No. _____

In The
Supreme Court of the United States

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION; et al.,

Petitioners,

v.

WILBUR ROSS; et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSHUA P. THOMPSON
DAMIEN M. SCHIFF
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

JONATHAN WOOD
Counsel of Record
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
Email: jwood@pacificlegal.org

Counsel for Petitioners

Questions Presented

The Antiquities Act of 1906 authorizes the President to declare national monuments to protect certain objects "situated on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). The boundaries of such monuments must be the "smallest area compatible with the proper care . . . of the objects to be protected." *Id.* § 320301(b).

For 100 years, the Antiquities Act was understood to apply only where the federal government has plenary power, such as federal land and tribal land. In 2006, however, the President claimed to discover that his power was greater than previously understood. Interpreting the Antiquities Act to authorize monuments anywhere the federal government has a significant amount of regulatory authority, the President designated five vast ocean monuments including the 3.2 million-acre Northeast Canyons and Seamounts Marine National Monument.

The questions presented are:

Whether, in conflict with the holdings of the Fifth and Eleventh Circuits and the National Marine Sanctuaries Act, the Antiquities Act applies to ocean areas beyond United States' sovereignty where the federal government has only limited regulatory authority.

Whether the President can evade the Antiquities Act's "smallest area" requirement, including designating ocean monuments larger than most states, by vaguely referencing "resources" or an "ecosystem" as the objects to be protected.

Parties to the Proceeding and Corporate Disclosure Statement

Petitioners, who were Plaintiffs-Appellants below, are the Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance. None are publicly traded corporations, issue any stock, or have any parent corporations. No publicly held corporation holds more than a 10% ownership in any of the organizations.

Respondents, who were Defendants-Appellees below, are the Secretary of Commerce, Wilbur J. Ross; Secretary of Interior, David Bernhardt; President Donald J. Trump; and the Chairman for the Council on Environmental Quality, Mary B. Neumayr. All are sued in their official capacities.

The Natural Resources Defense Council, Conservation Law Foundation, Center for Biological Diversity, and R. Zack Klyver intervened as defendants in the district court and were also appellees in the D.C. Circuit.

Rule 14.1(b)(iii) Statement

The proceedings in the U.S. District Court for the District of Columbia and U.S. Court of Appeals for the District of Columbia Circuit identified below are directly related to the above-captioned case in this Court.

Massachusetts Lobstermen's Association v. Ross, Case No. 1:17-cv-00406-JEB (D.D.C.); Order granting motion to dismiss without prejudice filed Oct. 5, 2018.

Massachusetts Lobstermen's Association v. Ross, Case No. 18-353 (D.C. Cir.); Judgment filed Dec. 27, 2019.

Massachusetts Lobstermen's Association v. Ross, Case No. 18-353 (D.C. Cir.); Order denying petition for rehearing en banc filed Feb. 28, 2020.

Table of Contents

Appendix

Table of Authorities
Cases

Constitutional Provision

Statutes

Rules

Other Authorities

Petition for a Writ of Certiorari

To protect the Constitution's separation of powers, this Court has required judicial skepticism when one branch claims significant, novel power at the expense of another branch. *See, e.g.*, *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). Such skepticism is warranted here.

The Antiquities Act of 1906 authorizes the President to declare national monuments on "land owned or controlled by the federal government." 54 U.S.C. § 320301. For a century, this was understood as limited to where the federal government exercises "'full dominion and power,'" such as federal land and tribal land. *See United States v. California (California II)*, 436 U.S. 32, 35-36 (1978) (quoting *United States v. California (California I)*, 332 U.S. 804, 805 (1947)).

Recently, however, the President adopted a much broader interpretation of his power. To justify vast ocean monuments, the President interpreted the Antiquities Act to require only "a significant amount" of federal authority. *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 186-87, 196-97 (2000). The President relied on this novel interpretation in designating 3.2 million acres of Atlantic Ocean as the Northeast Canyons and Seamounts Marine National Monument.

Compounding the separation of powers threat, this interpretation circumvents the National Marine Sanctuaries Act, which specifically governs the protection of special marine areas. 16 U.S.C. § 1431, *et seq*. That statute establishes comprehensive designation standards and an extensive public, science-based designation process. 16 U.S.C. §§ 1433-

1434. Since the President purportedly discovered these limits could be evaded by designating ocean monuments, no marine sanctuaries have been established. Instead, the National Marine Sanctuaries Act has been rendered a nullity.

A panel of the D.C. Circuit upheld the Northeast Canyons and Seamounts Marine National Monument, adopting a vague, three-factor test with no basis in the Antiquities Act's text, history, or judicial precedent. That holding conflicts with the settled law of the Fifth and Eleventh Circuits, which hold that the Antiquities Act does not apply where the federal government lacks sovereignty and its regulatory authority is of "limited scope." *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-40 (5th Cir. 1978). *See Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 636 F.3d 1338, 1341 (11th Cir. 2011) (following *Treasure Salvors*). This Court should grant this petition to resolve this circuit split and settle important federal questions about the President's power under the Antiquities Act.

As this petition was being drafted, the President issued a new proclamation lifting the monument's fishing prohibitions while preserving the monument in all other respects. Proclamation No. 10049, 85 Fed. Reg. 35,793 (June 5, 2020). This voluntary cessation neither moots this case nor reduces the need for review. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). However, if the Court declines to resolve this case on the merits, it should grant the petition and vacate the D.C. Circuit's judgment under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Opinions Below

The D.C. Circuit's opinion is reported at 945 F.3d 535 and is reproduced in the Appendix at A-1. The order denying rehearing *en banc* is unreported and is reproduced in the Appendix at D-1.

The district court's opinion is reported at 349 F. Supp. 3d 48 and is reproduced in the Appendix at B-1.

Jurisdiction

The D.C. Circuit rendered its decision on December 27, 2019. App. A-1. It denied *en banc* review on February 28, 2020. App. C-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

54 U.S.C. § 320301

> (a) Presidential declaration.—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.
>
> (b) Reservation of land.—The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

Statement of the Case

A. The Antiquities Act

Enacted in response to vandalism of Native American prehistorical sites, the Antiquities Act of 1906 is one of the nation's oldest conservation laws. *See generally* Ronald F. Lee, THE STORY OF THE ANTIQUITIES ACT (2001). To protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government[,]" the President is authorized to declare such objects to be national monuments. 54 U.S.C. § 320301(a). The President may also reserve "parcels of land" to protect these objects, limited "to the smallest area compatible with the proper care and management of the objects to be protected." *Id*. § 320301(b). Controversially, no public process is required to establish a national monument or restrict the use of land within its boundaries; monuments are established by mere proclamation. 54 U.S.C. § 320301(a). *See* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Yale J. on Reg. 617, 629-30 (2018).

Although Congress expected the Antiquities Act to be an important tool for protecting antiquities, it did not expect the statute to generate much controversy or to affect much land. *See* 40 Cong. Rec. S7888 (daily ed. June 5, 1906) (statement by Congressman John Lacey, the Antiquities Act's sponsor, that it would affect "[n]ot very much" land—"[c]ertainly not" as much as 70 to 80 million acres).

