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

Oral Argument Scheduled For June 5, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, *et al.*,
Defendants,

STATE OF ALASKA,
Intervenor-Defendant,

and

AMERICAN PETROLEUM INSTITUTE,
Intervenor-Defendant-Appellant.

On Appeal From the United States District Court For the District of Alaska
No. 3:17-cv-00101 (Hon. Sharon L. Gleason)

AMERICAN PETROLEUM INSTITUTE'S REPLY BRIEF

Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
(202) 662-6000
srosenbaum@cov.com

Attorneys for American Petroleum Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION

Section 1341(a) of the Outer Continental Shelf Lands Act ("OCSLA") broadly provides that a President "may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf [("OCS")]." 43 U.S.C. § 1341(a). Despite the authority traditionally conveyed by such language to make and revise discretionary decisions, Plaintiffs read this provision to permit a President only ***permanently*** to withdraw unleased lands from potential future disposition for leasing. *See* Pls.' Br. 1-2. But if Plaintiffs' reading is correct, then the past five Presidents—invoking Section 1341(a) over the last three decades to either issue time-limited withdrawals or modify prior withdrawals—have misunderstood and misapplied Section 1341(a), and their actions are invalid *post hac*. Well-established canons of statutory construction belie that result.

Indeed, if any statute should not be read in the manner proposed by Plaintiffs it is OCSLA. "The principal purpose of [OCSLA] is to authorize the leasing by the Federal Government of . . . the [OCS],"[1] and encourage the "expedited exploration and development of the [oil and gas resources of the OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade," 43 U.S.C. § 1802(1). Interpreting Section 1341(a) as

[1] H.R. Rep. No. 83-413, at 2 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2177, 2178.

Plaintiffs do—to permit a President to forever remove the entire unleased OCS from potential future leasing absent congressional passage of a new statute subject to presidential veto—negates Congress's entire "objective—the expeditious development of OCS resources." *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). That OCSLA thereafter directs the Secretary of Interior to make efforts to minimize environmental (and other) risks attendant to the desired OCS development does not, as Plaintiffs contend, detract from "[t]he first stated purpose of the Act . . . to establish procedures to expedite exploration and development of the OCS." *Id*. Plaintiffs' policy preferences cannot change that.

Taken together, OCSLA's language, "structure, history, and purpose," *Chan Healthcare Group, PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133, 1138 (9th Cir. 2017) (quotation omitted), support the President's interpretation and implementation of Section 1341(a) in Executive Order 13795. That Order simply modifies past withdrawals consistent with Section 1341(a)'s broad language and OCSLA's developmental purpose to re-open OCS areas for potential future disposition for leasing to "strengthen[] the Nation's security and reduce[] reliance on imported energy." 2 E.R. 285 (Dkt. 13-2), § 1. That decision is further confirmed by past congressional and presidential implementation of Section 1341(a), *see United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915), and

the President's independent constitutional powers, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

Plaintiffs provide no justification to deviate from these well-established sources of statutory meaning and executive authority. Instead, Plaintiffs' scattershot responsive brief mischaracterizes the arguments in API's Opening Brief ("API Br."), governing legal authority, and OCSLA's purpose and history.[2] Having failed to support their unprecedented claim that Congress delegated to the President authority to negate Congress' purpose in enacting OCSLA, or to refute contrary legal authority, Plaintiffs' challenge to the President's lawful exercise of his discretionary authority in Executive Order 13795 cannot stand.

ARGUMENT

I. SECTION 1341(a) AUTHORIZES PRESIDENTIAL MODIFICATION OF OCS WITHDRAWAL DECISIONS.

This case is not, as Plaintiffs suggest, *see* Pls.' Br. 44, about the scope of congressional authority over federal lands, but rather the scope of Congress's delegation to the President in Section 1341(a), and the confluence of that delegated authority with the President's existing Article II authority over foreign relations and national security. Applying standard tools of statutory construction and

[2] API's opening brief incorporated by reference the Federal Defendants' justiciability and merits arguments, and API incorporates their and the State of Alaska's reply arguments.

executive power confirms the President's modification of prior withdrawals under Section 1341(a).

A. Section 1341(a)'s Broad Discretionary Language Authorizes The President Both To Withdraw And Modify A Withdrawal.

Plaintiffs contend that Section 1341(a) precludes a President from modifying a prior withdrawal because the statute does not expressly state that a withdrawal may be modified or revoked. But there is no need to insert "absent provisions" into the language of Section 1341(a) to support Executive Order 13795. *See* Pls.' Br. 47 (quotation omitted). Section 1341(a)'s language authorizes the President to modify an existing withdrawal as part of the delegated withdrawal authority itself.

