No. 23-524

In the Supreme Court of the United States

AMERICAN FOREST RESOURCE COUNCIL, ET AL.,
PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act), ch. 876, 50 Stat. 874 (43 U.S.C. 2601 *et seq.*), includes approximately 2.5 million acres of federal land in western Oregon. The O&C Act provides that lands "classified as timberlands" shall be managed "for permanent forest production" and "providing recreational facil[i]ties." 43 U.S.C. 2601. Managing the timberlands for permanent forest production involves selling, cutting, and removing the timber "in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities." *Ibid.* (footnote omitted).

The Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (54 U.S.C. 320301 *et seq.*), grants the President discretion to declare "objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. 320301(a). In 2017, the President issued a Proclamation under the Antiquities Act expanding the Cascade-Siskiyou National Monument. That expansion included around 40,000 acres of O&C lands and barred most timber harvesting on those lands. The questions presented are:

1. Whether the President's 2017 Proclamation expanding the Monument was barred by the O&C Act.

2. Whether the Bureau of Land Management's 2016 resource management plans, which reserve portions of the O&C lands from sustained-yield timber harvest to protect species listed under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and maintain state water quality standards under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, violate the O&C Act.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Swanson Grp. Mfg. LLC v. *Bernhardt*, No. 15-cv-1419 (Nov. 19, 2021)

American Forest Resource Council v. *Pendley*, No. 16-cv-1599 (Nov. 19, 2021)

Association of O&C Counties v. *Pendley*, No. 16-cv-1602 (Nov. 19, 2021)

Association of O&C Counties v. *Trump*, No. 17-cv-280 (Nov. 22, 2019)

American Forest Res. Council v. *United States*, No. 17-cv-441 (Nov. 22, 2019)

United States Court of Appeals (D.C. Cir.):

American Forest Res. Council v. *United States*, Nos. 20-5008, 20-5009 (July 18, 2023)

Association of O&C Counties v. *Biden*, Nos. 20-5010, 20-5011 (July 18, 2023)

Swanson Grp. Mfg. LLC v. *Haaland*, No. 22-5019 (July 18, 2023)

American Forest Resource Council v. *Stone-Manning*, No. 22-5020 (July 18, 2023)

Association of O&C Counties v. *Stone-Manning*, No. 22-5021 (July 18, 2023)

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a–35a) is reported at 77 F.4th 787. The district court's opinion (Pet. App. 36a–53a) is reported at 422 F. Supp. 3d 184. The district court's remedial order is not published in the Federal Supplement but is available at 2021 WL 6692032.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2023. On September 29, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 15, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case in part involves the relationship between the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act), ch. 876, 50 Stat. 874 (43 U.S.C. 2601 *et seq.*), and the Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (54 U.S.C. 320301 *et seq.*).

a. In 1937, Congress enacted the O&C Act to address the management of millions of acres of federal lands in western Oregon. See Pet. App. 4a, 6a. Congress had granted those lands to railroad companies beginning in 1866, but—after the companies violated the terms of the grants—Congress revested title to the lands in the United States in 1916. *Id.* at 3a-4a; see *Oregon & Cal. R.R.* v. *United States*, 243 U.S. 549, 553-559 (1917). When the lands were revested in the United States, the region faced significant economic difficulties due to a loss of tax revenue. See Pet. App. 5a; *Clackamas Cnty.* v. *McKay*, 219 F.2d 479, 483 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955) (per curiam).

Against that background, Congress adopted the O&C Act, which provides that:

> [S]uch portions of the revested * * * lands * * * , which have heretofore or may hereafter be classified as timberlands, * * * shall be managed[] * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield for the purpose of 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.

43 U.S.C. 2601 (footnote omitted). The Act further provides that "[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act." Tit. II, § (c), 50 Stat. 876.

Today, half the proceeds from the sale of timber on the O&C lands are paid to the counties where the timber is located. See 43 U.S.C. 2605(a) and (b); see also, *e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Div. G, Tit. I, 136 Stat. 349 (redirecting 25% of the proceeds, thus reducing the counties' portion to 50%). The Secretary of the Interior is responsible for managing the O&C lands, see 43 U.S.C. 2604, 2605; she exercises that authority through the Bureau of Land Management (BLM), see, *e.g.*, 15 Fed. Reg. 5643, 5645-5647 (Aug. 23, 1950); 43 C.F.R. 5400.0-5, 5500.0-5(d).

b. The Antiquities Act confers "discretion" on the President to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. 320301(a). "The President may reserve parcels of land as a part of the national monuments." 54 U.S.C. 320301(b). The "limits of th[os]e parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Ibid.* Since the enactment of the Antiquities Act, 18 Presidents have established and sometimes enlarged 163 national monuments. Cong. Research Serv., *National Monuments and the Antiquities Act* 16 (updated Jan. 2, 2024), https://crsreports.congress.gov/product/pdf/R/R41330/46.

c. In 2000, President Clinton exercised his Antiquities Act authority by issuing a Proclamation establishing

the Cascade-Siskiyou National Monument in southern Oregon. 65 Fed. Reg. 37,249 (June 13, 2000). The Monument protects "a spectacular variety of rare and beautiful species of plants and animals, whose survival in this region depends upon its continued ecological integrity." *Id.* at 37,249. It "is an ecological wonder, with biological diversity unmatched in the Cascade Range." *Ibid.* Under the 2000 Proclamation, the Monument encompassed approximately 52,000 acres, including approximately 40,000 acres of lands covered by the O&C Act. *Id.* at 37,250; Pet. App. 12a. The 2000 Proclamation "prohibit[s]" "[t]he commercial harvest of timber," with limited exceptions not relevant here. 65 Fed. Reg. at 37,250. The Proclamation further provides 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." *Ibid.*[1] In 2009, Congress enacted a statute that acknowledged the establishment of the Monument, addressed leases and land exchanges within it, and designated 24,100 acres of the Monument as federal wilderness. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 1401-1405, 123 Stat. 1026-1031.

