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

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the President may establish a national monument within the U.S. Exclusive Economic Zone, an area of the ocean over which the federal government exercises substantial and unrivaled control, including specifically for the purpose of protecting the marine environment.

2. Whether Petitioners' complaint failed to allege sufficient non-conclusory facts to support their claim that a national monument was impermissibly large.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Intervenor Respondents Natural Resources Defense Council, Inc., Conservation Law Foundation, and Center for Biological Diversity represent that each is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in any of the organizations.

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STATEMENT OF THE CASE

For decades, the Executive Branch, Congress, and this Court have agreed that national monuments may exist in the ocean. The earliest such monuments were close to shore, but after President Reagan established the U.S. Exclusive Economic Zone (EEZ) in 1983, Presidents began designating monuments to protect special places there as well. Petitioners were the first to challenge such a monument, and the courts below roundly—and correctly—rejected their arguments.

There is no conflict of authority regarding the President's power to designate national monuments in the EEZ. Petitioners point to a Fifth Circuit decision from 1978, but that case predated the EEZ's establishment and did not, in fact, involve a national monument at all. Petitioners' heavy reliance on that decades-old decision—plus an Eleventh Circuit decision citing it for a wholly different proposition—highlights that the issues here are not frequently recurring and that there is no pressing need for this Court's review. Petitioners' further assertion that monuments in the ocean have "nullified" the National Marine Sanctuaries Act is factually incorrect. And Petitioners do not even attempt to identify any conflict of authority over their second, factbound question presented about this monument's size.

Moreover, this case is now a poor vehicle for addressing any of these questions because, as Petitioners themselves acknowledge, recent events have raised a threshold mootness issue that the Court would need to resolve before it could consider the merits. Certiorari should be denied.

I. Legal and Factual Background

The Antiquities Act empowers the President to preserve federal lands and objects of scientific or historic interest as national monuments. 54 U.S.C. § 320301(a)-(b); *see Alaska v. United States*, 545 U.S. 75, 103 (2005) ("An essential purpose of monuments created pursuant to the Antiquities Act … is to conserve the scenery and the natural and historic objects and the wild life therein … for the enjoyment of future generations." (quotations omitted)). Presidents have used this authority to protect marine areas off the coast since the 1930s.[1] Congress, too, has acted to protect such areas as national monuments.[2]

Petitioners assert that the Supreme Court has "not yet interpreted the statute's key jurisdictional phrase: 'land owned or controlled by the Federal Government.'" Pet. 5. But that is untrue. This Court has already construed that phrase and concluded there was "no serious question" that Presidents may protect submerged lands and waters in the ocean as national monuments. *United States v. California*

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[1] *See, e.g.*, Proclamation No. 2112, 49 Stat. 3430, 3431 (1935) (establishing Fort Jefferson National Monument off Florida's coast); Proclamation No. 2330, 53 Stat. 2534, 2534-35 (1939) (expanding Glacier Bay National Monument to include submerged lands up to three nautical miles from Alaska's coast); Proclamation No. 2825, 63 Stat. 1258, 1258 (1949) (expanding Channel Islands National Monument off California's coast to include area within one nautical mile of islands' shorelines).

[2] *See, e.g.*, Pub. L. No. 90-606, § 1, 82 Stat. 1188, 1188 (1968) (authorizing Biscayne National Monument off Florida's coast); Pub. L. No. 93-477, § 301(1), 88 Stat. 1445, 1446 (1974) (expanding Biscayne National Monument); Pub. L. No. 96-287, § 201, 94 Stat. 599, 600-01 (1980) (fine-tuning boundaries of Fort Jefferson National Monument).

(California II), 436 U.S. 32, 36 (1978). In that case, considering Channel Islands National Monument, the Court explained that the term "land" includes "submerged lands," and that the President in 1949 had authority to reserve those lands and the "waters located on or over" them because they were "controlled by the Government of the United States." *Id.* at 36 & n.9. More recently, the Court found that Glacier Bay National Monument "included the submerged lands within its boundaries"—both inside the bay and three miles "out to sea"—and called it "clear … that the Antiquities Act empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 101-03.

Because the Antiquities Act applies to land "owned or controlled by the Federal Government," 54 U.S.C. § 320301(a), it authorizes the President to designate monuments in new areas as the reach of U.S. ownership and control changes over time. *See infra* at 14-15. In the ocean, for example, the federal government has long claimed a territorial sea out to three nautical miles. *See United States v. California (California I)*, 332 U.S. 19, 33-34 (1947). In the 1980s, President Reagan significantly expanded the federal government's control in the ocean by extending the territorial sea out to twelve nautical miles and establishing the U.S. EEZ beyond that, out to 200 nautical miles. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (1988); Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983).[3]

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[3] President Reagan adopted the EEZ concept from the United Nations Convention on the Law of the Sea. *See* U.N.

Since President Reagan's 1983 proclamation establishing the U.S. EEZ, the federal government has exercised substantial and unrivaled control over its submerged lands and waters. Within this area, the United States has:

> (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters … ; and
>
> (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

48 Fed. Reg. at 10,605. In 2000, the Office of Legal Counsel (OLC) concluded that the nature and degree of the federal government's "control" allowed Presidents to designate national monuments in the EEZ under the Antiquities Act. *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 196-97 (2000).

Subsequently, President George W. Bush established four national monuments in the EEZ. In 2006, he designated the Northwestern Hawaiian

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Convention on the Law of the Sea arts. 55-57, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261. The Convention's relevant provisions are accepted as customary international law. *See* Restatement (Third) of Foreign Relations Law of the United States § 514 cmt. a (1987); *see also* Nat'l Oceanic & Atmospheric Admin., U.S. Maritime Limits and Boundaries, https://www.nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html#general-information (diagram of maritime zones) (last visited Dec. 1, 2020).

Islands Marine National Monument to protect a "dynamic reef ecosystem with more than 7,000 marine species." Proclamation No. 8031, 71 Fed. Reg. 36,443 (2006). In 2009, President Bush designated three more monuments in the EEZ: Marianas Trench, protecting the "greatest diversity of seamount and hydrothermal vent life yet discovered," Proclamation No. 8335, 74 Fed. Reg. 1557 (2009); Pacific Remote Islands, protecting "endemic species including corals, fish, shellfish, [and] marine mammals," Proclamation No. 8336, 74 Fed. Reg. 1565 (2009); and Rose Atoll, protecting a "reef ecosystem that is home to a very diverse assemblage of terrestrial and marine species," Proclamation No. 8337, 74 Fed. Reg. 1577 (2009).[4]

In 2016, following a yearlong public engagement process, President Obama designated the Northeast Canyons and Seamounts Marine National Monument ("the Monument"). *See* Proclamation No. 9496, 81 Fed. Reg. 65,161 (2016) ("the 2016 Proclamation") (App. D-52 to D-66); *see also infra* at 6 n.6. The Monument is located within the EEZ, roughly 130 miles southeast of Cape Cod, and it protects a "region of great abundance and diversity as well as stark geological relief." App. D-52. Divided into two units that together total roughly 5,000 square miles, the Monument encompasses three submarine canyons, four extinct undersea volcanoes, and the ecosystems in and around them. *See infra* at 26 (map of the Monument).

