IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Wilderness Society, *et al*.,	)	
Plaintiffs,	)	Civil Action No. 1:17-cv-02587 (TSC)
v.	)	
Donald J. Trump, *et al*.,	)	
Defendants.	)	

Grand Staircase Escalante Partners, *et al*.,	)	
Plaintiffs,	)	Civil Action No. 1:17-cv-02591 (TSC)
v.	)	
Donald J. Trump, *et al*.,	)	
	)	**CONSOLIDATED CASES**
Defendants.	)	
	)	**ORAL HEARING REQUESTED**

GRAND STAIRCASE ESCALANTE PARTNERS PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

President Clinton established the Grand Staircase-Escalante National Monument (the "Monument" or "GSENM" or "Grand Staircase") in 1996, *see* Proclamation No. 6920, 110 Stat. 4561 (the "1996 Proclamation"), using the Antiquities Act, 54 U.S.C. §§ 320301-320303, to protect its well-known, extensive, and spectacular geological, archaeological, historical, biological, and paleontological resources. The Act represents a concise and clear delegation of otherwise plenary Congressional power over public lands to the Executive: Pursuant to it, the President may only "declare . . . national monuments" and "reserve parcels of land" to protect the national treasures contained within. *Id.* § 320301.

Yet on December 4, 2017, President Trump issued a Presidential Proclamation "Modifying the Grand Staircase-Escalante National Monument" (the "2017 Proclamation"), purporting to eliminate significant portions of GSENM's protections, and plaintiffs in these consolidated cases filed suit the same day. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017). The 2017 Proclamation "modified and reduced" the existing Monument by 861,974 acres, a reduction of 46 percent from the size of the previous Monument. *See id.* at 58,093. Excluded from the Monument are countless irreplaceable resources, including those specifically identified in the 1996 Proclamation itself.

Defendants have moved to dismiss, principally arguing that the Antiquities Act implicitly grants to the President the authority to reduce national monuments. But as the text, purpose, and legislative history of the Antiquities Act make clear, the Act empowers the President only to *create* national monuments so as to *preserve* resources, not to strip protections from resources already safeguarded. The 2017 Proclamation is thus an unconstitutional and *ultra vires* exercise of powers expressly committed by the Constitution to Congress, which has not delegated any such powers to the Executive Branch. More fundamentally, Congress has fixed the boundaries of Grand Staircase

through specific legislation enacted after the Monument was created in 1996. Because Congress has thus asserted its prerogative over this particular monument, the President is prohibited from acting unilaterally to diminish it. The 2017 Proclamation completely ignores these subsequent Congressional actions, and is thus no different—and no more permissible—than the President attempting to overturn any duly enacted piece of legislation through unilateral Executive action.

No Court has ever endorsed the view that the President may reduce the size of national monuments or eliminate monument protections. Nor has Congress "acquiesced" to Presidential authority to eliminate monument protections wholesale simply because that body has not explicitly objected to modifications of other national monuments—in circumstances far different than those here—by other Presidents. Legislative history across multiple decades is clear that Congress has, consistent with its original understanding when it passed the Act, maintained its exclusive authority to reduce protections, and the limited record Defendants have compiled is not enough to overcome this history or the plain meaning of the Act's text.

Defendants' other arguments fare no better. Plaintiffs Grand Staircase Escalante Partners ("Partners"), Conservation Lands Foundation ("CLF"), and the Society of Vertebrate Paleontology ("SVP") (collectively "Partners Plaintiffs" or "Plaintiffs") have standing and the case is ripe because the 2017 Proclamation has put Monument resources at imminent risk of irreparable harm or is already creating such harm. The Plaintiffs who depend on these resources to conduct scientific research, to attract visitors to their businesses, and to appreciate the majesty and remoteness of the natural world have all suffered injury as a result. Likewise, Partners Plaintiffs provide sufficient grounds that the President's discretion does not extend so far as to remove thousands of resources from protection with little or no explanation other than the seeming desire

to promote commercial exploitation that is not contemplated by the Antiquities Act. For these reasons, the Motion to Dismiss should be denied.

BACKGROUND

I. The 1996 Proclamation Created Grand Staircase-Escalante National Monument to Protect and Preserve the Land and its Spectacular Sensitive Resources.

Grand Staircase-Escalante National Monument was protected by Presidential designation on September 18, 1996 for its "vast and austere landscape," its "wide variety" of unique geological formations, and a "spectacular array of scientific and historic resources."[1] In 2004, the U.S. District Court for the District of Utah confirmed that the 1996 Proclamation satisfied the requirements for the creation of national monuments under the Antiquities Act, stating that it was "undisputed that the President . . . set[] aside . . . the smallest area necessary."[2]

In particular, the Monument contains "world class paleontological" resources and "[e]xtremely significant fossils," including "one of the best and most continuous records of Late Cretaceous terrestrial life in the world."[3] In the years since the Monument was created, over forty-five newly discovered species—including twelve species of dinosaurs—and over three hundred taxa total have been reported from the Kaiparowits Plateau alone, yet only six percent of the region has been comprehensively inventoried.[4] According to the Bureau of Land Management ("BLM") itself, vast areas of the Monument exhibit the highest potential for fossil discovery, known as

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[1] Proclamation No. 6920, 110 Stat. 4561, 4561 (Sept. 18, 1996); Compl. ¶ 59. Partners Plaintiffs' complaint, and the materials filed in support of that complaint and their motion for partial summary judgment are located on docket No. 17-2591. *See* ECF Nos. 1, 21.
[2] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004); Compl. ¶ 9.
[3] 110 Stat. at 4562; Compl ¶ 6.
[4] *See* Compl. ¶¶ 36, 77.a.

paleosensitivity.[5] The Monument contains numerous paleontological resources that simply cannot be found elsewhere, yet which occur broadly throughout the formations within the Monument.[6]

The Monument also maintains a remarkable degree of present-day biological diversity,[7] including a significant percentage of Utah's rare and endemic plant species and a significant percentage of all the plants found in Utah.[8] Six hundred and fifty species of bees alone are found within the Monument.[9] Additionally, the Monument has been a rich source of archaeological discovery, with an estimated 100,000 archaeological sites within its original boundaries.[10]

Consistent with the 1996 Proclamation, the Monument has been managed pursuant to a resource management plan, promulgated in 2000, according to two basic precepts: that the Monument would need to remain remote and undeveloped, protected in its primitive frontier state, as an essential condition for safeguarding the widely dispersed and sensitive scientific and historic resources; and that the Monument would provide unparalleled opportunities for the study of scientific and historic resources.[11] The mere fact of development will thus undermine and destroy the very qualities of the Monument that preserve these sensitive resources and create the scientific opportunities for which the Monument was created and is best known.

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[5] *See* Alan L. Titus, Jeffrey G. Eaton & Joseph Sertich, *Late Cretaceous Stratigraphy and Vertebrate Faunas of the Markagunt, Paunsaugunt, and Kaiparowits Plateaus, Southern Utah*, 3 GEOLOGY OF THE INTERMOUNTAIN WEST 229 (2016); Compl. ¶ 77.b, Ex. B.
[6] Compl. ¶ 135.
[7] *See* 110 Stat. at 4563; Compl. ¶ 79.
[8] Compl. ¶ 79.a.
[9] *Id.* ¶ 79.b.
[10] *See* 110 Stat. at 4562; Compl. ¶ 81.e.
[11] BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NAT'L MONUMENT APPROVED MGMT. PLAN – REC. OF DECISION iv, 5 (2000) [hereinafter GSENM PLAN]; Compl. ¶¶ 8, 75.

II. Since the 1996 Proclamation, Congress Legislated Several Changes and Additions to Grand Staircase's Protected Areas.

When originally designated by President Clinton in 1996, the borders of GSENM encompassed significant inholdings of land originally deeded to Utah upon statehood and still owned by the state.[12] In 1998, Congress ratified an agreement exchanging "approximately 176,698.63 acres of state land and the mineral interest in approximately an additional 24,000 acres" that were "within the exterior boundaries of the Monument" in exchange for valuable revenue-producing federal lands outside the Monument boundaries.[13] The agreement clearly specifies that any lands acquired by the United States "within the exterior boundaries of the Monument . . . shall become a part of the Grand Staircase-Escalante National Monument, and shall be subject to all the laws and regulations applicable to the Monument."[14]

In the same year, Congress also passed a statute that further adjusted the boundaries of the Monument by adding and removing other lands.[15] That statute explicitly "modifie[s]" the "boundaries of the Grand Staircase-Escalante National Monument."[16] Finally, in 2009, Congress authorized the Secretary of the Interior to remove certain Monument lands and convey them to a private entity.[17] Upon such conveyance, "the boundaries of the Grand Staircase-Escalante

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[12] *See* Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, § 3, 112 Stat. 3139, 3139 (1998); Compl. ¶¶ 7, 64.
[13] Agreement to Exchange Utah School Trust Lands Between the State of Utah and the United States of America §2(E) (May 8, 1998) [hereinafter Exchange Agreement]; Utah Schools and Lands Exchange Act at 3139, 3141; Compl. ¶ 64.
[14] Exchange Agreement § 5(a); Compl. ¶ 64.
[15] *See* Automobile National Heritage Area Act of 1998, Pub. L. No. 105-355, §§ 201–202, 112 Stat. 3247, 3252–53 (1998); Compl. ¶ 66.
[16] Automobile National Heritage Area Act §§ 201–202, 112 Stat. at 3252–53; Compl. ¶ 66.
[17] *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 2604, 123 Stat. 991, 1119–20 [hereinafter OPLMA]; Compl. ¶ 67.

National Monument in the State of Utah [were] modified to exclude the Federal land conveyed to [the private entity]."[18]

Additionally, Congress permanently codified the National Landscape Conservation System ("NLCS").[19] The Department of the Interior had established the system administratively in 2000 and Grand Staircase was one of its original units. The 2009 Omnibus Act, by which this was accomplished, states that NLCS "shall include each of the following areas administered by the Bureau of Land Management: (1) Each area that is designated as—(A) a national monument."[20]

III. President Trump Eliminated Protections from the Monument, Including by Excluding Thousands of Protected Objects of Historic And Scientific Interest.