In 2017, President Obama issued a Proclamation enlarging the Monument by approximately 48,000 acres. 82 Fed. Reg. 6145, 6148 (Jan. 18, 2017). The expansion was needed to "bolster protection of the resources within the original boundaries of the monument" and "protect the important biological and historic resources

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[1] The D.C. Circuit rejected constitutional and *ultra vires* challenges to the 2000 Proclamation. See *Mountain States Legal Found.* v. *Bush*, 306 F.3d 1132, 1136-1138 (2002), cert. denied, 540 U.S. 812 (2003).

within the expansion area." *Id.* at 6145; see *id.* at 6148. The expanded area is managed "under the same laws and regulations that apply to the rest of the monument," *id.* at 6149, so the 2000 Proclamation's prohibition on commercial timber harvest applies to the entire Monument, see *id.* at 6148. Around 40,000 acres included in the 2017 expansion are O&C lands, although BLM was managing only about 16,500 acres of that land for sustained-yield timber production at the time. Pet. App. 25a; C.A. App. 1304.

2. This case also involves the relationship between the O&C Act and two other federal statutes: the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the Clean Water Act of 1977 (CWA), 33 U.S.C. 1251 *et seq.*

a. In 1973, Congress adopted the ESA to conserve endangered and threatened species. 16 U.S.C. 1531(b). After a species is listed as endangered or threatened under the ESA, see 16 U.S.C. 1533, the ESA requires all federal agencies to "insure that any action" they "authorize[], fund[], or carr[y] out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species," 16 U.S.C. 1536(a)(2). To comply with that obligation, the agency taking action consults with the United States Fish and Wildlife Service or National Marine Fisheries Service, depending on the species involved. See 16 U.S.C. 1536(b).

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve those goals, the CWA sets forth a framework for States to establish and revise water quality standards. See 33

U.S.C. 1313. The standards are not self-executing. Instead, permits for discharging pollutants include limits to achieve the receiving water's standards. See 33 U.S.C. 1313(a). Federal agencies must comply with state requirements "respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. 1323(a).

b. Before the 1970s, BLM established a sustained-yield capacity for the O&C lands based primarily on their biological capability to produce timber. See Pet. App. 7a, 24a. After Congress adopted the CWA and ESA, however, BLM determined that the O&C Act must be reconciled with the agency's obligations under those other statutes and therefore modified its management of the O&C lands. See *id.* at 7a-8a; see also, *e.g.*, C.A. App. 665-668 (1983 policy allowing timber harvest restrictions in light of fish and wildlife habitat needs).

In 1990, the Fish and Wildlife Service listed the northern spotted owl as a threatened species under the ESA due in part to "the loss and adverse modification of suitable habitat as the result of timber harvesting." 55 Fed. Reg. 26,114, 26,114 (June 26, 1990). In response to litigation, scientific study, and public debate—and to comply with CWA, the ESA, and other statutory obligations—the Secretaries of Agriculture and Interior subsequently adopted the Northwest Forest Plan. See 59 Fed. Reg. 18,788 (Apr. 20, 1994). The Plan covers approximately 25 million acres of federal land within the owl's range in California, Oregon, and Washington, including the O&C lands. Pet. App. 9a & n.6. As relevant here, the Plan designated some lands to be managed for sustained-yield timber production and designated other lands as late-successional reserves and riparian reserves—in which sustained-yield harvest

is generally prohibited to protect threatened and endangered species. See *id.* at 9a.

BLM incorporated the Northwest Forest Plan into its 1995 resource management plans covering the O&C lands. See Pet. App. 10a-11a. BLM revised those resource management plans in 2016; the revised plans, like the original 1995 plans, allocate the O&C lands to different management categories. *Id.* at 11a. Twenty percent of the O&C lands are managed to achieve continual timber production; 38% are managed as late-successional reserves; and 21% are managed as riparian reserves. *Id.* at 11a & n.10. The remaining O&C lands are part of congressional reserves, district-dedicated reserves, and national conservation designations. *Id.* at 11a. In the final environmental impact statement for the 2016 plans, BLM explained:

> Laws, such as the Endangered Species Act and Clean Water Act, are directly applicable to how the BLM exercises its statutory authorities in managing O&C lands, but none of these laws repealed the underlying primary direction and authority for the O&C lands [in the O&C Act]. Thus, the BLM has a duty to find a way to implement concurrently all these laws, in a manner that harmonizes any seeming conflict between them, unless Congress has provided that one law would override another law.

