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.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The President has discretion to declare "objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. 320301(a). Monuments "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). The questions presented are:

1. Whether the court of appeals correctly held that submerged land in the U.S. Exclusive Economic Zone is "owned or controlled by the Federal Government." 54 U.S.C. 320301(a).

2. Whether the selection of natural resources and an ecosystem as protected objects is irreconcilable with the requirement that national monuments "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).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 945 F.3d 535. The opinion of the district court (Pet. App. B1-B39) is reported at 349 F. Supp. 3d 48.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2019. A petition for rehearing was denied on February 28, 2020 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 27, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2016, President Barack Obama established the Northeast Canyons and Seamounts Marine National Monument (Monument) in the northern Atlantic Ocean,

130 miles southeast of Cape Cod, to protect three underwater canyons, four undersea mountains, and the natural resources and ecosystems in and around them. Pet. App. A3, A5-A6, D52-D66; see *id.* at A22 (map). The Monument encompasses 4913 square miles of submerged land in the U.S. Exclusive Economic Zone (EEZ), which is generally defined as the belt of sea between 12 and 200 nautical miles from the United States coastline. *Id.* at A6, D59. Petitioners (commercial fishing associations) brought this action in the U.S. District Court for the District of Columbia challenging the Monument's establishment. *Id.* at A8. The district court dismissed the case, *id.* at B39, and the court of appeals affirmed, *id.* at A1-A22.

1. a. The Antiquities Act of 1906 (Antiquities Act), ch. 3060, 34 Stat. 225 (54 U.S.C. 320301 *et seq.*), confers "discretion" on the President to "declare * * * historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. 320301(a). "The President may reserve parcels of land as a part of the national monuments." 54 U.S.C. 320301(b). The "limits of th[os]e parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Ibid.*

b. Since the enactment of the Antiquities Act, seventeen Presidents have established and enlarged 158 national monuments in more than thirty States, the District of Columbia, four territories, and two oceans. Nat'l Park Serv., U.S. Dep't of the Interior, *Antiquities Act 1906-2006: Monuments List*, www.nps.gov/archeology/sites/antiquities/monumentslist.htm. Beginning in

1935, Presidents have designated and expanded numerous monuments situated on submerged land in oceans. See *ibid.*; Proclamation No. 2112, 49 Stat. 3430 (Jan. 4, 1935).

Those monuments include monuments in the EEZ. Pet. App. A5-A6. Since 1983, the United States has exercised "sovereign rights and jurisdiction" in the EEZ to the extent permitted under international law, including "with regard to * * * the protection and preservation of the marine environment." Proclamation No. 5030, 3 C.F.R. 22-23 (1983 comp.) (Reagan Proclamation). Consistent with the Reagan Proclamation, Congress has enacted statutes that regulate economic activity in, and conserve the marine environment of, the EEZ. See, *e.g.*, 16 U.S.C. 1362(15)(B), 1811(a); 43 U.S.C. 1331(a), 1333. After the jurisdiction of the United States over the EEZ was firmly established in federal statutory law, Presidents designated and expanded monuments in the EEZ. See, *e.g.*, Proclamation No. 9173, 3 C.F.R. 115 (2014 comp.); Proclamation No. 8335, 3 C.F.R. 1 (2009 comp.); Proclamation No. 8031, 3 C.F.R. 67 (2006 comp.).

2. a. Continuing in that tradition, President Obama issued a proclamation in 2016 that established the Monument in a 4913-square-mile area of the EEZ. Pet. App. A5, B4, D59; see *id.* at A22 (Monument map). The Monument protects three sets of objects: three underwater canyons, four undersea mountains (*i.e.*, seamounts), and "the natural resources and ecosystems in and around them." *Id.* at A6, D53 (citation omitted). In addition to its geological value, the area supports a "great abundance and diversity" of marine species. *Id.* at D52-D54. President Obama determined that the Monument is the

"smallest area compatible with the proper care and management of the objects to be protected." *Id.* at D59.

