NOT YET SCHEDULED FOR ORAL ARUGMENT
No. 18-5353

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, et al.,
Intervenors for Defendants/Appellees.

Appeal from the United States District Court for the District of Columbia
No. 1:17-cv-00406 (Hon. James E. Boasberg)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Appellants' opening brief. Mary B. Neumayr substitutes for "Jane Doe" as the Chairman of the Council on Environmental Quality. Fed. R. App. P. 43(c).

B. Rulings Under Review.

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

C. Related Cases.

There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Avi Kupfer
AVI KUPFER

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Statutes, Regulations, and Court Rules

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GLOSSARY

ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
EEZ	Exclusive Economic Zone
FLPMA	Federal Land Policy and Management Act

INTRODUCTION

The Antiquities Act authorizes the President, in his discretion, to establish national monuments to protect objects of historic or scientific interest on land owned or controlled by the federal government. In 2016, President Barack Obama issued a proclamation establishing the Northeast Canyons and Seamounts Marine National Monument (the "Monument"). The Monument lies within the United States' Exclusive Economic Zone ("EEZ"), i.e., the submerged lands and water beyond the twelve-mile territorial sea extending to 200 miles from the coastline.

Several fishermen's associations (the "Lobstermen") filed suit alleging that the President lacked authority under the Antiquities Act to establish the Monument. The district court granted the Federal Appellees' motion to dismiss. The court held, consistent with longstanding Supreme Court precedent, that submerged land and water is "land" under the Act. The court also held that the federal government "controlled" the EEZ. Finally, the court held that it was unnecessary to decide whether the President's designation of the Monument's boundaries is judicially reviewable because the Lobstermen's factual allegations were insufficient to support their claim that the Monument contains more land than is necessary to protect the specified objects of interest. The Lobstermen challenge those holdings. Those challenges lack merit as they find no support in the applicable law or facts of this case.

The district court's dismissal should therefore be affirmed.

STATEMENT OF JURISDICTION

(a) The district court's jurisdiction to conduct non-statutory review of presidential action pursuant to the Antiquities Act was limited to, at most, ensuring that the action was "consistent with constitutional principles and that the President ha[d] not exceeded his statutory authority." *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002). The district court's lack of jurisdiction to review for abuse of discretion the President's determination of the Monument's size is discussed in Section II.B.

(b) The district court's order dismissing the action was final because it resolved all claims against all defendants. Appendix ("A") 54. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court's order was issued on October 5, 2018. A54. The Lobstermen filed their notice of appeal on December 3, 2018, or 59 days later. A8. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

The Lobstermen challenge the President's establishment of the Monument in the coastal seabed and water of the EEZ pursuant to the Antiquities Act, 54 U.S.C. §§ 320301 et seq. This appeal presents the following issues:

1. Whether the term "land" under the Antiquities Act includes submerged land and water in the ocean?

2. Whether in 2016 the United States "controlled" the EEZ within the meaning of the Antiquities Act?

3. Whether a plaintiff states a claim when the relevant facts alleged in the complaint contradict exhibits to the complaint?

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Lobstermen's opening brief.

STATEMENT OF THE CASE

A. The Antiquities Act

The Antiquities Act "confers very broad discretion on the President," *Mountain States*, 306 F.3d at 1137, to declare national monuments:

> The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

54 U.S.C. § 320301(a). "The President may reserve parcels of land as a part of the national monuments." *Id.* § 320301(b). The "limits" of such parcels "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* The

Antiquities Act contains no provision expressly authorizing judicial review of presidential proclamations.

Since the enactment of the Antiquities Act in 1906, almost every President has used the statute to establish 158 national monuments in thirty-three states, four territories, two oceans, and the District of Columbia. Antiquities Act: Monuments List, www.nps.gov/archeology/sites/antiquities/monumentslist.htm. Since 1935, Presidents have established many monuments in submerged lands and water in the oceans. *Id.* In 1983, President Ronald Reagan issued a proclamation declaring the United States' "sovereign rights and jurisdiction" in the EEZ, i.e., the belt of sea beyond the twelve-mile territorial sea that extends to 200 miles from the coastline. Proclamation No. 5030, 48 Fed. Reg. 10,605, 10,605 (Mar. 14, 1983); *see also Restatement (Third) of Foreign Relations* § 511(a), (d). Since that time, President George W. Bush and President Obama established and expanded five marine national monuments in the EEZ.

B. Northeast Canyons and Seamounts Marine National Monument

In 2016, President Obama issued a proclamation (the "Proclamation") establishing the Monument within an area of the EEZ encompassing 4,913 square miles approximately 130 miles off the coast of New England. Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 21, 2016); A42-51. The Monument designated for protection three sets of

objects: three underwater canyons, four undersea mountains known as seamounts, and "the natural resources and ecosystems in and around them." 81 Fed. Reg. at 65,161. In addition to its geological value, the area supports a "great abundance and diversity" of marine species. *Id.* at 65,161. "[D]eep-sea corals" and "other structure-forming fauna such as sponges and anemones" inhabit the area and "create a foundation for vibrant deep-sea ecosystems, providing food, spawning habitat, and shelter for an array of fish and invertebrate species." *Id.* "These habitats are extremely sensitive to disturbance from extractive activities." *Id.* The President determined that the Monument is the "smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 65,163.

The Proclamation directs the Secretary of Commerce and the Secretary of the Interior to "prohibit" certain extractive activities. *Id.* at 65,164-65. Among the prohibited activities are "energy exploration or development"; "[d]rilling into, anchoring, dredging, or otherwise altering the submerged lands"; and "[f]ishing commercially." *Id.*

C. The Lobstermen's lawsuit

In 2017, the Lobstermen sued the federal government alleging that the President "exceeded his power" in issuing the Proclamation. A23-25. The Lobstermen sought a declaration to that effect and an injunction blocking the ban on commercial fishing. A25. Several conservation organizations intervened as defendants. A5. The

government moved to dismiss the Lobstermen's action for lack of subject-matter jurisdiction, arguing that the President acted within his authority under the Antiquities Act because the EEZ is "land owned or controlled by the Federal Government," 54 U.S.C. § 320301(a), where the President has discretion to designate monuments. In the alternative, the government moved to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6).

The district court granted the government's motion, dismissing the action for lack of jurisdiction. A54-86. The court first held that submerged lands and water are "land" within the meaning of the Antiquities Act. A64-72. The Supreme Court has in three cases concluded that the Act reaches such land, Presidents have established a number of national monuments in the oceans, and Congress recently recodified the Act without modifying its reach. A64-67. Additionally, the ordinary meaning of the term "land" includes "places like the ocean floor and the beds of lakes and streams." A67-68. The court held that this reading creates no conflict with the later-enacted National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 et seq., which provided a "more targeted implement to achieve an overlapping, but not identical, set of goals." A68-72.

The district court next held that at the time of the Proclamation, the United States "controlled" the EEZ, and that the Lobstermen were incorrect in asserting that "control" means "absolute control." A72-84.

The "more persuasive interpretation . . . does not require inserting an adjective in front of the word to achieve a desired meaning." A76. The court ruled that neither the interpretive canons invoked by the Lobstermen nor the legislative history of the Antiquities Act supports the "absolute control" construction. A73-76. The court also ruled that the United States possesses "broad sovereign authority to manage and regulate the EEZ" and "specific authority to regulate the EEZ for purposes of marine conservation," and also that the government's control over the EEZ is "unrivaled." A78-82.

The district court finally held that it was unnecessary to determine whether the Lobstermen's claim that the Monument is larger than is necessary to protect the designated objects is subject to judicial review. A63, A84-86. The Lobstermen's complaint, the court ruled, lacks specific, non-conclusory factual allegations establishing their claim because it rests on the "incorrect factual assumption that the only objects designated for protection are the canyons and seamounts themselves." A85. The court held that the Monument also protects as objects "the natural resources and ecosystems in and around" the canyons and seamounts, 81 Fed. Reg. at 65,161, and that the Monument's boundaries "presumably align" with those objects. A85. Additionally, the Lobstermen's allegation that the ecosystem is not an "object" under the Antiquities Act contradicts holdings of the Supreme Court and of this Court. A86.

The Lobstermen appealed the district court's order.

SUMMARY OF ARGUMENT

1. The Antiquities Act grants the President discretion to proclaim national monuments in the EEZ. First, the Lobstermen are incorrect that submerged land and water in the ocean are not "land" under the Act. The Supreme Court has repeatedly and consistently held that the Act reaches submerged land and water. Congress has long acquiesced in that interpretation and has enacted legislation consistent with the Court's conclusion. That understanding also closely aligns with Presidents' frequent establishment of monuments in submerged land and water in the oceans. This Court therefore need not consider the Lobstermen's statutory construction arguments. But in any event, those arguments fail.