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[4] *See also* Proclamation No. 9173, 79 Fed. Reg. 58,645 (2014) (expanding Pacific Remote Islands); Proclamation No. 9478, 81 Fed. Reg. 60,227 (2016) (expanding Northwest Hawaiian Islands, now named Papahānaumokuākea).

The Monument area has long been the subject of "intense scientific interest" because of its unusual geology, its biodiversity, and the complex ecological relationships found there. App. D-57. Its canyons and seamounts "create dynamic currents and eddies that enhance biological productivity" and provide habitat to many species, including rare whales, sea turtles, seabirds, and ancient deep-sea corals. App. D-52 to D-57. Since its designation, scientific research has flourished in the Monument: Researchers have observed an extraordinary array of marine life there, including new species of deep-sea corals not known to live anywhere else on Earth.[5]

To protect the Monument's unique ecological resources, which are "extremely sensitive to disturbance from extractive activities," the 2016 Proclamation prohibited commercial fishing, oil and gas development, and certain other activities within the Monument's boundaries. App. D-53 to D-54, D-61 to D-62. Those boundaries were "narrowly tailored based on the best available science and stakeholder input," including from commercial fishing industry representatives.[6] Further, American lobster and red

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[5] *See* Woods Hole Oceanographic Inst., New Deep-Sea Coral Species Discovered in Atlantic Marine Monument (Apr. 9, 2019), https://www.whoi.edu/press-room/news-release/new-species-of-deep-sea-corals-discovered-in-atlantic-marine-monument/; U.S. Fish & Wildlife Serv., Exploration, Northeast Canyons and Seamounts Marine National Monument, https://www.fws.gov/northeast/northeast-canyons-and-seamounts/science-and-research/exploration.html (last visited Dec. 1, 2020).

[6] White House, Office of the Press Sec'y, Fact Sheet (Sept. 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate.

crab fishermen were permitted to continue fishing for seven years within the Monument to give them time to transition to other areas. App. D-63.

II. Procedural Background

Petitioners—five commercial fishing trade associations—challenged the Monument's designation as a purported "[v]iolation of the Antiquities Act." App. D-24. They advanced two arguments: first, that the Monument does not encompass "'lands owned or controlled' by the federal government," and second, that it is not "'the smallest area compatible with proper care and management' of the canyons and seamounts." App. D-24 to D-26. Three conservation groups and a naturalist ("Intervenor Respondents") intervened to defend the Monument.

The district court rejected Petitioners' arguments and dismissed their complaint, and a unanimous D.C. Circuit panel affirmed. Both courts followed this Court's pronouncements that national monuments may protect submerged lands and superjacent waters in the ocean, App. A-10 to A-14, B-11 to B-21, and concluded—consistent with the 2000 OLC opinion—that the federal government's substantial "control" over the EEZ allowed the President to designate a monument there. App. A-15 to A-17, B-21 to B-34.

Both courts also rejected Petitioners' contention that this holding conflicts with the Fifth Circuit's decades-old decision in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), which—both courts noted—predated President Reagan's establishment of the U.S. EEZ and thus never addressed whether the federal government controlled that area. App. A-17 to A-18, B-34 to B-35.

Finally, both courts rejected Petitioners' fact-specific challenge to the Monument's size, holding that Petitioners' complaint did not include sufficient nonconclusory factual allegations to support the claim. App. A-18 to A-20, B-37 to B-39.

The D.C. Circuit denied Petitioners' request for en banc rehearing in February 2020. App. C-1. No member of the court called for a vote. *Id.*

In June 2020, President Trump issued a proclamation lifting the Monument's prohibition on commercial fishing. *See* Proclamation No. 10049, 85 Fed. Reg. 35,793 (2020) ("the 2020 Proclamation"). That proclamation gave Petitioners the principal relief they sought in the instant litigation. *See* App. D-26. Intervenor Respondents have challenged the 2020 Proclamation in district court. *See Conservation Law Found. v. Trump*, No. 20-cv-01589 (D.D.C.).

REASONS TO DENY THE WRIT

I. Petitioners' First Question Does Not Merit Review.

A. There is no circuit split.

The D.C. Circuit and district court below are the only courts to have considered whether the President may designate national monuments in the EEZ. President Bush designated the first such monument in 2006, and no one challenged that monument—or the three others he designated. *See supra* at 4-5. Petitioners' lawsuit here was the first and, to date, *only* challenge to such a monument.

Petitioners' assertion that the D.C. Circuit is on the short end of a 2-1 circuit split, *see* Pet. 23-26, is thus manifestly incorrect—and, as to the cited Eleventh Circuit decision, borderline frivolous. The

only supposedly conflicting case Petitioners cite that even mentions the Antiquities Act is the Fifth Circuit's decision in *Treasure Salvors*, an *in rem* admiralty suit seeking to quiet title to a Spanish galleon "buried under tons of sand in international waters." 569 F.2d at 335. The United States intervened in that case to assert a claim to the salvaged shipwreck and its treasure, citing the Antiquities Act and other statutes. *Id.* at 337-40. The court rejected its claim. *Id.* at 333.

Treasure Salvors does not conflict with the D.C. Circuit's decision here for a simple reason: When *Treasure Salvors* was decided in 1978, the U.S. EEZ did not yet exist. President Reagan's proclamation declaring the EEZ was issued years later, in 1983. *See supra* at 3-4 & n.3; App. A-17 to A-18, B-34 to B-35; *see also Treasure Salvors*, 569 F.2d at 338 n.14 (describing ocean zones that existed in 1978). *Treasure Salvors* therefore did not—indeed, could not—consider the federal government's control over the EEZ. Instead, the Fifth Circuit focused primarily on the government's authority under the Outer Continental Shelf Lands Act (OCSLA)—the statute governing offshore oil and gas leasing—and held that the "limited scope" of federal control over the continental shelf for purposes of *exploiting* mineral resources did not establish control over that area for purposes of the Antiquities Act. 569 F.2d at 338-40.

