No. 23-524

IN THE

Supreme Court of the United States

AMERICAN FOREST RESOURCE COUNCIL, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition remains accurate.

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In 1937, Congress in the O&C Act set aside 2.6 million acres of land as a permanent trust for Oregon counties, with clear instructions that those lands "*shall* be managed" for timber production, and that "the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601 (emphases added).

Respondents do not dispute that the O&C Act is a dominant use statute or that Congress in 1937 intended to set aside the O&C timberlands as "a vast estate held in trust" to benefit the O&C Counties. Pet. 10; U.S.Opp. 15, 28. Nor do they dispute that the President used the Antiquities Act to override that congressional purpose by removing 40,000 acres (about 62 square miles) from the trust, instead putting those lands to an entirely different use. U.S.Opp. 4, 5. Likewise, they do not dispute that the BLM put nearly 80% of the O&C lands into no-harvest reserves, where sustained-yield timber harvest is prohibited. U.S.Opp. 7.

Instead, Respondents suggest these issues do not warrant review because this is a "factbound and case-specific disposition" involving a "*sui generis* statute" in Oregon. U.S.Opp. 11-12. Not so.

As confirmed by the amicus brief filed by members of Congress from 16 states, the question presented goes to important separation of powers issues: the plenary role of Congress in establishing land management policy, the limited role of the executive branch to carry out those instructions, and the important role of this Court to ensure "'that each Branch of government would confine itself to its assigned responsibility.'" Br. of Amici Curiae

Members of Congress 5 (quoting *I.N.S.* v. *Chadha*, 462 U.S. 919, 951 (1983)).

The implications of the decision below span far beyond the O&C Act. Respondents do not dispute Judge Tallman's warning that judicial approval of Proclamation 9564 has "transmuted the Antiquities Act into a coiled timber rattler poised to strike at any land management law that the President dislikes," *Murphy Co.* v. *Biden*, 65 F.4th 1122, 1142 (9th Cir. 2023) (Tallman, J., dissenting in part), or the Chief Justice's wariness of the "broad authority that the Antiquities Act vests in the President stand[ing] in marked contrast to other, more restrictive means" of executive land preservation. *Mass. Lobstermen's Ass'n* v. *Raimondo*, 141 S. Ct. 979, 980 (2021) (statement of Roberts, C.J., respecting denial of certiorari). Pet. 5; U.S.Opp. 22. The Antiquities Act was intended to designate "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). It was never intended to grant the executive branch carte blanche to override congressional land management policy.

But that is exactly what the ruling in this case allows. As the Public Lands Council explains, if "timberlands" under the O&C Act can be turned into "non-timberlands" with a flick of the Antiquities Act, there is nothing to stop the same result with respect to the Mineral Leasing Act, Taylor Grazing Act, the Outer Continental Shelf Lands Act, or any other congressional land management scheme. Br. of Public Lands Council and National Cattlemen's Beef

Association as Amici Curiae in Support of Petitioners ("PLC Am. Br.") 5, n.2. This is a "gateway" to presidential nullification of public land policy. *Id.* at 11-14.

This case presents an excellent vehicle for addressing this issue because there is such a stark conflict between the President's actions under the Antiquities Act and the BLM's land management decisions on the one hand, and the clear and strict mandates of the O&C Act on the other. This is not an esoteric debate about land management policy. Congress in 1937 promised that these exact lands would be managed for the benefit of Oregon Counties as a permanent trust to fund public services. Now, with no change to the O&C Act, Respondents have trampled on that promise by placing 80% of the O&C timberlands into no-harvest reserves. And the President has been allowed unfettered discretion to convert the remaining O&C timberlands into a no-harvest monument. That is the pinnacle of executive overreach. Review by this Court is urgently needed.

1. The answers to the questions presented here have immense practical and legal significance for not just Oregon but *all* federal lands.

a. As amici observe, this case presents the key issue of how the Antiquities Act (and under the Government's new-found justifications, the ESA and CWA) *interact with* the O&C Act. It asks whether the President exercising Antiquities Act authority (or BLM with new environmental aims) can unilaterally override an express congressional mandate directing how millions of acres of land must

be managed. This is a crucial test of our constitutional system: if the President can override even a plain, later-enacted congressional directive, then the Antiquities Act is wholly unconstrained.

