No. 23-525

IN THE

Supreme Court of the United States

MURPHY COMPANY, ET AL.,

Petitioners,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

Michael E. Haglund
Julie A. Weis
HAGLUND KELLEY LLP
2177 SW Broadway
Portland, OR 97201
(503) 225-0777

Donald B. Verrilli, Jr.
Counsel of Record
Elaine J. Goldenberg
Rachel G. Miller-Ziegler
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

Respondents do not even try to defend the Ninth Circuit's extraordinary ruling that the Antiquities Act gives Presidents a sweeping general power to override Congress's specific statutory directions about how particular federal lands should be managed. They instead contend that the Proclamation at issue did not actually override Congress's directives regarding the Oregon timberlands covered by the O&C Act. But the sparse and feeble statutory analysis respondents offer in support of that notion only confirms its implausibility.

Respondents are no more persuasive in contending that the question presented is not important enough to merit review. Even before the Ninth Circuit's ruling, Presidents had used the Antiquities Act's "purely discretionary" power to impose "myriad restrictions on public use" of federal land. *Mass. Lobstermen's Ass'n* v. *Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting denial of certiorari). By affirming a presidential decision to override Congress's statutory judgment about how particular federal lands should be managed, the Ninth Circuit has now placed its imprimatur on a substantial *additional* expansion of that power. Indeed, the decision below suggests that there are *no* meaningful limits to what a President can use the Antiquities Act to do. The separation-of-powers concerns raised by that ruling provide strong reason to grant review—as do the practical harms suffered by local communities and businesses that depend on logging revenue promised by Congress. And allowing the Ninth Circuit's decision to stand is certain to invite even more aggressive misuse of the Antiquities Act going forward.

ARGUMENT

I. The Ninth Circuit Endorsed The President's Use Of The Antiquities Act To Override A Controlling Federal Statute.

A. The Proclamation Directly Conflicts With The O&C Act.

1. The President's Antiquities Act Proclamation cannot be reconciled with the O&C Act. The O&C Act prescribes that covered timberlands "shall be managed * * * for permanent forest production" with the timber "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. 2601. The Proclamation orders that a significant portion of the very same timberlands "shall [not] be used in a calculation or provision of a sustained yield of timber" and cannot be used for the "commercial harvest of timber." 65 Fed. Reg. 37,249, 37,250 (June 9, 2000); see 82 Fed. Reg. 6,145, 6,149 (Jan. 12, 2017). Prior to the Proclamation, the land it covers was being used for timber production; the Proclamation halted that timber production. Pet.App.10a; Pet.8 & n.3.[1]

2. Respondents' efforts to harmonize the Proclamation with the O&C Act border on the incoherent.

a. Respondents begin with an irrelevant appeal to implied-repeal precedent. Govt.Opp.9-10; Soda.Mountain.Opp.19-20. Petitioners have never argued that the O&C Act "displaces" the Antiquities Act in the abstract. Govt.Opp.9 (citation omitted). The question is

---

[1] Although private respondents assert that the question presented is not "outcome-determinative," their very next sentence concedes that the Proclamation halted logging. Soda.Mountain.Opp.17.

whether the *exercise* of Antiquities Act authority here is compatible with the O&C Act. It is not. Pet.18-24.

b. Respondents next describe the authority the O&C Act vests in the Secretary of the Interior and Bureau of Land Management to identify and manage covered timberlands. Govt.Opp.11-12; Soda.Mountain.Opp.20-21. That discussion is beside the point. The President issued the Proclamation, not the agency. And, critically, the Proclamation directly overrode the agency's exercise of its O&C Act authority: the President forbade timber harvesting on land that the agency had both classified as timberland and directed should be "managed to 'achieve continual timber production.'" *Am. Forest Res. Council* v. *United States*, 77 F.4th 787, 794 n.10 (D.C. Cir. 2023); see Pet.8-9 & n.3.

c. Unable to deny the clash between the President's Proclamation and the agency's exercise of congressionally delegated authority, respondents suggest that the President was "effectively reclassifying" the covered area "as non-timberlands and exempting them from commercial harvest." Govt.Opp.13; see Soda.Mountain.20-21. Neither opposition, however, offers any defense of that so-called "reclassification" theory, which would violate the O&C Act.

As the government acknowledges, the O&C Act "authorizes and directs actions to be taken by the Secretary of the Interior," not the President. Govt.Opp.10. Given that concession, the government's assertion that the *President's* "effective[] reclassif[ication]" of O&C lands "is consistent with the O&C Act's text" is puzzling, to put it charitably. Govt.Opp.13.