When President Reagan established the U.S. EEZ several years later, he asserted significantly broader control than the federal government had exercised over the continental shelf under OCSLA. Specifically, the EEZ established U.S. control—over the submerged lands *and waters* within 200 nautical miles of the coastline—not only for purposes of "exploiting" the

natural resources there, but also for "conserving and managing" them for the "protection and preservation of the marine environment." 48 Fed. Reg. at 10,605. Ensuring "proper care and management" to "protect[]" and preserve such resources, 54 U.S.C. § 320301(b), is, of course, an "essential purpose of monuments created pursuant to the Antiquities Act," *Alaska*, 545 U.S. at 103. Thus, even assuming the federal government lacked control over the outer continental shelf for purposes of the Antiquities Act in 1978, that does not mean it lacked control over *the EEZ* after 1983—or in 2016, when the Monument at issue here was established. *See* 24 Op. O.L.C. at 197 n.18. Because *Treasure Salvors* confronted an entirely different and now obsolete legal landscape, it has "no bearing" on the question presented in this case. App. B-35.[7]

Petitioners assert that the Fifth Circuit has continued to apply *Treasure Salvors* after 1983, citing a footnote in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1227 n.4 (5th Cir. 1985). *See* Pet. 24-25. But that decision *rejected* the appellant's reliance on *Treasure Salvors*, and it never so much as mentioned the Antiquities Act—or the EEZ, for that matter. Instead, *Laredo* addressed whether OCSLA's provision granting federal courts

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[7] *Treasure Salvors* did not hold that "control" under the Antiquities Act depends on U.S. "sovereignty," as Petitioners apparently suggest. *See* Pet. 24-25. Rather, it merely observed that jurisdiction over the exploitation of mineral resources is "not necessarily an extension of sovereignty." 569 F.2d at 339. As explained above, the court had no occasion to consider whether the sovereign rights and jurisdiction that President Reagan later asserted in the EEZ (including for purposes of conserving and managing natural resources) sufficed under the Antiquities Act.

jurisdiction over cases arising from certain operations on the outer continental shelf, 43 U.S.C. § 1349(b), applied to a contract dispute involving construction of an oil and gas platform. 754 F.2d at 1225-27. The court concluded that *Treasure Salvors*' interpretation of OCSLA did not determine jurisdiction over that contract dispute. *Id.* at 1227-28 & n.4. In fact, *Laredo* also observed that Congress amended OCSLA—after *Treasure Salvors* was decided—to "update government control" over continental shelf resources, including by promoting "environmental protection." *Id.* at 1227 & n.6.[8] Accordingly, it is not even clear that *Treasure Salvors*' interpretation of OCSLA remains good law.

Petitioners next try to expand their illusory circuit split by arguing that the D.C. Circuit's decision conflicts with the Eleventh Circuit's "settled law" in *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 636 F.3d 1338 (11th Cir. 2011). Pet. 2, 23-26. But Petitioners never even cited *Odyssey* below, and for good reason: Like *Laredo*, the case has nothing to do with the Antiquities Act. The Eleventh Circuit relied on *Treasure Salvors* only for the proposition that "*in rem* actions concerning salvage [fall] within the scope of federal admiralty jurisdiction." *Odyssey*, 636 F.3d at 1340-41. It therefore held that a district court could hear a salvage contract dispute. *Id.* Because *Odyssey* addressed only admiralty jurisdiction over maritime contracts, 636 F.3d at 1340-41, and because it involved neither the

[8] *See, e.g.*, Pub. L. No. 95-372, §§ 101(13), 102(2)(B), 102(3), 92 Stat. 629, 631 (1978).

U.S. EEZ[9] nor the scope of control over submerged lands under the Antiquities Act, it does not bear on the question presented here.

In short, there is no conflict of authority—much less any "irreconcilabl[e]" one, Pet. 26—with the D.C. Circuit's decision below.

B. There is no other reason to grant certiorari.

1. The question is not frequently recurring or of pressing importance.

As described above, the district court and D.C. Circuit decisions here are the first to address the Antiquities Act's applicability in the EEZ. Even if the Fifth Circuit's inapposite decision in *Treasure Salvors* could be construed as conflicting with these rulings, however, Petitioners' heavy reliance on a case from more than 40 years ago—and which did not even involve a national monument—highlights that the question has not arisen with any frequency. Indeed, although Petitioners characterize President Bush's designation of four national monuments in the EEZ as an unconstitutional power grab and grave threat to the separation of powers, *see* Pet. 1-2, 5-7, 15-17, nobody challenged any of those designations in court, even though each of them restricted commercial fishing. The question presented plainly does not require the Court's immediate intervention.

Petitioners (and their amici) also overstate the economic importance of this case. Because Petitioners'

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[9] *See also Odyssey Marine Expl., Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 512 F. App'x 890, 892 (11th Cir. 2013) (noting shipwreck's location off the coast of England).

complaint failed at the pleading stage, they never had to prove their allegations of economic harm. Contrary to Petitioners' assertion that the "[M]onument contains a lucrative fishery," Pet. 10, U.S. government data suggest that only a very small number of commercial fishing vessels had previously derived any significant portion of their revenue from the Monument area.[10] Government data also show that overall landings and revenues in relevant commercial fisheries have either remained essentially stable or even increased since the Monument's designation.[11] The 2016 Proclamation neither precluded Petitioners' members from fishing elsewhere, nor adjusted their fishing quotas downward. In any event, as discussed below, *infra* at 30-31, recent events eliminated any harm Petitioners did suffer from the Monument's designation—underscoring the lack of any pressing need for this Court to review the question now.

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[10] *See* Jennifer Yachnin, *Interior Wrote Proclamations Scuttling Ocean Sites — Emails*, E&E News (July 24, 2018), https://www.eenews.net/stories/1060090197. Petitioners cite their own complaint for the "lucrative fishery" assertion, Pet. 10, but the relevant allegations refer to the vast "Georges Bank" area, not the Monument specifically. *See* App. D-15 to D-16; *see also* App. D-20 (Monument map, with inset showing "Georges Bank" almost entirely outside the Monument boundaries).

[11] *See* Brad Sewell, *The Northeast Canyons and Seamounts Marine National Monument: Impacts on Commercial Fisheries*, NRDC (Oct. 1, 2020), https://www.nrdc.org/resources/northeast-canyons-and-seamounts-marine-national-monument-impacts-commercial-fisheries (analyzing data from state-federal fisheries information program). Research suggests that protected ocean areas can benefit a range of fisheries in surrounding areas. *See, e.g.*, Benjamin Halpern *et al.*, *Spillover from Marine Reserves and the Replenishment of Fished Stocks*, 36 ENVTL. CONSERVATION 268 (2010).

