ORAL ARGUMENT NOT YET SCHEDULED
No. 18-5353

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al.,
Plaintiffs-Appellants,

v.

WILBUR J. ROSS, JR., in his official capacity
as Secretary of Department of Commerce, et al.,
Defendants-Appellees,

and

NATURAL RESOURCES DEFENSE COUNSEL, et al.,
Defendants-Intervenors-Appellees.

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

BRIEF OF OCEAN AND COASTAL LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND DEFENDANTS-INTERVENORS-APPELLEES AND AFFIRMATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the undersigned amici law professors and other amici that may seek leave to participate before this Court, all of the parties, intervenors, and amici appearing before the district court and this Court are listed in the Appellants' opening brief. The undersigned amici are an *ad hoc* group of law professors and are not a corporation, association, joint venture, partnership, syndicate, or other similar entity with respect to which D.C. Circuit Rule 26.1 requires filing of a disclosure statement.

B. Rulings Under Review

References to the rulings at issue appear in the Appellants' opening brief.

C. Related Cases

Amici are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: June 5, 2019

/s/ Douglas W. Baruch
Douglas W. Baruch

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GLOSSARY

EEZ	Exclusive Economic Zone
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STATEMENT OF IDENTITY AND INTEREST[1]

The undersigned amici are law school professors who are recognized experts in United States ocean and coastal law. Amici collectively have decades of experience analyzing marine law and policy, and they direct or participate in several university centers and institutes devoted to the subject. Their interest in this litigation is to provide the Court with a description of how the Antiquities Act of 1906, 54 U.S.C. § 320301(a) (formerly 16 U.S.C. § 431(a)) (the "Antiquities Act"), has been applied to protect nationally significant marine ecological resources. Amici also seek to clarify the ways in which the Antiquities Act conserves marine resources relative to other laws, including multiple federal statutes. Amici are well-suited to opine on whether the Antiquities Act applies to submerged lands within the United States' continental shelf and exclusive economic zone (the "EEZ"), where the Northeast Canyons and Seamounts Marine National Monument (the "Monument") is located—a central issue raised by Appellants. As set forth herein, amici submit that the designation creating the Monument was consistent with presidential authority under the Antiquities Act to designate national monuments on "land owned or controlled" by the United States.

[1] Amici make the following disclosure pursuant to Fed. R. App. P. 29(a)(4)(E): No party's counsel authored this brief in whole or in part. No party, party's counsel, nor any other person contributed any money to fund preparing or submitting this brief.

Amici have filed with the Court a Motion for Leave to Participate as Amici Curiae pursuant to Fed. R. App. P. 29(a)(3) and D.C. Circuit Rule 29(b). A full list of amici is attached as Appendix A to this brief.

SUMMARY OF THE ARGUMENT

The Antiquities Act authorizes the creation, by presidential proclamation, of national monuments to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). President Barack Obama established the Northeast Canyons and Seamounts Marine National Monument pursuant to the Antiquities Act to protect "the canyons and seamounts themselves, and the natural resources and ecosystems in and around them." Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 21, 2016).

The District Court correctly held that creation of the Monument, with all its geologic and other objects of scientific interest, was consistent with the president's authority under the Antiquities Act because, among other reasons, it is "situated on land . . . controlled by the Federal Government." Doc. No. 47 at 3 (citing 54 U.S.C. § 320301(a)). It is settled law that the seabed of the continental shelf and EEZ is "land" for purposes of the

Antiquities Act. The federal government "controls" the seabed and waters above (referred to as the "water column") the continental shelf and EEZ, both of which extend to 200 nautical miles from the coastline of the United States. The federal government routinely exercises this control through, *inter alia*, military oversight and Coast Guard patrols, fishing regulation, offshore oil and gas leasing, national marine sanctuaries, and marine national monuments.

