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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al*., Plaintiffs, v. DONALD J. TRUMP, *et al*., Defendants.	Case No. 17-cv-02590 (TSC)
UTAH DINÉ BIKÉYAH, *et al*., Plaintiffs, v. DONALD J. TRUMP, *et al*., Defendants.	Case No. 17-cv-02605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al*., Plaintiffs, v.	Case No. 17-cv-02606 (TSC) **CONSOLIDATED CASES**

DONALD J. TRUMP, *et al*.,

Defendants.

AMICUS CURIAE BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, HAWAII, MAINE, MARYLAND, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND VERMONT, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

These consolidated cases challenge presidential proclamations making drastic and unprecedented revisions to Grand Staircase-Escalante and Bears Ears National Monuments. President Trump slashed the decades-old Grand Staircase-Escalante National Monument by half and eliminated a staggering eighty-five percent from Bears Ears National Monument—effectively rescinding a national monument for the first time in U.S. history.

The President's monument reductions overstep his authority and upend the very purposes of the Antiquities Act (Act). The Property Clause of the Constitution grants Congress alone the power to dispose of public lands. While the Act delegated a limited amount of authority to the president to preserve the nation's archeological, historic, and scientific "objects" as national monuments, Congress granted no authority to the president to revoke or reduce established national monument protections. Simply put, the Act is a one-way ratchet in favor of preservation. No rational reading of the Act allows otherwise. Federal Defendants' reliance on language in the Act stating that reservations of land be the smallest area compatible with protection of objects designated by the national monument is unavailing. This language merely limits the amount of land a president may reserve at the time of monument creation to protect objects of historic and scientific interest and ensure their proper care and management. It does not authorize future presidents to undo fixed reservations and certainly does not authorize President Trump's wholesale elimination of objects of historic and scientific interest from established monuments.

President Trump's rescissions also upset important relationships between the states and the federal government when it comes to management of federal lands. The permanent protections provided by national monuments significantly influence state management and resource allocation decisions; preserve important archeological, historic, and scientific resources used for research and

education; and create recreational and economic opportunities. President Trump's rescissions subvert these interests. For these reasons, the States of Washington, California, Hawaii, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, and Vermont, and the Commonwealth of Massachusetts (collectively "*Amici* States") urge this Court to deny Federal Defendants' motions to dismiss.[1]

II. IDENTITY AND INTEREST OF AMICI CURIAE

Amici States submit this brief as *amici curiae* in support of Plaintiffs under Local Civil Rule 7(o)(1) to ensure the integrity of the Antiquities Act in protecting our nation's archeological, cultural, historic, and scientific resources. Federal Defendants seek to dismiss Plaintiffs' challenges to President Trump's proclamations that unlawfully excluded 861,974 acres from Grand Staircase-Escalante National Monument and 1,150,860 acres from Bears Ears National Monument. Proclamation No. 9682, Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089 (Dec. 8, 2017) (signed Dec. 4, 2017) [hereinafter GSE Procl.]; Proclamation No. 9681, Modifying the Bears Ears National Monument, 82 Fed. Reg. 58,081 (Dec. 8, 2017) (signed Dec. 4, 2017) [hereinafter Bears Ears Procl.].

Amici States have a fundamental and unique interest in preventing President Trump's unlawful extension of executive authority over national monuments. Numerous presidentially-created national monuments within certain *Amici* States could be at risk if President Trump's unlawful actions are allowed to stand. Prior to the challenged proclamations, President Trump issued an Executive Order directing Interior Secretary Ryan Zinke to review presidential

[1] With the exception of this footnote, this brief is identical to the brief filed by *Amici* States in the related cases consolidated under *The Wilderness Society, et al. v. Trump, et al.*, Case No. 17-cv-02587 (TSC). "Federal Defendants" as used in this brief refers to President Donald J. Trump, Secretary Ryan Zinke, Director Brian Steed, Secretary Sonny Perdue, and Chief Vicki Christiansen.

designations or expansions of national monuments made since January 1, 1996 that exceed 100,000 acres in size. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017). Secretary Zinke's review included twenty-two national monuments and four marine monuments, including Berryessa Snow Mountain, Carrizo Plain, Giant Sequoia, Mojave Trails, Sand to Snow, and San Gabriel Mountains National Monuments in California; Cascade-Siskiyou National Monument in Oregon and California; Hanford Reach National Monument in Washington; Katahdin Woods and Waters National Monument in Maine; Organ Mountains-Desert Peaks and Rio Grande del Norte National Monuments in New Mexico; Papahānaumokuākea Marine National Monument in Hawaii; and Northeast Canyons and Seamounts Marine National Monument off of the New England coast in the Atlantic Ocean. *See* Mem. from Secretary Zinke to President Trump, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (Dec. 5, 2017) [hereinafter Zinke Final Report].[2] President Trump's unlawful interpretation of his authority under the Antiquities Act threatens the long-term vitality of these national monuments and subjects *all* presidentially-created national monuments, regardless of the time of creation, to the whim of future administrations.

Further, as discussed in detail in Part III.D., presidentially-created national monuments benefit *Amici* States and their residents by guiding state land and resource management decisions, contributing to essential research, and providing recreational and economic opportunities. Each of these benefits would be at risk if President Trump's unlawful actions are allowed to stand.