If national monuments in the ocean actually pose the problems Petitioners suggest, someone would have challenged one of the earlier designations or will challenge another such monument in the future. Petitioners contend that five circuits are unlikely to confront the question because of their location or specialized jurisdiction, Pet. 23 n.10, but—even if true—that still leaves eight circuits that could hear a challenge. And *that* future case, unlike this one, may present an actual circuit split and not suffer from the vehicle problem that now complicates this one.

2. The decision below does not conflict with *Utility Air Regulatory Group*.

Petitioners also attempt to manufacture a conflict between the D.C. Circuit's decision and this Court's opinion in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), by asserting that President Bush purported to "discover" a new power when he designated a national monument in the EEZ. Pet. 15-17. But this assertion ignores a key aspect of the particular statutory phrase at issue here: By applying to land "owned or controlled by the federal government," 54 U.S.C. § 320301(a), the Antiquities Act's reach changes over time as the government's ownership and control changes too. *See* 24 Op. O.L.C. at 191; *supra* at 3.

The designation of monuments in the EEZ therefore is not a "belated, novel claim to power," as Petitioners contend, Pet. 16. Rather, it is entirely consistent with the Act's plain text and its historical application to new areas as the federal government has expanded its ownership or control. For example, a few decades after the United States acquired the U.S. Virgin Islands from Denmark, *see* 39 Stat. 1706 (1917),

President Kennedy designated Buck Island Reef National Monument to protect its coral reefs, Proclamation No. 3443, 27 Fed. Reg. 31 (1962). Contrary to Petitioners' contention, *see* Pet. 4-5, it is irrelevant whether the Antiquities Act's drafters "anticipated their work would lead to this particular result." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020); *cf. People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 257 (1937) (interpreting the statutory phrase "territory of the United States" to include Puerto Rico, even though it was not "in the immediate contemplation of Congress" in 1890). But, if anything, Congress likely expected that the Act's application to land "owned or controlled" by the federal government would reach new areas, because it enacted the statute at a time of significant territorial expansion.[12]

It is thus unsurprising—and "irrelevant," *Bostock*, 140 S. Ct. at 1751—that national monuments in the EEZ are relatively recent. President Reagan did not establish this zone of federal control until 1983, and, rather than irresponsibly aggrandizing power, *see* Pet. 15, later Presidents acted cautiously in applying the Act to this new area: Only following a confirmatory OLC opinion in 2000 did President Bush begin declaring monuments there. Nor does the size of these monuments suggest President Bush's interpretation of the Act was novel. *See id.* at 7-8. Rather, it simply

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[12] *See e.g.,* Joint Resolution, 30 Stat. 750 (1898) (annexing Hawaiian Islands); Treaty of Paris, U.S.-Sp., Dec. 10, 1898, 30 Stat. 1754 (acquiring Puerto Rico, Guam, and the Philippines); Convention Between the United States, Germany, and Great Britain, Dec. 2, 1899, 31 Stat. 1878 (acquiring parts of American Samoa).

reflects that the EEZ significantly expanded the area under U.S. control by billions of acres. *Id.* at 16 & n.5.

In short, the Antiquities Act's application to new areas as they come under federal ownership or control distinguishes this case from *Utility Air Regulatory Group*—and from the two other lower court opinions (one a concurrence) on which Petitioners erroneously rely. Unlike in those cases, the Executive Branch's "interpretation" of the relevant statute has not changed. *See Chamber of Com. v. U.S. Dep't of Labor*, 885 F.3d 360, 379-81 (5th Cir. 2018) (considering agency's "novel interpretation" of the phrase "investment advice for a fee"); *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302-03 (Fed. Cir. 2015) (O'Malley, J., concurring) (similar, regarding the term "articles"). Rather, what changed here is the *fact* of federal control over the EEZ—and, thus, the geographic scope of federally controlled areas to which the Antiquities Act, by its terms, applies.

3. There is no conflict between the Antiquities Act and the National Marine Sanctuaries Act.

Finally, Petitioners assert a "conflict" between the Antiquities Act's application in the ocean and the National Marine Sanctuaries Act. Pet. i, 17-23. The conflict is imaginary.

The Sanctuaries Act authorizes the Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), to designate marine sanctuaries if they meet certain criteria. *See* 16 U.S.C. § 1433(a). While the statute's "primary objective" is "resource protection," its purposes include facilitating "all public and private uses" of the sanctuary resources. *Id.* § 1431(b)(6). The Sanctuaries

Act also aims to provide "coordinated conservation and management" of marine areas that will "complement[] existing regulatory authorities." *Id.* § 1431(b)(2).

Petitioners are mistaken when they assert that "no marine sanctuaries have been established" since 2006, when President Bush first designated a national monument in the EEZ. Pet. 2, 9-10; *see also id.* at 22. On the contrary: NOAA designated a new marine sanctuary just last year, *see* 84 Fed. Reg. 50,736 (2019) (Mallows Bay–Potomac River), and it significantly expanded several other sanctuaries in recent years, *see* 80 Fed. Reg. 13,078 (2015) (Gulf of the Farallones and Cordell Bank); 79 Fed. Reg. 52,960 (2014) (Thunder Bay); 77 Fed. Reg. 43,942 (2012) (American Samoa). Additional proposed sanctuary designations and expansions are also underway. *See, e.g.*, 85 Fed. Reg. 25,359 (2020) (Flower Garden Banks expansion); 84 Fed. Reg. 16,004 (2019) (Great Lake Ontario). Clearly, the Sanctuaries Act has not been "rendered a nullity," Pet. 2, nor has the designation of national monuments in the ocean prevented NOAA from continuing to comply with the Sanctuaries Act's "substantive and procedural requirements," Pet. 22.[13]

In fact, Petitioners' assertion that monuments "circumvent the sanctuary designation process," Pet.

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[13] Petitioners' chronology suffers from another problem, too. They assert that President Bush's marine monuments "presaged the practical demise" of the Sanctuaries Act, Pet. 9-10, 22-23, but in fact, NOAA paused its process for new sanctuary nominations in 1995—over a decade *before* the first monument in the EEZ—so that it could focus on managing existing sanctuaries. *See* 79 Fed. Reg. 33,851, 33,852 (2014). Since reopening the process in 2014, *see id.*, NOAA has—as noted above—moved forward with several new sanctuary designations and expansions.