But it was not to be. Instead, the President's use of the Antiquities Act has been a recurring source of legal, political, and social conflict. *See* Yoo & Gaziano, *supra* at 623-28. In 1950 and 1980, Congress responded to perceived presidential overreach by limiting the power to declare monuments in Wyoming and Alaska, respectively. 16 U.S.C. § 3213(a); 54 U.S.C. § 320301(d). *See Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019).

This Court has also been called on to resolve these conflicts. *See Alaska v. United States*, 545 U.S. 75, 102-11 (2005); *California II*, 436 U.S. at 36-41; *Cappaert v. United States*, 426 U.S. 128, 138-47 (1976); *Cameron v. United States*, 252 U.S. 450, 455-56 (1920). But it has not yet interpreted the statute's key jurisdictional phrase: "land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a).

This is because, until very recently, Presidents only designated monuments in areas where the federal government exercised "full dominion and power[,]". *See California II*, 436 U.S. at 35-36 (quoting *California I*, 332 U.S. at 805). For the statute's first 100 years, national monuments were only established on federal land, tribal land, and territorial seas.

B. The President's Adoption of a Novel Interpretation of the Antiquities Act

In 2006, however, the President claimed the novel power to designate vast ocean monuments. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006). This claim was based on a 2000 Office of Legal Counsel memo interpreting the federal "control" required by the Antiquities Act much more broadly than previously understood. *See* Administration of

Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 196-97 (2000). According to the OLC Memo, the Antiquities Act requires only "a significant amount" of authority. *Id.* at 196.

Describing it as a "close question" even under this lax standard, the OLC Memo concluded that the Antiquities Act applies to the Exclusive Economic Zone (EEZ). *Id.* at 197. The EEZ is the area of ocean from 12 to 200 miles off a nation's coast where international law recognizes certain sovereign rights to exploit, manage, and conserve natural resources and authority to regulate some activities affecting the marine environment. *Id.* at 195-97. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 514 (2019) [hereinafter THIRD RESTATEMENT]. The United States' EEZ was established by presidential proclamation in 1983. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

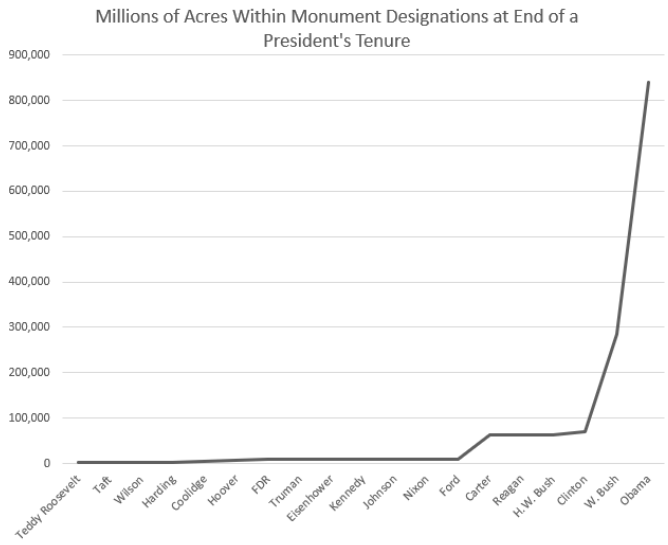
One anomaly of the OLC Memo's interpretation is that an area may be deemed "controlled by the federal government" even though the government's authority is insufficient to protect objects at the Antiquities Act's core. *See* 24 Op. O.L.C. at 196 n.16. The federal government's authority over the EEZ, for instance, does not include the protection of sunken ships or other antiquities. *See id.*; *see also* THIRD RESTATEMENT § 514 cmt. c. Acknowledging this problem, the OLC Memo construes controlled as relating to the object protected by the monument, rather than as a characteristic of the place designated. Thus, the memo concludes not that the United States controls the EEZ but that it controls the EEZ "for the purposes of protecting the marine environment." 24 Op. O.L.C. at 197.

In 2006, the President adopted the OLC Memo's interpretation by proclaiming the 89-million-acre Northwestern Hawaiian Islands Marine National Monument. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006). Six years earlier, Congress had directed the Secretary of Commerce to initiate designation of the area as a marine sanctuary. National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106-513, § 5(g)(2), 114 Stat. 2381 (Nov. 13, 2000). The sanctuary was proposed as required. *See* Robin Kundis Craig, *Are Marine National Monuments Better Than National Marine Sanctuaries?*, 7 Sustainable Dev. L. & Pol'y 27, 31 (2006). However, when this process took too long for the President's liking, he "reached for the Antiquities Act," declaring the nation's first "marine national monument" instead. *Id*.

It took 100 years for 16 Presidents to eclipse Congressman Lacey's prediction that the Antiquities Act would "certainly not" affect 70 to 80 million acres. *See* 40 Cong. Rec. S7888. In just 10 years, however, two presidents designated five ocean monuments encompassing 700 million acres. *See* Press Release, Department of Interior, *Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments* (May 5, 2017).[1] This has increased the total area within monument designations to such an extent that it easily swamps all past Antiquities Act controversies.

---

[1] https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal.



C. The National Marine Sanctuaries Act

The National Marine Sanctuaries Act, enacted in 1972, provides for the identification and protection of special areas of the marine environment. 16 U.S.C. § 1431, *et seq*. As the statute candidly acknowledges, earlier laws "have been directed almost exclusively to land areas above the high-water mark," thereby omitting consideration of ocean health. 16 U.S.C. § 1431(a)(1).

The National Marine Sanctuaries Act closed this gap by allowing designation of marine sanctuaries to protect "areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities[.]" 16 U.S.C. § 1431(a)(4). After the EEZ was established, Congress amended the National Marine Sanctuaries Act to make clear that it applies to this new area. *See* Pub. L. No. 102-587, 106 Stat. 5039, § 2102 (Nov. 4, 1992).

The National Marine Sanctuaries Act delegates significant authority to the Executive Branch, subject to substantive and procedural constraints. 16 U.S.C. §§ 1433-1434. Unlike the Antiquities Act, this statute requires a public, science-based process for designating marine sanctuaries. 16 U.S.C. § 1434(a)(1)-(3) (requiring broad public notice of sanctuary proposals, preparation and publicization of environmental studies and management plans, and a public hearing). And every sanctuary proposal must be submitted for review to Congress and affected states. *Id*. § 1434(b)(1).

Advocates of greater restrictions on ocean use have criticized the National Marine Sanctuaries Act for delegating to the Executive Branch too little power and subjecting that power to too cumbersome procedures. *See* 146 Cong. Rec. S10637 (daily ed. Oct. 17, 2020) (statement of Sen. Hollings noting criticisms but defending the process as necessary to public input and accountability). *See generally* Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Envtl. L.J. 711 (2003). But these critics have failed to convince Congress to fundamentally alter the statute. *See id.* at 755 (observing that the process ensures sanctuaries are not designated without congressional support).