The Lobstermen are also incorrect that the United States does not "control" the EEZ under the Antiquities Act. "Controlled" carries its ordinary meaning distinct from "owned." Neither the interpretive canons nor the legislative history invoked by the Lobstermen is to the contrary. The federal government "controlled" the EEZ when the President reserved the Monument because the government exercises sovereign rights and jurisdiction in the EEZ to the extent permitted under international law, including the authority to exploit, conserve, and manage its natural resources. The National Marine Sanctuaries

Act did not strip the President of authority to establish monuments in the EEZ because the Sanctuaries Act is a gap-filling statute intended to supplement, not to replace, existing authorities for marine conservation.

2. The district court properly declined to review the Lobstermen's claim that the Monument is larger than is necessary to protect the specific objects of interest. First, the Lobstermen's complaint fails to state a claim because their allegations rest on the faulty premise that the Monument protects only the canyons and seamounts. The Proclamation explicitly names as a protected object the natural resources and ecosystems in and around the canyons and seamounts. Additionally, the Lobstermen's claim that an ecosystem is not an object of scientific interest under the Antiquities Act contradicts holdings of the Supreme Court and of this Court.

If this Court reaches the proper scope of judicial review of the Lobstermen's claim, it should hold that review is unavailable because the Antiquities Act commits decisions regarding the proper size of monuments to the President's discretion. Determining that a monument's boundaries encompass the smallest area compatible with protecting the named objects is a discretionary line-drawing exercise.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir.

2018). Non-statutory review of presidential action pursuant to the Antiquities Act, which provides no cause of action, is limited to ensuring that the action is "consistent with constitutional principles and that the President has not exceeded his statutory authority." *Mountain States*, 306 F.3d at 1136; *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996) (noting the Supreme Court's "hesitancy" to review presidential action).

ARGUMENT

I. The Antiquities Act gives the President discretion to proclaim national monuments in the EEZ.

The President had statutory authority to establish the Monument because (i) "land" under the Antiquities Act includes submerged land and water; and (ii) the United States "controlled" the EEZ when the President issued the Proclamation.

A. The Antiquities Act authorizes the reservation of submerged land and water.

The Lobstermen first assert that submerged lands and water in the ocean are not "land" under the Antiquities Act, 54 U.S.C. § 320301(a). *See* Br. 35-37. That argument fails because the Supreme Court has repeatedly held that the Antiquities Act reaches submerged land and water; Congress has long acquiesced in that construction; and no interpretive canon supports the Lobstermen's view.

1. The Supreme Court has foreclosed the Lobstermen's attempt to limit the Act to the "non-ocean surface."

The Supreme Court has repeatedly held that the Antiquities Act's reference to "land" authorizes the reservation not only of dry land but also the reservation of "submerged lands and waters." *United States v. California*, 436 U.S. 32, 36 & n.9 (1978) (opining that "[t]here can be no serious question" on this point); *accord Alaska v. United States*, 545 U.S. 75, 103 (2005) ("It is clear . . . that the Antiquities Act empowers the President to reserve submerged lands."); *Cappaert v. United States*, 426 U.S. 128, 131, 147 (1976). In thrice reaching that conclusion, the Court has considered different types of submerged lands—a pool of water in Death Valley, *Cappaert*, 426 U.S. at 131; a bay containing inland navigable waters, *Alaska*, 545 U.S. 99-100; and the seabed of the Pacific Ocean, *California*, 436 U.S. at 33. The location of submerged lands and water therefore has no bearing on whether they are "land" within the meaning of the Act.

The Lobstermen's argument that "land" in the Antiquities Act refers only to "the Earth's non-ocean surface" ignores these Supreme Court cases. Br. 39. Tellingly, the Lobstermen discuss these cases only to advance the separate argument that "ocean *beyond* the territorial sea is not . . . controlled by the federal government." Br. 54-58 (emphasis added). Indeed, elsewhere in their opening brief, the Lobstermen

appear to concede that monuments may be established in at least some submerged land and waters in the ocean. Br. 18-19, 35, 50, 57.

Regardless, the Lobstermen's dismissal of this Supreme Court authority is unfounded. First, the Lobstermen are mistaken that the statements are dicta that should be "discount[ed]." Br. 55 & n.15. In *Alaska*, the Court undertook a "two-step inquiry" to determine whether, on account of President Calvin Coolidge's establishment of the Glacier Bay National Monument, the United States retained title to submerged lands in Glacier Bay that otherwise would have passed to Alaska when it became a state. 545 U.S. at 100. The first step of that inquiry forced the Court to consider whether "Glacier Bay National Monument, at the time of Alaska's statehood, included the submerged lands underlying Glacier Bay." *Id.* at 102. The Court's affirmative answer was not dicta because it was "necessary" to its subsequent holding that the United States retained those submerged lands. *Id.* at 101; *accord United States v. Windsor*, 570 U.S. 744, 759 (2013) (statement not dicta when it "was a necessary predicate to the Court's holding"). *Alaska*'s understanding that "the Antiquities Act empowers the President to reserve submerged lands," 545 U.S. at 103, was a "necessary antecedent" to its holding. *In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019).

Even if the Supreme Court's repeated references to the President's authority to reserve submerged land and water were dicta, this Court "generally treat[s] Supreme Court dicta as authoritative," *Bahlul v.*

United States, 840 F.3d 757, 763 n.6 (D.C. Cir. 2016), particularly where, as here, the statement at issue was expressed repeatedly and unequivocally, *Zivotofsky v. Secretary of State*, 725 F.3d 197, 212 (D.C. Cir. 2013). The Lobstermen's assertion notwithstanding, Br. 55, the Supreme Court's reasoning rested on considerations of the text of the statute and of earlier Supreme Court precedents, *Alaska*, 545 U.S. at 102-03; *California*, 436 U.S. at 39 n.9.

The Lobstermen's remaining arguments, Br. 55-58, do nothing to rebut the Supreme Court's conclusion that "the Antiquities Act empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 103. Rather, the Lobstermen assert that the Court's statements are distinguishable because they arose in cases that "concerned monuments containing federal land"—i.e., the monuments included both submerged land and water *and* non-submerged land. Br. 55-57. But the Lobstermen fail to explain why that matters: in those cases, the Supreme Court concluded that Presidents may reserve submerged land and water under the Antiquities Act, and that conclusion is what controls here. As the district court understood, A64-67, the location of the submerged land is immaterial to the Supreme Court's unambiguous statement that the Antiquities Act's reference to "land" authorizes the President to reserve "submerged lands and waters." *California*, 436 U.S. at 36.

Insofar as the Lobstermen are asserting that *Alaska*, *California*, and *Cappaert* had no occasion to consider whether the United States "controlled" the submerged land and water in the EEZ, they are indeed correct. Whether the *specific* land at issue here is "controlled" by the United States is a separate question, which is addressed below. Thus, the Lobstermen's arguments simply do not rebut the Supreme Court's conclusion that the Antiquities Act's reference to "land" encompasses submerged land and water, and the Lobstermen provide no reasonable basis for the Court to apply those precedents to some submerged lands but not to others.

2. Congress has long acquiesced in the Supreme Court's interpretation of the Act.

In more than forty years since the Supreme Court announced in *California* that "[t]here can be no serious question" that the President is empowered "under the Antiquities Act to reserve . . . submerged lands and waters," 436 U.S. at 36, Congress has taken no step to modify that statement, which the *Alaska* Court reaffirmed in 2005. That "long congressional acquiescence 'has enhanced even the usual precedential force'" accorded to the Supreme Court's interpretation of a statute. *Watson v. United States*, 552 U.S. 74, 82-83 (2007) (quoting *Shepard v. United States*, 544 U.S. 13, 23 (2005)); *see also General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 594 (2004) ("[C]ongressional silence

after years of judicial interpretation supports adherence to the traditional view" of a statute.).