C.A. App. 3698-3699.

3. Petitioners filed four suits in the United States District Court for the District of Columbia challenging the 2017 Proclamation and BLM's 2016 resource management plans as violating the O&C Act. See Pet. App. 14a, 37a-39a, 42a.

The district court granted summary judgment for petitioners in all four cases. Pet. App. 37a-53a. The

court ruled that the Antiquities Act "does not give the President license to contravene the O&C Act" and that the 2017 Proclamation "'unacceptably conflicts' with the O&C Act['s] * * * require[ment] that timberland subject to the Act be managed 'for permanent forest production' and the timber grown on the land be 'sold, cut, and removed in conformity with the principle of sustained yield.'" *Id.* at 50a-51a (brackets, citations, and emphasis omitted); see *id.* at 49a-52a. The court also held that BLM's 2016 resource management plans violate those requirements in the O&C Act because the plans prohibit timber harvesting in areas the court considered timberlands. *Id.* at 43a-48a.

4. The court of appeals reversed. Pet. App. 1a-35a.

a. The court of appeals held that the President's exercise of Antiquities Act authority in the 2017 Proclamation was consistent with the O&C Act. Pet. App. 16a-28a.

The court of appeals first found petitioners' challenge to the Proclamation justiciable. Pet. App. 16a-19a. The court noted that petitioners "argue that the President's exercise of authority under the Antiquities Act was *ultra vires* because it was inconsistent with an independent statute—the O & C Act"—and held that such "claims are reviewable." *Id.* at 19a.

On the merits, the court of appeals held that the O&C Act and the Antiquities Act can, and therefore must, be interpreted harmoniously. Pet. App. 19a-28a. The court reasoned that, "[i]n anticipating that only 'portions' of the O & C land were to be classified as timberland, the [O&C] Act necessarily implies that land may be classified as timberland or not." *Id.* at 23a. The court further reasoned that "[t]he Act's 'or may hereafter' language indicates * * * that a parcel's timberland classification

is not fixed; it may be reclassified in the future." *Ibid.* And the court determined that because the Act does not "require a fixed proportion of O & C land to be classified as timberland"—indeed, it "does not define 'timberland'" at all—"the Act provides the Secretary with considerable discretion regarding the classification and reclassification of O & C land." *Ibid.* The court also rejected petitioners' argument that "'timberlands'" must be defined by reference to a statutory definition that predated the O&C Act, emphasizing that the Act "replaced" that earlier statute. *Id.* at 24a. And the court noted that the Act's text "authorizes the Secretary to manage the O & C land for uses other than the production of timber." *Id.* at 25a.

The court of appeals therefore concluded that the 2017 Proclamation effectively and permissibly "reclassified, albeit by implication, the 40,000 acres of O & C land the President added to the Monument as non-timberlands, thereby removing the land from the O & C Act's 'permanent forest production' mandate." Pet. App. 24a. The court noted that history supported that conclusion: The O&C Act replaced "the former clear-cutting regime"—which required "'timber to be sold as rapidly as possible'"—with the requirement "that timberland should be managed in accordance with the 'innovative' principle of 'sustained yield' so that the land's 'natural assets could be 'conserved and perpetuated.'" *Id.* at 26a-27a (citations omitted). The court also concluded that the Proclamation effectuates the O&C Act's aims of protecting watersheds, regulating streamflow, providing recreational facilities, and ensuring a long-term timber supply. *Id.* at 27a.

In rejecting petitioners' challenge to the Proclamation, the court of appeals emphasized that "this is not a

case where the executive's action eviscerated Congress's land-management scheme, nor is it a case that concerns vast and amorphous expanses of terrain." Pet. App. 24a-25a (brackets, citation, and internal quotation marks omitted). Rather, the court noted, "the Proclamation's Monument expansion was modest, affecting only 40,000—less than two per cent—of the more than two million acres of O & C land." *Id.* at 25a.

b. The court of appeals also held that BLM's 2016 resource management plans do not violate the O&C Act, Pet. App. 28a-31a, concluding that the plans are a "permissible exercise of the Secretary's discretion" and "valid[ly]" "balance" "conservation and logging," *id.* at 28a. In the court's view, both late-successional reserves and riparian reserves "can reasonably be viewed as an exercise of the Secretary's discretion to reclassify O & C land as non-timberland." *Id.* at 29a. The court also determined that such reserves help advance various objectives of the O&C Act, noting that "[r]iparian reserves advance the aims of 'protecting watersheds' and 'regulating stream flow.'" *Ibid.* (citation omitted). And the court found that both types of "reserves also advance the Act's principal objective—providing a permanent source of timber supply—because a failure to protect endangered species (and their critical habitat) and water quality, both necessary for the continuing vitality of the forest ecosystem, would eventually limit the lands' timber production capacity." *Id.* at 29a-30a.

The court of appeals further concluded that "both the ESA and the CWA support the establishment of reserves on O & C land." Pet. App. 30a. The court emphasized that because the reserves protect the habitat of northern spotted owls, they "are consistent with the ESA's requirement that the Secretary ensure her

actions are 'not likely to jeopardize the continued existence' of any listed species or 'result in the destruction or adverse modification' of the species' designated critical habitat." *Id.* at 30a-31a (quoting 16 U.S.C. 1536(a)(2)).

