No. 20-97

In The

Supreme Court of the United States

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, ET AL.,
Petitioners,

v.

WILBUR ROSS, SECRETARY OF COMMERCE, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In this challenge to the president's statutory powers under the Antiquities Act, petitioners present the following question:

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.

Amicus Cato Institute suggests that the Court, in to granting the petition on that question, add the following question for briefing:

Is reasonableness review of the president's statutory authority a necessary complement to any permissible delegation of Congress's power to regulate public lands?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the separation of powers preserves liberty by ensuring that too much power doesn't reside in a single constitutional actor.

INTRODUCTION AND SUMMARY OF ARGUMENT

On its face, Proclamation 9496 undermines the limits set by the Antiquities Act. Although it's called the "Northeast Canyons and Seamounts Marine National Monument," its seven marquee objects—three underwater canyons and four seamounts—occupy only a small part of the whole. *See* Proclamation 9496, 81 Fed. Reg. 65,161, 65,167 (Sept. 21, 2016) (depicting map of monument). To justify this expanse, the Proclamation explains that its stipulated boundaries contain ill-defined "ecosystems," which are themselves monuments. *Id.* at 81 Fed. Reg. at 65,162-63. But this can't be right, because every square inch of the ocean

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

contains or is part of a marine ecosystem. By drawing lines in the open ocean, and then declaring all "ecosystems" therein to be a composite monument, Proclamation 9496 obviates the statute's requirement that such designations reflect "the smallest area compatible with the proper care and management of the objects to be protected." *See* 54 U.S.C. § 320301(b).

To be sure, presidents have created monuments from scenic landscapes for more than a century. *See, e.g.*, Proclamation 794 (31 Stat. 2175) (Jan. 11, 1908) (establishing Grand Canyon National Monument). And, for about as long, presidents have protected ecological features in and around natural landmarks. *See, e.g.*, Proclamation 1733 (43 Stat. 1988) (Feb. 26, 1925) (noting the "great variety of forest . . . flora and fauna" within the newly established Glacier Bay National Monument). Only in recent history, however, have presidents moved from designating "curiosit[ies]" and "landscape[s]" to protecting "ecosystem[s]." *See* Bruce Babbitt, Sec'y, Dep't of Interior, Address at the Sturm College of Law of the University of Denver, *Is There a Monumental Future for the BLM?* (Feb. 17, 2000), https://tinyurl.com/y3vjucxh.

Vast oceanic monuments are an even more recent development. As petitioners explain, presidents started designating monuments within the waters of the Economic Exclusion Zone only after a 2000 Office of Legal Counsel memo. *See* Pet. App. at 5-6.

Since 2006, these modern interpretive trends converged to justify five marine ecosystems monuments, whose total area far exceeds the combined acreage of all other monuments established during the 114-year

history of the Antiquities Act. *Id.* at 7. Thus, with the swipe of a pen, recent presidents have achieved regulatory results that otherwise would take years to accomplish—through administrative processes designed by Congress to incorporate various stakeholders into ocean management. *See* 16 U.S.C. §§ 1433-1434 (setting forth the procedural requirements for the Commerce Department under the National Marine Sanctuaries Act).

Under black-letter administrative law, courts subject agency action to a reasonableness test, known as "hard look" review. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (characterizing the scope of review under the Administrative Procedure Act). In this context, courts would be skeptical if an agency advanced an unprecedented application of a century-old enabling act. If an agency, and not the president, had established the monument at issue, the courts below would have demanded a reasoned explanation for why there is so much open space within its boundaries.

Nevertheless, this Court has foreclosed "hard look" review of *presidential* regulatory powers and has yet to provide any guidance to lower courts. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). The subsequent confusion—as evidenced by the opinions below—has given presidents every incentive to expand their authority through interpretation. It follows that this case is as much about judicial review as it is about monuments. If judicial review of the president's statutory powers were less in doubt, then recent presidents wouldn't have been emboldened to

adopt self-serving interpretations of the Antiquities Act, and there would be no case or controversy.

Of course, presidents exercise many delegations. *See, e.g.*, President Donald J. Trump, Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (July 21, 2020) (announcing president's intention to exercise statutory authority to influence the apportionment process); Proclamation 9844, 84 Fed. Reg. 4,949 (Feb. 20, 2019) (declaring a national emergency at southern border to invoke statutory authority to construct a border wall). For all such regulatory regimes, the uncertainty of judicial review creates an ever-present opportunity for presidents to push the limits of their power.

Given these structural concerns, the Court should use this case to align the circuit courts' disparate—but mostly deferential to a fault—approaches for judicial review of the president's statutory powers.

ARGUMENT: JUDICIAL REVIEW OF THE PRESIDENT'S STATUTORY POWERS IS IN DISARRAY

In *Franklin v. Massachusetts*, this Court removed the president's regulatory power from the standard framework for hearing claims against administrative action. *See* 505 U.S. at 800–01. Since *Franklin*, this Court has not provided further guidance for how lower courts should review the president's statutory authorities. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) ("assum[ing] without deciding that . . . statutory claims [against the president] are reviewable" without setting forth the scope of such review);

Dalton v. Specter, 511 U.S. 462, 474 (1994) ("We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA."). In *Franklin*'s wake, some circuits have abandoned judicial review altogether, while others perform searching review—perhaps too searching. For its part, the D.C. Circuit's muddled framework falls nearer the deferential extreme of the spectrum.

