No. 20-97

In The
Supreme Court of the United States

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al.,
Petitioners,

v.

WILBUR ROSS, Secretary of Commerce, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, AND OFFSHORE OPERATORS COMMITTEE IN SUPPORT OF PETITIONERS

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Question Presented

The Antiquities Act of 1906 authorizes the President to declare national monuments to protect certain objects "situated on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). The boundaries of such monuments must be the "smallest area compatible with the proper care . . . of the objects to be protected." Id. § 320301(b).

For 100 years, the Antiquities Act was understood to apply only where the federal government has plenary power, such as federal land and tribal land. In 2006, however, the President claimed to discover that his power was greater than previously understood. Interpreting the Antiquities Act to authorize monuments anywhere the federal government has a significant amount of regulatory authority, the President designated five vast ocean monuments including the 3.2 million-acre Northeast Canyons and Seamounts Marine National Monument.

The questions presented are:

Whether, in conflict with the holdings of the Fifth and Eleventh Circuits and the National Marine Sanctuaries Act, the Antiquities Act applies to ocean areas beyond United States' sovereignty where the federal government has only limited regulatory authority.

Whether the President can evade the Antiquities Act's "smallest area" requirement, including designating ocean monuments larger than most states, by vaguely referencing "resources" or an "ecosystem" as the objects to be protected.

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IDENTITIES AND INTERESTS OF AMICI

Amici[1] consist of a broad coalition of associations representing the onshore and offshore energy exploration and production industry.

The International Association of Geophysical Contractors (IAGC) is the global trade association for the geophysical and exploration industry, the cornerstone of the energy industry. IAGC works to enhance public understanding to support a strong, viable geophysical and exploration industry essential to discovering and delivering the world's energy resources. IAGC's membership includes onshore and offshore survey operators and acquisition companies, data and processing providers, exploration and production companies, equipment and software manufacturers, industry suppliers, and service providers.

The National Ocean Industries Association (NOIA) represents and advances a dynamic and growing offshore energy industry, providing solutions that support communities and protect workers, the public and the environment. NOIA has more than 100 member companies, representing offshore oil and natural gas, wind and mineral production, drilling contractors, service providers, geophysical explorers,

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[1] Counsel of record for all parties received timely notice of the intention to file this brief, and the parties have consented to the brief's filing. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than amici, their members or counsel made a monetary contribution towards the preparation of submission of this brief.

manufacturers and suppliers, marine construction, marine and air transportation, and law, finance and professional services, among other offshore industry segments.

The Offshore Operators Committee (OOC) is a trade association formed in 1948. It represents offshore oil and natural gas exploration and production companies that operate on the Outer Continental Shelf, as well as the service and supply industries that support their efforts. In 2019, the OOC's mission expanded to include offshore renewable-energy development.

Members of amici who are involved in the offshore development of energy take pride in doing so in a way that is both safe and protective of marine resources. And they recognize the Federal Government's role in the protection of those important resources. Their interest is in ensuring that all government actions to that end are consistent with the law.

Congress gave the Executive Branch authority to protect special marine areas through the enactment of the National Marine Sanctuaries Act. That law provides for a transparent, democratic, and robust review process before the Secretary of Commerce may designate and thereby restrict activities in ocean areas. But in an effort to short-circuit those strict standards and procedures, established for the benefit of all stakeholders and the general public, the President has in recent years turned to an inapt and near-standardless statute enacted for the designation of *structures* and *objects* situated on *land* (the Antiquities Act of 1906) to proclaim millions of acres of ocean as "monuments." In the President's quest for

a quick and easy fix to the National Marine Sanctuaries Act's slower, more deliberative process, the Act has been abandoned—and, with it, the consensus-building, public participation, and scientific rigor that Congress purposely built into sanctuary decisions.

The livelihoods of amici's members depend upon the responsible use of ocean areas. Those areas are threatened with "monument" status by the mere stroke of a presidential pen, with no required public notice or comment, and no required consultation with affected States, the Congress, or experts. In hopes of restoring their voices and those of other stakeholders to the designation process, amici urge the Court to grant the petition and resolve whether the Executive may effectively modify or ignore laws, like the National Marine Sanctuaries Act, that plainly govern its authority to designate special marine areas.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Acting pursuant to the Antiquities Act of 1906, 54 U.S.C. §§ 320301 *et seq.*, President Obama issued Proclamation 9496 ("Proclamation"), designating approximately 3.2 million acres of the Atlantic Ocean as the Northeast Canyons and Seamounts Marine National Monument ("Monument"). 81 Fed. Reg. 65,161 (Sept. 21, 2016). With the objective of protecting that area as a special "marine environment," the Proclamation prohibits, among other activities, "[f]ishing commercially or possessing commercial fishing gear" within the Monument. *Id.* at 65163, 65165. Given that prohibition, commercial fishing groups challenged the Proclamation as

exceeding the authority that the Antiquities Act grants to the President. However, the Proclamation—and the purported authority upon which it rests—affect other vital industries, including amici's.[2]

