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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, *et al.*, Plaintiffs, ZEBEDIAH GEORGE DALTON, *et al.*, Consolidated Pls., v. JOSEPH R. BIDEN, JR., *et al.*, Defendants, HOPI TRIBE, *et al.*, Intervenor-Defs., SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*, Intervenor-Defs.	**SUWA INTERVENORS' REPLY IN SUPPORT OF MOTION TO DISMISS** Lead Case No. 4:22-cv-00059-DN-PK Member Case No. 4:22-cv-00060-DN-PK District Judge David Nuffer Magistrate Judge Paul Kohler

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INTRODUCTION

Federal Defendants and Tribal Nation Intervenors have raised substantial jurisdictional grounds for dismissing Plaintiffs' amended complaints. If the Court does not dispose of the cases on those threshold grounds, it should dismiss the complaints for failure to state a claim on which relief can be granted.

Plaintiffs base all their claims on the flatly erroneous premise that national monuments may protect only discrete items like archeological "relics," and cannot protect landscapes, habitats, or wildlife of scientific interest.[1] Their argument misreads both the text and legislative history of the Antiquities Act, as Federal Defendants and Tribal Nation Intervenors explain. Their argument also contravenes more than a century of established practice and precedent in the executive, legislative, and judicial branches,[2] as this brief elaborates.

Since the Antiquities Act's earliest days, Presidents have designated national monuments to protect some of our nation's most cherished landscapes and ecosystems—from the Grand Canyon in Arizona (1908), to Zion's labyrinth of multi-hued sandstone walls in Utah (1918), to the estuarine habitat for salmon and brown bears in Glacier Bay in Alaska (1925). These and other early monuments are similar in scale and purpose to both Bears Ears and Grand Staircase-Escalante. The Supreme Court has repeatedly affirmed that the Act authorizes the President to designate such monuments. So has every lower court to address the question, including this court. And Congress, too, has enacted numerous other statutes which confirm that national

[1] Utah Pls.' Opp. Br. 45-58, Docket No. 154 ("Utah Br."); Dalton Pls.' Opp. Br. 36-54, Docket No. 153 ("Dalton Br.").

[2] *Contra* Utah Br. 56-58; Dalton Br. 47-50, 54-57, 61-63.

monuments—including Grand Staircase, specifically—appropriately protect nationally significant landscapes and wildlife.

In short, for more than a century, all three branches have agreed that the Act authorizes national monuments like those at issue here. Plaintiffs' claims fail as a matter of law.

ARGUMENT

I. More than a Century of Presidential Practice Contradicts Plaintiffs' Interpretation.

Shortly after the Antiquities Act's passage in 1906, Presidents began designating national monuments to protect the kinds of objects that Plaintiffs claim are excluded from the Act. These monuments include Muir Woods, which President Theodore Roosevelt established in 1908 to protect a grove of old-growth redwood trees in California,[3] and Mount Olympus, which he established in 1909 to protect the breeding grounds for an elk species in Washington.[4] In the following decades, President Wilson protected the "flora" and "fauna" of Mount Desert Island in Maine[5]; President Coolidge protected the "great variety of forest" and "fauna" of Glacier Bay in Alaska[6]; and President Hoover protected "various species of cacti" in Saguaro National Monument in Arizona.[7] For more than a century, then, Presidents have understood that habitats, plants, and animals are protectable objects of interest under the Act.

[3] Proclamation No. 793, 35 Stat. 2174 (1908).

[4] Proclamation No. 869, 35 Stat. 2247 (1909).

[5] Proclamation No. 1339, 39 Stat. 1785 (1916).

[6] Proclamation No. 1733, 43 Stat. 1988 (1925).

[7] Proclamation No. 2032, 47 Stat. 2557 (1933).

