UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Wilderness Society, *et al.*, Plaintiffs, v. Donald J. Trump, *et al.*, Defendants.	Case No. 17-cv-02587 (TSC)
Grand Staircase Escalante Partners, *et al.*, Plaintiffs, v. Donald J. Trump, *et al.*, Defendants.	Case No. 17-cv-02591 (TSC) **CONSOLIDATED CASES** Oral argument requested

TWS PLAINTIFFS' OPPOSITION
TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The Grand Staircase-Escalante National Monument earned its nickname as the "Science Monument" for the world-class paleontological sites, showcasing millennia of geologic and evolutionary history, that are embedded in its stair-stepping sandstone cliffs and plateaus. This extraordinary landscape is also home to outstanding biodiversity and irreplaceable cultural and historical resources. Yet, in December 2017, President Trump issued a proclamation revoking monument status and protection from approximately half of Grand Staircase—roughly 900,000 acres—and exposing the excised lands and objects to irreversible damage. *See* Pres. Proc. No. 9862, 82 Fed. Reg. 58,089 (Dec. 4, 2017) ("Trump Proclamation"). Plaintiffs The Wilderness Society *et al.* ("TWS Plaintiffs") challenge the President's unlawful and *ultra vires* proclamation.

The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellín v. Texas*, 552 U.S. 491, 524 (2008). Defendants concede that no constitutional provision grants the President power to dismantle a national monument. Defs.' Mem. in Supp. of Mot. to Dismiss 41, ECF No. 43-1 ("Defs.' Br."). They urge the Court instead to find such a power hidden in the Antiquities Act, but the Act confers no such power. The Antiquities Act authorizes Presidents only to "declare" national monuments and "reserve" federal public lands as part of those monuments. 54 U.S.C. § 320301(a)-(b). This narrow delegation of Congress's otherwise exclusive Property Clause power authorizes Presidents to provide swift and enduring protection for national treasures on public lands. Defendants ask this Court to read into the Act the *opposite* power—the power to *abolish* protections—but neither the text of the Act nor any other interpretive aid supports their novel argument. If Defendants were correct, national monuments across the country would have only ephemeral protection, potentially see-sawing from protected to unprotected status with every change of presidential

administration. That is not what the Act authorizes, or what Congress intended. Congress retained *for itself* the power to rescind or reduce national monuments. The Trump Proclamation runs roughshod over that exclusive congressional power, even going so far as to remove roughly 80,000 acres of land that Congress itself added to the Monument.

Defendants also seek to avoid this Court's review altogether, raising spurious arguments about standing and ripeness. But the Trump Proclamation took immediate effect, and by Defendants' own account, new mining claims have already been located in the excised Monument lands. There is no sound reason to delay resolving the purely legal issues concerning the President's lack of statutory or constitutional authority to dismantle the Monument. Defendants' motion to dismiss should be denied.

BACKGROUND

I. The Antiquities Act

The Antiquities Act authorizes the President to preserve irreplaceable natural, cultural, and historic resources and the federal public lands on which they are located. It delegates to the President the power to "declare" objects of historic or scientific interest to be national monuments, and to "reserve parcels of land as part of the national monuments" for the objects' protection. 54 U.S.C. § 320301(a)-(b).

Congress enacted the Antiquities Act in 1906 as part of a nascent effort to preserve America's public lands. Until the late 1800s, disposal and privatization of federal public land was the norm: a variety of general land laws left unallocated federal land open to extractive uses

and private sale with few restrictions.[1] Recognizing that much of this land contained invaluable natural and historic treasures, Congress began designating national parks by statute in the late 1800s. *See, e.g.*, Act of March 1, 1872, ch. 24, 17 Stat. 32 (establishing Yellowstone National Park). The legislative process was slow, however, and the land remained vulnerable in the meantime to looting, development, and conversion to private property through homesteading. *See* RONALD F. LEE, NAT'L PARK SERV., THE STORY OF THE ANTIQUITIES ACT, ch. 4 (2001 ed.), https://www.nps.gov/archeology/pubs/lee/index.htm.

As a result, in the years leading up to the Antiquities Act's enactment, the Interior Department and its General Land Office (a precursor to today's Bureau of Land Management, or BLM) lobbied Congress to enact legislation authorizing the Executive Branch to confer enduring protection—similar to national park designations by Congress—on worthy public lands. *See infra* at 27-28. These efforts culminated in the Antiquities Act of 1906, which delegated to the President a discrete part of Congress's otherwise exclusive "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress intended for national monuments, like "parks," to serve as "a perpetual source of education and enjoyment for the American people, as well as for travelers from foreign lands." H.R. Rep. No. 59-2224, at 2-3 (1906) (Hewett Memorandum).

Over the past century, presidents have used the Antiquities Act to confer enduring protection on more than 150 national monuments, preserving them for the benefit and edification of current and future generations. TWS Complaint ¶ 65, ECF No. 1 ("Compl."). Starting with

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[1] *See, e.g.*, General Mining Act of 1872, 30 U.S.C. § 21 *et. seq.* (allowing prospectors to locate claims for hard-rock minerals on unallocated land); Homestead Act of 1862, 12 Stat. 392 (codified at 43 U.S.C. §§ 161-284, repealed 1976) (granting title to any citizen who farmed plot of unallocated land for five years).

Theodore Roosevelt, who signed the Antiquities Act into law, Presidents have used the Act to designate national monuments that protect paleontological sites, geological wonders, biological resources, and landmarks of the United States' diverse cultural heritage ranging from less than an acre to millions of acres in size. Courts have uniformly upheld the President's authority under the Act to designate national monuments that protect a wide range of public resources. *See, e.g.*, *Cameron v. United States*, 252 U.S. 450, 455-56 (1920) (upholding designation of Grand Canyon National Monument); *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976) (confirming that Death Valley National Monument protected underground pool and rare fish living there); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1133-38 (D.C. Cir. 2002) (upholding designation of six national monuments); *Tulare County v. Bush*, 306 F.3d 1138, 1140-44 (D.C. Cir. 2002) (upholding designation of Giant Sequoia National Monument to protect "ecosystems and scenic vistas"); *Mass. Lobstermen's Ass'n v. Ross*, No. 17-406-JEB, 2018 WL 4853901, at *1 (D.D.C. Oct. 5, 2018) (upholding designation of Northeast Canyons and Seamounts Marine National Monument off New England's coast).

A President's monument designation immediately confers legal protection upon "objects of historic or scientific interest" and the reserved lands where they are located. 54 U.S.C. § 320301(a), (b). Once designated as a national monument, those lands must be managed to preserve and safeguard the objects of scientific and historic interest. "An essential purpose of monuments created pursuant to the Antiquities Act," the Supreme Court has explained, is "to conserve . . . the natural and historic objects . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Alaska v. United States*, 545 U.S. 75, 103 (2005) (quoting 54 U.S.C. § 100101(a), relating to national monuments managed by the Park Service); *see also* 16 U.S.C. § 7202(a), (b)(1)(A) (recognizing "national monuments" managed

by the BLM as a type of protective land designation meant "to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations"). To this end, Presidents commonly identify in the monument proclamation a federal agency (such as the BLM or the Park Service) to manage the monument, including by developing land-management plans that protect the objects identified in the proclamation. The President may also directly impose use restrictions in the proclamation itself—for example, by withdrawing the monument lands from new mining claims and from oil, gas, and coal leasing. *See, e.g.*, *Cameron*, 252 U.S. at 454-55.

Since the Antiquities Act's passage, Congress has played an active role in maintaining national monuments created by presidential proclamation. Congress can, and does, pass legislation enlarging monuments, shrinking them, abolishing them, or modifying them in other ways. Defendants note scattered instances when past Presidents purported to shrink monuments' boundaries, but no court ever passed on the legality of those acts, and the last such occasion was in 1963. Since then, Congress has affirmed that it alone has the power to reduce or rescind monument designations. *See infra* at 32-36. Consistent with Congress's design, for the past fifty-plus years, no President has purported to remove lands from a national monument—until now.

II. President Clinton's Designation of Grand Staircase-Escalante National Monument

In 1996, then-President Clinton used his authority under the Antiquities Act to establish the Grand Staircase-Escalante National Monument on 1.7 million acres of federal public lands in south-central Utah. *See* Pres. Proc. No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) ("1996 Proclamation"). The 1996 Proclamation described in detail the Monument's "value for scientific study" and its "long and dignified human history," explaining that it "presents exemplary opportunities for geologists, paleontologists, archeologists, historians, and biologists." *Id.* at 50,223. Among Grand Staircase's many objects of scientific and historic interest are

exposed geologic formations interlaced by a maze of canyon systems, which offer a fascinating window into the area's early history. *Id.* at 50,223-25. Its "world class paleontological sites" represent "one of the best and most continuous records of Late Cretaceous terrestrial life in the world," including "[e]xtremely significant fossils" of "dinosaurs, fishes, and mammals." *Id*. at 50,223-24. It also features rich archaeological resources, including "rock art panels, occupation sites, campsites, and granaries"—evidence of the area's history as a point of contact for different Native American cultures. *Id.* at 50,224. And it contains outstanding biological resources, representing "perhaps the richest floristic region in the Intermountain West." *Id.*

Prior to 1996, the BLM managed these lands in accordance with the "multiple use, sustained yield" principle, which allows for a range of uses, including oil and gas drilling, mining, off-highway vehicle use, and wilderness protection. Compl. ¶ 77; *see* 43 U.S.C. §§ 1702(c), 1712, 1732(a). The BLM leased large tracts of land for coal mining, and it was working toward approval of a large coal mine in the heart of the future Monument, the Kaiparowits Plateau. Compl. ¶ 78. The vast majority of the future Monument was open to cross-country motorized vehicle use, which damaged fragile soils and led to the looting and vandalism of cultural sites and fossils. *Id.*

In recognition of Grand Staircase's scientific and historical values and the threats to their conservation, the 1996 Proclamation "set apart and reserved" 1.7 million acres of federal public lands "for the purpose of protecting the objects identified [in the Proclamation]," explaining that this was "the smallest area compatible with the proper care and management of the objects to be protected." 61 Fed. Reg. at 50,225. The proclamation immediately prohibited the location of any new mining claims and withdrew the lands from mineral leasing. *Id*. It also directed the BLM to "manage the monument" consistent with "the purposes of this proclamation" and to prepare a

management plan for the Monument to achieve those purposes. *Id.* The 1996 Proclamation thus ended BLM's multiple-use approach to the management of these lands and required the agency to prioritize preservation and protection, making the national monument "the dominant reservation" on the land. *Id*.