The 2016 proclamation directed the Secretary of Commerce and the Secretary of the Interior to "prohibit" within the Monument's boundaries "[f]ishing commercially"—with the exception of "[c]ommercial fishing for red crab and American lobster," which the proclamation authorized the Secretaries to "permit[]" for "not more than 7 years," at which point that too "is prohibited in the monument." Pet. App. D61-D63. In June 2020, however, three months after the court of appeals' mandate issued in this case, President Donald Trump "lift[ed] the prohibition on commercial fishing." Proclamation No. 10,049, 85 Fed. Reg. 35,793, 35,793 (June 11, 2020).

b. Petitioners filed suit in the U.S. District Court for the District of Columbia, asserting that designating the Monument was *ultra vires* because submerged land in the ocean is not "land," and the EEZ is not "controlled" by the federal government, within the meaning of the Antiquities Act, Pet. App. A8, A10 (citation omitted); and because interpreting the Act to permit ocean-based monuments would render the later-enacted National Marine Sanctuaries Act (Sanctuaries Act), 16 U.S.C. 1431 *et seq.*, a "practical nullity," Pet. App. A12 (quoting Pet. C.A. Br. 27). Petitioners further asserted that the Monument's boundaries do not cover the " 'smallest area compatible' with [the proper care and] management" of the canyons, seamounts, and natural resources and ecosystems in and around them. *Id.* at A8 (citation omitted).

The district court granted the government's motion to dismiss. Pet. App. B1-B39. The court first held that

the term "land" in the Antiquities Act encompasses submerged land under the ocean. *Id.* at B11-B17. The court further held that the federal government "controls" the EEZ under the Act because of its "broad sovereign authority to manage and regulate the EEZ" and its "specific authority to regulate the EEZ for purposes of marine conservation," and because the government's "control * * * is unrivaled." *Id.* at B30, B32. The Sanctuaries Act, the court held, "did not invalidate Congress's prior authorization to the Executive to designate national monuments." *Id.* at B19. The court did not reach the merits of petitioners' challenge to the size of the Monument because "the Monument's boundaries presumably align with the resources and ecosystems around them," and the complaint "allege[s] no facts to the contrary." *Id.* at B38.

3. The court of appeals affirmed. Pet. App. A1-A22.

a. The court of appeals first held that designating a monument that encompasses submerged land in the EEZ does not exceed the President's statutory authority under the Antiquities Act. Pet. App. A10-A18. The court determined that the term "land" in the Antiquities Act includes submerged land in the ocean, because this Court has "consistently held" that "the Antiquities Act reaches submerged lands and the waters associated with them." *Id.* at A10; see *id.* at A10-A12. The court of appeals observed that the issue was first considered in *Cappaert* v. *United States*, 426 U.S. 128 (1976), which "reject[ed] the contention that the [Antiquities] Act protected 'archeologic sites' only" and held that the Act authorized the President to reserve "an underground pool of water near Death Valley that housed a rare species of fish." Pet. App. A10 (quoting *Cappaert*, 426 U.S.

at 142). Next, the court explained, *United States* v. *California*, 436 U.S. 32 (1978), "emphatically extended the point" to submerged land in the ocean, observing that "'[t]here can be no serious question that the President . . . had power under the Antiquities Act to reserve the submerged lands and waters' of Channel Islands National Monument" off California's coast. Pet. App. A10 (quoting *California*, 436 U.S. at 36) (brackets in original). Most recently, the court stated, *Alaska* v. *United States*, 545 U.S. 75 (2005), reaffirmed this conclusion, holding that "the Antiquities Act empowers the President to reserve submerged lands." Pet. App. A11 (quoting *Alaska*, 545 U.S. at 103).

The court of appeals next held that, for purposes of the Antiquities Act, the federal government "control[s]" the "area of ocean where [the Monument] is located." Pet. App. A15. Construing the statutory phrase "land owned or controlled by the Federal Government," 54 U.S.C. 320301(a), the court observed that "[c]ontrol and ownership . . . are distinct concepts," Pet. App. A15 (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 477 (2003)) (brackets in original), and concluded that "the federal government exercises sufficient authority to 'control[]' the U.S. EEZ for purposes of the Act." *Id.* at A16 (brackets in original); see *id.* at A17-A18.