I. The D.C. Circuit Framework Is Unworkable

Relying on circuit precedent, the appellate proceedings below performed a dichotomous review divided into two types of claims. *See Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 540 (D.C. Cir. 2019) ("Our court set out a framework for reviewing challenges to national monument designations in two companion cases, *Mt. States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) and *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002)."). The first category includes claims that are "justiciable on the face of the proclamation," while the second class of claims are "those requiring factual development." *Id.* For the second category of claims, the court imposes heightened pleading requirements. Specifically, "plaintiffs' pleadings must contain plausible factual allegations identifying an aspect of the designation that exceeds the President's statutory authority." *Id.*

On paper, the D.C. Circuit's bifurcated review scheme seems like a viable means to keep the president within the bounds of the statute. In practice, however, it doesn't work. The framework's flaws became evident as the court addressed the Antiquities

Act's most important constraint: the requirement for a monument's buffer zone to be "the smallest area compatible" with its protection. 54 U.S.C. § 320301(b).

As explained above, Proclamation 9496 obviates the statute's essential limitation by drawing giant geometric shapes in the ocean, and then declaring all "ecosystems" therein to be monuments. The unreasonableness of the president's interpretation is obvious: marine ecosystems exist everywhere there is ocean; therefore, any part of the ocean (within the Exclusive Economic Zone) would meet Proclamation 9496's threshold for becoming a monument.

Where, as here, a proclamation avows no limits, it should be "justiciable on the face of the proclamation." Notwithstanding the apparent availability of facial review (category one), the D.C. Circuit instead heard this claim under its second category of review, which "requires plausible factual allegations that the Monument is not the 'smallest area compatible' with management." *Mass. Lobstermen's Ass'n*, 945 at 544. As a general matter, it's unclear why the court parsed the petitioners' claims the way it did.

The court's second category engenders no less confusion. To survive a motion to dismiss, the opinion below holds that plaintiffs would have to present "factual allegations identifying a portion of the Monument that lacks the natural resources and ecosystems the President sought to protect." *Id.* at 540, 544. Yet such an allegation doesn't make sense—and is impossible to make—where, as here, the "ecosystems the

President sought to protect" are coterminous with the boundaries he draws.

It's worth contrasting these heightened pleading requirements with the explanation set forth by Proclamation 9496 to meet the Antiquities Act's requirements that monuments not exceed "the smallest area compatible" with their protection. In all, the document addresses this crucial provision with one conclusory clause of one sentence: "The Federal lands and interests in lands reserved consist of approximately 4,913 square miles, *which is the smallest area compatible with the proper care and management of the objects to be protected*." 81 Fed. Reg. at 65,163 (formatting added). No further explanation was offered.

II. The Circuit Courts Are Split

In theory, the D.C. Circuit's two-track framework allows for judicial review of the president's statutory powers. By contrast, the Federal Circuit takes this Court's precedents as having foreclosed review altogether. Recently, a lower court in the Federal Circuit's purvey described that jurisdiction's prevailing approach as allowing for "a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1345 (Ct. Int'l Trade 2019).

At least two opinions by Federal Circuit judges have acknowledged the split between their court and the D.C. Circuit over how to handle challenges to a president's statutory powers. *See Motions Sys. Corp.*

v. Bush, 437 F.3d 1356, 1363-64 (Fed. Cir. 2006) (Gajarsa, J., concurring) (arguing that his court should follow the D.C. Circuit and allow for review of the range of the president's statutory discretion); *Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1366–67 (Fed. Cir. 2003) (Newman, J., dissenting in part) (referencing the D.C. Circuit's Antiquities Act cases.as a model eschewed by the majority).

At the other end of the spectrum, the Ninth Circuit recently has afforded generous review of the president's statutory powers. In *East Bay Sanctuary Covenant v. Trump*, for example, the court determined that presidential decisions are subject to review under the Administrative Procedure Act when the president's determination is combined with an agency action that together creates an "operative rule of decision." *See* 950 F.3d 1242, 1271 (9th Cir. 2019). The Ninth Circuit's novel standard seemingly would allow for substantive review of Proclamation 9496 whenever its implementing regulations are issued. 81 Fed. Reg. 65,164 (assigning the Commerce Department regulatory responsibilities).

Earlier this year, in *Doe v. Trump*, the Ninth Circuit took a different approach to achieve searching review of the president's statutory powers. *See* 957 F.3d 1050 (2020). In that case, the court made the commonsense distinction between foreign and domestic policy. While allowing that the president warrants great deference in foreign affairs, the Ninth Circuit panel pos-

ited that the president's "power is more circumscribed" when he addresses a "purely" domestic issue. *Id.* at 1067.

There are costs to lower-court uncertainty over judicial review of the president's regulatory power. In particular, the absence of an overarching framework for judicial review invites presidential adventurism of the sort evidenced by Proclamation 9496.

CONCLUSION

It is well past time for this Court to provide guidance on the crucial matter of how lower courts should review the president's statutory authority. If "hard look" review is too strong for the president's regulatory powers, then this Court, on the merits, should consider some sort of "soft look" review. Something must be done, because the status quo upsets the constitutional separation of powers by encouraging presidents to attain power through interpretation.

For the foregoing reasons, the Court should grant the petition and add a clarifying question that addresses the pressing need for some sort of reasonableness review of the president's statutory authority.

Respectfully submitted,

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