ARGUMENT

Petitioners renew their contention (Pet. 20-26) that the 2017 Proclamation expanding the Cascade-Siskiyou National Monument is inconsistent with the O&C Act.[2] The court of appeals correctly rejected that argument. Its resolution of that issue does not conflict with any decision of this Court or of another court of appeals; indeed, the Ninth Circuit likewise has rejected the same challenge to the 2017 Proclamation. Nor does this case present general questions—or any questions—about the meaning of the Antiquities Act because petitioners have not pressed an Antiquities Act claim. Rather, this case involves the narrow question of whether a *sui generis* statute—the O&C Act—forecloses a single Proclamation issued under the Antiquities Act. That Proclamation built upon the 2000 Proclamation that established the Monument, which has been acknowledged in a 2009 Act of Congress that designated a portion of the Monument's land to wilderness use. And the question concerning the 2017 Monument expansion—the first question presented—has no significance outside the small area of federal lands governed by the O&C Act and included in that expansion, which is less than two percent of the O&C lands. Further review of the first question presented is not warranted.

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[2] Another pending petition for a writ of certiorari presents the same question as the first question presented here. See *Murphy Co.* v. *Biden*, No. 23-525 (filed Nov. 15, 2023).

Petitioners also renew their contention (Pet. 26-34) that BLM's 2016 resource management plans violate the O&C Act. The court of appeals again correctly rejected that argument, and its resolution of petitioners' challenge to the plans does not conflict with any decision of this Court or of another court of appeals. The court of appeals' factbound and case-specific disposition of petitioners' challenge to BLM's 2016 plans does not otherwise merit further review.

1. The court of appeals correctly held that there is no conflict between the Antiquities Act and the O&C Act and that the 2017 Proclamation does not violate the O&C Act. The O&C Act's text and history support its compatibility with the Proclamation. Petitioners' contrary arguments have no sound basis, and they have identified no good reason for further review.

a. i. As this Court has emphasized, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic," a court must "strive 'to give effect to both'"—and a party arguing "that two statutes cannot be harmonized" "bears the heavy burden of showing 'a clearly expressed congressional intention'" "that one displaces the other." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510 (2018) (citations omitted). Here, the court of appeals correctly concluded that the Antiquities Act and the O&C Act can properly be harmonized. The O&C Act does not purport to repeal or limit the Antiquities Act; indeed, the O&C Act makes no reference to the Antiquities Act at all.[3]

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[3] While Congress did not purport to limit the Antiquities Act when adopting the O&C Act, in numerous other situations Congress has expressly limited the President's authority under the Act. See 16 U.S.C. 3213 (restricting future Executive Branch withdrawals of more than 5000 acres of public lands within Alaska); 54 U.S.C.

Nor is there any irreconcilable conflict between the two Acts' treatment of the O&C lands. The O&C Act's sustained-yield principle requires BLM to take into account "protecting watersheds," "regulating stream flow," and "contributing to the economic stability of local communities and industries." 43 U.S.C. 2601. The O&C Act also requires BLM to manage lands covered by the Act in light of the interest of "providing recreational facil[i]ties." *Ibid.* The Antiquities Act permits the President to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal land. 54 U.S.C. 320301(a). Those goals are compatible.

What is more, the two statutes are directed at different officials, which further confirms their compatibility. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 171-173 (1993); *Regan* v. *Wald*, 468 U.S. 222, 233 n.16 (1984). The Antiquities Act authorizes action by the

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320301(d) ("No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress."). Congress has also modified and abolished monuments created by the President. See, *e.g.*, Automobile National Heritage Area Act, Pub. L. No. 105-355, § 201, 112 Stat. 3252-3253 (modifying the boundaries and directing conveyance of lands within Grand Staircase-Escalante National Monument); Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 205, 110 Stat. 4106 (revising the borders of Craters of the Moon National Monument); Act of Aug. 1, 1956, ch. 847, 70 Stat. 898 (abolishing Fossil Cycad National Monument); Act of July 30, 1956, ch. 790, 70 Stat. 730 (abolishing Verendrye National Monument and conveying the lands to North Dakota for continued public use as a state historic site); Act of July 26, 1955, ch. 387, 69 Stat. 380 (abolishing Old Kasaan National Monument and authorizing administration of the lands as national forest); Act of Aug. 3, 1950, ch. 534, 64 Stat. 405 (same for Wheeler National Monument); Act of Aug. 3, 1950, ch. 530, 64 Stat. 404 (same for Holy Cross National Monument).

President. 54 U.S.C. 320301(a) and (b). The O&C Act says nothing about the President. Rather, it authorizes and directs actions to be taken by the Secretary of the Interior. See, *e.g.*, 43 U.S.C. 2601-2604.

Because the two Acts can thus be reconciled, there is no need to consider whether one is more specific than the other or that the O&C Act was adopted after the Antiquities Act. Contra Pet. 20, 22. A court may need to take such considerations into account only when there is an "irreconcilable statutory conflict." *Epic Sys. Corp.*, 584 U.S. at 511; see *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) ("[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). For the same reason, the O&C Act's *non obstante* clause—which applies only in the event of "conflict" between the Act and other legislation, Tit. II, § (c), 50 Stat. 876—has no role to play here.

ii. The court of appeals also correctly rejected petitioners' contention that the President's 2017 Proclamation issued under the Antiquities Act is irreconcilable with the O&C Act's provisions for timber harvesting. The O&C Act has never required commercial timber harvesting on all O&C lands. And the Proclamation is consistent with the O&C Act because it serves conservation and recreational goals—which are also recognized in the Act.

