congress itself established a marine sanctuary in the

[14] Congressional appropriation committees have also recognized that monuments and sanctuaries complement each other in the ocean. *See, e.g.*, S. Rep. No. 109-280, at 94 (2006) (acknowledging designation of Northwestern Hawaiian Islands monument); S. Rep. No. 115-275, at 29 (2018) (supporting scientific research in marine monuments).

Florida Keys, it carefully drew the sanctuary's boundaries to retain, rather than displace, the national monument. *See* Pub. L. No. 101-605, § 5(b)(1), 104 Stat. 3089, 3090 (1990). If Congress had intended sanctuaries to be the *only* protected marine areas in the ocean, as Plaintiffs insist, it would not have expressly retained the monument and its longstanding protections for the marine environment.

* * *

In short, there is "no serious question" that the Antiquities Act authorizes the reservation of submerged lands in the ocean. *California II*, 436 U.S. at 36; *accord Alaska*, 545 U.S. at 103. Plaintiffs' efforts to re-define "land" as excluding such areas fail as a matter of law.

B. The Monument's submerged lands and waters are "controlled" by the federal government

Plaintiffs also advance an alternative—and, given their heavy reliance on the Sanctuaries Act, inconsistent—statutory argument. Even granting that the Monument contains submerged "land," they contend the federal government does not "control" this area for purposes of the Antiquities Act, 54 U.S.C. § 320301(a). OB39-50. This argument also fails.

"Control" is a practical, non-technical term, meaning to "exercise restraining or directing influence over," "dominate," "regulate," or "hold from action." Webster's New Int'l Dictionary 490 (1909); *see* 2 Oxford English Dictionary 927 (1st ed. 1893) (similar). Since at least 1983, the federal government has exercised substantial and unrivaled control over the Monument area—including, specifically, to manage natural resources and protect the marine environment there. This control allows the government to accomplish the Monument's purpose of preserving its natural resources for future generations.

Against this straightforward interpretation, Plaintiffs argue that the Act requires not just "control," as that term is ordinarily understood, but rather "plenary authority" like the government has over land it owns outright. OB40. As with their arguments regarding "land," this strained construction is foreclosed by the statutory text and Supreme Court caselaw.

1. The federal government controls the U.S. Exclusive Economic Zone

As the district court correctly concluded, the federal government "controls" the Monument area for purposes of the Antiquities Act. APP78. The court reached this determination based on three factors,

echoing the Office of Legal Counsel's earlier analysis and identical conclusion. *See* 24 Op. O.L.C. at 196-97.

First, the United States "exercises substantial general authority" over its Exclusive Economic Zone, including managing "natural-resource extraction," "fisheries' health," and "economic output" there. APP78-79 (citing 48 Fed. Reg. at 10,605); *accord* UNCLOS, art. 56(1); 24 Op. O.L.C. at 196 ("[U]nder customary international law and the 1983 proclamation, the United States maintains a significant amount of overall authority to exercise restraining and directing influence over the [area]."). The federal government has power here to grant or deny vessels permission to fish, 16 U.S.C. §§ 1811, 1824, 1857; to lease submerged lands to third parties for oil and gas development, 43 U.S.C. § 1344; and even to establish artificial islands and installations, *id.* § 1333(d)-(e). The United States therefore has "broad sovereign authority to manage and regulate" its Exclusive Economic Zone, which "obviously tips the scale towards finding that it controls the [area] under the Antiquities Act." APP79.

Second, and crucially for the Monument here, the federal government has "specific authority to regulate the [area] for purposes of

marine conservation." APP79. Indeed, as the Law of the Sea Convention specifically provides, *id.*, one of President Reagan's stated reasons for establishing the U.S. Exclusive Economic Zone was "protection and preservation of the marine environment," 48 Fed. Reg. at 10,605. The federal government has exercised this "substantial authority," 24 Op. O.L.C. at 197 (discussing UNCLOS, arts. 61-62, 65-67, 194), by, among other things, designating marine sanctuaries, 16 U.S.C. § 1433, managing fisheries, *id.* § 1801, and protecting certain submerged lands on the continental shelf from oil and gas leasing, 43 U.S.C. § 1341(a). That the federal government has "specific authority" to protect the environment in this area strongly supports the conclusion that its Exclusive Economic Zone falls within the Antiquities Act's protective ambit. APP80.