In 2000, after a three-year-long public process, the BLM issued a management plan focused on safeguarding the Monument's undeveloped character and facilitating the study of its scientific and historic resources. Compl. ¶¶ 81-82. Since then, research in the Monument has flourished, facilitating study of a previously unknown fossil record, the history and interaction of diverse Native American cultures, and desert biota. *Id.* ¶¶ 83, 85; *see also* Partners' Br. 3-4, 9.[2]

III. Congressional Acts Relating to the Monument

In the twenty-two years since President Clinton designated the Monument, Congress has played an active role in Grand Staircase, modifying and expanding its boundaries and total area through legislation. *See* Compl. ¶¶ 86-90. For example, in 1998, Congress ratified an agreement between the federal government and the State of Utah exchanging state-owned lands and mineral interests within the Monument for federal lands and minerals outside of the Monument, and paying the State of Utah $50 million in furtherance of the agreement. *See* Utah Schools and Lands Exchange Act, Pub. L. No. 105-335, 112 Stat. 3139 (1998). That same year, Congress passed another statute adjusting the Monument's boundaries, adding some lands and removing others. *See* Pub. L. No. 105-355, § 201, 112 Stat. 3247, 3252-53 (1998). Together, these two acts

[2] Throughout this brief, to minimize repetition, TWS Plaintiffs have incorporated by reference the opposition briefs submitted by plaintiffs in *Grand Staircase Escalante Partners v. Trump*, No. 17-cv-02591-TSC (D.D.C. Nov. 15, 2018) ("Partners' Br."); *Hopi Tribe v. Trump,* No. 17-cv-02590-TSC (Nov. 15, 2018 (Tribal Br.); and *Utah Diné Bikéyah v. Trump*, No. 17-cv-02605-TSC (D.D.C. Nov. 15, 2018) ("UDB Br.").

of Congress added roughly 200,000 acres to the Monument, bringing its total area up to 1.9 million acres. Compl. ¶ 88; *see also* Partners' Br. 5-6, 28-29.

The following year, Congress appropriated $19.5 million to buy back preexisting coal leases located within the Monument, thereby preventing future development and safeguarding the Monument's integrity and undeveloped character. Pub. L. No. 106-113, § 601, 113 Stat. 1501, 1501A-215 (1999). And in 2009, as part of the Omnibus Public Land Management Act, Congress both made an additional modification to Grand Staircase's boundaries, Pub. L. No. 111-11, § 2604, 123 Stat. 993, 119-20 (2009), and included Grand Staircase (and all BLM-managed national monuments) within a newly established "National Landscape Conservation System," whose purpose is to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations." *Id.* § 2002, 123 Stat. at 1095 (codified at 16 U.S.C. § 7202(a), (b)(1)(A)).

Through these acts, Congress adjusted the Monument's boundaries, resolved resource disputes, and affirmed its intention that the Monument and its objects of interest be protected for the "benefit of current and future generations." 16 U.S.C. § 7202(a); *see infra* at 37-40.

IV. Judicial Approval of the Monument

After its designation, Monument opponents challenged the Monument's legality and size. In 2004, the district court rejected the plaintiffs' claims, concluding that "the President exercised the discretion lawfully delegated to him by Congress under the Antiquities Act." *Utah Ass'n of Counties v. Bush,* 316 F. Supp. 2d 1172, 1186 (D. Utah 2004), *appeal dismissed,* 455 F.3d 1094 (10th Cir. 2006). In particular, the Court found it "undisputed" that "the President complied with the Antiquities Act[]" by "setting aside, in his discretion, the smallest area necessary to protect the objects" of historic or scientific interest. *Id.* at 1183.

V. President Trump's Proclamation Dismantling Grand Staircase

On April 26, 2017, President Trump issued an executive order directing the Secretary of the Interior to "review" certain national monuments that had been designated or expanded since 1996—the same year that President Clinton designated Grand Staircase. Exec. Order 13,792, 82 Fed. Reg. 20,429. The order opined, *inter alia*, that national monuments "may . . . create barriers to achieving energy independence . . . and otherwise curtail economic growth," *id.*, and it directed the Secretary to provide the President with recommendations concerning possible actions regarding those monuments, *id.* at 20,430. During a sixty-day public comment period beginning in May 2017, the public submitted 2.8 million comments that were "overwhelmingly in favor of maintaining existing monuments," including Grand Staircase. Compl. ¶¶ 96-97. Yet less than two months later, Secretary Zinke recommended that the President eliminate portions of Grand Staircase. *Id*. ¶ 97.

On December 4, 2017, President Trump issued a Proclamation purportedly "Modifying the Grand Staircase-Escalante National Monument," which revoked monument status from nearly half the Monument and carved the remaining area into three much smaller parcels (the "Grand Staircase," "Kaiparowits," and "Escalante Canyons" units, plus two discontinuous parcels in the area of East Clark Bench). 82 Fed. Reg. at 58,091; *see also* Ex. A (map). In total, the Trump Proclamation stripped monument status from nearly 900,000 acres of the Monument—including 80,000 acres of land that Congress itself had added to the Monument through legislation. Compl. ¶ 98. These excised lands include countless objects of scientific and historic interest as identified in the 1996 Proclamation. *Id*.

The Trump Proclamation stated that, after sixty days (i.e., as of February 2, 2018), the lands carved out of the Monument "shall be open to . . . location [and] entry . . . under the mining laws" and to leasing for coal, oil, and gas development. 82 Fed. Reg. at 58,093. It also directed

Interior and the BLM to develop new management plans for the three new monument units, and a separate plan for the excised lands. *Id*. at 58,094. An expedited planning process is now underway. *See* Defs.' Br. 10 & n.5. In the meantime, on lands excluded from the Monument, the BLM is no longer prioritizing protection of scientific and historical objects as the 1996 Proclamation requires. Compl. ¶ 101. The removal of monument protections from nearly a million acres of land threatens irreversible damage to the scientific and historic resources for which Grand Staircase was designated twenty-two years ago. *See e.g., id*. ¶¶ 1, 9, 102, 112.

STANDARD OF REVIEW

To survive a Rule 12(b)(1) motion, "plaintiffs are required only to 'state a *plausible* claim' that each of the standing elements is present." *Attias v. Carefirst, Inc*., 865 F.3d 620, 625 (D.C. Cir. 2017) (citation omitted; emphasis in *Attias*). While the Court "may consider materials outside the pleadings" in ascertaining its jurisdiction, it "must still accept all of the factual allegations in the complaint as true." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (citations and quotation marks omitted); *see also Attias*, 865 F.3d at 627 (describing this "familiar principle" of the "motion-to-dismiss stage").

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court looks to the allegations in the complaint, and to documents attached to the complaint or incorporated by reference (such as, here, the presidential proclamations). *Frese v. City Segway Tours of Wash., D.C., LLC*, 249 F. Supp. 3d 230, 234 (D.D.C. 2017).

ARGUMENT

I. Plaintiffs Have Standing to Challenge President Trump's Proclamation.

TWS Plaintiffs have associational standing to bring this suit because each Plaintiff organization has "members [who] would . . . have standing to sue in [their] own right." *Friends*

of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 181 (2000).[3] The complaint plausibly alleges that (1) Plaintiffs' members face "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 180-81. Defendants take issue with the first and third elements of standing: injury in fact and redressability. As explained below, Plaintiffs' allegations state a plausible claim as to both elements. *See Attias*, 865 F.3d at 625.

A. Plaintiffs have plausibly alleged injury in fact.

With respect to "injury in fact," Defendants' argument rests on a misstatement of the law. They contend that "Plaintiffs' 'threatened injury must be *certainly impending* to constitute injury in fact,'" Defs.' Br. 13 (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013)), but they ignore the other half of the test. As *Clapper* recognized, the Supreme Court has also "found standing based on a 'substantial risk' that the harm will occur." *Clapper*, 568 U.S. at 414 n.5. Since *Clapper*, the Supreme Court and the D.C. Circuit have affirmed that a future injury may be imminent "if the threatened injury is certainly impending[] *or* there is a *substantial risk* that the harm will occur." *Susan B. Anthony List v. Driehaus* (*SBA List*), 134 S. Ct. 2334, 2341 (2014) (emphases added); *accord Attias*, 865 F.3d at 626-27 ("[A] plaintiff can establish standing by satisfying *either* the 'certainly impending' test *or* the 'substantial risk' test." (quoting *SBA List*)).

[3] Plaintiffs' allegations also satisfy the other two criteria for associational standing. Specifically, safeguarding Grand Staircase from destructive and extractive activities is "germane" to the organizational purposes of each of the Plaintiffs. *Friends of the Earth*, 528 U.S. at 181; *see* Compl. ¶¶ 19-21, 23-25, 26-27, 29-32, 34-35, 37-41, 42-43, 45, 47-49, 51-53. And Plaintiffs' members need not participate in this litigation because none of the claims asserted or the relief sought requires individualized proof. *See Friends of the Earth*, 528 U.S. at 181.

Plaintiffs' allegations easily meet the "substantial risk" test, and Defendants—who focus exclusively on the "certainly impending" standard, *see* Defs.' Br. 14—offer no argument to the contrary. "[D]rawing on 'experience and common sense,'" *Attias*, 865 F.3d at 628 (citation omitted), courts routinely find standing where, as here, plaintiffs challenge government action to weaken or remove barriers to third-party activity that would harm them. *See, e.g.*, *Sierra Club v. Jewell*, 764 F.3d 1, 7-8 (D.C. Cir. 2014) (rescission of historic battlefield's protected status posed a "substantial probability" of injury to plaintiffs' aesthetic interests due to likelihood of resumed coal mining); *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) ("Once EPA promulgated the [rule excluding certain facilities from waste-burning regulations], it was 'a hardly-speculative exercise in naked capitalism' to predict that facilities would take advantage of it . . . ."); *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 998 (D. Alaska 2018) (executive order lifting ban on energy exploration on outer continental shelf presented "risk of imminent harm").

