No. 20-97

In The
# Supreme Court of the United States

MASSACHUSETTS
LOBSTERMEN'S ASSOCIATION; et al.,

*Petitioners,*

v.

WILBUR ROSS; et al.,

*Respondents.*

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

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


JOSHUA P. THOMPSON
DAMIEN M. SCHIFF
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

JONATHAN WOOD
*Counsel of Record*
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
Email: jwood@pacificlegal.org

*Counsel for Petitioners*

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## Introduction

The D.C. Circuit's novel holding that ocean beyond the nation's territorial sea is "land owned or controlled by the Federal Government" for purposes of the Antiquities Act, 54 U.S.C. § 320301, presents important questions that have divided the courts of appeals and should be resolved by this Court. Respondents offer nothing to lessen the need for this Court's review.

The decision below is contrary to the Antiquities Act's text, including its limitation to "land." *See* Pet. 29-32. Moreover, this statute was understood for a century as authorizing national monuments only where the federal government exercises "full dominion and power[.]" *See United States v. California (California II)*, 436 U.S. 32, 35-36 (1978) (quoting *United States v. California (California I)*, 332 U.S. 804, 805 (1947)). Since 2006, however, Presidents have claimed power to designate national monuments anywhere the federal government has "a significant amount" of authority. *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 186-87, 196-97 (2000). Relying on this interpretation, Presidents have declared monuments encompassing 700 million acres of ocean, including the Northeast Canyons and Seamounts Marine National Monument, dwarfing the prior century's monument designations combined. *See* Pet. 7-8.

The D.C. Circuit adopted a vague multi-factor test with no basis in the Antiquities Act's text, history, or judicial precedent. The Fifth and Eleventh Circuits, however, have long held that the Antiquities Act does not apply beyond the territorial sea because the

federal government lacks sovereignty and its regulatory authority is of limited scope. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-40 (5th Cir. 1978). *See Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 636 F.3d 1338, 1341 (11th Cir. 2011).

The President's belated claim of significant, new power under a long extant statute raises serious separation of powers concerns. *See* Pet. 14-23 Indeed, the President has effectively nullified the National Marine Sanctuaries Act. *Id.* 17-23.

## I. Reasons for Granting the Petition

### A. The Petition Presents Important Questions That Merit Review

The questions presented implicate use of hundreds of millions of acres of ocean, recurring conflict over the Antiquities Act's limits, and the separation of powers. The Government does not dispute the importance of these questions. Intervenors do, but unconvincingly.

#### 1. Vast Ocean Monuments Have Significant Practical Impacts

Since 2006, Presidents have designated more than 700 million acres of ocean monuments, an area larger than Alaska. *See* Pet. 7-8. These monuments are beyond the nation's territorial sea and rely for their vastness on vague references to "ecosystems" or "resources." *See, e.g.*, Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016). Both questions presented directly implicate these monuments. Intervenors do not dispute that questions affecting 700 million acres of ocean are important. Instead, they respond only

that the other ocean monuments have not yet been challenged. *See* Int. BIO 12-13.

Considering only currently designated areas, however, underestimates the importance of the questions presented. There has been an exponential rise in area under monument designations due to ocean monuments. *See* Pet. 7-8. Intervenors offer no reason to expect this trend to end. Instead, their percolation argument assumes that it will continue. *See* Int. BIO 14. Further percolation is unnecessary for this Court to interpret this 114-year-old statute. Indeed, waiting to decide the questions presented could only make this Court's eventual decision more disruptive. The President-elect has pledged to conserve 30% of the nation's land and water by 2030, which news reports indicate would require extensive use of the Antiquities Act. *See, e.g.*, Lisa Friedman, *9 Things the Biden Administration Could Do Quickly on the Environment*, NY Times (Nov. 8, 2020).[1]

Moreover, the Government conceded at oral argument below that its theory would allow the entire Exclusive Economic Zone to be declared off-limits by mere pen-stroke. *See* Pet. 23. This area is significantly important to fishing, energy development, federal revenue, and environmental conservation. *See* Pet. 35-36; Br. of Int'l Ass'n of Geophysical Contractors, et al.

[1] https://www.nytimes.com/2020/11/08/climate/biden-climate.html.

The second question presented[2] is also the subject of recurring conflict over land-based monuments. As amici explain, these monuments have considerable economic, social, and political consequences. *See* Br. of Utah Counties and Utah Representatives; Br. of Am. Forest Res. Council.