Third, as the Exclusive Economic Zone's name suggests, "the federal government's control over the [area] is unrivaled." *Id.* No state, foreign nation, or private party has any interest that "comes close to matching" the federal government's control over this area, "whether for the purposes discussed already or for any others." *Id.* The federal government "exerts greater restraining and directing influence over the

[area] than any other sovereign entity, and that influence, as an overall matter, is extensive." 24 Op. O.L.C. at 196-97.

In short, the district court recognized that the federal government's substantial and unrivaled authority over the Monument area—including for the specific purpose of managing natural resources and protecting the marine environment—suffices to establish "control" under the Antiquities Act. APP78-82. Plaintiffs are thus flat wrong when they mischaracterize the district court's analysis as focusing *only* on the government's "unrivaled authority," irrespective of the "extent" or "degree" of that authority. OB48-49. The district court concluded, expressly, that the federal government has "broad sovereign authority" in the Monument area, including "specific authority … for purposes of marine conservation," APP79, and Plaintiffs never explain why that substantial authority does not qualify as "control" under the Act.

In fact, the management proscriptions in the Monument demonstrate that the federal government's control over this area suffices to accomplish the purpose of the designation—i.e., "the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). For example, to protect objects that are "extremely

sensitive to disturbance from extractive activities," APP43, the proclamation designating the Monument "regulate[s]" and "prohibit[s]" numerous extractive activities, including commercial fishing and energy exploration or development, APP48-50. It also assigns "responsibility for management of activities and species within the monument" to federal agencies and directs them, pursuant to their "applicable legal authorities," to "prepare a joint management plan" and promulgate regulations as "necessary for the proper care and management of the objects." APP47.

That the federal government—and no one else—has authority to "manage[]" the Monument in these ways, 54 U.S.C. § 320301(b), demonstrates its "control[]" of the area, *id.* § 320301(a), as that term is (and was) ordinarily understood. *See* Webster's New Int'l Dictionary 490 (1909); Black's Law Dictionary 403 (10th ed. 2014).

In fact, Congress itself has used the term "control" to describe the federal government's authority in this area. *See, e.g.*, 42 U.S.C. § 6202(10) (defining "'[f]ederal land'" to mean "all lands owned or *controlled* by the United States, including the Outer Continental Shelf" (emphasis added)); 43 U.S.C. § 1331(a) (submerged lands of outer

continental shelf "are subject to [U.S.] jurisdiction and *control*" (emphasis added)). So have the federal courts. *See, e.g.*, *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 27 (1988) (outer continental shelf is "subject to the exclusive jurisdiction and control of the Federal Government"); *Native Vill. of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1091 (9th Cir. 1998) (recognizing "sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast").

Lacking any real response to these authorities, Plaintiffs largely ignore them. Plaintiffs mention the Office of Legal Counsel opinion only in passing, OB32, and they never engage with the Law of the Sea Convention or the proclamation establishing the U.S. Exclusive Economic Zone, *see* OB46, much less with Congress's extensive regulation and management of this area, or its repeated use of the term "control" to describe the federal government's authority here.

Nor do Plaintiffs acknowledge, let alone resolve, a basic inconsistency at the heart of their argument. Plaintiffs recognize, as they must, that the federal government has sufficient control in the U.S. Exclusive Economic Zone to provide for the designation of marine

sanctuaries there. OB25-26 (citing 16 U.S.C. § 1432(3)). Yet Plaintiffs' argument rests on the premise that "the Federal Government"—including Congress—does *not* "control[]" this area. 54 U.S.C. § 320301(a). That is not the law, as Plaintiffs' own favored example, the Sanctuaries Act, demonstrates. *See* OB5 (acknowledging Congress's power to protect special areas in the ocean). Congress plainly has authority to establish monuments, as it does sanctuaries and other protected areas, in the U.S. Exclusive Economic Zone. By virtue of the Antiquities Act's delegation of authority, the President does, too.