A. Executive Order 13,792 and the Monument Review Process

On April 26, 2017, President Trump signed Executive Order 13,792, in which he proclaimed that "[m]onument designations . . . may . . . create barriers to achieving energy independence . . . and otherwise curtail economic growth."[21] The order mandated that the Secretary of the Interior review, *inter alia*, "all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres," and provide a final report to the President.[22] The date range suggests that the review was specifically structured to include Grand Staircase, which was created in 1996 and thus was the longest established monument subject to this review.[23]

[18] OPLMA § 2604, 123 Stat. at 1120; Compl. ¶ 67.
[19] *See* OPLMA § 2002, 123 Stat. at 1095; Compl. ¶ 68.
[20] OPLMA § 2002, 123 Stat. at 1095; Compl. ¶ 68.
[21] Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (April 26, 2017); Compl. ¶ 92.
[22] Exec. Order No. 13,792, 82 Fed. Reg. at 20,429–30; Compl. ¶ 92.
[23] Compl. ¶¶ 92-93.

The Department of Interior's ("DOI") review process from the start focused heavily on extractive potential at the Monument. The internal report generated by BLM to aid the Secretary of Interior's review included, at DOI's request, "[i]nformation on activities that likely would have occurred . . . if the Monument had not been designated," including: "[e]nergy - annual production of coal, oil, gas"; "annual mineral production"; and "annual timber production."[24] Secretary Zinke's report to the President, submitted in August 2017, concluded that the Monument: "restrict[ed]" "activities that facilitate grazing"; "limited" "[m]otorized vehicle use"; and "contain[ed] an estimated several billion tons of coal."[25] Secretary Zinke recommended that "[t]he boundary should be revised" as a result.[26]

B. The 2017 Proclamation

Following the Secretary's review, on December 4, 2017, President Trump issued the 2017 Proclamation. That Proclamation removed nearly 900,000 acres from Grand Staircase, including thousands of specifically-designated objects of scientific and historic importance, and split the Monument into five irregularly shaped and non-contiguous areas (three of which are named the "Grand Staircase," the "Kaiparowits," and "Escalante Canyons" Units).[27] Additionally, the 2017 Proclamation portends management changes for the entire remaining area, by altering protections for road and trail use and vegetation management.[28]

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[24] *See* Bureau of Land Mgmt., Dep't of the Interior, Call for Data Related to Review of National Monuments Under EO 13792 (Apr. 26, 2017), *available at*: https://www.documentcloud.org/documents/4391967-National-Monuments-a-Look-at-the-Debate-From.html#document/.

[25] *See* Ryan K. Zinke, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act 13 (Dec. 5, 2017), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf; Compl. ¶ 100.

[26] Zinke, *supra* note 25, at 14; Compl. ¶ 100.

[27] *See* Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017); Compl. ¶ 101.

[28] 82 Fed. Reg. at 58,094; Compl. ¶ 146.

The 2017 Proclamation asserts—without citation to the Antiquities Act, case law construing the Act, or any other source of law—that "[d]etermining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws."[29] It concludes, without further specificity, that "in light of the research conducted since designation . . . many of the objects identified by the [1996 Proclamation] are not unique to the monument[] and . . . are not of significant historic or scientific interest."[30]

However, the proffered reasoning ignores the value of the excluded historic and scientific objects and the importance of the context in which they exist.[31] As BLM itself recently concluded, "[r]esource conditions have not changed . . . but management objectives . . . have."[32] The areas eliminated from the Monument by the 2017 Proclamation, according to BLM, contain numerous sensitive resources, including objects specifically identified for protection in the 1996 Proclamation.[33] BLM mapping itself indicates the abundance of known objects and sensitive resources excluded by the redrawn boundaries.[34] BLM notes that "the features, resources, and

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[29] 82 Fed. Reg. at 58,089.
[30] *Id.* at 58,090-91.
[31] Compl. ¶ 137.
[32] BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, ANALYSIS OF Mgmt. SITUATION: GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT AND KANAB-ESCALANTE PLANNING AREA AT 3 (June 2018) [hereinafter ANALYSIS OF MGMT. SITUATION], *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/154274/188891/GSKRMP_Analysis_of_Mngt_Situation_2018_0711_508.pdf.
[33] Compl. ¶ 14; *see also, e.g.*, ANALYSIS OF MGMT. SITUATION at 30 (noting "some of the highest site densities and most important" archaeological sites are excluded, and lamenting "a serious loss of research potential"); *id.* at 125-26 (portions of Burr Trail Road—"one of the most picturesque drives in Utah"—excluded).
[34] BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NAT'L MONUMENT & KANAB-ESCALANTE AREA RESOURCE MGMT. PLANS SCOPING: CULTURAL AND

history of [the excluded lands] are similar to those" for the lands that remain within the Monument.[35]

Strikingly, the 2017 Proclamation excludes over 700 scientifically important fossil sites—approximately one third of all discoveries made to date in the Monument—that represent entire chapters of the paleontological record.[36] Parts of the Vermillion Cliffs containing portions of the fossil record from the Late Triassic era have been excised. The Dakota and Tropic Shale Formations have been almost entirely excluded, and parts of the Wahweap Formation have been excluded.[37] The Tropic Shale is one of the only fully marine geological units in the Monument, and is part of the Late Cretaceous sequence of ecosystems referred to in the 1996 Proclamation. Specifically identified iconic geological formations, such as the Waterpocket Fold, portions of the Kaiparowits Plateau, and the Grand Staircase cliff sequence have been removed or fractured by only partial inclusion.[38] Specifically identified historical locations, such as the Hole-in-the-Rock

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PALEONTOLOGICAL RESOURCES (April 5, 2018), *available at*: https://eplanning.blm.gov/epl-front-office/projects/lup/94706/140146/172250/Cultural_and_Paleo_Resources_Poster.pdf, Attached hereto as Exhibit 1.

[35] 1 BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NAT'L MONUMENT AND KANAB-ESCALANTE PLANNING AREA DRAFT RESOURCE MGMT. PLANS AND ENVTL. IMPACT STATEMENT 1-3 (Aug. 2018) [hereinafter GSENM Draft EIS], *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/155931/190911/GSENM-KEPA_RMPs-EIS_Vol_1-508.pdf.

[36] *See* P. David Polly, *Shrinking the Grand Staircase-Escalante National Monument is a Disaster for Paleontology*, THE CONVERSATION (Sept. 21, 2018), https://theconversation.com/shrinking-the-grand-staircase-escalante-national-monument-is-a-disaster-for-paleontology-103414; Compl. ¶ 104.a.

[37] Compl. ¶ 104 e, h: *see also* ANALYSIS OF MGMT. SITUATION at 269, 274.

[38] Compl. ¶ 103.

trail, have been excluded and carved up.[39] And corridors between and immediately adjacent to the non-contiguous new Monument units allow for greatly enhanced and unconstrained access.[40]

As directed by the 2017 Proclamation,[41] on August 17 2018, BLM released draft revised resource management plans for both the revised remaining GSENM and the lands newly excluded from its borders. BLM will accept comments on these plans until November 30, 2018, but has explicitly decided to ignore comments about the lawfulness of the 2017 Proclamation as outside the scope of its considerations—presupposing its legality.[42] While the final plan has not yet been adopted, every proposed alternative is less protective of the sensitive resources on the newly-excluded lands than the status quo before the 2017 Proclamation.[43] BLM has stated, in line with the monument review process and the 2017 Proclamation, that its "preferred option" is the one that "emphasizes resource uses and reduces constraints" and "is the least restrictive to energy and mineral development."[44] BLM's preferred alternative would: "conserve[] the least land area for

[39] *Id.*; *see also* ANALYSIS OF MGMT. SITUATION at 125-126.
[40] *See* Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,094 (Dec. 8, 2017) (permitting the Secretary of the Interior to allow motorized and non-motorized vehicle use on roads and trails).
[41] *See id.*
[42] *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NAT'L MONUMENT & KANAB-ESCALANTE AREA RESOURCE MGMT. PLANS AND ENVTL. IMPACT STATEMENT SCOPING REPORT 7 (August 2018) [hereinafter EIS Scoping Report] (such comments are "out of the decision space" and "beyond the scope" of the project).
[43] Even Alternative A, the CEQ-mandated "no action" alternative, *see* 40 C.F.R. 1502.14(d), reflects the management changes accomplished by the 2017 Proclamation, including the allowance of increased access and activity under the mining laws, which BLM identifies as having the potential to impact resources. *See* BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NAT'L MONUMENT AND KANAB-ESCALANTE PLANNING AREA DRAFT RESOURCE MGMT. PLANS AND ENVTL. IMPACT STATEMENT: EXECUTIVE SUMMARY 5 (Aug. 2018) [hereinafter Draft RMP ES], *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/155930/190910/GSENM-KEPA_Executive_Summary-508.pdf.
[44] *See* Draft RMP ES at ES-10.

physical, biological, cultural, and visual resources;"[45] "[o]pen 551,582 acres of Federal mineral estate to mineral leasing subject to moderate constraints and 108,230 acres subject to major constraints;"[46] open 642,991 acres to mineral material disposal;[47] and "[i]ncrease the potential for impacts on paleontological resources."[48]

C. The Purportedly Excluded Lands Are Now Open to Private Mining Activities.[49]

On February 2, 2018, under the terms of the 2017 Proclamation itself, "the public lands excluded from the monument reservation [were] open[ed] to: (1) entry, location, selection, sale or other disposition under the public land laws; (2) disposition under all laws relating to mineral and geothermal leasing; and (3) location, entry, and patent under the mining laws."[50] Of central concern are activities under the General Mining Law of 1872, 30 U.S.C. §§ 21 *et seq.*, pursuant to which "anyone can enter open public lands, undertake excavation, stake mining claims, and set up mining operations."[51]

Several entities have already sought to take advantage of this opening of the newly-excluded lands to extractive activity, and have staked mining claims. Glacier Lake Resources Inc. has staked claims for the area comprising the Colt Mesa Mine, located in the Circle Cliffs region

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[45] *Id.* at ES-10.
[46] *Id.* at ES-11.
[47] *Id.* at ES-40.
[48] *Id.* at ES-23.
[49] Plaintiffs discuss events occurring after the filing of the complaint to provide crucial context; to clarify the post-complaint developments Defendants themselves introduced, *see, e.g.,* Roberson Decl. ¶ 29, ECF No. 43-2; and to demonstrate that the issues presented are prudentially ripe for review. *See Buckley v. Valeo*, 424 U.S. 1, 114-17 (1976) (basing ripeness determination on events that occurred in "the passage of months" during the suit). Plaintiffs do not—and need not, given the 2017 Proclamation's immediate impacts—rely on these events to establish standing.
[50] Proclamation No. 9682, 82 Fed. Reg. 58,093 (Dec. 8, 2017); Compl. ¶¶ 12, 27.
[51] *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 324 (D.C. Cir. 1987).

of the original Monument, near the border of the Escalante Canyons Unit of the reduced monument.[52] Glacier's CEO has publicly stated that "drill permitting will be initiated shortly."[53] The company has already visited the site and taken samples, and reports commercially viable concentrations of several minerals, including copper and cobalt.[54]

Glacier is not alone. As Defendants admit in their filing, additional claims have been staked on newly-excluded lands southeast of Cannonville, near the border of the new Kaiparowits unit of the revised monument and the sensitive resources there.[55] Additional claims—Volcon Coin 1, 2, & 3—have been filed outside the borders of Escalante within the original boundaries. Many of the claims filed to date are near and may threaten documented paleontological discoveries.[56]

STANDARD OF REVIEW

In order to survive a 12(b)(6) motion to dismiss, Plaintiffs' complaint and affidavits 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) (internal quotation marks and citation omitted).