That inference is supported by more than mere congressional inaction. In 2014, Congress recodified the Antiquities Act without any substantive modifications and with the "intent . . . to conform to the understood policy, intent, and purpose of Congress in the original enactment[]." Pub. L. No. 113-287, § 2(b), 128 Stat. 3094, 3094; *see also id.* at 3259-60 (enacting 54 U.S.C. §§ 320301-320303). As explained in the House report accompanying the enacted bill, the purpose of the legislation was to "restate[] and reenact[]" certain laws, including the Antiquities Act. H.R. Rep. No. 113-44, at 5 (2013). "Congress is presumed to be aware of a judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *DOT v. Public Citizen*, 541 U.S. 752, 770 n.4 (2004) (alterations omitted), particularly where, as here, that judicial interpretation is a longstanding and repeated Supreme Court precedent. *See Jama v. ICE*, 543 U.S. 335, 349 (2005) (framing ratification doctrine as a two-part inquiry: (i) whether Congress reenacted the statute without change and (ii) whether the judicial consensus was "so broad and unquestioned" that Congress presumptively "knew of and endorsed it"). Congress's statement of intent "to conform to the understood policy, intent, and purpose of Congress in the original enactment[]," 128 Stat. at 3094, is not evidence that Congress disclaimed those precedents, *cf.* Lobstermen

Br. 34-35, because "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).[1]

Congress has taken other actions that are fully consistent with the Supreme Court's conclusion, confirming that Congress "knew of and endorsed" that conclusion. For example, Congress was presumptively aware of this judicial precedent when it enacted legislation to improve the administration of the "marine environments, significant coral formations, fish and other marine animal populations" found within the submerged lands of Fort Jefferson National Monument off the coast of Florida. Pub. L. No. 96-287, § 201, 94 Stat. 599, 600 (1980). So, too, with regard to the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq. ("FLPMA"), which Congress enacted in 1976. FLPMA repealed a number of statutes that authorized the President to create, modify, or terminate public land withdrawals. Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976). The report for the companion

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[1] The Lobstermen discuss the 2014 recodification only to assert that Congress did not "acquiesce" to the "President's interpretation that the Antiquities Act applies to the" EEZ. Br. 29, 32, 34. The Federal Appellees have not argued that the recodification ratified its view that the United States "controls" the EEZ, and contrary to the Lobstermen's assertion, Br. 31, the district court made no such holding. *Cf.* A66, A70-71. This brief addresses below the separate question whether the federal government "controls" the EEZ. *See infra* pp. 22-44.

House bill made clear, however, that Congress was leaving intact the President's powers under the Antiquities Act. H.R. Rep. No. 94-1163, at 29 (1976) ("The bill would repeal . . . with certain exceptions, all identified withdrawal authority granted to the President . . . . The exceptions, which are not repealed, are contained in the Antiquities Act" and three other statutes.).

Congress's understanding also closely aligns with that of the President. Congress acted as described above against the backdrop of frequent presidential reservations of monuments containing submerged land and water in the ocean, further supporting a presumption of "congressional familiarity" with the shared understanding of both the judiciary and the executive that the Antiquities Act reaches submerged lands. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 429 n.14 (D.C. Cir. 1983). The "President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect." *AFL-CIO v. Khan*, 618 F.2d 784, 790 (D.C. Cir. 1979).

One of the very first designations under the Act, the Montezuma Castle National Monument, encompassed submerged land and water in a creek. Proclamation No. 696, 34 Stat. 3265 (Dec. 8, 1906). And since 1935, Presidents have consistently interpreted the Act as a grant of

authority to designated submerged land and water in the oceans for protection.[2]

Despite this long and consistent history of Presidents relying on the Antiquities Act as authority to designate monuments in ocean lands, Congress has never curtailed its use for that purpose. Even when Congress has limited presidential authority under the Act, it has not limited the scope of the Act to dry land. In 1950, after President Franklin Roosevelt's controversial designation of Jackson Hole National Monument, Congress amended the Antiquities Act to prohibit further establishment of monuments in Wyoming. 54 U.S.C. § 320301(d); *see also* Ronald F. Lee, *The Story of the Antiquities Act* ch. 8 (2001), *available at* www.nps.gov/archeology/Pubs/Lee/Lee_CH8.htm. Even then, Congress did not prevent the President from establishing monuments to protect submerged lands and water outside that State.

For these reasons, the Lobstermen cannot overcome the presumption that Congress ratified the shared understanding of the

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[2] *See, e.g.*, Proclamation No. 9173, 79 Fed. Reg. 58,645 (Sept. 29, 2014) (Pacific Remote Islands expansion); Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 26, 2006) (Northwestern Hawaiian Islands); Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001) (Virgin Islands Coral Reef); Proclamation No. 4346, 40 Fed. Reg. 5127 (Feb. 4, 1975) (Buck Island expansion); Proclamation No. 3443, 76 Stat. 1441 (Dec. 28, 1961) (Buck Island Reef); Proclamation No. 2825, 63 Stat. 1258 (Feb. 9, 1949) (Channel Islands expansion); Proclamation No. 2330, 53 Stat. 2534 (Apr. 18, 1939) (Glacier Bay expansion); Proclamation No. 2112, 49 Stat. 3430 (Jan. 4, 1935) (Fort Jefferson).

judicial and executive branches that the Antiquities Act reaches submerged land and water.

3. No textual canon supports the Lobstermen's view that the term "land" excludes submerged land in the ocean.

Because the Supreme Court has foreclosed the Lobstermen's interpretation of the term "land," this Court need not consider their arguments about statutory construction. Br. 35-37. But in any event, those arguments fail. As an initial matter, the Lobstermen disregard the crucial fact that the Monument is not merely "the ocean," Br. 35, but rather constitutes the "waters *and submerged lands* in and around the deep-sea canyons . . . and the seamounts," 81 Fed. Reg. at 65,161. In mischaracterizing the Monument, the Lobstermen thus fail to engage with the key issue—that the Supreme Court has repeatedly stated that monuments may include submerged land and water.

Regardless, the Lobsterman are incorrect in asserting that in 1906 the ordinary meaning of the word "land" would have excluded submerged land and water in the ocean. Br. 36. In support of that assertion, the Lobstermen selectively quote from the definition of "land" in contemporary dictionaries. Br. 36, 38. Yet those dictionaries also include "land under water" as a proper usage of the word "land." *Webster's New International Dictionary* 1209 (1909); *see also Black's Law Dictionary* 684 (1st ed. 1891) (defining "land," "in the most general

sense," as "any ground, soil, or earth whatsoever," including "everything attached to it . . . [such] as trees, herbage, and water"). That is consistent with the definitions of "land" in other leading contemporary dictionaries. *See, e.g.*, *The Century Dictionary and Cyclopedia* 3342 (1911) (defining "land" to mean "any part of the continuous surface of the solid materials constituting the body of the globe," including "submerged land"); Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* 528 (1901) (defining "land" to mean "any ground, soil, or earth whatsoever," including "waters"). As the district court correctly held, those definitions are consistent with "ordinary parlance," which "deem[s] places like the ocean floor and the beds of lakes and streams *land*." A67. Although the Lobstermen correctly note that the term "land" does not "speak to . . . the ocean" in particular, Br. 39, that is because "land" broadly encompasses *all* submerged land regardless of its location.

In a case "directly on point" from the time of the enactment of the Antiquities Act, A68, the Supreme Court commented that the term "land" includes "waters of every description by which such lands, or any portion of them, may be submerged." *Illinois Central Railroad Co. v. City of Chicago*, 176 U.S. 646, 660 (1900). The Lobstermen's assertion notwithstanding, Br. 38, that reasoning was not context-specific, but rather stated the "general principle" that the term "land" includes submerged lands and water. *Illinois Central*, 176 U.S. at 660; *see also*

Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918) (construing a congressional reservation of islands and observing that the term "land" is "sometimes" used "in a sense embracing" submerged land and water).[3]

The Lobstermen next argue that only their construction of the term "land" is compatible with 54 U.S.C. § 320301(b), which authorizes the President to reserve "*parcels* of land." Br. 37 (emphasis added) (quoting 54 U.S.C. § 320301(b)). Contrary to the Lobstermen's assertion, the term "parcel" is applicable to dry and submerged lands alike because it is broadly defined as a "portion of *anything* taken separately." *Webster's International Dictionary* 1042 (1907) (emphasis added); *see also Webster's New International Dictionary* 1566 (defining "parcel" to mean "portion" or "part"). The Lobstermen again ignore that in the Monument at issue, the President reserved submerged land, not just untethered ocean water.

Thus, the textual canons that the Lobstermen invoke do not undermine the Supreme Court's repeated statement that the

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[3] The Lobstermen also argue, Br. 38-39, that "land" would not typically have been understood to include submerged land and water because the Alaska National Interest Lands Conservation Act ("ANILCA"), enacted nearly seventy-five years after the Antiquities Act, defines "land" to include "waters," 16 U.S.C. § 3102(a). Even if considering the definition of "land" in ANILCA were appropriate here, that statute would shed no light on the ordinary meaning of "land" because nowhere does ANILCA state that its definition of "land" is *not* an ordinary usage of that term.