Even accepting the implausible premise that a President could unilaterally override agency determi-

nations with respect to O&C lands (and evade the procedural safeguards that Congress put in place to control such decisions, Pet.20), respondents offer *no* explanation of how the President's supposed "reclassif[ication]" here was consistent with the O&C Act. As the petition explains, the fact that the O&C Act allows the Secretary to determine what land covered by the statute is "timberland" does not grant "unfettered discretion." Pet.App.42a (Tallman, J., dissenting); see Pet.19. In the absence of a statutory definition in the O&C Act, "timberland" takes its ordinary meaning at the time of the Act's passage: "land with forest growth suitable for timber production." Pet.19. Thus, as the agency has long required, whether O&C lands are treated as timberlands turns on whether they are "suitable for the production of trees." 3 Fed. Reg. 1,795, 1,798 (July 21, 1938) (initial agency regulations directing selective logging "on all lands chiefly valuable for the production of timber"). Respondents do not assert that the President "reclassif[ied]" the Monument lands here as "non-timberlands" based on a judgment that they were not suitable for timber production. Such an argument would be a nonstarter. See 82 Fed. Reg. at 6,145 (Proclamation addresses biodiversity and says nothing about timber production). Nor, tellingly, do respondents offer *any* alternative understanding of the definition of "timberlands" under the O&C Act, much less an explanation of why treating the lands at issue as "non-timberlands" would be consistent with such a definition.

In addition to their failure to offer any affirmative textual argument, respondents' attack on petitioners' reading of the statute is ineffective. The government contends that the interpretation of timberlands that petitioners offer, Pet.19-20, "brushes aside the O&C Act's plain language" by "fail[ing] 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." Govt.Opp.14. But reading "timberlands" to mean "land suitable for forest growth" in no way disables the Secretary from determining what land meets that definition. And the government's invocation of secretarial discretion is (at best) confusing given that the Proclamation is an exercise of *presidential* authority that overrides the agency's O&C Act determination of how the lands at issue should be managed. See p.3, *supra*.

d. Finally, respondents insist that the Proclamation is compatible with the O&C Act because that statute lists certain conservation and recreational uses for timberlands. Govt.Opp.13-15; Soda.Mountain.Opp. 21-22. But the O&C Act does not direct that covered lands be used for "conservation and recreation[]." *Ibid.* It directs that that timberlands "*shall* be managed * * * for permanent forest production" and that timber "*shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield"—and then explains that using such a sustained-yield approach will serve specified purposes, including certain environmental and recreational goals. 43 U.S.C. 2601 (emphasis added).

The government's attempts to deal with that glaring flaw in its argument only emphasize how weak its position is. First, the government criticizes the petition for describing the statute's secondary purposes as "results that Congress said would be reached *by means* of 'selling, cutting, and removing' timber," Pet.21, noting that "Section 2601 does not refer to 'results'" and instead uses "purpose," Govt.Opp.15. The government does not explain why petitioners' use of the word "results" misconstrues the statute. It does not: in speci-

fying the "purpose" of using a sustained-yield approach, Congress was specifying "[t]he object, effect, or *result*, aimed at." Webster's New International Dictionary (2d ed. 1935) (emphasis added). The government nitpicks petitioners' use of a synonym because it has nothing to say about the substance of petitioners' argument.

Second, the government says that "the Act is clear that" logging "must be [done] in accordance with the additional purposes identified by the Act," such that "petitioners' approach * * * requir[ing] the Secretary to sell, cut, and remove all harvestable timber" is wrong. Govt.Opp.15. But petitioners have never argued that the O&C Act requires "remov[ing] all harvestable timber." *Ibid.* What the Act requires is *sustained-yield* logging, which the Proclamation thwarts by forbidding logging. Put differently, the President did not ban logging in the Monument to, say, promote timber production in adjacent O&C lands or encourage future timber growth in the covered area—that is, he did not ban logging as part of a sustained-yield approach. The President banned logging to ensure "habitat connectivity" and promote "biodiversity of the monument." 82 Fed. Reg. at 6,145. Those may be worthy purposes in the abstract, but seeking to advance those objectives on timberlands covered by the O&C Act flatly contradicts Congress's commands.

B. The Ninth Circuit Upheld The Proclamation Based On A View That The President Can Override Other Statutes Under the Antiquities Act.