Here, President Trump's proclamation specifically opened the lands carved out of the Monument to "disposition under all laws relating to mineral . . . leasing" and to "location, entry, and patent under the mining laws." 82 Fed. Reg. at 58,093; *see also* Compl. ¶¶ 9, 115, 121, 126-30. This termination of the 1996 Proclamation's mineral withdrawal was self-executing: it became effective "60 days after" President Trump's signature, with no need for a new management plan or any other agency action. 82 Fed. Reg. at 58,093. It requires no speculation—only common sense—to conclude there is a substantial risk that mining and leasing activity will now occur in the unprotected lands, harming Plaintiffs' members' interests in enjoying the lands in their pristine, natural state. *See* Compl. ¶¶ 22, 25, 28, 33, 36, 41, 44, 46, 48-50, 52, 104-12.

Most immediately, the Trump Proclamation allows prospectors to stake hard-rock mining claims and begin mineral exploration under the General Mining Law of 1872, 30 U.S.C. § 22 *et seq*. The Mining Law, which aims "[t]o encourage mining" on federal public lands, is extraordinarily permissive: it allows private citizens to enter onto federal land and "stake, or 'locate,' claims to extract minerals *without prior government permission*." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 699 (D.C. Cir. 2009) (emphasis added); *see also* 43 C.F.R. §§ 3832.1, 3833.11. Once a claimant has located her claim, she may undertake "[c]asual use" activities at any time, and she "need not notify BLM" before doing so. 43 C.F.R. § 3809.10(a).[4] A claimant may also undertake more extensive "notice"-level activities—that is, activities "causing surface disturbance" of up to five acres—simply by sending the BLM a "notice" of planned operations and waiting fifteen calendar days after the BLM receives it. *Id.* §§ 3809.10(b), 3809.21(a). Unless the BLM requests additional information or takes other specific actions within that fifteen-day window, the claimant may proceed with ground-disturbing work. *Id.* §§ 3809.312(a), 3809.313. Though they bury it in a footnote, Defendants concede that "'notice-level' activities do not require affirmative BLM approval." Defs.' Br. 15 n.8.

Thus, contrary to Defendants' assertion, there is no "attenuated chain" of events that must happen here before surface-disturbing mining activities may begin. *Contra* Defs.' Br. 14. A prospector may locate a claim and undertake notice-level activity without *any* affirmative approval from the BLM. There are deposits of hard-rock minerals—including "copper, uranium, titanium, alabaster, and zirconium"—throughout the Monument, Compl. ¶ 127, and the Trump

[4] *See* 43 C.F.R. § 3809.5 (defining "casual use" activities as those that "result[] in no or negligible disturbance," e.g., collecting samples without mechanized earth-moving equipment).

Proclamation specifically opened the excluded Monument lands to hard-rock mining activity. Indeed, as Defendants' own declarant avers, new mining claims *have already been located* on lands carved out of the Monument. Roberson Decl. ¶ 29, ECF No. 43-2. Defendants' assertion that "the BLM has not received any proposals or notices" for those new claims *yet*, Defs.' Br. 15 n.8, is irrelevant, given that notice-level activities may commence as early as fifteen days after the BLM receives a claimant's notice.[5] Given these facts, it strains credulity for Defendants to suggest there is no substantial risk of mining activity in the excluded lands.

The harm associated with such notice-level activities can be substantial. Road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment all can be undertaken without affirmative BLM approval. *See* 43 C.F.R. §§ 3809.5, 3809.21(a), 3809.312(a). These activities can have long-lasting impacts on the land: polluting the air and soil, producing unsightly waste and debris, scraping scars into the soil, removing native vegetation, disturbing wildlife habitat, increasing erosion, and harming water quality. Compl. ¶ 130. The "auditory and visual" effects of these activities can extend well beyond the boundaries of the mining claims themselves, broadly impacting large "areas that

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[5] Defendants rely on a declaration by the BLM's state director Edwin Roberson. The Court "*may* consider materials outside the pleadings when deciding . . . a motion to dismiss for lack of jurisdiction," but it "must still accept all of the factual allegations in the complaint as true," *Jerome Stevens*, 402 F.3d at 1253 (emphasis added), and it should be wary of resolving factual disputes before there has been "a full airing of the facts," *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992). Regardless, Mr. Roberson's declaration *supports* Plaintiffs' contention that the resumption of hard-rock mining is neither unlikely nor speculative. He concedes that "'notice-level' exploration operations do not require formal BLM approval or NEPA analysis," and that, "since the withdrawal was lifted in February . . . there have been 16 new mining claims recorded in the lands excluded from the Monument." Roberson Decl. ¶¶ 24, 29. That includes ten new claims— "Mesa 001" through "Mesa 010," *id.* ¶ 29—where the operator has publicly expressed its intention to begin "[s]urface exploration work" in the near future. Global Newswire, *Acquisition of Colt Mesa Copper-Cobalt Property, Utah* (June 13, 2018), https://bit.ly/2vvdt8O. *See also* Partners' Br. 11-12.

would otherwise be quiet and pristine." *Id.*; *see also id.* ¶ 132. These impacts pose substantial harm to Plaintiffs' members, who enjoy quiet recreation, solitude, education, and aesthetic delight from visiting the areas the Trump Proclamation has now stripped of monument protection. *Id.* ¶¶ 103-12.

Defendants attempt to minimize these allegations of harm, but it is well settled that injuries to aesthetic interests—such as the ability to "view and enjoy" an unspoiled landscape or to "observe it for purposes of studying and appreciating its history"—are cognizable injuries for standing purposes. *Jewell*, 764 F.3d at 5; *see also Friends of the Earth*, 528 U.S. at 183. Defendants also attempt to downplay Plaintiffs' injuries by asserting that "significant amounts of the excluded lands are subject to other protective proscriptions or designations." Defs.' Br. 15 n.7. Notably, however, Defendants do *not* assert that "all" (or even "most") of the nearly 900,000 acres excluded from the Monument are covered by other designations, or that those designations provide the same level of protection as monument status does. For example, there is no categorical prohibition on hard-rock mining in Wilderness Study Areas. *See* 43 U.S.C. § 1782(c); 43 C.F.R. § 3802.0-2(a). Nor do Defendants dispute that the specific areas Plaintiffs name in the complaint, which their members use—the Rimrocks, Sunset Arch, and part of the Circle Cliffs, Compl. ¶¶ 106-08—are now open to mineral activity.

Given these facts, Plaintiffs have alleged a "plausible claim" that there is a "substantial risk" of mining activity in the excised lands, as is sufficient to invoke the Court's jurisdiction. *Attias*, 865 F.3d at 625, 627 (citations and emphasis omitted).

B. Plaintiffs' injuries would be redressed by a favorable decision.

Plaintiffs' complaint also satisfies Article III's redressability requirement. It is "well-established" that traceability and redressability are satisfied where a plaintiff challenges

government action authorizing third-party conduct "that allegedly caused the plaintiff's injuries" if "that conduct would allegedly be illegal otherwise." *NRDC*, 755 F.3d at 1017 (quotation marks and ellipsis omitted); *accord Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc). Here, the Trump Proclamation purports to allow mining activities that would have been illegal under the 1996 Proclamation to resume on the excised lands. *See* Compl. ¶¶ 101, 138-39. Plaintiffs' injuries are thus directly traceable to the Trump Proclamation, and they would be redressed by the relief Plaintiffs seek.

Specifically, Plaintiffs ask this Court to declare the Trump Proclamation unlawful and to enjoin its implementation. *See* Compl. 56-57 (prayer for relief). Defendants protest that no such relief is available "against the President," Defs.' Br. 18-19, but they do not dispute that the Court *can* issue injunctive and declaratory relief against the Agency Defendants. To be sure, "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken." *Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996).[6] For purposes of the instant motion, however, the Court need not resolve the propriety of injunctive relief against the President himself, because the Court's undisputed power to issue such relief "against subordinate executive officials is sufficient for redressability." *Id.* at 980-81.

It is well settled that "when the President takes official action," federal courts have "the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. 681, 703 (1997). With respect to the Antiquities Act specifically, the D.C. Circuit has affirmed that "[judicial] review is available to ensure that the [President's] Proclamations are consistent with

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[6] *But see Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) ("[T]raceability and redressability are easily satisfied [when] injury is traceable to the President's [actions] and would be redressed by a declaratory judgment that the [actions] are invalid."); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("[D]eclar[ing] . . . that the President has a constitutional duty forthwith to grant . . . the federal pay increase mandated by the Congress.").

constitutional principles and that the President has not exceeded his statutory authority." *Mountain States*, 306 F.3d at 1136. It is equally well settled that "courts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quotation marks omitted); *see also, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). Here, issuing the relief Plaintiffs seek—a declaration that the Trump Proclamation is unlawful, and an injunction prohibiting the Agency Defendants from implementing it—would effectively eliminate the risk of harm to Plaintiffs' members' interests by reinstating the 1996 Proclamation's protections for the entire Monument. *See* Compl. ¶ 101. Such relief is well within the Court's equitable power.

The Court need not decide at this stage exactly which forms of relief against which Defendants would be appropriate if Plaintiffs prevail on the merits. To resolve the instant motion to dismiss, it is enough to conclude that a "favorable judicial decision," if granted, would "likely" redress Plaintiffs' alleged injuries. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see also Blumenthal v. Trump*, No. 17-cv-1154-EGS, 2018 WL 4681001, at *19 (D.D.C. Sept. 28, 2018) (slip op.); *League of Conservation Voters*, 303 F. Supp. 3d at 995. Plaintiffs' complaint meets that bar.

II. Plaintiffs' Claims Are Ripe for Judicial Review.

Because Plaintiffs' "threatened injury is sufficiently 'imminent' to establish standing," as explained above, "the constitutional requirements of the ripeness doctrine [are] necessarily . . . satisfied." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996). Plaintiffs' claims are also prudentially ripe. *See id.* at 1427-28 (prudential ripeness inquiry requires "balanc[ing] the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (quotation marks omitted)).