The 2017 Proclamation's determination that a small percentage of O&C lands are not subject to commercial timber harvesting does not violate the O&C Act. The O&C Act provides that "such portions of" the O&C lands "which have heretofore or may hereafter be classified as timberlands * * * shall be managed[] * * * for permanent forest production" and the other purposes

discussed above. 43 U.S.C. 2601. The Act has always anticipated that portions of the O&C lands would not be harvested, because only "such portions of" the lands that are "classified as timberlands" must be "managed * * * for permanent forest production." *Ibid.* The Act likewise provides for reclassification decisions: It contemplates lands that "may hereafter be classified as timberlands." *Ibid.* The Act thus expressly leaves room for some O&C lands to be classified as something other than timberlands—and therefore not be harvested.

Even on lands classified as timberlands, the O&C Act requires BLM to take into account a variety of goals—not just timber production—and gives BLM significant discretion in how it manages those lands. See Pet. App. 25a. The Act's primary management objective for timberlands is "permanent forest production"—that is, the lands "shall be managed[] * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. 2601 (footnote omitted). But the Act establishes that sustained-yield management is for more than one purpose: It is "sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries." *Ibid.* After setting the sustained-yield principle and the "purpose[s]" that inform it, the Act provides that the lands should also be managed for "providing recreational facil[i]ties." *Ibid.* The Act therefore includes conservation and recreational purposes among the purposes that BLM must take into account in managing the O&C lands.

Consistent with the statutory text, Interior promulgated regulations one year after Congress adopted the O&C Act that made clear both that timbered areas could be reserved from timber production and that BLM has significant discretion in managing timberlands. First, those regulations provided that the Secretary "is authorized to classify" "as agricultural" "any of [the O&C land] which, in his judgment, is more suitable for agricultural use than for afforestation, reforestation, stream-flow protection, recreation, or other public purposes." 3 Fed. Reg. 1795, 1795 (July 21, 1938). Second, the regulations provided that, even on "lands classified for continuous timber production," "scenic strips of merchantable timber may be reserved adjacent to public roads, along stream courses and surrounding lakes." *Id.* at 1796. The regulations also provided that, "[i]n the discretion of the officer in charge, a strip of suitable width on each side of lakes, streams, roads, and trails and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed." *Id.* at 1798.

The legislative history confirms that conservation concerns partially motivated Congress's adoption of the O&C Act. The House Report criticized the O&C Act's predecessor statute for "call[ing] for outright liquidation" of timber on the lands and making "[n]o provision * * * for the administration of the land on a conservation basis looking toward the orderly use and preservation of its natural resources." H.R. Rep. No. 1119, 75th Cong., 1st Sess. 2 (1937). The prior statute's "cutting policy" was "now believed to be wasteful and destructive of the best social interests of the State and Nation." *Ibid.*; see S. Rep. No. 1231, 75th Cong., 1st Sess. 2 (1937) (Senate Report) ("The purpose of [the Act] is to provide

conservation and scientific management for this vast Federal property."). Similarly, the Senate Report clarified that when the Act refers to "regulating stream flow," 43 U.S.C. 2601, that "should be construed to mean the protection of the watersheds and the run-off of waters," Senate Report 5.

The 2017 Proclamation is consistent with the O&C Act's text, its overall framework, and its purposes as just described. As an initial matter, the Proclamation covers less than two percent of the O&C lands, effectively reclassifying those lands as non-timberlands and exempting them from commercial harvest, which is consistent with the O&C Act's text and history. And the National Monument expanded by the Proclamation furthers conservation and recreational goals recognized in the O&C Act. The Proclamation explains that "ecological integrity of the ecosystems that harbor [the] diverse array of species" that live in the Monument "is vital to their continued existence"; that "[e]xpanding the monument" will help "provide[] vital habitat connectivity, watershed protection, and landscape-scale resilience for the area's critically important natural resources"; and that the expansion "protect[s] the important biological and historic resources within the expansion area." 82 Fed. Reg. at 6145. Those purposes are consistent with the O&C Act's purposes. Indeed, the Proclamation's more specific conservation purposes mirror those in the Act: The Act identifies "protecting watersheds" as a purpose of sustained-yield management, 43 U.S.C. 2601, while the Proclamation explicitly addresses watershed protection, *e.g.*, 82 Fed. Reg. at 6147 (discussing certain headwaters included in the expanded Monument that "are vital to the ecological integrity of the watershed as a whole"). The Proclamation likewise

furthers the O&C Act's "recreational facil[i]ties" purpose, 43 U.S.C. 2601; it references hiking on "the Applegate Trail," "hydrologic features that capture the interest of visitors," and "snowmobile and nonmotorized mechanized use off of roads" in the Monument, 82 Fed. Reg. at 6145, 6147, 6149.

b. Petitioners' contrary arguments lack merit. Petitioners fail to seriously grapple with the O&C Act's text and history, and they overread the court of appeals' decision.

i. Petitioners first contend that the 2017 Proclamation is incompatible with the O&C Act's text. They assert (Pet. 3) that the Proclamation "eviscerates the dominant purpose for which the land was designated by Congress," suggesting that apparently any wooded land on which timber can be produced must be harvested. That argument brushes aside the O&C Act's plain language: It fails to account for the Act's allowance for reclassification of lands as timberlands and the discretion the Act gives to the Secretary in managing the O&C lands. See pp. 14-15, *supra*. And it ignores BLM's longstanding regulatory approach. See p. 16, *supra*.