III. ARGUMENT

This Court should deny Federal Defendants' motions to dismiss for three reasons. First, and with respect to standing, Federal Defendants wrongly contend that elimination of national

[2] *Available at* https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf.

monument protections has no immediate impacts despite the fact that the challenged actions expose more than two million acres of formerly protected lands to development under an administration that has aggressively sought to increase resource extraction on public lands. Second, turning to the merits, President Trump's unprecedented rescissions conflict with the Antiquities Act's plain language and purpose and cannot be justified by a limited number of presidential monument modifications that occurred more than fifty-five years ago. Third, President Trump's unlawful expansion of executive authority over national monuments harms *Amici* States and their residents by weakening important federal-state resource-management relationships and threatening the benefits national monuments provide to *Amici* States and their residents.

A. Diminishing National Monuments Exposes Previously Protected Lands and Objects to Fossil Fuel and Mineral Development

Federal Defendants wrongly challenge Plaintiffs' standing by claiming that removal of national monument protections from these areas will not impact their management. This claim is belied by the facts. Areas stripped of monument protections now are exposed to energy and mineral development and resource extraction that will significantly alter the character of lands now excluded from the monuments. *See, e.g.*, TWS Plantiffs' Opp. to Fed. Defendants' Motion to Dismiss 11–15, ECF No. 61, Case No. 17-cv-02587 (Nov. 15, 2018); NRDC Plaintiffs' Opp. to Fed. Defendants' Motion to Dismiss 4–11, ECF No. 72, Case No. 17-cv-2606 (Nov. 15, 2018). Especially at this early stage of litigation, where the court "must assume that the plaintiffs state a valid legal claim and accept the factual allegations in the complaint as true," Federal Defendants' arguments should be rejected. *See Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1196 (D.C. Cir. 2015) (citation omitted). In addition to the well-pleaded harms identified by Plaintiffs, the Court should be especially dubious of Federal Defendants' assertions in light of the Trump Administration's unprecedented push for resource extraction on federal lands.

The term "energy dominance" is a hallmark of this administration. During his campaign, then-candidate Trump promised to revive the coal industry and roll back policies that, in his view, hindered the energy sector, principally fossil fuel production. Since taking office, President Trump has pushed policies that encourage resource extraction and reduce protections on public lands. Even compared against historical efforts to facilitate resource extraction, "the ambitions of the Trump Administration in reorienting public lands management in the service of energy production, especially fossil fuel leasing," have been "breathtaking." Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 Envtl. L. 311, 349 (2018).

Just over two months after taking office, President Trump issued Executive Order 13783 titled "Promoting Energy Independence and Economic Growth." 82 Fed. Reg. 16,093 (Mar. 31, 2017), which sought to radically shift the balance towards permissive practices in resource development. The Executive Order directed executive branch departments and agencies to "suspend, revise, or rescind" existing regulations that burdened "the development or use of domestically produced energy resources[,]" *id*. Sec. 1(c), and required agencies to "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions" that burdened, in particular, extraction of fossil fuels, *id*. Sec. 2. Critically for this case, Executive Order 13783 directed Secretary Zinke to end the moratorium on coal leases on federal lands, *id*. Sec. 6, and within twenty-four hours, Secretary Zinke complied, *see* Secretarial Order No. 3348, Concerning the Fed. Coal Moratorium (Interior Dep't Mar. 29, 2017). As a result, coal deposits on lands no longer subject to national monument protections (or within other protected areas such as wilderness) are now available to be leased.

The Interior Department and its sub-agencies next took swift action to remove other perceived impediments to extractive uses of federal lands. In January 2018, the Bureau of Land Management ("BLM") issued an Instruction Memorandum to its field offices revising oil and gas leasing policies "to alleviate unnecessary impediments and burdens, to expedite the offering of lands for lease, and to ensure quarterly oil and gas lease sales are consistently held in accordance with the Mineral Leasing Act." Instruction Mem. 2018-034, *Updating Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews* (BLM Jan. 31, 2018).[3] The Instruction Memorandum jettisoned policies encouraging measured and thoughtful leasing decisions, including BLM's use of Master Leasing Plans, a collaborative tool for making site-specific decisions that protect iconic scenery, natural resources, and recreational opportunities while allowing for responsible mineral development. *Id*. Secs. I & II.

In addition to shifts in general policies, the Administration's "energy dominance" policies directly target the monuments at issue in these cases. Executive Order 13792 directed Secretary Zinke to review Grand Staircase-Escalante and Bears Ears National Monuments, among others, to consider whether they were "appropriately classified" under the Antiquities Act. Exec. Order 13,792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (May 1, 2017). The order explicitly charged that this review be conducted with an eye toward eliminating "barriers to achieving energy independence." *Id*.

These energy development and resource extraction policies have driven the management decisions on the lands at issue in this litigation. In August of this year, and in direct response to the President's proclamation reducing the Grand Staircase-Escalante National Monument, BLM issued its draft Resource Management Plans for the reduced monument area and the associated

[3] *Available at* https://www.blm.gov/policy/im-2018-034.