The "burden imposed on plaintiff to establish standing is not onerous" at the 12(b)(1) stage, *NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 89 (D.C. Cir. 2012) (internal quotation marks omitted), and is satisfied if the "facts alleged by the Plaintiffs are specific, plausible and susceptible to proof at trial." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1066 (D.C Cir. 2015). To establish standing, a plaintiff must show that (i) it has "suffered a concrete and particularized injury

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[52] Roberson Decl. ¶ 29.
[53] GLACIER LAKE RESOURCES INC., *Acquisition of Colt Mesa Copper-Cobalt Property, Utah, Surface Grab Samples Return 0.88% Copper and 2.31% Cobalt* (June 13, 2018) [hereinafter Glacier Press Release] *available at* https://www.cnbc.com/2018/06/13/globe-newswire-acquisition-of-colt-mesa-copper-cobalt-property-utah-surface-grab-samples-return-0-point-88-percent-copper-and-2-point-31.html.
[54] *See id.*, *see also* GLACIER LAKE RESOURCES, Colt Mesa Project, https://www.glacierlake.ca/colt-mesa/ (showing pictures of copper and cobalt deposits).
[55] Roberson Decl. ¶ 29.
[56] *See generally* Polly Decl. III, attached hereto as Exhibit 2.

in fact, (ii) that was caused by or is fairly traceable to the actions of the defendant, and (iii) is capable of resolution and likely to be redressed by judicial decision." *Sierra Club v. EPA*, 755 F.3d 968, 973 (D.C. Cir. 2014) (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)).

JURISDICTIONAL ISSUES

President Trump's 2017 Proclamation excised approximately 900,000 acres of land from Grand Staircase-Escalante National Monument for the stated purpose of opening those lands for mining, oil and gas extraction, and this has resulted or imminently will result in concrete injury to the scientific, aesthetic, and economic interests of Plaintiffs. Plaintiffs represent a wide swath of individuals deeply invested in the preservation of Grand Staircase-Escalante National Monument, including scientific researchers who have devoted their professional careers to conducting long-term research projects on lands now excluded from protections by President Trump's Proclamation, business owners reliant on tourism to visit the now-excluded lands, and individuals who spend time in the Monument due to its unique undeveloped character and who are interested in preserving the unspoiled nature of the excluded lands. Plaintiffs are organizations whose specific missions are preservation and promotion of the Monument and its irreplaceable resources. Nonetheless, Defendants argue that none of these individuals or entities has a sufficiently vested stake in this controversy to challenge the Constitutional authority of the President to take such an action. Such an outcome would defy relevant precedent, logic, and common sense.

I. Plaintiffs Have Pled Sufficient Facts To Establish Standing

A. SVP and Partners Have Pled Concrete and Imminent Injury to Their Members' Interests

Plaintiff groups Grand Staircase Escalante Partners and the Society of Vertebrate Paleontology both[57] have associational standing to bring this suit because both groups have "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).

SVP and Partners have identified specific and concrete harms to their members' scientific research interests, both in their Complaint and in their previously filed Motion for Partial Summary Judgment.[58] Approximately ten percent of SVP's members have done some field research in the Monument, and many have recently published scientific papers on their discoveries in the Monument. Compl. ¶ 33; Polly Decl. I. ¶ 10, Compl. Ex. D. Currently, twenty-seven SVP members are conducting long-term research projects on lands specifically excised from the Monument by the 2017 Proclamation. Compl. ¶ 34; Polly Decl. II ¶ 5, Pls.' Mot. Summ. J. Ex. 2. Members of Partners similarly plan to conduct research on the excised lands. Compl. ¶¶ 22, 24; Sadler Decl. ¶ 8, Pls.' Mot. Summ. J. Ex. 3.

Exclusion of these lands from the Monument directly limits scientists' ability to finance their research. First, research projects on excluded lands are no longer eligible to receive funding through the Bureau of Land Management's Management Studies Support Program for National Conservation Lands.[59] Polly Decl. I ¶ 13.b.1. SVP members conducting research on excluded

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[57] This court need only find that one of the three plaintiff organizations in this suit has demonstrated standing in order to retain jurisdiction over all of the Plaintiffs. *See Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009).
[58] *See supra* note 1.
[59] As just one example, this program provides approximately $300,000 annually geared towards "increasing our understanding of the resources present on" NLCS lands. Bureau of Land Mgmt., U.S. Dept. of the Interior, BLM Funding Opportunity No. L18AS00007 3 (2018), *available at* http://sfc-cesu.com/wp-content/uploads/2018/08/WO-FY19-Bureau-wide-Mgmt-Studies-Support-Program-for-NCL_Final-L18AS00007.pdf. National Conservation Lands are a defined category of lands, which includes "National Monuments" but not most of the excluded lands. *Id.*

lands rely on this, now unavailable, funding to support the costs of preparation, curation, and storage of discoveries at approved research repositories. *Id*.

Second, researchers face difficulties securing research funding from other sources as well, because they cannot provide the requisite assurances that paleontological sites will be protected and monitored through the duration of the dig and preserved for on-going research beyond that period. Polly Decl. I ¶13.b.ii. Standard paleontological research field projects take years, given the time it takes to safely preserve and curate the sensitive objects, while some research requires decades of site visits (and return visits after science has advanced) to obtain an understanding of the historical context of the discovery. Compl. ¶ 37. "[C]ommon sense," *Attias v. Carefirst, Inc.*, 865 F.3d 620, 628 (D.C. Cir. 2017), and the experiences of Plaintiffs, Sadler Decl. ¶ 14.D, F.2, Polly Decl. I, ¶13.b.ii, dictate that the potential for future contamination, unintentional destruction, and loss of integrity of research sites deters investment for projects on non-Monument lands.

Defendants do not contest that these harms to the research and career interests of Plaintiffs' members constitute a concrete and particularized injury. Instead, Defendants only argue that the injury is not "imminent" because ground-disturbing activity is either prohibited under the current Management Plan, or would otherwise require BLM's approval. Br. at 17. But such arguments misunderstand the injuries alleged. Researchers conducting projects on the excised lands are, and were immediately, rendered categorically ineligible for future NLCS funding because the 2017 Proclamation altered the legal *status* of the excised lands on December 4th, 2017. Similarly, researchers now face difficulty making the necessary assurances to secure funding through other sources because of the commonsense perception—arising from the 2017 Proclamation and borne out by the proposed draft management plan implementing it—that the reductions will eliminate protections for excluded lands. BLM itself has determined that "safeguarding the remote and

undeveloped frontier character of the Monument is essential to the protection of the scientific and historic resources" identified by the Proclamation.[60] There is simply nothing "tentative" about the President's actions to so radically reconfigure the Monument. *See Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151 (1967) (abrogated on other grounds).

Apart from these injuries to members' research interests, Plaintiffs have also alleged imminent and concrete damage to the visual beauty and uniqueness of Grand Staircase's expansive and frontier landscape, affecting Plaintiffs' aesthetic enjoyment of the excluded lands and their related economic interests. Members of Partners, for example, have spent significant time in the Monument exploring the numerous canyons and ridges, and enjoying the serene, peaceful nature of a landscape that stretches undisturbed by human activity for as far as the eye can see. Compl. ¶ 24; Sadler Decl. ¶¶ 7; Berry Decl. ¶ 16, Compl. Ex. C; Watts Decl. ¶¶ 18-21, Summ. J. Ex. 4. Members plan to return to these areas regularly. *Id.*

Several specific sites frequently visited by members of the Plaintiff organizations are now excluded from the protections afforded under the Monument designation, including the slot canyons by the "Hole in the Rock" cliff crevice near Lake Powell, and the Circle Cliffs area. *Id*. Several mining claims have already been staked in the Circle Cliffs region, the development of which would not only destroy the natural "painted desert" landscape of the Circle Cliffs region, but would send mining trucks up and through the Old Burr Trail, one of the most scenic and

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[60] *See* GSENM PLAN at 5. This is also why BLM designated 65% of the Monument as in the "primitive zone," which is most restrictive to motorized access, and aimed to "connect" the Monument's primitive zone to "primitive and undeveloped areas on surrounding lands managed by other Federal agencies." *Id*. at 9.

popular areas in the Monument, and frequently visited by tourists and Partners' members alike.[61] Watts Decl. ¶¶ 17-19. Development is thus poised to mar "one of the last places in this country where one can truly experience solitude."[62] *Id.* ¶ 19.

Defendants' assertion that there is no heightened risk of harm to the resources on the Monument until (and unless) BLM authorizes extractive activities under a new Monument Management Plan, *see* Br. at 14, is belied by the record. Redrawing the Monument boundaries jeopardizes the undeveloped and remote condition that BLM's current management plan recognizes is necessary for preservation of the widely-dispersed and sensitive resources there. *See supra* nn.11, 60. Moreover, the 2017 Proclamation splits the landscape into five non-contiguous parcels with access between and among these parcels, and authorizes mineral and geothermal leasing, mining, and drilling, Compl. ¶ 12, making the injuries alleged by Plaintiff imminent and likely. *See League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 997 (D. Alaska 2018) (finding standing because "although third parties must obtain permits before seismic surveying and other activities may occur, there is no indication that the government will not promptly grant such permits, particularly in light of the Executive Order's stated purpose of expediting energy production").