Throughout this period, Presidents also identified certain lands and landscapes as worthy of protection under the Act—contradicting Plaintiffs' repeated attempts to portray President Biden's protection of the Bears Ears and Grand Staircase landscapes as "unprecedented."[8] In 1923, for example, President Harding declared "certain *lands* . . . known as Bryce Canyon" in Utah to be of both "scenic beauty" and "scientific interest."[9] The following year, President Coolidge identified the "weird and scenic *landscape*" of Craters of the Moon in Idaho as meriting protection.[10] President Hoover likewise declared that Saguaro's "*lands* are of outstanding scientific interest."[11] And President Kennedy in 1961 explained that "*lands*" and "related features" of Buck Island in the Virgin Islands—including its "rare marine life" and "undersea coral reef formations"—are of "great scientific interest."[12]

Further, Presidents have long designated national monuments that are similar in size to the monuments here. The Grand Canyon National Monument, as designated by President Roosevelt in 1908, covered 800,000 acres.[13] The Katmai monument, as established by President Wilson in 1918, covered over one million acres.[14] And Glacier Bay monument, as established by

[8] *See, e.g.*, Dalton Br. 1-2, 6, 44.

[9] Proclamation No. 1664, 43 Stat. 1914 (1923) (emphasis added).

[10] Proclamation No. 1694, 43 Stat. 1947 (1924) (emphasis added).

[11] Proclamation No. 2032, 47 Stat. at 2557 (emphasis added).

[12] Proclamation No. 3443, 76 Stat. 1441 (1961) (emphasis added).

[13] Proclamation No. 794, 35 Stat. 2175 (1908); *see Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 538 (D.C. Cir. 2019).

[14] Proclamation No. 1487, 40 Stat. 1855 (1918).

President Coolidge in 1925, covered almost 1.4 million acres.[15] Plaintiffs are thus wrong to suggest that monuments of this size are a "modern phenomenon."[16]

This long and consistent presidential practice—dating back to the earliest days of the Antiquities Act—negates Plaintiffs' inapt invocation of the major questions doctrine.[17] That doctrine applies to "unheralded" assertions of agency power that would represent a "transformative expansion in [the agency's] regulatory authority."[18] It is not clear the doctrine even applies to presidential action, much less to assertions of *proprietary* authority over land owned by the federal government.[19] Regardless, the President's authority to designate monuments like Bears Ears and Grand Staircase is not "unheralded" and would not represent a "transformative expansion" of power, but rather is entirely consistent with "established practice."[20] In fact, even forty years ago another court found that the President's practice of designating monuments like those at issue here was already "consistent and long established."[21]

II. Courts Have Consistently Rejected Plaintiffs' Interpretation.

These cases are of a piece with a handful of others where plaintiffs complained that a national monument protected improper objects or was too large. But every court to consider such

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[15] *See* Cong. Rsch. Serv., R41330, National Monuments and the Antiquities Act 5 (2023).

[16] Dalton Br. 62.

[17] *Id.* at 50-51.

[18] *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Util. Air Regulatory Grp. v. EPA* (*UARG*), 573 U.S. 302, 324 (2014)).

[19] *See Mayes v. Biden*, ---F.4th----, 2023 WL 2997037, at *8-10 (9th Cir. Apr. 19, 2023).

[20] *West Virginia*, 142 S. Ct. at 2610 (quoting *UARG*, 573 U.S. at 324, and *FTC v. Bunte Bros., Inc*., 312 U.S. 349, 352 (1941)).

[21] *Anaconda Copper Co. v. Andrus*, No. A79-171, 1980 U.S. Dist. LEXIS 17861, *6 (D. Alaska June 26, 1980) (unpublished) (attached as Exhibit 1).

arguments has rejected them. Indeed, Supreme Court precedent forecloses Plaintiffs' interpretation of the Antiquities Act. Plaintiffs argue otherwise only by ignoring the plain language and import of the Court's decisions.

As early as 1920, the Supreme Court affirmed that the Act authorizes Presidents to designate monuments protecting large landscapes by upholding the validity of the 800,000-acre Grand Canyon monument.[22] In two subsequent cases, the Court also confirmed that Presidents may designate national monuments to protect wildlife and their habitat.