In sharp contrast to the dramatic increase in monument designations since 2006, the President's novel interpretation of the Antiquities Act presaged the practical demise of the National Marine Sanctuaries Act. Prior to this time, 13 marine sanctuaries were established. *See* NOAA, National

Marine Sanctuary System (2016).[2] None have been established since. *See id.* Instead, the protection of special areas of the marine environment has been completely coopted by the President's novel interpretation of the Antiquities Act.

D. Factual Background

Northeast Canyons and Seamounts Marine National Monument

On September 15, 2016, President Obama declared 3.2 million acres of Atlantic Ocean more than 100 miles from the nation's coast to be the Northeast Canyons and Seamounts Marine National Monument. App. D-19 to D-20. The 2016 Proclamation establishing the monument identifies as protected objects three underwater canyons, four seamounts, and surrounding resources and ecosystems. App. D-20 to D-21.

This Connecticut-sized monument contains a lucrative fishery. App. D-15 to D-16. When the monument was proposed, commercial fishermen, the Atlantic States Fisheries Commission, the eight Regional Fishery Management Councils, and the Governor of Massachusetts expressed concern that the monument would be illegal, would frustrate efforts to manage the fishery, or both. App. D-18 to D-19. For example, the Regional Fishery Management Councils—charged by Congress with managing fisheries under the federal Magnuson-Stevens Act—explained that "[m]arine monument designations can

---

[2] https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/docs/2016-national-marine-sanctuary-system-brochure.pdf.

be counterproductive as they may shift fishing effort to less sustainable practices . . . ." App. D-33 to D-37.

Despite these concerns, the President proclaimed the monument and prohibited most commercial fishing beginning on November 14, 2016. App. D-22 to D-23. Lobster and red crab fishing was to be prohibited six years later. *Id.*

E. Proceedings Below

District Court proceedings

The Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance (collectively, the Fishermen) filed this lawsuit challenging the 2016 Proclamation on March 7, 2017. *See* App. D-1. The district court's jurisdiction was under 28 U.S.C. § 1331, § 2201, and § 2202. Conservation Law Foundation, Natural Resources Defense Council, R. Zack Klyver, and Center for Biological Diversity intervened as defendants.

The Fishermen claim that the monument exceeds the President's power under the Antiquities Act because it consists of ocean beyond the territorial sea, rather than any land owned or controlled by the federal government. App. D-24 to D-25. They also claim that the boundary set is not the smallest area compatible with protecting objects covered by the Antiquities Act. App. D-25 to D-26.

On October 5, 2018, the district court dismissed the Fishermen's complaint, holding that the monument was authorized by the Antiquities Act and

that its boundary was justified by the monuments' reference to an ecosystem. App. B-1 to B-39.

D.C. Circuit proceedings

"With a minor alteration,"[3] the D.C. Circuit affirmed. App. A-3. First, it held that the Antiquities Act's reference to "land" includes the ocean based on statements in *Alaska* and *California II*, regardless of whether those statements were dicta. App. A-10 to A-12. The court expressly declined to "wade into" any arguments regarding the ordinary meaning of the text or historical practice. App. A-12.

Second, the D.C. Circuit held that the President's novel interpretation of the Antiquities Act poses no conflict with the National Marine Sanctuaries Act, that the two statutes merely overlap. App. A-12 to A-14. This is so, the D.C. Circuit asserted, because (1) marine sanctuaries can be bigger than ocean monuments, App. A-13; (2) marine sanctuaries can protect a broader range of values than monuments, including "recreational," "cultural," and "human-use values," *id.* (quoting 16 U.S.C. § 1433(a)(2)); and (3) only objects can be designated as national monuments, whereas areas can be designated as marine sanctuaries, App. A-14.

Third, the court held that the federal government has "sufficient authority to 'control[]'" the EEZ based on "three factors." App. A-16. They are: (1) that the federal government has "significant authority" over the EEZ under international law, App. A-16; (2) that

---

[3] The D.C. Circuit held that it was error to dismiss the case for lack of subject matter jurisdiction, rather than for failure to state a claim. App. A-20 to A-21.

it has "substantial authority" over the EEZ under domestic law, *id.*; and (3) that its authority is "unrivaled," App. A-17.

Finally, the D.C. Circuit held that the Fishermen's "smallest area" allegations are insufficient because the 2016 Proclamation references "resources and ecosystems." App. A-19. To survive dismissal, the court stated, the fishermen must allege that an area included within the monument "did not, in fact, contain natural resources that the President sought to protect." *Id.*

The Fishermen timely sought rehearing *en banc*, which was denied on February 28, 2020. App. C-1. Judges Katsas and Rao were recused and took no part in the consideration of the *en banc* petition. *Id.*

F. The President Lifts the Monument's Fishing Prohibitions

Last month, President Trump signed a proclamation modifying the Northeast Canyons and Seamounts Marine National Monument by lifting the prohibitions on commercial fishing. *See* Proclamation No. 10049, 85 Fed. Reg. 35,793. The 2020 Proclamation declares that some of the marine resources identified in the 2016 Proclamation are "not unique to the monument" and "are not of such significant scientific interest that they merit additional protection." *Id.* at 35,794. However, the 2020 Proclamation "does not modify the monument in any other respect." *Id.* at 35,793. Instead, it reaffirms the President's authority to designate the monument. *Id.*

On June 17, 2020, Conservation Law Foundation, Natural Resources Defense Council, R. Zack Klyver,

and Center for Biological Diversity—the Intervenors here—sued the President and Secretaries of the Interior and Commerce, arguing the 2020 Proclamation lifting fishing prohibitions violates the Antiquities Act. *Conservation Law Foundation v. Trump*, No. 20-cv-01589 (D.D.C.).

Reasons for Granting the Petition

I

The Petition Raises Important Unsettled Questions of Federal Law, Including Questions That Have Divided the Circuits

This petition should be granted because the D.C. Circuit decided important questions of federal law that this Court has not settled but should. Sup. Ct. R. 10(c). The D.C. Circuit's decision also conflicts with those of other circuits on the same important matter. Sup. Ct. R. 10(a).

A. The Petition Presents a Significant Separation of Powers Question

To preserve the Constitution's separation of powers, this Court has repeatedly urged skepticism of broad and novel claims of power, especially where such claims affect the balance between the branches or between the government and the people. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress' action." (quoting *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

Thus, this Court has struck down or narrowly interpreted statutes that intrude on individual liberty

in novel ways. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 549-50; *United States v. Windsor*, 570 U.S. 744, 768 (2013). It has applied this anti-novelty principle to preserve the balance between federal and state power. *Printz v. United States*, 521 U.S. 898, 905 (1997); *New York v. United States*, 505 U.S. 144, 177 (1992). And it has applied this principle to the Legislature's novel interference with Executive power. *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7, 2020 WL 3492641, at *10 (U.S. June 29, 2020); *Free Enterprise Fund*, 561 U.S. at 505.