18, ignores at least two important statutory distinctions. First, the President establishes national monuments under the Antiquities Act, 54 U.S.C. § 320301, whereas NOAA (on behalf of the Secretary of Commerce) designates sanctuaries, 16 U.S.C. § 1433(a). Congress frequently imposes greater procedural requirements on federal agencies than on the President. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("[T]he President is not an agency within the meaning of the [Administrative Procedure] Act."). And second, while the Antiquities Act focuses solely on the "protect[ion]" of designated objects, 54 U.S.C. § 320301(b), the Sanctuaries Act's purposes include facilitating "*all* public *and private* uses of the resources," 16 U.S.C. § 1431(b)(6) (emphasis added)—a different mandate that informs its different procedures.

Nor is there anything "novel" about monuments and other protective designations, such as marine sanctuaries, potentially applying to the same area. Pet. 22. Petitioners do not (and cannot) dispute that Congress has enacted "overlapping sources of protection" on dry land, *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002)—such as wilderness areas, wildlife refuges, and forest reserves, each of which may encompass the same land as monuments. *See Cameron v. United States*, 252 U.S. 450, 455 (1920) (recognizing that preexisting "forest reserve remained effective after the creation of the monument," even where "both embraced the same land"); *Mountain States*, 306 F.3d at 1138 (rejecting purported conflict between national monuments and Wilderness Act and Endangered Species Act); *Utah Ass'n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) (similar), *appeal dismissed*, 455 F.3d 1094

(10th Cir. 2006); 24 Op. O.L.C. at 207 (noting Presidents have repeatedly "designat[ed] monuments on lands already reserved under other statutes"). That monuments and other protective designations may apply to the same land does not mean one of them is "redundant." Pet. 19.

Indeed, the Sanctuaries Act itself disproves Petitioners' suggestion, *see* Pet. 22, that Congress intended that Act to provide the exclusive means for protecting the marine environment. One of the Act's express purposes is to "complement[]" other "existing regulatory authorities" in marine areas. 16 U.S.C. § 1431(b)(2); *see also* 24 Op. O.L.C. at 210 (observing that the Sanctuaries Act "specifically envisions that other regulatory schemes could be applicable to the area sought to be designated as a sanctuary"). And, true to Congress's design, monuments and sanctuaries do co-exist and complement each other in the ocean. When Congress established a marine sanctuary in the Florida Keys in 1990, for example, it carefully drew the sanctuary's boundaries to retain, rather than displace, the existing national monument that also protected the marine environment there.[14]

Moreover, as Petitioners elsewhere acknowledge, *see* Pet. 5, Presidents have long designated national monuments to protect marine environments in the

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[14] *See* Pub. L. No. 101-605, § 5(b)(1), 104 Stat. 3089, 3090 (1990) (drawing sanctuary boundaries around submerged lands and waters of Fort Jefferson National Monument); *see also* Pub. L. No. 96-287, § 201, 94 Stat. at 600-01 (describing "significant coral formations, fish and other marine animal populations" protected within that monument). Similarly, in 2012, NOAA expanded an existing marine sanctuary to include parts of Rose Atoll Marine National Monument. 77 Fed. Reg. at 43,945.

territorial sea—both before and after the Sanctuaries Act's enactment in 1972. *See supra* at 2-3, 14-15 (discussing, e.g., Channel Islands and Buck Island Reef). Petitioners do not contend that those monuments "circumvent" the Sanctuaries Act. Pet. 1. If Petitioners mean to suggest that monuments *in the EEZ* conflict with the Sanctuaries Act, but monuments *in the territorial sea* do not, they never explain why that would be so. The Sanctuaries Act, which applies to both areas, *see* 16 U.S.C. § 1432(3), does not support such a distinction. Petitioners' purported conflict between the Antiquities Act and the Sanctuaries Act is illusory.

C. The D.C. Circuit's decision is correct.

Certiorari is also unwarranted here because the D.C. Circuit's decision is correct, and Petitioners never coherently explain what alternative reading of the Antiquities Act they would have this Court adopt.

1. First, the D.C. Circuit correctly concluded that the federal government's control over the EEZ suffices to support the Monument's designation. App. A-16 to A-18. As described above, the federal government has substantial and unrivaled authority over the area—including, specifically, for the purpose of "conserving and managing natural resources" and "protect[ing] and preserv[ing] … the marine environment." 48 Fed. Reg. at 10,605. The federal government exercises this authority by, for example, managing fisheries, and granting or denying permits to fish, 16 U.S.C. §§ 1801 *et seq*.; establishing marine sanctuaries, *id.* at § 1433; granting or denying permits to conduct marine

scientific research;[15] and leasing submerged lands to third parties for oil and gas development, or withdrawing such lands from leasing, 43 U.S.C. §§ 1334, 1341(a). *Cf.* Pet. 27 n.11 (asserting the relevant question regarding "control[]" under the Antiquities Act is "Congress'[s] authority over an area"). And no other sovereigns, states, or private landowners have competing authority in the area. App. A-17 (citing, e.g., *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1887 (2019)).

Petitioners never clearly explain what else they believe "control" requires. They criticize the D.C. Circuit for supposedly "eschewing any consideration of the statute's ordinary meaning," Pet. 17, but in fact, the same "[c]ontemporaneous dictionaries" Petitioners cite elsewhere, *id.* at 31, support the D.C. Circuit's conclusion. *See* Webster's New Int'l Dictionary 490 (1909) (defining "control" to mean to "exercise restraining or directing influence over," "dominate," "regulate," or "hold from action"); Webster's Int'l Dictionary 316 (1900) (similar); *see also* App. B-22 to B-23 (discussing dictionary definitions). Petitioners variously suggest "control" means something more: "plenary authority," "sovereignty," "police power," or "full dominion and power." *See* Pet. 1, 24-25, 28, 29. But they never explain which one (or combination) of these they believe to be necessary—much less how that is consistent with the ordinary meaning of "control."

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[15] *See* U.S. Dep't of State, Marine Scientific Research: About the Research Application Tracking System, https://www.state.gov/research-application-tracking-system/ ("The advance consent of the United States is required for [marine scientific research] conducted … within the U.S. EEZ") (last visited Dec. 1, 2020).