First, in *Cappaert v. United States*, the Supreme Court specifically rejected the argument—like the one Plaintiffs press here—that the Act authorizes the President to designate monuments "only to protect archeologic sites."[23] Instead, the Court affirmed President Truman's authority to expand the Death Valley monument in Nevada to include Devil's Hole, an underground pool that served as habitat for "a peculiar race of desert fish."[24] Plaintiffs try to escape the import of *Cappaert* by claiming that "only the pool, not the fish within it," was an object of interest under the Act.[25] But the Supreme Court could not have been clearer in its conclusion that "[t]he pool in Devil's Hole *and its rare inhabitants* are 'objects of historic or scientific interest.'"[26] The Court explained that "the Proclamation must be read in its entirety," and that "[t]he fish are one of the features of scientific interest."[27] Accordingly, the Court held

[22] *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

[23] 426 U.S. 128, 141-42 (1976).

[24] *Id.* at 132 (quoting Proclamation No. 2961, 66 Stat. c18 (1952)).

[25] Utah Br. 56-57; Dalton Br. 55.

[26] 426 U.S. at 142 (emphasis added).

[27] *Id.* at 141.

that President Truman's designation of the monument had impliedly reserved enough water to maintain the pool "as the natural habitat of the species sought to be preserved."[28]

Second, in *Alaska v. United States*, the Supreme Court again confirmed that Presidents may designate national monuments to protect wildlife and habitat. The Court recounted at length how the Glacier Bay monument was established and expanded in the 1920s and 30s to protect its "complex ecosystem," including fish, birds, bears, and other wildlife.[29] Plaintiffs try to bury the significance of *Alaska*, claiming that its discussion of national monuments protecting ecosystems was dicta.[30] That is incorrect. Recognizing the monument's "goal of safeguarding the flora and fauna that thrive in Glacier Bay's complex and interdependent ecosystem" was a "necessary part of [the Court's] reasoning" in resolving the case.[31] Indeed, the Court's holding that the federal government retained title to the submerged lands in Glacier Bay turned on the conclusion that the national monument was designated "for the protection of wildlife."[32] The Court explained that the monument was clearly designated to preserve it as "habitat" for many forms of "flora and fauna."[33] And in reaching that conclusion, the Court recognized that "Congress has made clear that one of the fundamental purposes of wildlife reservations set apart pursuant to the Antiquities

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[28] *Id.*; *accord United States v. New Mexico*, 438 U.S. 696, 700 n.4 (1978) (explaining that the fish was the "principal" scientific interest of the pool).

[29] 545 U.S. 75, 98-99 (2005).

[30] Dalton Br. 57 n.337; Utah Br. 57.

[31] 545 U.S. at 101-02; *see Mass. Lobstermen's Ass'n*, 945 F.3d at 541 (explaining why a related aspect of the *Alaska* decision was not dicta).

[32] 545 U.S. at 105-10 (quoting Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 341 (1958)).

[33] *Id.* at 109.

Act is 'to conserve the scenery and the natural and historic objects and the wild life therein.'"[34] The Supreme Court has explained that a legal conclusion like this, which is a "necessary predicate" to the Court's holding, is "not dictum."[35]

Plaintiffs cannot square their interpretation of the Act with the Court's decisions in these earlier cases. Instead, they repeatedly quote a statement respecting the denial of certiorari[36] as if it was legal authority or precedential, which it is not. And it is outlandish that Plaintiffs rely on the statement to support their mistaken assertion that the Court's prior holdings were "pure dicta,"[37] given that the statement of a single Justice, in a case where the Court denied certiorari, is itself the "purest form of dicta"—and is "potentially misleading" to boot.[38]

In any event, every lower court to consider the question also has agreed that landscapes, ecosystems, and wildlife are protectable "objects" under the Antiquities Act.[39] In *Mountain States Legal Foundation v. Bush*, the D.C. Circuit specifically rejected the argument (made by

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[34] *Id.* (quoting 16 U.S.C. § 1).

[35] *United States v. Windsor*, 570 U.S. 744, 759 (2013).

[36] *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting denial of cert.).

[37] Dalton Br. 57 n.337.

[38] *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., statement respecting denial of cert.); *see also* Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 Wake Forest L. Rev. 1021 (2021) (identifying several "serious problems" with such statements, including their potential violation of the Article III case or controversy requirement).