In *Utility Air Regulatory Group*, the Court applied the anti-novelty principle to Executive Branch encroachments on Congress' prerogatives. *See* 573 U.S. at 324. Under that case, skepticism is required when "an agency claims to discover in a long-extant statute an unheralded power to regulate[.]" *Id.* Such novelty indicates that the Executive Branch is claiming power Congress never delegated—and perhaps intentionally withheld.

1. A century after the Antiquities Act's enactment, the President claimed to discover significant new power

For the Antiquities Act's first 100 years, it was applied only where the federal government exercised "'full dominion and power,'" such as federal land and tribal land. *See California II*, 436 U.S. at 35-36 (quoting *California I*, 332 U.S. at 805). Since 2006, however, the President has claimed significantly broader power. To justify the designation of vast ocean monuments, the President interprets the Antiquities Act to apply wherever the federal government has "a significant amount" of regulatory authority. 24 Op.

O.L.C. at 196-97 (citing no authority or historical precedent for this interpretation).

There can be no doubt that this interpretation expands considerably the President's power. The federal government owns or controls approximately 700 million acres of land, including land held in trust for Native American tribes and individuals. *See* Cong. Res. Serv., *Fed. Land Ownership: Overview and Data* 1 n.1 (2020).[4] This overstates the area previously subject to the Antiquities Act, of course, because Congress has designated the use of much of this land or otherwise foreclosed monument designations. *See, e.g.*, *Amer. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184 (D.D.C. 2019). For instance, Congress has forbidden or sharply limited the Antiquities Act's application in Alaska and Wyoming, two states which contain 40% of federal land. 16 U.S.C. § 3213(a); 54 U.S.C. § 320301(d). *See also Federal Land Ownership*, *supra* at 7-9.

Interpreting the Antiquities Act to reach the three-billion-acre EEZ expands the President's power by orders of magnitude. *See* NOAA, *The United States is an Ocean Nation* (2011).[5] In the short time since the President purportedly discovered this power, there has been an exponential rise in the area within monument designations. *See supra* 7-8.

Despite *Utility Air Regulatory Group*, the D.C. Circuit applied no skepticism to this belated, novel claim to power. Indeed, after extensive briefing on the question, the D.C. Circuit deemed the issue unworthy

---

[4] https://fas.org/sgp/crs/misc/R42346.pdf.

[5] https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf.

of comment. *See* App. A-1 to A-22. However, the D.C. Circuit's opinion endorses the President's creativity by eschewing any consideration of the statute's ordinary meaning or historical practice in favor of a new three-factor test for which the D.C. Circuit cites no authority. *See* App. A-15 to A-18.

The D.C. Circuit's treatment of the President's novel interpretation stands in sharp contrast to the Fifth Circuit's application of *Utility Air Regulatory Group*. In *Chamber of Commerce v. U.S. Dep't of Labor*, a 40-year delay between a statute's enactment and an agency's claimed discovery of significant, new power was deemed highly suggestive that the agency's interpretation was unreasonable. *See* 885 F.3d 360, 380 (5th Cir. 2018). *See also ClearCorrect Operating, LLC v. International Trade Comm'n*, 810 F.3d 1283, 1302-03 (Fed. Cir. 2015) (O'Malley, J., concurring) (expressing skepticism of an agency's power over international data transmissions under a statute that was last amended before the internet rose to prominence).

This Court should grant review to resolve the important federal question when, consistent with the separation of powers, the President may assume significant, novel powers under a long-extant statute.

2. The circumvention of the National Marine Sanctuaries Act compounds the separation of powers concern

This is a good vehicle for deciding this separation of powers question because it involves a novel interpretation that evades, and essentially nullifies, the requirements of another, more specific statute. *See RadLAX Gateway Hotel v. Amalgamated Bank*,

566 U.S. 639 (2012). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Here, the President did not claim this power because Congress failed to act (although that too would present serious separation of powers concerns). Instead, Congress recognized that earlier conservation statutes focused on land to the exclusion of ocean health. 16 U.S.C. § 1431(a)(1); *see* 146 Cong. Rec. S10636 (statement of Sen. Hollings distinguishing the National Marine Sanctuaries Act from earlier statutes addressed to "'special areas' on land"). To fill this gap, the National Marine Sanctuaries Act establishes a comprehensive process for identifying and protecting special areas of the "marine environment." 16 U.S.C. § 1431(a)(4). And, after the EEZ was established, Congress amended the statute, providing that the identification and protection of special areas of the EEZ would also be governed by the National Marine Sanctuaries Act. *See* Pub. L. No. 102-587, § 2102.

Marine monuments created under the Antiquities Act circumvent the sanctuary designation process. Because the federal government has no authority to regulate the salvage of sunken ships and recovery of other antiquities in the EEZ, THIRD RESTATEMENT § 514 cmt. c., the OLC describes the purpose of ocean monuments as limited to protection of special areas of the marine environment. 24 Op. O.L.C. at 197. Indeed, the first marine monument in 2006 was established in an area of ocean that Congress had specifically directed be considered for sanctuary status. *See* Pub. L. No. 106-513, § 6(g)(1). Congress also authorized the President to perform limited, preliminary steps to protect the area, authorization which was

unnecessary under the President's novel interpretation of the Antiquities Act. *See id. See also* 146 Cong. Rec. S10638 (statement of Sen. Inouye expressing concern about the administration's "interest in immediately establishing, without any public input," restrictions for marine areas, which should instead "be subject to review during the course of the sanctuary designation process"); *id.* (statement of Sen. Snowe expressing the same concern).

Without evincing any skepticism of the President's novel interpretation, the D.C. Circuit panel ruled that the interpretation does not make the National Marine Sanctuaries Act redundant, but that the two powers merely overlap. It offered three justifications for this conclusion, all of which collapse under even minimal scrutiny. App. A-12 to A-14.

First, the D.C. Circuit asserted that marine sanctuaries "may be larger" than an ocean monument. *Id.* at A-14. In fact, ocean monuments are far larger than marine sanctuaries, with the largest ocean monument being fifty times larger than the largest marine sanctuary—and larger than the land area of every state. *Compare* NOAA, *National Marine Sanctuary of American Samoa: About the Sanctuary*[6] *with* Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016) (expanding the Papahanaumokuakea Marine National Monument to 583 million acres). This is because ocean monuments evade the procedural and political checks on executive power that keep marine sanctuaries reasonably sized. *See* Joseph Briggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act*

[6] https://americansamoa.noaa.gov/about/ (last visited July 21, 2020).