The Proclamation largely bans oil, gas, and renewable-energy exploration and production in the Monument. The Proclamation specifically prohibits "[e]xploring for, development, or producing oil and gas or minerals, or undertaking any other energy exploration or development activities within the monument," as well as "drilling into, anchoring, dredging, or otherwise altering the submerged lands" or "constructing, placing, or abandoning any structure, material, or other matter on the submerged lands." *Id.* at 65164-65. The Proclamation and the purported authority on which it is based threaten the viability of offshore energy exploration and production, which is an important driver of this Nation's energy independence.[3]

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[2] In June, the President issued a new proclamation lifting the Monument's prohibitions on commercial fishing. 85 Fed. Reg. 35,793 (June 5, 2020). All remaining provisions of the Proclamation remain intact, including the prohibition on offshore energy exploration and development. *Id.*

[3] Bureau of Ocean Energy Management, *Oil and Gas Energy Fact Sheet* (rev. Jan. 2020), *available at* https://www.boem.gov/sites/default/files/documents/oil-gas-energy/BOEM_FactSheet-Oil%26amp%3BGas-2-26-2020.pdf ("Offshore oil and gas play an important role in our national energy portfolio. In Fiscal Year (FY) 2019, offshore federal production . . . accounted for about 16 percent of all domestic oil production and 3 percent of domestic natural gas production."); Bradford Alexander Hillman, *Stuck in Limbo: Can Offshore Wind Ever Break Free in New England Amid Maze of Regulatory and Political Challenges?*, 18 Vt. J. Envtl. L. 308, 345 (2016)

The areas offshore the Nation's coasts have for decades supplied oil and natural gas for the United States economy, and they are projected to become a major source of wind energy for the United States power market over the next ten to twenty years. Federal production from offshore areas has exceeded one million barrels of oil per day since June of 1996, with volumes reaching a record level of more than two million barrels of oil per day this past November.[4] Offshore production currently accounts for about 16 percent of domestic oil production and was as high as 32 percent of United States production in July of 2009.[5] Every barrel produced in the United States is one less barrel required from foreign sources.[6] As for renewable energy, nearly $70 billion in capital expenditures is projected for the build out of the Atlantic offshore wind industry between now and 2030, based upon forecasts of state offshore wind

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("New England retains vast potential in offshore wind that could bring a multitude of benefits to New England from reduced electric rates to energy independence to thousands of jobs and billions of dollars in investment."); Gregory J. Rigano, Note, *The Solution to the United States' Energy Troubles Is Blowing in the Wind*, 39 Hofstra J. Rev. 201, 236 (2010) ("[R]enewable energy in the form of offshore wind is imperative for the United States to proceed with its quest for energy independence.").

[4] U.S. Energy Information Administration, *Petroleum & Other Liquids: Crude Oil Production*, *available at* http://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbblpd_m.htm; U.S. Energy Information Administration, *Federal Offshore—Gulf of Mexico Field Production of Crude Oil*, *available at* https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFP3FM2&f=M.

[5] *Id.*

[6] *Id.*

power procurements.[7] Additional federal leasing opportunities for offshore wind could result in the development of 28 gigawatts of offshore wind energy, 80,000 American jobs per year by 2035, more than $1 billion to the U.S. Treasury, and $166 billion in total investment in the U.S. economy by 2035.[8]

As a voice of the offshore energy industry, amici recognize the need to protect special marine areas off the Nation's coasts. Their members have been steadfast in their promotion of the health and biodiversity of marine ecosystems, as they toil offshore to supply America's energy needs. But this case is not about *whether* the Federal Government can or should protect special marine environments. It is about *how* it may lawfully do so.

In 1972, over sixty-five years after passage of the Antiquities Act, Congress passed the National Marine Sanctuaries Act ("NMSA") for the specific purpose of protecting special marine areas—like the area designated by the 2016 Proclamation. 16 U.S.C. § 1431, *et seq*. Nevertheless, when designating marine areas, Presidents in recent years have abandoned the NMSA in favor of the Antiquities Act. The reason is that designating "monuments" under the Antiquities

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[7] Stephanie A. McClennan, Ph.D., University of Delaware, Supply Chain Contracting Forecast for U.S. Offshore Wind Power 6 (March 2019), *available at* https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/e/10028/files/2020/01/SIOW-White-Paper-Supply-Chain-Contracting-Forecast-for-US-Offshore-Wind-Power-FINAL.pdf.