[39] *See, e.g.*, *Mass. Lobstermen's Ass'n*, 945 F.3d at 544; *Anaconda Copper*, 1980 U.S. Dist. LEXIS 17861, at *7 ("Obviously, matters of scientific interest which . . . involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."); *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945) (affirming validity of monument designated to protect "plant life," a "biological field for research of wild life in its particular habitat," and other "different species of wild animals").

the BlueRibbon Coalition, now one of the Dalton Plaintiffs here) that "Congress intended only to preserve ruins, artifacts, and other manmade objects situated on public lands—[but] not the land itself."[40] Instead, the court upheld the validity of monuments that protected, among other things, a "rugged landscape," "biological crossroads," and "desert ecosystem."[41] In *Tulare County v. Bush*, the D.C. Circuit expressly held that "ecosystems and scenic vistas" are protectable objects of interest under the Act.[42] And in affirming the validity of the Grand Staircase monument in *Utah Association of Counties v. Bush*, this court similarly rejected the argument (made by a group that represented two of the Utah Plaintiffs here) that the Act could be used only to protect "man-made objects," noting several instances in which the Supreme Court upheld the designation of natural objects in national monuments.[43] Plaintiffs' arguments challenging Grand Staircase and Bears Ears here are—just like the arguments in these prior cases—"untenable" in light of the "plain language" of both the Act and the Supreme Court decisions interpreting it.[44]

Although Plaintiffs nowhere mention it, this court and the D.C. Circuit also have rejected arguments that the prevailing interpretation of the Act poses a nondelegation problem[45]—defeating Plaintiffs' attempted invocation of the constitutional avoidance canon.[46] And the courts' interpretation of the Act also confirms why the Dalton Plaintiffs' invocation of the

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[40] 306 F.3d 1132, 1134, 1137-38 (D.C. Cir. 2002).

[41] *Id.* at 1133-34.

[42] 306 F.3d 1138, 1142 (D.C. Cir. 2002).

[43] 316 F. Supp. 2d 1172, 1186 n.8 (D. Utah 2004).

[44] *Id.*

[45] *Id.* at 1190-91; *Mountain States*, 306 F.3d at 1137.

[46] *See* Utah Br. 47-48; Dalton Br. 50-51.

federalism canon fares no better.[47] The Antiquities Act authorizes the President to designate monuments on land "owned or controlled by the Federal Government."[48] As the Supreme Court has explained, "[a] reservation under the Antiquities Act thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another."[49] Shifting such designations of federal land does not "significantly alter the balance between federal and state power, [or] the power of the Government over private property."[50]

In short, arguments just like the Plaintiffs' have, in Plaintiffs' own words, "never worked in an Antiquities Act case."[51] Instead, "every court to address the argument has rejected it."[52] This Court should too.

III. Congress's Subsequent Statutes Are Incompatible with Plaintiffs' Interpretation.

Congress has made clear that it, too, agrees that national monuments may protect the kinds of objects that Plaintiffs contest. Rather than limit the types of things Presidents can protect under the Antiquities Act, Congress has enacted numerous other statutes that confirm national monuments properly protect landscapes, scenery, and wildlife. Plaintiffs' interpretation of the

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[47] *See* Dalton Br. 49-50.

[48] 54 U.S.C. § 320301(a).

[49] *United States v. California*, 436 U.S. 32, 40 (1978).

[50] Dalton Br. 50 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)); *cf. Kleppe v. New Mexico*, 426 U.S. 529, 541-45 (1976) (rejecting argument that federal statute governing federal lands somehow represents an "impermissible intrusion on state sovereignty").

[51] Dalton Br. 10.

[52] *Id.* at 11.

