No. 20-97

In The
Supreme Court of the United States

MASSACHUSETTS LOBSTERMEN'S ASS'N, et al.,

Petitioners,

v.

WILBUR ROSS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* AMERICAN FOREST RESOURCE COUNCIL SUPPORTING PETITIONERS

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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).

The questions presented are:

Whether, in conflict with the Fifth and Eleventh Circuits and with the National Marine Sanctuaries Act, the Antiquities Act applies to the offshore areas beyond the Territorial Sea and Contiguous Zone, such as the Exclusive Economic Zone (EEZ), where the United States does not own submerged land but only claims authority to regulate natural resources.

Whether the Antiquities Act authorizes the President to unilaterally override fisheries regulations made pursuant to the Magnuson-Stevens Fisheries Conservation and Management Act.

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.

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INTEREST OF *AMICUS CURIAE*[1]

The American Forest Resource Council (AFRC) is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. It also works to preserve and enforce laws providing for timber harvest as a goal in itself and as a tool to achieve broader land management goals. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. These businesses provide tens of thousands of family-wage jobs in rural communities.

AFRC has a significant interest in preventing Presidential abuse of the Antiquities Act. It is the plaintiff in one of the cases cited by the petition, *AFRC v. Hammond*, 422 F.Supp.3d 184 (D.D.C. 2019), *appeal*

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[1] All parties received timely notice and have consented in writing to the filing of this *amicus* brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or part, and no counsel or party made monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

docketed, Nos. 20-5008, 20-5009 (D.C. Cir. Jan. 24, 2020), *see* Pet. 16, 34, which is the only decision in the 112-year history of the Antiquities Act to invalidate a Presidential proclamation of a National Monument.

SUMMARY OF ARGUMENT

Public land management has long been recognized as a source of conflict between the States. The Framers placed the chief responsibility for resolution of these issues with Congress. The Antiquities Act delegates a small portion of authority to the President to make reservations of public lands. It does not give the President power to rewrite statute or repurpose land.

Recent Presidents, frustrated with the slow pace of Congressional action, have used the Antiquities Act to short-circuit the legislative process and to target resource users, from miners to loggers and commercial fishers. Now, the President claims the power to seize an enormous maritime area. The Court of Appeals rubber-stamped this exercise, in conflict with at least two other Circuits, multiple federal statutes, and the body of law, both foreign and domestic, finely demarcating the maritime balance of power between the Federal Government, the States, and other Nations.

The Court should grant the petition to preserve Congressional authority in this area where Congress is Constitutionally supreme.

REASONS FOR GRANTING THE WRIT

I. Presidential Abuse of Antiquities Act Authority Presents Important Questions of the Separation of Powers That Have Nationally Significant Consequences.

A. *Antiquities Act Abuse Is Already a Significant Problem on Land.*

The Antiquities Act is a limited delegation of power from Congress to the President, and must be narrowly construed to preserve the separation of powers, for the public lands are an area of Congressional supremacy. Congress has the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, §3, cl. 2. This is a "complete power" which the Court has "repeatedly observed" to be "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539, 540 (1976) (quoting *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 29–30 (1940)). In short, "the power of Congress is exclusive," and "only through its exercise in some form can rights in lands belonging to the United States be acquired." *Utah Pwr. & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

Similarly, under the Enclave Clause, Congress has "Power . . . To exercise exclusive Legislation in all Cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, §8, cl. 17. When legislating for Territories,

this Court has held, "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state." *Simms v. Simms*, 175 U.S. 162, 168 (1899). Sensibly, then, *Kleppe* concluded that "determinations under the Property Clause are entrusted primarily to the judgment of Congress." 426 U.S. at 536. Congress has similar plenary authority "in maritime matters" which "extends to all matters and places to which the maritime law extends." *Ex parte Garnett*, 141 U.S. 1, 12 (1891).

"The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). *Medellin* held that "[t]he President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them." 552 U.S. at 525. Thus, "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.* at 525–26. The President's responsibility is to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, §3. This clause "allows the President to execute the laws, not make them." *Medellin*, 552 U.S. at 532.