Antiquities Act's reference to "land" authorizes the reservation of submerged land and water.

B. The United States "controls" the EEZ within the meaning of the Antiquities Act.

The Lobstermen next argue, Br. 39-58, that even if submerged land and water is "land" under the Antiquities Act, the President nonetheless lacked authority to reserve the particular submerged land and water within the Monument's boundaries because the EEZ was not "owned or controlled by the Federal Government" in 2016 when the President issued the Proclamation. 54 U.S.C. § 320301(a).

1. "Owned" and "controlled" have different meanings under the Act.

The Lobstermen primarily assert that the President lacks authority to establish monuments in the EEZ because the terms "controlled" and "owned" in the Antiquities Act should be given "similar meanings," and the federal government does not "own" the EEZ. Br. 39-50. The better construction, however, is that the term "controlled" carries a meaning distinct from the term "owned."

Beginning with the relevant text, the Antiquities Act authorizes the President to proclaim monuments "on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). As the Lobstermen acknowledge, Br. 40, "controlled" and "owned" have distinct meanings in ordinary usage. Whereas "control" means to "exercise restraining or

governing influence over," *Webster's International Dictionary* 316, "own" means to "hold as property" or to possess "legal or rightful title to," *id.* at 1026; *see also Webster's New International Dictionary* 490, 1541 (similar). Indeed, even the definitions of "control" cited by the Lobstermen, Br. 40, use language akin to influence rather than ownership. That is because "[c]ontrol and ownership . . . are distinct concepts." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003); *see also Judicial Watch, Inc. v. FHFA*, 646 F.3d 924, 927 (D.C. Cir. 2011) ("[O]ur cases have never suggested that ownership means control.").

This distinction is reinforced by case law in a wide range of contexts. In *United States v. Texas*, 339 U.S. 707, 712 (1950), for instance, the Supreme Court, in rejecting Texas's claim to certain property rights in submerged coastal lands, distinguished "dominium (ownership or proprietary rights)" from "imperium (governmental powers of regulation and control) as respects the lands, minerals and other products underlying the marginal sea." *See also, e.g.*, *SEC v. Platforms Wireless International Corp.*, 617 F.3d 1072, 1088 (9th Cir. 2010); *Schenkel & Shultz, Inc. v. Homestead Ins. Co.*, 119 F.3d 548, 551 (7th Cir. 1997); *Rose v. Union Gas & Oil Co.*, 297 F. 16, 18 (6th Cir. 1924).

To highlight the distinction between "controlled" and "owned," Congress separated those terms with "or," signaling two separate situations in which the President has discretion to establish

monuments. The word "or" is "almost always" used disjunctively to link independent ideas such that "the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). Indeed, this Court, in construing a statutory phrase that refers to "operation[s] owned or controlled by the applicant," 30 U.S.C. § 1260(c), stressed the importance of the disjunctive "or" in deferring to the interpretation of the Department of the Interior that the provision applies to operations "controlled, albeit not owned, by the applicant." *National Mining Ass'n v. DOI*, 177 F.3d 1, 5 (D.C. Cir. 1999); *see also Miami Newspaper Pressmen's Local No. 46 v. NLRB*, 322 F.2d 405, 408 n.6 (D.C. Cir. 1963) (noting that "commonly owned or controlled" is a "disjunctive phrase").

In a long-running state-federal dispute over the marginal ocean belt off the West Coast, the Supreme Court in *California* applied this ordinary meaning of "controlled" in holding that expanding a monument into submerged land and water surrounding several coastal islands was within "Presidential power." 436 U.S. at 36. In an earlier case shortly before the monument's expansion, the Court had held that the United States possessed "paramount rights in and powers over" the submerged land and water surrounding the islands. *United States v. California*, 332 U.S. 19, 40 (1947). Even though the State of California exercised "local police power functions" within that area, the federal government "both claim[ed] and exercise[d] broad . . . *control*." *Id.* at 33, 36

(emphasis added). Based on that earlier holding, *California* held that the submerged land and water where the monument had been expanded was "controlled" by the federal government within the meaning of the Antiquities Act, and that there could be "no serious question" on this point. 436 U.S. at 36.

a. No textual canon supports the Lobstermen's view that "controlled" and "owned" are synonymous.

None of the interpretive principles invoked by the Lobstermen supports their assertion that "owned" and "controlled" should be given identical meanings. The Lobstermen first argue that the associated-words canon (*noscitur a sociis*)—that "a word is given more precise content by the neighboring words with which it is associated," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634-35 (2012)—supports such a reading. Br. 40-42. The Lobstermen's examples notwithstanding, Br. 41-42, the Supreme Court has cautioned that a list like "owned or controlled" that contains only a few items, "each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010). Regardless, the associated-words canon does not aid the Lobstermen's argument because any related meaning given to the terms "owned" and "controlled" should be based on the "most general quality—the least

common denominator, so to speak—relevant to the context." Antonin Scalia & Bryan A. Garner, *Reading Law* 196 (2012). Thus applied, the canon may limit the meaning "controlled" to usages that, like "owned," relate to power or authority over land. But the fit between those terms "is not so tight . . . as to demand" that this Court rob either of its "independent and ordinary significance." *Graham County*, 559 U.S. at 288.

The Lobstermen next argue that giving the term "controlled" its ordinary meaning would violate the surplusage canon by rendering the term "owned" superfluous. Br. 41. The district court correctly dismissed this argument, A74, because that canon "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 106 (2011) (internal quotation marks omitted). Here, even if the Lobstermen were correct that giving the term "controlled" its ordinary meaning would render the term "owned" unnecessary, Br. 41, adopting the Lobstermen's reading would similarly deprive "controlled" of independent significance. Moreover, if the Lobstermen have accurately identified excess language, it is "hardly unusual" in comparison to the many other federal statutes that use this same formulation to describe land over which the federal government exercises some degree of authority, including (as here) in the context of land management.

Microsoft, 564 U.S. at 107; *see also, e.g.*, 16 U.S.C. §§ 590b, 670a; 30 U.S.C. § 554; 54 U.S.C. §§ 101512, 306101.

The Lobstermen's final argument, Br. 42-43, is that giving "controlled" its ordinary meaning would create unnecessary conflict with the provision of the Antiquities Act that requires the promulgation of general regulations, 54 U.S.C. § 320303. According to the Lobstermen, managing monument lands over which the level of federal government authority is less than that of "ownership" would "compel the adoption of a regulation that exceeds Congress' authority." Br. 43; *see also* Br. 49. The Lobstermen do not further develop that argument, and they in fact acknowledge that Congress has the "power to regulate commercial activity" in the lands at issue in this case. Br. 23. Further, their bald assertion has no basis in the text of the Act. Section 320303 simply requires the promulgation of "uniform regulations for the purpose of carrying out this chapter." It contains no requirement governing the contents of those regulations, which in any event the Lobstermen do not challenge. *See* 43 C.F.R. §§ 3.1 et seq.

For these reasons, the textual canons invoked by the Lobstermen do not support giving the same meaning to "controlled" and "owned."

b. The Act's legislative history does not support the Lobstermen's interpretation.

The Lobstermen's appeal to the legislative history of the Antiquities Act, Br. 43, likewise fails to overcome the statutory language. The Lobstermen first assert that "the chief concern was ensuring that the Antiquities Act would apply to Indian lands," citing without elaboration a page of a Senate subcommittee hearing regarding earlier bills. Br. 43 (discussing *Preservation of Historic and Prehistoric Ruins: Hearing on S. 4127 and S. 5603 Before the Subcomm. of the S. Comm. on Public Lands*, 58th Cong. 24 (1904) (S. Doc. No. 314)). In that portion of the hearing, the Commissioner of Indian Affairs presented his view that the Secretary of the Interior should have authority to protect archeological sites on public lands outside Indian reservations and on lands within Indian reservations established by treaty or executive order. S. Doc. No. 314, at 23-25. Section 3 of the Antiquities Act did just that by authorizing the Secretary to grant permits to examine ruins, excavate archeological sites, and gather objects of antiquity on lands under the Secretary's jurisdiction. 54 U.S.C. § 320302(a).

The Lobstermen refer to the hearing presumably to press the same argument that they raised below—that the isolated statement of a Senator contemplating whether Indian reservations were "public lands"

for purposes of the unenacted bills supports giving "controlled" and "owned" in Section 2 of the Antiquities Act the same meaning. Dkt. 41, at 22-23. Yet the meaning of "public lands" in those unenacted bills sheds no light on the scope of presidential authority in a later, enacted statute to reserve "land owned or controlled by the Federal Government." Even if the Lobstermen's assertion were on point, a stray statement of a single legislator in a hearing on unenacted bills that did not even include the term at issue is a poor indicator of statutory meaning. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998); *SW General, Inc. v. NLRB*, 796 F.3d 67, 77 (D.C. Cir. 2015). As the district court explained, the remark was "highly equivocal" and is therefore "unreliable evidence of legislative intent." A75-76.