Kanab-Escalante Planning Area. The preferred alternative for management (Alternative D) "emphasizes resource uses." U.S. Dep't of the Interior, BLM, Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Draft Resource Management Plans and Environmental Impact Statement (EIS), at ES-10 (August 2018).[4] Indeed, "[c]ompared to other alternatives, Alternative D conserves the least land area for physical, biological, and cultural resources; designates no [Areas of Critical Environmental Concern] … and is the *least restrictive to energy and mineral development*." *Id*. (emphasis added). In a similar plan covering areas in the reduced Bears Ears National Monument (and also drafted in response to rescission of monument protection), the preferred alternative "provides more flexibility" for uses like mining, timber harvest, grazing, and off-road vehicles. U.S. Dep't of the Interior, BLM, Bears Ears National Monument: Draft Monument Management Plans and EIS Shash Jáa and Indian Creek Units, at ES-5, Table ES-3 (Aug. 2018).[5]

These proposals mark a significant departure from how lands would be managed under the prior national monument designations with grave implications for sensitive areas previously subject to protection. Of the nearly 900,000 acres removed from Grand Staircase-Escalante National Monument, BLM's proposal opens nearly 700,000 acres to resource extraction, including coal, oil, and natural gas development. BLM, *Mineral Potential Report for the Lands Now Excluded from Grand Staircase-Escalante National Monument*, at 8 (Apr. 2018).[6] The situation is even more dire for the Bears Ears area, where only a small fraction of the original monument

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[4] *Available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/155930/190910/GSENM-KEPA_Executive_Summary-508.pdf.

[5] *Available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94460/154290/188907/BENM_Draft_MMPs-EIS_Executive_Summary.pdf.

[6] *Available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/154275/188892/GSKRMP_Mineral_Potential_Report_508.pdf.

remains and eighty-five percent of the former monument is now open to resource extraction, including uranium mining that would forever alter the landscape. *See* Bears Ears Procl., 82 Fed. Reg. at 58,085 (stating that excluded lands are open to "disposition under all laws relating to mineral and geothermal leasing" and "location, entry, and patent under the mining laws").

The Administration's ongoing push for resource extraction demonstrates that serious harms are imminent, and Federal Defendants' assertions to the contrary lack merit. Plaintiffs have thus demonstrated standing, and the Court should refuse to dismiss the actions on those grounds.

B. The Antiquities Act Does Not Authorize President Trump's Reduction of Grand Staircase-Escalante or Bears Ears National Monuments

Federal Defendants wrongly assert that the Antiquities Act vests President Trump with authority to shrink previously created national monuments. *See* Mem. in Support of Fed. Defendants' Motion to Dismiss 25–29, ECF No. 43-1, Case No. 1:17-cv-02587 (Oct. 1, 2018) [hereinafter GSE Fed. Br.]; Mem. in Support of Fed. Defendants' Motion to Dismiss 28–32, ECF No. 49-1, Case No. 1:17-cv-02590 (Oct. 1, 2018) [hereinafter Bears Ears Fed. Br.]. This assertion contradicts the plain language of the Antiquities Act and should be rejected.

1. The Plain Language of the Antiquities Act Does Not Grant the Authority Asserted by President Trump

Where a statute has "a plain and unambiguous meaning with regard to the particular dispute in the case … [t]he inquiry ceases." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)), and thus "a court must give effect to a statute's unambiguous meaning," *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 220 (D.C. Cir. 1980). Here, the unambiguous plain language of the Antiquities Act demonstrates that President Trump exceeded his authority.

The Constitution's Property Clause vests Congress with power over public lands. U.S. Const. art. IV § 3, cl. 2. In passing the Antiquities Act, Congress delegated part of this authority

to the President. 54 U.S.C. § 320301. This delegation, however, is limited to two specific functions. First, the President may "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal lands to be national monuments. *Id*. Second, the President may "reserve parcels of land as a part of the national monuments" so long as the area is "the smallest area compatible with the proper care and management of the objects to be protected." *Id*. The Act's language is simple and direct: it authorizes the President to create national monuments with few limitations, but it grants no authority to the president to revoke or shrink existing national monuments. President Trump's rescissions exceed this limited delegation of authority and are thus, *ultra vires*.

2. The "Smallest Area Compatible" Clause Does Not Authorize the President to Diminish National Monuments

Undeterred by the absence of any express authority, Federal Defendants contend that the clause in the Antiquities Act that directs reservations of parcels to be "the smallest area compatible with the proper care and management of the objects to be protected" implies presidential authority to diminish national monuments. GSE Fed. Br. 25–29; Bears Ears Fed. Br. 28–32. No reasonable interpretation of this clause supports this argument.

a. The "Smallest Area Compatible" Clause Does Not Authorize Post Monument Designation Boundary Alterations

The "smallest area compatible" clause's plain language demonstrates that it does not authorize the president to rescind previously reserved lands. As noted above, the Antiquities Act grants a president only two specific powers: declaring objects to be protected as national monuments and, along with that declaration, "reserv[ing] parcels of land as part of the national monument." 54 U.S.C. § 320301(a), (b); *see Mass. Lobstermen's Ass'n v. Ross*, No. CV 17-406 (JEB), 2018 WL 4853901, at *2 (D.D.C. Oct. 5, 2018) (describing these parts of the Antiquities Act). The "smallest area compatible" limitation applies only to the second step that authorizes a

president to reserve parcels of land. Thus, this secondary power is auxiliary to the first: the clause limits the size of surrounding area that the president may reserve when establishing national monuments to ensure proper care and management of the designated objects. 54 U.S.C. § 320301; *see Cameron v. United States*, 252 U.S. 450, 455 (1920) (recognizing a president's authority "to establish reserves *embracing* 'objects of historic or scientific interest'") (emphasis added). It does not create an independent power for a president to—years or decades after the fact—rescind monument protections or second-guess a previous president's determination of the land necessary for those protections.