Act thus fails the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination."[53]

As early as 1916, only a decade after the Antiquities Act, Congress explained in the National Park Service Act that it understood the "fundamental purpose" of both national parks *and* national monuments was to "conserve the scenery and the natural and historic objects and the wild life therein."[54] That statute addressed monuments administered by the Park Service, but Congress more recently enacted another statute confirming that it takes a similar view of monuments administered by the Bureau of Land Management (BLM)—such as Bears Ears and Grand Staircase. In the 2009 Omnibus Public Land Management Act, Congress included all BLM-managed "national monument[s]" in the National Landscape Conservation System, which Congress established to "conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values."[55] These two statutes confirm Congress's understanding that national monuments can—and should—protect landscapes, wildlife, and other ecological values "for the benefit of current and future generations."[56]

Elsewhere, too, Congress has made clear that national monuments properly protect landscapes, ecosystems, and wildlife. Just a few examples: In 1929, Congress directed the

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[53] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

[54] Pub. L. No. 64-235, § 1, 39 Stat. 535 (1916) (directing the Park Service to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations").

[55] Pub. L. No. 111-11, § 2002, 123 Stat. 991, 1095 (2009) (codified at 16 U.S.C. § 7202(a), (b)(1)(A)).

[56] *Id.*; *see also* Pub. L. No. 64-235, § 1, 39 Stat. at 535 ("monuments" shall be managed "as will leave them unimpaired for the enjoyment of future generations").

executive branch to acquire sufficient lands to establish the Badlands National Monument in South Dakota,[57] and in 1968 Congress revised the monument's boundaries specifically to include "*lands* of outstanding scenic and scientific character."[58] That same year, Congress also directed establishment of the Biscayne National Monument in Florida to protect a "rare combination of terrestrial, marine, and amphibious life in a tropical setting of great natural beauty."[59] In 1980, while modifying the boundaries of Fort Jefferson National Monument in Florida, Congress recognized the need for "protecting … a pristine natural environment" within the monument, including "fish and other marine animal populations, and populations of nesting and migrating birds."[60] Later that year, Congress established four national monuments in Alaska, together comprising roughly 4 million acres, and specifically directed that two of them "shall" be managed to "protect habitat" for "wildlife."[61] In 1991, Congress expanded the size of Saguaro National Monument to protect "prime Sonoran desert habitat," including "important habitat for the desert tortoise, gila monster, javelina, and other species of reptiles, mammals, and birds."[62] And in 2000, Congress designated the Santa Rosa and San Jacinto Mountains National Monument in California to protect its "nationally significant biological . . . values," including

[57] Pub. L. No. 70-1021, § 1, 45 Stat. 1553-54 (1929).

[58] Pub. L. No. 90-468, 82 Stat. 663 (1968) (emphasis added).

[59] Pub. L. No. 90-606, 82 Stat. 1188 (1968).

[60] Pub. L. No. 96-287, § 201, 94 Stat. 599, 600 (1980).

[61] Pub. L. No. 96-487, §§ 201(1), (3), 503(a)-(b), 94 Stat. 2371, 2378, 2399 (1980) (establishing Aniakchak, Cape Krusenstern, Misty Fjords, and Admiralty Island national monuments).

[62] Pub. L. No. 102-61, § 2(a), 105 Stat. 303 (1991).

"magnificent vistas" and "wildlife."[63] Although these statutes are not themselves actions under the Antiquities Act, they confirm that Congress believes national monuments may protect landscapes and habitat, and that it does not subscribe to Plaintiffs' narrow reading of the word "monument" as merely a "building, pillar, stone, or the like."[64] Rather, as the Ninth Circuit recently observed, the meaning of the word "monument" in the Antiquities Act encompasses things like "mountains and deserts, as much as it does physical statues or icons."[65]

Plaintiffs nowhere attempt to square their interpretation of the Antiquities Act with how Congress itself has repeatedly characterized national monuments. Instead, Plaintiffs contend that various Presidents' century-old interpretation of the Act somehow "seeks to circumvent" other public lands statutes, such as the Wilderness Act, National Marine Sanctuaries Act, Park Service Act, and Federal Land Policy and Management Act.[66] Once again, Plaintiffs ignore that courts have already rejected the argument. In *Utah Association of Counties*, this court rejected the assertion that designation of Grand Staircase was an end-run around the Wilderness Act.[67] The D.C. Circuit likewise has rejected arguments about national monuments allegedly circumventing the Wilderness Act[68] and Sanctuaries Act.[69] And Congress has confirmed that monuments complement, and co-exist with, both wilderness and sanctuary designations—for example, by

[63] Pub. L. No. 106-351, § 2(a)(1)-(2), (b), 114 Stat. 1362 (2000).