The court of appeals based that conclusion on "three factors": (i) "'under international law,' the federal government exerts 'significant' 'authority to exercise restraining and directing influence over the EEZ,'" including for "'protecting the marine environment,'" Pet. App. A16 (quoting *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, 24 Op. O.L.C. 183, 196-197 (2000)); (ii) the government has "substantial authority over the EEZ under domestic

law," as "established" by the Reagan Proclamation and as subsequently expressed in "several statutes regulating extraction and conservation activities in the EEZ," *ibid.*; and (iii) the government has "'exclusive' authority over this portion of the ocean," unrivaled by another sovereign or owner, *id.* at A17 (quoting *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1887 (2019)). The court rejected petitioners' argument that its interpretation conflicted with *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), explaining that *Treasure Salvors* "predated the Reagan Proclamation and thus never addressed whether the federal government exercises control over the U.S. EEZ." Pet. App. A18.

The court of appeals also rejected petitioners' claim that the Sanctuaries Act cabins the President's authority under the Antiquities Act. Pet. App. A12-A14. The court explained that "Congress crafted the Sanctuaries Act to 'complement[] existing regulatory authorities,'" *id.* at A12 (quoting 16 U.S.C. 1431(b)(2)) (brackets in original), which that statute accomplishes by "empower[ing]" the "Secretary of Commerce to 'designate any discrete area of the marine environment as a national marine sanctuary,'" *ibid.* (quoting 16 U.S.C. 1433(a)). "Applying the Antiquities Act to oceans does not nullify the Sanctuaries Act," the court concluded, because "the two statutory schemes differ in several critical respects." *Id.* at A13. The court explained that marine sanctuaries "may be larger" than national monuments in protecting the same resources; that the Sanctuaries Act "protect[s] more diverse values" than the Antiquities Act because the Sanctuaries Act safeguards "areas' 'recreational,' 'cultural,' or 'human-use values'"; and that the Antiquities Act "protect[s] specific '*objects*'

of historic or scientific interest," whereas "the Sanctuaries Act focuses on designating and managing '*areas* as the National Marine Sanctuary System.'" *Id.* at A13-A14 (emphases added; citations omitted). That "the Antiquities and Sanctuaries Acts 'provid[e] overlapping sources of protection'" within the EEZ, the court observed, does not conflict with "congressional intent regarding the" Sanctuaries Act's "scope and purpose." *Id.* at A14 (quoting *Mountain States Legal Found.* v. *Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002), cert. denied, 540 U.S. 812 (2003)) (brackets in original).

b. Like the district court, the court of appeals had no occasion to reach the merits of petitioners' challenge to the size of the Monument because the complaint "contains no factual allegations identifying a portion of the Monument that lacks the natural resources and ecosystems the President sought to protect." Pet. App. A20.

4. The court of appeals denied rehearing en banc, with no judge requesting a vote. Pet. App. C1-C2.

ARGUMENT

Petitioners contend (Pet. 14-32) that the court of appeals' interpretation of the Antiquities Act to reach submerged land in the EEZ is inconsistent with the Act, violates the separation of powers, intrudes on the Sanctuaries Act, and conflicts with the decisions of two other courts of appeals. The D.C. Circuit correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioners also are wrong to assert (Pet. 32) that this case "presents a * * * question about the meaning of the Antiquities Act's 'smallest area' limit," an issue on which the court below did not pass. Finally, although petitioners might be correct (Pet. 37-38) that President Trump's lifting of the commercial fishing ban does not

entirely moot the case, that action raises substantial questions regarding standing and the availability of equitable relief that were not decided below and that would be an impediment to review here. The petition for a writ of certiorari should be denied.

1. a. The Antiquities Act provides the President with "discretion" to declare "objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government" as "national monuments," and to "reserve parcels of land as a part of the national monuments." 54 U.S.C. 320301(a) and (b). Since 1935, Presidents have interpreted the Act as a grant of authority to protect submerged land and water in the oceans. See pp. 2-3, *supra*. That practice is consistent with this Court's precedents, which have explicitly "recognized that [the Act] authorizes the reservation of waters located on or over federal lands." *United States* v. *California*, 436 U.S. 32, 36 n.9 (1978); see also *Alaska* v. *United States*, 545 U.S. 75, 103 (2005) ("It is clear * * * that the Antiquities Act empowers the President to reserve submerged lands."); *Cappaert* v. *United States*, 426 U.S. 128, 131, 147 (1976). This Court has also observed that the objects of "scientific interest" protected by the Act may include the natural resources and ecosystems associated with submerged lands and the waters above them. See *Alaska*, 545 U.S. at 102 (purpose of monument included "safeguarding the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem"); *Cappaert*, 426 U.S. at 141 (objects of interest included a species of fish and its "natural habitat").