The only coherent way to defend the Proclamation is to take the extreme position that the Antiquities Act grants the President an executive superpower to override other statutes even where ordinary principles of

statutory interpretation dictate that those other statutes control. Pet.14-15. And that was, in fact, what the court of appeals held. Pet.15-18. Recognizing the extraordinary nature of such a holding—and the need for this Court's review of a decision embracing such a jarring expansion of executive power—respondents insist the Ninth Circuit did not go so far. It did.

1. The court of appeals expressly and repeatedly stated its view that the Antiquities Act permits the President "to dedicate federal land for one use that Congress had previously appropriated for a different use." Pet.App.31a; see, *e.g.*, Pet.App.30a (Antiquities Act authority includes "power to shift federal land from one federal use to another" with "concurrent shift" in "laws and regulations governing its use" (citation omitted)).

The *only* mention of any of those remarkable statements in either opposition is the government's undeveloped assertion that the Ninth Circuit did not hold that "the Antiquities Act 'effectively allows the President to repeal any disagreeable statute.'" Govt.Opp.16 (quoting Pet.2 (quoting Pet.App.31a)). Although the government tries to obscure it through a "citation omitted" parenthetical, *that is a quote from the majority opinion*. Specifically, the majority noted the dissent's concern that the court's opinion would "effectively allow the President to repeal any disagreeable statute." Pet.App.31a. But, far from disavowing that reading, the majority accepted it—while sloughing off the dissent's concern. Pet.App.31a; see Pet.App.23a (drawing support from "the fact that the Supreme Court has never overturned an Antiquities Act proclamation").

Although the government (at 16) may wish the Ninth Circuit "did not adopt" that radical—and

certworthy—view of the Antiquities Act, the court of appeals could hardly have been clearer about the sweeping power it understood the Antiquities Act to give the President.

2. The Ninth Circuit confirmed its expansive interpretation of the Antiquities Act by stating that Congress could step in if the President goes too far. Pet.App.31a-32a. Incredibly, respondents embrace the Ninth Circuit's approach, cataloging the times that Congress has responded to presidential exercises of the Antiquities Act. Govt.Opp.16 & n.3; Soda.Mountain.Opp.23-24. Indeed, the private respondents even contend that Congress's *2009* statute addressing the original Monument "strongly signals" that the *2016* Proclamation is consistent with the O&C Act. Soda.Mountain.Opp.24. But demanding that Congress, rather than the courts, police the limits of the Antiquities Act is not how separation of powers works—particularly where Congress has already enacted a post-Antiquities Act statute specifying precisely how certain land should be used. Pet.17-18; see Pet.15 (discussing O&C Act's *non obstante* clause).

II. The Petition Presents An Excellent Vehicle To Resolve An Important Question Of Presidential Power.

A. There is a pressing need for this Court to address the limits of the Antiquities Act given the ever-expanding power Presidents have asserted under it. The Ninth Circuit's view that the judiciary has essentially no role to play in considering the lawfulness of Antiquities Act proclamations reinforces the need for the Court's review. And this case provides an excellent vehicle given the cleanly presented, outcome-determinative question on which there are now three separate opinions, each taking a different approach. Pet.29.

B. Respondents' attempts to minimize the need for review come up short.

1. Respondents first contend that this case is about interpreting the O&C Act, not the Antiquities Act. Govt.Opp.19-20; Soda.Mountain.Opp.13-16. But as discussed (pp.7-8, *supra*) the *only* way to justify the Proclamation is to take the view, as the court below did, that the Antiquities Act authorizes Presidents to override otherwise controlling statutes like the O&C Act. The correctness of *that* interpretation of the Antiquities Act is the question presented by this petition, and it manifestly warrants review. See Public.Lands.Council.Amicus.Br.5 n.2, 21-25 (discussing other public lands statutes Antiquities Act could be used to override).

Respondents also criticize petitioners for not raising a question regarding whether the Proclamation violates the Antiquities Act's direction that monuments be declared only to protect "objects of historic or scientific interest" or that land "be confined to the smallest area compatible" with protecting such objects. 54 U.S.C. 320301(a)-(b); see Govt.Opp.19-20; Soda.Mountain.Opp.13-14. It may well be that the Antiquities Act has already been stretched far beyond what its text properly allows, and questions of that kind might well warrant review in a future case. But that does not diminish the need for review of the cleanly presented and critically important question of whether the Antiquities Act can be used to override other statutes.