Indeed, Plaintiffs' reading of Section 1341(a), *see, e.g.*, *id*. 46, 53, ignores the provision's language aside from the word "withdraw." Viewed as a whole, as it must be, *e.g.*, *In re DBSI, Inc.*, 869 F.3d 1004, 1010 (9th Cir. 2017) ("Statutory construction is a holistic endeavor[.]" (quotation omitted)), Section 1341(a) provides that the President "may, from time to time, withdraw" unleased OCS lands. 43 U.S.C. § 1341(a). Statutes and the Constitution commonly employ that discretionary language to bestow the additional power to revise actions previously taken under the discretionary authority as circumstances demand. *See* API Br. 20-26. Plaintiffs identify no case, constitutional provision, or statutory provision in which that formulation was held not to include a revisionary power.

Instead, Plaintiffs fail substantively to address the two circumstances most analogous to Section 1341(a). First, *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974), involved a comparable situation in which the court rejected a challenge—similar to Plaintiffs'—to the Secretary for Housing and Urban Development's suspension of certain housing programs created by Congress even though Congress did not provide the Secretary express suspension authority. *Id*. at 852, 855-56. Like here, the holder of Congress's delegated authority had "the discretion, or indeed the obligation" to modify or reverse the programs "when he has adequate reason to believe that they are not serving the Congress's purpose[.]" *Id*. at 855-56. Plaintiffs do not address *Lynn* at all.

More significantly, Article III of the Constitution uses language identical to Section 1341(a), providing that "Congress ***may from time to time*** ordain and establish" federal courts inferior to the Supreme Court. U.S. Const., art. III § 1 (emphasis added). If this formulation did not, as Plaintiffs' read it, confer the power to modify a prior exercise of the discretion, then Congress could not modify or abolish inferior courts once established. But Congress has repeatedly acted with great flexibility in declining to create inferior courts or altering their jurisdiction, *see Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), or abolishing inferior courts it had previously established, *see Glidden Co. v. Zdanok*, 370 U.S. 530, 551-52 (1962) (Harlan, J., plurality op.) (Constitution "authorized but did not obligate

Congress to create inferior federal courts," and Congress could "supplant[]" inferior courts created pursuant to Article III).[3]

Rather than address this long-settled understanding of language identical to Section 1341(a), Plaintiffs posit that the Constitution only uses the "from time to time" formulation to denote timing or "frequency of a legislative . . . power." Pls.' Br. 61 n.11 (quoting V. Kesavan & J.G. Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1, 13-18 (2002)). That suggestion simply ignores the discretionary power over the creation (and elimination) of lower federal courts. That power is the ***only instance*** of the formulation in the Constitution that—like Section 1341(a)—pairs the phrase "from time to time" with the discretionary statement that the delegated authority "may" be taken. *See* U.S. Const., art. III § 1.[4]

Nor do Plaintiffs substantively address 28 U.S.C. § 2071(a)'s implicit authorization to the Supreme Court to revise its rules as an incident to its express

---

[3] *See also, e.g.*, VanDercreek, *From the Judiciary Act of 1789 to the Judicial Improvements Act of 1989 - Two Hundred Years of Non-Inferior Inferior Courts*, 14 Okla. City U. L. Rev. 565, 568-79 (1989); *Aleut Tribe v. United States*, 702 F.2d 1015, 1017 (Fed. Cir. 1983) (Congress abolished Court of Claims and Court of Customs and Patent Appeals); *United States v. Mitchell*, 463 U.S. 206, 228 n.33 (1983) ("Congress merged the Court of Claims and the Court of Customs and Patent Appeals into a new federal court of appeals[.]").

[4] The Constitution's other uses of the phrase "from time to time" correspond to non-discretionary actions that either Congress or the President "shall" take. *See* U.S. Const., art. I § 5, cl. 3 (publication of congressional proceedings); U.S. Const., art. I § 9, cl. 7 (publication of government receipts and expenditures); U.S. Const., art. II § 3 (State of the Union).

statutory authority "from time to time" to "prescribe rules," or various statutes' implicit authorization to administrative agencies to revise regulations as an incident to the authority "from time to time" to promulgate regulations. *See* API Br. 21-22.[5] At most, Plaintiffs assert that the authority to revoke is "inherent[]" in the authorizations identified by API. *See* Pls.' Br. 60. That is little more than question-begging because it assumes, for example, that it is not the discretionary presence of the phrase "from time to time" that renders the underlying power "inherently" subject to modification in the first instance. *See* API Br. 21-22.

Having failed to rebut the well-established power to modify past discretionary actions undertaken pursuant to delegations comparable to Section 1341(a), Plaintiffs propose counter-examples of statutory provisions using the "from time to time" formulation that, in their view, demonstrate that Section 1341(a) refers to the timing, rather than the scope, of delegated authority. *See* Pls.' Br. 59-60. In each instance, Plaintiffs improperly read the formulation without

[5] To the extent that Plaintiffs address the traditional "rule of constitutional and statutory construction" recognizing the President's power to remove federal officers "incident to the power" to make that discretionary decision in the first instance, *Myers v. United States*, 272 U.S. 52, 119 (1926); *see also* API Br. 23-24, Plaintiffs—like the district court, *see* 1 E.R. (Dkt. 13-1) 16-17—seek to confine *Myers* to removal of federal officers, *see* Pls.' Br. 81-82 n.16, without explaining how that authority materially differs from the President's obligation to execute OCSLA's developmental purpose, *see* API Br. 24.

regard to the statutory context. *See, e.g.*, *DBSI, Inc.*, 869 F.3d at 1010 ("Statutory construction . . . relies on context to be a preliminary determinant of meaning[.]") (quotations omitted).