Congress's use of the word "reserve" in the Act comports with this interpretation. "Reserve" means "[t]o keep back; to retain; not to deliver, make over, or disclose." 2 Webster's Int'l Dictionary of the English Language 1225 (1907, W.T. Harris ed.).[7] As such, the "smallest area compatible" clause limits the size of the area that a president may "keep back" or "retain" for national monuments but does not authorize a president to shrink or "make over" a previously designated monument. Reading this clause to implicitly empower a president to diminish or erase previously created national monuments takes the phrase out of context in a way that vastly exceeds any authority Congress intended to grant. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

To accept Federal Defendants' interpretation, this Court must conclude that Congress—in the context of landmark legislation enacted to *protect* natural and archeological wonders from destruction—intended a single clause relating to the size of land necessary for that protection to

[7] *Available at* https://babel.hathitrust.org/cgi/pt?id=uiug.30112099825041;view=1up;seq=115.

authorize subsequent presidents to drastically curtail existing monuments. Such reasoning conflicts with the basic principle that Congress means what it says and does "not have to disguise its purpose or furtively accomplish it." *Cochnower v. U.S.*, 248 U.S. 405, 407–08 (1919) (holding that statute authorizing Treasury Secretary to "increase and fix" compensation does not include authority to decrease compensation). Courts have "no license to disregard clear language based on an intuition that Congress must have intended something broader." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018) (citations and quotations marks omitted).

Had Congress intended to provide presidential authority to diminish or revoke previously created national monuments, it could have easily done so using language similar to contemporaneously enacted statutes.[8] Because Congress explicitly granted the president authority to revoke or modify public land withdrawals in other contexts, but did not include such language in the Antiquities Act, it would be "particularly inappropriate" to find such authority under the Act. *See Kimbrough v. U.S.*, 552 U.S. 85, 103 (2007) (declining "to read any implicit directive into … congressional silence" in the Anti-Drug Abuse Act of 1986).

b. President Trump's Proclamations Exceed Any Conceivable Authority Granted by the Antiquities Act

Next, even if the Court were to conclude that the "smallest area compatible" language provides some implicit authority for a president to reduce retroactively established national monuments (which it does not), that language does not authorize the President's actions here.

[8] For example, both the Picket Act of 1910 and the 1897 Appropriations Act expressly authorize a president to revoke or reduce previously reserved lands. Pickett Act of 1910, 36 Stat. 847 (1910) (authorizing the President to withdraw lands for certain public purposes "until revoked by him or by Act of Congress"); An Act Making Appropriation for the Department of Agriculture for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Ninety-Eight, 1897, 30 Stat. 11, 36 (1897) (authorizing the President "at any time to modify any Executive order … establishing any forest reserve").

The limitation that monument reservations be the smallest area compatible with the proper care and management of protected objects cannot possibly sustain President Trump's elimination of objects previously designated as national monuments. As noted above, a president's reservation authority is auxiliary to a president's authority to designate objects as national monuments and the "smallest area compatible" clause limits only that auxiliary reservation authority. The clause places no limit on a president's authority to designate objects as national monuments. *See supra* Part III.B.2.a. Because the language restricts only the size of the area reserved to ensure protection of presidentially-designated objects, it cannot be the basis for a president's decision to remove designated objects from national monument protection. *See Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (statutory provisions must be read "in the context of the *entire* section in which they appear") (emphasis in original). That is, even if the Court were to find some limited presidential authority to revise monument boundaries to ensure proper care and management of monument objects, the statute grants no presidential authority to redefine objects previously designated as national monuments.

Despite this lack of authority, President Trump's challenged proclamations unlawfully rescinded national monument protections from objects of historic or scientific interest designated by prior presidents. Proclamation 9682 diminished Grand Staircase-Escalante National Monument by 861,974 acres and withdrew national monument protections from a wide swath of previously protected objects of historic or scientific interest, including the Circle Cliffs, portions of the Waterpocket Fold, portions of the Hole-in-the-Rock Trail, Ancestral Puebloan rock art panels, historic objects left behind by Mormon pioneers, parts of "one of the richest floristic regions in the Inter-Mountain west," and other areas known for their paleontological and fossil resources. *See* GSE Procl., 82 Fed. Reg. 58,089–90; The Wilderness Soc'y Complaint ¶¶ 98, 106, ECF No. 1,

Case No. 1:17-cv-02587 (Dec. 4, 2017); Grand Staircase-Escalante Partners Complaint ¶ 104, ECF No. 1, Case No. 1:17-cv-02591 (Dec. 4, 2017); Proclamation 6920, Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50,223, 50,223–27 (Sept. 18, 1996). Similarly, Proclamation 9681, diminished Bears Ears National Monument by over a million acres and excluded previously designated objects of scientific or historic interest including the San Juan River corridor, the Valley of the Gods, Cedar Mesa, Farm House Ruin, Tower Ruin, Lockhart Basin, and Fry Canyon Ruin, crucial habitat for plant and animal species, numerous paleontological resources, and other objects of historic or scientific interest. *See* Bears Ears Procl., 82 Fed. Reg. at 58,081–84; Hopi Tribe Compl. ¶ 149, ECF No. 1, Case No. 1:17-cv-02590; Utah Diné Bikéyah Compl. ¶¶ 174–75, ECF No. 1, Case No. 1:17-cv-02605 (Dec. 6, 2017); Natural Res. Defense Ctr., Compl. ¶¶ 129–30, 136, ECF No. 1, Case No. 1:17-cv-02606 (Dec. 7, 2017); Proclamation 9558, Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139–47 (Dec. 28, 2016).