Nearly two years after that hearing, the term "controlled" appeared in the enacted Senate bill and in a related House bill. *See* S. 4698, 59th Cong., 1st Sess. (1906); H.R. 11016, 59th Cong., 1st Sess. (1906). The Lobstermen incorrectly assert that a committee report for the House bill "explain[ed]" that land "owned or controlled" in Section 2 of the Antiquities Act means land in "the public domain or in Indian reservations." Br. 53 (quoting H.R. Rep. No. 59-2224, at 2 (1906)). The House report made no such assertion. The sentence actually reads: "The United States should adopt some method of protecting these remains of the historic past that are still upon the public domain or in Indian reservations." H.R. Rep. No. 59-2224, at 1-2.

This introductory statement did not assert that the method of protection should be through permanent withdrawals. Indeed, the report went on to recommend that multiple agencies protect archeological sites through a permitting system. *Id.* at 7-8. The report neither interpreted the term "controlled" nor suggested that the bill's exclusive focus was land owned by the federal government. That silence "cannot lend any clarity" to the meaning of statutory text. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). Contrary to the Lobstermen's assertion, Br. 45, rejecting their argument will not place "private lands" within the ambit of the Act because land "held in private ownership" may be reserved as part of a monument only if the owner chooses to "relinquish[]" that land to the federal government. 54 U.S.C. § 320301(c).

In sum, the brief legislative history of the Antiquities Act sheds no light on the meaning of the word "controlled." That word should be given its ordinary meaning—distinct from that of "owned."

2. The United States "controlled" the EEZ when the President established the Monument.

The federal government "controlled" the land within the Monument when the President issued the Proclamation in 2016 because, like the submerged coastal land and water at issue in *California*, the federal government claims and exerts significant

authority over the EEZ. Since President Ronald Reagan's 1983 proclamation ("Reagan Proclamation"), the United States has exercised "sovereign rights and jurisdiction" in the EEZ to the extent permitted under international law. Proclamation No. 5030, 48 Fed. Reg. at 10,605. The Reagan Proclamation claimed the exclusive authority of the United States in the EEZ to exploit, conserve, and manage the natural resources of the seabed, subsoil, and superadjacent waters; to pursue other activates for economic exploitation and exploration; to establish and use artificial islands and structures for economics purposes; and to protect and preserve the marine environment. *Id.*

Consistent with the Reagan Proclamation, Congress has enacted many statutes directing the federal government to regulate economic activity and to conserve the marine environment in the EEZ. *See, e.g.*, 16 U.S.C. § 1362(15)(B) (listing EEZ among areas "under the jurisdiction of the United States" for purposes of marine mammal protection); *id.* § 1811(a) (directing the exercise of exclusive fishery jurisdiction in the EEZ); 43 U.S.C. §§ 1331(a), 1333 (authorizing regulation of the mineral resources of the outer Continental Shelf, which is subject to the United States' "jurisdiction and control"); Agreement for the Implementation of the United Nations Convention of the Law of the Sea of 10 Dec. 1982 Relating to Fish Stocks, S. Treaty Doc. No. 104-24 (Dec. 4, 1995) (multilateral treaty to which the United States is a signatory providing the basis for reconciling fishery

management within EEZs); *see also* Thomas J. Schoenbaum, 1 *Admiralty and Maritime Law* § 2:17 (6th ed. 2018) (listing "[e]xtensive legislation to implement fully the rights accorded by th[e] concept" of the EEZ as "promulgated" by the Reagan Proclamation). Based in part on these legal authorities, the Office of Legal Counsel of the Department of Justice concluded in 2000 that the federal government "controlled" the EEZ within the meaning of the Antiquities Act. 24 Op. O.L.C. 183 (2000).

Consistent with the plain meaning of "control," courts have often described the EEZ as an area subject to the control of the federal government. *See, e.g.*, *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (describing the EEZ as an area where "a nation may exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil"); *Native Village of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1091 (9th Cir. 1998) (noting the "sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast"); *People of Village of Gambell v. Hodel*, 869 F.2d 1273, 1277 (9th Cir. 1989) (The "federal government has exerted significant control over" the outer Continental Shelf.).

This understanding is also reflected in the baseline provisions of the United Nations Convention on the Law of the Sea, Dec. 10, 1982,

1833 U.N.T.S. 397.[4] For example, the Convention, like the Reagan Proclamation, recognizes states' "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" in their EEZs and "with regard to other activities for the economic exploitation and exploration" of those EEZs. art 56(1)(a); *see also Restatement (Third) of Foreign Relations* § 514(1) (similar principle). With respect to the protection of the marine environment in particular, the Convention recognizes the authority of coastal states to prevent overexploitation by restricting the allowable catch of living resources within their EEZs, art. 61, ¶¶ 1-2; and to prohibit, limit, or regulate the exploitation of marine mammals more strictly than provided for in the Convention, art. 65. Collectively, these authorities demonstrate that the federal government has sufficient "control" over the EEZ for the President to invoke the Antiquities Act for the purpose of protecting the marine environment.

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[4] The United States has not ratified the Convention but has recognized that its baseline provisions reflect customary international law. *See* S. Treaty Doc. 103-39 (Oct. 7, 1994) (President Clinton, upon submitting Convention to Senate for advice and consent to ratification, noting that "it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans"); 1 *Public Papers of the Presidents of the United States: Ronald Reagan, 1983*, at 378-79 (1984) (President Reagan's statement explaining that Reagan Proclamation is consistent with the Convention whose non-seabed-mining provisions "generally confirm existing maritime law and practice"); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900).

The Lobstermen's counterarguments fail to demonstrate that the EEZ is not "controlled" by the United States within the meaning of the Act. The Lobstermen point to a single case, *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), in support of their view. Br. 50-53. That case was a quiet-title action, did not involve a national monument, and was decided *before* the Reagan Proclamation. *Treasure Salvors* considered whether a shipwreck on the outer Continental Shelf was situated on land "owned or controlled" by the United States for purposes of the Antiquities Act. The court rejected the argument that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq., gave the federal government "control" over the lands. 569 F.2d at 338-40. The court observed that at that time, the federal government asserted control over the outer Continental Shelf through OCSLA only for a limited purpose—to regulate the exploitation of mineral resources—and did not extend to "objects such as wrecked ships." *Id.* at 339-40. That analysis is inapplicable here because unlike the Reagan Proclamation—which explicitly gave the United States sovereign rights and jurisdiction in the EEZ to the extent permitted under international law—OCSLA gives the government only limited control over certain mineral resources.

As historical background to its OCSLA analysis, *Treasure Salvors* referred to an earlier proclamation by President Harry Truman asserting jurisdiction over mineral resources in the subsoil of the

Continental Shelf. 569 F.2d at 338 (discussing Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945)). But the court did not, contrary to the Lobstermen's assertion, Br. 52, rely on the Truman proclamation to answer the question whether the shipwreck was situated on land "controlled" by the United States under the Antiquities Act. In any event, the authority over mineral resources claimed in President Truman's proclamation is far more circumscribed than the broad power over the EEZ, coextensive with international law, asserted in the Reagan Proclamation.

The Lobstermen also protest that this interpretation marks a "dramatic[] expan[sion]" of presidential power because prior to 2000, no President had designated a monument "exclusively" in the submerged lands and water of the ocean. Br. 13. That argument misapprehends the relevant statutory inquiry. Because the Antiquities Act is not linked to a particular geographic area, its reach extends to all lands "controlled" by the federal government when a monument is established. *See California*, 436 U.S. at 36 (1978) ("When President Truman issued Proclamation No. 2825 *in 1949*, the submerged lands and waters" surrounding several coastal islands "were under federal dominion and control." (emphasis added)).

Thus, the relevant question is not whether Presidents previously designated monuments in a particular area, but rather whether the land underlying a given monument was "controlled" by the federal

government at the time of its establishment. As discussed above, *see supra* pp. 17-18, Presidents have consistently established monuments in ocean land since the 1930s; when the concept of United States jurisdiction over the EEZ was established in federal law through the Reagan Proclamation and subsequent congressional enactments, monuments were then designated in the EEZ. *Accord, e.g.*, *In re Air Crash Off Long Island*, 209 F.3d 200, 213 (2d Cir. 2000) (scope of statute tied to the "high seas" was not "fix[ed] immutably . . . to the boundary between United States territorial waters and nonterritorial waters" at the time of enactment and therefore changed based on Reagan Proclamation). The same principle applies to other monuments on land that came under the federal government's control after 1906, which are nonetheless covered by the Antiquities Act. *See, e.g.*, 76 Stat. at 1441 (establishing monument in Virgin Islands). The Lobstermen do not question the legitimacy of those monuments.