Thus, if Congress has established a particular management scheme for a federal area, the President

is powerless to countermand that direction. In other words, the President may not purport to reserve under the Antiquities Act what Congress has already reserved for another purpose. The Antiquities Act must be given this narrowing construction to avoid nondelegation concerns. *See National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). For similar reasons, in *THE ABBY DODGE*, 223 U.S. 166 (1912), the Court narrowly construed the Sponge Act's prohibition on taking sponges in "the waters of the Gulf of Mexico or Straits of Florida" to apply only to Federal waters. *Id.* at 173, 177.[2]

Presidential attempts at unilateral legislation through monument proclamations are growing in both breadth and boldness. This Court's review is warranted to push back on these blatant power grabs. The Northeast Canyons are but one example. Even more egregious is the President's attempt to cast aside an explicit Congressional mandate with the Cascade-Siskiyou National Monument, at issue in *AFRC v. Hammond*.

Hammond concerns the Cascade-Siskiyou National Monument in Oregon and California. President William J. Clinton established Cascade-Siskiyou by Presidential Proclamation in 2000. *Establishment of Cascade-Siskiyou National Monument*, Presidential Proclamation 7318, 65 Fed. Reg. 37,249 (June 9, 2000).

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[2] The initial Sponge Act is the Act of June 20, 1906, 34 Stat. 313, c. 3442. Subsequent to *THE ABBY DODGE*, Congress amended the Act to ratify the Court's reasoning. Act of Aug. 15, 1914, c. 253, 38 Stat. 692; 16 U.S.C. §§781–85.

The Clinton Proclamation prohibited "commercial harvest of timber or other vegetative material, except when part of an authorized science-based ecological restoration project. . . ." *Id.* at 37,250. It further provided that "[n]o portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber." *Id.*

In his final days in office, President Barack H. Obama proclaimed an expansion of Cascade-Siskiyou, doubling its size from about 50,000 acres to nearly 100,000. *Boundary Enlargement of the Cascade-Siskiyou National Monument*, Presidential Proclamation 9564 of January 12, 2017, 82 Fed. Reg. 6145 (Jan. 17, 2017). The Obama Proclamation directed the monument expansion area to be managed "under the same laws and regulations that apply to the rest of the monument." *Id.* at 6149.

About 80% of the area covered by the Obama proclamation is "O&C" lands, which are former railroad grant lands revested in the United States in 1916. *See Oregon & Cal. R.R. Co. v. United States*, 238 U.S. 393 (1915); Chamberlain-Ferris Act of June 9, 1916, 39 Stat. 218; Act of Feb. 26, 1919, 65 Cong. ch. 47, 40 Stat. 1179. In 1937, Congress enacted the Oregon & California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act). Act of Aug. 28, 1937, 50 Stat. 874; 43 U.S.C. §§2601–06. The O&C Act required the subject lands to be devoted to "permanent forest production," specifically mandating "the timber thereon shall be sold, cut, and removed in conformity with the

princip[le] of sustained yield. . . ." 43 U.S.C. §2601. Congress recognized that sustained-yield forestry would result in "providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties." *Id.* It also recognized the mandatory nature of sustained-yield forestry on the lands when enacting legislation in 1948 to reopen the O&C lands to exploration location, entry, and disposition under the general mining laws. Act of Apr. 8, 1948, 80th Cong., 2d sess., ch. 179, Pub. L. No. 80-477, 62 Stat. 162.

The Constitutional authority to establish rules and regulations for the management of the impacted O&C Lands resides with Congress. And it is beyond dispute that Congress was authorized to pass the O&C Act to reserve lands in perpetuity as a sustainable forestry reserve to provide perpetual economic benefits to local communities. The Constitution does not, on the other hand, vest in the President any inherent authority to make rules and regulations regarding the management of public lands.