b. The court of appeals properly followed those precedents to reject petitioners' challenges to the President's designation of a national monument on submerged land in the EEZ under the Antiquities Act.

i. Contrary to petitioners' contentions (Pet. 26-29), the court of appeals reasonably determined that the federal government "control[s]" the EEZ for the purposes of the Antiquities Act. The court correctly explained that because the Antiquities Act refers to "land owned *or* controlled by the Federal Government," 54 U.S.C. 320301(a) (emphasis added), the government's "control" over land may be sufficient under the Act "even if [the government] lacks authority akin to ownership there." Pet. App. A16-A17 (brackets omitted). The court identified three factors establishing the government's "control" over lands in the EEZ: the government's "'significant'" authority under international law to exert "'restraining and directing influence'" over the EEZ, including for "'protecting the marine environment,'" *id.* at A16 (brackets and citations omitted); the government's "substantial authority over the EEZ under domestic law" for numerous purposes pursuant to the Reagan Proclamation and subsequent congressional enactments, *ibid.*; and the fact that "no other entity matches" that "'extensive' 'restraining and directing influence'" in the EEZ, *id.* at A17 (citation omitted). Collectively, those authorities under international law and domestic law in an area constituting the United States *Exclusive* Economic Zone demonstrate that the federal government has the necessary "control" over the EEZ to designate a monument within that zone for the purpose of protecting the marine environment.

Petitioners do not dispute any of the three elements of the United States' primary authority identified by

the court of appeals as supporting a finding of "control" here. Instead, petitioners mischaracterize the court of appeals as having established a "three-part test" that is in tension with a supposed "standard" for "'control'" established by this Court's decision in *California*, *supra*. Pet. 27, 29. But the court of appeals did not establish a "test," *per se*, and instead pointed to three distinct aspects of the United States' authority over the EEZ that supported the President's determination that the specific area in question was under federal "control." Pet. App. A16. Nor did that straightforward analysis of the government's legal authority in the EEZ depart from any "standard" established in *California*, *supra*. In *California*, this Court simply observed that there "can be no serious question" that submerged lands surrounding the Channel Islands are "'controlled'" by the government given an earlier decision determining that the lands "were under federal dominion and control." 436 U.S. at 35-36. Thus, *California* had no occasion to establish a "standard" for determining whether land in the EEZ is under federal "control" within the meaning of the Antiquities Act.

For the same reason, petitioners err (Pet. 27) in asserting that the court of appeals' "test is unadministrable" as applied to other types of land. The court of appeals did not purport to announce a "test" that would apply in other contexts, such as evaluating federal "control" over private or tribal lands within the territory of a State. Indeed, entirely separate legal provisions often govern in those situations. See, *e.g.*, 54 U.S.C. 320301(c) (Antiquities Act provision establishing that land "held in private ownership" may be reserved as part of a monument if the owner chooses to "relinquish[]" that land

to the federal government); *Cohen's Handbook of Federal Indian Law* chs. 10, 15, 17, 20 (Nell Jessup Newton et al. eds., 2012) (explaining that the management of Indian lands—including to protect historic sites—is governed by numerous federal statutes specifically applicable to Indian lands, most of which were enacted after the Antiquities Act).

ii. The court of appeals also correctly held that submerged land in the EEZ is "land" under the Antiquities Act. As described above, that determination is consistent with this Court's case law, which has repeatedly recognized that the Antiquities Act covers submerged land. In reaching that conclusion, this Court has considered submerged lands within a State, *Cappaert*, 426 U.S. at 131, and beneath the territorial sea, *Alaska*, 545 U.S. at 99-100; *California*, 436 U.S. at 33. Accordingly, and contrary to petitioners' assertion (Pet. 31) that the Antiquities Act "does not" reach "the ocean," the location of submerged lands does not control whether it is "'land'" within the meaning of the Act.