The Lobstermen next argue that the EEZ is not "controlled" by the federal government because its sovereign authority over the EEZ is not absolute. Br. 46-48. Yet even the government's authority over the territorial sea, whose "control" the Lobstermen accept, Br. 50, is not without exception. *See, e.g.*, *United States v. Louisiana*, 394 U.S. 11, 22-23 (1969) ("[C]oastal nation[s] . . . cannot deny the right of innocent passage to foreign nations."). Accordingly, when the Supreme Court affirmed in *California* that the federal government "controlled"

submerged lands and water in the territorial sea, 436 U.S. at 36, the Court "had in mind something short of absolute control," A77. As the district court explained, the *California* Court "understood the term to mean something closer to" the ordinary meaning provided in contemporary dictionaries: "to exercise directing or restraining influence over." A77 (quoting *Webster's International Dictionary* 490). As discussed above, the United States' broad and exclusive authority over a variety of activities—including the authority to exploit, conserve, and manage marine resources—demonstrates its restraining influence over the EEZ even if, as with the territorial sea, other states may exercise certain limited rights therein. *See Restatement (Third) of Foreign Relations* § 514(2) (freedom of navigation and overflight and freedom to lay submarine cables and pipelines).

Finally, the district court did not err in considering whether other entities besides the federal government may claim any "control" over the EEZ. A80-81. The Lobstermen assert that the court failed to analyze "the extent of federal authority" but instead merely "compar[ed] . . . federal authority and the influence of others." Br. 48. To the contrary, the district court considered three factors—the federal government's "substantial general authority," its "specific authority . . . for purposes of environmental conservation," and the lack of others' exercise of control—in holding that the United States "controls" the EEZ. A78-82. Although not necessarily determinative, the fact that the

United States is the only sovereign with authority over the EEZ is certainly a relevant factor in considering whether that land is "controlled" by the federal government.

Contrary to the Lobstermen's assertion, Br. 49, the district court's analysis of the application of the Antiquities Act to the EEZ does not affect the Act's application to Indian lands, which are typically owned by the United States and held in trust for the benefit of tribes. The management of Indian lands—including to protect historic sites—is governed by numerous federal statutes specifically applicable to Indian lands, most of which were enacted after the Antiquities Act. *See generally Cohen's Handbook of Federal Indian Law* §§ 1.05, 1.07 (history of federal Indian policy), ch. 10 (environmental regulation in Indian country), ch. 15 (tribal property), ch. 17 (natural resources), ch. 20 (tribal cultural resources) (2012 ed.). Those statutes define the respective roles of the federal government and Indian tribes in managing Indian lands. In recent decades, federal statutes have increased tribal management over natural resources development. *American Indian Law Deskbook* § 3:8 (2019 ed.); *see also Cohen's Handbook of Federal Indian Law* § 17.01.[5]

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[5] The Lobstermen are correct that Congress's power to legislate with respect to tribal lands is often described as "plenary." Br. 44. But the district court was also correct that "'this power to control and manage [is] not absolute.'" A76 (quoting *United States v. Creek Nation*, 295 U.S. 103, 109 (1935)).

3. The National Marine Sanctuaries Act does not strip the President of authority to proclaim national monuments in the EEZ.

Finally, the Lobstermen assert, Br. 23-35, that interpreting the Antiquities Act to reach the EEZ would violate the general/specific canon, which applies to (i) resolve "contradiction[s]" between general and specific provisions and (ii) avoid the "superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). In the Lobstermen's view, the later-enacted National Marine Sanctuaries Act is a "comprehensive scheme" that addresses the "specific problem" of marine conservation, and it would lack any force whatsoever if the Antiquities Act extends to the EEZ. Br. 25; *see also Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (A "specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").[6]

There is no "contradiction" between those statutes in need of elimination. The Sanctuaries Act authorizes the Secretary of Commerce to designate "submerged lands" under the jurisdiction of the United States as "national marine sanctuar[ies]." 16 U.S.C. §§ 1432(3),

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[6] The scope of the Lobstermen's Sanctuaries Act argument has evolved during litigation. The complaint asserts that the Antiquities Act conflicts with the Sanctuaries Act in the EEZ specifically, A18, but the opposition to the motion to dismiss references "the ocean" generally, Dkt. 41, at 33-40. The opening brief appears to advance the narrower of those arguments. Br. 29 (disapproving of interpreting the Antiquities Act to reach "*beyond the territorial sea*" (emphasis added)).

1433(a). The President's authority to designate marine monuments pursuant to the Antiquities Act in no way limits or invalidates the authority of the Secretary of Commerce to designate marine sanctuaries—and the Lobstermen do not argue otherwise. *See* Br. 27-28. The Lobstermen are correct that Presidents in recent years have exercised the Antiquities Act power more frequently than Secretaries of Commerce have exercised the Sanctuaries Act power. Br. 27-28. But that creates no incompatibility between those statutes. Because the statutes are "capable of co-existence," this Court has a "*duty* . . . to regard each as effective." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting *Mancari*, 417 U.S. at 551).

Nor does interpreting the Antiquities Act to reach the EEZ render superfluous any provision of the Sanctuaries Act.

First, the Sanctuaries Act does not occupy the field of marine protection but rather is a gap-filling statute for designating sanctuaries when existing protections are "inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area." 16 U.S.C. § 1433(a)(3). Section 1433 thus envisions that the Secretary of Commerce will step in to supplement existing protections such as the designation of marine monuments pursuant to the Antiquities Act—not that the Sanctuaries Act will operate alone. This understanding of the Sanctuaries Act is reinforced by its "Purposes and policies" section, which is explicit that the statute operates "in a

manner which complements existing regulatory authorities" for "conservation and management of these marine areas." *Id.* § 1431(b)(2).

Second, although both the Antiquities Act and the Sanctuaries Act address marine protection, they do so (as the district court observed) "in different ways and to different ends." A70. The Antiquities Act protects "objects of historic or scientific interest." 54 U.S.C. § 320301(a). The Sanctuaries Act, by contrast, authorizes designations for a broader set of purposes that include not only the protection of an area's historic and scientific value but also the protection of its "recreational," "cultural," and "esthetic" qualities as well as its "human-use values." 16 U.S.C. § 1433(a)(2).

Third, unsurprisingly given the statutes' divergent approaches to marine protection, their "regulatory tools" are different. A70. Whereas monuments are "confined to the smallest area compatible with the proper care and management of the objects to be protected," 54 U.S.C. § 320301(b), marine sanctuaries more broadly occupy any area "of a size and nature that will permit comprehensive and coordinated conservation and management," 16 U.S.C. § 1433(a)(5).

Fourth, the respective processes for the establishment and review of monuments and sanctuaries differ substantially. Unlike the President, who has broad discretion to designate monuments, 54 U.S.C. § 320301, the Secretary must, in making a sanctuary designation, consult with federal and state agencies, fishery management councils,

and other interested persons,16 U.S.C. § 1433(b)(2); conduct a thorough environmental review that incorporates public comments pursuant to the National Environmental Policy Act, *id.* § 1434(a)(2)(A); and develop a management plan for proposed sanctuaries, *id.* § 1434(a)(2)(C). Whereas this Court will review the Secretary's designation of a marine sanctuary for arbitrariness and capriciousness under the Administrative Procedure Act ("APA"), review of the President's actions pursuant to the Antiquities Act is much narrower. *See Mountain States*, 306 F.3d at 1136.

The Lobstermen point to no provision in the Sanctuaries Act and to no evidence from the voluminous history of the Act's enactment and subsequent amendments that supports the view that Congress intended to displace the Antiquities Act in the EEZ. As the Lobstermen note, Br. 25, 33, 37, a 1984 amendment to the "Findings" section of the Sanctuaries Act does remark that then-existing conservation efforts were "directed almost exclusively to land areas above the high-water mark." 16 U.S.C. § 1431(a)(1)(A). Yet that observation, which speaks in general terms, does not suggest that *every* conservation statute, much less that the Antiquities Act in particular, excludes the marine environment. It is therefore a poor indicator that Congress intended to limit the scope of the Antiquities Act. Further, Congress in 1984 was presumptively aware of the numerous marine monuments that had already been designated, and of the Supreme Court's then-recent

decision in *California* holding that the Antiquities Act authorized the designation of a monument in submerged lands surrounding the Channel Islands. *See supra* pp. 14-17.