Petitioners also contend that when the O&C Act references various goals of the identified management approach it does not actually create "objectives." Pet. 33 (emphasis omitted). In petitioners' view, those goals are merely "ancillary benefits of sustained-yield timber production." *Ibid.* But Section 2601 does not refer to mere ancillary "benefits." Section 2601 provides that timber must be cut "in conformity with the princip[le] of sustained yield *for the purpose of* providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries." 43

U.S.C. 2601 (emphasis added; footnote omitted). A series of clauses (only the first of which is "providing a permanent source of timber") thus follows the phrase "for the purpose of." *Ibid.* The text is therefore clear: "[P]rotecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries" are *all* part of "the purpose" of the sustained-yield principle—and the lands also must be managed to "provid[e] recreational facil[i]ties." *Ibid.*

Contrary to petitioners' suggestion (Pet. 25), the O&C Act's reference to "permanent forest production," 43 U.S.C. 2601, does not mandate maximum timber production wherever possible. See pp. 14-17, *supra*. In the absence of such a mandate, the Proclamation clearly can be harmonized with the O&C Act: The Proclamation reserves a small amount of O&C lands to the Monument—less than two percent of the total O&C lands. So the Proclamation does not significantly affect the lands' overall timber production. And the Proclamation furthers conservation and recreational purposes that are encompassed within the flexible management contemplated by the Act. See pp. 17-18, *supra*.

ii. Petitioners' criticisms of the court of appeals' decision are likewise misplaced. Petitioners contend (Pet. 24) that the court "open[ed] the door to drastically expanding the use of the Antiquities Act." But the court did not take any such expansive action; rather, it thoughtfully analyzed the specific Proclamation at issue and the text and purposes of the O&C Act and found them compatible. See Pet. App. 19a-28a.

Petitioners' assertions (Pet. 20-22) that the decision below creates separation-of-powers concerns and violates the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, are similarly incorrect. As an initial matter,

petitioners are mistaken in framing their statutory-interpretation argument in constitutional terms. Petitioners' claim is not that the Constitution forbids the President from designating National Monuments, but that the 2017 Proclamation exceeded the President's authority because it was inconsistent with the O&C Act. See Pet. App. 14a, 42a (court of appeals and district court describing petitioners' challenge to the Proclamation). That was the sole claim in petitioners' complaint—which did not even reference separation of powers or the Property Clause. See C.A. App. 31 ("By reserving O&C Lands for a monument purpose, and prohibiting their use for sustained yield timber production, [the 2017 Proclamation] violates the O&C Act, and exceeds the authority granted to the President in the Antiquities Act."). Where, as here, "the only source of [the President's] authority is statutory, no 'constitutional question whatever' is raised." *Dalton* v. *Specter*, 511 U.S. 462, 474 n.6 (1994) (citation omitted); see *id.* at 473 ("[C]laims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims."). And, in any event, as already discussed, the court of appeals did not interpret the Antiquities Act to allow the President to "'suspend,'" "override," or "nullif[y]" Acts of Congress. Pet. 21-22 (citation omitted). Indeed, the court did not materially interpret the Antiquities Act at all—and nothing in the decision below affects Congress's ability to place further limits on the President's Antiquities Act authority. Cf. p. 12 n.3, *supra* (collecting examples of Congress limiting the President's Antiquities Act authority).

Petitioners finally cite (Pet. 23) a 1940 opinion by the Department of the Interior's Solicitor for the proposition that creating a national monument on O&C lands

would be "inconsistent with the O&C Act." But the President is not bound by the opinion of the Solicitor. That is particularly so when the President exercises power that Congress has expressly vested exclusively in him. See U.S. Const. Art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed"). In any event, before President Clinton designated the original Monument in 2000, the Secretary recommended that he establish the Monument; advised that the Monument would have a minimal immediate effect on commercial timber harvest; and confirmed that land use plans could be amended to ensure that total production on all O&C lands was not diminished by the Proclamation. Memorandum from Bruce Babbit, Sec'y of the Interior, *Discussion of the Cascade-Siskiyou National Monument Proposal* 4-5, 7-8 (June 6, 2000) (on file with the Clinton Presidential Library).

c. Further review of the first question presented is unwarranted. There is no conflict between the decision below and any decision of this Court or of another court of appeals. This case would be a poor vehicle for considering more general questions about the scope of the Antiquities Act. And the 2017 Proclamation has a minimal effect on the O&C lands because it withdraws only a small percentage of the O&C lands from commercial timber harvest.