First, Plaintiffs' claims are fit for judicial resolution now. Plaintiffs ask the Court to determine whether the President had the authority to eliminate monument protections from roughly half of Grand Staircase. There is no uncertainty about whether agency officials will treat the Trump Proclamation as controlling: Defendants acknowledge that they will. *See* Defs.' Br. 45 ("To the extent there are any inconsistencies with the 1996 Proclamation, [the Trump] Proclamation . . . now controls."); *accord* Compl. ¶ 138. Thus, Plaintiffs' "legal argument[s] that the President d[id] not have the statutory or constitutional authority" to issue his proclamation are already "fully formed." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 410-11 (D.D.C. 2018). There is no need to await further action or clarification of the agency's position before resolving those legal arguments. *See id.*; *see also Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 408 (D.C. Cir. 2013); *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 234, 246 (D.D.C. 2014).

Second, resolving Plaintiffs' claims now imposes no hardship on Defendants—and Defendants have not argued otherwise. In fact, given that mining claims have already been located in the excluded lands, presumably "the government has an interest in knowing sooner, rather than later," whether the Trump Proclamation is legal, even though "it is not the government asking for the review." *Mead v. Holder*, 766 F. Supp. 2d 16, 27 n.8 (D.D.C. 2011) (quotation marks omitted). In contrast, the longer Plaintiffs must wait for a judicial ruling on the Trump Proclamation's illegality, the more likely it is that irreversible damage will befall the lands carved out of the Monument. *See supra* at 9-10, 13-15; *cf. Ctr. for Biological Diversity*, 722 F.3d at 408. There is no prudential reason to delay resolving Plaintiffs' legal claims.

III. President Trump Had No Authority to Dismantle the National Monument.

"The President's power, if any," to issue a proclamation dismantling a national monument "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343

U.S. at 585; *accord Medellín*, 552 U.S. at 524. Here, the President had neither constitutional nor statutory authority to dismantle Grand Staircase.

A. The President has no constitutional authority over federal lands.

The Property Clause of the Constitution grants exclusive power over the nation's public lands to Congress. U.S. Const. art. IV, § 3, cl. 2 (empowering Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Congress's "complete power" over federal lands is "without limitation." *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (quoting *United States v. City of San Francisco*, 310 U.S. 16, 29-30 (1940)). When it comes to managing or disposing of federal lands, the President may exercise only such power as Congress has delegated. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) (President's power to dispose of public lands must derive from a congressional delegation of such authority). The Constitution does not accommodate a unilateral presidential power to undo monument protections on public lands.

Indeed, Defendants admit that President Trump lacked any independent constitutional authority to support his proclamation. *See* Defs.' Br. 41 ("No authority has been asserted by the President to support the Proclamation in the event the Antiquities Act is held not to authorize it."). Because Defendants rely "entirely upon authority said to be delegated by statute, and make[] no appeal to constitutional powers of the Executive," the "central issue in this case" is whether the Antiquities Act "indeed grants to the President the powers he has asserted." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). As explained below, it does not.

B. The President had no statutory authority to dismantle Grand Staircase.

The Antiquities Act does not grant the President authority to rescind or reduce national monuments. Its text, protective purpose, legislative history, and numerous other congressional

enactments all confirm that Congress delegated to the President a limited power to *create* national monuments, but not to diminish or dismantle them.

1. The text of the Antiquities Act delegates the power to create national monuments, not to remove monument protections.

On its face, the Antiquities Act authorizes the President to take two actions: he may "*declare* by public proclamation . . . objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be . . . national monuments," and he may "*reserve* parcels of land as a part of the national monuments." 54 U.S.C. § 320301(a), (b) (emphases added). These terms describe the President's authority to create national monuments and set aside lands for protection. *See* Webster's Int'l Dictionary 377 (1907) (stating "declare" means "[t]o make known by language; . . . to proclaim"); *id.* at 1225 (stating "reserve" means "[t]o keep back; to retain"); *see also* UDB Br. 25-26 (discussing dictionary definitions). Nothing in the Antiquities Act authorizes the President to diminish or dismantle an existing national monument, as President Trump purports to have done.

"[T]he starting point for [a court's] interpretation of a statute is always its language." *Lindeen v. SEC*, 825 F.3d 646, 653 (D.C. Cir. 2016) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). Courts "do not start from the premise that [a statute's] language is imprecise," but instead "assume that in drafting . . . legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Here, Congress expressly authorized the President to "declare" national monuments and "reserve" parcels of land to protect the historic and scientific objects found there. Had Congress intended to delegate the "opposite power" of *revoking* monument status and protections from such lands, "it would have been at equal pains to have explicitly declared it." *Cochnower v. United States*, 248 U.S. 405, 407 (1919); *see also id.* at 407-08 (statute delegating authority to "increase and fix" compensation does not include

power to decrease compensation); *see North Dakota v. United States*, 460 U.S. 300, 312-13 (1983) (statute authorizing purchase of state lands with state consent does not authorize states to revoke consent); *In re Aiken Cty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (noting that statutes authorizing President to spend funds do not include power to "refuse to spend the funds"); *cf. Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (where "the Constitution expressly authorizes the President to play a role in the process of enacting statutes, [but] is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes," such unilateral action to repeal or amend is "prohibit[ed]").

Notably, the Antiquities Act's text contrasts with other turn-of-the-century public land statutes where Congress *did* expressly delegate the authority to reduce or revoke earlier land reservations. For example, the Forest Service Organic Administration Act of 1897 authorized the President to "modify any Executive order . . . establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve." 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 473).[7] Other contemporaneous statutes similarly demonstrate that when Congress wanted to grant authority to reduce or revoke land reservations, it did so expressly. *See, e.g.*, Pickett Act, Pub. L. No. 61-303, § 1, 36 Stat. 847 (1910) (authorizing President to "temporarily withdraw" public lands, and stating that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress"); *see also* UDB Br. 32-34 & n.5 (discussing statutes in detail).

[7] During congressional deliberations over the Forest Service Act, Representative Lacey—who later sponsored the Antiquities Act—affirmed that without an express delegation of authority, the President lacked power to rescind or reduce land reservations. 29 Cong. Rec. 2677 (Mar. 2, 1897). And, notably, Congress in the mid-1920s considered—and rejected—bills that would have granted the President power to reduce national monuments. *See infra* 31.

Unable to identify any comparable text in the Antiquities Act, Defendants attempt to find an implied power to diminish monuments within Congress's instruction that the reservation of land for national monuments "'be confined to the smallest area compatible with the proper care and management of the objects to be protected.'" Defs.' Br. 26-28 (quoting 54 U.S.C. § 320301(b)). But Defendants' interpretation violates the "fundamental canon of statutory construction that the words of a statute must be read in their context." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). In the Antiquities Act, both today and as originally enacted, the phrase "shall be confined" follows directly after the grant of power to "reserve" parcels of land:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and *may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible* with the proper care and management of the objects to be protected . . . .

Pub. L. No. 59-209, ch. 3060, § 2, 34 Stat. 225 (1906) (emphasis added).[8] Thus, the "shall be confined" language is not a *grant* of power, but rather a *limiting condition* on the President's power to "reserve . . . parcels of land," incident to the initial, discretionary decision to "declare" a national monument. *Id*. Reading the "shall be confined" language as a condition on the President's initial decision to reserve land—and not as a free-standing, ongoing grant of authority to diminish existing monuments, as Defendants urge—is the most straightforward reading of the statute. *Cf. Nestor v. Hershey*, 425 F.2d 504, 516 (D.C. Cir. 1969) ("The last

[8] The relevant statutory language has remained largely unchanged since Congress enacted it in 1906. In 2014, Congress codified the Act (along with other land preservation statutes) into positive law at its current place in the U.S. Code, making minor wording changes to ensure that the statutory language "conform[ed] to the understood policy, intent, and purpose of Congress in the original enactments." Pub. L. No. 113-287, § 2, 128 Stat. 3094 (2014).

sentence of paragraph 6(i)(2) is not a grant of authority, but is merely a clarification . . . intended to limit the authority already granted . . . .").

Contrary to Defendants' assertions, then, nothing in the Antiquities Act empowers (let alone requires[9]) a President to continually "revisit prior reservations" and *remove* lands from previously designated monuments. Defs.' Br. 27. Defendants ask the Court, in essence, to "add words to the [statute] to produce what is thought to be a desirable result." *Mass. Lobstermen's Assoc.*, 2018 WL 4853901, at *11 (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015)). In Defendants' view, Congress meant to require Presidents "to ensure that monument reservations are *and remain* 'confined' to the smallest area." Defs.' Br. 26 (emphasis added). If that is what Congress had meant, it easily could have said so. As illustrated by the contemporaneous public land statutes referenced above, *see supra* at 21-22, when Congress *wanted* to empower the Executive Branch to revisit earlier land withdrawals, "it had little trouble in doing so expressly." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176-77 (1994) (surveying statutes and concluding "Congress knew how to impose aiding and abetting liability when it chose to do so").[10]

Defendants fare no better by positing that Presidents have a free-floating "inherent" power to undo prior monument decisions. Defs.' Br. 27-29. Contrary to their contention, "[t]here

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[9] Indeed, Defendants' reading of the statute is illogical. If the Act's "shall be confined" proviso truly imposed on Presidents a "mandatory duty" to review and revise the boundaries of existing monuments, Defs.' Br. 29, President Trump's monument review necessarily should have covered not only monuments established "since . . . 1996," 82 Fed. Reg. at 20,429, but *all* national monuments in existence—and that review would need to continue perpetually. Congress would not have imposed such an onerous obligation in such an oblique manner. *See* UDB Br. 31-32.