This Court has rejected the similar argument that a law enacted after the Antiquities Act provides the "sole means" of protection for a particular area, opining that federal laws "provid[e] overlapping sources of protection" for environmental resources with the intent not to replace but to complement earlier statutes. *Mountain States*, 306 F.3d at 1138; *see also Cameron v. United States*, 252 U.S. 450, 455 (1920) (upholding designation of a monument that "embraced the same land" as a forest reserve that "remained effective after the creation of the monument").

The Sanctuaries Act is but one of many congressional enactments that provide overlapping sources of protection for the marine environment. *See, e.g.*, 16 U.S.C. § 668dd(a)(2) (consolidating certain areas as the "national wildlife refuge system" to be administered "for the conservation, management, and . . . restoration of the fish, wildlife, and plant resources and their habitats"); *id.* § 1382(e) (authorizing the implementation of measures to alleviate negative impacts on "rookeries, mating grounds, or other areas of similar ecological significance to marine mammals"); *id.* § 1533(a)(3)(A) (authorizing the designation of areas essential to the conservation of threatened and endangered species); *id.* § 1801(a)(6) (authorizing regulation of coastal fishing to ensure the "conservation and management" of fishery resources and the

"long-term protection of essential fish habitats"); 54 U.S.C. § 100506(c)(1) (authorizing boundary changes to National Park System units when necessary for "proper preservation, protection, interpretation, or management").

Finally, the Lobstermen are mistaken in their assertion that only their construction—whereby the Sanctuaries Act limits the scope of the Antiquities Act—is consistent with the Constitution's separation-of-powers principles. Br. 23-24, 27. As this Court has held, the Antiquities Act contains "intelligible principles to guide the President's actions." *Mountain States*, 306 F.3d at 1137. Because the only source of authority that the President claimed in establishing the Monument was the Antiquities Act—a statute with the requisite "intelligible principle" to guide the exercise of that authority, A45-46—"no constitutional question whatever is raised," *Dalton v. Specter*, 511 U.S. 462, 474 n.6 (1994) (internal quotation marks omitted). Indeed, the Lobstermen's complaint alleges no constitutional violation but rather asserts that the President exceeded his *statutory* authority. A23-25. Accordingly, interpreting the Antiquities Act to reach the EEZ does not render the Sanctuaries Act superfluous.

* * * * *

As the Supreme Court has consistently stated, the Antiquities Act authorizes the reservation of submerged lands and water. "Owned" and "controlled" have distinct meanings under the Act and, at the time of

the Monument's designation, the EEZ was "controlled" by the federal government. Thus, the designation was a proper exercise of the President's discretion under the Act.

II. The district court properly declined to review the Proclamation for abuse of discretion.

The Lobstermen's final argument is that the Monument includes too much land, Br. 58-61, i.e., "that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest." *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002). This Court need not reach the question whether the Monument's size is reviewable for abuse of discretion because the Lobstermen's complaint clearly failed to state a claim. If the Court does reach this issue, it should decline to review the non-statutory claim for lack of jurisdiction because judicial review is unavailable when the statute in question commits the decision to the President's discretion.

A. This Court need not reach the question of whether the Proclamation is reviewable for abuse of presidential discretion.

The Lobstermen's abuse-of-discretion claim contains two separate allegations. The first is that the Monument is overbroad because it "encompasses areas" besides, and "bears little relation to," the canyons and seamounts themselves. A24, ¶¶ 72-74; *see also* Br. 2, 58 (asserting that the Monument's "boundaries cannot be justified by the canyons and seamounts"). Resolving that claim does not require scrutinizing the

relationship between the size of the Monument and the objects therein. This Court does not accept as true allegations in a complaint that "contradict exhibits to the complaint or matters subject to judicial notice," *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004), and it is particularly "sensitive" to pleading requirements where the complaint alleges violations of the Antiquities Act, a statute that confers "very broad discretion," *Mountain States*, 306 F.3d at 1137.

A facial examination of the Proclamation reveals the obviously "incorrect factual assumption" on which the Lobstermen's allegation rests. A85. The Lobstermen are clearly incorrect that the Monument's boundaries "bear[] little relation" to the canyons and seamounts. *See* 81 Fed. Reg. at 65,161 (designating two units—a "Canyons Unit" that "includes three underwater canyons" and a "Seamounts Unit" that "includes four seamounts"). Furthermore, the Proclamation explicitly stated that the objects of scientific interest are not only "the canyons and seamounts themselves," but also include "the natural resources and ecosystems in and around them." *Id.* Therefore, the district court properly concluded that factual review was unnecessary because the Monument's boundaries "presumably align" with the ecosystems around the canyons and seamounts. A85. An inquiry into the size of the Monument would therefore yield no set of facts that supports the faulty premise of the Lobstermen's claim that the Monument protects only the canyons and seamounts themselves.

The Lobstermen argue for the first time in their opening brief that an "implication" of their claim regarding the canyons and seamounts is that the Monument's boundaries are *also* a "poor fit" for the ecosystem. Br. 61. In reviewing the dismissal of an action, this Court generally looks only to "the facts alleged in the complaint," and none of the narrow circumstances for considering outside information applies here. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017); *Osborn v. Visa Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015); *see also Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). The Lobstermen's assertion appears nowhere in their complaint. *Cf.* A24, ¶¶ 72-74. Indeed, the complaint references the marine ecosystem only to advance the separate and distinct argument that the President lacks authority under the Antiquities Act to designate the ecosystem as a protected object. A24-25, ¶ 75.

In any event, even if the Lobstermen's complaint had included this new ecosystem claim, it would nonetheless fail to state a claim because an allegation that a monument includes more land than is necessary to protect an object of scientific interest "is dependent on the proposition that parts of the [m]onument lack scientific . . . value." *Tulare County*, 306 F.3d at 1142. The Lobstermen's complaint made no factual allegations regarding areas of the Monument that lack scientific value.

See Tulare County v. Bush, 317 F.3d 227 (D.C. Cir. 2003) (mem.) ("It was . . . incumbent" on plaintiff challenging a monument designation "to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect."). Thus, the district court properly ruled that deciding this issue is unnecessary because the Lobstermen's claim can be resolved without a factual examination of the Monument's size in relation to the objects protected. A63, A84-86.

The Lobstermen's second allegation is that the marine "ecosystem is not an 'object'" of scientific interest within the meaning of the Antiquities Act. A24-25, ¶ 75; *see also* 54 U.S.C. § 320301(a). Whether an ecosystem is an object of "scientific interest" raises a purely legal question; in reviewing the grant of a motion to dismiss, this Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The Lobstermen's legal assertion regarding ecosystems plainly contradicts this Court's holding that the "[i]nclusion of such items as ecosystems" in monument reservations does "not contravene the terms of the [Antiquities Act] by relying on nonqualifying features." *Tulare County*, 306 F.3d at 1142; *see also Alaska*, 545 U.S. at 102-03 (upholding the reservation of a monument to safeguard "the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem"); *Mountain States*, 306 F.3d at 1133-34 (rejecting argument that the Antiquities Act reaches only archeological interests, and noting the designation of

monuments to protect valuable "ecoregions," the "shrub-steppe ecosystem," and a "desert ecosystem").

The Lobstermen do not grapple with these precedents but instead assert that an ecosystem is not an object of "scientific interest" because objects must be "situated" on land, 54 U.S.C. § 320301(a), and ecosystems include migratory species not always "situated" on the reserved parcel. Br. 59-60. Although it is true that individual members of migratory species may not always be present in a given ecosystems, the Lobstermen conflate those individual members with the ecosystem itself. As the district court correctly found, "the Proclamation did not designate highly migratory species as objects—it instead so designated the *ecosystems* surrounding the canyons and seamounts." A86. An ecosystem is not "transitory," Br. 59, but rather is a "biological system composed of all the organisms found in a *particular physical environment*," *Oxford English Dictionary* (Mar. 2019 ed.), http://oed.com/view/Entry/59402; *accord American Heritage Dictionary of the English Language* 566 (5th ed. 2016) (similar); *see also Florida v. Georgia*, 138 S. Ct. 2502, 2529 (2018) (discussing the unique ecosystems of a river and downstream bay); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1058-59 (D.C. Cir. 1997) (Henderson, J., concurring).