First, the use of "from time to time" in 43 U.S.C. § 1335(a)(1), relates to timing because the sole purpose of that provision is to establish the timing by which holders of a state oil and gas lease issued on the OCS prior to OCSLA's enactment could bring their lease within its protections.[6] Second, 43 U.S.C. § 1347(c)'s first sentence imposes a non-discretionary duty to promulgate certain regulations. Because the duty—unlike Section 1341(a)—is non-discretionary, it does not include the revisionary power inherent in the "from time to time" formulation. Instead, that formulation is included in the second sentence of 43 U.S.C. § 1347(c), which separately provides that the agency "may from time to time modify" a regulation. Finally, 43 U.S.C. § 1351(h)(3)'s provision directing the Secretary of Interior to review issued exploration and development plans "from time to time" is both non-discretionary, and, in fact, ***does*** authorize the Secretary to revise or reverse provisions of an earlier approved plan. *See* 30 C.F.R. § 550.284 ("How will BOEM require revisions to the approved [plan]?").

[6] While Plaintiffs believe that an established date could not be changed, *see* Pls.' Br. 59, the provision does not clearly preclude the Secretary from extending the protections of OCSLA for an additional "period or periods," 43 U.S.C. § 1335(a)(1).

Plaintiffs' proffered caselaw, *see* Pls.' Br. 47-48, fares no better. To the contrary, those cases often support reading Section 1341(a) to authorize modifications of prior discretionary withdrawals.

Unlike OCSLA, Congress enacted the statute at issue in *North Dakota v. United States*, 460 U.S. 300 (1983), explicitly and solely for the environmental protective purpose to acquire land "for use as inviolate sanctuaries for migratory birds." *Id*. at 302-03 (quotation omitted). In ***that*** context, the Court read a provision for State approval of federal acquisition of a sanctuary easement to preclude the State from later revoking the approval. "To hold otherwise would be inconsistent with the very purpose behind" the statute that "was expressly intended to facilitate the acquisition of wetlands[.]" *Id*. at 313-14.

The Court's reasoning ***belies*** Plaintiffs' reading of Section 1341(a), which would allow "[a] detailed federal program" designed to expedite OCS development, *id*. at 314; *see also* API Br. 4-9; *infra* pp. 13-18, to "be negated in an instant" by a single decision, *North Dakota*, 460 U.S. at 314. It is unreasonable "to assume that Congress, while expressing its firm belief in the need" for expeditious OCS development, "so casually would have undercut," *id*. at 315, that

development by allowing any President to remove permanently all unleased lands from consideration for leasing.[7]

In *Cochnower v. United States*, 248 U.S. 405 (1919), the Court held that a statute allowing the Secretary of Treasury to "increase and fix" compensation of customs inspectors did not include the power to decrease compensation. *Id*. at 406-07. But, unlike the Property Clause, *see* API Br. 33-34; *Midwest Oil*, 236 U.S. at 474, "the creation of offices and the assignment of their compensation is a legislative function" giving less space for an implicit delegation, *Cochnower*, 248 U.S. at 407. Moreover, the Court explained that reading the statute to provide the Secretary unchecked discretion to increase or decrease compensation would leave the statutory language authorizing the Secretary to "increase and fix" compensation "no purpose." *Id*. at 407.

The Court's reasoning again belies Plaintiffs' interpretation of Section 1341(a). Reading the President's withdrawal authority to preclude future modifications leaves the adjoining phrase "from time to time" with "no purpose." *Id*. *See also* Fed. Defs.' Opening Br. 50. Removing that phrase—so that Section 1341(a) reads simply, the "President . . . may . . . withdraw" unleased lands—would still permit the President to withdraw lands at any time. Because that is the

[7] Plaintiffs' suggestion that Congress anticipated such nullification of OCSLA, *see* Pls.' Br. 58, ignores the federalism context surrounding President Truman's interactions with Congress over OCS development. *See infra* pp. 23-25.

same meaning that Plaintiffs read into Section 1341(a)'s text including the phrase "from time to time," Plaintiffs' construction improperly renders the phrase superfluous. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotation omitted)).[8]

In Plaintiffs' view, recognizing authority to revise prior withdrawals makes Section 1341(a) "superfluous" because a President purportedly can simply "direct Secretaries present and future not to offer a given area for" leasing. *See* Pls.' Br. 55. But Plaintiffs' argument rests on their blithe assertion that "[t]here is no doubt the President could direct" the Secretary not to lease certain areas based on the President's "general administrative control" over the Executive Branch. *Id*. at 55 (quotation omitted).