President Trump's reasons for excluding these previously designated objects from national monument protections have no support in the Antiquities Act. President Trump first claims that some of the objects in the original Grand Staircase-Escalante and Bears Ears National Monuments "are not unique to the monument[s]" or are not otherwise "significant." GSE Procl., 82 Fed. Reg. at 58,090; Bears Ears Procl., 82 Fed. Reg. at 58,081. But that, again, is a determination the Act does not authorize him to make. Instead, as explained above, it is a determination that Congress placed solely in the hands of the president making the initial monument designation. And even if that were not the case, the Act requires only that objects be of "historic or scientific *interest*," not that they be "unique" or "significant." 54 U.S.C. § 320301 (emphasis added). Nothing in the Act's

text authorizes President Trump unilaterally to erect new barriers to monument protections that contradict the Act's plain language.

President Trump next asserts that the now-excluded objects are "not under threat of damage or destruction" or are otherwise protected by federal laws or policies. GSE Procl., 82 Fed. Reg. at 58,090, 58,093 (claiming that "many of the objects identified by Proclamation 6290" do not need protection or "are otherwise protected by Federal law"); Bears Ears Procl., 82 Fed. Reg. at 58,081, 58,084, 58,085 (claiming that many existing monument objects are otherwise protected by existing laws or policies). Once again nothing in the Act's text authorizes President Trump to eliminate previously designated objects from national monument protection, regardless of other purported protections. Further, as demonstrated above, the claim of other protections is undermined by President Trump's own policies that expose these excluded objects to impacts from energy development and resource extraction. *See supra* Part III.A. Because President Trump had no authority under the Act to unilaterally decide that objects of historic or scientific interest designated by prior presidents should not be national monuments, his actions are *ultra vires*.

President Trump's actions also cannot reasonably be justified as excluding objects not properly protected by the original monument designation. Courts recognize that the Antiquities Act appropriately protects as objects of historic or scientific interest spectacular landscapes including canyons, glacial formations, paleontological resources, precious ecosystems, and sites historically used for trails, villages, sacred purposes, art, or food processing. For example, in *Cameron v. United States*, the Supreme Court endorsed a broad reading of "objects of historic or scientific interest" and held that the Grand Canyon, in its entirety, squarely falls within the statutory language. 252 U.S. at 455–56. Since that early case, courts have continued to broadly construe "objects of historic or scientific interest." *See, e.g.*, *Tulare County v. Bush*, 306 F.3d 1138,

1141–42 (D.C. Cir. 2002) (affirming dismissal of challenge to President Clinton's creation of Giant Sequoia National Monument and explaining that "[i]nclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features"); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (affirming dismissal of challenges to six national monument proclamations and finding no "infirmity" in proclamations protecting "abundant rock art sites and other archeological objects of scientific interest"). Most recently, in rejecting a challenge to Northeast Canyons and Seamounts Marine National Monument, this Court reiterated that "'objects of historic and scientific interest' properly can include not just the canyons and seamounts but also the natural resources and ecosystems in and around them." *Mass. Lobstermen's Assoc.*, 2018 WL 4853901, at *14 (quotations omitted). Here, in contrast, President Trump unlawfully excised many of the same types of objects previously recognized by federal courts as properly falling within the broad purview of the Antiquities Act. President Trump lacked authority to take this action.

C. Federal Defendants' Congressional Acquiescence Argument Fails

Federal Defendants' congressional acquiescence argument rests on the flawed proposition that eighteen monument boundary revisions—all occurring more than half a century ago—justify President Trump's unprecedented monument reductions. This argument conflicts with the plain language of the Antiquities Act, fails to show a longstanding, unbroken practice of presidential action, and disrupts national policies to preserve the nation's historic and scientific resources.

Federal Defendants' congressional acquiescence argument lacks textual support. "[I]n the absence of textual ambiguity, the suggestion of congressional acquiescence cannot change the plain meaning of enacted text." *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n.*, 904 F. 3d 1014, 1018 (D.C. Cir. 2018). Here, as explained above, the plain language of the Antiquities Act grants no presidential authority to revise national monuments or to remove

objects from protection. On this ground alone, Federal Defendants' congressional acquiesce argument fails.

Federal Defendants also overstate the supposed "longstanding and extensive history of presidential modifications of monument boundaries." GSE Fed. Br. 29; Bears Ears Fed. Br. 33. Although previous presidents have modified national monuments, the last modification occurred in 1963, when President Kennedy reduced Bandelier National Monument in New Mexico by just over 1,000 acres. Proclamation 3539, Revising the Boundaries of the Bandelier National Monument, New Mexico (removing 3,925 acres from and adding 2,882 acres to the monument). In the ensuing fifty-five years, no president has eliminated land from a national monument. GSE Fed Br. 7 n.4 (listing national monument reductions); Bears Ears Fed Br. 7 n.4 (same) (GSE); John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications,* 71 (2018) (reviewing national monument reductions).[9]