Contrary to the narrative advanced in Appellant's opening brief, presidents have used the Antiquities Act to protect marine resources since the 1930s, and they have established national monuments primarily to protect ocean resources and ecosystems since 1961. The Supreme Court has long acknowledged presidential authority under the Antiquities Act to protect such marine ecosystems. *Alaska v. United States*, 545 U.S. 75, 102-03 (2005); *United States v. California*, 436 U.S. 32, 36 (1978). Federal agencies also manage the use and exploitation of the continental shelf and EEZ via other laws, such as the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (1972), the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1976) (the "Magnuson-Stevens Act"), and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1953). However, these statutes operate simultaneously, serving

a variety of different purposes, and do not preclude presidential action to protect ocean resources within national monuments under the Antiquities Act. Accordingly, amici respectfully submit that this Court should affirm the District Court's well-reasoned decision upholding the designation of the Monument.

ARGUMENT

I. The District Court Correctly Held that Submerged Lands are Subject to the Antiquities Act

Under the Antiquities Act, the president has discretion to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on *land* owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a) (emphasis added). There can be no dispute that the seabed of the continental shelf and EEZ is "land" for purposes of the Antiquities Act.

Evaluating President Calvin Coolidge's 1925 designation of the Glacier Bay National Monument and President Franklin Roosevelt's 1939 expansion of the monument to protect, among other resources, fjord waters, intertidal glaciers, terrestrial animals, and marine life within Alaska's Inside Passage, Proclamation No. 1733, 43 Stat. 1988 (Feb. 26, 1925),

Proclamation No. 2330, 53 Stat. 2534 (April 18, 1939), the Supreme Court recognized submerged land as "land" for purposes of the Antiquities Act. *Alaska*, 545 U.S. 75 at 102-03. In *Alaska*, the Court found that the president properly exercised his authority under the Antiquities Act to include submerged lands within the Glacier Bay National Monument because excluding them would undermine the purposes of the monument's creation, including "scientific study of the majestic tidewater glaciers surrounding the bay" and "safeguarding the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem." *Id.* at 102.

Congress also has long considered the seabed to be "land" under federal law. *See, e.g.,* Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1953) (establishing state ownership of the seabed within three nautical miles of terrestrial land); OCSLA, 43 U.S.C. § 1331(a) (defining the "outer Continental Shelf" as comprising "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control"). OCSLA directly parallels terrestrial federal lands statutes, including the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-195, and OCSLA's legislative history confirms that Congress viewed the seabed as federal "land." *See, e.g.*, 43 U.S.C. § 1331(q) (incorporating terrestrial

federal lands statutes into the offshore definition of "minerals"); H.R. Rep. No. 83-215 (March 27, 1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1388, 1434; Robin Kundis Craig, "*Treating Offshore Submerged Lands as Public Lands: A Historical Perspective*," 34 Public Land & Resources L. Rev. 51, 62-68 (2013).

Thus, over the past century, all three branches of the federal government have deemed the seabed of the United States' ocean territory to be "land" for purposes of federal law. Indeed, a finding to the contrary would contradict Supreme Court precedent, congressional intent, and the manner in which the United States has legislated and perceived of its expansion of territory over time.

II. The Federal Government Exercises "Control" over the EEZ and Continental Shelf for Purposes of the Antiquities Act

The District Court also correctly determined that the federal government "controls" the seabed and water column comprising the Monument for purposes of the Antiquities Act. Doc. No. 47 at 18-30.

A. The United States Controls the EEZ

The United States has asserted control over the continental shelf since at least 1945, when President Harry Truman issued a presidential proclamation asserting that "the Government of the United States regards the

natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States*, subject to its jurisdiction and control*." Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945) (emphasis added).

Soon after President Truman's proclamation, the Supreme Court affirmed that the federal government may exercise jurisdiction over the continental shelf and the ocean above it. In its landmark 1947 decision, *United States v. California*, the Court acknowledged that the federal government has a paramount interest and rights in the continental shelf "transcending those of a mere property owner," as compared to coastal states. 332 U.S. 19, 29, 38-39 (1947). These rights include "the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean" and, as relates to other nations, "power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it." *Id.* at 29. Recognizing these national defense and international law considerations, the Supreme Court concluded "that the Federal

Government rather than the state has paramount rights in and power over [the seabed], an incident to which is *full dominion over the resources of the soil* under that water area, including oil." *Id*. at 38-39 (emphasis added).