Defendants themselves recognize that the 2017 Proclamation allows individuals to stake a mining claim and begin ground disturbing activity without requiring any changes to the current

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[61] Because the Proclamation divides the Monument into non-contiguous pieces, development of excised lands will be visible from, and increase traffic through, areas retained *within* the Monument, including by increasing air and noise pollution. For this reason, the Proclamation harms the vistas, remoteness, and resources of even those lands still formally protected.

[62] Defendants' unsupported opinion that the lands remaining in the Monument are still "spectacular and expansive," Br. at 17, n.2, cannot supersede the specific harm to aesthetic interests pled by Plaintiffs in the Complaint and accompanying declarations. *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (stating that the Court must "grant[] plaintiff the benefit of all inferences that can be derived from the facts alleged").

Management Plan. Br. at 15 n.8; Roberson Decl. ¶ 21. Such activities are not limited to casual collection of resources; rather claimants can also commence drilling, bulldozing, and improving roads on an area of up to five acres by simply notifying BLM of the proposed activity. 43 C.F.R. § 3809.21(a); *see also* TWS Br. at 13-15. Sixteen mining claims have already been staked on the Monument, Roberson Decl. ¶ 29, including ten claims by Glacier Lake Resources, which has publicly expressed its intent to begin "[s]urface exploration work" in the near future.[63] This work will likely increase traffic on existing trails, including the Old Burr Trail, and will also likely require road improvement or maintenance work to ensure access to the mining area, which is remote and currently difficult to access.[64] Sadler Decl. ¶ 14.B.2. This type of trail construction and improvement, and increased vehicle traffic alters, and destroys the unspoiled environment in which these scientific objects are found, and significantly impairs researchers' ability to understand the scientific and historical significance of objects found in the affected area. *Id.* ¶¶ 13, 14.B.2.

Defendants argue that injury from notice-level mining activity is "attenuated," because BLM has the opportunity to prohibit claimants from moving forward with notice-level activity, and because the claimant must provide "a financial guarantee to cover reclamation costs." Br. at 15.[65] But the primary authorities Defendants rely on to support this contention are not at all

[63] *See* Glacier Press Release, *supra* n.53.
[64] *See* Glacier Press Release, *supra* n.53.
[65] Defendants' lack of regard for the core protective purposes of the Antiquities Act is revealed by their suggestion that "reclamation" could suffice to repair or compensate for damage to centuries or millennia old objects, or the environment in which they are found.

analogous to the situation here, as they each involved a combination of multiple uncertain or hypothetical future actions.[66]

Finally, Defendants argue that Plaintiffs' injuries are overstated because the Paleontological Resources Preservation Act ("PRPA") is sufficient to protect sensitive paleontological resources from harm or injury. *See* Br. at 17. But PRPA only protects resources against "remov[al]," "excavation," or "damage." *See* 16 U.S.C. § 470aaa-5. It does not, however: prevent visual and aesthetic disturbances at dig sites; prohibit "casual collection" of fossils; compel claimants to avoid unintentional harm to these objects; prevent individuals from staking mining claims near paleontological sites thus detrimentally impacting the context of research; and does not and cannot be used to prevent BLM from authorizing notice-level mining or other resource extraction.[67]

Moreover, PRPA is only as effective as the amount of resources devoted by BLM to enforcement of the statute. Plaintiffs have pled facts demonstrating, however, that BLM devotes greater resources to protecting sites within Monument boundaries, and has historically spent far

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[66] In *Clapper v. Amnesty Intl. USA*, the Court found that the plaintiffs' alleged injury was too "attenuated" because the injury followed a chain of uncertain events: (1) plaintiffs correctly assumed that the government was targeting the communications of Plaintiffs' foreign contacts; (2) the government chose to target those foreign contacts using its authority under the challenged statute; (3) a FISA court agreed to allow the targeting; and (4) the government's targeting effort would be successful. 568 U.S. 398, 413-14 (2013). Similarly, in *Arpaio v. Obama*, the D.C. Circuit found that the injuries alleged by Sherriff Joe Arpaio from the existence of the DACA program were too attenuated because the injury could only occur if an improbable chain of conditions were met: (1) foreign citizens learned of DACA; (2) those citizens mistakenly believed the policy applies to them; (3) those citizens, relying on this incorrect reading of the policy, decided to enter the United States unlawfully; and (4) committed crimes. 797 F.3d 11, 20 (D.C. Cir. 2015).

[67] PRPA explicitly includes a savings clause to continue to permit activities that are permitted under the mining laws. 16 U.S.C. § 470aaa-10(1) ("Nothing in this subtitle shall be construed to— (1) invalidate, modify, or impose any additional restrictions. . . on any activities permitted. . . under the general mining laws,").

fewer resources remediating damage from vandalism, looting, and unauthorized use of ATVs and other vehicles on lands that are outside Monument boundaries. Compl. ¶ 15; Berry Decl. ¶ 8.c; Sadler Decl. ¶14. Plaintiffs thus satisfy the injury-in-fact and imminence requirements for standing.

B. Plaintiff Organizations Meet the Requirements for Member and Organizational Standing

Plaintiffs also have standing to bring claims on their own behalf, pursuant to the doctrine of organizational standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources" suffices for standing). To demonstrate organizational standing, a plaintiff organization must show that "the agency's action or omission to act injured the organization's interest" and that "the organization used its resources to counteract that harm." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (internal quotation marks omitted).

Partners and CLF have been required to divert resources from active ecological restoration work, which enriches the Monument, to counteracting the risk of irreparable damage to objects lacking Monument protection. *Equal Rights Ctr. v. Post Properties*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (finding organizational standing where plaintiff organizations "chose to redirect their resources to counteract the effects of the defendants' allegedly unlawful acts"). For example, because sensitive paleontological resources that have been excluded from the Monument are at increased risk of harm, Partners has had to dedicate its own resources to monitor, patrol, and coordinate research at sites that BLM previously monitored more closely. *See* Berry Decl. ¶ 8.B. CLF has devoted resources to developing and deploying a sophisticated citizen monitoring program, known as TerraTruth, designed to assure on-going protection of historic and scientific

resources in the excluded areas. Compl. ¶¶ 39, 43; Overby Decl. I ¶10, Compl. Ex. E; Overby Decl. II ¶¶ 5-6, Ex. 3. Similarly, SVP's mission and activities have been devoted to education around the rich paleontological resources at the Monument, an effort that is now limited and compromised by the exclusion of vast portions of those resources. Polly Decl. I ¶¶ 9, 14. Defendants are thus wrong when they argue that Plaintiffs "allege *only* that they have diverted funding. . . towards 'advocacy.'" Br. at 18 (emphasis added).

C. This Court Can Grant Effective Relief to Redress Plaintiffs' Injuries

Plaintiffs' complaint meets Article III's traceability and redressability requirements, which require only that a "favorable decision" would "likely" redress the injuries alleged by Plaintiffs. *Lujan*, 504 U.S. at 561.

Plaintiffs clearly meet this standard. As explained above, Plaintiffs' injuries arise directly from the 2017 Proclamation and are thus "traceable" to the challenged action. Moreover, a declaratory judgment finding that the President's 2017 Proclamation was outside the bounds of his delegated power, and an injunction barring officials besides the President from "recognizing, enforcing" or implementing the Proclamation, would address all of the harms alleged by Plaintiffs. *See* Compl., Prayer for Relief. Such an order could, for example, preserve the remote and undeveloped character of the lands, allow for the continuation of scientific research as a central priority in management, and require BLM to halt all efforts towards the new management plan, which BLM has undertaken in order to implement the 2017 Proclamation.[68] Such an order would also prohibit any hard-rock mining on currently excised lands, or at a minimum, require BLM to

[68] *See* Draft RMP ES at ES-1 ("The purpose of these Draft RMPs is to. . . implement the modifications included in Presidential Proclamation 9682. . . [and] the President's vision that the [excised] lands are managed for multiple use.").

deny or prohibit notice-level proposals for ground-disturbing hard rock mining or other likely eventualities, such as extensive exploitation of these areas for invasive coal mining.

Defendants do not contest the fact that an injunction prohibiting the Department of Interior from implementing the Proclamation would redress most, if not all, of the harms raised by the Plaintiff, and that this is sufficient to establish redressability. *See Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996) ("We need not decide [the availability of declaratory relief against the President]. Instead, we hold that the partial relief . . . against subordinate executive officials is sufficient for redressability.").[69] Indeed, one of the central cases upon which Defendants rely, *Franklin v. Massachusetts*, Br. at 1, plainly establishes the appropriateness of standing in these circumstances. *See* 505 U.S. 788, 803 (1992) ("For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."). Nor can Defendants argue that this court is without power to issue declaratory relief against the President.[70] Indeed, this Circuit has recognized that it has the jurisdiction to review Presidential action to "ensure that [National Monument] Proclamations are consistent with

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[69] *See also League of Conservation Voters*, 303 F. Supp. 3d at 995 (finding that Plaintiffs "alleged harms may well be adequately redressed if an injunction against subordinate officials were to issue"); *Blumenthal v. Trump*, No. 17-1154 (EGS), 2018 WL 4681001, at *19 (D.D.C. Sept. 28, 2018).

[70] As a general matter, the federal judiciary can and has issued declaratory relief against the President in the past. *See Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment against President Clinton stating that Line Item Veto Act was unconstitutional); *Swan v. Clinton*, 100 F.3d at 977; *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 752 (D. Md. 2018) ("The Court sees no barrier to its authority to grant either injunctive or declaratory relief.").

constitutional principles and that the President has not exceeded his statutory authority." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

D. Plaintiffs' Claims Are Ripe for Adjudication

Finally, Defendants argue that Plaintiffs' claims are not ripe for adjudication under the doctrine of prudential ripeness.[71] The Supreme Court has recently disfavored the dismissal of cases for "prudential" concerns where the Court otherwise has Article III jurisdiction, finding the doctrine inconsistent with the federal court's "virtually unflagging" "obligation to hear and decide cases within its jurisdiction." *Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2347 (2014) (internal quotation marks omitted).