2. Plaintiffs' proposed interpretation requiring "plenary authority" is contrary to the statutory text and Supreme Court caselaw

Ultimately, Plaintiffs appear to concede that the Monument area is "controlled" by the United States as that word is ordinarily understood. OB40. They nevertheless urge this Court to reject that ordinary meaning and adopt a "narrower" definition instead. *Id.* In their view, "controlled" must be read to require nothing less than the "plenary authority" the federal government has over land it owns outright. OB40, 42, 45, 49. Yet Plaintiffs identify no dictionary, statute,

or other authority defining "control" in this way, and the Supreme Court has effectively foreclosed Plaintiffs' interpretation.

The Antiquities Act authorizes monuments on land "owned *or* controlled" by the federal government. 54 U.S.C. § 320301(a) (emphasis added). Plaintiffs suggest that by grouping these two terms together, Congress intended for them to have nearly identical meanings. OB40. "Control and ownership, however, are distinct concepts," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003), and Congress highlighted the distinction here by separating the terms with the word "or."

The word "or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014). Its use in the Antiquities Act is no exception. In fact, this Court has emphasized the disjunctive "or" when interpreting the very same phrase in another statute, highlighting the importance of assigning each term—"owned *or controlled*"—an independent meaning. *Nat'l Mining 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 Mining Ass'n*). Plaintiffs' "strained construction" of this same phrase here, however, would "ignore the disjunctive 'or' and rob the

term ['controlled'] of its independent and ordinary significance." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979).

Plaintiffs nonetheless insist that their "narrower" definition of "controlled" is necessary to "avoid[] rendering the inclusion of 'owned' redundant." OB41. But overlap in statutory language is common, especially where, as here, Congress seeks to indicate inclusiveness or dispel doubts about a statute's application. *See, e.g.*, *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 383 (2013). Moreover, Plaintiffs' interpretation does not resolve the purported redundancy problem, for "[a]ll federally owned land," OB41, would be covered under Plaintiffs' *narrower* definition of control, too. *See* APP74. Because Plaintiffs' reading would merely substitute one supposed redundancy for another, the canon against superfluity does them no good. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011).[15]

[15] Plaintiffs maintain their reading gives "owned" an illustrative effect: "it provides the necessary context to interpret the extent of authority required." OB41. But "owned" plays an illustrative role in the district court's construction, too: Because the term is set off from "controlled" with a disjunctive "or," it indicates that de facto control suffices *in the absence of ownership*. *See Nat'l Mining Ass'n*, 177 F.3d at 5.

Plaintiffs' appeal to *noscitur a sociis*—the notion that a word is known by the company it keeps, OB40—is similarly unavailing. The Antiquities Act's pairing of two terms, each "distinct from the other," is "too short to be particularly illuminating," especially when separated by the "'disjunctive' … 'or.'" *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 288 (2010). Plaintiffs argue, in effect, "that pairing a broad statutory term with a narrow one shrinks the broad one," but as the Supreme Court has cautioned, "there is no such general usage." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006). In the absence of ambiguity or other textual cues that grouped words should be construed similarly, their ordinary meaning prevails. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 474-75 (2010) (finding *noscitur a sociis* unhelpful where "the phrase 'wounded … or killed' … contains little ambiguity," and concluding those words "should be read according to their ordinary meaning"); *Reiter*, 442 U.S. at 338-39 (similar, interpreting "business or property").

Here, there is no reason to think Congress meant for the word "controlled" to depart from its ordinary meaning. The most natural reading of the phrase "land owned or controlled" is a capacious one,

reaching both land the U.S. government owns outright (a well identified category) and land it controls but does not own (a more flexible category), which describes the area at issue here. Notably, that is also how Congress used the same phrase in the Energy Policy and Conservation Act years later, which defines "Federal lands" as "all lands owned or controlled by the United States, *including the Outer Continental Shelf*." 42 U.S.C. § 6202(10) (emphasis added).

Plaintiffs' attempt to engraft a heightened standard onto the Antiquities Act—requiring not just "control," but "plenary authority"—contravenes not only the statutory text, but also Supreme Court caselaw. In *Cappaert*, for example, the Court upheld the President's authority to reserve a subterranean pool and appurtenant waters in a national monument. 426 U.S. at 138-42, 147. As the Supreme Court recently explained, the federal government did *not* have "plenary authority" over those appurtenant waters. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1079 (2019). Nevertheless, the federal government could "control" those waters to "'accomplish the purpose of the … reservation,'" *id.* (quoting *Cappaert*, 426 U.S. at 138)—that is, to preserve the "scientific value of the pool" as "natural habitat" for a rare species of fish.