[8] Feng Zhang et al., Economic Impact Study of New Offshore Wind Lease Auctions by BOEM (Aug. 2020), *available at* https://www.noia.org/wp-content/uploads/2020/08/Offshore-wind-economic-impact-analysis-white-paper-final-1.pdf.

Act is far easier and quicker than designating "sanctuaries" under the NMSA.

Indeed, the substantive and procedural requirements imposed by the two statutes could not be more different. The President has broad discretion under the Antiquities Act to designate monuments without regard to their social, economic, or environmental benefits and costs, and with no obligation to consult Congress, other government agencies, experts, or the public. In stark contrast, the NMSA allows a sanctuary to be designated only if strict standards and procedures are met, including subjecting the proposal to rigorous environmental review, and public notice and comment.

As detailed below, the two statutes are radically different in their purposes and their requirements. In that respect, and contrary to the lower court's conclusion, there is no meaningful "overlap" between the two. App. A-12—A-14. Yet in recent years, only one of those statutes has been used to designate and prohibit activities within large marine areas, in an obvious effort to evade the exacting requirements of the other. In practice, the Antiquities Act has swallowed the NMSA, rendering the latter "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009).

The Court should resolve an important federal question that affects several industries, including amici's: In pursuing the praiseworthy goal of protecting marine resources, may the President abandon the very statute intended to achieve that objective in favor of another, ill-suited statute, simply because it is more expedient? As long as that question

remains unanswered, the NMSA—a law that sensibly demands a deliberative and transparent approach to marine designations, like the one at issue in this case—will be relegated to the dustbin of history.

ARGUMENT

The D.C. Circuit Court of Appeals concluded that the President's novel interpretation of the Antiquities Act did not make the NMSA redundant. App. A-13. The court found that the statutes just overlap, offering the President a choice as to which statute to employ when identifying and protecting special marine environments. App. A-12—A-14. In so finding, the court deftly avoided the separation-of-powers problem with the President's effective repeal of the very statute that governs its authority to protect marine areas. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."). The D.C. Circuit Court of Appeals was wrong. As the following chart illustrates, and as explained in detail below, the statutes differ dramatically in every important respect:

	Antiquities Act	**National Marine Sanctuaries Act**
Designator and Designation	The President designates "monuments." 54 U.S.C. § 320301(a).	The Secretary of Commerce designates "sanctuaries." 16 U.S.C. § 1433(a).

Object of protection	"objects of historic or scientific interest … situated on land." 54 U.S.C. § 320301(a).	"any discrete area of the marine environment … of special national significance." 16 U.S.C. § 1433(a).
Substantive limitations on discretion to designate	(1) designated land in and around protected structure or object must be "smallest area" possible, and (2) Congress must authorize any proposed extension or establishment of Wyoming monuments.[9] 54 U.S.C. § 320301(b), (d).	The Secretary weighs 12 factors, including the need for the sanctuary; the area's significance; commercial and other uses of the area; the "negative impacts" of restrictions on "income-generating activities"; and the sanctuary's "socioeconomic effects." 16 U.S.C §§ 1433(b)(1).
Consultation requirement	None	The Secretary must, *inter alia*, submit a

[9] Another statute limits the power to declare monuments in Alaska. 16 U.S.C. § 3213(a).

		sanctuary proposal to Governors of affected states and Congress, who can effectively veto the proposal. 16 U.S.C §§ 1433(b)(2), 1434.
Procedures for designation	By proclamation, at the President's "discretion." 54 U.S.C. § 320301(a).	Review of the sanctuary proposal under NEPA, including for economic impacts; extensive consultation; public notice and comment; public hearing. 16 U.S.C § 1434.

The Antiquities Act is styled "[a]n Act For the Preservation of American antiquities." Antiquities Act of 1906, Pub. L. 59-209, 34 Stat. 225 (codified at 54 U.S.C. §§ 320301-03). The Act starts by making it a crime, punishable by a fine and/or imprisonment, to "appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the government of the United States" without prior authorization. *Id.* Against the backdrop of protecting antiquities, the Act gives the President the power, "in his discretion, to declare by public proclamation

historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments." *Id.*; *see also* 54 U.S.C. § 320301(a) (codified language).