Defendants have failed to demonstrate that this is a case that meets the stringent requirements for dismissal for prudential ripeness. Courts may dismiss a suit for prudential purposes where the suit is not fit for judicial review, and where withholding a decision will not cause hardship to the parties. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012). The fitness prong is "meant to protect the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Id.* at 388 (*citing Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (internal quotation mark omitted)). This is applicable where, for example, the Court is asked to review "tentative agency positions." *Id.* (internal quotation marks omitted).

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[71] Defendants also argue that this matter is not constitutionally ripe and thus the Court lacks jurisdiction to hear the case, but, as Defendants agree, such an inquiry is "subsumed into the . . . standing" analysis. Br. at 21 (citing *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927 (D.C. Cir. 2013)). Because Plaintiffs have demonstrated a sufficient injury in fact, as demonstrated above, Plaintiffs have also satisfied ripeness under Article III.

There is nothing tentative or abstract about the 2017 Proclamation and its legal effect on the excised lands. As discussed above, the President's proclamation has already had extensive real world effects: Over 800,000 acres have been illegally excised from the Monument's boundaries and have been opened to hard-rock mining claims, while ongoing research projects on those lands have lost access to vital funding sources. Given these facts, there can be no doubt that the 2017 Presidential Proclamation "alters the legal regime" around the protection of these resources, *Bennett v. Spear*, 520 U.S. 154, 169 (1997), and is "one by which rights or obligations have been determined, or from which legal consequences will flow," *id.* at 178 (internal quotation marks omitted).

Defendants argue that Plaintiffs' injuries cannot occur until and unless BLM adopts a new Management Plan which authorizes resource-disturbing activity. Br. at 22. But Plaintiffs seek review of "purely legal" questions about the President's authority to reduce the size of the Monument; there is no need for BLM to implement a new management plan for resolution of these questions, and therefore no reason to delay review of the merits of Plaintiffs' claims. *See e.g. SBA List*, 134 S. Ct. at 2347 (noting "purely legal" claims that "will not be clarified by further factual development" are ripe (internal quotation marks omitted)). Nor is it clear that Plaintiffs would be permitted to adjudicate the underlying constitutionality of the President's action if they were to wait to challenge the 2017 Proclamation via a challenge to BLM's new planning process, as BLM has already explicitly concluded that these fundamental Constitutional considerations are outside the scope of that planning process.[72]

Moreover, delayed review would result in significant hardship to Plaintiffs. As discussed above, the Proclamation has resulted in ongoing injury to Plaintiffs' conservation and research

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[72] *See supra* note 42.

interests. Moreover, Plaintiffs have documented growing levels of vandalism, looting, and unauthorized ATV and motorized vehicle use on the excised lands. Second Overby Decl. ¶ 7, Ex. 1. In this year alone, individuals have used the TerraTruth App to report 132 instances of illegal use and damage to resources in Grand Staircase, including several instances of illegal off-highway vehicle (OHV) use in the Paria Wash, damage to an ancient Native American fire pit where travelers lit a fire, and vandalism of irreplaceable archeological art panels. *Id.*

PLAINTIFFS HAVE STATED SUFFICIENT CLAIMS FOR RELIEF BECAUSE THE 2017 PROCLAMATION UNCONSTITUTIONALLY USURPS CONGRESSIONAL AUTHORITY AND CONTRAVENES STATUTORY LIMITS

The President's actions shrinking Grand Staircase and eliminating the protections for numerous objects specified in the original 1996 Proclamation directly contravene specific Congressional statutes recognizing and setting the Monument's boundaries. The President's actions also exceed the powers delegated to the President by Congress under the Antiquities Act, which only delegates the power to *create* monuments to preserve critical objects, not the power to rescind or reduce monument designations. Congress was quite intentional in its design of the President's national monument authority. The text of the Antiquities Act clearly provides the President only with the limited authority to create monuments. Moreover, the Act's purpose and legislative history, as well as subsequent developments since the Act, demonstrate that both Congress and the Executive Branch historically viewed the modification power as belonging to Congress.

The Property Clause of the Constitution gives Congress "plenary power" over federal lands. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987); *see also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). The Complaint asserts that Congress has not delegated to the President the power to modify or reduce national monuments. *See* Compl. ¶¶ 109-112 (pleading violation of the Property Clause); *id.* ¶¶ 50-56 (pleading Presidential encroachment on

property protections Congress has specifically reserved for itself). The D.C. Circuit has previously held that review of national monument proclamations is available to determine their compliance with the Constitution. *See Mountain States*, 306 F.3d at 1136 ("[R]eview is available to ensure that [national monument] Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority").[73] Where, as here, Plaintiffs "offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set," this Court may maintain judicial review. *Mass. Lobstermen's Ass'n v. Ross*, No. 17-406, 2018 WL 4853901, at *4 (D.D.C. Oct. 5, 2018) (Boasberg, J.).

It is axiomatic that judicial review is available to ensure that the Executive acts in accordance with the supreme law of the land. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014) (finding Presidential appointments in violation of the Recess Appointments Clause); *see also Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (noting it is "beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action"). Courts also have authority to review whether Executive Branch action is an unconstitutional exercise of legislative authority. *See Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (striking down Executive Order that encroaching on a Congressionally enacted statute). Plaintiffs state justiciable counts that are appropriately within this Court's authority to entertain.

I. Congress has Asserted its Plenary Authority under the Antiquities Act to Codify Grand Staircase's Boundaries, and Only Congress Can Make Further Reductions to the Size of and Protections Afforded by the Monument.

Congress has acted under its plenary power to set the boundaries of Grand Staircase by adding and subtracting lands and modifying and affirming the boundaries. It also codified the

[73] Unlike the plaintiffs in *Dalton v. Specter*, 511 U.S. 462 (1994), Plaintiffs have asserted specific Constitutional and statutory *ultra vires* claims.

Monument as part of the NLCS, a permanent land management and conservation system. Because Congress has exercised its authority to set the boundaries of Grand Staircase, the President cannot legally modify those boundaries through Executive action alone.

Far from being a "novel" theory, as Defendants claim, Br. at 34, this limitation on Presidential power to override Congress follows from bedrock separation of powers principles. Congress retains plenary power over federal lands. *See* U.S. Const. Art. IV, § 3 cl. 2; *Kleppe*, 426 U.S. at 539 (Supreme Court has "repeatedly observed" that "(t)he power over the [federal] land thus entrusted to Congress is without limitations"). This necessarily includes the power to bar further Executive action affecting a specific monument. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000) (Congress "preclude[d]" particular executive action pursuant to delegated authority by "enact[ing] several statutes addressing the particular subject"). Individual monuments created directly and in the first instance by Congress have boundaries designated by statute, and are thus immune from unilateral Presidential action to change them the same as any other law. *See Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978) ("Of course, an executive order cannot supersede a statute."). Instead, Congress itself would have to enact legislation to modify the boundaries, or make a new specific delegation of power to the Executive to so modify a monument, as it has in fact previously done. *See, e.g.*, Act of July 3, 1930, ch. 837, § 2, 46 Stat. 855, 855 (authorizing "the boundaries so established [to] be enlarged or diminished by subsequent proclamation or proclamations of the President"). Similarly, when Congress uses its legislative authority to adjust the boundaries of a previously Presidentially-proclaimed Monument, "any [arguable] inherent reconsideration authority" that the President may have had under the Antiquities Act "does not apply" because "Congress has spoken" through legislative action. *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014); *see also United States v. Heinszen*,

206 U.S. 370, 384 (1907) (finding that "the ratification, if made, was equivalent to an original authority").[74]

Congress has taken legislative action to finalize the boundaries of Grand Staircase. Congress ratified a 1998 land exchange, which provided that lands received from Utah were to "become a part of the Grand Staircase-Escalante National Monument." Exchange Agreement § 5. Congress explicitly approved this agreement, and provided that the agreement "set forth the obligations and commitments of the United States . . . as a matter of Federal law." 112 Stat. at 3141. "[O]nce ratified by Act of Congress, the provisions of [negotiated] agreements become law, and like treaties, the supreme law of the land." *Antoine v. Washington*, 420 U.S. 194, 204 (1975). The contention, if true, that the land exchange negotiation process was initiated before the Monument was designated, Br. at 35, is irrelevant, for Congress thereafter made its intentions clear that the purpose of the legislation was to prevent "[d]evelopment of surface and mineral resources . . . within the Monument [that] could be incompatible with the preservation of . . . resources for which the Monument was established." 112 Stat. at 3139. Another 1998 bill explicitly modified portions of the Monument while leaving the majority of the boundaries untouched. Pub. L. No. 105-355 § 201, 112 Stat. at 3252-53. In 2009, Congress further provided that "the boundaries of

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[74] These circumstances are similar to instances where Congress has imposed other limits on subsequent Presidential action regarding specific lands, such as with the management regime. "[T]he directions of Congress are controlling with respect to the administration of territories set apart as reservations for various purposes. Where Congress has itself designated the supervising authority, either expressly or by fair implication, it is not within Executive authority to alter such designation." Transfer of Nat'l Monuments to Nat'l Park Serv. in the Dep't of the Interior, 36 Op. Att'y Gen. 75, 76 (1929).

This type of Congressional assertion of authority has an extensive history in the federal lands context. *See, e.g.*, *Idaho v. United States*, 533 U.S. 262, 272-81 (2001) (finding Congressional ratification of a tribal reservation and concomitant submerged lands such that Idaho's claim to such lands was defeated); *United States v. Alaska*, 521 U.S. 1, 41-45 (1997) (finding that Congress ratified the Presidential reservation of submerged lands within the National Petroleum Reserve such that Alaska could not claim the lands).

the Grand Staircase-Escalante National Monument in the State of Utah [were] modified" to effectuate its will. 123 Stat. at 1120.