Cappaert, 426 U.S. at 141-42. The Supreme Court's recognition that functional "control," not "plenary authority," suffices to support a monument reservation, *Sturgeon*, 139 S. Ct. at 1079, is fatal to Plaintiffs' position here.

In *California II*, similarly, the federal government's control over the territorial sea was not plenary. Rather, it was limited by other commitments under international law. *See United States v. Louisiana*, 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 Supreme Court saw "no serious question" that the federal government's "control" in the territorial sea sufficed for Antiquities Act purposes. *California II*, 436 U.S. at 35-36; *see* 24 Op. O.L.C. at 186-87 & n.6.

Plaintiffs suggest *California II* "shed[s] no light on the meaning of 'controlled'" because it "concerned areas that the federal government *owned*." OB57 (emphasis added). Not so. The Supreme Court explained, unambiguously, that the President "had power under the Antiquities Act to reserve the submerged lands and waters" of the territorial sea because "they were then '*controlled* by the Government of the United

States.'" *California II*, 436 U.S. at 36 (emphasis added); *see* 24 Op. O.L.C. at 186-87.

Applying the Supreme Court's reasoning to the U.S. Exclusive Economic Zone today yields the same result. *Cf. United States v. Louisiana*, 339 U.S. 699, 704-06 (1950) (extending *California I*'s holding about federal "control" to area beyond the territorial sea). True, the federal government recognizes more international commitments in the U.S. Exclusive Economic Zone than it does in the territorial sea. *Compare* 48 Fed. Reg. at 10,606 (recognizing other nations' rights to overflight, navigation, and laying of cable in Exclusive Economic Zone), *with* 54 Fed. Reg. at 777 (recognizing other nations' right of innocent passage in territorial sea). But that the United States recognizes certain limited rights in the Exclusive Economic Zone does not mean it loses "control" at the twelve-mile mark. *Cf. California I*, 332 U.S. at 36 (states' exercise of police powers in territorial sea "do[es] not detract from the Federal Government's paramount rights in and power over this area").

To be sure, any monument designation must be consistent with the United States' international commitments—in the territorial sea

and Exclusive Economic Zone alike. But "[n]othing in the Antiquities Act prohibits the President from establishing a monument subject to preexisting easements and reservations, and indeed previous monuments have [long] been subject to such reservations." 24 Op. O.L.C. at 187 n.6 (citing, e.g., Giant Sequoia proclamation). Nor is there any serious dispute that the federal government has sufficient "control" over the Monument area, consistent with domestic and international law, to "accomplish the purpose of the … reservation," *Sturgeon*, 139 S. Ct. at 1079—i.e., the "proper care and management of the objects to be protected" here. 54 U.S.C. § 320301(b); *see supra* 47-48.[16]

Plaintiffs also suggest, erroneously, that the federal government exercises greater control over private property than over the U.S. Exclusive Economic Zone, so interpreting the Act to apply to the latter would necessarily allow monuments on "private lands," too. OB45 (drawing depicting Plaintiffs' view of relative authority over different

[16] Plaintiffs appear to contend that the United States lacks authority to protect historic objects in its Exclusive Economic Zone. OB47, 53. *But see, e.g.*, 16 U.S.C. §§ 1433(a)(2)(A), 1432(3) (authorizing designation of marine sanctuaries to protect "historical" values, including in Exclusive Economic Zone). In any event, the Court "need not decide" that issue, APP83, because the federal government can clearly protect the designated objects of interest in the Monument here.

areas). That is plainly wrong: the federal government may not lease privately owned land to third parties for oil and gas development, for example, or construct artificial islands in a privately owned pond, *cf.* *supra* 45 (discussing U.S. authority in Exclusive Economic Zone)—at least without compensating the private owner. *See* APP84. In any event, the Act makes clear that private land cannot be reserved as a national monument unless the owner first "relinquish[es] [it] to the Federal Government." 54 U.S.C. § 320301(c).