[8] Plaintiffs' remaining cases are even further afield. *United States v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947), involved an agency adjudication—which Plaintiffs themselves dismiss as inapt, *see* Pls.' Br. 83-85—of a private party's certificate to engage in activities as a common carrier. At any rate, the agency in that case had—unlike past Presidents invoking Section 1341(a), *see infra* pp. 20-22—previously held that it could not revoke such certificate "under its general statutory power to alter orders previously made." *Seatrain*, 329 U.S. at 430-31. *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000), involved express limitations on the Attorney General's authority to revoke citizenship. *See Gorbach*, 219 F.3d at 1093-94 (describing "express statutory procedure"). Section 1341(a) imposes no such express limitations.

To the contrary, OCSLA Section 18 mandates that the Secretary promulgate five-year oil and gas leasing programs, and details with specificity the criteria that the Secretary shall apply in assessing the relative benefits of development of each oil and gas bearing OCS region. *See* 43 U.S.C. § 1344(a). It is the application of these criteria that could "warrant[] the exclusion of any proposed area in the Leasing Program." *Ctr. for Biological Diversity v. United States Dep't of the Interior*, 563 F.3d 466, 473-74, 487-89 (D.C. Cir. 2009) (describing statutory requirements in developing leasing program). Failure to apply these criteria in deciding whether to do so would violate the Secretary's statutory obligations. *Id.* at 487-89.

Given these statutory directives to the Secretary, a President cannot independently order the Secretary not to consider certain areas for leasing, and thereby violate OCSLA Section 18. Rather, the President must rely upon the power provided in Section 1341(a)—the direct authority delegated to the President by Congress—to accomplish that result (or, if it exists, a congressional moratorium). Thus, the plain reading of Section 1341(a) to permit modification of prior withdrawals "from time to time" is not redundant of the Secretary's leasing

obligations. Instead, it confers a power upon the President to affect the latter's statutory duties.[9]

Read in context, Plaintiffs' arguments and proposed authorities fall far short of undermining the revisionary discretion inherent in Section 1341(a)'s plain language.

B. OCSLA's Developmental Purpose Supports Reading Section 1341(a) To Authorize The President To Modify A Withdrawal.

Section 1341(a)'s discretionary language is bolstered by OCSLA's purpose. *See* API Br. 4-9, 27-30. Because construction of a statutory term must account for the "purpose of the statute," *Chan Healthcare*, 844 F.3d at 1138 (quotation omitted); *see also, e.g.*, *DBSI, Inc.*, 869 F.3d at 1010, the central question here is how best to interpret Section 1341(a) in light of OCSLA's overarching purpose to ***expedite*** OCS oil and gas development. Interpreting Section 1341(a)—as Plaintiffs do—to allow a President permanently to withdraw (up to) the entire OCS beyond the reach of a future President or Congress (absent a new statutory enactment) fails to "tie[] the statutory requirements together in a manner consistent with the

[9] Moreover, as a practical matter, because a leasing program lasts for five years, most (or even all) of a President's four-year term may be spent under his or her predecessor's five-year program. A President will thus need to exercise Section 1341(a) authority, not dictate leasing results under Sections 18, if the President wants to place a given OCS area temporarily beyond leasing.

statute's language and purpose." *Presidio Historical Ass'n v. Presidio Trust*, 811 F.3d 1154, 1167 (9th Cir. 2016).

Both in originally enacting OCSLA in 1953, and in amending the Act in 1978, Congress made clear that "[t]he principal purpose of [OCSLA] is to authorize the leasing by the Federal Government of . . . the [OCS]." H.R. Rep. No. 83-413, at 2. *See also* 43 U.S.C. § 1802(1) (purpose to ensure "expedited exploration and development of the [OCS]"); 43 U.S.C. § 1332(3) (finding that OCS "should be made available for expeditious and orderly development"). Plaintiffs largely ignore OCSLA's stated primary purpose, instead replacing it with Plaintiffs' policy preference permanently to protect ecological resources. But Plaintiffs are not entitled simply to replace Congress' purpose with their own.

Plaintiffs scour OCSLA for any mention of environmental resources to claim that Congress's purpose was "to balance resource extraction and conservation." *See, e.g.*, Pls.' Br. 71. But the 1978 amendments to OCSLA upon which Plaintiffs principally rely, *see id*. 68-71, cemented OCSLA's purpose of "promot[ing] the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the [OCS]."[10] As the D.C. Circuit and Supreme Court explained nearly contemporaneously, Congress's explicit "objective [was] . . . the expeditious development of OCS resources," *Watt*, 668 F.2d at 1316,

[10] H.R. Rep. No. 95-590, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N 1450, 1460.

and it designed a detailed development structure to "forestall premature litigation regarding adverse environmental effects that . . . will flow, if at all, only from the latter stages of OCS exploration and production," *Sec'y of the Interior v. California*, 464 U.S. 312, 341 (1984).