Yet the Clinton and Obama Proclamations purported to prohibit sustained-yield management, the exact land use required by statute. They acted contrary to early advice of the Interior Solicitor to Secretary Harold Ickes, who stated that "where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified, by Congress." Nathan R. Margold, Solicitor, U.S. Dep't of Interior, to Harold

Ickes, Secretary, Opinion M.30506, Mar. 9, 1940, at 3–4. Thus, the President did not have the authority to reserve O&C lands as part of Oregon Caves National Monument. *Id.*

Because the Obama Proclamation was incompatible with the express will of Congress to use the O&C Lands for forest production, the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Justice Jackson's opinion noted in such a situation the President's power is "at its lowest ebb" and "Courts can sustain exclusive Presidential control in such a case only b[y] disabling the Congress from acting upon the subject." *Id.* at 637–38. But disabling Congress from acting in areas of plenary authority cannot fit within our Constitutional structure.

For these reasons, *Hammond* struck down the Obama Proclamation, ruling the Antiquities Act's "broad delegation of discretion . . . does not give the President license to contravene the O&C Act." 422 F.Supp.3d at 192. Accordingly, the Obama Proclamation was "*ultra vires* and invalid." *Id.* at 193.

Unfortunately, Cascade-Siskiyou is not the only instance where the President attempted to use the Antiquities Act to rewrite the law. The same occurred with the Northeast Canyons Monument, showing how widespread and pervasive is the Presidential abuse of this authority.

B. *The Decision Below Wrongly Allows the President to Preempt the Congressional Scheme for Fishery Management Over an Incredibly Large Area.*

While the abuse of authority in proclaiming the Canyons and Seamounts Monument is not as plain or obvious as in the case of Cascade-Siskiyou, the President's action attempted a unilateral power grab over fisheries management. The Executive Branch claims the authority to vaporize the Nation's entire commercial fishing industry at the stroke of a pen. Pet. 33. The Court should not let that claim pass by.

To call the EEZ "vast" is only to hint at its size. The U.S. EEZ "is the largest in the world, spanning over 13,000 miles of coastline and containing 3.4 million square nautical miles of ocean—larger than the combined land area of all fifty states." Nat'l Marine Fisheries Serv., *The United States Is an Ocean Nation*, http://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf. This is equivalent to 4.42 million square statute miles, or 2.8 billion acres. By contrast, the 50 States together make up 2.3 billion acres, with federal landholdings therein of about 640 million acres. Congressional Research Service, *Federal Land Ownership: Overview and Data* 1, 8–9, R42346 (Feb. 21, 2020), https://fas.org/sgp/crs/misc/R42346.pdf. And if one combines the 45 States that had joined the Union as of 1906, the total area is 1.7 billion acres—or little more than half the size of the EEZ. The scope of the authority now claimed by the President outpaces

anything within the contemplation of the Fifty-Ninth Congress.

Proclamation 9496 directs the Commerce Secretary to prohibit, within the delimited area, "[f]ishing commercially or possessing commercial fishing gear except when stowed and not available for immediate use during passage without interruption through the monument. . . ." Pet. App. D-62. The President asserted the authority to unilaterally prohibit all commercial fishing within a Connecticut-sized chunk of the EEZ. Pet. App. D-53. And the President maintains he could take similar action over the *entire* EEZ. Pet. 20. But President Obama no more had that authority than President Truman had the authority to seize the steel mills.

Fisheries in federal waters are governed by the Magnuson-Stevens Fisheries Conservation & Management Act of 1976, as amended by the Sustainable Fisheries Act of 1996 and Magnuson-Stevens Act Reauthorization of 2007, 16 U.S.C. §§1801–1891d. Prior to President Reagan's proclamation of the EEZ (now ratified by 16 U.S.C. §1801(b)(1)), the Act established a "fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish. . . ." Pub. L. No. 94-265, §2(b)(1), 90 Stat. 331, 332 (Apr. 13, 1976). The fishery conservation zone was coterminous with the eventual EEZ.[3] Congress directed that "[t]he United States shall

[3] Pub. L. No. 94-265, §101, 90 Stat. at 336, provided: "There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous

exercise exclusive fishery management authority, *in the manner provided for in this Act*, over . . . [a]ll fish within the fishery conservation zone." *Id.* §102(1), 90 Stat. 336 (emphasis added).