President Truman's 1945 proclamation and the Supreme Court's 1947 *California* decision were consistent with the country's longstanding and expanding notions of the federal government's authority over marine areas beyond the nation's coasts. By the end of the 19th century, the United States (and most of the rest of the world) had accepted each coastal nation's control over the first three miles of ocean (both the submerged lands and the water column) off their coastlines; indeed, such an assertion of jurisdiction was included in California's 1849 constitution. Cal. Const., Art. XII § 1 (1849); *see also California*, 332 U.S. at 29-35 & nn. 15-17 (concluding that international acceptance of coastal nations' jurisdiction over this "belt" emerged as a generally accepted principle between the late 18th century and approximately 1872-1876). As the 1947 *California* Court also noted, the infant United States asserted jurisdiction over the ocean more than three miles offshore. 332 U.S. at 32 n. 15 (noting that the Continental Congress authorized capture of ships carrying British goods within about nine miles of the coast). In addition, as far back as 1939, pursuant to the Declaration of

Panama, the United States claimed the right to be free "from a hostile act in a zone 300 miles from the American coasts." *Id*.

In 1953, Congress affirmed the federal government's control of the seabed beyond three miles by enacting the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, and OCSLA, 43 U.S.C. §§ 1331-1356. The Submerged Lands Act, enacted in response to the Supreme Court's 1947 decision in *California*, transferred most of the first three miles of submerged lands, and control over the ocean waters above them, to the states—but subject to paramount federal control when the federal government chooses to assert its interests. 43 U.S.C. §§ 1301(a)(1), (b), 1302, 1311(a), (d), 1313, 1314. A few months later, OCSLA established federal control over the outer continental shelf. 43 U.S.C. § 1331(a). Under OCSLA, "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, *control*, and power of disposition as provided in this Act . . . ." 43 U.S.C. § 1332(1) (emphasis added). Under this Act, the Bureau of Ocean Energy Management "manages approximately 1.7 billion acres" of offshore area with "[f]ederal jurisdiction generally end[ing] around 200 nautical miles from the coastline." Bureau of Ocean Energy Management, *Oil and Gas Leasing on the Outer Continental Shelf,*

Background, 1 (n.d.), https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy _Program/Leasing/5BOEMRE_Leasing101.pdf.

Today, the federal government's jurisdiction and control over the seabed extends to the outer boundary of the EEZ, up to 200 nautical miles offshore in accordance with international law, pursuant to President Ronald Reagan's 1983 proclamation acknowledging international recognition of the EEZ. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 11, 1983); *see* United Nations Convention on the Law of the Sea arts. 55-57, 76-78, Dec. 10, 1982, 1833 U.N.T.S. 397, 418-19, 428-30 (entered into force Nov. 16, 1994) (the "Convention") (establishing the EEZ of a coastal State out to 200 nautical miles and the continental shelf as comprising "the *sea-bed and subsoil* of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance" (emphasis added)). The United States is not a party to the Convention; however, it acknowledges the Convention's jurisdictional provisions to be customary international law. *See, e.g.*, "Statement of Admiral Samuel J. Locklear: The Law of the Sea Convention: Perspectives from the U.S.

Military," Testimony before the Senate Foreign Relations Committee (June 14, 2012), https://www.foreign.senate.gov/imo/media/doc/Admiral_Samuel_Locklear_III_Testimony.pdf; The UN Convention on the Law of the Sea: Hearing Before the S. Foreign Relations Comm., 110th Cong. (2007) (written testimony of John D. Negroponte, Deputy Secretary of State), https://2001-2009.state.gov/s/d/2007/92921.htm.

Moreover, the United States has enacted a number of laws through which it actively manages and asserts its authority over its EEZ. Indeed, the federal government exercises control of the seabed and water column within this area in myriad ways, including, *inter alia*, fishing regulation under the Magnuson-Stevens Act; permitting of incidental take of marine species under both the Endangered Species Act, 16 U.S.C. §§ 1531-1540 (1973), and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423 (1972); designations of national monuments, 54 U.S.C. § 320301(a), and National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445; and offshore national security and defense activities. *See, e.g.*, https://www.uscg.mil/readings/Articles/1548177/authorities/ (referencing statutes pursuant to which the United States Coast Guard operates on water controlled by the United States, including military security and intelligence operations, incident response, vessel inspection, and enforcement of laws protecting marine resources).