That OCSLA occasionally directs the Secretary to consider environmental impacts does not alter the main thrust of the statute, but rather provides that development should be "subject to environmental safeguards" to ameliorate the attendant effects of OCSLA's overriding purpose to produce OCS oil and gas. 43 U.S.C. § 1332(3). *See also Watt*, 668 F.2d at 1316; *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (statutory construction focuses on "dominant legislative purpose" (quotation omitted)). The OCSLA provisions on which Plaintiffs rely prove the point.

Far from supporting Plaintiffs' "balance" argument, *see* Pls.' Br. 55, 43 U.S.C. § 1337 "authorize[s]" the Secretary "to grant to the highest responsible qualified bidder . . . any [OCS] oil and gas lease[.]" *Id*. § 1337(a)(1). Section 1337's remaining provisions describe the lease bidding, payment, and royalty schemes, and authorizes the Secretary to alter these regimes—for example, through royalty reductions—"in order to ***promote increased production*** on the lease area[.]" *Id*. § 1337(a)(3)(A) (emphasis added). *See also id*. § 1337(a)(3)(B) (Secretary may alter royalties to "promote development or increased production"

or "encourage production of marginal resources"); *id*. § 1337(b)(2)(B) (Secretary may extend lease term "to encourage exploration and development in . . . deep water or other unusually adverse conditions"); *id*. § 1337(p)(1)(A) (Secretary may grant leases, easements, and right-of-ways to "support exploration, development, production, or storage of oil or natural gas").

While Section 1337 also directs the Secretary to ensure that an authorized activity "provides for" "protection of the environment," *id*. § 1337(p)(4), that does not alter the overriding tenor of the Section to expedite exploration and production. *E.g.*, *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (rejecting statutory interpretation that "would distort the tenor of the statute"). Rather, protection of the environment is simply included among ***thirteen other factors***—including, *inter alia*, ensuring "a fair return to the United States," 43 U.S.C. § 1337(p)(4)(H)—for the Secretary to consider in pursuing the "[t]he first stated purpose of the Act . . . to establish procedures to expedite exploration and development of the OCS," *Watt*, 668 F.2d at 1316.

Section 1344's directive that the Secretary "prepare and periodically revise, and maintain an oil and gas leasing program" likewise focuses on the "leasing activity which he determines will ***best meet national energy needs***[.]" 43 U.S.C. § 1344(a) (emphasis added). To that end, the Secretary need only "consider[] economic, social, and environmental values," *id*. § 1344(a)(1), not sacrifice

development. To be sure, OCSLA directs the Secretary "to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." *Id.* § 1344(a)(3). But Congress left the determination of the "proper balance" to the Secretary, and, again, did so in the interest of a leasing program that "he determines will best meet national energy needs." *Id.* § 1344(a).

More importantly, Section 1341(a) itself includes no suggestion, explicit or otherwise, that "it is a protective complement" to the "delegated leasing discretion to the" Secretary. Pls.'s Br. 54-55. Nor does the remainder of Section 1341. As a whole, the section establishes the United States' authority over withdrawals and reservations from OCS leasing. In so doing, it protects national rights "during a state of war or national emergency," 43 U.S.C. § 1341(c); *see also id.* § 1341(b), (d), and ownership over critical resources such as "uranium, thorium," and "helium," *id.* § 1341(e)-(f). Environmental protection is wholly absent. Compared to Plaintiffs' references to other public lands statues enacted decades apart from OCSLA, *see* Pls.' Br. 49-51, these "neighboring" provisions in the same enactment are a superior guide to Congress's intent, *In re Google LLC*, 949 F.3d 1338, 1344 (Fed. Cir. 2020) (quotation omitted). *See also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1092 (9th Cir. 2014) (relying on longstanding interpretation of "related section of the same statute"). *Cf. United States v. Mills*, 850 F.3d 693,

698-99 (4th Cir. 2017) ("adjacent statutory subsections that refer to the same subject matter should be read harmoniously").[11]

Having failed to demonstrate that Congress intended OCSLA to "balance"—rather than account for—environmental resources with OCS development, Plaintiffs' assertion that Section 1341(a) precludes all but permanent withdrawals would provide a President the authority single-handedly—until Congress could enact a repealing statute subject to the President's veto—to negate OCSLA's developmental purpose by withdrawing the entire unleased OCS from disposition for leasing. "[S]uch an interpretation is unpersuasive because it contradicts the purpose of the statute." *Parra v. Astrue*, 481 F.3d 742, 749 (9th Cir. 2007) (rejecting agency interpretation of statute). *See also, e.g.*, *Donovan v. S. Cal. Gas Co.*, 715 F.2d 1405, 1408 (9th Cir. 1983) ("To allow the construction of the statute which the [party] here urges undermines the purpose of Congress in enacting the statute. We will not do so.").