Consistent with that definition, the Proclamation described the marine ecosystem as the nonliving structures, "corals," and "other

structure-forming fauna such as sponges and anemones" that support "spawning habitat . . . and shelter for an array of fish and invertebrate species." A43; *see also, e.g.*, A44 ("[B]eaked whales are strongly attracted to the environments created by submarine canyons."). No one would think that canyons and seamounts were not objects of scientific interest merely because many of the species that the Proclamation aims to protect are not, in the Lobstermen's words, Br. 59, "permanently fixed" to those named features. *See Alaska*, 545 U.S. at 109 (Preserving "habitat for many forms of wildlife" corresponds to "one of the fundamental purposes of wildlife reservations set apart pursuant to the Antiquities Act."); *California*, 436 U.S. at 34 & n.5 (observing that monument designation was "[p]rompted by a desire to protect" a "variety of marine life," including "birds, sea otters, elephant seals, and fur seals"). The result should be no different for the marine ecosystem.

The Lobstermen support their assertion regarding migratory species with two documents that postdate the Antiquities Act by more than thirty years. The first document, an unenacted House bill, aimed to authorize the establishment of monuments on land "of outstanding scientific value . . . for the purpose of protecting the plant and animal life native thereto." H.R. 8912, 75th Cong., 3rd Sess. (1938); *see also* S. 3890, 75th Cong., 3rd Sess. (1938). Even the enacted "views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight." *United States v. X-Citement Video, Inc.*,

513 U.S. 64, 77 n.6 (1994). That principle carries greater force with respect to the *unenacted* intent of a later Congress. *See United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) ("[I]f the *enacted* intent of a later Congress cannot change the meaning of an earlier statute, then it should go without saying that the later *unenacted intent* cannot possibly do so."). In any event, the bill does not contain, much less interpret, the term "object."

The second document—a letter of the Secretary of the Interior commenting on the proposed bill—did not, as the Lobstermen claim, offer the views of the Department of the Interior regarding the term "situated." Br. 59. Rather, the Secretary observed that the Antiquities Act "ha[d] been interpreted" to encompass "immobile and permanently affixed" objects, and he supported the bill so as to "remove any existing doubt" regarding whether the Act also reaches "plant and animal life." H.R. Rep. No. 75-2691, at 2 (1938). These documents therefore do not support the Lobstermen's assertion that an ecosystem is not an object under the Act; in any event, they cannot overcome the consistent statements of the Supreme Court and of this Court that the Act *does* reach ecosystems and protect mobile species. *See supra* p. 48.

This Court therefore need not reach the Lobstermen's argument that the Monument includes too much land because their complaint fails to allege specific, non-conclusory facts that establish any issue with the Monument's boundaries.

B. Judicial review of the size of a monument for abuse of presidential discretion is not available.

If this Court reaches the question of the proper scope of review of the Lobstermen's claim that "the President abused his discretion by designating more land than is necessary to protect the specific objects of interest," *Tulare County*, 306 F.3d at 1142, then it should adhere to "longstanding authority," which "holds that such review is not available when the statute in question commits the decision to the discretion of the President," *Dalton*, 511 U.S. at 474; *see also Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (requiring "an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion"); *Chamber of Commerce*, 74 F.3d at 1331 n.4 (noting the "special status of the President" that underpinned the "*Dalton* Court's hesitancy to review presidential action").

Congress *expressly* delegated to the President "very broad discretion" to reserve parcels of land as monuments, *Mountain States*, 306 F.3d at 1137—much broader and more explicit than the authority the Supreme Court held to be sufficiently discretionary in *Dalton* and *Franklin*. *See Dalton*, 511 U.S. at 470 (statute did "not by its terms circumscribe the President's discretion to approve or disapprove . . . report" recommending military bases for closure); *Franklin*, 505 U.S. at 800 ("final act" of apportionment statute wherein President transmitted

to Congress results from census was "not merely ceremonial or ministerial"). The Antiquities Act provides that the "President *may, in the President's discretion*, declare . . . objects of historic or scientific interest" to be national monuments, and "*may* reserve parcels of land as part of the national monuments." 54 U.S.C. § 320301 (emphasis added). The President is to ensure that the reserved land "be confined to the smallest area compatible with the proper care and management of the objects to be protected," *id.*, but there is no limitation on the manner in which the President is to identify that "smallest area." The Act thus gives the President authority "to be exercised by him upon his own opinion of certain facts," *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)—that there are objects of scientific or historic interest to be protected, and that the land reserved is the smallest area compatible with those objects' protection. The President's judgment "as to the existence of the facts calling for that action is not subject to review," *id.*, and the designation of monuments to protect objects of historic or scientific interest "derives its vitality from the exercise" of that "unreviewable Presidential discretion," *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948).

The Lobstermen assert no statutory cause of action, and none is available because the Antiquities Act contains no judicial review provision, and the APA does not provide for review of presidential action. *Tulare County*, 306 F.3d at 1143. Rather, the Lobstermen

assert a non-statutory review action. Br. 1, 20-21. Yet the Lobstermen are incorrect that this Court's decisions in *Mountain States* and *Chamber of Commerce* (and the Supreme Court's decision in *Stark v. Wickard*) provide for judicial review for abuse of the President's discretion here. Br. 20-21. *Mountain States* presented "no occasion to decide the ultimate question of the availability or scope of review" of presidential action taken pursuant to the Antiquities Act because, as here, *see supra* pp. 45-47, the plaintiffs in *Mountain States* failed to allege facts sufficient to support their claim. 306 F.3d at 1137; *see also Tulare County*, 306 F.3d at 1144 (citing *Mountain States* in affirming dismissal of complaint that presented no "factual allegations that would occasion . . . *ultra vires* review" of a monument designation). Although a dictum in *Mountain States* observed that "the Supreme Court has indicated generally that review is available to ensure that" proclamations have "not exceeded [the President's] statutory authority," this Court did not opine on the scope of such review, and the cited cases did not review a monument's size. 306 F.3d at 1136 (discussing *California*, 436 U.S. at 35-36; *Cappaert*, 426 U.S. at 142; and *Cameron*, 252 U.S. at 455-56).

The Lobstermen's reliance on *Chamber of Commerce* is likewise misplaced. That case concerned an executive order barring federal government contracts with employers that permanently replaced striking workers. This Court held that the plaintiffs were not barred

from seeking judicial review of whether the order "independently violate[d]" the National Labor Relations Act. 74 F.3d at 1332. The Lobstermen do not assert that the Proclamation runs afoul of any direct statutory prohibition, in either the Antiquities Act or another statute. Instead, they allege "that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest." *Tulare*, 306 F.3d at 1142. Congress entrusted that "discrete specific decision" to the President without statutory limitations. *Chamber of Commerce*, 74 F.3d at 1331 (discussing *Dalton*).

Finally, *Stark v. Wickard*, 321 U.S. 288 (1944) concerned action of a subordinate executive official, not presidential action. The Lobstermen are correct that *Stark* was a case about "determining the limits of statutory grants of authority." *Id.* at 310. But the Lobstermen misapprehend the crucial distinction between review for *ultra vires* actions and review for abuse of discretion. Br. 20. An action is *ultra vires* if the conduct is "*completely beyond* the scope of the officer's authority." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 157 (1984) (emphasis added); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (An ultra vires claim rests on "the officer's lack of delegated power."); *Black's Law Dictionary* 1755 (10th ed. 2014).

Conversely, a "claim of error in the exercise of that power" is not an *ultra vires* claim. *Larson*, 337 U.S. at 690. Unlike the Lobstermen's

claims addressed above that concern whether the EEZ is "land owned or controlled" by the United States, their claim that the President "designat[ed] more land than is necessary to protect the specific objects of interest," is, as this Court has noted, a claim that "the President abused his discretion." *Tulare*, 306 F.3d at 1142. That claim challenges the correctness of the President's determination that the boundaries of this particular Monument encompass the smallest area compatible with the protection of the canyons, the seamounts, and the marine ecosystem. Br. 58 (alleging that "fit is lacking"). That is not an *ultra vires* claim that the President acted beyond the scope of power granted by the Antiquities Act, but rather a challenge to the President's judgment in drawing the lines of a monument. That line drawing is by its nature a "policy judgment[]," *Franklin*, 505 U.S. at 799, that the Antiquities Act gives the President the discretion to make.

* * * * *

The Court need not reach the question whether the Proclamation is reviewable for abuse of discretion because the complaint did not include factual allegations sufficient to support the Lobstermen's "smallest area" claim. If the Court reaches this issue, however, the Lobstermen's claim is not judicially reviewable because it raises no question of law but rather challenges the President's discretionary determination of the boundaries to protect the objects contained within the Monument.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(G)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, using Microsoft Word 2013. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,914 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e).

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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