This assertion of control extends to all U.S. territories and possessions. *See* Proclamation No. 5030.

B. The Antiquities Act Is Not Limited to Lands Owned or Controlled by the United States as of 1906

In District Court proceedings, Appellants unsuccessfully argued that the Monument does not meet the "control" element of the Antiquities Act because when the Act was passed in 1906 Congress could not have anticipated that the federal government's authority would extend so far as the present day EEZ. Doc. No. 47 at 18-30. However, the United States acquired control over several new domains in the years before Congress enacted the Antiquities Act, including Alaska,[2] Hawaii,[3] Puerto Rico, Guam, and the Philippines.[4] Accordingly, when it enacted the Antiquities Act, Congress could not have reasonably assumed that the lands under the federal government's ownership and control would remain static into the future. Indeed, as anticipated and intended by Congress, presidents have applied the

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[2] The United States had purchased Alaska in 1867 from Russia, but it did not become an official U.S. territory until 1912 and did not become a state until 1959. Pub. L. No. 85–508, 72 Stat. 339 (1958).

[3] Hawaii was annexed in 1898 and became an official U.S. territory in 1900, Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (1900), but it did not become a state until 1959. Pub. L. No. 86–3, 73 Stat. 4 (1959).

[4] The United States acquired Puerto Rico, Guam, and the Philippines from Spain in 1898 at the conclusion of the Spanish-American War. Pub. L. No. 114-265, 30 Stat. 1759 (1898).

Antiquities Act to territories that the United States acquired after 1906. One prominent example is the U.S. Virgin Islands, which remained a Danish possession until 1917, when the United States purchased them. Pub. L. No. 64-389, 39 Stat. 1132 (1917). Despite the fact that United States acquired these islands after 1906, President John F. Kennedy Jr. established the Buck Island Reef National Monument in the Virgin Islands in 1961. Proclamation No. 3443, 27 Fed. Reg. 31 (Jan. 4, 1962). Forty years later, President William Clinton added the Virgin Islands Coral Reef National Monument. Proclamation No. 7399, 66 Fed. Reg. 7,364 (Jan. 22, 2001). Accordingly, the designation of the Northeast Canyons and Seamounts Marine National Monument is consistent with prior use of the Antiquities Act to establish national monuments on lands owned or controlled by the federal government after 1906, because the federal government has asserted control over the EEZ and continental shelf since at least 1983.

The federal government actively manages—*controls*—both the submerged lands of the seabed and the water column out to 200 nautical miles from the United States' shorelines. Given this history, the District Court was correct in holding that the seabed of the continental shelf and within the EEZ, Doc. No. 47 at 18-30, where the Monument is located, falls within the purview of the Antiquities Act. 54 U.S.C. § 320301(a).

III. The Existence of Other Laws that Manage Marine Resources Does Not Preclude Presidential Authority under the Antiquities Act

In their opening brief, Appellants suggest that presidents first discovered and began to use the Antiquities Act to protect marine areas in 2006 in order to bypass more cumbersome legal frameworks for managing marine resources—in particular, the National Marine Sanctuaries Act. Doc. No. 1781760 at 4. In reality, however, presidents have used their authority under the Antiquities Act to protect marine resources since the 1930s. Over time, Congress has enacted numerous laws that all operate simultaneously to regulate, manage, and protect the United States' ocean. Just as the federal government can choose to designate terrestrial areas as national parks, national forests, national monuments, or wilderness areas using different legal authorities to serve different purposes under different circumstances, none of the various marine laws that Congress has enacted since 1906 depletes presidential authority to use the Antiquities Act to create marine national monuments, the chief goal of which is to protect lands and objects that are uniquely precious to science and to American culture. 54 U.S.C. § 320301(a)