Power to Designate Monuments In the Outer Continental Shelf, 22 Tul. Envtl. L.J. 403, 415-16 (2009) (criticizing this evasion); Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 Ecology L.Q. 71, 123-27 (2002) (advocating designation of ocean monuments to evade these checks). Moreover, the government conceded during oral argument before the D.C. Circuit that, under its view, the President could establish a monument encompassing the entire Exclusive Economic Zone. Oral Argument at 21:22-22:41.[7]

Second, the D.C. Circuit asserted that sanctuaries protect more diverse values, including "recreational," "cultural," and "human-use values," that are beyond the Antiquities Act. App. A-13 to A-14. In fact, Presidents have long designated monuments based on these values. In 1924, President Coolidge expanded Pinnacles National Monument to include an area with "valuable camping sites." Proclamation No. 1704, 43 Stat. 1961 (July 2, 1924). In 1928 and 1930, Presidents Coolidge and Hoover expanded Craters of the Moon National Monument to encompass several nearby streams. Proclamation No. 1916, 46 Stat. 3029 (July 9, 1930); Proclamation No. 1843, 45 Stat. 2959 (July 23, 1928). The lava flows and other volcanic features for which the monument was established did not suddenly get thirsty; instead, the National Park Service desired a water supply to support campsites and other recreational facilities. *See* National Park

---

[7] https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/485E883472F2DFDC8525849B005A5D94/$file/18-5353.mp3#t=21:22.

Service, *Land Issues and Legislative History in* CRATERS OF THE MOON NATIONAL MONUMENT: ADMINISTRATIVE HISTORY (1992).[8] To this day, Presidents routinely cite "outdoor recreation opportunities, including hunting, fishing, hiking, camping, mountain biking, and horseback riding" when designating monuments. Proclamation No. 9396, 81 Fed. Reg. 8379 (Feb. 12, 2016). *See, e.g.*, Proclamation No. 9476, 81 Fed. Reg. 59,121 (Aug. 24, 2016); Proclamation No. 9298, 80 Fed. Reg. 41,975 (July 10, 2015); Proclamation No. 9193, 79 Fed. Reg. 62,301 (Oct. 10, 2014); Proclamation No. 8803, 77 Fed. Reg. 24,579 (Apr. 20, 2012). They likewise frequently cite cultural values. *See, e.g.*, Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016); Proclamation No. 4625, 93 Stat. 1470 (Dec. 1, 1978). Indeed, the 2016 Proclamation cites the cultural importance of fishing to New England. App. D-52.

Finally, the D.C. Circuit distinguished the Antiquities Act's protection of "objects" from the Marine Sanctuaries Act's protection of "areas." *Id.* D-52 to D-53. This distinction too is illusory. Proclamations designating monuments based on ecosystems and similar features routinely speak in "area" terms *See, e.g.*, Proclamation No. 9298, 80 Fed. Reg. 41,975 (referring repeatedly to "the Berryessa Snow Mountain area"). This practice is more pronounced for proclamations establishing ocean monuments, which are replete with terms from the Marine Sanctuaries Act. *See, e.g.*, Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009) (describing the "Pacific Remote Islands area" generally and the

---

[8] http://npshistory.com/publications/crmo/adhi/chap4.htm.

monument's purpose as "preserv[ing] the marine environment"); Proclamation No. 8031, 71 Fed. Reg. 36,443 (describing the monument's purpose as protecting the "marine area" and labeling the monument a "sanctuary").[9] Again, the 2016 Proclamation is no exception, speaking generally of the "canyons and seamounts area" rather than of specific objects. App. D-52, D-53, D-55 to D-58.

Despite the D.C. Circuit's assertions to the contrary, the President's novel interpretation of the Antiquities Act enables him to do precisely what the National Marine Sanctuaries Act was enacted to govern while evading the latter's substantive and procedural limits. *Compare* 24 Op. O.L.C. at 197 (The President can designate ocean monuments for "the purposes of protecting the marine environment.") *with* 16 U.S.C. § 1431 (The National Marine Sanctuary Act's "primary objective" is protecting marine resources.). If the Executive Branch's interpretation of the Antiquities Act is upheld, there would be no reason any future administration would ever again comply with the National Marine Sanctuaries Act's substantive and procedural requirements.

Practice confirms what logic predicts. Whereas the President's novel interpretation of the Antiquities Act has led to an exponential rise in the area under monument designation, *supra* at 7-8, it has had the opposite effect on the National Marine Sanctuaries Act. No marine sanctuaries have been designated since this power was purportedly discovered, *see* NOAA, National Marine Sanctuary System, *supra*,

---

[9] Proclamation No. 8031 was later amended to remove references to the monument as a sanctuary. *See* Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007).

and there is little reason any would be created in the future.

Consequently, this case is a good vehicle for considering whether the separation of powers permits the claimed discovery of significant, unheralded power under the Antiquities Act, where that power comes at the expense of the statute specifically directed to the protection of special marine areas.

B. The D.C. Circuit Holding Conflicts with Holdings of the Fifth and Eleventh Circuits

This case also merits review because the D.C. Circuit's holding conflicts with holdings of the Fifth and Eleventh Circuits. *Treasure Salvors*, 569 F.2d at 333 & n.1, 337-38; *Odyssey Marine Exploration*, 636 F.3d at 1341 (holding that *Treasure Salvors* is binding in the Eleventh Circuit).[10]

In *Treasure Salvors*, the Fifth Circuit considered whether federal authority over "the continental shelf, outside the territorial waters of the United States" constitutes "control" under the Antiquities Act. 569 F.2d at 333 & n.1, 337-38. In that case, the United States intervened in a quiet title action asserting an interest under the Antiquities Act and other laws in a salvaged seventeenth-century shipwreck. *Id.* at 333, 337-40.

Acknowledging exclusive federal authority to regulate the continental shelf under an international convention, presidential proclamation, and federal

---

[10] Five circuits are landlocked or have specialized jurisdictions and are, therefore, unlikely to confront the question. Consequently, this two-to-one split governs a significant portion of the EEZ.

statute, the Fifth Circuit held that this was insufficient. *Id.* at 340. "[L]and owned or controlled" by the federal government does not include areas where the United States lacks sovereignty and its regulatory authority is of "limited scope[,]" the court held. *Id.* at 339-40. *See Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1227 n.4 (5th Cir. 1985) (emphasizing *Treasure Salvors*' requirement of a "general extension of United States sovereignty"). Therefore, the Antiquities Act does not apply beyond the territorial sea. *Treasure Salvors*, 569 F.2d at 340.

The D.C. Circuit panel dismissed *Treasure Salvors* as insignificant solely because it predated the 1983 Proclamation establishing the EEZ. App. A-17 to A-18. But that factual distinction does not justify dismissing the case so cavalierly, without any consideration of its holding or legal reasoning. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1218 (2018) (rejecting, as a "distinction without a difference," a factor that does not "relate to" the reasoning of the prior holding). The D.C. Circuit gave no consideration to *Treasure Salvors*' holding or reasoning. Instead, citing the mere change, it ascribed to *Treasure Salvors* "no significance." App. A-18.

The 1983 Proclamation does not affect the continued validity of *Treasure Salvors* for at least two reasons. First, the Fifth Circuit has never overruled *Treasure Salvors* nor even questioned the soundness of its holding during the 37 years since the 1983 Proclamation was issued. Instead, it continued to apply that holding after 1983. *See Laredo Offshore Constructors*, 754 F.2d at 1227 n.4 (finding federal jurisdiction over a contract dispute because, unlike in *Treasure Salvors*, the question did not depend on "a

general extension of United States sovereignty"). *See also Odyssey Marine Exploration*, 636 F.3d at 1341 (2011 decision that *Treasure Salvors* is binding in the Eleventh Circuit).