The court of appeals also correctly rejected petitioners' assertion that the "pronouncement[]" in *Alaska* regarding the President's authority to reserve submerged lands is dicta. Pet. App. A11. In *Alaska*, this Court undertook a "two-step inquiry" to determine whether the United States retained title to submerged lands in Glacier Bay at the time of Alaska's statehood. 545 U.S. at 100. The first step required this Court to consider whether "Glacier Bay National Monument * * * included the submerged lands underlying Glacier Bay." *Id.* at 102. The Court answered that question in the affirmative. *Ibid.* As the court of appeals here explained, "[h]ad the President lacked authority to reserve the submerged lands in the first place, th[is] Court would

have had no reason to inquire into whether he had, in fact, intended to do so." Pet. App. A11; see *ibid.* (quoting maxim from *United States* v. *Windsor*, 570 U.S. 744, 759 (2013), that "legal conclusions that are 'necessary predicate[s]' to a court's holding are 'not dictum'") (brackets in original). Petitioners note (Pet. 30 n.14) that in answering the second step of the inquiry—whether the United States "inten[ded] to defeat Alaska's title to these submerged lands"—*Alaska* did not rely on the Antiquities Act. 545 U.S. at 103; see *id.* at 103-104 (instead analyzing the question under the Alaska Statehood Act). But even so, in discussing the second step, this Court observed that "it would require little additional effort to reach a holding that the Antiquities Act itself delegated to the President sufficient power not only to reserve submerged lands" (the first inquiry, answered in the affirmative), "but also to defeat a future State's title to them" (the second inquiry, answered on different grounds). *Id.* at 103.

Notwithstanding this Court's precedents, petitioners assert (Pet. 31) that the "ordinary meaning of 'land' does not include the ocean." That assertion disregards the crucial fact that ocean-based monuments are not "the ocean," but rather constitute, as exemplified by the Monument at issue in this case, land-based objects and the "waters and submerged lands in and around" them designated for protection. Pet. App. D57. In mischaracterizing the Monument, petitioners fail to engage with the key issue—this Court's repeated statements that monuments may include submerged lands and their appurtenant waters.

Petitioners are also incorrect in asserting that in 1906, the ordinary meaning of the word "land" would have excluded submerged land and appurtenant water

in the ocean. In support of that assertion, petitioners cite two contemporaneous dictionaries. Pet. 31 (citing *Webster's New International Dictionary* (1909), and *Webster's International Dictionary* (1900)). Yet those dictionaries include "land under water," *Webster's New International Dictionary* 1209, and "any earth * * * whatsoever" and "water" "annexed to it," *Webster's International Dictionary* 827, as proper usages of the word "land." That is consistent with the definitions of "land" in other leading contemporaneous dictionaries. See, *e.g.*, 5 *The Century Dictionary and Cyclopedia* 3342 (1911) (defining "land" to mean "any part of the continuous surface of the solid materials constituting the body of the globe," including "submerged land") (emphasis omitted); Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* 528 (1901) (defining "land" to mean "any ground, soil, or earth whatsoever," including "waters"); cf. *Illinois Cent. R.R.* v. *Chicago*, 176 U.S. 646, 660 (1900) (noting the "general principle" that "the word 'lands' includes everything which the land carries or which stands upon it," including "waters of every description by which such lands, or any portion of them, may be submerged").

c. Petitioners' contention (Pet. 14-23) that the court of appeals' interpretation of the Antiquities Act raises separation of powers concerns is incorrect.

i. As an initial matter, petitioners err in framing their statutory interpretation argument in constitutional terms. Petitioners' claim is not that the Constitution forbids the President from designating marine monuments, but that the President has exceeded the authority granted to him by the Antiquities Act and that the federal government should instead proceed through the Sanctuaries Act. Where, as here, "the only source

of [the President's] authority is statutory, no constitutional question whatever is raised." *Dalton* v. *Specter*, 511 U.S. 462, 474 n.6 (1994) (citation and internal quotation marks omitted); see also *id.* at 473 ("claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims").