Finally, Congress permanently codified the Monument in 2009, by including BLM-managed national monuments in the NLCS statutory scheme. *See* 2009 Omnibus Act § 2002(b)(1)(A), 123 Stat. at 1095 (including "[e]ach area that is designated as . . . a national monument" as a part of the NLCS system). The legislative history of the NLCS confirms that the "the primary motivation of this legislation" was to "establish" "permanenc[y] . . . [so] that no President or administration with the stroke of a pen can destroy what has been set aside." *See H.R. 2016, National Landscape Conservation System Act: Legislative Hearing Before the Subcommittee on National Parks, Forests and Public Lands of the H.R. Comm. on Natural Resources*, 110th Cong. 47 (2007) (statement of Rep. Griajlava) (chair of the relevant subcommittee).

Contrary to Defendants' characterization, Br. at 36, the NLCS and the specific Grand Staircase boundary modifications placed Grand Staircase beyond the President's reach without having to modify any other statutory authority (including the Antiquities Act).[75] The current boundaries of the Monument were established by statute, and Executive action cannot change them any more than it could directly contradict any other law—or Monument—duly passed by Congress and enacted into law. Consequently, Count III may not be dismissed.

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[75] For this reason, citation to the savings clause of the Omnibus Public Land Management Act, 16 U.S.C. § 7202(d)(1)—which, *inter alia*, established the NLCS—is irrelevant. *See* Br. at 36-37. Indeed, the legislative history shows the provision was aimed at ensuring that the NLCS statute did not alter the management authorities for the units. *See* 154 Cong. Rec. 5541–42 (2008) (statement of Rep. Grijalva) ("Mr. Chairman, opponents of this bill seem to be concerned that it will somehow change or alter the current management of these lands. This is simply not true. Included in H.R. 2016 is a section that specifically states [quoting subsection (d)].").

II. Counts I and II May Not Be Dismissed Because the Antiquities Act Does Not Delegate to the President the Power to Shrink or Undo Prior National Monument Proclamations.

A. The Plain Text of the Statute Provides the President the Power Only to Create, Not Modify or Eliminate, National Monuments.

The Constitution vests exclusive power in Congress to manage, govern, and dispose of federal property, including public lands. *See* U.S. Const. Art. IV, § 3 cl. 2.; *Kleppe,* 426 U.S. at 539. Given this precise vesting of power in Congress, any delegation of authority to the Executive Branch must have "clear expression or implication." *Cochnower v. United States*, 248 U.S. 405, 407, *judgment modified* 249 U.S. 588 (1919).

Congress, however, has not delegated a general power to unilaterally reduce or modify national monuments to the President, in the Antiquities Act or elsewhere. The relevant portions of the Antiquities Act state:

> (a) Presidential declaration.--The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) Reservation of land.--The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

54 U.S.C. § 320301.

The Act, as a matter of its unambiguous plain language, grants the President the power to "declare" national monuments and "reserve" parcels of land as part of such monuments, *id.*, but not the power to "revoke," "modify," "remove," "diminish," or any other construction. "If [Congress] had . . . intended to give the power to 'decrease'—an accurately opposite power—it would have been at equal pains to have explicitly declared it . . . and not left [it] to be guessed

from a circumlocution of words or to be picked out of a questionable ambiguity." *Cochnower*, 248 U.S. at 407-08.

The absence of these words is purposeful, especially in light of Congressional practice at the time. Numerous other federal lands statutes[76] passed around the time of the Antiquities Act granted the Executive Branch land withdrawal authority which featured explicit language precisely delineating the powers of the President to modify such land withdrawals. To take just one example, the Sundry Civil Appropriations Act of 1897, Act of June 4, 1897, ch. 2, 30 Stat. 11, modified an earlier bill allowing the President to "set apart and reserve" forest reservations, Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, by adding the power to "modify any Executive order [creating a forest reserve] and . . . reduce the area or change the boundary lines," 30 Stat. at 36. During debates in the House of Representatives, Representative John Fletcher Lacey, who would later become the primary legislator behind the Antiquities Act, explained that such an amendment was needed because the earlier act "gave [the President] the power to create a reserve, but no power to restrict it or annul it, and there ought to be such authority vested in the President of the United States." 29 Cong. Rec. 2677 (1897).

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[76] *See, e.g.*, Act of June 17, 1902, ch. 1093, § 3, 32 Stat. 388, 388 (directing Secretary of Interior to "withdraw lands from public entry" but also granting the power to "restore to public entry and of the lands so withdrawn when . . . such lands are not required for the purposes of this Act"); *see also* Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 527 (explicitly granting the President the power to "open any portion or all of the lands reserved" by the statute to settlement); Act of May 14, 1898, ch. 299, § 12, 30 Stat. 409, 414 (granting the President the power to "establish or discontinue" land districts in Alaska and to "define, modify, or change the boundaries thereof"); Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847, 847 (authorizing the President to "temporarily withdraw" lands "until revoked by him" or Congress). Even in the Antiquities Act context, Congress knew how to grant the President specific modification authority when it wished. In 1930 Congress set out the procedure for creating Colonial National Monument, and specified that "the boundaries so established may be enlarged *or diminished* by subsequent proclamation or proclamations of the President." Act of July 3, 1930, 46 Stat. at 855 (emphasis added).

Defendants purport to locate the power to modify Monument boundaries in the Act's requirement that the President "confine[]" monument lands to the smallest area compatible with protection. *See* Br. 26-28. But that language is an "intelligible principle[] to guide the President's actions." *Mountain States*, 306 F.3d at 1137. It conditions and limits the initial exercise of the establishment power, and is not a separate grant of power that gives rise to an ongoing test of a monument's proper size. Nowhere does the text of the statute indicate that protected land must "remain" so confined for all time. Indeed, interpreting the word "confine" as Defendants do gives rise to inscrutable issues that would cabin the broad discretion they claim: If the President is under such a "strong and mandatory" continuing obligation "to ensure that monument reservations are and remain 'confined'" to the smallest area compatible with their management, Br. at 26, why was the monument review process not begun sooner than 20 years after GSENM was established? And why did it not include all Monuments?[77] Furthermore, even if the Court were to accept Defendants' reading, it would not support what the President has done here—which is to not only limit the reserved lands, but to remove from protection thousands of specifically designated objects of historic and scientific interest. *See supra* Background III.B.

Nor do Defendants gain traction by citing overbroad statements about the power of government entities to reconsider their decisions. Br. at 27, 29. Where, as here, the question is the scope of specific delegated authority under a statute, "[t]here is no general principle that what one can do, one can undo." *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000). "[W]hat one can do, one can undo, is sometimes true, sometimes not" and "depends on whether Congress said

[77] Executive Order 13,792, which initiated the review process culminating in the 2017 Proclamation, applied only certain monuments, including those designated since 1996 that were greater than 100,000 acres. *See supra* Background III.A.

[he] could." *Id.*[78] Thus, general citations to the power of the President to revoke Executive Orders issued pursuant to his own Article II Powers, Br. at 29—which Defendants go on to expressly disclaim reliance on, focusing solely on the Antiquities Act's statutory authorization, Br. at 41—provide no help.[79] As demonstrated by the text of the Antiquities Act, and its purpose and legislative history, *infra*, the President has no such power here.

B. The Act's Purpose and Legislative History Confirm that the President Does Not Have the Authority to Revoke or Modify National Monuments

While it is not necessary to go further than the plain text, *see Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 151 (D.D.C. 2004) (consideration of legislative history and purpose relevant "only when the text is ambiguous"), the purpose of the Antiquities Act and its legislative history both confirm that Congress did not implicitly delegate to the President the power to revoke or modify a national monument. The initial impetus for the Act grew out of increasing concerns over the looting and destruction of sensitive sites in the southwestern United States during the late 1800s and early 1900s.[80] At the time, the General Land Office (predecessor to the BLM) already had a "power of temporary withdrawal" that it used to try and protect sites as a stopgap.[81] But that

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[78] Courts have consistently looked at the question as one of statutory interpretation. *See North Dakota v. United States*, 460 U.S. 300, 312-13 (1983) ("uncomplicated" statutory language authorized states to approve federal acquisition of lands; however, "[n]othing in the statute authorizes the withdrawal of approval previously given."); *Cochnower*, 248 U.S. at 407-08.

[79] *Compare* Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 7 (2014) (Defendants' quoted language) *with id.* at 9 ("distinguish[ing] . . . orders that are based on the President's exclusive constitutional authority" from "[o]rders issued pursuant to authority provided to the President by Congress").

[80] *See generally* Hal Rothman, *America's National Monuments: The Politics of Preservation* Chs. 1-3 (1989), *available at*: https://www.nps.gov/parkhistory/online_books/rothman/contents.htm.

[81] *Id.* at 58-59, Ch. 4; *see also* General Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior For the Fiscal Year Ended June 30, 1901* 150–51 (1901).

temporary power did not suffice, and the GLO lobbied for legislation to allow the Executive Branch to protect sites permanently.[82] The Act was designed to provide the Executive Branch the means to address the need for permanent and speedy protection.[83]

Defendants' reference to a statement in the Act's House Report that some lands "should be temporarily withdrawn and allowed to revert to the public domain," Br at 3-4, 27-28, is taken out of context. The statement actually describes existing *temporary* withdrawal authority, not the yet to be extant Act,[84] and the report ultimately concluded that DOI should "immediately exercise[]" its preexisting authority "to protect all ruins" until "general legislation authorizing the creation of" "permanent withdrawal" authority was passed—i.e., the Antiquities Act. H.R. Rep. No. 59-2224, at 2-3, 7-8 (1906).

Moreover, Presidential power to later modify monuments was explicitly considered and rejected, strongly suggesting that the Act contains no modification authority. During the six-year iterative process leading to final passage of the Antiquities Act, Congress considered bills that would have granted the Executive Branch creation authority alone, as well as bills that would have granted the Executive Branch both creation authority and elimination authority. *Compare* H.R. 11021, 56th Cong. (1st Sess. 1900) (only creation authority), and H.R. 13478, 58th Cong. (2d Sess. 1904) (only creation authority), *with* S. 5603, 58th Cong. (3d Sess. 1905) (creation authority and elimination authority). The final version of the Act rejected the proposals that would have delegated any elimination authority. *Compare* S. 4698, 59th Cong. (1st Sess. 1906) (final version

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[82] *See, e.g.*, General Land Office*, Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior For the Fiscal Year Ended June 30, 1904* 59-62 (1904).