The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Indeed, the Ninth Circuit—the only other court of appeals that is likely to consider the question presented, due to the O&C lands' location—has likewise upheld the 2017 Proclamation's expansion of the Monument. *Murphy Co.* v. *Biden*, 65 F.4th 1122, 1131-1138 (2023), petition for cert. pending, No. 23-525 (filed Nov. 15, 2023).

Petitioners assert (Pet. 24-25) that "[t]his case presents an excellent vehicle" to address "the extent of the President's authority under the Antiquities Act." But this case is not a suitable vehicle for considering any such issue for the simple reason that petitioners have not brought a claim under the Antiquities Act itself. Petitioners pleaded a single claim contending that the 2017 Proclamation exceeds the President's authority under the O&C Act. See p. 20, *supra*. And the court of appeals resolved this case primarily by interpreting the O&C Act. See Pet. App. 21a-28a. This case thus does not present a clean question regarding the Antiquities Act more generally or its application in other circumstances. Rather, it presents the narrow question of whether a unique statute (the O&C Act) forecloses one particular action under the Antiquities Act (the 2017 Proclamation) that expanded the preexisting Cascade-Siskiyou National Monument—a Monument that itself had been acknowledged by Congress in a statute that designated a portion of Monument land as wilderness. See p. 4, *supra*. And, for those reasons, this case likewise does not provide a suitable vehicle for the Court to consider whether a "monument" of significant "proportions" "can be justified under the Antiquities Act" or to determine the correct "interpret[ation] [of] the Antiquities Act's 'smallest area compatible' requirement." *Massachusetts Lobstermen's Ass'n* v. *Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., respecting the denial of certiorari) (quoting 54 U.S.C. 320301(b)).

Petitioners also suggest (Pet. 27) that further review is warranted because by preventing timber sales on a portion of the O&C lands, the 2017 Proclamation deprives the surrounding counties of "'the stream of revenue which had been promised' by Congress." But,

contrary to petitioners' assertion (*ibid.*), the Proclamation only negligibly reduces commercial timber harvest on the O&C lands. The 2017 expansion includes 40,000 acres of O&C lands—less than two percent of the more than two million acres subject to the O&C Act. Pet. App. 25a. And of those 40,000 acres, only approximately 16,500 were being managed for sustained-yield timber production before the 2017 Proclamation. C.A. App. 1304. Those case-specific circumstances do not warrant this Court's review.

2. The court of appeals likewise correctly held there is no conflict between the O&C Act and BLM's 2016 resource management plans. Petitioners' contrary arguments lack merit, and the court's factbound resolution of that issue does not warrant further review.

a. As discussed above, see pp. 14-17, *supra*, the O&C Act confers discretion on the Secretary to exclude portions of the O&C lands from timber production. Neither the ESA nor the CWA directly addresses the O&C Act, and therefore the three statutes should be read so that all are "give[n] effect." *Epic Sys. Corp.*, 584 U.S. at 510 (citation omitted). The same flexibility that allows the O&C Act to be harmonized with the Antiquities Act and the 2017 Proclamation likewise allows the O&C Act to be harmonized with the ESA and CWA.

i. In the ESA, Congress unambiguously required all federal agencies to ensure that their actions are not likely to jeopardize a listed species' continued existence or adversely modify or destroy its critical habitat. 16 U.S.C. 1536(a)(2). Thus, when BLM makes discretionary decisions about how to manage the O&C lands, it must ensure that those decisions do not violate those ESA requirements. See 50 C.F.R. 402.03. Northern spotted owls "require large, contiguous blocks of forest

for habitat," Pet. App. 30a, and the 2016 resource management plans designate reserves—particularly late-successional reserves—to provide such habitat. Such reserves ensure BLM's compliance with the ESA.

At the same time, the late-successional reserves also serve the O&C Act's purpose of "providing a permanent source of timber supply" and "contributing to the economic stability of local communities and industries." 43 U.S.C. 2601. As the court of appeals recognized, late-successional reserves further those ends "because a failure to protect endangered species (and their critical habitat)"—which are "necessary for the continuing vitality of the forest ecosystem"—"would eventually limit the lands' timber production capacity." Pet. App. 29a-30a. That is not a belated justification for the plans; rather, BLM's explanation of the plans' purpose and need recognized that "the conservation and recovery of listed species is essential to delivering a predictable supply of timber." C.A. App. 3678. BLM likewise explained that "[f]urther population declines of the northern spotted owl could result in additional restrictions on timber harvest" throughout the region—which would "disrupt[] and limit[]" timber harvest. *Id.* at 3747. Thus, BLM concluded that "[b]y protecting and managing habitat now * * * BLM can best avoid future, disruptive restrictions on" the area's timber production. *Ibid.*

ii. The CWA requires federal agencies to comply with water-pollution-control requirements in state law. 33 U.S.C. 1323(a); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 614 (2013) (acknowledging Oregon's "extensive effort to develop a comprehensive set of best practices to manage stormwater runoff from logging roads"). BLM's decision to set aside riparian reserves in the 2016 plans serves the purpose of "continuing

to comply with the Clean Water Act." C.A. App. 3681 (BLM's explanation of the 2016 plans' purpose and need).