In any event, petitioners are incorrect (Pet. 16) that the designation of EEZ-based monuments is based on a "novel claim to power." To be sure, Presidents have designated monuments in new *areas* that came under federal ownership or control after the 1906 enactment of the Antiquities Act. But those designations were made pursuant to the Act's preexisting grant of "discretion" to "declare" monuments on any "land owned or controlled by the Federal Government." 54 U.S.C. 320301(a). That practice has included the establishment of monuments on submerged land in the ocean. See, *e.g.*, *California*, 436 U.S. at 35 ("When President Truman issued Proclamation No. 2825 * * * in 1949, the submerged lands and waters within these belts were under federal dominion and control, *as a result of this Court's decision two years earlier*.") (emphasis added). After the Reagan Proclamation and subsequent congressional enactments established the United States' authority over the EEZ, Presidents designated monuments there as well. The same principle applies to monuments on dry land that came under federal control after 1906. See, *e.g.*, Proclamation No. 3443, 3 C.F.R. 21 (1962 Supp.) (establishing monument in the Virgin Islands). Petitioners do not question the legitimacy of those monuments, and EEZ-based monuments should be treated no differently.[1]

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[1] As petitioners acknowledge (Pet. 16-17), the court of appeals did not address their assertion (Pet. 14) that the designation of EEZ-

ii. Petitioners also contend (Pet. 17-26) that the court of appeals' interpretation of the Antiquities Act presents a "separation of powers question" because it "nullifies" the Sanctuaries Act. Pet. 17. As described above, this statutory claim presents no constitutional question. See pp. 14-15, *supra*; *Dalton*, 511 U.S. at 473-474 & n.6.

In any event, the court of appeals correctly rejected petitioners' "nullification" argument. Pet. App. A12-A14. The President's authority to designate national monuments in the EEZ in no way nullifies the authority of the Secretary of Commerce to designate marine sanctuaries, and nothing in the Sanctuaries Act supports the view that Congress intended for the Sanctuaries Act to be the exclusive authority for protecting the marine environment. To the contrary, one of the Sanctuaries Act's express "purposes" is to "*complement*[] existing regulatory authorities" with respect to the "conservation and management" of "areas of the marine environment which are of special national significance." 16 U.S.C. 1431(b)(1)-(2) (emphasis added); see 16 U.S.C. 1433(a)(3) (authorizing the designation of marine sanctuaries where "existing State and Federal authorities * * * should be supplemented"). One such "existing regulatory authority" is the Antiquities Act, which Presidents have often used to "conserve" and "manage"

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based monuments calls for judicial "skepticism" in order to "preserve the Constitution's separation of powers." This Court "ordinarily do[es] not decide in the first instance issues not decided below," *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam)), and petitioners do not identify any "exceptional circumstances" that would justify deviation from that rule here, *id.* at 169.

areas of the marine environment that carry "special national significance," even before the Sanctuaries Act's passage in 1972. See, *e.g.*, *Alaska*, 545 U.S. at 101-102 (describing conservation-focused reasons for the Glacier Bay Monument to include submerged lands in Glacier Bay, as reflected in 1925, 1939, and 1955 Presidential proclamations).

"[T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *J. E. M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (statutes that overlap "do not pose an either-or proposition" where each confers jurisdiction over cases that the other does not reach). As the court of appeals recognized, the Antiquities Act and Sanctuaries Act "differ in several critical respects," notwithstanding their overlap. Pet. App. A13. Their "focuses" differ, for example, *id.* at A14: Whereas the Sanctuaries Act authorizes designations of "areas of the marine environment which are of special national significance," 16 U.S.C. 1431(b)(1), the Antiquities Act is concerned with the "care and management of" specified "objects" that are "situated on land," 54 U.S.C. 320301(a). Of course a national monument designation must, as petitioners observe, "speak in 'area' terms" in order to identify the monument's location. Pet. 21; see 54 U.S.C. 320301(b) (authorizing the President to "reserve parcels of land"). But that does not detract from the Antiquities Act's narrower focus on specified "objects to be protected," 54 U.S.C. 320301(b).