Petitioners' reliance on *California II* to invent a "full dominion and power" standard is particularly odd, given that Petitioners elsewhere argue the same portion of that decision is dictum. *See* Pet. 29-32. Regardless, *California II* did not suggest that full dominion and power was *necessary*, but rather that it was *sufficient* for there to be "no serious question" about control. 436 U.S. at 36. In fact, this Court recently observed that although the federal government lacked "plenary authority" over waters in Devil's Hole National Monument, it did have sufficient control over those waters to "'accomplish the purpose of the reservation.'" *Sturgeon v. Frost*, 139 S. Ct. 1066, 1078-79 (2019) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). The same is true here. The federal government has exclusive authority to "manag[e]" the submerged lands and waters of the EEZ, including for natural resource protection. 48 Fed. Reg. at 10,605. It therefore has sufficient control to ensure the "proper care and management" of the Monument's objects, 54 U.S.C. § 320301(b), and thus to "achieve the specific goal" of the Monument reservation here, App. A-16.

Petitioners also mischaracterize the D.C. Circuit's decision as adopting a "vague, three-part test." Pet. 27. It did not. Like *California II*, the D.C. Circuit simply found certain factors "sufficient" to conclude that the federal government "controls" the Monument area as that word is ordinarily understood. App. A-16 to A-17. Petitioners further misread the D.C. Circuit's decision as justifying the designation of national monuments on state or private land, *see* Pet. 27, but it does no such thing. As the court explained, land-owning parties possess competing authority in those other areas, whereas "no other entity—public or private—exerts

competing influence" in the EEZ. App. A-18. Petitioners' observation that the federal government "permits" states to exercise certain authority over federal land, Pet. 28, does not mean states possess "competing" authority to "[]rival[]" the federal government's, App. A-17 to A-18.

2. Second, the D.C. Circuit correctly applied this Court's pronouncements in concluding that the Antiquities Act reaches submerged lands and waters in the ocean. App. A-10 to A-12. Petitioners assert that this Court should grant certiorari to "finally and fully consider" the issue, Pet. 32, but this Court has already found it "clear" that the Act "empowers the President to reserve submerged lands," *Alaska*, 545 U.S. at 103; *see also Cappaert*, 426 U.S. at 141-42, and has asserted that there is "no serious question" that the Act applies to submerged lands and waters in the ocean, *California II*, 436 U.S. at 36 & n.9. No lower court has ever questioned that interpretation.[16]

Contrary to Petitioners' contention, *see* Pet. 30 & n.14, this Court's interpretation of the Antiquities Act in *Alaska* was a holding, not dictum. Whether the President had lawfully "reserved the submerged lands underlying Glacier Bay and the remaining waters within the monument's boundaries" was, the Court explained, a "necessary part of the reasoning" for its decision. *Alaska*, 545 U.S. at 100-01. As the D.C.

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[16] Petitioners criticize the Court's explanations in those cases, *see* Pet. 30, but ignore that the Court had already interpreted "land" to include submerged land in other cases contemporaneous with the Antiquities Act's enactment. *See, e.g.*, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87-89 (1918) ("body of lands" in 1891 statute included submerged lands and waters).

Circuit observed, "[h]ad the President lacked authority to reserve the submerged lands in the first place, the Court would have had no reason to inquire into whether he had, in fact, intended to do so." App. A-11. And Petitioners never acknowledge the Court's holding in *Cappaert* that the President had "authority to reserve a pool" and its appurtenant water under the Antiquities Act. 426 U.S. at 141-42; *see* App. A-10, B-12.

Where "a decision … interprets a statute," as *Alaska* and *Cappaert* do, stare decisis carries "enhanced force." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Some "special justification—over and above the belief that the precedent was wrongly decided"—would be needed to unsettle the Court's interpretation. *Id.* (quotations omitted). Petitioners offer none. And even if the Court's unambiguous (and repeated) interpretation were dicta, the fact remains that Congress has had over four decades to correct any mistake it saw, and it can still do so at any time.

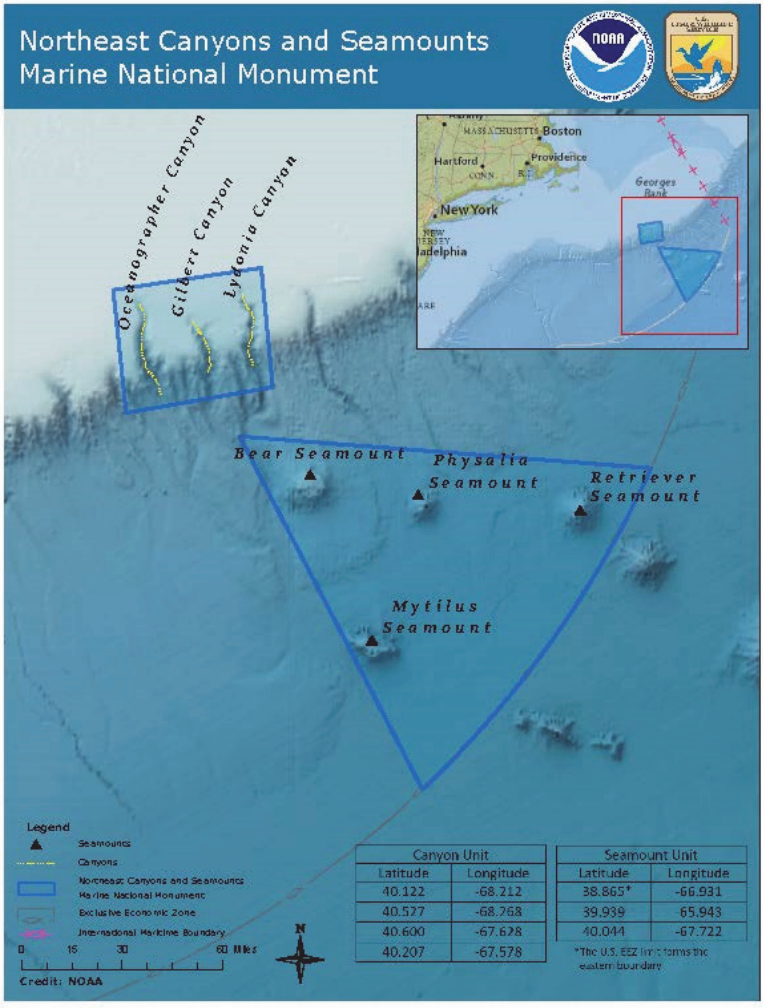
Indeed, Petitioners note that Congress has—more than once—taken action to limit the President's Antiquities Act authority in response to perceived overreach. *See* Pet. 5, 16, 34 (noting statutory limits on President's authority to designate monuments in Wyoming and Alaska). But Congress has never imposed similar limitations on the President's authority to designate monuments in the ocean, and, in fact, Congress has itself included submerged ocean lands in national monuments. *See supra* at 2 & n.2. For their part, Presidents have continued to designate such monuments in good-faith reliance on this Court's decisions. *See, e.g.*, 24 Op. O.L.C. at 186 n.2. Were the Court now to revisit its decades-old interpretation of

the Antiquities Act, it would jeopardize national monuments across the country that include submerged lands and waters. *See, e.g.*, Proclamation No. 3656, 30 Fed. Reg. 6571, 6571 (1965) (expanding Statue of Liberty National Monument to include "submerged lands" around Ellis Island).