A. Presidents Have Used the Antiquities Act to Protect Marine Resources Since the 1930s

President Coolidge established the Glacier Bay National Monument, now Glacier Bay National Park, in 1925, and in 1939 President Roosevelt expanded the monument to protect the unique ecosystem within Alaska's Inside Passage, including the marine features and objects integral to that ecosystem. Proclamation No. 1733; Proclamation No. 2330; 16 U.S.C. § 410hh-1(1); *Alaska*, 545 U.S. at 102-03. In 1935, President Roosevelt established the Fort Jefferson National Monument in Florida, a deep water fort, which Congress redesignated as the Dry Tortugas National Park in 1992. Proclamation No. 2112 (Jan. 4, 1935); 16 U.S.C. § 410xx. In 1938, President Roosevelt designated Anacapa and Santa Barbara Islands, off the coast of California, as Channel Island National Monument, Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938), and in 1949, President Truman expanded the monument to include area within one nautical mile of the shorelines. Proclamation No. 2825, 63 Stat. 1258 (Feb. 9, 1949).

In 1961, President John F. Kennedy became the first president to designate a national monument primarily to protect marine resources, Buck Island Reef National Monument, observing that Buck Island's "adjoining shoals, rocks, and undersea coral reef formations possess one of the finest

marine gardens in the Caribbean Sea." Proclamation No. 3443. Following expansions by President Ford (1975) and President Clinton (2001), the monument now protects both a 176-acre tropical island and the much larger coral reef ecosystems, rare marine life, and historic shipwrecks that surround it. *See id.*; Proclamation No. 4346, 40 Fed. Reg. 5,127 (Feb. 4, 1975); Proclamation No. 7392, 66 Fed. Reg. 7,335 (Jan. 22, 2001).

Following President Kennedy, presidents have used the Antiquities Act to create 12 additional national monuments to protect scientifically and culturally significant marine areas: (1) Bering Land Bridge National Monument (Alaska), Proclamation No. 4614, 43 Fed. Reg. 57,025 (Dec. 5, 1978) (President Carter); (2) Kenai Fjords National Monument (Alaska), Proclamation No. 4620, 43 Fed. Reg. 57,067 (Dec. 5, 1978) (President Carter); (3) Misty Fjords National Monument (Alaska), Proclamation No. 4623, 43 Fed. Reg. 57,087 (Dec. 5, 1978) (President Carter); (4) California Coastal National Monument, Proclamation No. 7264, 65 Fed. Reg. 2,821 (Jan. 18, 2000) (President Clinton); (5) Virgin Islands Coral Reef National Monument, Proclamation No. 7399, 66 Fed. Reg. 7,364 (Jan. 17, 2001) (President Clinton); (6) Papahānaumokuākea (Northwestern Hawaiian Islands) Marine National Monument, Proclamation No. 8031, 71 Fed. Reg, 36,443 (June 15, 2006), amended by Proclamation No. 8112, 72 Fed. Reg.

10,031 (Feb. 28, 2007) (President George W. Bush); (7) World War II Valor in the Pacific National Monument (Pearl Harbor, HI), Proclamation No. 8327, 73 Fed. Reg. 75,293 (Dec. 5, 2008) (President Bush); (8) Marianas Trench Marine National Monument (Northern Marianas Islands and Guam), Proclamation No. 8335, 74 Fed. Reg. 1,557 (Jan. 12, 2009) (President Bush); (9) Pacific Remote Islands Marine National Monument (Wake, Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll), Proclamation No. 8336, 74 Fed. Reg. 1,565 (Jan. 12, 2009) (President Bush); (10) Rose Atoll Marine National Monument (off American Samoa), Proclamation No. 8337, 74 Fed. Reg. 1,577 (Jan. 12, 2009) (President Bush); (11) San Juan Islands National Monument (Puget Sound, WA), Proclamation No. 8947, 78 Fed. Reg. 18,789 (March 25, 2013) (President Obama); and (12) Northeast Canyons and Seamounts Marine National Monument (Atlantic Ocean off the coast of New England), Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 21, 2016) (President Obama).

