ORAL ARGUMENT REQUESTED
No. 18-5353

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, et al.,

Appellants,

v.

WILBUR J. ROSS, JR., in his official capacity
as Secretary of Department of Commerce, et al.,

Appellees.

On Appeal from the United States District Court
for the District of the District of Columbia
Honorable James E. Boasberg, District Judge

APPELLANTS' OPENING BRIEF

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Certificate as to Parties, Rulings, and Related Cases

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel for Appellants certify as follows:

A. Parties

The parties to this litigation in the district court were Massachusetts Lobstermen's Association; Atlantic Offshore Lobstermen's Association; Long Island Commercial Fishing Association; Garden State Seafood Association; Rhode Island Fishermen's Alliance; Wilbur J. Ross, Jr., in his official capacity as Secretary of Department of Commerce; Benjamin Friedman, in his official capacity as Deputy Undersecretary for Operations for the National Oceanic and Atmospheric Association; Ryan Zinke, in his official capacity as Secretary of the Department of Interior; Donald J. Trump, in his official capacity as President of the United States; and Jane Doe, in her official capacity as Chairman for the Council on Environmental Quality.

Defendants-Intervenors in this litigation in the district court were Natural Resources Defense Council; Conservation Law Foundation; Center for Biological Diversity; and R. Zack Klyver.

Amicus in this litigation in the district court were Alson Rieser, Donna R. Christie, Josh Eagle, and Law Professors, ECF Doc. 39 at Appendix A.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Counsel for Appellants Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association; Long Island Commercial Fishing Association; Garden State Seafood Association; and Rhode Island Fishermen's Alliance also certifies that Appellants have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

B. Rulings Under Review

The ruling under review is the Order and Memorandum Opinion entered by the district court, Judge James E. Boasberg, on October 5, 2018 [Doc #46 and 47], App. 54-86, granting Defendants' motion to dismiss. The Memorandum Opinion has not been published in the Federal Supplement, but is available on Westlaw at 2018 WL 4853901.

C. Related Cases

This case has not previously been filed in this Court and Counsel is unaware of any related cases.

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The Fishermen: Plaintiffs – Appellants Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance

Statement of Jurisdiction

On September 15, 2016, President Obama proclaimed the 5,000 square mile Northeast Canyons and Seamounts Marine National Monument, purportedly under the Antiquities Act. App. 20-21. On March 7, 2017, Plaintiffs filed this lawsuit challenging that proclamation as ultra vires. Because Plaintiffs have fished the area included within the monument and would continue doing so but for its restrictions, they are the objects of the regulation and have standing to challenge it. They assert that the proclamation exceeds the Antiquities Act's statutory restrictions and constitutional principle because the monument consists exclusively of ocean beyond the territorial sea, which is beyond the Antiquities Act's limit to "land owned or controlled by the federal government." App. 9. They also allege that the monument's boundaries do not conform to the Antiquities Act's "smallest area" requirement. *Id.*; 54 U.S.C. § 320301(b). The district court had jurisdiction under the Antiquities Act. 28 U.S.C. § 1331; 54 U.S.C. § 320301; *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).

On October 5, 2018, the district court dismissed this case challenging the establishment of the Northeast Canyons and Seamounts Marine National Monument. App. 54. Plaintiffs timely filed their notice of appeal on December 3, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

There are two issues presented for review:

First, whether the district court erred in holding that the Antiquities Act, which limits national monuments to "land owned or controlled by the Federal Government," authorizes the President to establish monuments consisting solely of ocean and ocean floor beyond the nation's territorial sea; and

Second, whether the district court erred in dismissing the claim that the monument's boundaries fail the Antiquities Act's "smallest area" requirement because those boundaries bear no reasonable relationship to the canyons and seamounts identified in the proclamation.

Statutes and Regulations

Pertinent provisions of the National Marine Sanctuaries Act and Antiquities Act are set forth in the addendum.