President Reagan's proclamation of the EEZ did not disturb the exclusivity of governance of fisheries under the Magnuson-Stevens Act. President Ronald W. Reagan, *Exclusive Economic Zone of the United States of America*, Proclamation 5030, 97 Stat. 1558 (Mar. 14, 1983). Far from it. The proclamation explicitly "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction and require international agreements for effective management." *Id.* Those policies, of course, include the Magnuson-Stevens Act and its exclusive fisheries regulation.

As amended, the Act continues to exercise "sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone. . . ." 16 U.S.C. §1801(b)(1). Further, under section 101 of the Act as amended, Congress directs that "the United States claims, and will exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. §1811(a).

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with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured."

The Act establishes eight Regional Fishery Management Councils. 16 U.S.C. §1852(a)(1). The Councils are required to include major fisheries stakeholders, 16 U.S.C. §1852(b)(1), and are empowered to issue Fishery Management Plans governing conduct of the subject fisheries. 16 U.S.C. §1852(h). The Secretary of Commerce (through the National Marine Fisheries Service) plays an important role in administering the Act, but the Secretary's ultimate authority is limited. The Secretary may issue emergency regulations with maximum effect of 366 days. 16 U.S.C. §1855(c)(3). The Secretary reviews Council-approved plans and may approve or disapprove them in whole or part. 16 U.S.C. §1854(a). But the Secretary may not unilaterally develop a plan unless the Council fails to act. 16 U.S.C. §1854(c). Because the Act vests primary authority in the Council, which operates by majority vote, review of fishery decisions is subject to a 30-day statute of limitations. 16 U.S.C. §1855(f). Fisheries in the EEZ are thus subject to a "network of statutory provisions, regulations, and agreements too complicated to summarize." *Gowen, Inc. v. F/V QUALITY ONE*, 244 F.3d 64, 68 (1st Cir. 2001).

To its credit, the Commerce Department argued to the Office of Legal Counsel that the President should follow this law in considering whether to designate marine monuments. *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, 24 Op. O.L.C. 183, 209 (2000). In a triumph of circular logic, OLC opined that a monument proclamation could trump the Magnuson-Stevens Act because the

Magnuson-Stevens Act requires fishery management plans to comply with "any other applicable law." *Id.* at 209 & n.32 (citing 16 U.S.C. §1854(a)(1)(A)). So the source of the President's claim to this power is his *own* proclamation of a Monument.

The President apparently believed the vague grant of authority in the Antiquities Act empowered him to cut the Gordian knot. As the Petition demonstrates, the Marine Sanctuaries Act provides an avenue to restrict activity in the EEZ. But nothing in the Antiquities Act empowers the President to contravene the direction that the fisheries in the EEZ shall be managed pursuant to the procedures of the Magnuson-Stevens Act. When a President abuses a limited delegation to circumvent the need for bicameralism and presentment, the result will "lack the democratic provenance the Constitution demands before a federal law may be declared supreme." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 (2019) (plurality opinion).

II. The Court of Appeals Made Several Significant Errors in Conflict With the Law of the Sea and With Other Courts.

A. *The Waters of the EEZ Are Part of the High Seas, Not Submerged Land, and Are Not Subject to Federal Sovereignty.*

As discussed above, the Court of Appeals erred in permitting the President to discard the underlying statute. It also erred in its characterizations of the EEZ

in ways that could have myriad negative consequences. These errors also obscure the conflict between the decision below and other State and Federal courts.

Petitioners contend the EEZ is not subject to the Antiquities Act because it is not "land owned or controlled by the Federal Government" under section 320301(a). Pet. 26–33. The Court of Appeals rejected this argument because it mistakenly equated the EEZ's waters with submerged lands. Pet. App. A-10–12. All the cases upon which the court relied, however, dealt with territorial waters. *See Cappaert*, 426 U.S. at 141–42 (groundwater in landlocked Nevada); *United States v. California*, 436 U.S. 32, 36 (1978) (one-mile zone around Channel Islands); *Alaska v. United States*, 545 U.S. 75 (2005) (internal waters within Glacier Bay). The EEZ is none of these. It "remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea." Procl. 5050, 97 Stat. 1558. The high seas are "the common highway of all, appropriated to the use of all; and no one can vindicate to [their]self a superior or exclusive prerogative there." *THE MARIANNA FLORA*, 24 U.S. (11 Wheat.) 1, 42 (1825).