Given the relatively few instances of presidential reductions and the absence of any such reductions in more than half a century, Federal Defendants' congressional acquiescence argument rests on facts distinct from those presented in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), which upheld the president's executive withdrawal of public lands containing petroleum deposits to prevent private acquisition of those lands. There, while the Supreme Court recognized congressional acquiescence to executive withdrawals of public lands, the Court identified a continuing practice occurring over an eighty-year period during which presidents issued at least 252 executive orders reserving or withdrawing public lands, including over 100 withdrawals known to Congress and several withdrawals occurring within a few years of the executive order

[9] Harvard Environmental Law Review, Vol. 43; University of Utah College of Law Research Paper Forthcoming, *available at* SSRN: https://ssrn.com/abstract=3272594.

challenged in that case. *Midwest Oil Co.*, 236 U.S. at 469–71, 478–81. In contrast, the situation here does not constitute the "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned" on which the Supreme Court previously found congressional acquiescence. *Dames & Moore v. Regan*, 453 U.S. 654, 680–86 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).[10] As in *Youngstown Sheet & Tube Co.*, "[t]he contrast between the circumstances of [*Midwest Oil*] and this one helps to draw a clear line between authority not explicitly conferred yet authorized to be exercised by the President and the denial of such authority." 343 U.S. at 610–11 (1952) (Frankfurter, J., concurring).

President Trump's actions also fundamentally differ from previous presidential monument revisions. Whereas the majority of those modifications preserved the purpose of the original monument protections by making only minor boundary adjustments to fix errors, improve resource protections, or clarify monument boundaries, President Trump's proclamations removed half of Grand Staircase-Escalante National Monument, eliminated eighty-five percent of Bears Ears National Monument, and excised numerous objects of historic and scientific interest from national monument status.[11] These actions are thus "distinct[] in principle" from prior modifications. *Midwest Oil Co.*, 236 U.S. at 475–76. Even if Congress acquiesced to some limited and constrained degree of presidential monument modification authority, it does not follow that Congress acquiesced to President Trump's drastic actions here.

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[10] Similarly, unlike *Massachusetts Lobstermen's Association* where this Court found compelling a past presidential practice of reserving submerged lands as national monuments, this case does not present a situation where the Supreme Court, or any court, previously affirmed a president's asserted authority to revise monument boundaries. 2018 WL 4853901, at *6.

[11] *See generally* John Ruple, *supra* Part III.C (providing a detailed review of all presidential national monument reductions).

Finally, applying congressional acquiescence would undermine decades of congressional efforts to protect the nation's historic and natural treasures. In the fifty-five years since the last monument revision, Congress repeatedly prioritized preserving the nation's historic and natural resources, particularly those resources located on federal public lands. In 1964, Congress passed the Wilderness Act creating a National Wilderness Preservation System declaring the need "to assure than an increasing population … does not occupy and modify all areas within the United States …, leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. § 1131. Congress followed with the National Historic Preservation Act of 1966, declaring a policy to administer federally owned or controlled historic properties, including prehistoric or historic sites or objects, "in a spirit of stewardship for the inspiration and benefit of present and future generations." 54 U.S.C. §§ 300101, 300308. In 1970, Congress passed the National Environmental Policy Act, declaring for the first time a national environmental policy that seeks, among other things, to "preserve important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331. And in the Federal Land Policy and Management Act of 1976 (FLPMA), Congress emphasized that public lands should be "managed in a manner that will protect the quality of scientific, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701. FLPMA further clarified that only Congress can revoke or downsize a national monument. By excluding the Antiquities Act from FLPMA's consolidation of other laws governing Presidential authority to make, modify or revoke land withdrawals, Congress left unchanged the President's "one-way" authority to create national monuments, and made clear its intent to constrain executive branch power to modify or revoke them, a power reserved to Congress. *See* Squillace, Biber, Bryner & Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55, 59–64 (2017).

Following the enactment of these laws promoting preservation and conservation, no president until now has reduced—let alone virtually eliminated—a national monument. And for good reason: eliminating national monument protections for countless archeological, historic, and scientific objects both contradicts the text and purpose of the Antiquities Act and undermines decades of Congressional efforts to preserve the nation's historic and scientific heritage. Congressional acquiescence, if it should ever be given substantial weight, is a poor fit for such reversals of Congressional priorities.

D. States Are Harmed by President Trump's Unlawful Expansion of Presidential Authority

President Trump's assertion of power over national monuments threatens the permanence of all presidentially-created national monuments. Under President Trump's interpretation of the Antiquities Act, any president at any time could remove national monument protections from large swaths of public lands that now preserve some of the nation's most iconic landscapes and seascapes, indispensable historic and scientific resources, and essential ecosystems. These protected areas are an essential component of state resource management decisions, an important resource for academic and professional research, and a recreational hub and economic driver for *Amici* State residents and communities. President Trump's rescissions harm these interests.

1. President Trump's Actions Destroy Decades of State Reliance on the Permanence of Presidential Monument Proclamations

The longstanding interpretation of the Antiquities Act to allow a president only to designate national monuments is critical to the relationship between federal and state governments in land and resource management. Many *Amici* States have made important policy and resource management decisions on the understanding that a president cannot rescind monument protections.