[64] Dalton Br. 39 (quotation omitted).

[65] *Murphy Co. v. Biden*, ---F.4th----, 2023 WL 3050074, at *3 (9th Cir. Apr. 24, 2023).

[66] Dalton Br. 48-49.

[67] 316 F. Supp. 2d at 1192-93.

[68] *Mountain States*, 306 F.3d at 1138.

[69] *Mass. Lobstermen's Ass'n*, 945 F.3d at 542.

designating wilderness areas within national monuments,[70] and by drawing a sanctuary's boundaries to retain, rather than displace, a preexisting monument.[71]

The other two public lands statutes Plaintiffs cite are of even less help to them. First, regarding the Park Service Act, Plaintiffs overlook that the statutory phrase they quote—about protecting "scenery, natural and historic objects, and wildlife"[72]—applies to both national parks *and national monuments* administered by the Park Service.[73] Indeed, it was a materially identical, earlier version of this provision that the Supreme Court recognized in *Alaska* "made clear" that protecting scenery and wildlife were "fundamental purposes" of monuments "set apart pursuant to the Antiquities Act."[74]

Second, in FLPMA, while Congress limited the Secretary of the Interior's authority to withdraw public land—and also repealed the President's withdrawal authority under several other statutes (as well as under the Supreme Court's decision in *United States v. Midwest Oil Co.*[75])[76]—Congress quite deliberately chose to leave the President's withdrawal authority under

[70] *See* Pub. L. No. 94-567, § 1, 90 Stat. 2692 (1976) (designating wilderness areas within Badlands, Bandelier, Black Canyon of the Gunnison, Chiricahua, Great Sand Dunes, Joshua Tree, Pinnacles, and Saguaro national monuments).

[71] *See* Pub. L. No. 101-605, § 5(b)(1), 104 Stat. 3089 (1990) (drawing sanctuary boundaries to abut, and leave intact, Fort Jefferson National Monument).

[72] Dalton Br. 49 (quoting 54 U.S.C. § 100101(a)).

[73] *See* 54 U.S.C. §§ 100102(6), 100501 (defining national park "[s]ystem unit" to include "monument[s]" administered by the Park Service).

[74] 545 U.S. at 109.

[75] 236 U.S. 459 (1915).

[76] Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976).

the Antiquities Act unchanged.[77] Because Congress repealed other presidential withdrawal authority in FLPMA, and the statute "afforded Congress an opportunity to restrict the by then well-established exercise of presidential authority under the 1906 Antiquities Act," it is "significant" that Congress declined to do so.[78] And elsewhere in FLPMA, Congress confirmed that it viewed national monuments designated under the Antiquities Act as similar to other protective designations designed to protect wildlife, by listing monuments together with national wildlife refuges as land designations that only Congress could undo.[79]

Congress's decision not to curtail or restrict the kinds of objects Presidents may protect under the Antiquities Act—either in FLPMA, or when it recodified the Act with minor changes in 2014[80]—is particularly telling given that, as the above examples show, Congress has otherwise played an active role regarding national monuments. In addition to the many instances where Congress itself has established monuments or expanded their size,[81] Congress has not been shy about abolishing some monuments and reducing the size of others.[82] And "[w]hen

[77] *See* H.R. Rep. No. 94-1163, at 29 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6175, 6203 ("The exceptions, which are not repealed, [include] the Antiquities Act (national monuments) . . . .").

[78] *Anaconda Copper*, 1980 U.S. Dist. LEXIS 17861, *6.

[79] Pub. L. No. 94-579, § 204(j), 90 Stat. 2743 (codified at 43 U.S.C. § 1714(j)); *see also* H.R. Rep. No. 94-1163, at 9 (explaining that this provision would preserve the "integrity of the great national resource management systems").

[80] *See Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 57 (D.D.C. 2018); Pub. L. No. 113-287, 128 Stat. 3094 (2014).