B. The National Marine Sanctuaries Act Does Not Preclude the Creation of Marine National Monuments under the Antiquities Act

The Antiquities Act is one of several tools available to manage the United States' marine resources, including through creation of marine

protected areas. *See* Robin Kundis Craig, *Are Marine National Monuments Better than National Marine Sanctuaries?*, 7 Sustainable Dev. L. & Pol'y 27, 27 (2006). As is true of the many federal statutes that exist to manage and protect terrestrial public lands, these marine statutes serve different, if somewhat overlapping, purposes. The Magnuson-Stevens Act, for example, requires the National Oceanic and Atmospheric Administration and the regional Fishery Management Councils to identify and protect "essential fish habitat," 16 U.S.C. §§ 1801(a)(6), 1853(a)(7), which the Act defines to be "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." *Id*. § 1802(10). Thus, marine protected areas created under this statute further the Magnuson-Stevens Act's goal of maximizing long-term sustainable fishing throughout U.S. marine waters. OCSLA, in turn, allows the president to set aside areas of the continental shelf to protect them from oil and gas development. 43 U.S.C. § 1341(a). Other systems of regulations applicable to marine resources include the National Wildlife Refuge System, which "includes 180 refuges that protect ocean, coastal or Great Lakes habitats", *see* https://www.fws.gov/refuges/whm/coastalandmarine.html; and the National Parks System, which includes "88 ocean and coastal parks." *See* https://www.nps.gov/subjects/oceans/index.htm.

Similarly, the Antiquities Act and the National Marine Sanctuaries Act, serve different purposes. The Antiquities Act historically has played a unique role in protecting individual and often isolated sets of marine resources of scientific and cultural value, as opposed either to regulating extractive use, as the Magnuson-Stevens Act and OCSLA do, or to pursuing a *system* of marine protected areas, as the National Marine Sanctuaries Act seeks to do. In terms of cultural resources, for example, the Papahānaumokuākea Marine National Monument, which is located in the Northwestern Hawaiian Islands and includes the Midway Atoll, protects the area around sunken ships and downed aircraft that serve "as a final resting place for the more than 3,000 people lost during the [B]attle [of Midway]"—one of the most significant and decisive naval battles of World War II. Proclamation No. 9478, 81 Fed. Reg. 60,227, 60,229 (Aug. 31, 2016) (expanding the monument). Buck Island Reef National Monument likewise protects sunken slave ships that carried hundreds of enslaved people during the Trans-Atlantic slave trade. *See* Proclamation No. 7392, 66 Fed. Reg. at 7,335-36 (expanding the monument in part to protect these shipwrecks and other objects of cultural and historic significance).

Presidents also have used their authority under the Antiquities Act to protect marine resources of scientific interest, including across much larger

areas than that encompassed by the Monument at issue here. Papahānaumokuākea's 442,781 square miles protect unique coral reefs and deep-sea ecosystems. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), amended by Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007), Proclamation No. 9478, 81 Fed. Reg. at 60,227-29. The California Coastal National Monument protects both fragile geologic formations extending 1,100 miles along California's coast and marine mammal habitat extending 12 nautical miles out to sea. Proclamation No. 7264, 65 Fed. Reg. at 2,821-22. The Marianas Trench Marine National Monument safeguards rare interactions between photosynthetic and chemosynthetic lifeforms within its 95,216 square miles of water and submerged lands. Proclamation No. 8335, 74 Fed. Reg. at 1,557-58. The 4,913 square miles of seabed and water column constituting the Monument at issue in this case protect impressive seamounts and deep undersea canyons that provide habitat for sensitive deep sea corals and other unusual life forms and that supply the feeding grounds relied upon by endangered whales, overexploited fish stocks, and numerous other migratory species. Proclamation No. 9496, 81 Fed. Reg. at 65,161-63. Thus, each of these marine national monuments contains specific "objects of historic or

scientific interest" that qualify for protection that the Antiquities Act affords. 54 U.S.C. § 320301(a).