Several *Amici* States rely on the long-term protections historically provided by the Antiquities Act as a backdrop to ongoing cooperative agreements with federal agencies for wildlife

and land management. New Mexico has a cooperative agreement with several federal agencies to ensure the protection of the White Sands Pupfish, which New Mexico lists as a threatened species and which only occurs on federal land including White Sands National Monument.[12] Similarly, the California Department of Fish and Wildlife entered into a memorandum of understanding with the BLM concerning cooperative management of the Horseshoe Ranch Wildlife area located within Cascade-Siskiyou National Monument. *See* Envtl. Assessment for a Proposal to Amend the Redding Resource Mgmt. Plan Regarding the Horseshoe Ranch Wildlife Area, U.S. Dep't of the Interior Bureau of Land Mgmt. Redding Field Office, 2 (Dec. 2001).[13] And the Washington Department of Fish and Wildlife administers and jointly manages approximately 800 acres of Hanford Reach National Monument through a permit with the Department of Energy. *See* Notice of Intent to Prepare a Comprehensive Conservation Plan and Associated Envtl. Impact Statement for Hanford Reach Nat'l Monument/Saddle Mountain Nat'l Wildlife Refuge, 67 Fed. Reg. 40,333, 40,333–34 (June 12, 2002). Incentive for such cooperative efforts between state and federal agencies would be weakened if monument status were ephemeral.

States also make considerable investments in infrastructure related to national monument access within or near their borders. For example, Washington State has invested nearly eight million dollars to facilitate recreational access to two presidentially-created national monuments, Hanford Reach National Monument and San Juan Islands National Monument. These grants demonstrate the intertwined state and federal management that is essential to the successful

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[12] *See* White Sands Pupfish Cooperative Agreement (May 2006), *available at* http://www.wildlife.state.nm.us/download/conservation/species/fish/management-recovery-plans/White-Sands-Pupfish-Cooperative-Agreement.pdf

[13] *Available at* https://www.blm.gov/ca/pdfs/redding_pdfs/HRWA_EA1.pdf.

conservation of national monuments. If a president could revoke all or part of these national monuments at any time, then states will likely be much more cautious about such investments.

States further adopt statutes, regulations, and policies making specific reference to national monument designations, with the understanding that they shall be in accordance with law. State regulations dealing with incinerator ash siting, dangerous waste management facilities, and air pollution sources refer specifically to national monuments—and not as temporary or contingent land designations, but rather as enduring reservations. *See, e.g.*, Wash. Admin. Code 173-306-350 (2000) (incinerator ash); 173-303-282 (2009) (dangerous waste); 173-400-118 (2012) (air pollution); NM Admin. Code 20.2.74.108 (2002) (listing areas that must be designated for Class I or II protections under the Clean Air Act, including Bandelier, El Malpais, and White Sands National Monuments). Washington State also accounts for protections in Hanford Reach National Monument when determining hunting prospects in the state. *See* Wash. Dep't of Fish & Wildlife, District 4 Hunting Prospects 2 (2018) (noting that bull elk numbers are high near Hanford Reach National Monument due to protections on federal lands during hunting season), 9 (discussing pheasant habitat in the monument).[14] Were this court to hold that a president may revoke a national monument designation, it would render these siting and area designation rules transitory and unreliable and undermine ongoing efforts to develop meaningful plans for the management of state wildlife and resources.

The permanence of presidentially designated national monuments also informs state compliance with federal and state laws designed to protect historic and archeological resources. The National Historic Preservation Act directs states to establish a State Historic Preservation Office to administer state historic preservation programs and to consult with federal agencies on

[14] Available at https://wdfw.wa.gov/hunting/prospects/2018/district04.pdf.

federal actions that may affect historic property. 54 U.S.C. § 302303. Similarly, state environmental review and historic preservation laws require review of potential impacts to state historic resources, *see e.g.*, Wash. State Envtl. Policy Act, Wash. Rev. Code Ch. 43.21C; Cal. Pub. Res. Code § 5020 et seq.; Cal. Envtl. Quality Act, Cal. Pub. Res. Code §§ 21083.2, 21084, 21084.1; N.M. Stat. Ann. 1978, § 18-6-8.1; New York Envtl. Conservation Law §§ 8-0105(6), 8-0109. Washington State law also requires any site listed in the state historic registry to be considered when evaluating projects under the Washington State Environmental Policy Act. Pursuant to these legal requirements, the Washington Department of Archaeological and Historic Preservation works cooperatively with the Hanford Reach National Monument to comply with the National Historic Preservation Act and the Monument's management plan to protect three state archaeological districts. Allowing President Trump to unilaterally rescind national monument protections for large swaths of land previously recognized for their historic import would compromise *Amici* States' ability to effectuate the goals of state and federal laws in preserving our nation's historic and ecological treasures.

2. National Monument Protections Support Academic Research and Public Education

National monuments also play an important role in *Amici* States by providing critical research opportunities for scientists seeking to understand the past and to predict the future of our states and our nation. Many public and private institutions in *Amici* States utilize in their research objects of historic or scientific interest protected by presidentially-created national monuments. For example, Washington State University Professor Emeritus Bill Lipe has conducted field work in the Cedar Mesa area of the Bears Ears National Monument that resulted in extensive collections and records that now reside at the Museum of Anthropology at Washington State University to the

benefit of academics, students, and the public.[15] Similarly, the area protected by Northeast Canyons and Seamounts Marine National Monument has "long been of intense scientific interest" to government and academic oceanographic institutions. *See* Proclamation of President Barak Obama, 81 Fed. Reg. 65,159 (Sept. 15, 2016). The monument "create[s] natural laboratories for scientists to monitor and explore the impacts of climate change,"[16] and promotes further study of how the protected ocean ecosystem allows marine species to grow and spread outside the monument's borders, helping to rejuvenate commercially and recreationally important fish stocks, endangered whales, and other marine species.[17] In addition, Hawaii's Bishop Museum and the University of Hawaii recently received grant funding to study the structure and function of one of the world's last remaining pristine coral reef ecosystems protected by the Papahānaumokuākea Marine National Monument.[18] Allowing President Trump to unilaterally rescind monument protections threatens to undermine this research that is essential to the preservation, conservation, and understanding of our nation's historical and biological heritage.