[81] *See supra* pages 10-12.

[82] *See, e.g.*, Pub. L. No. 71-92, 46 Stat. 142 (1930) (abolishing Papago Saguaro in Arizona); Pub. L. No. 81-837, 64 Stat. 1033 (1950) (reducing the size of Joshua Tree in California); Pub. L. No. 84-891, 70 Stat. 898 (1956) (abolishing Fossil Cycad in South Dakota); Pub. L. No. 87-81, § 2,

Congress has wished to restrict the President's Antiquities Act authority, it has done so expressly"[83]—such as by requiring additional congressional approval for new monuments in Wyoming and Alaska.[84] Plaintiffs' slippery slope argument about the "practical 'fallout'" of the government's position purportedly converting "all federal land into a monument"[85] thus has no basis in practice, or in law. And it improperly "reduces Congress to a bit player" in the ongoing management and oversight of national monuments, ignoring the "long history of vigorous action [Congress] has taken in response to what it perceived to be presidential overreach."[86]

Here, moreover, Congress's repeated actions *strengthening protections* within Grand Staircase defeat Plaintiffs' arguments that the monument is unlawfully large or protects improper objects—confirming that this case does not present any legitimate question about the outer contours of the Antiquities Act. In 1998, Congress enacted two statutes adding roughly 180,000 acres to the monument, bringing its total area up to 1.9 million acres.[87] As part of these enactments, Congress expressly found that "the Federal lands comprising the Monument[] have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources, including … rare plant and animal communities."[88] And Congress found that "[d]evelopment of

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75 Stat. 198 (1961) (reducing the size of Cedar Breaks in Utah); Pub. L. No. 104-333, § 205(a), 110 Stat. 4093, 4106 (1996) (reducing the size of Craters of the Moon in Idaho).

[83] *Murphy Co.*, 2023 WL 3050074, at *8.

[84] 54 U.S.C. § 320301(d); 16 U.S.C. § 3213(a).

[85] Dalton Br. 47.

[86] *Murphy Co.*, 2023 WL 3050074, at *12.

[87] Pub. L. No. 105-335, 112 Stat. 3139 (1998); Pub. L. No. 105-355, § 201, 112 Stat. 3247 (1998).

[88] Pub. L. No. 105-335, § 2(2), 112 Stat. at 3139.

surface and mineral resources" within Grand Staircase would be "incompatible with the preservation of these scientific and historic resources for which the Monument was established."[89] Plaintiffs try to downplay the significance of these statutes,[90] but they never explain why Congress would have *added* 180,000 acres to the monument if it was unlawfully large to begin with. Nor do they explain why Congress would have taken steps to further protect the "scientific and historic resources for which the Monument was established," if such resources were an unlawful basis for establishing Grand Staircase in the first place.

"Taken together," the many statutes Congress has enacted over the decades "preclude an interpretation" of the Antiquities Act that forbids protection of landscapes, wildlife, or habitat.[91] Contrary to Plaintiffs' suggestion,[92] "this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position."[93] Rather, Congress—acting "against the background" of a century of consistent executive practice and court precedent—has "enacted [numerous] statutes addressing the particular subject" of national monuments that confirm, were there ever any doubt, that Congress agrees with the other branches' longstanding interpretation.[94]

CONCLUSION

The Court should dismiss the amended complaints.

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[89] *Id.* § 2(3).

[90] Dalton Br. 62-63; Utah Br. 57-58.

[91] *Brown & Williamson*, 529 U.S. at 155.

[92] Dalton Br. 61-62.

[93] *Brown & Williamson*, 529 U.S. at 155.

[94] *Id.* at 155-56.

Respectfully submitted this 5th day of May, 2023,

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the Court's order of March 2, 2023, ECF No. 111, because it contains fewer than 33 pages.

May 5, 2023 */s/ Heidi McIntosh*

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, I caused the foregoing document to be filed with the Clerk of the Court using the Court's CM/ECF system, and service was thereby effected electronically to all counsel of record.

May 5, 2023 */s/ Heidi McIntosh*