Events leading up to the Act's passage corroborates the fact that its purpose is "to protect ancient and prehistoric American Indian archaeological sites on federal lands in the southwest from looting." John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Yale J. on Reg. 617, 623 (2018). While the focus of the Act is on the protection of "man made artifacts" and "archaeological sites" (*id.* at 624-25), the Act does allow the President to "reserve parcels of land" as part of the monument designation, "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). But "the allowance for small historic landmarks was not meant to include vast scenic or geological parks," let alone millions of acres of ocean beyond the sovereign borders of the United States. Yoo & Gaziano, *supra*, at 624-25.

Two scholars who extensively researched the history and purpose of the Antiquities Act conclude that the Act's application is limited to "protecting sites made historic by human endeavors and not geologic 'history.'" *Id.* at 625. Thus, in addition to structures or objects of "antiquity," and consistent with the Act's text and purpose, the President may make a "monument" of an "historic battlefield, an historic

home or treaty site, or a historic stop on the Oregon Trail or other well-known marker on a journey." *Id.*

Further, the President's authority under the Act to reserve land is only ancillary to, and strictly defined by, the designated structure or object. As noted above, the "limits of [reserved] parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). Thus, when it passed the Act, Congress never could have contemplated its use to designate, as an activity-restricting "monument," millions upon millions of acres of land, let alone vast ocean areas. One exchange on the floor of the U.S. House of Representatives between a congressman and the Act's sponsor (Representative John F. Lacey) highlights this indisputable fact:

> Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?
>
> Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.
>
> Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

> Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other serves the forests and the water courses.

40 Cong. Rec. 7888 (June 6, 1906) (cited and discussed by Yoo & Gaziano, *supra*, at 626 n.36).

The Act imposes no substantive or procedural conditions on the President's ability to designate monuments. That should come as no surprise. The Act's text and purpose make clear that the President has only limited authority to designate certain objects that are *bona fide* antiquities, as well as a small area of land in or around them, as "monuments." Given that narrow scope of authority, the Congress sensibly deemed it unnecessary to impose on the President extensive substantive and procedural requirements before designating a monument.

Congress' hands-off approach in the Antiquities Act stands in stark contrast to the more deliberative approach it took over sixty-five years later in the NMSA. The latter statute was passed in direct response to the absence of a federal law for the designation and protection of "areas of the marine environment which are of special national significance." 16 U.S.C. § 1431(b)(1). In its report on the bill, a congressional committee underscored "the need to create a mechanism for protecting certain important areas of the coastal zone from intrusive activities by man," which "is not met by any legislation now on the books." William J. Chandler & Hannah Gillelan, *The History and Evolution of the National*

Marine Sanctuaries Act, 34 Envtl. L. Reporter 10505, 10524 (2004) (quoting H.R. Rep. No. 92-361, at 15); *id.* at 10539 (noting a 1981 U.S. Government Accounting Office report that the NMSA "fills 'gaps' in federal regulatory authority affecting the protection of marine resources," because "it can offer benefits not available under other federal laws"—including, according to the article, the Antiquities Act). The NMSA's legislative findings note that efforts thus far "have been directed almost exclusively to land areas above the high-water mark." 16 U.S.C. § 1431(a)(1). Thus, the consensus at the time was that the presidential authority to declare monuments under the Antiquities Act did not reach marine areas and resources, such as the 3.2 million acres of Atlantic Ocean covered by the Proclamation at issue in this case.

To fill that gap, the NMSA authorizes the Secretary of Commerce to "designate any discrete area of the marine environment as a national marine sanctuary." *Id.* § 1433(a). The Act's focus is on the protection, not of land-based "structures" and "objects," but of the "marine environment" and marine "resource[s]." *Id.*; *United States v. Great Lakes Dredge & Dock Co.*, 259 F.3d 1300, 1303 (11th Cir. 2001) (upholding liability under the Act for damage to "sea bottom" and "sea grasses," which were deemed to be sanctuary resources); *United States v. M/V Miss Beholden*, 856 F. Supp. 668, 670 (S.D. Fla. 1994) (granting summary judgment on defendant's liability for damage to coral reefs, a sanctuary resource). "The language in the NMSA indicates that Congress intended it as the federal government's main vehicle for marine resource protection." Joseph Briggett,

Comment, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power To Designate Monuments in the Outer Continental Shelf*, 22 Tul. Envtl. L.J. 403, 417 (2009).