### 2. The President's Interpretation Raises Separation of Powers Concerns

Neither respondent disputes that the President's belated assertion of significant, new power under a long-extant statute raises separation of powers concerns. *See* Pet. 14-23. Instead, they dispute whether that issue was raised and decided below, whether the President adopted a novel interpretation of the Antiquities Act, and whether that interpretation conflicts with the National Marine Sanctuaries Act.

First, relying on *Dalton v. Specter*, the Government asserts that the President's exceeding statutory limits raises no constitutional question. Gov. BIO 14-15. But, as this Court has repeatedly held, constitutional considerations, including avoidance of serious constitutional concerns, inform statutory interpretation. *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2332-33 (2019). *Dalton* does not reject this principle.

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[2] The Government characterizes the D.C. Circuit's holding on this issue as limited to pleading requirements. *See* Gov. BIO 20. But, as the colloquy between Judge Tatel and Government's counsel showed, the D.C. Circuit's theory means that no "smallest area" claim could ever survive dismissal. *See* Pet. 33. The Fishermen raised this issue below. *See* Opening Br. 57-60.

Second, the Government argues that the Court should not consider the issue because it was not decided below. *See* Gov. BIO 15-16 n.1. This Court ordinarily does not decide alternative grounds supporting a lower court's decision because these can and should be addressed on remand. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004). That custom is not implicated here. The Fishermen indisputably raised their separation of powers argument below and, in ruling against them, the D.C. Circuit decided the issue even though the opinion did not address it. *See* Pet. 16-17. Therefore, the issue is properly before this Court.

Next, the Government asserts there's nothing novel in the President's interpretation. Gov. BIO 15. This is refuted by the primary authority on which the Government relies. To justify ocean monuments, the OLC Memo interprets "controlled by the federal government" to require only "a significant amount" of regulatory authority, an interpretation with no historical precedent. 24 Op. O.L.C. at 196-98. *See* Pet. 5-6.

The OLC Memo describes the designation of ocean monuments as a "close question" even under this new, lax standard. 24 Op. O.L.C. at 197. Therefore, the Government's analogy to land recently purchased is misplaced. That circumstance does not require any change in the meaning of "owned."

Finally, the Government asserts that the National Marine Sanctuaries Act has not been rendered redundant. Gov. BIO 17-18. But this is not a situation where two statutes merely overlap while "each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144

(2001). The D.C. Circuit's assertions to the contrary collapse under even minimal scrutiny. Pet. 8-10, 19-22. The Government repeats these assertions but does not answer the Fishermen's rebuttal nor identify any "distinct case" that the National Marine Sanctuaries Act alone would reach. *See J.E.M. Ag Supply*, 534 U.S. at 144.[3]

### B. The Decision Below Creates a Circuit Split

Below, the D.C. Circuit adopted a vague and unworkable three-factor test for determining whether an area is "controlled by the federal government." App. A-16 to A-18. *See* Pet. 26-27. The Fifth and Eleventh Circuits have a straightforward standard: The Antiquities Act does not apply where the federal government lacks sovereignty and its regulatory authority is of limited scope. *See Treasure Salvors*, 569 F.2d at 339-40.

These interpretations are irreconcilable. If the D.C. Circuit is correct, *Treasure Salvors* was wrong when it was decided. *See* Pet. 23-24. Likewise, the challenged monument fails *Treasure Salvors*' test because the government lacks sovereignty over the Exclusive Economic Zone and its regulatory authority is of limited scope. *See* Pet. 25-26.

Respondents dismiss *Treasure Salvors*' significance solely because it predates establishment

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[3] Intervenors note that the Secretary of Commerce recently declared a small (18 square mile) marine sanctuary, the first since the President "discovered" the power to declare marine monuments. Int. BIO at 17. However, this only makes the separation of powers problem slightly less conspicuous; it does not avoid it.

of the Exclusive Economic Zone. Gov. BIO 19. But they offer no reason why this distinction makes a difference to the clear conflict among the circuits over what the Antiquities Act requires. As the Petition explains, it does not. *See* Pet. 24-26. Indeed, the Fifth Circuit continued to apply *Treasure Salvors*' holding after 1983. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1227 n.4 (5th Cir. 1985) (emphasizing Treasure Salvors' "general extension of United States sovereignty" requirement).