Further, the D.C. Circuit erred in relying on the Outer Continental Shelf Lands Act (OCSLA) for its conclusion that the EEZ is under sufficient Federal dominion to be equivalent to "lands" for Antiquities Act purposes. Pet. App. A-16. OCSLA says otherwise. It "shall be construed in such a manner that the

character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected." 43 U.S.C. §1332(2). This is different from the EEZ's "subsoil and seabed" which "appertain to the United States and are subject to its jurisdiction, control, and power of disposition." 43 U.S.C. §1332(1).[4] For this reason, the Court's decision in a later stage of *Treasure Salvors* "determined" that a wreck of a Spanish galleon 40 miles west of Key West "was not found on 'state-owned sovereignty submerged lands.' Rather, it was discovered on the Outer Continental Shelf of the United States, beneath international waters." *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 695 (1982). The difference between the soil/seabed and waters in the EEZ has significant consequences, as in the former State laws may apply, whereas in the latter statutes such as the Death on the High Seas Act, 46 U.S.C. §§30301–08, will control. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019).

Under the Convention on the High Seas, the areas now comprising the EEZ were "open to all nations." Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, art. II. "Freedom of the high seas" consisted of

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[4] OCSLA extends federal jurisdiction as well "to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources." 43 U.S.C. §1333(a)(1).

"(1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines;" and "(4) Freedom to fly over the high seas." *Id.* The Convention on the Continental Shelf establishes rights of Coastal states essentially equivalent to those claimed now in the EEZ. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, arts. I–II. These rights "do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." *Id.* art. III. The waters of the EEZ were made a fishery management zone by the Magnuson-Stevens Act, not by presidential proclamation. The proclamation of the EEZ did not affect the structure of the fishery management zone, only its name. This means the conflict with the Fifth and Eleventh Circuits arising from *Treasure Salvors* was not erased by the EEZ's proclamation and remains to be resolved. *See* Pet. 23–26; *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).

B. *The Decision Below Upsets the Federal-State Balance and Conflicts With Important Maritime Policies.*

In the year before enactment of the Antiquities Act, a murderer went free in Montana because the State court found that Fort Missoula was a federal enclave and the Federal court found it to be state land. *United States v. Tully*, 140 F. 899, 900 (C.C.D. Mont. 1905); *cf. State v. Tully*, 78 P. 760, 31 Mont. 365 (1904); Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy*, 101 Penn. L. Rev. 124 (1952).

Since that time, the States and Federal government have worked more cooperatively to establish areas of concurrent or overlapping jurisdiction. The Court held in *Skiriotes v. Florida* that States may exercise jurisdiction over their citizens "upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." 313 U.S. 69, 77 (1941). This is an incident of the State sovereignty that the Court continues to guard. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007). The Court views the Union as "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

This means even under the federal power exercised in the Territorial Sea and EEZ, States retain and continue to exercise their sovereignty as coastal States. *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1173 (9th Cir. 2011); *People v. Weeren*, 607 P.2d 1279, 1285–87, 26 Cal.3d 654 (1980) (upholding conviction under California law for swordfish caught in Federal waters); *State v. Bundrant*, 546 P.2d 530 (Alaska 1976) (affirming conviction for taking crab in the Bering Sea); *State v. Sieminski*, 556 P.2d 929, 930–34 (Alaska 1976); *F/V Am. Eagle v. State*, 620 P.2d 657, 662 (Alaska 1980); *State v. Stepansky*, 761 So.2d 1027 (Fla. 2000) (affirming conviction for assault in EEZ off Florida); *Keen v. State*, 504 So.2d 396, 398 (Fla. 1987), *disapproved of on other grounds by Owen v. State*, 596 So.2d 985 (Fla. 1992) (state has concurrent jurisdiction

with 18 U.S.C. §7 to prosecute murder on the high seas); *Davis v. State*, 390 A.2d 1112, 283 Md. 358 (1978) (Maryland could prosecute catch of crab in Virginia waters). States may also "assert their pilotage regulations at distances considerably greater than three miles from their shores." *Warner v. Dunlap*, 532 F.2d 767, 772 (1st Cir. 1976); *accord Gillis v. Louisiana*, 294 F.3d 755, 761 (5th Cir. 2002). By equating the EEZ's waters with the ocean floor, the Court of Appeals' decision creates a conflict with the many concurrent authorities over the water and upsets a Federal-State balance constructed over a century.