Similarly, the court of appeals observed that the Sanctuaries Act "protect[s] more diverse values" than the Antiquities Act. Pet. App. A14. The Antiquities Act

authorizes the designation of "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 54 U.S.C. 320301(a). The Sanctuaries Act likewise allows for the protection of areas of "historical" and "scientific" concern, but it also authorizes designating "area[s]" that have special "recreational," "cultural," or "esthetic qualities," or "resource or human-use values." 16 U.S.C. 1433(a)(2)(A) and (C).[2]

Finally, as the court of appeals explained (Pet. App. A14), a national monument must be limited to the "smallest area compatible with the proper care and management of the objects to be protected," 54 U.S.C. 320301(b), whereas a marine sanctuary may occupy an "area" of any "size * * * that will permit [its] comprehensive and coordinated * * * management," 16 U.S.C. 1433(a)(5). While petitioners are correct (Pet. 19) that certain ocean-based monuments are "larger" than existing marine sanctuaries, the Sanctuaries Act does not require the same degree of tailoring between the protected interest and the designated area as does the Antiquities Act. Thus while the Antiquities and Sanctuaries Acts "overlap," they "each reach[] some distinct cases," and "'it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J. E. M. AG Supply*, 534 U.S. at 143-144 (citation omitted).

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[2] Petitioners cite (Pet. 20) several proclamations that discuss national monuments' recreational or cultural values. Yet unlike marine sanctuaries, national monuments also require a "historic or scientific" connection. 54 U.S.C. 320301(a). Consequently, even those proclamations that mention monuments' recreational opportunities or cultural significance also specify objects of historic or scientific interest designated for protection.

d. Petitioners contend (Pet. 23-26) that the court of appeals' decision creates a conflict with the Fifth and Eleventh Circuits. That is incorrect. In reality, no other court of appeals has considered whether monuments in the EEZ are within the scope of the Antiquities Act.

The primary case on which petitioners rely to demonstrate a division of authority is *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). Pet. 23-26. But as the opinion below explained, the Fifth Circuit's decision in *Treasure Salvors* "carries no significance here" because it "predate[s] the Reagan Proclamation and thus never addressed whether the federal government exercises control over the U.S. EEZ." Pet. App. A18. *Treasure Salvors* was a quiet title action that considered whether a shipwreck was situated on land "owned or controlled" by the federal government under the Antiquities Act. 569 F.2d at 337. The decision rejected the government's argument that the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, "demonstrate[d] Congressional intent to extend the * * * control of the United States to the outer continental shelf." 569 F.2d at 338; see *id.* at 339-340. That decision did not consider the federal government's control over the EEZ; indeed, it could not have done so because the EEZ did not exist until five years later when the Reagan Proclamation asserted the United States' "sovereign rights and jurisdiction" therein. Reagan Proclamation 22-23.

The Eleventh Circuit decision cited by petitioners, *Odyssey Marine Exploration, Inc.* v. *Unidentified, Shipwrecked Vessel or Vessels*, 636 F.3d 1338 (2011), did not interpret the Antiquities Act. Rather, that decision

cited *Treasure Salvors* for an unrelated proposition regarding admiralty jurisdiction. *Id.* at 1340-1341. Whatever the merits of the Eleventh Circuit's decision, it does not conflict with the ruling in the instant case.

2. Petitioners also assert (Pet. i, 32-36) that even if the President has authority to establish EEZ-based monuments, designating "natural resources and ecosystems" as protected objects, Pet. App. D53, "evade[s]" the requirement that monuments "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). Yet petitioners advanced no such argument in the court of appeals. Instead, petitioners argued that the boundaries of the particular monument at issue in this case are not "the 'smallest area compatible' with management," and the court dismissed that claim without reaching its merits because the complaint "failed to" make "factual allegations identifying a portion of the Monument that lacks" the protected objects. Pet. App. A18, A20 (citation omitted). Because petitioners' challenge to the designation of natural resources and ecosystems as protected objects was neither presented nor passed upon below, this Court should not address it. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Percolation of that issue, moreover, would aid this Court's review if that were warranted at some point.

Even if it were properly presented, petitioners' argument ignores this Court's repeated observation that objects of "scientific interest" may include natural resources and ecosystems. See *Alaska*, 545 U.S. at 102 (noting that the Glacier Bay Monument protected "scientific study of * * * majestic tidewater glaciers" and "'interglacial forests,'" as well as "safeguarding the

flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem") (citation omitted); *Cappaert*, 426 U.S. at 141 (objects of interest included a species of fish and its "natural habitat"); cf. *Tulare Cnty.* v. *Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (holding that designating "ecosystems * * * d[oes] not contravene" the Act), cert. denied, 540 U.S. 813 (2003). Those observations are consistent with more than a century of designations through which Presidents have protected natural resources and particular ecosystems as objects of scientific interest under the Act. See, *e.g.*, Proclamation No. 1733, 43 Stat. 1988, 1989 (1925); Proclamation No. 1339, 39 Stat. 1785, 1791 (1916); Proclamation No. 869, 35 Stat. 2247, 2248 (1909).