The riparian reserves also further the O&C Act's express purposes. The Act requires that BLM engage in sustained-yield management in part to "protect[] watersheds" and "regulat[e] stream flow." 43 U.S.C. 2601. Riparian reserves "help attain and maintain water quality standards, a fundamental aspect of watershed protection." C.A. App. 3126 (record of decision for Northwest Forest Plan). And they "help regulate streamflows, thus moderating peak streamflows and attendant adverse impacts to watersheds." *Ibid.* In addition, "[p]roviding clean water is essential to the conservation and recovery of listed fish, and a failure to protect water quality would lead to restrictions that would further limit the BLM's ability to provide a predictable supply of timber." *Id.* at 3678 (BLM's explanation of the 2016 plans' purpose and need). That, in turn, would undermine the O&C Act's goal of sustained-yield timber production.

b. Petitioners' primary arguments fall short for the same reasons that their challenge to the 2017 Proclamation fails. They again do not account for the obligation to harmonize overlapping statutory requirements. See, *e.g.*, Pet. 28-29. They again fail to grapple with the O&C Act's plain text, which provides various goals of sustained-yield management that are compatible with the requirements of the ESA and CWA. See, *e.g.*, Pet. 33-34. Indeed, petitioners' arguments rely heavily (Pet. 27-28) on a definition of "timberlands" in legislation predating the O&C Act—and that the O&C Act replaced. But as the court of appeals recognized, there is no good textual basis for "fill[ing] in * * * gaps" in the O&C Act

"with provisions from * * * outdated" and superseded legislation. Pet. App. 24a. And petitioners again attempt (Pet. 26-27) to raise a meritless and unpreserved separation-of-powers claim. Petitioners' complaint did not allege constitutional challenges to the 2016 resource management plans; rather, they pleaded only statutory claims. See C.A. App. 1687 (complaint alleging that "[t]he 2016 [resource management plans] violate the O&C Act" because they "do not allow the timber on * * * the O&C timberlands to be sold, cut, and removed in conformity with the principle of sustained yield"); *id.* at 4109 (complaint alleging that "the 2016 [resource management plans] violate[] the O&C Act * * * by reserving O&C lands from timber production") (capitalization altered; emphasis omitted). As discussed, see pp. 14-19, *supra*, the O&C Act's text and history support its compatibility with conservation goals such as those furthered by the 2016 plans.

Petitioners also contend (Pet. 30) that under this Court's decision in *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 551 U.S. 644 (2007), "the ESA cannot be interpreted as having implicitly repealed the non-discretionary mandates of [the] pre-existing [O&C Act]." But *Home Builders* does not support petitioners' contention. *Home Builders* affirmed a regulation interpreting 16 U.S.C. 1536(a)(2) to "apply to all actions in which there is *discretionary* Federal involvement or control." 551 U.S. at 665 (quoting 50 C.F.R. 402.03). The Court held that the regulation permissibly interpreted Section 1536(a)(2)'s obligations to not "attach to actions * * * that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Id.* at 669; see *id.* at 666-668. Applying that rubric, the Court determined that a provision in the

CWA that listed "enumerated statutory criteria" did "not grant [the Environmental Protection Agency] the discretion to add another entirely separate prerequisite to that list." *Id.* at 671. Here, in contrast, the O&C Act gives BLM significant discretion in managing the O&C lands and furthering the Act's various purposes. Timber-harvest planning itself requires BLM to exercise its professional judgment, expertise, and discretion in a variety of situations, including in deciding how to balance timber growth and harvest; managing the lands before and after fires, storms, insect infestation, and disease; promoting tree growth and survival; and selecting appropriate harvest methods. As a result, there is sufficient "discretionary Federal involvement or control," *id.* at 665 (citation and emphasis omitted), that BLM is required to comply with the ESA when making management decisions under the O&C Act.

Petitioners also argue (Pet. 29-30) that the court of appeals violated the principle that agency action must be upheld on the basis articulated by the agency, noting that BLM did not state that it was reclassifying timberlands. But the court merely concluded that the 2016 resource management plans were consistent with the O&C Act; it did not make "a determination * * * or judgment which [an administrative] agency alone is authorized to make." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (prohibiting judicial substitutions for administrative orders in such instances). And, even assuming that *Chenery* was applicable, courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Here, it is clear that BLM intended to exclude certain portions of the O&C lands from sustained-yield

harvest—that is, to effectively treat them as non-timberlands, regardless of whether BLM actually reclassified timberlands in the 2016 plans.

c. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review of its highly factbound determination that the 2016 resource management plans comply with the O&C Act is unwarranted.

Petitioners assert (Pet. 32) that the court of appeals' resolution of the second question presented "creates a circuit conflict" with the understanding of "'sustained yield'" adopted by the Ninth Circuit in *Headwaters, Inc.* v. *Bureau of Land Mgmt.*, 914 F.2d 1174 (1990). Petitioners are wrong. *Headwaters* merely adopted the uncontested proposition that timber production is the primary use for the O&C lands. See *id.* at 1183-1184. And *Headwaters* did not address the interplay between the O&C Act and the ESA, or the relationship between the O&C Act and the CWA. What is more, the Ninth Circuit distinguished *Headwaters* in its more recent decision in *Murphy*, 65 F.4th at 1134-1135, and any intracircuit tension between *Headwaters* and *Murphy* would not be a basis for certiorari, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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