Introduction

The Constitution's separation of powers forbids the Executive Branch from exercising power that the Constitution vests in Congress, absent a valid delegation. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). A corollary to this principle is that the Executive Branch cannot adopt a novel interpretation of an old statute to give itself significant, new power when Congress has directly addressed the issue under another, more constraining statute. *See Utility Air Reg. Gp. v. EPA*, 573 U.S. 302, 324 (2014); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). These principles require the setting aside of the presidential proclamation declaring—purportedly under the Antiquities Act of 1906—the Northeast Canyons and Seamounts Marine National Monument, which consists of more than three-million acres of Atlantic Ocean more than a hundred miles from the nation's shores.

Through the National Marine Sanctuaries Act, Congress delegated the power to set aside "areas of the marine environment which have special conservation, recreational, ecological, historical,

cultural, archeological, scientific, educational, or esthetic qualities" as marine sanctuaries. *See* 16 U.S.C. § 1431(a)(4). However, Congress imposed significant substantive and procedural limits on the exercise of this delegated power. *See id.* §§ 1433, 1434.

In establishing the Northeast Canyons and Seamounts Marine National Monument, the President did not comply with these limits. Instead, he claimed to have discovered the power to protect such areas by establishing marine national monuments under the Antiquities Act, thereby avoiding the substantive and procedural limits Congress imposed on marine sanctuaries. *Cf. Utility Air Reg. Gp.*, 573 U.S. at 324 (urging skepticism of Executive Branch "claims to discover in a long-extant statute an unheralded power"). He did so despite the Antiquities Act's limiting the President's monument-proclamation power to "land owned or controlled by the Federal Government"—which the ocean beyond the nation's territorial sea is not. 54 U.S.C. § 320301. The district court did not merely err in approving this novel reinterpretation of the Antiquities Act but created a conflict with the only other federal court to have considered whether the law's text could be stretched so far. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned*

Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (the ocean beyond the nation's territorial sea is not land owned or controlled by the federal government).

The question in this case is not whether special areas of the marine environment should be protected; Congress can, within constitutional limits, pursue that goal. Rather, the question is whether Congress has authorized the President to protect such areas through the Antiquities Act. Because the Northeast Canyons and Seamounts Marine National Monument is not authorized by the Antiquities Act and was not established in compliance with the Marine Sanctuaries Act, it is unlawful. The Constitution's separation of powers requires the President's proclamation to be held void.

The district court's judgment dismissing this case should be vacated and this case remanded for proceedings on the merits.

Background

The Antiquities Act

Enacted in response to reports of vandalism of Native American historical sites, the Antiquities Act of 1906 is one of the nation's oldest conservation laws. *See generally* Ronald F. Lee, *The Story of the Antiquities Act* (2001)[1] (describing the events leading to the act's enactment). It authorizes the President to unilaterally establish national monuments by mere public proclamation. 54 U.S.C. § 320301(a).

This authority extends to "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." *Id.* The President may reserve "parcels of land" to protect the object, but 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[.]" *Id.* § 320301(b). Thereafter, the secretary of the relevant department is authorized to regulate the examination, excavation, and

[1] *Available at* https://www.nps.gov/archeology/PUBS/LEE/Index.htm.

gathering of certain objects, as well as impose "uniform regulations for the purpose of carrying out this chapter." *Id.* § 320303.

The Antiquities Act's legislative history demonstrates that it was a compromise bill, intended to address an important problem while nonetheless constraining the President's authority. The President and Department of Interior sought broad authority to establish national parks, based on broad factors like "scenic beauty," "natural wonders," and "other properties it is desirable to protect and utilize in the interest of the public." *See* Lee, *supra*, ch. 6. Congress countered with a narrow proposal authorizing the protection of "cliff dwellings and other prehistoric remains" with reservations that could not exceed 320 acres. *See id.*