[83] *See* General Land Office, *Report of the Commissioner of the General Land Office to the Secretary of the Interior For the Year Ended June 30, 1906* 47-48 (1906) (indicating that passage of the Antiquities Act fulfilled GLO's prior request for permanent protection legislation).

[84] The report stated that "speedy accomplishment" of protecting antiquities could be managed by preexisting "authority lodged in . . . the Interior Department" H.R. Rep. No. 59-2224, at 2.

of the Act), *with* S. 5603, 58th Cong. (3d Sess. 1905) (including language authorizing "temporary withdrawals of the land" alongside "permanent withdrawals").

C. Congress has Consistently Acted to Retain its Sole Authority to Modify National Monuments

Defendants argue that that the 2017 Proclamation is authorized because Congress has acquiesced to unilateral monument reductions[85] under the Antiquities Act, based primarily on the fact that Presidents have issued a limited number of such modifications in the past. Crucially, none of the modifications to which Defendants cite was ever upheld by any court, and thus these actions do not provide a sound basis for confirming this authority.[86] And acquiescence arguments have no power where, as here, the plain text, original purpose, and legislative history are clear. *See CREW v. FEC*, 904 F.3d 1014, 1018 (D.C. Cir. 2018) (noting "congressional acquiescence cannot change the plain meaning of enacted text" and rejecting "post-enactment congressional inaction"); *see also SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 n.5 (2001) (noting absent "overwhelming evidence of acquiescence, [courts] are loath to replace the plain text and original understanding of a statute").

Further, "past practice does not, by itself, create power." *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (internal quotation marks and alterations omitted). The limited evidence Defendants

[85] Defendants also cite to unilateral Presidential additions of lands to national monuments, Br. at 6-7, but those provide no support for their argument. Additions are consistent both with the plain text of the Act, allowing the President to "declare" monuments and "reserve" lands to protect them, and its purpose, which is protection.

[86] Query whether the 2017 Proclamation may fairly be considered a "modification" of the original 1996 Proclamation. Defendants seem to have gone to great lengths to avoid entirely revoking the Monument, only to split it into five non-contiguous, smaller units, and exclude thousands of objects the original proclamation deemed worthy of enduring protection.

marshal is not enough to show the "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress" that is necessary. *Id.* at 531 (internal quotation marks omitted).

Executive practice in this area has hardly been consistent. Though Presidents sometimes unilaterally did reduce monuments, they just as often temporarily withdrew lands in advance of a formal proclamation under the Antiquities Act to determine their suitability for monument status.[87] *See* H.R. Rep. No. 68-1119, at 1 (1925) (noting that "it has been the usual practice to make a temporary withdrawal of these areas for examination before such permanent reservation" in the form of a national monument). These Executive Orders, which were explicitly based on authorities other than the Act, would have been unnecessary and redundant if monuments created under the Act were temporary or freely modifiable.

Nor was the Executive Branch's own interpretation of its Antiquities Act authority ever consistent or unbroken. The Attorney General has considered the issue of the Executive's authority to undo land reservations made pursuant to an act of Congress multiple times, including explicitly under the Antiquities Act, only to repeatedly come to the conclusion that the Executive Branch *lacks* that authority.[88] In 1915, the Solicitor of the Interior issued an opinion justifying a

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[87] *See e.g.*, Exec. Order No. 3297 (Woodrow Wilson, June 30, 1920); Exec. Order No. 3345 (Woodrow Wilson, Oct. 23, 1920); Exec. Order No. 3450 (Warren Harding, May 3, 1921); Exec. Order No. 3650 (Warren Harding, Mar. 20, 1922); Exec. Order No. 3983 (Calvin Coolidge, April 1, 1924); Exec. Order No. 5038 (Calvin Coolidge, Feb. 2, 1929); Exec. Order No. 5105 (Herbert Hoover, May, 3, 1929); Exec. Order No. 5276 (Herbert Hoover, Feb. 7, 1930); Exec. Order No. 6212 (Franklin Roosevelt, July 25, 1933); and Exec. Order No. 7888 (Franklin Roosevelt, May 16, 1938); *see also* John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENVTL. L. REV __, at 37 (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272594&download=yes (collecting 12 additional proclamations).

[88] *See, e.g.*, Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 361-66 (1862); Naval Reservation-Restoration to Public Domain, 21 Op. Att'y Gen. 120, 120-21 (1895); Disposition of

Presidential monument reduction, only to issue opinions coming to the opposite conclusion in 1924 and 1932, before changing its position once again in 1935.[89] There is thus no basis for Defendants' claim to an "enduring" Executive Branch understanding in its favor. Br. at 31.

Moreover, many of the prior monument modifications were different in kind, and easily distinguishable. *See Medellin*, 552 U.S. at 528 (no acquiescence when prior practice was not "remotely" similar). Many of the modifications reflect exceedingly minor boundary adjustments. Nine of the eighteen modifications Defendants cite involved reductions of under 1,000 acres (just under 2 square miles), *cf.* Proclamation 9682, 82 Fed. Reg. at 58,093 (removing 861,974 acres, 46% of prior size removed), and nine involved reductions of less than 5% of the total acreage of the relevant monument.[90] And many of these adjustments were effectively ministerial in nature. Until the 2017 Proclamation,

> every national monument that ha[d] been reduced by presidential action was set aside before 1940, and most at least a decade before that. Maps of the rural West, where all of the reduced monuments are found, were often of poor quality . . . . This frequently resulted in errors in monument boundary descriptions, and also often resulted in inadvertent inclusion of non-federal lands within these federal reserves.

Ruple, *supra* n.87, at 43 (footnote omitted); *id* at 43-65 (describing reductions in detail).[91]

Abandoned Lighthouse Sites, 32 Op. Att'y Gen. 488, 489-91 (1921); Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938) (Antiquities Act).

[89] *See, e.g.*, Solicitor's Opinion of April 20, 1915; M-12501 and M-12529, Solicitor's Opinion of June 3, 1924; M-27025, Solicitor's Opinion of May 16, 1932; M-27657, Solicitor's Opinion of Jan. 30, 1935; *see also* Ruple, *supra* n.87, at 36 (collecting additional opinions).

[90] *See Antiquities Act 1906-2006: Monuments List*, NAT'L PARK SERVICE ARCHEOLOGY PROGRAM, https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last accessed Nov. 15, 2018).

[91] Hovenweep National Monument, which Defendants cite, was modified for no other reason than that the proclamation establishing it contained a typographical error. *See* Proclamation No. 3132, 70 Stat. c26 (Apr. 6, 1956) (replacing lands at SW1/4NE1/4 with lands at SE1/4NE1/4).

In addition, it is doubtful that Congress acquiesced because the Executive Branch repeatedly asserted otherwise—indicating that the President lacked modification authority.[92] In January 1925, Secretary of the Interior Hubert Work sent a letter to Congress requesting that the Antiquities Act be amended to provide the President with the authority to undo monument land designations, as an opinion of the Attorney General had determined that the President did not possess such authority. *See* H.R. Rep. No. 68-1119, at 1–2 (1925); S. Rep. 68-849, at 1–2 (1925). In response, Congress introduced two bills to grant the President the power to "restore" to the public domain "any lands heretofore or hereafter reserved as national monuments by public proclamation as provided by the Act of June 8, 1906" when they were "not needed for such purpose." S. 3840, 68th Cong. (2d Sess. 1925); *see also* H.R. 11357, 68th Cong. (2d Sess. 1925). Congress ultimately declined to pass either bill. It again considered granting the President authority to "eliminate lands from national monuments" in February 1925 in S. 3826. *See* 66 Cong. Rec. 4833 (1925). This bill passed the Senate, but failed in the House. *See* 66 Cong. Rec. Index 219 (1925).[93] These actions do not support a conclusion that Congress acquiesced in Presidential modifications.

If there were any doubt about Congress's intentions in this regard, subsequent Congressional statements in the context of the Federal Land Policy and Management Act of 1976 ("FLPMA")[94] and the Alaska National Interest Lands Conservation Act, ("ANILCA")[95] reaffirm

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[92] *See also infra* n.97 & accompanying text (recounting additional statements to Congress by Secretary of the Interior that monuments are permanent).

[93] Congress also considered granting the President the power to "eliminate lands from national monuments by proclamation" again in 1926 in S. 2703. *See* 67 Cong. Rec. 6805 (1926). In the Senate Committee on Indian Affairs, however, the bill was amended to strike any elimination power. *See* 67 Cong. Rec. 6805.

[94] Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701 et seq.)

[95] Pub L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended at 16 U.S.C. §§ 3101 et seq.)

that Congress reserved solely for itself the power to modify national monuments. As Defendants note, Br. at 33, FLPMA was a comprehensive overhaul that established the modern land withdrawal system. *See, e.g.*, H.R. Rep. No. 94-1163, at 9 (1976) (with limited exception, FLPMA "repeal[ed] all existing law related to executive authority to create, modify, and terminate withdrawals and reservations"). In doing so, the Act "specifically reserve[d] to the *Congress* the authority to *modify and revoke* withdrawals for national monuments created under the Antiquities Act." *Id.* (emphasis added).

Statements by both Congress and the Executive Branch around the passage of ANILCA confirm that the unquestioned universal understanding was that Congress alone possesses monument modification authority. Two different House committee reports, and the dissenting views in one of them, concluded that "national monuments are permanent unless changed by the Congress."[96] Secretary of Interior Cecil Andrus, during the Congressional hearings, repeatedly agreed, stating that monuments "are in fact permanent until congressional action might change them."[97] So did the National Park Service—the agency charged with managing the monuments at issue in ANILCA.[98] Confirming this seemingly universal understanding, for the past fifty years, no President since FLPMA has attempted unilaterally to modify a national monument, until now.

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[96] H.R. Rep. No. 96-97, pt. 1 at 393 (1979); *id.*, pt. 2 at 93 (noting President Carter's monument declaration "will be permanent unless it is modified by Congress"); *id.* pt. 1 at 142.
[97] *Alaska National Interest Lands Conservation Act of 1979: Hearings Before the H. Comm. on Interior and Insular Affairs*, 96th Cong. 14 (1979) (statement of Sec. of Int. Cecil Andrus); *see also id*. at 808 (White House press briefing transcript); *The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearing Before the Subcommittee on Parks, Recreation, and Renewable Resources of the S. Comm. on Energy and Natural Resources*, 96th Cong. 29 (1979) (statement of Sec. of Int. Cecil Andrus).
[98] H.R. Rep. No. 96-97, pt. 1 at 653 n.1 (incorporating in Appendix National Park Service report on Alaska monument issues stating "[o]nly Congress has authority to modify the monuments).