Significantly, the NMSA imposes rigorous substantive and procedural requirements. As one scholar put it, "[s]anctuary designation under the Act involves highly complex and time-consuming procedures." Peter H. Morris, *Monumental Seascape Modification Under the Antiquities Act*, 43 Envtl. L. 173, 184-95 (2013). Those procedures "promote pluralistic consensus-building over swift action." Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 Ecology L.Q. 71, 87 (2002).

First, the Secretary must consider twelve factors in assessing the benefits and costs of a sanctuary designation. 16 U.S.C. § 1433(b)(1). Factors include the qualities and significance of the area proposed for designation, the need for a sanctuary there, the negative impacts resulting from restrictions on income-generating activities in the sanctuary, and the socioeconomic effects of sanctuary designation. *Id.* Before the Secretary can designate a sanctuary, it must make adequate findings that the designation is appropriate in light of those factors. *Id.* § 1433(a).

The NMSA also requires the Secretary to engage in extensive consultation with numerous federal and state bodies and officials. 16 U.S.C. § 1433(b)(2). In particular, the Secretary must consult with congressional committees, various Executive Branch officials, State and local government officials and

agency heads who "will or are likely to be affected by the establishment of the areas as a national marine sanctuary," officials of any Regional Fishery Management Council that might be affected, and "other interested persons." *Id.* The consultation requirement ensures that there is broad political consensus and support in favor of the proposed sanctuary, including by those whose constituencies are most interested and affected by the proposal.

The NMSA also imposes a formal public notice requirement. For example, the Secretary must issue notice of its sanctuary proposal, proposed regulations, and draft management plan in the Federal Register. 16 U.S.C. § 1434(a)(1)(A). At the same time, the Secretary must also submit "draft sanctuary designation documents" to two congressional committees, as well as the Governor of each State in which any part of the sanctuary would be located. *Id.* § 1434(a)(1)(C). Those documents include the draft management plan, a draft environmental impact statement ("EIS") prepared pursuant to the National Environmental Policy Act ("NEPA"), maps of the sanctuary's proposed boundaries, and an assessment of the twelve factors under section 1433(b)(1). *Id.* § 1434(a)(2). The congressional committees receiving those documents may each hold hearings on the proposal and issue a report to the Secretary, which the Secretary must consider before publishing a notice of designation. *Id.* § 1434(a)(6). In addition, no earlier than 30 days following notice in the Federal Register, the Secretary must hold at least one public hearing in the coastal area or areas that will be most affected by the proposed sanctuary in order to receive public input. *Id.* § 1434(a)(3).

Finally, after completing the required consultation and the publication of a notice of proposal, the Secretary must follow certain procedures for formally designating the sanctuary. Again, the Secretary must publish in the Federal Register notice of designation, together with the final regulations, and submit that notice to Congress. *Id.* § 1434(b)(1). The Secretary must advise the public of the availability of the draft management plan and final EIS. *Id.* Either the Congress or the Governor of an affected state may block a designation or any of its terms before it goes into effect. *Id.*

Again, the Antiquities Act, which the President has used in this case to designate 3.2 million acres of ocean, contains none of these substantive and procedural safeguards. The two statutes do *not* overlap in any legally relevant way, as the D.C. Circuit found. They are different in their legislative purposes, in the objects they seek to protect, and in their standards and procedures for designation.

"The standard designation process laid out in the NMSA is lengthy and entails exceptional stakeholder involvement." Jason Patlis et al., *The National Marine Sanctuary System: The Once and Future Promise of Comprehensive Ocean Governance*, 44 Envtl. L. Reporter 10932, 10937 (2014). And that's a good thing. By providing standards and procedures for designating sanctuaries, the NMSA "is more likely to create comprehensive sanctuaries that work because it involves all interested parties." Briggett, *supra*, at 417. That "buy in" from stakeholders and members of the public who know their voices have been heard before a sanctuary is designated makes it more likely

that prohibitions and restrictions associated with the sanctuary will be respected. *Id.*

With the President's new-found "authority" to proclaim marine sanctuaries under the Antiquities Act, NMSA has effectively become a dead letter. Why seek congressional, State, or stakeholder input and approval for a proposed designation, or subject it to extensive environmental review under NEPA, when a simple, unilateral proclamation under the Antiquities Act will do? The Antiquities Act of 1906 may be a convenient tool to designate marine sanctuaries, but presidential invocation of that statute for that purpose defies congressional authority and intent. The Court should grant certiorari to consider the important federal question whether the 2016 Proclamation, and the purported authority under which it was issued, violate basic separation-of-powers principles.

CONCLUSION

For these reasons, and those stated in the petition, the petition should be granted.

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Respectfully submitted,

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