Second, the 1983 Proclamation provides no ground for abandoning *Treasure Salvors*' holding. The 1983 Proclamation did not extend U.S. sovereignty to the EEZ. Proclamation No. 5030, 48 Fed. Reg. at 10,606 (The exclusive economic zone "remains . . . beyond the territory and territorial sea of the United States[.]"). Nor could it do so. *See* THIRD RESTATEMENT § 514 cmt. c (A coastal nation "does not have sovereignty over the exclusive economic zone."). The 1983 Proclamation also did not assert full dominion and power over the EEZ. Proclamation No. 5030, 48 Fed. Reg. at 10,605 (The proclamation "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries[.]"). As President Reagan observed at the time, the 1983 Proclamation permitted only "limited additional steps to protect the marine environment[,]" the sort of limited authority *Treasure Salvors* held insufficient. *See* Statement on United States Oceans Policy, 1 Pub. Papers of Ronald Reagan at 379 (Mar. 10, 1983). *See also* THIRD RESTATEMENT § 514 cmt. c (describing coastal nation's authority over the EEZ and its limits, including that coastal nations cannot restrict navigation, pipeline or cable installation, or the salvaging of shipwrecks and historic artifacts).

As when *Treasure Salvors* was decided, the United States enjoys certain sovereign rights to natural resources beyond the territorial sea, 569 F.2d at 339-40 (discussing the sovereign rights that existed in 1978), but it lacks sovereignty and the police power.

See United Nations Convention on the Law of the Sea, art. 58 § 2 (applying to the EEZ rules governing the high seas). Therefore, contrary to the D.C. Circuit's speculation, *Treasure Salvors*' remains good law, as two circuits treat it. The D.C. Circuit's holding irreconcilably conflicts with Fifth Circuit and Eleventh Circuit precedent on the same important matter. This Court should grant review to resolve this split of authority.

C. The D.C. Circuit's Interpretation Is Unworkable and Explicitly Ignores the Statute's Text

1. "Control"

In *California II*, this Court held that the Submerged Lands Act extinguished the federal government's interest in the areas of territorial sea included in the Channel Islands National Monument. 436 U.S. at 36-41. Previously, in *California I*, the Court had held that the federal government, rather than the state, had "full dominion and power" over the territorial sea. 332 U.S. at 805. Through the Submerged Lands Act, Congress reversed this holding. 43 U.S.C. §§ 1301-1315. Therefore, *California II* explains, the loss of "full dominion and power" meant that the federal government no longer owned or controlled the territorial sea for purposes of the Antiquities Act. 436 U.S. at 36-41.

The D.C. Circuit interpreted the Antiquities Act's reference to "control" far more broadly. According to the creative decision below, three newly minted factors of unknown weight and relationship to each other determine whether the federal government's authority is enough. First is whether the government

has "significant authority" to regulate under international law. *See* App. A-16. Second, is whether Congress has passed legislation delegating "substantial authority" to regulate an area. *See id*.[11] Third, is whether the authority is "unrivaled," meaning no other party exerts competing sovereign, ownership, or other interests. *See id*. at A-17.

The adoption of this vague, three-part test increases the importance of this Court's review for at least two reasons. First, this test will "leave[] courts adrift" when deciding future cases. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1898 (2016) (Thomas, J., dissenting). Under vague, multi-factor tests, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." *June Medical Serv. L.L.C. v. Russo*, No. 18-1323, 2020 WL 3492640, at *23 (U.S. June 29, 2020) (Roberts, J., concurring) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

Second, and relatedly, the D.C. Circuit's test is unadministrable. Although the opinion disclaims this, App. A-18, the reasoning would justify the Antiquities Act's application to state and private land, despite the statute's text and consistent practice foreclosing this result. *See, e.g.*, 54 U.S.C. § 320301(c). Under current Commerce Clause precedent, the federal government has significant authority to regulate conduct affecting the environment on state and private land. *See Hodel*

---

[11] The statute speaks to areas owned or controlled by *the federal government*, not the Executive Branch. 54 U.S.C. § 320301(a). Therefore, what should matter is Congress' authority over an area, not the authority it has delegated to the Executive. *Cf.* U.S. Const. art. IV, § 3, cl. 2.

v. Indiana, 452 U.S. 314, 329 (1981); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). Indeed, this authority is greater than the government's authority over the Exclusive Economic Zone in at least two respects. First, the federal government may regulate the collection of antiquities and other artifacts that are the Antiquities Act's central concern—power it lacks in the EEZ. *Compare Andrus v. Allard*, 444 U.S. 51 (1979) *with* THIRD RESTATEMENT § 514 cmt. c. Second, the federal government may take private land by eminent domain, extinguishing any limit on its authority over that land. U.S. Const. amend. V. It has no similar power to obtain full dominion and power over the EEZ.

In dismissing this implication of its test, the D.C. Circuit appears to elevate the "unrivaled" factor to decisive status. App. A-18. However, this creates more problems than it solves. Federal authority is rivaled, in the sense the D.C. Circuit uses the term, in areas Congress clearly intended to be covered by the Antiquities Act.

Take federal lands. Congress generally does not assert exclusive authority over federal land but, instead, permits states to exercise significant authority. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). In many contexts, federal agencies are directed to manage federal land consistent with state and local policy. *See, e.g.*, 43 U.S.C. § 1712(c)(9). States may also take a direct role in improving or managing federal lands. *See* U.S.

Forest Serv., *Good Neighbor Authority*;[12] U.S. Forest Serv., *Fire Cooperator Agreements/Programs*.[13]

Or consider tribal land. Although Congress enjoys "plenary" authority over such land, *United States v. Lara*, 541 U.S. 193, 200 (2004), it is not exclusive. Instead, tribes also exercise a significant amount of authority. *See McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *9 (U.S. July 9, 2020) (discussing the evolution of tribal autonomy in the 20th century). *See also* AMERICAN INDIAN LAW DESKBOOK § 3.8 (May 2018).

Under *California II*'s "full dominion and power" standard, these are easy cases. The federal government enjoys plenary authority, including the police power, over federal land and tribal land even if it permits states or tribes to supplement federal regulation. *See Granite Rock Co.*, 480 U.S. at 581; *Lara*, 541 U.S. at 200. But it lacks such power over state land, private land, and the EEZ. Yet the D.C. Circuit adopts a test that calls these easy cases into question. Because of the importance of "control" as a limit on the President's Antiquities Act authority, this Court should grant review to consider a workable standard.

2. "Land"

Citing two sentences of dicta from *Alaska* and *California II*, the D.C. Circuit also held that the Antiquities Act's reference to "land" includes the

---

[12] https://www.fs.usda.gov/managing-land/farm-bill/gna (last visited July 21, 2020).