Finally, Plaintiffs attempt to support their strained statutory construction with two inconclusive snippets of legislative history, which—they speculate—suggest that Congress's "chief concern was ensuring that the Antiquities Act would apply to Indian lands." OB43. The district court correctly dismissed Plaintiffs' speculation. APP75-76 (describing floor colloquy on which Plaintiffs rely as "highly equivocal"). If Congress had wanted the Antiquities Act to apply *only* to federally owned land and tribal land, as Plaintiffs suggest, it easily could have said so in the statute. Instead, having considered earlier bills that would have applied only to "public lands" (i.e., federally owned land managed by the Interior Department), Congress opted for the more

expansive and flexible phrase "lands owned or controlled," APP74, which left room for monuments in new areas as the federal government expanded its control.

3. Plaintiffs fail to account for the federal government's expanded control

Plaintiffs' argument about U.S. control—indeed, their entire attempt to portray the Monument as based on some "reinterpretation of the Antiquities Act," OB4, 25, 27-28 (citing *Util. Air Regulatory Grp. v EPA*, 573 U.S. 302, 324 (2014))—fails to account for the significant expansion of U.S. authority that occurred in this part of the ocean toward the end of the twentieth century.

By its terms, the Antiquities Act's reach is not frozen in time. Rather, because the Act "extends to lands 'controlled' by the U.S. Government, its reach changes as the U.S. Government's control changes." 24 Op. O.L.C. at 191. Congress enacted the statute at a time of significant territorial expansion, *see supra* 7 n.2, and thus drafted the statute to apply to new areas that the federal government owned or controlled "at the particular time the monument is being established," 24 Op. O.L.C. at 191.

Plaintiffs' observation that the Monument area "constituted high seas *when the Antiquities Act was enacted*" is therefore irrelevant. OB46 (emphasis added). The federal government's control over the ocean expanded significantly in the latter half of the twentieth century. *See supra* 10-14. The question now before this Court is whether the federal government controlled the area *when the Monument was established* in 2016. *See California II*, 436 U.S. at 36 ("[T]he President *in 1949* had power under the Antiquities Act to reserve the submerged lands and waters [of the territorial sea] since they were *then* 'controlled by the Government of the United States.'" (emphases added)). For the reasons explained above (at 44-48), it did.

Plaintiffs' reliance on an outdated Fifth Circuit decision fails for this same reason. OB50-53 (discussing *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978)). Contrary to Plaintiffs' characterization, that decision did not—indeed, because of when it was decided, *could not*—answer "[t]he question at issue here." OB50. In fact, *Treasure Salvors* did not involve a national monument at all. As its name suggests, it was an in rem admiralty suit to settle title to a Spanish shipwreck, which treasure

seekers had discovered "buried under tons of sand in international waters." 569 F.2d at 335. The United States intervened to assert a claim to the ship, citing the Antiquities Act, among other statutes. *Id.* at 337-40. The Fifth Circuit rejected its claim. *Id.*

Crucially for the question now at issue in this case, the Fifth Circuit never considered the federal government's control over the U.S. Exclusive Economic Zone. Nor could it. The Exclusive Economic Zone did not yet exist and would not be incorporated into international or domestic law until several years later. *See supra* 12-14. Thus, because *Treasure Salvors* "predated President Reagan's Proclamation establishing U.S. control" over the Exclusive Economic Zone, APP82, it "does not govern," 24 Op. O.L.C. at 197 n.18, or even address, whether the federal government controlled that area for purposes of the Antiquities Act in 2016, when the Monument here was established.

Instead, the Fifth Circuit focused primarily on the Outer Continental Shelf Lands Act and held that federal regulation of "exploitation of the natural resources of the continental shelf" did not establish control over the area for Antiquities Act purposes. 569 F.2d at 339 (interpreting Outer Continental Shelf Lands Act of 1953 as

"facilitat[ing] exploitation of natural resources"). Whatever its force at the time, the Fifth Circuit's reasoning quickly became outdated. Congress amended that Act several months after *Treasure Salvors*, adding various provisions expressly relating to "protection" of the "marine environment." *E.g.*, Pub. L. No. 95-372, §§ 101(13), 102(2)(B), 102(3), 201(b)(2), 202, 92 Stat. 629, 631-35 (1978). And critically, when President Reagan established the U.S. Exclusive Economic Zone a few years later, he expressly asserted federal control over "protection and preservation of the marine environment." 48 Fed. Reg. at 10,605. Of course, "protection and preservation" are the animating purposes of the Antiquities Act, and of the Monument here.