The proclamation at issue in this case, for example, describes the protected objects and appurtenant ecosystem as including the designated "canyons and seamounts" and their "corals" and "other structure-forming fauna," which support a "spawning habitat" and "shelter for an array of fish and invertebrate species" and "provide feeding grounds for seabirds," "pelagic species," and "highly migratory fish." Pet. App. D53-D54, D56. Contrary to petitioners' suggestion, the fact that those supported species are not "affixed" (Pet. 34) to the land does not undermine the designation of the canyons and seamounts as objects of scientific interest. See *Alaska*, 545 U.S. at 109 (observing that protecting "habitat for many forms of wildlife" corresponds to "one of the fundamental purposes of wildlife reservations set apart pursuant to the Antiquities Act"); *California*, 436 U.S. at 34 & n.5 (observing that monument designation was "[p]rompted by a desire to protect" a "variety of marine life," including "birds, sea otters, elephant seals,

and fur seals"). The result should be no different for the Monument's distinct marine ecosystem.[3]

3. Finally, petitioners acknowledge (Pet. 37-38) that President Trump issued a proclamation after the court of appeals' decision was issued, which lifted the ban on commercial fishing within the Monument's boundaries but did not "modify the monument in any other respect." Proclamation No. 10,049, 85 Fed. Reg. at 35,793. Although the commercial fishing ban was the source of petitioners' injury, they contend that the new proclamation does not moot their case because it does not make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." Pet. 37 (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 n.1 (2017)). In the alternative, petitioners request (Pet. 38) that if "the Court declines to resolve this case on the merits, it should vacate" the court of appeals' decision pursuant to *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

The government agrees with petitioners that, due to the "'presumption of future injury'" that applies when

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[3] The unenacted House bill cited by petitioners (Pet. 34) aimed to authorize the establishment of monuments on land "of outstanding scientific value * * * for the purpose of protecting the plant and animal life native thereto." H.R. 8912, 75th Cong., 3d Sess. (1938). Even the enacted "views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight," *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994), and that principle carries greater force with respect to an *unenacted* measure in a later Congress, *United States* v. *Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part and concurring in the judgment). Regardless, the bill did not contain, much less interpret, the phrase "objects of historic or scientific interest," which is at issue here.

a defendant voluntarily "ceases the complained-of activity," the case may not be completely moot. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (brackets and citation omitted). And even if the case were moot, the "extraordinary remedy" of vacatur, *U. S. Bancorp Mortg. Corp.* v. *Bonner Mall P'ship*, 513 U.S. 18, 26 (1994), would not be appropriate here because mootness during the pendency of a certiorari petition ordinarily does not provide a basis for vacatur if the case would not otherwise have warranted review by this Court. See Stephen M. Shapiro et al., *Supreme Court Practice* 19-28 & n.33 (11th ed. 2019); Br. in Opp., *Velsicol Chem. Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900). *Munsingwear* vacatur would thus not be appropriate.

The "'presumption of future injury'" cannot, however, "substitute for the allegation of present or threatened injury upon which initial standing must be based," and the lifting of the commercial fishing ban raises questions both about petitioners' standing and about any basis for equitable relief that militate against granting review here. *Steel Co.*, 523 U.S at 109 (brackets and citation omitted). Petitioners' complaint seeks only forward-looking relief, including a declaratory judgment that the President violated the Antiquities Act, and orders forbidding respondents from "enforcing any of" the "fishing prohibitions" in President Obama's proclamation and from "issuing any further regulations restricting fishing pursuant to the proclamation." Pet. App. D26-D27. Because none of the specific items of requested relief aim to redress *past* injury, petitioners' standing to sue and plea for relief depend entirely on establishing a risk of *future* harm, and petitioners may not be able to make that showing: "Past exposure to

illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)). Likewise, the issuance of a declaratory judgment requires the presence of "a substantial controversy * * * of sufficient immediacy and reality." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Because the ban on commercial fishing has been lifted, petitioners cannot establish a continuing injury or the imminence of a future injury necessary to support declaratory and injunctive relief. For this reason as well, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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