II. Petitioners' Second Question Also Does Not Merit Review.

Petitioners' second question presented—concerning the sufficiency of their complaint's allegations regarding the Monument's size—implicates no arguable disagreement among the lower courts. It is a factbound claim of error that does not warrant this Court's review.

Petitioners premised their "smallest area" claim on their allegation that the Monument's boundaries "bear little relation to the canyons and seamounts" for which the Monument is named. App. D-25; *see also* App. D-4 to D-5, D-25 to D-26. This allegation cannot be credited. The Monument's boundaries bear a clear relationship to the canyons and seamounts, as the 2016 Proclamation's map (which Petitioners incorporated into their complaint) makes evident:



App. D-20.

Even if Petitioners' allegation were true, however, it *still* would be insufficient to support their claim. That is because the 2016 Proclamation designated not only "the canyons and seamounts themselves," but also "the natural resources and ecosystems *in and around* them," as objects of interest to be protected

under the Antiquities Act. App. D-53 (emphasis added). To state a claim that the Monument is not the "smallest area compatible with the proper care and management of the objects to be protected," 54 U.S.C. § 320301(b), it was thus "incumbent upon [Petitioners] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect." App. A-19 (quotations omitted). Petitioners made no such factual allegations. It was this pleading failure that required dismissal of the complaint. *See* App. A-19 to A-20, B-37 to B-39.

Petitioners now appear to argue that the 2016 Proclamation was too "vague" in its description of the natural resources and ecosystems that it designated for protection. Pet. 32-33. But in fact, the 2016 Proclamation described these objects of interest in considerable detail.[17] Petitioners point to no authority, either in the Antiquities Act or elsewhere, that requires the President to describe the designated objects with greater specificity. Nor do Petitioners explain why a factbound inquiry into the 2016

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[17] *See, e.g.*, App. D-53 to D-54 (explaining that "at least 54 species of deep-sea corals, … together with other structure-forming fauna such as sponges and anemones, … provid[e] food, spawning habitat, and shelter for an array of fish and invertebrate species"); App. D-56 to D-57 (explaining how the canyons and seamounts "create dynamic currents and eddies that enhance biological productivity and provide feeding grounds" in the area for species of scientific interest, including whales, dolphins, turtles, sharks, and puffins).

Proclamation's degree of specificity is worthy of this Court's review.[18]

To the extent Petitioners contend that natural resources or ecosystems are somehow too ill-defined to qualify as "objects of … scientific interest" under the Act, 54 U.S.C. § 320301(a), they identify no conflict of authority on the question and ignore this Court's repeated affirmation that the Antiquities Act does authorize protection of ecosystems and other living resources. *See, e.g.*, *Cappaert*, 426 U.S. at 141-42 (holding that rare fish and its subterranean pool habitat were objects of scientific interest); *Alaska*, 545 U.S. at 102-03 (noting an "essential purpose of monuments … is to conserve … wild life," such as "the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem" (quotations omitted)). Petitioners also float a narrower argument that national monuments cannot protect "whale species that migrate," Pet. 33, but that argument is irrelevant to the legality of *this* Monument, which includes numerous objects of scientific interest that do not migrate, *see, e.g.*, App. D-53 (describing "deep-sea corals" and "other structure-forming fauna"). Nor do Petitioners explain why a national monument could not protect important habitat for species whose

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[18] Amicus Cato Institute suggests adding a question presented about the standard for reviewing a President's exercise of delegated statutory authority, *see* Cato Amicus Br. i, but the premise of its suggestion—that the D.C. Circuit purportedly "imposes heightened pleading requirements," *id.* at 5—is untrue. *See* App. A-9 to A-10; *see also Tulare Cnty v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003) (per curiam) (explaining that the court applies "a no more rigorous standard of pleading than that of Fed. R. Civ. P. 8(a)").

individual members may move around. *Cf. Alaska*, 545 U.S. at 98-99 (describing birds, fish, whales, and bears that frequented monument's "complex ecosystem").[19]

Petitioners' (and amici's) various policy objections to what they deem "vast" monument designations, Pet. 34-36, are overstated and provide no basis to grant certiorari here either. Petitioners vaguely advert to "five other ongoing cases concerning the boundaries of national monuments," Pet. 34, but those cases present questions entirely different from the factbound pleading failure at issue here.[20] Petitioners and amici also suggest the President might determine the entire U.S. Atlantic to be an "object" worthy of protection, but (again) that hypothetical does not affect the legality of *this* Monument, whose boundaries were drawn to protect identified objects of "intense scientific interest," App. D-57, while also accommodating

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[19] Congress, notably, has itself endorsed monuments protecting such habitat. *See, e.g.*, Pub. L. No. 96-487, tit. ii, § 201(3), 94 Stat. 2371, 2379 (1980) (Cape Krusenstern National Monument shall "protect habitat" for birds, seals, and other marine mammals); Pub. L. No. 96-287, § 201, 94 Stat. at 600 (recognizing need "for protecting … fish and other marine animal populations, and populations of nesting and migrating birds" within Fort Jefferson National Monument).

[20] Two cases challenge the *removal* of land from monuments, *Wilderness Soc'y v. Trump*, No. 17-cv-2587 (D.D.C.); *Utah Diné Bikéyah v. Trump*, No. 17-cv-2605 (D.D.C.), while two others challenge the reservation of lands covered by the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act, *Am. Forest Res. Council v. Hammond*, No. 20-5008 (D.C. Cir.); *Murphy Co. v. Trump*, No. 19-35921 (9th Cir.). And Petitioners never explain how Intervenor Respondents' lawsuit challenging the re-opening of the entire Monument to commercial fishing, *Conservation Law Found. v. Trump*, No. 20-cv-1589 (D.D.C.), "concern[s] the [Monument's] boundaries," Pet. 34.

commercial interests, *see* App. D-20 (map showing transit corridor between Monument units). In any event, as the government explained below, Congress can, and does, rein in presidential monument designations when it disagrees with them.[21] Congress has reduced the size of particular monuments,[22] and it has acted to restrict future monument designations in other circumstances, *see supra* at 24. "Such legislation demonstrates Congress's willingness to consider policy concerns of the sort" that Petitioners and their amici press here. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014).