Thus, even if *Treasure Salvors* was correctly decided in 1978, "its logic," OB51—which focused on "exploitation" of natural resources, 569 F.2d at 338-40—is inapposite today.

* * *

Considering the long history of monuments protecting marine areas, *supra* 7-10, and the relatively recent evolution of U.S. authority in the ocean farther offshore, *supra* 11-14, Plaintiffs' attempt to portray the Monument as a "presidential power grab" based on some "novel

reinterpretation of the Antiquities Act," OB3-4, 32, falls apart. What has changed over time is not the Executive Branch's interpretation of the Antiquities Act, but rather the geographic extent of the land "controlled" by the federal government. 54 U.S.C. § 320301(a). Presidents began designating monuments in the U.S. Exclusive Economic Zone only after it was established, in a manner wholly consistent with domestic and international law. These monuments may be larger than earlier ones, OB12, but that simply reflects the scale of this area and the size of its ecosystems. And, as explained below, this Court's precedent leaves no doubt that ecosystems—even large ones—may be protected under the Antiquities Act.

II. The district court correctly dismissed Plaintiffs' challenge to the Monument's size

Plaintiffs' "smallest area" challenge rests on the legally erroneous premise—foreclosed by this Court's precedent—that the Monument's ecosystems and other natural resources are not "objects to be protected" under the Act. 54 U.S.C. § 320301(b). A straightforward application of this Court's precedent requires dismissal of Plaintiffs' challenge to the Monument's size.

Plaintiffs' complaint alleged that the Monument is "not 'the smallest area compatible with the proper care and management' *of the canyons and seamounts*" because its boundaries purportedly "bear little relation *to the canyons and seamounts*." APP24 (Compl. ¶¶ 72-74 (emphasis added)); *see also* APP11 (Compl. ¶ 3). Even if this allegation were true—which it is not, *see* APP21 (map of the Monument)—it still would not state a valid claim because the canyons and seamounts are not the only objects designated for protection in the Monument.

Rather, the proclamation expressly declared that the Monument's designated objects of interest include both "the canyons and seamounts themselves" *and* "the natural resources and ecosystems in and around them." APP43. The proclamation explained that the President reserved the Monument also to "protect[] *those* objects," APP46 (emphasis added), which it described in detail, APP42-45, and that the reservation "is the smallest area compatible with the proper care and management of the objects to be protected," APP46. As the district court correctly observed, Plaintiffs' complaint contains "no factual allegations explaining why the *entire* Monument"—"including not just the seamounts and canyons but *also their ecosystems*"—"is too large."

APP86 (emphasis added). As a result, the Court "need not undertake further review of the matter." *Id.*

This is the very same pleading deficiency this Court identified in *Tulare County*. There, the Giant Sequoia National Monument protected "groves of giant sequoias … *and their surrounding ecosystem*." 306 F.3d at 1140 (emphasis added); *id.* at 1142 (noting the groves "comprise part of a spectrum of interconnected ecosystems"). As the panel explained, the plaintiff's "allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient" to state a valid smallest-area claim "if the President had identified only Sequoia groves for protection." *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003) (per curiam) (statement respecting denial of reh'g en banc). "[B]ut he did not." *Id.* Rather, there—as here—"the Proclamation covered natural resources present throughout the Monument area." *Id.*

Plaintiffs, surprisingly, never so much as acknowledge this Court's decision in *Tulare County*. Instead, they suggest the district court's analysis here would "practically immunize any proclamation vaguely referencing an ecosystem from judicial review." OB61. Not so. Under this Court's precedent, it was "incumbent" upon Plaintiffs to plausibly

"allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect." *Tulare County*, 317 F.3d at 227. Plaintiffs' claim fails because they alleged no such facts. APP24-25.