The Court of Appeals' decision conflicts with a number of Federal maritime policies. For example, while the United States claims significant power over the EEZ, it explicitly rejects the idea that an EEZ's claimant may restrict foreign military activities in the Zone. Congressional Research Service, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress* 7 (Aug. 6, 2020), R42784 https://fas.org/sgp/crs/row/R42784.pdf (describing U.S.-China diplomatic dispute on this point). Thus, the respondents would claim the President may not exclude Chinese or North Korean nuclear submarines from the EEZ, but may ban all commercial fishing.

Additionally, the State Department takes the position that, for purposes of acquisition of citizenship, a "U.S.-registered or documented ship on the high seas or in the exclusive economic zone is not considered to be part of the United States." 8 Foreign Aff. Man'l §301.1-3(a) (2018). Thus, a "child born on such a vessel

does not acquire U.S. citizenship by reason of the place of birth." *Id.* This contrasts with the territorial sea, at least out to the traditional three-mile limit, where "persons are considered to have been born in the United States. Such persons will acquire U.S. citizenship at birth if they are subject to the jurisdiction of the United States." *Id.* §301.1-4(a). The EEZ is not, within the view of the Fourteenth Amendment, "in the United States, and subject to the jurisdiction thereof." U.S. Const. amend. XIV, §1; *cf. Lam Mow v. Nagle*, 24 F.2d 316, 317 (9th Cir. 1928); *United States v. 12,536 Gross Tons of Whale Oil ex the* CHARLES RACINE, 29 F. Supp. 262, 269 (E.D. Va. 1939) (holding "transportation by the Norwegian vessel CHARLES RACINE, of the cargo of whale oil from the American factory ship ULYSSES, in Shark Bay, in the territorial waters of West Australia, to Norfolk, Virginia" did not constitute travel between points in the United States in violation of the Merchant Marine Act).

It remains true, as both international and domestic law, that "beyond the territorial waters lie the high seas, over which no nation can exercise sovereignty." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999). "This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations." *United States v. California*, 332 U.S. 19, 34 (1947). The D.C. Circuit's misreading of and departure from these principles warrants review.

C. *Enforcement of the "Smallest Area Necessary" Clause Is an Important Check on Abuse of Executive Power.*

The Antiquities Act requires monument reservations to be "confined to the smallest area compatible with proper care and management of the objects to be protected." 54 U.S.C. §320301(b). This additional standard provides an important limit on Presidential power to designate monuments. But so far that limit has proven merely theoretical, as no court has deemed a complaint specific enough to sustain a challenge. In *Cameron v. United States*, for example, the Court agreed with little analysis that the entire Grand Canyon was an "object" of "scientific interest" under the Act. 252 U.S. 450, 455–56 (1920); *accord Cappaert*, 426 U.S. at 142 (pool and its rare inhabitants were similar objects). Courts' demurral has continued despite Presidential action pushing ever farther from the original Congressional delegation. This abdication has serious negative consequences and this case is a suitable opportunity for the Court to step in.

In *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), the D.C. Circuit reviewed a challenge to President Clinton's designation of the Giant Sequoia National Monument, which encompassed 327,769 acres of the Sequoia National Forest and contained groves of giant sequoias. *Id*. at 1140. Tulare County alleged that the proclamation violated the Antiquities Act because, among other things, the designation "did not confine the size of the Monument 'to the smallest area compatible with proper care and management of the objects to

be protected' " and "increased the likelihood of harm by fires to any objects of alleged historic or scientific interest within the Monument rather than protecting those objects." *Id.* at 1140–41. The D.C. Circuit rejected both claims and determined that Tulare County's complaint "fail[ed] to identify the improperly designated lands with sufficient particularity to state a claim" and failed to allege that the "designation under the Proclamation was the cause for likely increases in catastrophic fires." *Id.* at 1142. The County argued that a designation where only six percent of the acres contained sequoia groves was well beyond the "smallest area." *See* Pet. App. A-19 (quoting *Tulare Cty. v. Bush*, 317 F.3d 227 (*per curiam*)). The D.C. Circuit held that was not a specific enough challenge because President Clinton's Proclamation also protected the "ecosystem." Pet. App. A-19 (quoting *Tulare Cty.*, 306 F.3d at 1140).