The statute reflects a midpoint between these opening bids: an important law for protecting Native American antiquities and other historic sites (such as landmarks and battlefields) but which Congress did not anticipate would affect most federal land. Despite substituting the relatively vague "smallest area compatible" requirement for a strict acreage limit, Congress still expected the Antiquities Act's reach to be relatively modest. During the debate over the law, for instance,

Congressman Stephens of Texas asked Congressman Lacey, the Antiquities Act's sponsor, "[h]ow much land will be taken off the market in the Western States by the passage of the bill?" 40 Cong. Rec. S7888 (daily ed. June 5, 1906). The response was an opaque "[n]ot very much." *Id.* Unsatisfied, Congressman Stephens asked more specifically if it would "be anything like the forest-reserve bill, by which seventy or eighty million[] acres of land in the United States have been tied up" and which was controversial for that reason. *Id.* To that, Congressman Lacey's answer was unequivocal: "Certainly not." *Id.*

Congressman Lacey's prediction was accurate until 1978, when President Carter declared 56 million acres of national monuments in Alaska in a single day (far exceeding the roughly 10 million acres that had been designated to that point). *See Sturgeon v. Frost*, _____ S. Ct. ____, 2019 WL 1333260, at *5 (U.S. Mar. 26, 2019). That drew sharp protests from Alaskans and led Congress to enact the Alaska National Interest Lands Conservation Act, which rescinded these monuments, forbade further Alaskan monuments larger than 5,000 acres without congressional approval, and altered the designation of 157 million acres of federal land. *See id.*

Marine Sanctuaries Act

The 1970s saw a significant change to the federal government's approach to conservation. Most federal environmental laws were enacted during this time, many of which filled acknowledged gaps in earlier conservation laws. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (enacted in 1973); Clean Water Act, 33 U.S.C. § 1251, *et seq.* (enacted in 1972); Clean Air Act, 42 U.S.C. § 7401, *et seq.* (enacted in 1970).

The National Marine Sanctuaries Act, enacted in 1972, was one such law. 16 U.S.C. § 1431, *et seq.* As the statute candidly acknowledges, earlier laws "have been directed almost exclusively to land areas[,]" omitting consideration of ocean health. 16 U.S.C. § 1431(a)(1). The National Marine Sanctuaries Act closed this gap by allowing designation of marine sanctuaries to protect "areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities[.]" 16 U.S.C. § 1431(a)(4); 16 U.S.C. § 1433(a) (establishing a five-part test for marine sanctuaries).

The National Marine Sanctuaries Act, like other 1970s conservation laws, delegates significant authority to the Executive Branch, but conditions its exercise on compliance with an extensive public notice and comment process. It applies to the full extent of Congress' authority to regulate the marine environment, including "coastal and ocean waters[.]" 16 U.S.C. § 1432(3). Relevant here, when customary international law recognized nations' limited authority to regulate the 200 miles of ocean nearest their coast, Congress amended the National Marine Sanctuaries Act to include this "exclusive economic zone." *See* Pub. L. No. 102-587, 106 Stat. 5039, § 2102 (Nov. 4, 1992).

But the National Marine Sanctuaries Act also requires the Secretary of Commerce to provide broad public notice of any sanctuary proposal, to prepare and publicize environmental studies and management plans, and to hold a public hearing. 16 U.S.C. § 1434(a)(1)-(3). It also requires the Secretary to generally defer on fishery-management issues to the appropriate Regional Fishery Management Council, which Congress established to ensure sustainable fishing under the Magnuson-Stevens Act of 1976. *Id.* § 1434(a)(5). And every

sanctuary proposal must be submitted to Congress and affected states, to give each an opportunity to object. *Id.* § 1434(b)(1).