Respondents incorrectly reframe Petitioners' claims as involving the question of whether the President exceeded his statutory power under the Antiquities Act. U.S.Opp. 19-20. But Petitioners' complaint sufficiently pleaded a violation of the "[c]onstitutional doctrine of separation of powers." J.A. 1127. Moreover, the district court held that ""Proclamation 9564 is without a constitutional basis, violates the principle of separation of powers, is *ultra vires,* and must be enjoined." Pet.App. 49a-50a. And Petitioners argued to the court of appeals that when the President uses his Antiquities Act powers to abrogate an express congressional command, as here, the result is a clear separation of powers violation.[1] See Br. for Plaintiff-Appellees, *AFRC* v. *United States*, No. 20-5008 (D.C. Cir. Oct. 26, 2022) at 55-56 (ECF 1967936). Petitioners throughout have asserted a separation of powers claim.

b. The district court, Judge Tallman, and Chief Justice Roberts have all recognized the threat posed by using the Antiquities Act in this manner. Respondents say this case falls outside the Chief Justice's criticism of the "trend of ever-expanding

[1] *Dalton* v. *Specter* (U.S.Opp. 20) involved no such clash with a specific Congressional mandate, just a generalized claim "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." 511 U.S. 462, 471 (1994).

antiquities," *Mass. Lobstermen's* (statement of Roberts, C.J., respecting denial of certiorari), because it does not implicate the "smallest area" requirement. U.S.Opp. 22; Int.Opp 13. But the President's flouting of the Antiquities Act here is *more* egregious, because it contravenes a clear statutory directive. Moreover, in contrast to *Massachusetts Lobstermen's*, in which "[n]o court of appeals ha[d] addressed the questions raised," *ibid.*, here, the issues have been thoroughly explored in contradictory opinions of the district court and D.C. Circuit, and by the Ninth Circuit in recent majority and dissenting opinions in the parallel *Murphy* case, and earlier in *Headwaters*, teeing up this Court's review. If any Antiquities Act case is squarely and ripely in need of adjudication, it is this one.

c. The adverse effects of the D.C. Circuit's decision will be far-reaching. Respondents concede that Presidents have already used Antiquities Act authority over 160 times. U.S.Opp. 3. If the D.C. Circuit's holding stands, it will incentivize new designations in lands that Congress has set aside for specified uses, whether by reservation or in trust. See PLC Am. Br. 5, n.2. As the Congressional amici point out (at 19), a President could, for example, convert federal lands that Congress designated as wilderness for new use as a mine, simply by issuing an Antiquities Act proclamation touting the area as historically important to mining. The President's ability to wield Antiquities Act authority in this way would be a remarkable rebuff of constitutional and statutory principles.

The outcome here will directly affect the management of 2.6 million acres of western

forestland and the lives of hundreds of thousands of residents of the O&C Counties. The more than 30 amici in support of Petitioners attest that absent action by this Court, these affected communities will suffer real and immediate harm. See Roseburg Area Chamber of Commerce and NFIB Small Business Center Am. Br. 15-17.

Respondents concede that the O&C Act sought to address "the region['s] * * * significant economic difficulties" and ensure "economic stability" of the Counties. U.S.Opp. 2, 3. They contend that the Proclamation does not conflict with those goals because it covers 2 percent of O&C timberlands and so cannot "significantly affect" timber production. U.S.Opp. 19. But that argument ignores the many millions of dollars in public funding at stake. Pet. 11; Pet.App. 13a-14a. Moreover, Respondents cannot make the same argument with respect to BLM's reservation—which has taken 80% of the O&C timberlands out of harvest, breaking Congress' promise in the O&C Act that the O&C Counties and their citizens would receive a steady stream of funding from timber revenues.