[13] https://www.fs.usda.gov/detail/r5/fire-aviation/?cid=stelprdb5374321 (last visited July 21, 2020).

ocean. App. A-10 to A-12 (discussing *Alaska*, 545 U.S. at 103-04 and *California II*, 436 U.S. at 36 n.9). This case presents an important opportunity for this Court to clarify its past references to the Antiquities Act's application to water and determine whether ocean monuments are consistent with the statute's text.

The relevant statements in *Alaska* and *California II* are overbroad dicta. In neither case was the meaning of the Antiquities Act's reference to "land" at issue. *See Alaska*, 545 U.S. at 103-04; *California II*, 436 U.S. at 36 n.9. Instead, both decisions contain only a stray sentence asserting, without explanation, that the Antiquities Act applies to at least some waterbodies—a textbook example of dicta. *See Alaska*, 545 U.S. at 103-04; [14] *California II*, 436 U.S. at 36 n.9.

Because of these dicta, however, the D.C. Circuit declined to even consider the ordinary meaning of the Antiquities Act's text. *See* App. A-12. ("Although the

---

[14] The D.C. Circuit's suggestion that *Alaska*'s statement may not be dicta misreads this Court's opinion. App. A-11. There were two "necessary part[s]" to *Alaska*'s holding: (1) whether Glacier Bay had been included in the Glacier Bay National Monument; and (2) whether Congress intended to retain Glacier Bay under the Alaska Statehood Act. 545 U.S. at 100-01. The Court resolved the first issue without reference to the meaning of land. *Id*. at 101-02. The Court stated that it "might conceivably" decide the second issue on grounds that would implicate whether the Antiquities Act applies to submerged areas. *See id*. at 103. However, it noted that the parties had not advanced this argument and found it unnecessary to "pursue this alternative basis [any] further." *Id*. at 103-04. Instead, the Court decided the second issue solely based on the text of the Alaska Statehood Act. *Id*. at 104-10; *id*. at 113 (Scalia, J., dissenting) ("Though the Court makes a dictal feint toward the Antiquities Act of 1906, . . . its holding relies on only a single proviso to § 6(e) of the Alaska Statehood Act[.]").

parties advanced" arguments about "ordinary meaning[,] we need not wade into those waters[.]"). Yet this Court has repeatedly emphasized the importance of starting (and usually ending) with a statute's text. *See McGirt*, 2020 WL 3848063, at *10 ("[A]scertain[ing] and follow[ing] the original meaning of the law" is "the only 'step' proper for a court of law.").

The argument that the ordinary meaning of "land" does not include the ocean is worthy of consideration. Contemporaneous dictionaries define "land" by explicitly distinguishing it from the ocean. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1209 (1909) [hereinafter WEBSTER'S SECOND]; WEBSTER'S INTERNATIONAL DICTIONARY 827 (1900). And numerous federal statutes use the term in this sense. *See, e.g.*, Forest Reserve Act, Pub. L. No. 51-561, 26 Stat. 1095 (Mar. 3, 1891); Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (Sept. 3, 1964); Federal Land Policy Management Act, 43 U.S.C. § 1702(e). When Congress wishes to refer to the ocean, by contrast, it does not refer to it as "land." *See* 16 U.S.C. §§ 1432(3), 1433(a) ("marine environment"). *See also* 16 U.S.C. § 1431(a)(1); 146 Cong. Rec. S10636 (statement of Sen. Hollings distinguishing land from the marine environment).[15]

Contrary to the decision below, *Alaska* and *California II*'s dicta give no reason to ignore the ordinary meaning of the Antiquities Act. Indeed, the dicta provide no supporting analysis whatsoever,

---

[15] Congress sometimes defines "land" to include waters. *See, e.g.*, 16 U.S.C. § 3102(1) (defining "lands" as "lands, waters, and interests therein"). But it didn't do so in the Antiquities Act.

relying instead on mere assertion. *Alaska*, 545 U.S. at 103-04; *California II*, 436 U.S. at 36 n.9. However, absent this Court's intervention, lower courts are unlikely to analyze the ordinary meaning of the statute's text. Instead, they will feel bound by the dicta, notwithstanding their shortcomings. *See* App. A-12. Therefore, this Court should grant review to finally and fully consider the ordinary meaning of "land owned or controlled by the federal government."

D. The Petition Also Presents a Significant Question About the Antiquities Act's "Smallest Area Compatible" Limit

This case also presents a paramount question about the meaning of the Antiquities Act's "smallest area" limit. The D.C. Circuit's interpretation eviscerates this limit, at least where Presidents vaguely refer to "resources" or "ecosystems" as the objects to be protected. Because of the importance of this limitation to the Antiquities Act's structure, the recurring conflict over vast monuments, and the significant practical effects of such monuments, this question merit's the Court's attention.

According to the D.C. Circuit, a plaintiff may only state a smallest area claim by showing that an area does "not, in fact, contain natural resources that the President sought to protect[.]" App. A-19 (quoting *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003)). In other words, the D.C. Circuit's test measures presidential intent, not whether that intent is consistent with the statute.

When applied to proclamations vaguely referencing resources or ecosystems, like the 2016 Proclamation, this test is impossible to satisfy. No

area on earth is entirely devoid of "resources." Therefore, a plaintiff could never show that any boundary is too big, so long as a proclamation includes such vague references.

The government has admitted that its theory would authorize the designation of the entire three-billion-acre EEZ. At oral argument, Judge Tatel asked: "What are the limits then? Could the President, say, declare an Atlantic coast monument that would be the whole EEZ? . . . It is clearly an ecosystem." Oral Argument at 21:22-22:41.[16] The government's answer was yes, *id.*, yet the D.C. Circuit adopted the government's theory anyway. App. A-19.

The 2016 Proclamation, for instance, references two whale species that migrate annually from the Arctic to the Tropics. *See* NOAA Fisheries, *Fin Whale (Balaenoptera physalus): About the Species*;[17] NOAA Fisheries, *Sei Whale (Balaenoptera borealis): About the Species*.[18] This reference alone would, under the D.C. Circuit's holding, permit the designation of the entire Atlantic EEZ. Yet this conclusion is irreconcilable with the statute's text and history. In addition to the "smallest area" requirement, the Antiquities Act restricts designations to objects "*situated on* land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a) (emphasis

---

[16] https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/485E883472F2DFDC8525849B005A5D94/$file/18-5353.mp3#t=21:22.

[17] https://www.fisheries.noaa.gov/species/fin-whale (last visited July 21, 2020).

[18] https://www.fisheries.noaa.gov/species/sei-whale (last visited July 21, 2020).

added). "Situated" means affixed, as opposed to mobile. *See* WEBSTER'S SECOND at 1347. In the 1930s, Congress considered amending the statute to eliminate this requirement so that it could be applied to migratory wildlife but declined to do so. *See* H.R. 8912 (1938). The D.C. Circuit has effectively amended the statute in precisely the way Congress refused to.

Moreover, the 2020 Proclamation declares that some of the resources relied on by the D.C. Circuit are "not unique to the monument" and "are not of such significant scientific interest that they merit additional protection." *See* Proclamation No. 10049, 85 Fed. Reg. at 35,794. This significantly undermines, if not outright repudiates, the D.C. Circuit's rationale.