III. Recent Events Present a Vehicle Problem, and *Munsingwear* Vacatur Is Unwarranted.

A. Recent events further undermine the asserted importance of this case and make it a poor vehicle for considering the questions presented. In June 2020, President Trump issued a proclamation leaving the Monument designation and boundaries intact, but "lift[ing] the prohibition on commercial fishing" based on an assertion that the prohibition is "not, at this time, necessary." 85 Fed. Reg. at 35,793-94. Because Petitioners premised their alleged injury on the Monument's commercial fishing restrictions, *see supra* at 13, they do not identify any ongoing harm they face now that the 2020 Proclamation has "remov[ed]" those

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[21] *See* Oral Argument at 22:28-23:15, D.C. Cir. No. 18-5353, https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/485E883472F2DFDC8525849B005A5D94/$file/18-5353.mp3.

[22] *See, e.g.*, Pub. L. No. 81-837, ch. 1030, 64 Stat. 1033 (1950) (Joshua Tree); Pub. L. No. 87-81, § 2, 75 Stat. 198 (1961) (Cedar Breaks); Pub. L. No. 104-333, tit. II, § 205(a), 110 Stat. 4093, 4106 (1996) (Craters of the Moon).

restrictions. 85 Fed. Reg. at 35,794. Given this changed factual backdrop, there is no pressing "need for this Court's review." Pet. 37.

Indeed, because the 2020 Proclamation has removed their asserted injury, Petitioners acknowledge that the proclamation raises a threshold mootness question that the Court would need to resolve before it could reach either question presented. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975 (2016) ("[b]efore we reach the merits, we must assess our jurisdiction," including mootness). Petitioners impliedly concede that the mootness issue itself does not warrant certiorari, as they omit it from their questions presented. *See* Pet. i. And yet, the mootness issue indisputably poses a threshold hurdle for this Court's review of those questions and could divert the Court's resources and attention were it to grant certiorari. *See, e.g.*, *Kingdomware*, 136 S. Ct. at 1976 (basing mootness determination in part on declaration submitted after supplemental briefing on the question). The 2020 Proclamation thus presents a vehicle problem that could complicate, if not ultimately foreclose, the Court's consideration of the questions that Petitioners ask this Court to review.

B. Petitioners' alternative request for vacatur under *United States v. Munsingwear*, 340 U.S. 36, (1950), *see* Pet. 38-39, is misplaced for several reasons.

First, vacatur is available only where the Court finds that a case is indeed moot. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam) (granting vacatur where it was "undisputed" that respondent's "individual claim … became moot"). Yet here, Petitioners maintain that their claims are *not* moot because the 2020 Proclamation "creates no …

barrier to reimposing the prohibition[]" on commercial fishing. Pet. 37 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017)). They may be right: The 2020 Proclamation asserts that a commercial fishing prohibition is "not, *at this time*, necessary." 85 Fed. Reg. at 35,794 (emphasis added). And Intervenor Respondents have challenged the proclamation as unlawful. *See supra* at 8. Given Petitioners' own arguments and the text of the 2020 Proclamation, the Court cannot presently find this case moot based on the record and briefing before it. *Cf. Camreta v. Greene*, 563 U.S. 692, 711 (2011) (granting vacatur only where it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (quotations omitted)).

Second, even if the Court could find Petitioners' claims moot at this time, "not every moot case will warrant vacatur." *Azar*, 138 S. Ct. at 1792-93. Vacatur is a remedy "rooted in equity," *id.*, and "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate … equitable *entitlement* to th[at] extraordinary remedy," *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (emphasis added). Petitioners fail to meet that burden here.

Unlike a party "frustrated by the vagaries of circumstance" or by the "unilateral action of the party who prevailed below," *Bancorp*, 513 U.S. at 25, Petitioners actively worked to bring about the mooting event during the pendency of their lawsuit. They lobbied Federal Respondents to lift the Monument's

commercial fishing prohibition,[23] and they agreed to stay proceedings in this case for months while Federal Respondents considered Petitioners' and others' requests, *see* ECF Nos. 21, 23 (D.D.C. No. 17-0406). The 2020 Proclamation was not, therefore, mere "'happenstance'" or the typical "unilateral action" that warrants the equitable remedy of vacatur. *Bancorp*, 513 U.S. at 25 (quoting *Munsingwear*).

Third and finally, vacatur is unwarranted here because—for all the reasons explained above—the petition does not present any question that is independently worthy of this Court's review. As a result, the Court should "simply deny certiorari." Stephen M. Shapiro et al., Supreme Court Practice § 19.4, at 19-28 (11th ed. 2019). Indeed, it has long been "the consistent position of the United States that," in such circumstances, "the Court should ordinarily deny review" without vacatur. U.S. Br. in Opp. at 7, *Elec. Priv. Inf. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, cert. denied, 139 S. Ct. 791 (2019) (No. 18-267); *see also, e.g.*, U.S. Br. in Opp. at 11-14, *Enron Power Mktg., Inc. v. N. States Power Co.*, cert. denied, 528 U.S. 1182 (2000) (No. 99-916). This Court's practice accords with that position. *See* Supreme Court Practice § 19.4, at 19-28 n.34.

That practice makes sense: Vacatur is an equitable remedy for "those who have been prevented

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[23] *See, e.g.*, Letter from Jonathan Wood, Att'y, Pac. Legal Found., to Ryan Zinke, Secretary, Dep't of the Interior at 20 (June 16, 2017), https://beta.regulations.gov/document/DOI-2017-0002-173980; Letter from David Borden, Exec. Dir., Atl. Offshore Lobstermen's Ass'n, to Ryan Zinke, Secretary, Dep't of the Interior at 2 (July 7, 2017), https://beta.regulations.gov/document/DOI-2017-0002-545488.

from obtaining the review to which they are *entitled*." *Camreta*, 563 U.S. at 712 (emphasis added) (quoting *Munsingwear*, 340 U.S. at 39). But "[r]eview on a writ of certiorari is not a matter of right." Sup. Ct. R. 10. And because review here is unwarranted anyway, the intervening events cannot be said to have "prevented" this Court's review. There is nothing "unusual[]" or "unfair," Pet. 39, about leaving Petitioners to the same fate as any others who file an uncertworthy petition, and who must then live with a lower court decision with which they disagree.

CONCLUSION

The petition should be denied.

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