Intervenors assert (at 5) that the O&C Counties no longer need O&C Act funding because they receive payments from other congressional sources. That is factually incorrect (as well as legally irrelevant). Neither the Secure Rural Schools and Community Self-Determination Act nor short-term renewals of it provide the Counties with the funding level needed and promised by the O&C Act. And these stop gap funding measures are currently expired and do not replace the "permanent" source of funding promised by the O&C Act.

2. Turning to the merits, the court of appeals got it wrong. The conflict between the Proclamation's and Plans' land reservations and Congress's O&C Act mandate is direct and irreconcilable. Congress required that O&C timberlands "*shall* be managed * * * for permanent forest production" and that "the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601 (emphases added; footnote omitted). Yet the President in Proclamation 9564 prohibited sustained-yield timber production on 40,000 acres of O&C timberlands; BLM with its 2016 Plans placed over 80% of O&C timberlands into no-harvest reserves. The conflict is clear on the face of the Act, the designations irreconcilable.

a. Respondents do not refute the effect of the executive land designations at issue here. U.S.Opp. 4, 7. Instead, they argue that the O&C Act somehow allows for timberlands to be managed for non-harvest use and, even if not, that the President and BLM may—and did—implicitly reclassify the timberlands as non-timberlands to avoid the mandate.[2]

Those arguments are easily refuted. Respondents' continued reliance on the O&C Act's subsidiary "watersheds" and "streamflow" language

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[2] This post-hoc reasoning was the D.C. Circuit's own invention. That BLM did not argue below that it had implicitly reclassified timberlands shows the weakness of the argument, and also independently warrants reversal. See Pet. 29-30. Unsurprisingly, BLM's belated claim (at 27) that it "intended * * * to effectively treat" the land at issue as non-timberlands all along lacks any record support.

to justify the non-harvest land designations ignores both statutory text and legislative history. Pet. 31-33. Their interpretation erroneously elevates subsidiary *purposes* above the *dominant use* (sustained-yield management) itself. Pet. 32-34. This inversion is insupportable. "Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all." *Headwaters, Inc.* v. *Bureau of Land Mgmt., Medford Dist.,* 914 F.2d 1174, 1184 (9th Cir. 1990).

Respondents' suggestion that "conservation concerns partially motivated" the Act's adoption is similarly misleading. Pet. 30-33. The cited discussion in the congressional reports (U.S.Opp. 16-17) promoting "conservation" distinguished sustained-yield production from the prior practice of clear-cutting without reforestation as a "more permanent" and "self-sustaining" type of management. H.R. Rep. No. 1119, 75th Cong., 1st Sess. 2, 4 (1937); see also *Headwaters*, 914 F.2d at 1183-84. It was not, as Respondents suggest, some congressional paean to lofty environmental goals.

Respondents' reliance on the regulations enacted in 1938 is similarly unavailing. The preamble to Interior's own implementing regulations issued a year after the O&C Act confirms these environmental considerations are "secondary benefits" of sustained-yield timber production. 3 Fed. Reg. 1,795, 1,796 (July 21, 1938). That these rules provided narrow exceptions for "scenic strips * * * on each side of" recreational waterbodies and reclassification of timberlands "more suitable for

agricultural use" than timber production (U.S.Opp. 16) is also irrelevant. That language comes from the original version of the O&C Act, which did authorize reclassification of lands for agricultural purposes if the "land * * * is more suitable for agricultural use." 50 Stat. 874, 875 (Sec. 3). But that authority to reclassify lands was *repealed*. Pub. L. No. 94-579, Title VII, Sec. 702, 90 Stat. 2787 (1976). Besides, the 62 square miles of O&C Lands designated as a monument by Proclamation 9564 were neither for agricultural use, nor "scenic strips."