[10] For example, the 1902 Reclamation Act expressly provided that "[t]he Secretary of the Interior . . . shall restore to public entry any of the lands so withdrawn when, in his judgement, such lands are not required for the purposes of this Act." Pub. L. No. 57-161, § 3, 32 Stat. 388 (1902).

is no general principle that what one can do, one can undo." *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (rejecting Attorney General's argument that "the power to denaturalize is 'inherent' in the power to naturalize"); *see also North Dakota*, 460 U.S. at 312-13. If such a principle existed, there would have been no reason for Congress to grant express modification authority, as it did, in the other turn-of-the-century public land statutes: those express grants would have been entirely superfluous. Defendants also miss the point when they argue that neither the President nor Congress can bind their successors in the exercise of their own constitutional authority. Defs.' Br. 29; *but see* UDB Br. 32 (noting President cannot reverse duly-enacted legislation). Critically, this case involves the scope of the President's *delegated* power. The Constitution assigns the exclusive power over federal lands to Congress, *see supra* at 19, and there is no serious question that Congress, where it chooses, may delegate only a *part* of that power and retain the rest for itself. *See Cochnower*, 248 U.S. at 407-08 (finding one-way delegation of authority where question involved "a legislative function").[11]

In short, the Court need look no further than the text of the Antiquities Act, which does not confer the authority that President Trump now asserts. "If, as [Defendants] . . . say, Congress intended" to delegate authority to diminish national monuments, "it would have used the words . . . in the statutory text." *Cent. Bank of Denver*, 511 U.S. at 177. "But it did not." *Id.*

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[11] Defendants cite cases where executive agencies sought to repair factual or legal errors in their adjudicative decisions, *see* Defs.' Br. 27-28 (citing *Albertson v. FCC*, 182 F.2d 397 (D.C. Cir. 1950); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21 (D.D.C. 2008)), but those cases say nothing about Congress's ability to make a one-way delegation of its own authority if it so chooses. *See NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (rejecting agency assertion of "inherent" authority to reconsider a rule, because agency "has '*only* those authorities conferred upon it by Congress'" (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)). Nor does an agency's ability to modify or repeal rules promulgated under the APA support Defendants' argument. In the APA, Congress expressly defined rulemaking to include "formulating, *amending*, *or repealing* a rule." 5 U.S.C. § 551(5) (emphasis added).

2. President Trump's attempt to remove monument protections is inconsistent with the Act's protective purpose and legislative history.

The Antiquities Act's purpose—to *protect* scientific and historic resources—confirms what the text states: Presidents may create national monuments and protect federal land, but they may not remove such protections. The "Antiquities Act is entirely focused on preservation." *Mass. Lobstermen's Assoc.*, 2018 WL 4853901, at *7. By its terms, it speaks of the "reserv[ation]" of land and the "proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). Because these objects cannot be recreated if destroyed, Congress intended monument protections to be enduring, not ephemeral. An "essential purpose of monuments created pursuant to the Antiquities Act . . . is 'to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'" *Alaska*, 545 U.S. at 103 (quoting 16 U.S.C. § 1, now codified at 54 U.S.C. § 100101(a)). Nowhere does the Act suggest that other possible uses of the land (private sale, resource extraction, and so on) may take precedence over protecting the objects of historic or scientific interest.

Defendants' argument—that the Court should graft onto the Act an implied power to *eliminate* monument protections—is wholly incompatible with the Act's "essential purpose," *id.*, of providing stable, long-term protection for irreplaceable scientific and historic objects. If Defendants were correct that President Trump could abolish nearly half of Grand Staircase, a future President could still reinstate the Monument's boundaries, setting in motion a potentially endless see-sawing of monument protections with each change of presidential administration. Congress did not intend such a disorderly and disruptive result.

The Antiquities Act's one-way delegation of protective authority fits comfortably within a broader pattern in public lands law. Unlike "multiple-use" land designations (such as forest

reserves) where Congress authorizes the President to revoke prior withdrawals to balance among competing interests over time, "categorically protected" land designations like national monuments cannot be moved into and out of protected status without risking irrevocable damage to the resources that merit protection. Jedediah Purdy, *The Shape of Public-Lands Law and Trump's National Monument Proclamations*, ECOLOGY L.Q. (forthcoming 2019) (Oct. 1, 2018 manuscript at 22-23), https://bit.ly/2OVglrb. Congress therefore tightly restricts the power to remove such protections, recognizing that conservation resources, once lost, can never be recovered. *See id.* at 18-22 (discussing, e.g., national wildlife refuges, 16 U.S.C. § 668dd(a)(6), and wilderness study areas, 43 U.S.C. § 1782[12]); *see also* UDB Br. 34-36. Defendants' attempt to characterize the Antiquities Act's one-way ratchet as an anomaly, Defs.' Br. 28, ignores this broader pattern and purpose.

The legislative history of the Antiquities Act confirms that Congress intended national monuments to provide such enduring protection. For years leading up to the Act's passage, Interior's General Land Office lobbied Congress to grant the Executive Branch a permanent protection power. *See, e.g.*, Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 117 (1902) (advocating for legislation "empowering the President to set apart, as national parks, tracts of public land which . . . it is desirable to protect and utilize in the interest of the public"); *see also* LEE, *supra*, ch. 6. The final bill that became the Antiquities Act responded to this need. The House Report on the enacted bill confirmed that the Act would authorize the "*permanent* withdrawal" of federal

[12] *See also* U.S. Dep't of Justice, Off. of Legal Counsel, *Presidential Authority Over Wilderness Areas Under the Federal Land Policy and Management Act of 1976*, 6 Op. O.L.C. 63, 65 (1982) (opining that, having recommended wilderness study areas, "the President does not have the authority to return lands to multiple use management without congressional action").

public land "for the purpose of protecting" objects of scientific or historical interest. H.R. Rep. No. 59-2224, at 7 (1906) (emphasis added).

Defendants misread the House Report as suggesting that Congress intended the Antiquities Act to authorize "temporary" withdrawals. *See* Defs.' Br. 3-4, 27-28. In fact, the House Report's reference to temporary withdrawals merely described the Interior Department's *existing* authority—a stop-gap authority that both Congress and Interior deemed insufficient to ensure meaningful protection of especially important scientific and historic sites. H.R. Rep. No. 59-2224, at 2-3, 6-7; *see, e.g.*, *id.* at 2 (recommending "prompt exercise of the authority lodged in various branches of the Interior Department"); *id.* at 7 (similar).[13] The House Report therefore went on to identify a "need for general legislation" to grant the Executive Branch a new, distinct power: the power to create "permanent" reservations, like parks, to protect irreplaceable natural treasures. *Id.* at 8. The Antiquities Act addressed this need, authorizing the President to ensure

[13] *See* LEE, *supra*, ch. 5 ("Until the Antiquities Act was passed in 1906, the chief tool available to the Federal Government for protecting antiquities on public land was the power to withdraw specific tracts from sale or entry for a temporary period."). Professor Hewett—who authored the relevant part of the House Report—recognized there was no need for Congress to authorize temporary withdrawals because Interior already that power. *See* Letter from Edgar Lee Hewett to Gen. Land Office (Sept. 14, 1904), *reprinted in* Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office* 318 (1904) (opining that many artifacts should be preserved "long enough for scientific investigation, and no longer," but noting "the Secretary of the Interior *already* has full power to protect these ruins." (emphasis added)).

that "these regions may be made a *perpetual* source of education and enjoyment for the American people, as well as for travelers from foreign lands." *Id.* at 2-3 (emphasis added).[14]

3. Congress did not acquiesce to prior presidential diminishments, but rather reaffirmed its exclusive power to reduce or rescind monuments.

Because the Antiquities Act's text, purpose, and history all confirm that Congress delegated only the power to create national monuments, but not to rescind or reduce them, Defendants resort to an acquiescence argument. They contend that intermittent presidential actions—never approved by the courts, and last occurring more than fifty years ago—created an unwritten power that, after a long dormancy, can now suddenly be revived. Defs.' Br. 29-33. But where the question is one of statutory interpretation—as Defendants concede it is here—the Court "need not consider" the Executive Branch's "post-enactment practice" to illuminate the meaning of Congress's clear words. *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 942 (2017).

Even if post-enactment practice were relevant, however, Defendants' argument fails on its own terms. It is axiomatic that "[p]ast practice does not, by itself, create power." *Medellín*, 552 U.S. at 532 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). Defendants' scattered examples from over half a century ago do not come close to the sort of "systematic, unbroken, executive practice, . . . never before questioned," that might support an acquiescence argument. *Id.* at 531 (quoting *Dames & Moore*, 453 U.S. at 686). Some of the proclamations Defendants cite merely corrected errors or clarified the original proclamations' boundaries;

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[14] The other legislative "need" described in the House Report was authority to issue scientific excavation permits. *See* H.R. Rep. No. 59-2224, at 3, 8 (describing "need" for statute "providing for the excavation of prehistoric ruins in the interests of science only"). Congress fulfilled that need with section 3 of the Antiquities Act, which authorized the Secretaries of the Interior, Agriculture, and War to permit excavation of objects from "land under their respective jurisdictions," so long as such removal was "undertaken for the benefit of . . . recognized scientific or educational institutions" and would result in the objects' "permanent preservation." Pub. L. No. 59-209, ch. 3060, § 3, 34 Stat. 225 (1906) (now codified at 54 U.S.C. § 320302).

others made more substantial boundary adjustments. *See* UDB Br. 41-43. No court ever ruled on the legality of those reductions, and the proclamations themselves offer little legal justification. Regardless, looking comprehensively at the Executive Branch's practice from 1906 to today, it is clear there was never an unquestioned, consistent practice of unilaterally reducing monuments. Even if there had been, Congress in 1976 definitively closed the door on such assertions of authority.

(a) 1906 – 1963. Contrary to Defendants' assertion, the Executive Branch's "contemporaneous understanding near the time of the statute's passage," Defs.' Br. 32, was fully consistent with the statutory text and Congress's intent. The Interior Department originally understood the Antiquities Act to authorize permanent reservations, like national parks. *See* Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 47-48 (1906) (describing the Act as authorizing creation of "parks"). So did President Theodore Roosevelt, who signed the Act into law, and who credited the Antiquities Act with "preserv[ing]" some of America's national treasures "for all time." THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 460 (1913), https://bit.ly/2ytAjQs.