3. National Monuments Provide Important Recreational Opportunities and Economic Benefits for *Amici* States and Their Residents

National monuments further provide unparalleled recreational opportunities to state residents and visitors and enhance the economies of nearby communities which benefit from tourism to and protection of these iconic areas. Allowing rescission of national monuments would adversely impact communities and *Amici* States that benefit from the recreational and economic

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[15] *See materials collected at* Washington State University Libraries, Cedar Mesa Project (https://research.libraries.wsu.edu/xmlui/handle/2376/735).

[16] *See* https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate.

[17] Letter to Interior Secretary Zinke and Secretary Ross from Stephen M. Coan, PhD, and Maliz E. Beams (July 2017), https://www.nrdc.org/sites/default/files/mystic-ne-aquarium-letter.pdf.

[18] https://www.nfwf.org/whoweare/mediacenter/pr/Pages/hawaii-research-team-is-awarded-for-exploration-of-papahanaumokuakea-to-benefit-future-conservation-efforts-2018-0426.aspx.

opportunities provided by national monuments.

Innumerable outdoor recreation opportunities in and near national monuments support vibrant tourism industries. Millions of people visit national monuments annually to take advantage of a wide range of outdoor activities. At Giant Sequoia National Monument in California, where majestic trees live for as long as 3,000 years and soar as high as a football field is long, throngs of visitors hike, camp, fish, ride horses and mountain bikes, birdwatch, and so much more. Visitors to Hanford Reach National Monument, which protects vital habitat in southwest Washington, can hunt mule deer and elk, fish for salmon and bass, and view abundant wildflowers and wildlife. And in Massachusetts, thriving whale and seabird populations protected by Northeast Canyons and Seamounts Marine National Monument provide opportunities for excellent wildlife watching.

These recreational opportunities support numerous local businesses, allowing communities surrounding monuments to thrive economically.[19] The National Park Service's 2017 Report on the "Economic Contributions to Local Communities, States, and the Nation" shows that Park Service managed national monuments, including several in *Amici* States, receive multitudes of visitors each year that contribute to local economies and add jobs to communities. *See* Nat'l Park Service, 2017 National Park Visitor Spending Effects: Economic Contributions to Local Communities, States, and the Nation, Tbl. 3 (Apr. 2018).[20] Similarly, a recent study by Headwaters Economics that analyzed seventeen monuments in western states, including several in *Amici* States, found that monument designations "help nearby communities diversify economically while increasing

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[19] *See* Ben Alexander, *Giant Sequoia National Monument: A Summary of Economic Performance in the Surrounding Communities*, Spring 2017, https://headwaterseconomics.org/wp-content/uploads/Sequoia.pdf.

[20] *Available at* https://www.nps.gov/nature/customcf/NPS_Data_Visualization/docs/NPS_2017_Visitor_Spending_Effects.pdf

quality of life and recreational opportunities that make communities more attractive for new residents, businesses, and investment." Headwaters Economics, Updated Summary: The Importance of National Monuments to Communities (Aug. 2017).[21] Whale watching off the New England coast is also an important economic driver, generating, in 2008 alone, approximately $126 million in revenue.[22] Moreover, the tourism supported by national monuments provides direct benefits to states through increased revenue from lodging taxes, *see, e.g.,* Cal. Rev. & Tax Code § 7200; Or. Rev. Stat. § 320.305, gas taxes, *see, e.g.,* Or. Rev. Stat. § 319.530, and sales taxes, *see, e.g.,* Cal. Rev. & Tax Code § 6001; Or. Rev. Stat. § 323.505; Or. Rev. Stat. § 475B.705. Allowing a president to remove national monument protections with the stroke of a pen would disrupt these economic benefits and alter recreational opportunities for communities near and visitors to national monuments.

IV. CONCLUSION

President Trump's unlawful assertion of power over national monuments has no logical end-point. If the current rescissions are allowed to stand, this President—or future presidents—could slash national monument protections for each and every previously-designated monument in the country, essentially rendering the Antiquities Act a nullity and causing significant harm to *Amici* States' interests. Given the nationwide and potentially far-reaching implications of President Trump's rescissions, this Court should deny Federal Defendants' motions to dismiss.

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[21] *Available at* https://headwaterseconomics.org/public-lands/protected-lands/national-monuments/#factsheets.

[22] Simon O'Connor, *et al*., WHALE WATCHING WORLDWIDE: TOURISM NUMBERS, EXPENDITURES AND EXPANDING ECONOMIC BENEFITS, Int'l Fund for Animal Welfare, 228 (2009), https://www.mmc.gov/wp-content/uploads/whale_watching_worldwide.pdf.

RESPECTFULLY SUBMITTED this 19th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of the filing to all parties.

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