But Tulare County's concern about the risk to giant sequoia groves from an overbroad designation was prescient. The D.C. Circuit was gravely mistaken in giving the President a pass because it thought prohibiting all active management protected the ecosystem. The Giant Sequoia National Monument Proclamation prohibits the removal of trees, except for personal use fuel wood, from within the monument area and may take place only if clearly needed for ecological restoration and maintenance or public safety. President William J. Clinton, Proclamation 7295, *Establishment of the Giant Sequoia National Monument*, 65 Fed. Reg. 24,095 (Apr. 15, 2000). For the last 20 years, the proclamation of the Giant Sequoia

National Monument has precluded active management of areas of the Forest outside sequoia groves, as forest health has continued to deteriorate and fuels accumulate.

This prohibition of active management has turned the ecosystem into a tinderbox. It placed the giant sequoia groves at risk of loss to wildfires that are no longer hypothetical. "In the national monument's Black Mountain Grove, as well as elsewhere in the Sierra Nevada, researchers studying the toll of recent wildfires are finding surprising numbers of dead sequoias. The losses, they say, are the product of bigger blazes fueled by warming temperatures on top of forests that have grown dangerously thick because of poor forest management." Kurtis Alexander, *Giant sequoias—long survivors of the forest—succumbing to climate-driven wildfires*, S.F. Chronicle, Sept. 12, 2019; https://www.sfchronicle.com/environment/article/Giant-sequoias-long-survivors-of-the-forest-14432963.php. This is just what challengers to the monument sought to avoid, but the D.C. Circuit rejected the claim that "the Monument designation actually increases the risk of harm from fires to many of the objects that the Proclamation aims to protect." *Tulare Cty.*, 306 F.3d at 1142. It pointed, conclusorily, to its reading that "the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection." *Id.*

The deferential review given presidential interpretation of the "smallest area" clause is incompatible with Congress' exclusive authority, with the separation of powers, and with rational land management. When

a President can use this authority to evade the strictures of bicameralism and presentment, yet still evade accountability in the courts, this is coercion without democracy.[5] This case gives the Court an opportunity at course correction.

III. This Case Is A Suitable Vehicle.

In June 2020, only after the D.C. Circuit had upheld the 2016 Proclamation and had denied rehearing, President Trump modified the Northeast Canyons Monument to permit commercial fishing once more. President Donald J. Trump, Proclamation No. 10049, *Modifying the Northeast Canyons and Seamounts Marine National Monument*, 85 Fed. Reg. 35,793 (June 5, 2020). Nowhere in this proclamation does the President acknowledge that the original proclamation exceeded Presidential authority. Instead, it merely reevaluates the need for fishing restrictions as part of the monument. *Id*. at 35,794. As the Petition states, this is mere voluntary cessation. Pet. 37–38. Further, because new litigation has been filed against the 2020 proclamation, the decision below would preclude presentation of the most pertinent defense—that the President lacked the authority in the first place to ban fishing in the monument. Accordingly, the Court

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[5] *See* Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 Ecology L.Q. 707, 745 (2002) ("The means of protecting the land is both coercive and democratic—coercive because decisions are made in the absence of consensus and perhaps without exhaustive public input; democratic because of the multiple checks that ultimately provide accountability.").

should grant the Petition for plenary review or at minimum vacate the decision below. Pet. 38–39.[6]

CONCLUSION

The petition for writ of *certiorari* should be granted.

August 2020

Respectfully submitted.

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[6] There is no reason to await further percolation of Antiquities Act issues, as the appeals relative to Cascade-Siskiyou have been abated at the Government's request and over AFRC's objection. *See* D.C. Cir. No. 20-5008, Order, May 1, 2020.