[11] The specificity of Section 1341's other provisions further informs congressional intent for the entire section. *Cf. In re Lifshultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) ("[W]hen forced to choose between specific substantive provisions and a general savings clause, we choose the more specific provisions because we believe they express congressional intent more clearly.").

C. Presidential And Congressional Practice Supports Reading Section 1341(a) To Authorize The President To Modify A Withdrawal.

Plaintiffs fare no better in their attempt to obfuscate presidential and congressional practice that further confirms reading Section 1341(a) to authorize a President to modify a withdrawal. A reviewing court must give heed to the "consistent" usage of delegated authority. *Haig v. Agee*, 453 U.S. 280, 291 (1981). The Supreme Court has applied that principle directly to public land withdrawal orders made without explicit statutory authorization. *See Midwest Oil*, 236 U.S. at 469.[12] In short, "in determining the meaning of a statute or the existence of a

[12] Plaintiffs are simply wrong in suggesting that *Midwest Oil* was decided "in the absence of a statute." Pls.' Br. 72. *Midwest Oil* addressed a statute that opened lands for "exploration" of petroleum, and, more specifically, the legality of presidential withdrawal of lands from the reach of the statute. *See* 236 U.S. at 466. Thus, the Supreme Court considered—as here—past practice in determining whether a withdrawal power should be implied in that statute. Nor does the passage of other public land statutes, *see* Pls.' Br. 4-5, undercut the authority delegated to the President in OCSLA. That Congress enacted various public land statutes prior to 1910 is irrelevant because *Midwest Oil* was decided after the referenced statutes had been enacted, and the Court nevertheless recognized presidential power to withdraw notwithstanding that the statute at issue on its face did not provide such power. *See Midwest Oil*, 236 U.S. at 466. The Court therefore made clear that the existence of other statutes with explicit presidential modification authority does not eliminate such power implied from practice under another statute.

power, weight shall be given to the usage" of the statutory provision "itself, even when the validity of the practice is the subject of investigation." *Id*. at 472-73.[13]

Contrary to Plaintiffs' reading of Section 1341(a) to authorize only permanent OCS withdrawals, the past five Presidents have issued either withdrawals limited to a date certain, *see* API Br. 10-14; 2 E.R. 302-03 (President George H.W. Bush); 2 E.R. 301 (President Clinton); 2 E.R. 300 (President George W. Bush); 2 E.R. 298 (President Obama),[14] or modified existing withdrawals to re-open OCS lands to potential leasing, *see* 2 E.R. 299 (President George W. Bush); 2 E.R. 285-86 (President Trump).

If Plaintiffs' statutory construction is correct, every President since 1990 has violated Section 1341(a). Plaintiffs attempt to sidestep this ramification of their construction. But the point of Section 1341(a)'s consistent historical usage is not whether it is Congress or the President that holds the authority to "rescind" a withdrawal, *see* Pls.' Br. 63, but rather that Section 1341(a) no more explicitly authorizes the President to issue a time-limited withdrawal than it explicitly states

[13] Plaintiffs quote *Alabama v Texas* for the proposition that powers within the Property Clause are "without limitation." *See* Pls.' Br. 79. But the case was quoting *Midwest Oil*, which upheld presidential withdrawal power in the absence of an express congressional delegation.

[14] President Obama's March 31, 2010 withdrawal of a portion of the North Aleutian Basin "through June 30, 2017," 2 E.R. 298, was supplanted by the withdrawals subsequently modified by Executive Order 13795.

that a withdrawal may be modified. Both powers are implied. In other words, the unchallenged existence of time-limited withdrawals—along with two instances of express modifications revoking prior withdrawals—confirms the breadth, in practice, of the authority conferred by Congress in Section 1341(a).

Likewise, Presidents have occasionally indicated that their withdrawals are "subject to revocation" in the "interests of national security." 2 E.R. 301. Because nothing in Section 1341(a) explicitly conveys such reservation authority, the President again exercised an ***implied*** power reflecting the changeable nature of withdrawals.

That non-permanent withdrawals have been relatively rare, *see* Pls.' Br. 71, is misleading because ***any*** invocation of Section 1341(a) is uncommon. *See* Fed. Defs.' Br. 70 (noting "twelve prior withdrawals under Section 12(a)"). And those non-permanent withdrawals, however few, covered large swaths of the OCS. *See* API Br. 10-14. At any rate, the Supreme Court has made clear that "practice [is] an important interpretive factor ***even when the nature or longevity of that practice is subject to dispute***." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (emphasis added).