The designation of vast monuments has been a recurring source of legal, political, and social conflict. *See* Yoo & Gaziano, *supra* at 623-28; Erik C. Rusnak, Note, *The Straw That Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 Ohio St. L.J. 669, 681-98 (2003). Perceived overreaches have sparked protests, lawsuits, and led Congress to limit the President's authority in Wyoming and Alaska. *See Sturgeon*, 139 S. Ct. at 1074.

There are at least five other ongoing cases concerning the boundaries of national monuments. *See Amer. Forest Res. Council v. Hammond,* No. 20-5008 (D.C. Cir.); *Murphy Company v. Trump*, No. 19-35921 (9th Cir.); *Conservation Law Foundation*, No. 20-cv-1589; *Wilderness Society v. Trump*, No. 17-cv-2587 (D.D.C.); *Utah Dine Bikeyah v. Trump*, No. 17-cv-2605 (D.D.C.). This uptick reflects the vastness of recent monument designations. Only two monument proclamations affecting one million or more acres

were issued during the Antiquities Act's first 70 years. *See* Proclamation No. 1733, 43 Stat. 1988 (Feb. 26, 1925); Proclamation No. 1487, 40 Stat. 1855 (Sept. 24, 1918). Eleven such proclamations have been issued since 2006. *See Interior Department Releases List of Monuments Under Review*, *supra*.

Many activities are impacted by vast monument designations. Commercial fishing generates approximately $1 billion in annual income in the United States. *See* Food and Agriculture Organization of the United Nations, *Fishery and Aquaculture Country Profiles: United States of America.*[19] Offshore oil production produces $6 billion in federal revenue, in addition to significant private income. Dep't of the Interior, *Natural Resources Revenue Data* (2019).[20] Onshore drilling produces another $5 billion in federal revenue. *Id.* The government raises several hundred million dollars more from timber sales and grazing leases. *See* Cong. Res. Serv., *Leasing and Selling Federal Lands and Resources: Receipts and Their Disposition* (2011).[21]

Congress funds conservation and other public programs with revenues from these activities, *see* Tate Watkins, *How We Pay to Play: Funding Outdoor Recreation on Public Lands in the 21st Century*, PERC Public Lands Report 10-20 (2019),[22] an approach

---

[19] http://www.fao.org/fishery/facp/USA/en (last visited July 21, 2020).

[20] https://revenuedata.doi.gov/.

[21] https://www.everycrsreport.com/files/20110414_R41770_855ccf91157e09f817de57512d262b8561d6fcee.pdf.

[22] https://www.perc.org/wp-content/uploads/2019/05/how-we-pay-to-play.pdf.

frustrated by vast monuments that deplete these revenue sources. The Land and Water Conservation Fund, for instance, relies on nearly $1 billion in oil and gas royalties to fund parks, wildlife refuges, and other conservation areas. *See* Dep't of the Interior, *LWCF Overview*.[23] Revenue from federal lands is also used to support rural education and other services. *See* Forest Serv., News Release, *Forest Service Distributes Secure Rural School Payments* (Mar. 31, 2020)[24] (reporting the allocation of $215 million to states and counties to fund schools, roads, and other services).

Under the statute, the impact of monument designations on these activities and the programs they fund is minimized. Only those activities occurring on the smallest area compatible with the protection of designated objects can be restricted. But under the D.C. Circuit's presidential-intent test, the President may freely prohibit the use of vast areas—to the detriment of other federally protected interests. Therefore, designation of vast national monuments is a matter of substantial national importance that merits this Court's attention.

---

[23] https://www.doi.gov/lwcf/about/overview (last visited July 23, 2020).

[24] https://www.fs.usda.gov/news/releases/forest-service-distributes-secure-rural-schools-payments-0.

II

The 2020 Proclamation Neither Moots This Case Nor Diminishes the Need for Review

Although the President lifted the monument's fishing restrictions on the eve of this petition's filing, this does not moot the case nor diminish the need for this Court's review. "[V]oluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur.'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

The 2020 Proclamation cannot meet this standard for at least three reasons. First, the President has not disclaimed the power to designate the monument but expressly reaffirmed it. Proclamation No. 10049, 85 Fed. Reg. 35,793. *See Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (voluntary cessation will not moot a case where the party "continues to defend the legality" of its conduct). Second, the 2020 Proclamation lifts the prohibition solely as an exercise of discretion, while otherwise reaffirming the President's power to change his mind. Proclamation No. 10049, 85 Fed. Reg. 35,793. And, third, the 2020 Proclamation creates no substantive or procedural barrier to reimposing the prohibitions. *Id.* Moreover, this is no "run of the mill" voluntary cessation case because mootness would allow a party to "manipulate the Court's jurisdiction to insulate a favorable decision from review." *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

The 2020 Proclamation also does not diminish the need for this Court's review. The scope of the President's power to designate and regulate the monument remains a live controversy, as shown by the Intervenors' lawsuit challenging the 2020 Proclamation's deregulatory impact. *Conservation Law Foundation*, No. 20-cv-1589. And the circuit split over the extent of federal authority required by the Antiquities Act continues. By granting review in this case, this Court can settle the questions presented and provide needed clarity about the scope of the President's Antiquities Act power.

III

At a Minimum, the D.C. Circuit's Judgment Should Be Vacated Under *Munsingwear*

If the Court declines to resolve this case on the merits, it should vacate the D.C. Circuit's decision under *Munsingwear*, 340 U.S. at 39. Vacatur is this Court's "established practice" where a mootness issue arises during a case's journey to this Court, especially where it arises as a result of "the 'unilateral action of the party who prevailed in the lower court.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *Munsingwear*, 340 U.S. at 39 and *Arizonans for Official English v. Arizona*, 540 U.S. 43, 71-72 (1997)).

Those are precisely the circumstances presented here. The D.C. Circuit decided this case in the President's favor. App. A-1. The 2020 Proclamation later, and narrowly, modified the monument to lift the restrictions that apply to the Fishermen. *See* Proclamation No. 10049, 85 Fed. Reg. at 35,794. The President otherwise retained the monument as-is and

reaffirmed his authority to establish and regulate it at his discretion. *Id.* at 35,793.

Unless the D.C. Circuit's decision is vacated by this Court, the fishermen may be bound by that decision even though the President's unilateral actions "prevented" them "from obtaining the review to which they are entitled." *See Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). Allowing the D.C. Circuit's decision to bind the fishermen would be unusually unfair here considering the Intervenors' ongoing challenge to the 2020 proclamation. *Conservation Law Foundation*, No. 20-cv-1589.

Conclusion

For these reasons, the petition for certiorari should be granted and the D.C. Circuit's decision reversed or, in the alternative, vacated under *Munsingwear*.

DATED: July 2020.

Respectfully submitted,

JOSHUA P. THOMPSON
DAMIEN M. SCHIFF
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

JONATHAN WOOD
Counsel of Record
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
Email: jwood@pacificlegal.org

Counsel for Petitioners