Defendants rest their acquiescence argument entirely on a collection of presidential modifications that occurred between 1911 and 1963. Defs.' Br. 7 n.4. Those instances, however, do not establish a "systematic, unbroken," or "[un]questioned" practice. *Dames & Moore*, 453 U.S. at 686. Rather, during that same period, the Solicitor of the Interior specifically *declined* to approve draft proclamations reducing national monuments because the President lacked such authority. *See* U.S. Dep't of the Interior, Solicitor's Opinion M-12501 and M-12529 at 2 (June 3, 1924) ("After . . . establishment by proclamation," a monument "becomes a fixed reservation subject to restoration to the public domain only by legislative act."); U.S. Dep't of the Interior,

Solicitor's Opinion M-27025 at 1, 6-7 (May 16, 1932) (concluding that President had no power to reopen monument lands to mining because, "upon the issuance of a proclamation . . . the lands thus declared to be a national monument are permanently withdrawn").

In fact, the Executive Branch repeatedly asked *Congress* to reduce national monuments throughout this period, further demonstrating its understanding that the President had no power to do so himself.[15] And in the 1920s, the Executive Branch specifically (and unsuccessfully) asked Congress for legislation granting the President the power to reduce monuments—a power that, as the Interior Secretary told Congress, the President lacked under existing law. *See* H.R. Rep. No. 68-1119, at 2 (1925) (incorporating letter of Interior Secretary, recognizing that "after . . . establishment by proclamation [a monument] becomes a fixed reservation subject to restoration only by legislative act"); S. Rep. No. 68-849, at 2 (1925) (same); S. Rep. No. 69-423, at 2 (1926) (incorporating letter of Interior Secretary, asking Congress to pass legislation eliminating lands from Casa Grande and "permit[ting] the taking of similar action in the future where conditions require"). Congress, notably, rejected these requests for a presidential revocation power, *see* 67 Cong. Rec. 6805 (1926) (noting the Senate Committee "str[uck] out" language that would have authorized President "'to eliminate lands from national monuments by proclamation'"), choosing to exercise its own authority to modify national monuments instead,

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[15] *See, e.g.*, S. Rep. No. 69-423 (1926) (Interior Secretary asking Congress to reduce Casa Grande); Pub. L. No. 69-342, ch. 483, 44 Stat. 698 (1926) (reducing Casa Grande); S. Rep. No. 74-214 (1936) (Interior Secretary asking Congress to reduce Craters of the Moon); Pub. L. No. 74-668, ch. 527, 49 Stat. 1484 (1936) (reducing Craters of the Moon); S. Rep. No. 77-1128 (1942) (Acting Interior Secretary asking Congress to reduce Cedar Breaks); Pub. L. No. 77-486, ch. 162, 56 Stat. 141 (1942) (reducing Cedar Breaks); S. Rep. No. 81-2166, at 3-4 (1950) (Interior Secretary recommending reduction of Joshua Tree); Pub. L. No. 81-837, ch. 1030, 64 Stat. 1033 (1950) (reducing Joshua Tree); S. Rep. No. 89-766 (1965) (Assistant Interior Secretary recommending reduction of Jewel Cave); Pub. L. No. 89-250, 79 Stat. 971 (1965) (reducing Jewel Cave).

see Pub. L. No. 69-342, ch. 483, 44 Stat. 698 (1926) (reducing Casa Grande by legislation); *see also* UDB Br. 39-41.

Defendants are thus mistaken in suggesting that there existed some "enduring understanding" of a purported presidential power to diminish national monuments. Defs.' Br. 31. Indeed, even the Attorney General opinion that Defendants cite undermines their argument. In 1938, the Attorney General concluded that "the President is without authority" to "abolish" an existing national monument. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188-89 (1938). Defendants selectively quote the opinion's observation that "the President from time to time has diminished the area of national monuments," but notably, the Attorney General did not analyze the legality of those diminishments. *Id.* In fact, although the 1938 opinion was concerned specifically with abolishment, its reasoning prohibits diminishment as well. It relied at length on an earlier Attorney General opinion holding broadly that "[w]hen the President, in the exercise of the discretion vested in him by [statute]," reserved land for a specified purpose, "the power conferred by the act was exhausted, and he had no . . . authority to recall that reservation." *Id.* at 187 (quoting Rock Island Military Reservation, 10 Op. Atty. Gen. 359, 364 (1862)); *see also* Disposition of Abandoned Lighthouse Sites, 32 Op. Att'y Gen. 488, 490 (1921) (similar); Solicitor's Opinion M-12501 and M-12529 at 1 (relying on Lighthouse opinion to conclude that President had no authority to *reduce* national monuments).

In short, even during the time period on which Defendants exclusively rely, their examples reflect at most an ad hoc, conflicting, and confused approach to diminishing national monuments. Given the Executive Branch's inability to maintain a consistent position of its own, and its periodic representations to Congress that the President did *not* have the power to reduce monuments unilaterally, it is impossible to infer that Congress "kn[ew] . . . and acquiesced in"

any "long-continued practice" of executive reductions. *Dames & Moore*, 453 U.S. at 686; *see also SW Gen.*, 137 S. Ct. at 943 ("Congress's failure to speak up" in response to 112 occasions of Executive Branch overreach "does not fairly imply that it has acquiesced in the [Executive's] interpretation"; it was "at least as plausible" to conclude that "[t]he Senate may not have noticed . . . , or it may have chosen not to [take corrective action] . . . just to make a point about compliance with the statute."); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (declining to "impute to Congress" endorsement of executive practice that did not evince a "consistent[] . . . pattern").

(b) 1964 – 2017. In any event, Defendants' acquiescence argument breaks down completely after 1963, when what they call a "longstanding and extensive history" of presidential reductions ceased entirely. Defs.' Br. 30. Defendants have offered no examples of presidential monument reductions after 1963, and Plaintiffs know of none. In other words, Presidents have now abandoned such claims of authority for a longer period than they ever claimed it.[16] The practice is therefore not "unbroken." *Dames & Moore*, 453 U.S. at 686; *see also Haig v. Agee*, 453 U.S. 280, 297-98, 303 (1981) (noting the importance of consistent and "unbroken" executive interpretation and practice in finding acquiescence). And even if the occasional presidential reductions from 1911 to 1963 could have been sustained at the time as exercises of implied authority (which they could not), Congress foreclosed any such argument when it enacted the Federal Land Policy and Management Act (FLPMA) in 1976.

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[16] Contrary to Defendants' suggestion, Defs.' Br. 6 n.3; *id.* 31 n.17, presidential *expansions* do not support their acquiescence argument, not least because the Antiquities Act authorizes a President to effectively expand a national monument by "declar[ing]" and "reserv[ing]" additional acres of qualifying land adjacent to the existing monument. 54 U.S.C. § 320301(a), (b). *See, e.g.*, Pres. Proc. No. 9478, 81 Fed. Reg. 60,225, 60,225 (Aug. 26, 2016) (establishing Papahānaumokuākea Marine National Monument Expansion, and reserving "[a]n area adjacent to the [original] Monument").

FLPMA consolidated a patchwork of existing public land laws and broadly reaffirmed Congress's paramount power over withdrawals and reservations, clarifying that delegations of power to the Executive Branch must be express. Among other things, FLPMA was Congress's reaction to the *Midwest Oil* doctrine, under which Presidents had asserted implied authority over public land withdrawals and reservations. *See* 43 U.S.C. § 1701(a)(4) (purpose of FLPMA is to "delineate" executive withdrawal power); H.R. Rep. No. 94-1163, at 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6175-76 (noting Congress's concern with executive gap-filling). In *United States v. Midwest Oil*, the Supreme Court held that Congress had, through acquiescence, implicitly delegated to the President the authority to make certain types of land withdrawals. 236 U.S. 459, 474 (1915). Several administrations subsequently interpreted the *Midwest Oil* doctrine as giving the President power not only to make withdrawals, but also to reduce them, including national monuments. *See*, *e.g.*, U.S. Dep't of the Interior, Solicitor's Opinion M-27657 at 3-5, 7 (Jan. 30, 1935); U.S. Dep't of the Interior, Solicitor's Opinion at 3 (Apr. 20, 1915).

Congress, when it enacted FLPMA in 1976, expressly "repealed" the "implied authority of the President to make withdrawals and reservations resulting from acquiescence" under *Midwest Oil*. Pub. L. No. 94-579 § 704(a), 90 Stat. 2743, 2792 (1976). By repudiating *Midwest Oil*, Congress made clear that any delegations of its Property Clause power over land withdrawals must be express, not implied. *See Nat'l Mining Assoc. v. Zinke*, 877 F.3d 845, 856 (9th Cir. 2017) ("FLPMA eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority."). Consistent with this rule, FLPMA went on to confer *express* authority on the Interior Secretary to "make, modify, extend, or revoke [certain types of] withdrawals"—not including national monuments. Pub. L. No. 74-

597 § 204(a) (codified at 43 U.S.C. § 1714(a)); *see also* H.R. Rep. No. 94-1163, at 29, *reprinted in* 1976 U.S.C.C.A.N. at 6203 (noting that FLPMA left the Antiquities Act unchanged).

Not only did FLPMA leave the Antiquities Act (and its one-way delegation of authority) unchanged; it also listed "national monuments" as part of a group of land designations for which Congress retained tight control over the right to modify or undo protections. Following section 204(a) (which expressly authorized the Interior Secretary to modify or revoke certain types of withdrawals), section 204(j) provided: "The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress [such as national parks]; . . . modify or revoke any withdrawal creating national monuments . . . ; or modify[] or revoke any withdrawal which added lands to the National Wildlife Refuge System . . . ." Pub. L. No. 94-579, § 204(j), 90 Stat. at 2754 (codified at 43 U.S.C. § 1714(j)). The House Report explained that FLPMA would "specifically reserve *to the Congress* the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act." H.R. Rep. No. 94-1163, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6183 (emphasis added).