Far from it. That the President has used the Antiquities Act—enacted to respond to "widespread defacement of Pueblo ruins in the American Southwest"—to (for example) declare millions of acres of fed-

eral land part of a national monument to protect underwater canyons and volcanos intensifies the need for review in this case. *Mass. Lobstermen's*, 141 S. Ct. at 980-981 (statement of Roberts, C.J.). As the Chief Justice recognized, the Antiquities Act has come very "far * * * from [its] indigenous pottery" origins. *Id.* at 981. Interpreting the Act to grant the President the *additional* power to override otherwise controlling statutes only compounds the extent of potential abuse of what is supposed to be a limited grant of presidential authority. If this Court does not act, there is every reason to think Presidents will make increasingly aggressive and potentially irrevocable monument designations irrespective of what Congress has provided in other statutes—and no reason to think the lower courts will do anything to stop that abuse. Pet.31.

2. Respondents also insist there is no need to worry that the Proclamation cuts off funding that Congress specifically designated for affected Oregon counties. Govt.Opp.20; Soda.Mountain.Opp.17-18. Their rationales are cold comfort to those communities. Whatever the "percentage" of lands covered by the Proclamation, the area is large in absolute terms—tens of thousands of acres. Moreover, given that nothing about the Ninth Circuit's reasoning turns on the amount of land at issue, nothing would stop a future President from adding tens of thousands more acres of timberland to the Monument, further eating into critical revenues that Congress wanted to secure for Oregon counties. And legislation that once provided additional funds to Oregon counties, Soda.Mountain.Opp.18, only confirms Congress's continued belief that those counties need federal financial support—without actually making up for the critical funds lost here, Roseburg.Area.Chamber.Amicus.Br.15-20.

Even more to the point, it is not up to respondents—or a President—to second-guess Congress's judgments. The decision below stands as a blueprint for future Presidents to make whatever federal land-management decisions they deem appropriate, Congress and affected communities be damned. Pet.28-29; Pet.App.44a (Tallman, J., dissenting) (discussing "unfortunate back-end cost of conservation" on "small, local communities"). The President's interest in protecting an area's flora and fauna should not be allowed to displace Congress's determination that the area's natural resources should be used to provide for the people who live there.

3. Finally, respondents emphasize the absence of a circuit split. But, as the petition explains, given that the Ninth and D.C. Circuits have already weighed in as to this specific monument, no split can develop. And that will often be true in this context: a challenge to any given monument may implicate a statute that applies only in a geographically specific area and is likely to fall within the jurisdiction of, at most, one regional circuit and the D.C. Circuit. Pet.32 (citing 16 U.S.C. 410hh's Alaska-specific provisions); see, *e.g.*, 43 U.S.C. 966 (granting right-of-way on federal lands in Arkansas to pipeline companies); 42 U.S.C. 6502 (specifying management of National Petroleum Reserve in Alaska). The Court is thus never going to have a large number of "thorough lower court opinions" addressing a particular statutory conflict in the Antiquities Act context. Soda.Mountain.Opp.19. That the Court has three separate opinions providing three modes of analysis here provides uncommonly robust lower-court consideration of the precise question in this case.

And, for the same reasons that a split is unlikely to develop on whether the Antiquities Act allows the

President to override a contrary statute, other Antiquities Act questions are not susceptible to a clean split. For example, one circuit's determination that a monument within its geographic region is compatible with the Antiquities Act's "smallest area" requirement will not create a split with a different circuit's determination that a different monument within its area fails that requirement. 54 U.S.C. 320301(b); see *Mass. Lobstermen's*, 141 S. Ct. at 981 (statement of Roberts, C.J.). The two courts would be reviewing different monuments of different sizes aimed at protecting different objects.

At bottom, that every monument designation will be unique and geographically limited makes it near-impossible for any clean split to develop on any Antiquities Act question. If the Court wishes to address the Antiquities Act, it cannot wait for a split. Given the importance of the question presented—and the egregiously wrong reasoning of the Ninth Circuit—the Court should grant review here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Michael E. Haglund
Julie A. Weis
HAGLUND KELLEY LLP
2177 SW Broadway
Portland, OR 97201
(503) 225-0777

Donald B. Verrilli, Jr.
Counsel of Record
Elaine J. Goldenberg
Rachel G. Miller-Ziegler
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Donald.Verrilli@mto.com

March 5, 2024