In contrast to these repeated, explicit statements of Congressional understanding, Defendants rely on weak inferences and speculation to discern acquiescence. Congress' decisions to transform certain previously modified monuments into parks, Br. at 32—even assuming it was aware of such modifications—is not evidence that Congress specifically considered and approved of that reduction (or any other). *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) (noting "Congress's failure to speak up does not fairly imply that it acquiesced" and noting it was "at least as plausible" that "[t]he Senate may not have noticed" or "chosen not to . . . make a point about compliance with the statute"). The same is true of Congress' decision to revise the Antiquities Act to prohibit monuments in Wyoming. *See* Br. at 32-33. The provision was a targeted response to a specific controversy, not an implied acceptance of general Executive practice to that date.[99] Congress, far from acquiescing to Presidential power, was making clear that it retained ultimate authority over public lands issues. There is thus no consistent record of Congressional acquiescence to overcome the clear and limited language and conservationist purpose of the Antiquities Act.

III. This Court has the Authority to Review Presidential Action to Ensure Monument Boundaries Were Selected in Conformity with the Requirements of the Antiquities Act.

Even if the Court were to find that the President has some authority to eliminate national monument protections, the Antiquities Act does not grant the President *carte blanche* authority to overturn Monument proclamations or remove already protected objects specifically designated by a prior proclamation, and instead "places discernible limits on the President's discretion,"

[99] Congress was outraged after President Roosevelt designated Jackson Hole National Monument, and quickly passed a bill abolishing the monument, which Roosevelt vetoed. *See generally* Rothman, *supra* n.81, Ch. 11. Congress ultimately folded that monument into a new Grand Teton National Park, and the bill included a one sentence provision prohibiting designation of future national monuments in Wyoming. Act of Sept. 14, 1950, Pub. L. No. 81-787, § 1, 64 Stat. 849.

Mountain States, 306 F.3d at 1136. The 2017 Proclamation exceeds the authority delegated to the President because the revised Monument boundaries disregard the "proper care and management," 54 U.S.C. § 320301(b), of the unique resources on these lands. Although the Antiquities Act vests the President with substantial discretion, its exercise cannot be boundless.

"[T]o obtain judicial review of claims about a monument's size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem with its boundaries." *Mass. Lobstermen*, 2018 WL 4853901, at *14; *see also Tulare Cty. v. Bush,* 306 F.3d 1138, 1142 (D.C. Cir. 2002); *Mountain States*, 306 F.3d at 1137. Plaintiffs' complaint meets this standard, as it provides detailed allegations not only of the extensive number of scientific and historical objects excluded from the Monument, but also of the non-statutory extractive considerations and political factors that primarily and impermissibly governed the Administration's selection of the new boundaries.

Despite the 2017 Proclamation's broad-sweeping assurance that resources on excluded lands "are not of significant historic or scientific interest" and "are not under threat of damage or destruction," 82 Fed. Reg. at 58,090, Plaintiffs' Complaint identifies specific objects with significant scientific, historical and cultural value that are now unprotected, including the Circle Cliffs, portions of the Kaiparowits Plateau, and portions of the Grand Staircase cliff sequence. Compl. ¶¶ 14, 103; Cultural and Paleontological Map, Ex. 1. Retaining only "portion[s]" of these resources or retaining them "in . . . part" while opening the remainder to destructive activities, as the 2017 Proclamation does, 82 Fed. Reg. at 58,089-90, would also undermine the remote, frontier quality that makes the Monument unique and is at the heart of its protections. "These objects and lands depend upon Grand Staircase as a cohesive, undeveloped unit for their continued protection." Compl. ¶ 103; *see also id.* ¶¶ 14, 75. A map released by the BLM of the new boundaries confirms

that hundreds of scientifically important fossil sites, representing entire chapters of the paleontological record, and numerous archaeological sites, have been excluded from the Monument.[100] *See* Ex. 1; *see also* Compl. ¶ 104; *supra* Background III.B. Contrary to Defendants' suggestion that further study has revealed excluded areas to be unimportant to paleontological research, Br. at 38, BLM's own materials show that important discoveries have been made in the excluded areas and are expected in the future, particularly given the high "paleosensitivity" of those areas. Compl. ¶ 36; Ex. 1. As explained more thoroughly *supra*, their exclusion from the Monument puts these resources at significant risk because of the mining claims authorized by the Proclamation and the impending changes from revised management plans.

These irreplaceable resources have been excluded from the Monument because Defendants were improperly motivated by potential energy production and resource extraction, or by a desire to turn public lands into private holdings.[101] *See supra* Background III.A. The President has no authority under the Antiquities Act to consider such factors when determining the size of a Monument, as the sole focus of the Act is the protection and preservation of sensitive resources. *See supra* Argument II.B; *Mass. Lobstermen's*, 2018 WL 4853901, at *7 ("The Antiquities Act is

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[100] For example, virtually all the Tropic Shale, which was specifically named in the 1996 Proclamation (and the 2017 Proclamation) as meriting protection, has been excluded. This formation includes unique scientific resources about evidence of an extinction that preceded the asteroid impact at the end of the Cretaceous period, and is one of the only fully marine geological units in the Monument. *See* 110 Stat. at 4562 ("marine" fossils preserved within the Monument are "[e]xtremely significant").

[101] While BLM quickly withdrew its initial proposal to make 1610 acres of land surrounding a private ranch available for disposal to private interests, the redrawn Monument boundaries still reflect this otherwise inexplicable carve out. *See* BUREAU OF LAND MANAGEMENT, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT AND KANAB-ESCALANTE PLANNING AREA DRAFT RESOURCE MANAGEMENT PLANS AND ENVIRONMENTAL IMPACT STATEMENT, VOL. 1 (OBSOLETE) 3-86 (Aug. 2018), *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/94706/154277/188894/_GSENM-KEPA_RMPs-EIS_Vol_1-508_r.pdf (discussing "Lands Identified for Disposal").

entirely focused on preservation."). Defendants cannot insulate the Proclamation or its decisionmaking process from judicial review in light of the concrete, specific deficiencies alleged.

IV. Defendants' Decision to Implement the 2017 Proclamation in Violation of the Antiquities Act Creates a Cause of Action Under the Administrative Procedure Act.

Defendants' decision to implement the 2017 Proclamation—and to disregard the boundaries created by the 1996 Proclamation and protections fortified by Congress thereafter—is final agency action. Because the 2017 Proclamation violates the Antiquities Act, Defendants' decision to implement it is "not in accordance with the law" and provides Plaintiffs' a cause of action under the Administrative Procedure Act ("APA") 5 U.S.C. § 706(2), as asserted in Count V of the Complaint.[102]

An agency's action is final when it "mark[s] the consummation of the agency's decisionmaking process," and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (internal citation and quotation marks omitted). The decision to follow and implement the 2017 Proclamation and to disregard the 1996 Proclamation satisfies both criteria. It represents the fulfillment of DOI's decision making process with respect to the current Monument boundaries; indeed, BLM has expressly refused to consider any arguments that the 1996 Proclamation controls.[103] And it is DOI's decision to take specific actions implementing the new boundaries. For example, DOI is now recognizing and recording mining claims on lands purportedly excluded from the Monument. *See* Roberson Decl. ¶ 29; *supra* Background III.C. Where, as here, the agency makes a decision

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[102] Defendants' arguments concerning 5 U.S.C. § 706(1) are not relevant to the Partners Plaintiffs, as their Complaint only states a claim for relief under 5 U.S.C. § 706(2).

[103] Defendants have explicitly excluded any considerations regarding the legality of the 2017 Proclamation from the ongoing BLM Planning Process. *See* EIS Scoping Report at 7 (identifying "issues that will not be addressed as part of this planning process").

between two competing legal directives, the agency's decision is reviewable under the APA. *See Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016) (holding that the Park Service's "decision to apply NAGPRA," instead of certain treaties with the Navajo Nation, "constituted final agency action"); *see also Tulare*, 306 F.3d at 1143 (entertaining reviewing agency compliance with a Proclamation under the APA before dismissing the case for unrelated reasons). No further factual development is necessary regarding the legality of these underlying acts. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807, 1815 (2016); *see also Nat'l Treasury Empls. Union v. FLRA*, 745 F.3d 1219, 1222 (D.C. Cir. 2014) ("[F]or purposes of judicial review a final agency action need not be the last administrative action contemplated by the statutory scheme."); *accord Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 (D.C. Cir. 1971); *Role Models Am., Inc. v. White*, 317 F.3d 327, 331-32 (D.C. Cir. 2003).

Agency actions implementing Presidential proclamations are not themselves Presidential actions, and thus are reviewable under the APA. Defendants' primarily rely on *Franklin v. Massachusetts*, but the D.C. Circuit has limited that doctrine, to only "those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." *See Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). That agency decisions are based on or are implementing a Presidential Proclamation does not "insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question." *Reich*, 74 F.3d at 1327. The actions

an agency undertakes to implement a proclamation remain distinct from the President's issuance of that Proclamation.[104]

"Final agency action for which there is no other adequate remedy in a court [is] . . .subject to judicial review." 5 U.S.C. § 704. The failure to continue to implement the 1996 Proclamation in favor of the 2017 Proclamation is reviewable. Because there is no other forum to challenge the Defendants' unlawful final action implementing the 2017 Proclamation due to the BLM planning process scoping limits, Plaintiffs have adequately pled their APA claim.

CONCLUSION

For the reasons above, this Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

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[104] While the D.C. Circuit has indicated that management plan activities themselves may not be reviewable in the context of a challenge to a monument designation, *Tulare County*, 306 F.3d at 1143, that case did not arise where, as here, the final decision had been made to ignore a plan under a valid proclamation in favor of one alleged to be enacted without any authority. *See also W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 961 (D. Ariz. 2009) (interpreting *Tulare* as leaving room for APA review).

Certificate of Service

I HEREBY CERTIFY that on the 15th day of November, 2018, I filed the foregoing electronically through the CM/ECF system, which provided notice of this filing by e-mail to all counsel of record.

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