That record of past withdrawals also contradicts Plaintiffs' unsupported insistence that "Congress has never acquiesced in" a presidential modification under Section 1341(a). Pls.' Br. 71. Not only has Congress chosen not to overturn

any withdrawal modification,[15] it has confirmed a revocation. On July 14, 2008, President George W. Bush applied Section 1341(a) to "modify the prior memoranda of withdrawals" to open all previously withdrawn OCS lands except for existing Marine Sanctuaries. 2 E.R. 299. Congress then followed suit, excluding its prior moratoria from appropriations for 2009. *See* Consolidated Security Disaster Assistance, and Continuing Appropriation Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574 (Sept. 30, 2008).[16] Thus, by adopting (including affirmatively) presidential withdrawal modifications, Congress' acquiescence "add[s] a gloss or qualification" to Section 1341(a)'s language, *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (citing *Midwest Oil*), that further supports Executive Order 13795.

Enactment of the Federal Land Policy and Management Act ("FLPMA") in 1976, *see*, *e.g.*, Pls.' Br. 6 n.1, did not change the interpretive standards set out in

[15] Such past congressional inaction does not purport to "amend a duly enacted statute," Pls.' Br. 72 (quotation omitted), but rather provides a guide to interpreting the language used by Congress in Section 1341(a). *See Midwest Oil*, 236 U.S. at 472-73; 1 E.R. 17-18 (finding Section 1341(a) ambiguous).

[16] Plaintiffs blindly speculate that Congress took this action independently because "its own leasing policies were shifting and happened to align with the President's." Pls.' Br. 74. Plaintiffs' speculation cannot overcome Congress's cessation of a years-long moratorium to match the President's revocation of existing withdrawals a mere six months earlier. *Cf. Bilski v. Kappos*, 561 U.S. 593, 608 (2010) (an "established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision").

Midwest Oil. *See, e.g.*, *Noel Canning*, 573 U.S. at 525 (citing *Midwest Oil* in support of general rule allowing past practice to inform interpretation); *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686 (2010) ("longstanding practice" informs statutory construction). Addressing changing circumstances in the use of public land after World War II, *see Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 855 (9th Cir. 2017), the FLPMA reflects Congress's exercise of its constitutional authority expressly to supplant long-established and valid presidential exercises of authority implied from past practice. The FLPMA says nothing about the scope of Congress's past delegations of authority over federal property, or the impact of past practice on that delegation where, as here, no express superseding congressional action has been taken. *See* FLPMA, Pub. L. No. 94-579, § 103(e), 90 Stat. 2743 (Oct. 21, 1976) (excluding "lands located on the [OCS]" from the definition of covered "public lands").

Plaintiffs' attempted reliance on President Truman's Executive Order 10426, *see* Pls.' Br. 6, 58-59, is likewise misplaced because the historical context belies Plaintiffs' arguments regarding President Truman's creation of a naval reserve on the OCS. President Truman fully supported robust development of OCS resources, *see, e.g.*, 2 E.R. 309 (recognizing "need for new sources of petroleum and other minerals," and that "efforts to discover and make available new supplies of these resources should be encouraged" on the OCS), and Executive Order 10426 was

simply part of an ongoing debate about the federal government's authority over offshore resources vis-à-vis ***state governments***.

The Supreme Court had ruled in *United States v. California*, 332 U.S. 19 (1947), and *United States v. Louisiana*, 339 U.S. 699 (1950), that the federal government, not the states, controlled the marginal belt beyond the low-water mark. Republicans sought to return that belt to state control and enacted legislation to do so, which President Truman vetoed. *See Title to Certain Submerged Lands—Veto Message*, 98 Cong. Rec. 6251 (May 29, 1952). Then, four days before he left office, President Truman issued Executive Order 10426, 18 Fed. Reg. 405 (Jan. 16, 1953), creating a naval reserve on the OCS in an attempt to hinder renewed Republican efforts to return the belt to the states by making it more difficult for the federal government to "give away" the reserved lands. *See* Washington Post, Jan. 16, 1953 p. 1, *Navy Gets Tideland Oil, Truman Says in Press Finale* ("The President's action will bring acute embarrassment to President-elect Eisenhower, who made the return of the disputed tidelands ***to the States*** one of his top campaign issues" (emphasis added)).

But Congress and President Eisenhower nevertheless transferred control of the marginal belt to the states and repealed Executive Order 10426 insofar as it applied to the marginal belt, *see* Submerged Lands Act, Pub. L. No. 83-31, 67 Stat. 29, 30, 33 (May 22, 1953), and then with respect to the entire OCS through

OCSLA, *see* Pub. L. No. 83-212 § 13, 67 Stat. 462, 470 (Aug. 7, 1953). In short, Executive Order 10426 had nothing to do with the President's and Congress's relative power to "withdraw" regions of the OCS, but was instead part of a partisan political battle over the geographic limits of federal and state jurisdiction.