Respondents' arguments also disregard decades of administrative guidance from the Department of the Interior. That includes the 1940 Interior Solicitor's Opinion that "the President is without authority to reserve the [timber]lands for another purpose inconsistent with that specified by Congress" in the O&C Act (Pet.App. 112a; see Pet. 2, 22-23), and the 1977 Interior Memorandum confirming that "[r]ather than allowing equal consideration of all land uses," all "[o]ther uses" are "only allowed when subordinated to commercial forest management." U.S. Dep't of the Interior, Memorandum from Deputy Solicitor to Director, Bureau of Land Mgmt. at 10 (June 1, 1977); see Pet. 33. Respondents ignore the 1977 memorandum. As to the 1940 opinion, they respond only that the President is not bound by it. U.S.Opp. 21. But that hardly undermines the Solicitor's near contemporaneous understanding of Congress's language and intent that creating a national monument "would be inconsistent with the utilization of the O. and C. lands as directed by Congress." Pet. App. 112a.

b. O&C "timberlands" cannot simply be "reclassified" without any regard to their productive capacity as Respondents suggest (U.S.Opp. 15), and certainly not implicitly. The "timberlands" that Congress specified are subject to the sustained-yield mandate are those lands growing "not less than three hundred thousand feet board measure on each forty-acre subdivision." 64 Pub. L. No. 86 § 2, 39 Stat. 218, 219. That definition from the O&C Act's predecessor, the Chamberlain-Ferris Act, remains in full force today. Pet. 27-29. Respondents cannot refute that lands meeting that timber capacity threshold are "timberlands" subject to the O&C Act's mandate and cannot be reclassified at the whim of the President or BLM. Indeed, the only textual authority to "reclassify" lands for other uses was limited to "agricultural" purposes, and that authority was repealed in 1976.

Respondents' reclassification argument is all the more illogical given their own emphasis on the fact that the Antiquities Act and O&C Act are "directed at different officials." U.S.Opp. 13. Respondents cannot have it both ways. If the O&C Act does not apply to the President, then neither does it authorize the President to reclassify O&C timberlands. U.S.Opp. 17, 27-28.

In truth, the O&C Act's mandates on the use of the O&C lands bind the President and the Solicitor of the Interior alike. The cases relied on by Respondents are distinguishable. Presidential authority trumped a congressional immigration directive in *Sale* v. *Haitian Centers Council, Inc.,* 509 U.S. 155, 171 (1993), but Congress had expressly limited that directive "insofar as" it related to "the

powers, functions, and duties conferred upon the President." The O&C Act contains no such limitation. *Regan* v. *Wald*, 468 U.S. 222, 233 n.16 (1984), affirmed the President's authority under the broad, Cold War-era "Trading with the Enemy Act," with language much broader than that in the Antiquities Act, over a conflicting Treasury *regulation*. It did not involve the exercise of presidential discretion that overrode a clear congressional directive.

c. Respondents seek to minimize the extent of executive overreach here by divorcing the impact of the BLM Plans from the Proclamation. But that the Plans remove nearly 80% of the O&C timberlands from sustained-yield production cannot be ignored. Coupled with the impact of the Proclamation, the Plans all but erase Congress's promise in the O&C Act.

BLM's decision to manage O&C lands for purposes other than sustained-yield timber production conflicts with the O&C Act for the same reasons as the Proclamation. And BLM's actions cannot be justified under Respondents' post-hoc, modern conceptualization of "conservation" or the ESA or CWA. Pet. 30; Pet.App. 47a. Respondents concede that neither the ESA nor CWA "repealed the underlying primary direction * * * for the O&C lands." U.S.Opp. 7 (quoting BLM's Final Environmental Impact Statement for the Plans). *Home Builders*, which squarely held that an agency's obligations under Section 7 of the ESA cannot be read to trump nondiscretionary pre-existing statutory mandates, confirms the priority of the O&C Act's directives. Respondents' attempt to

distinguish *Home Builders* (at 26-27) rests on a misreading of the O&C Act's sustained-yield mandate, which is in no way discretionary as Respondents suggest, much less allows BLM to devote the vast majority of O&C lands for the inconsistent purpose of wildlife preservation under the ESA. Pet 17-18, 30; Pet.App. 47a-48a.

Respondents' repetition of the D.C. Circuit's claim that restricting timber production will actually help sustained-yield production via the "vitality of the forest ecosystem," U.S.Opp. 10 (quoting Pet. App. 29a-30a), also fails. The Orwellian notion that forbidding harvest on 80% of O&C timberlands will somehow increase sustained-yield production runs so far afield from common sense that it needs no further response.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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