Perhaps recognizing as much, Plaintiffs now try to recast their claim and suggest that "the same deficiency that makes the boundary a poor fit with the canyons and seamounts necessarily makes it a poor fit for an ecosystem." OB61. But even if true—which, again, it is not—Plaintiffs did not allege that in their complaint. Plaintiffs there acknowledged that the designated ecosystems are not coextensive with the canyons and seamounts, but rather are located "in *and around*" them. APP21 (Compl. ¶ 53) (emphasis added); *see also, e.g.*, APP21-22 (Compl. ¶¶ 54-56); *cf.* APP43 ("Together the geology, currents, and productivity create diverse and vibrant ecosystems."); APP45 (describing ecosystems "in and around" canyons and seamounts).

Instead, Plaintiffs' complaint unambiguously premised their "smallest area" claim on their erroneous contention that "[a]n ecosystem is not an 'object' under the Antiquities Act." APP24-25 (Compl. ¶ 75 (citing *Yates v. United States*, 135 S. Ct. 1074 (2015))). However, both

this Court and the Supreme Court have rejected any such argument, confirming repeatedly that monuments may protect such resources. *See Tulare County*, 306 F.3d at 1142 ("Inclusion of … ecosystems … did not contravene the terms of the statute by relying on nonqualifying features."); *Alaska*, 545 U.S. at 102-03 (purpose of monument included "safeguarding the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem"); *Cappaert*, 426 U.S. at 141-42 (rare fish and its subterranean pool habitat were objects of interest).

Plaintiffs' present argument that monuments cannot protect migratory species, in particular, OB59-60, also does not appear in their complaint, and even if it did, could not rehabilitate their "smallest area" claim either. Plaintiffs' argument neither accounts for the many other designated objects of scientific interest in the Monument, APP43-45, nor explains why a national monument cannot protect a foraging hotspot for many different species. *Cf. Alaska*, 545 U.S. at 98-99 (describing birds, fish, marine mammals, and bears that frequented Glacier Bay National Monument's "complex ecosystem"). An ecosystem or habitat is itself a protectible object of scientific interest under the Antiquities Act, as the cases above have recognized.

This case is no different. The Monument's extraordinary canyons and seamounts, as well as its rich ecosystems and vulnerable natural resources, are precisely the types of objects that Presidents have long protected as national monuments, dating back to when Theodore Roosevelt first signed the Antiquities Act into law. Both this Court and the Supreme Court have uniformly upheld the designation of such monuments. Here, just as in those cases, the President acted wholly within his authority to protect the Monument for the benefit of future generations.

CONCLUSION

The district court's judgment should be affirmed.

Dated: May 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,895 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

May 29, 2019 *<u>/s/Katherine Desormeau</u>*
Katherine Desormeau

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Katherine Desormeau
Katherine Desormeau

ADDENDUM

Table of Contents

U.N. Convention on the Law of the Sea

Article 56 – Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research
      (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Presidential Proclamation No. 5030

Exclusive Economic Zone of the United States of America

By the President of the United States of America
A Proclamation

WHEREAS the Government of the United States of America desires to facilitate the wise development and use of the oceans consistent with international law;

WHEREAS international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction; and

WHEREAS the establishment of an Exclusive Economic Zone by the United States will advance the development of ocean resources and promote the protection of the marine environment, while not affecting other lawful uses of the zone, including the freedoms of navigation and overflight, by other States;

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution and laws of the United States of America, do hereby proclaim the sovereign rights and jurisdiction of the United States of America and confirm also the rights and freedoms of all States within an Exclusive Economic Zone, as described herein.

The Exclusive Economic Zone of the United States is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States overseas territories and possessions. The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In cases where the maritime boundary with a neighboring State remains to be determined, the boundary of the Exclusive

Economic Zone shall be determined by the United States and other State concerned in accordance with equitable principles.

Within the Exclusive Economic Zone, the United States has, to the extent permitted by international law, (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 with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

This Proclamation does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management.

The United States will exercise these sovereign rights and jurisdiction in accordance with the rules of international law.

Without prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of March, in the year of our Lord nineteen hundred and eighty-three, and of the Independence of the United States of America the two hundred and seventh.

RONALD REAGAN
March 10, 1983