Finally, Plaintiffs' proffered cases do not undermine the longstanding application of revisionary authority under Section 1341(a). *See* Pls.' Br. 72. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), involved alleged congressional acquiescence to a ***judicial*** interpretation of the Securities Exchange Act. *Id*. at 186-87. While the Court questioned the "persuasive significance" of "[c]ongressional inaction," *id*. at 187 (quotation omitted), here Congress has affirmatively acted in accordance with a presidential withdrawal modification, *see supra* pp. 21-22. Nor does this case involve an "administrative interpretation[] of a statute" or an attempt to rely on "[f]ailed legislative proposals." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (quotation omitted).

Again, several of Plaintiffs' proffered cases support reading Section 1341(a) to authorize withdrawal modifications. Unlike the statute found to limit agency authority in *Zuber v. Allen*, 396 U.S. 168 (1969), Section 1341(a) delegates authority to the President "in broad and permissive terms" and without providing "specifically enumerated" limits on the President's exercise of the delegated

discretion. *Id*. at 183. Moreover, presidential modification of a past withdrawal to expand leasing is consistent with the "very purpose" of OCSLA and the comprehensive statutory scheme established to expedite development. *Id*. at 185. *See also* API Br. 4-9 (describing OCSLA's staged development regime); *supra* pp. 13-18.

Dames & Moore v. Regan, 453 U.S. 654 (1981), undercuts Plaintiffs' (and the district court's) belief that Section 1341(a)'s withdrawal modification history is too sparse to inform the President's delegated authority. In that case, the Supreme Court relied on only ten past uses of the claimed presidential power to settle private citizens' claims against foreign nations. *See id*. at 680.[17] The Court further noted that its own prior cases had recognized similar authority in the President, *see id*. at 683—comparable to *Midwest Oil*'s prior recognition of presidential authority to modify or revoke past withdrawals even in the absence of express statutory authorization. *See supra* pp. 19-20 & n.12.

* * *

Viewed as a whole, past practice under Section 1341(a) illustrates that withdrawals have rarely, if ever, been treated as permanent or inviolate. Instead,

[17] While Plaintiffs quote the Court's statement that "systematic, unbroken, executive practice" is necessary to imply congressional acquiescence, that discussion was (1) quoted alongside *Midwest Oil*, (2) made as part of the Court's analysis of the President's Article II powers, and (3) relied on only ten past instances of the challenged authority. *Id*. at 686.

withdrawals have been, among other things, made on a time-limited basis, and reversed or modified. That history provides "weight" "in determining the meaning of" OCSLA, *Midwest Oil*, 236 U.S. at 472-73, and further confirms the discretionary authority exercised in Executive Order 13795.

II. THE PRESIDENT'S DELEGATED DISCRETIONARY AUTHORITY UNDER SECTION 1341(a) COMBINED WITH THE PRESIDENT'S ARTICLE II POWERS FURTHER SUPPORT EXECUTIVE ORDER 13795.

Executive Order 13795 rests at the apex of the President's authority, *see* API Br. 37-39, which combines the OCS withdrawal powers expressly and impliedly delegated by Congress in Section 1341(a) with the President's own "Article II powers over national security and foreign relations." Fed. Defs.' Br. 4. *See also* Fed. Defs.' Reply Br. 28. Executive Order 13795 is thus "supported by the strongest of presumptions and the widest latitude of judicial interpretation" of the President's authority. *Youngstown*, 343 U.S. at 636-37 (Jackson, J., concurring).

Plaintiffs' insistence that there is no specific Article II power to revoke a withdrawal, *see* Pls.' Br. 78, is beside the point. The question is not whether Article II specifically addresses revocation, but rather whether Section 1341(a) must be ***interpreted*** broadly under *Youngstown g*iven that OCS activities implicate well-established Article II powers over national security and foreign affairs. In that light, Plaintiffs' assertion that Executive Order 13795 "falls under *Youngstown*

tier III," Pls.' Br. 78, simply begs the question as to the scope of Section 1341(a)'s delegation to the President.[18]

Because Section 1341(a)'s language and past implementation, bolstered by OCSLA's purpose, belie Plaintiffs' construction of Section 1341(a), Plaintiffs have fallen far short of their "heav[y]" burden to prove that Executive Order 13795 is beyond presidential authority. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

CONCLUSION

This Court should reverse the district court's decision, and direct entry of summary judgment for Federal Defendants and the Intervenor-Defendants.

Respectfully submitted,

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291

[18] For this reason, Plaintiffs' musing about other presidential powers, *see* Pls.' Br. 81, is inapposite. Article II provides the President unquestioned authority over foreign relations and national security. The question then is the scope of additive authority conferred by Section 1341(a)—not the scope of other presidential powers in Article II.

srosenbaum@cov.com

Attorneys for Defendant-Intervenor-Appellant American Petroleum Institute

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), Circuit Rule 32-1, and the Court's September 3, 2019 Scheduling Order because this brief contains 6499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Times New Roman font.

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291
srosenbaum@cov.com

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via the Court's CM/ECF system upon all counsel of record.

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001
Phone: (202) 662-6000
Fax: (202) 662-6291
srosenbaum@cov.com