Defendants try to turn FLPMA to their advantage by arguing that because section 204(j) forbids "[t]he Secretary" from undoing withdrawals, the President by negative inference *is* free to do so. *See* Defs.' Br. 33.[17] But Defendants' strained reading ignores the fact that section 204(j) includes national monuments in a category of land designations that cannot be diminished without Congress's express authorization. Presidents cannot unilaterally carve land out of

[17] FLPMA's reference to the Secretary, rather than the President, in section 204(j) may simply be a drafting error that Congress failed to correct after it decided not to transfer Antiquities Act powers from the President to the Secretary. *See* Mark Squillace *et al*., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 61-64 & n.37 (2017) (describing drafting and evolution of this provision); UDB Br. 28-30.

national parks or wildlife refuges, either, even though section 204(j) is phrased as a limitation on the Secretary. As the House Report makes clear, section 204(j) reflects Congress's desire to retain "control" over all these "great national resource management systems" to ensure their "integrity" and stability over time. H.R. Rep. No. 94-1163, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6183.[18] Requiring deliberative *legislative* action before monument protections may be revoked is central to achieving that goal.

Both Congress and the Executive Branch again confirmed this understanding shortly after FLPMA's passage. First, in 1978, Congress explicitly "reaffirm[ed]" that lands managed by the Park Service (which include many national monuments) "shall not be [administered] in derogation of the values and purposes for which [they] have been established, *except as directly and specifically provided by Congress*." 54 U.S.C. § 100101(b)(2) (emphasis added); *see id.* § 100501 (defining National Park System to include national monuments managed by the Park Service). Second, after President Carter designated a number of large national monuments in Alaska, Congress responded by enacting the Alaska National Interest Lands Conservation Act (ANILCA), Pub L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101 *et seq.*). The legislative history of ANILCA repeatedly reaffirmed that the monuments "will be permanent unless . . . modified by Congress." H.R. Rep. No. 96-97, pt. 2, at 93 (1979); *see also id.* pt. 1, at 142, 393, 653 n.1. The Secretary of the Interior agreed, acknowledging that because

[18] Congress has expressly authorized the Executive Branch to make minor adjustments to both national parks and national wildlife refuges, but only in carefully enumerated circumstances, underscoring Congress's determination to retain tight control over the revocation of protections. *See* 16 U.S.C. § 668dd(a)(5), (b)(3) (authorizing the Secretary to transfer or dispose of certain lands from national wildlife refuges, and authorizing transfer of other lands only as part of land exchanges); 54 U.S.C. § 100506(c)(1), (6) (authorizing the Secretary to make "minor" boundary changes to National Park Service units under certain conditions, but providing that "boundary changes involving only deletions of acreage may be made only by Act of Congress").

"Congress retained ultimate authority for itself in FLPMA," monument "[p]roclamations can be repealed by Congress, but not by the Executive Branch." *The Antiquities Act and FLPMA Amendments of 1979: Hearing Before the Subcomm. on Parks, Recreation, & Renewable Res. of the S. Comm. on Energy & Nat. Res.*, 96th Cong. 29 (1979) (statement of Interior Sec. Cecil Andrus). And finally, in 2009, Congress established a "National Landscape Conservation System," which includes all BLM-managed "national monument[s]" (including Grand Staircase), and which is meant to "conserve, protect, and restore nationally significant landscapes . . . for the benefit of current *and future generations*"—again underscoring Congress's understanding that monuments are permanent unless modified by statute. Pub. L. No. 111-11, § 2002(a)-(b)(1)(A), 123 Stat. 991, 1095 (2009) (codified at 16 U.S.C. § 7202(a)-(b)(1)(A)); *see also* Partners Br. 29 (discussing legislative history of this Act).

In sum, for more than half a century, no President—until now—has purported to remove land from a national monument. Over that same period, Congress has repeatedly affirmed that the power to remove monument protections belongs to Congress alone. This history forecloses Defendants' congressional acquiescence argument.

4. The President's assertion of authority to dismantle Grand Staircase is incompatible with Congress's own modifications of the Monument.

Finally, Congress's active exercise of its authority to modify national monuments shows that the President's assertion of that same power is both unnecessary and untenable. Over the course of the Antiquities Act's history, Congress has used its retained power to modify or revoke national monuments frequently: abolishing some monuments, reducing the size of others, and

modifying boundaries in other ways, including by expanding some monuments.[19] And Congress has repeatedly exercised this power with respect to Grand Staircase in particular. As noted above, Congress has enacted multiple statutes that modified the Monument's boundaries by both removing and adding lands, ultimately adding more than 200,000 acres to President Clinton's initial 1.7 million-acre reservation. *See supra* at 7-8; *see also* Partners' Br. 27-29.

Congress's deliberate additions and adjustments to Grand Staircase's boundaries highlight the absurdity of President Trump's assertion of authority here. Most glaringly, the Trump Proclamation purports to excise roughly 80,000 acres that *Congress itself added to the Monument* by statute in 1998. *See* Compl. ¶ 98; Pub. L. No. 105-335, 112 Stat. 3139 (1998) (Land Exchange Act). The Trump Proclamation excludes other lands from the Monument that Congress spent millions of dollars to protect—including large swaths of the Kaiparowits Plateau, where Congress appropriated $19.5 million to buy back preexisting coal leases to prevent their development. Pub. L. No. 106-113, app. C, tit. VI, § 601, 113 Stat. 1501, 1501A-215 (1999). By revoking monument status from these parcels, the President purported to override duly enacted legislation with his own say-so, reopening to development land that Congress had sought to protect. There can be no serious argument that the President has such authority. *Cf. Clinton*, 524 U.S. at 439 (President has no power to "repeal[] or amend[] parts of duly enacted statutes").

Defendants try to dodge the significance of these statutes by arguing that they did not "abrogate[] presidential authority to modify monument designations" or "partially repeal[] by implication the Antiquities Act." Defs.' Br. 33-35. As explained above, the President lacks any

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[19] *See, e.g.*, Pub. L. No. 71-92, 46 Stat. 142 (1930) (abolishing Papago Saguaro and transferring land to Arizona); Pub. L. No. 75-778, 52 Stat. 1241 (1938) (re-designating parts of Mount Olympus as a national park and transferring the rest to the Olympic National Forest); Pub. L. No. 84-891, 70 Stat. 898 (1956) (abolishing Fossil Cycad); Pub. L. No. 104-333, § 205(a), 110 Stat. 4093, 4106 (1996) (modifying Craters of the Moon boundaries); Tribal Br. 34-35.

such authority under the Antiquities Act, so there is nothing for Congress to "abrogate" or "repeal." Rather, the statutes reveal that Congress has actively exercised its authority to modify Grand Staircase, making the President's assertion of that same power unnecessary and untenable. Congress surely would not have appropriated tens of millions of dollars to buy back coal leases or acquire additional lands and mineral interests in Grand Staircase if it thought a subsequent President could excise those lands and reopen them to mining with the stroke of a pen.

To the contrary, Congress found in the 1998 Lands Exchange Act that the parcels at issue had substantial "scientific, historic, cultural, scenic, recreational, and natural resources, including ancient Native American archaeological sites and rare plant and animal communities," and that "[d]evelopment of surface and mineral resources" on such lands "could be incompatible with the preservation of these scientific and historic resources for which the Monument was established." Pub. L. No. 105-335, § 2(2)-(3), 112 Stat. at 3139; *see also id.* § 2(14), 112 Stat. at 3141 (describing Grand Staircase as "some of the most renowned conservation land . . . in the United States"). Congress therefore acquired those lands and added them to the Monument to "*eliminate* th[e] potential incompatibility." *Id.* § 2(3), 112 Stat. at 3139 (emphasis added); *see also id.* § 2(14), 112 Stat. at 3141 (finding that adding lands to the Monument "will *resolve* many longstanding environmental conflicts" (emphasis added)). The Trump Proclamation, by

purporting to excise some of those lands from the Monument and reopen them to harmful mineral development, attempts to override Congress's carefully considered enactment.[20]

Nor would it make any sense, given Congress's active engagement in monument boundaries, to suggest that Presidents may revoke monument status from parcels of land originally reserved *by prior Presidents*, though they cannot do so for parcels reserved *by Congress*. If that were true, it would mean different levels of permanence for different parcels of land within the same monument. For a monument like Grand Staircase, whose acreage Congress has carefully adjusted over the years, the result would be a checkerboard of "more permanent" and "less permanent" parcels side by side. The Trump Proclamation illustrates the absurdity of this position in a nutshell: it did *not* revoke monument status from parcels of land (known as East Clark Bench) that Congress added to the Monument's southern boundary in another 1998 statute, Pub. L. No. 105-355, § 201(b), 112 Stat. at 3253, but it *did* purport to abolish monument protection for the lands all around those parcels. The result is that the parcels Congress added to the Monument are now two isolated, rectangular strips of land, marooned several miles south of the Kaiparowits Unit's new southern boundary. *See* 82 Fed. Reg. at 58,096; *see also* Ex. A (map). When Congress added those parcels to the Monument in 1998, it surely expected they would remain *within* the Monument, barring further legislative action. The President's assertion

[20] Defendants attempt to downplay the Lands Exchange Act's significance by noting that it consummated a process begun years before the Monument's designation. Defs.' Br. 35 & n.18. But the 1993 statute Defendants reference is beside the point, as it addressed only state school trust lands *outside* of Grand Staircase. *See* Pub. L. No. 103-93, 107 Stat. 995 (1993). Designation of the Monument in 1996 spurred a broader agreement that exchanged all state school trust lands and minerals *inside* Grand Staircase, *see* Pub. L. No. 105-335, § 2(1)-(3), 112 Stat. at 3139, plus additional state lands identified in the 1993 law, *see id.* § 2(5)-(6), (9)-(10), 112 Stat. at 3140. The Monument was therefore fundamental to the Lands Exchange Act.

of unilateral authority to nullify Congress's careful adjustments to the Monument's boundaries has no place in the statutory or constitutional scheme.

IV. Defendants' Motion to Dismiss Should Be Denied.

A. Plaintiffs have stated *ultra vires* and constitutional claims (Counts I and II).

For the foregoing reasons, President Trump's proclamation removing monument protections from nearly 900,000 acres of Grand Staircase is unlawful. The Antiquities Act gives him no such authority. Plaintiffs' first count therefore states a claim and should not be dismissed. *See* Compl. ¶ 147 (Count I) ("the Trump Proclamation . . . is *ultra vires*").