The meaning of the statute's text was fixed in 1906 and has not changed since *Treasure Salvors* was decided. While federal regulation of private land and the high seas has grown in recent decades,[4] that does not alter the authority required by the Antiquities Act. By grouping "controlled" with "owned," the statute requires, consistent with *Treasure Salvors*, authority like that the government exercises over federal land. *See McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016).

*Treasure Salvors* is binding precedent in the Eleventh Circuit. *See* Pet. 23. Although the Eleventh Circuit has not yet relied on it in an Antiquities Act case, Gov. BIO 19-20, *Treasure Salvors* is binding because it predates the Eleventh Circuit's split from the Fifth Circuit, which applies to the Antiquities Act holding the same as any other part of the opinion that the Eleventh Circuit has reaffirmed. 636 F.3d at 1341 n.1.

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[4] *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*; Clean Water Act, 33 U.S.C. § 1251, *et seq.*

### C. The Court Should Clarify Its Past Dicta and Enforce the Statute's Text

The D.C. Circuit explicitly gave no consideration of the ordinary meaning of the statute's text, despite extensive briefing below. App. A-12. *See* Pet. 30-31. Opposing review, the Government argues the D.C. Circuit could have reached the same outcome under the ordinary meaning of the text. Gov. BIO 13-14. Granting the petition provides an ideal opportunity for this Court to finally resolve the meaning of critical words in the Antiquities Act's text. *See* Pet. 5, 26-32.

The ordinary meaning of "land" in 1906—as now—excluded the ocean. Pet. 31. A recent corpus linguistics analysis shows, based on historical usage, that "land" was not ordinarily understood to include the ocean or submerged land beneath it in 1906 and leaves no doubt that the Government's interpretation is wrong. *See* James C. Phillips & John C. Yoo, *The Ordinary Meaning of The Antiquities Act of 1906: A Corpus Linguistic Analysis* 13-34 (2020).[5] Simply put, if you told the average person (in 1906 or today) that the blue part on a map was land, they would likely assume you were joking. *Cf.* "Pilot," Arrested Development (2003).[6]

True, some dictionary definitions of "land" encompass some water bodies. Gov. BIO 14. But "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense." *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012). *See*

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[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747864.

[6] https://youtu.be/VwTCjUJo3wk?t=51.

*also* Phillips & Yoo, *supra* at 2-6. The Government selective quotation of *Illinois Cent. R.R. v. Chicago* omits that the technical use of "land" in a deed can cover some waters but not navigable waters. 176 U.S. 646, 660 (1900). *Alaska Pacific Fisheries Co. v. United States*, declined to apply ordinary meaning because "the body of lands known as Annette Islands" was a term of art encompassing adjacent waters, "as [it] is sometimes done[.]" 248 U.S. 78, 89 (1918).

Absent this Court's intervention, lower courts are unlikely to consider the statute's ordinary meaning because of the uncertain effect of this Court's prior dicta. *See* Pet. 31-32. The isolated sentences in *Alaska* and *California II*, which postdate enactment of the National Marine Sanctuaries Act, do not address ordinary meaning nor have any supporting analysis. *Id*. at 30. *See Alaska v. United States*, 545 U.S. 75, 103-04 (2005); *California II*, 436 U.S. at 36 n.9.[7]

Disputing that the language in *Alaska* is dicta, the Government ignores what this Court said in its opinion. *See* Gov BIO 12-13. As Justice Scalia noted in dissent, *Alaska* contains only a "dictal feint toward the Antiquities Act[.]" 545 U.S. at 113. The majority did not dispute that characterization. Instead, it confirmed that it "need pursue" the issue "no further" because the parties had not briefed the meaning of "land" and the Court decided the case solely on other grounds. *Id*. at 103-04. This case presents an important opportunity to clarify this Court's past

[7] *Cappaert v. United States* held that an isolated pool underlying federal land was an "object" under the Antiquities Act and did not address the meaning of "land." *See* 426 U.S. 128, 142 (1976).

dicta and interpret the Antiquities Act according to its text.

## II. This Case Is Not Moot and Standing Presents No Vehicle Issue

The Government admits this case is not moot. Gov's BIO 22-23. But it wrongly asserts the 2020 Proclamation presents a standing issue. *Id.* at 23-24. Contrary to the Government's argument, a party with standing cannot lose it due to the defendant's voluntary cessation. Instead, defendants can at most moot a case by their actions, which has not happened here.