In contrast to the Antiquities Act's focus on specific objects of historic or scientific interest, the National Marine Sanctuaries Act is intended to provide for "comprehensive, balanced management of the oceans . . . while also furthering the economic use of marine resources." Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Envtl. L.J. 711, 712 (2003) (hereinafter "Owen"). Congress enacted the National Marine Sanctuaries Act in 1972 following an oil spill near Santa Barbara, California. The Act's objectives are system-oriented, providing a different focus for the creation of marine protected areas that Congress intended to complement, rather than replace, other federal marine authorities. Thus, the National Marine Sanctuaries Act seeks "to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and *to manage these areas as the National Marine Sanctuary System*," and it "provide[s] authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner *which complements existing regulatory authorities* . . . ." 16 U.S.C. §§ 1431(b)(1), (2) (emphasis added); *see also id.* § 1431(c) ("There is established the

National Marine Sanctuary System, which shall consist of national marine sanctuaries designated by the Secretary in accordance with this chapter"); *id.* § 1433(b)(1)(L) (listing as one factor in choosing new national marine sanctuaries "the value of the area as an addition to the System").

Moreover, despite Congress's use of the term "sanctuary," national marine sanctuaries often allow extraction and exploitation, making them less protective than many marine national monuments. Thus, for example, oil and gas platforms operate within the Flower Garden Banks National Marine Sanctuary. *See* https://flowergarden.noaa.gov/about/naturalsetting.html (map at bottom); *see also* Craig, 7 Sustainable Dev. L. & Pol'y at 30 ("historically, very few National Marine Sanctuaries have included marine reserves because the [National Marine Sanctuaries Act] emphatically encourages multiple uses of these sanctuaries."); Owen at 718 (observing statements by representatives that designation under the National Marine Sanctuaries Act "provided for multiple uses, and was not analogous to the designation of a wilderness area").

In contrast, presidents have used the Antiquities Act effectively to protect marine "objects of historic or scientific interest," 54 U.S.C. § 320301(a), since well before the National Marine Sanctuaries Act's enactment. These designations continue to complement the National Marine

Sanctuary System, just as terrestrial national monuments, wilderness areas, and national forests complement the National Park System. In the absence of specific congressional action to reduce the scope of the Antiquities Act, it remains available for the president to use to protect the "geologic, ecological, and biological resources" within the Monument. Proclamation No. 9496.

CONCLUSION

Multiple presidents and the Supreme Court have concluded that the continental shelf and the seabed are land under federal control for purposes of the Antiquities Act. The history of the Antiquities Act makes clear that it applies to any land under federal control at the time of the national monument's designation. Accordingly, the Antiquities Act applies throughout the United States' EEZ and continental shelf. The fact that other laws also provide means to manage marine resources does not undermine presidential authority under the Antiquities Act, which is uniquely suited to protect specific culturally and scientifically significant marine resources. The undersigned law professors therefore respectfully urge the Court to affirm the District Court's order granting Defendant-Appellee's Motion to Dismiss.

Dated: June 5, 2019

/s/ Douglas W. Baruch
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Appendix A

ON BEHALF OF THE FOLLOWING LAW PROFESSOR SIGNATORIES:

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CERTIFICATE PURSUANT TO CIRCUIT RULE 29(D)

I understand that three other non-governmental amici curiae intend to submit briefs in support of Defendants-Appellees and Defendants-Intervenors-Appellees. Pursuant to Circuit Rule 29(d), I hereby certify that it is not practicable for the Proposed Amici to join in a single brief with any of the other amici curiae. Whereas Proposed Amici's brief provides historical perspective and legal analysis arising from their expertise as law school professors and experts on ocean and coastal law and the statutes at issue, the other amici provide different expertise and subject matter focus. In particular, the National Audubon Society is addressing presidential authority to protect and preserve ecosystems as objects of interest within a national monument; the thirty academic scientists are addressing the size of the Monument as necessary to protect the dynamic and complex ecosystems contained within it; and the ocean experts and former State Department officials are addressing the authority of the United States with respect to the surrounding ocean under the international law of the sea.

Dated: June 5, 2019

/s/ Douglas W. Baruch
Douglas W. Baruch

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), I hereby certify that this Brief of Amicus Curiae complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the Brief contains 4,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), according to the count of Microsoft Word.

I further certify that this Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the Motion has been prepared in Times New Roman 14-point.

Dated: June 5, 2019

/s/ Douglas W. Baruch
Douglas W. Baruch

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2019, I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: June 5, 2019

/s/ Douglas W. Baruch
Douglas W. Baruch