In addition, President Trump's arrogation of Congress's exclusive Property Clause power violates the Constitution's separation of powers. His proclamation revoking monument status from roughly half of Grand Staircase—including lands Congress itself added to the Monument—purports to do by executive fiat what only Congress can do. The complaint therefore states a separation-of-powers claim. *See* Compl. ¶¶ 151-53 (Count II). To be sure, the Court need not decide the constitutional question if it ultimately determines that Plaintiffs are entitled to relief on their *ultra vires* claim. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."). At this early stage in the proceedings, however, Plaintiffs' separation-of-powers claim should not be dismissed. *See, e.g.*, *Scott v. Dist. of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996) (plaintiffs may plead alternative theories of liability).[21]

[21] Because Defendants have disavowed any constitutional authority to diminish monuments, *see* Defs.' Br. 41, Plaintiffs will not pursue their claim under the Take Care clause (Count III).

B. Even assuming the President had some limited authority under the statute to reduce monuments, Plaintiffs have alleged sufficient facts to state a claim that the Trump Proclamation exceeded that authority (Count IV).

Even if the Antiquities Act afforded the President some limited authority to diminish monuments—which it does not—judicial review is available to ensure the President acted within those limits and "has not exceeded his statutory authority." *Mountain States*, 306 F.3d at 1136. Plaintiffs have adequately alleged that the President exceeded any such authority by "eliminating national monument status and protection from nearly 900,000 acres of the Monument," thereby "exclud[ing] objects of scientific and historic importance from . . . protection." Compl. ¶ 163 (Count IV). Circuit precedent "makes clear" that a President's authority "*must* be exercised consistently with the structure and purposes of the statute that delegates that power." *Reich*, 74 F.3d at 1330-31 (quoting *Kahn*, 618 F.2d at 793). Thus, the "court must analyze the organic statute that supposedly confers statutory authority upon the President, assess the scope of [the challenged proclamation], and check for inconsistencies between the statute and [proclamation]." *Am. Fed'n of Gov't Emps.*, 318 F. Supp. 3d at 393.

Here, even assuming the President has some limited authority to redraw monument boundaries that are "confined to the smallest area compatible with the proper care and management of the objects to be protected," 54 U.S.C. § 320301(b), such authority would in no way authorize the wholesale dismantling of a national monument, as President Trump has attempted to do here. The Trump Proclamation eliminates nearly half of the Monument's total acreage and leaves numerous objects of interest stranded without protection outside the monument boundaries. *See* Compl. ¶¶ 98-99, 163. Indeed, the Trump Proclamation *admits* that it strips monument protection from objects of scientific and historic interest. 82 Fed. Reg. at 58,089-90. And it attempts to justify their exclusion on the (unfounded) basis that some are not

of "significant" or "distinctive" historic or scientific interest, *id*. at 58,090—an ad hoc standard found nowhere in the Antiquities Act. *See* Compl. ¶ 164.[22]

For example, the Trump Proclamation excises from the Monument significant portions of the Circle Cliffs and Hole-in-the-Rock Trail, *id.* ¶¶ 106, 123, which the 1996 Proclamation specifically designated as objects of scientific and historical interest, 61 Fed. Reg. at 50,223-24. The same is true for "vast swaths" of the Kaiparowits Plateau "where troves of unique dinosaur fossils have been found." Compl. ¶ 9; *see also* 61 Fed. Reg. at 50,223-24. Thus, rather than ensuring the "proper care and management of the objects to be protected," 54 U.S.C. § 320301(b), the Trump Proclamation strips these objects of "the decades-long protection they enjoyed under the Antiquities Act, leaving them vulnerable to the damage that the 1996 Proclamation effectively barred." Compl. ¶ 163. The Trump Proclamation will, Plaintiffs allege, ultimately "destroy the resources the Monument was created to protect." *Id.* ¶ 9.

The complaint therefore "allege[s] facts to support the claim that the President acted beyond his authority under the Antiquities Act." *Mountain States*, 306 F.3d at 1137. The D.C. Circuit's opinion in *Tulare County* is instructive. There, a plaintiff challenging Giant Sequoia National Monument claimed that President Clinton "abused his discretion by designating more land than is necessary to protect the specific objects of interest." *Tulare County*, 306 F.3d at 1142. The D.C. Circuit affirmed dismissal of this claim not because the Proclamation "adverts to

[22] The Trump Proclamation notes that some of these objects of interest are "subject to [overlapping] Federal protections" under other laws or agency designations, 82 Fed. Reg. at 58,090, but that was true at the time of the Monument's designation in 1996, too. That fact does not render national monument protections superfluous or inappropriate; nor does it give the President a power to revoke monument protections that he otherwise lacks. *Cf. Utah Ass'n of Ctys*, 316 F. Supp. 2d at 1184 ("While the Antiquities Act and the Wilderness Act in certain respects may provide overlapping sources of protection, such overlap is neither novel nor illegal, and in no way renders the President's [Monument designation] invalid.").

the statutory standard," as Defendants appear to suggest (Defs.' Br. 37, 39), but rather because the plaintiff did "not make the factual allegations sufficient to support its claim[]"—namely, it failed to allege that any part of the Monument lacked scientific or historical value. *Tulare Cty.*, 306 F.3d at 1142. The court later reiterated that it was this pleading failure, "and nothing more," that required dismissal of the claim. *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003) (mem.) (per curiam) (denying petition for rehearing en banc).

Here, unlike in *Tulare County*, Plaintiffs have "identif[ied] the improperly [excluded] lands with sufficient particularity to state a claim." 306 F.3d at 1142; *see, e.g.*, Compl. ¶¶ 9, 106-09, 116-20, 123. If the Court ultimately determines that the President lacked *any* statutory authority to diminish the Monument (Count I), it would be unnecessary to reach this claim. But Defendants' attempt to dismiss the claim at this juncture must be denied.

C. Plaintiffs have stated a claim for relief under the APA (Count V).

Finally, the complaint states a claim for relief against the Agency Defendants under the Administrative Procedure Act (APA). Plaintiffs challenge a specific final agency action that occurred by the time of filing—namely, Interior and the BLM's decision to adhere to the Trump Proclamation, and to cease complying with the 1996 Proclamation in the excised lands insofar as it conflicts with the Trump Proclamation. Compl. ¶¶ 98, 102, 138-142. As explained above, that decision is "not in accordance with" the Antiquities Act, which authorizes the President to create but not to dismantle national monuments. 5 U.S.C. § 706(2)(A).[23]

[23] Defendants mischaracterize Plaintiffs' claim as a "broad programmatic attack," but it is no such thing. Defs.' Br. 43 (quoting *Norton v. SUWA*, 542 U.S. 55, 66 (2004)). Plaintiffs are not pursuing a "failure to act" claim under 5 U.S.C. § 706(1) as in *SUWA*, but rather are challenging a discrete agency decision already made. Defendants are similarly off base in arguing that Plaintiffs ask this Court to review agency action that has yet to occur. *See* Defs.' Br. 43. They conflate the *legal consequences* that flow from the challenged decision with the decision itself.

An agency action is final under the APA if it "mark[s] the consummation of the agency's decisionmaking process" and is an action from which "legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (citation omitted). Although the prototypical APA claim challenges a formal decisional document, "the absence of a formal statement of the agency's position . . . is not dispositive." *Her Majesty the Queen in Right of Ontario v. U.S. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990). As the D.C. Circuit has held, "agency inaction may represent effectively final agency action that the agency has not frankly acknowledged." *Id.* (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)).

Taking a "pragmatic" approach, *Hawkes*, 136 S. Ct. at 1815 (citation omitted), courts look not just at formal decisional documents but also at agency conduct and the practical effects of that conduct. For example, in *Navajo Nation v. U.S. Department of the Interior*, the Ninth Circuit concluded it could review the National Park Service's decision to "continue inventorying" certain remains and objects over the Navajo Nation's protest that the inventory was illegal. 819 F.3d 1084, 1092 (9th Cir. 2016). Although no formal decisional document existed, the court had "no trouble" finding that the continued inventory "consummated the Park Service's decisionmaking process as to the applicability of [the statute at issue]." *Id.*; *see also Alliance to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 9 (D.D.C. 2007) (EPA's failure to veto permit was final agency action, even though no formal decisional document existed, because EPA's inaction allowed the permit to issue).

Similarly, here, the Agency Defendants' decision to follow the Trump Proclamation in lieu of the 1996 Proclamation satisfies both finality criteria. The complaint alleges that Agency Defendants decided the Trump Proclamation supersedes the 1996 Proclamation, and they are acting on that decision. Compl. ¶¶ 102, 138-42; *see also* Defs.' Br. 45 (admitting as much). They

will not, for example, prohibit private parties from locating mineral claims and engaging in ground-disturbing activities in the excised lands—actions that would have been prohibited under the 1996 Proclamation. *See* Compl. ¶¶ 126, 129. Legal consequences flow from that decision because formerly protected lands are now open to extractive and destructive uses. Although Agency Defendants "ha[ve] not dressed [their] decision with the conventional . . . accoutrements of finality," their behavior "belies the claim" that their decision is not final. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

If, despite the foregoing, the Court dismisses Plaintiffs' APA claim, Agency Defendants should remain parties to the litigation to ensure that Plaintiffs may be afforded complete relief on their other claims. As explained above, *see supra* at 17, it is well established that courts may enjoin agency officials from implementing an unlawful presidential order. That is true even when there is otherwise no APA claim pending against those subordinate officials. *See Swan*, 100 F.3d at 980 & n.3; *Reich*, 74 F.3d at 1326-28.

CONCLUSION

In passing the Antiquities Act, Congress authorized the President to create national monuments, not to dismantle them. The President's proclamation subverts the statute's text and intrudes on Congress's sole authority by eliminating monument protections from nearly half of Grand Staircase—including areas that Congress itself added to the Monument through the years. No colorable reading of the statute supports the President's action. And because the President's unlawful action opens the excised lands to immediate and irreversible harm from hard-rock mining, there is no reason, constitutional or prudential, to delay the resolution of Plaintiffs' claims. Defendants' motion to dismiss should be denied.

Dated: November 15, 2018 Respectfully submitted,

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