Arguing otherwise, the Government fundamentally misunderstands *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). In that case, an environmental group notified a company of its failure to file forms required by federal law, prompting the company to cure the error. *Id.* at 87-88. When the group later sued, this Court held that it lacked standing because the group asserted only past injuries yet sought relief that would not remedy those injuries. *Id.* at 102-09.

As amicus, the United States urged the court to find standing under the voluntary cessation exception. U.S. Amicus Br. at 27-29, *Steel Co.*, 523 U.S. 83 (No. 96-643), 1997 WL 348166. In rejecting that argument, this Court cast no doubt on the exception's validity where "a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity." *Steel Co.*, 523 U.S. at 109. But it declined "to call the presumption into service as a substitute for the allegation of present or threatened injury upon which

*initial* standing must be based." *Id*. (emphasis added). In other words, a defendant's voluntary cessation cannot confer standing on a complaint that was otherwise deficient when it was filed.

The Government identifies no deficiency in the Fishermen's complaint when it was filed. As the "object" of the monument's fishing prohibitions, there is "little question" of the Fishermen's standing or their entitlement to the presumption of future injury. *See Steel Co.*, 523 U.S. at 109; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). *See also* App. D-5 to D-10. The complaint alleged "present or threatened injuries"—as the government admits, Gov's BIO 23—and the only question is whether "a defendant who, when sued . . . ceases the complained-of activity" has mooted the case. *Steel Co*., 523 U.S. at 109.

Citing the 2020 Proclamation, the Government asserts the Fishermen "may not be able to . . . show[]" that the fishing prohibitions will be restored. *See* Gov. BIO 23-24. But this is not the Fishermen's burden. It is the Government's burden to show it is "absolutely clear" that the fishing prohibitions "could not reasonably be expected" to be restored. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

The Government cannot carry that burden. First, the 2020 Proclamation does not disclaim the power to impose the fishing prohibitions but expressly reaffirms it. *See* Pet. 37. Second, the 2020 Proclamation erects no obstacle to restoring the prohibitions. *See id*. Indeed, it says only that the prohibitions are "not, at this time, necessary." 85 Fed. Reg. 35,793, 35,794 (June 5, 2020). Finally, the

upcoming change in administration presents at least a reasonable possibility that the prohibitions could be restored. It has been widely reported that the President-Elect will reverse the President's actions on national monuments, including by restoring the fishing prohibitions. *See, e.g.*, Michael D. Shear & Lisa Friedman, *Biden Could Roll Back Trump Agenda With Blitz of Executive Actions*, N.Y. Times (Nov. 8, 2020);[8] Craig Welch & Sarah Gibbens, *Trump v. Biden on the environment—here's where they stand*, Nat'l Geo. (Oct. 19, 2020).[9]

## III. If the Case Were Moot, the Decision Below Should Be Vacated

If the case were moot, the Court should follow its "established practice" and vacate the decision below. *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Intervenors argue that vacatur would be inequitable because, in 2017, the Fishermen filed public comments urging the monument's revocation or a substantial reduction, which Intervenors assert makes any mootness self-inflicted. Int. BIO at 32-33 & n.23. However, the President did not revoke or shrink the monument in 2017. Narrowly lifting the fishing prohibitions—perhaps only temporarily—on the eve of this petition's filing is precisely the sort of unilateral action by a prevailing party that calls for vacatur. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72 (1997). Indeed, the equitable case

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[8] https://www.nytimes.com/2020/11/08/us/politics/biden-trump-executive-action.html.

[9] https://www.nationalgeographic.com/science/2020/10/trump-vs-biden-environment-heres-where-they-stand/.

for vacatur is especially strong here. The 2020 Proclamation did not end the conflict among the parties; it merely reshuffled their alignment. The Fishermen have moved to intervene in Intervenors' challenge to the 2020 Proclamation. *Conservation Law Foundation v. Trump*, No. 20-cv-1589 (D.D.C. filed June 17, 2020). Without vacatur, they may be unfairly bound by the decision below despite being denied "the review to which they are entitled." *See Camreta v. Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39).

## Conclusion

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

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Respectfully submitted,

JOSHUA P. THOMPSON
DAMIEN M. SCHIFF
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

JONATHAN WOOD
*Counsel of Record*
TODD GAZIANO
Pacific Legal Foundation
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
Email: jwood@pacificlegal.org

*Counsel for Petitioners*