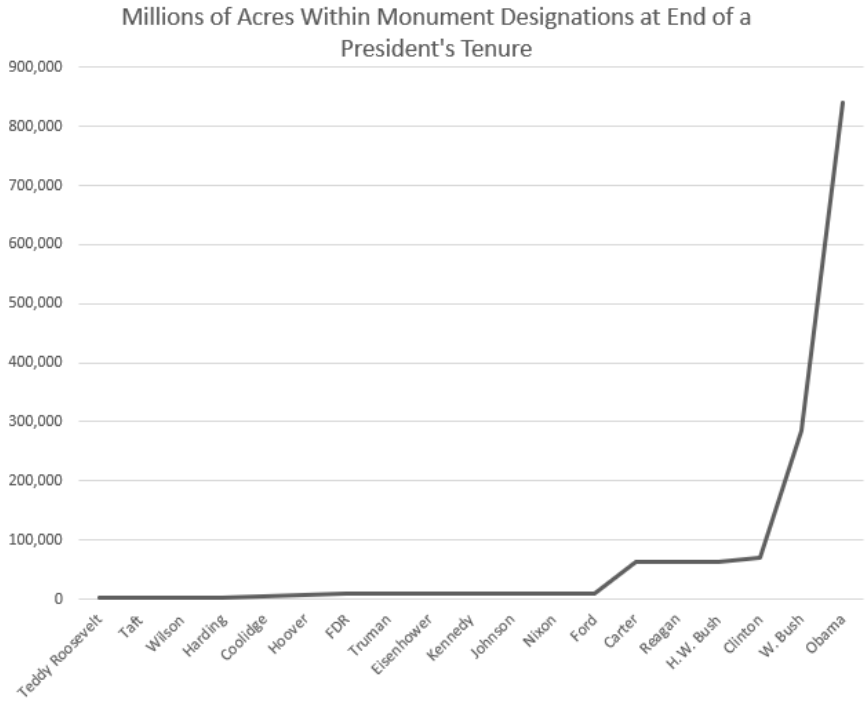
As with the Antiquities Act's monument-proclamation authority, the designation of a marine sanctuary is discretionary. 16 U.S.C. § 1433 ("The Secretary may designate . . . ."). Thus, the use of this power has waxed and waned with presidential administrations. *See* Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. Envtl. L.J. 711, 721-45 (2003) (describing this history). In total, 13 national marine sanctuaries have been designated. *See* NOAA, *National Marine Sanctuary System* (2016).[2]

The 2006 Sea Change

Over the Antiquities Act's first century, there was a steady rise in the amount of land contained within monuments, with the occasional spike. From 1906 to 2005, 16 Presidents designated 92 national

[2] https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/docs/2016-national-marine-sanctuary-system-brochure.pdf.

monuments covering a total area of 72-million acres. *See* Nat'l Park Serv., *Antiquities Act: 1906-2006: maps, facts, & figures*.[3]



2006 reflects a turning point, however, with an asymptotic rise in the area contained within national monuments from 2006 to 2017. During these 12 years, 37 additional monuments were designated totaling 760-million acres—a ten-fold increase over the prior century's total in a tenth of the time. *See, e.g.*, Press Release, Department of Interior, *Interior Department Releases List of Monuments Under*

[3] *Available at* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Apr. 2, 2019).

Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments (May 5, 2017).[4]

The cause of this orders-of-magnitude increase is the reinterpretation of the Antiquities Act to include the ocean beyond the nation's territorial sea. In 2000, the White House Office of Legal Counsel issued an opinion stating that it is "a close question" whether the Antiquities Act could be applied to this area but ultimately concluding that it could, overturning the National Oceanic and Atmospheric Administration's contrary opinion. *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 8-10 (2000). Prior to this, the President had never designated a monument consisting exclusively of ocean, although he had several times included water bodies (like ponds and bays) within designations of land-based monuments. By adopting this interpretation, the President dramatically expanded the scope of his powers, from the

[4] *Available at* https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal.

roughly 640 million acres of federal land[5] to 3.4 million-square nautical miles (nearly 3 billion acres) of ocean.[6]

The first monument designated under this novel interpretation—the Paphanaumokuakea Marine National Monument—was originally proposed as a marine sanctuary. In 2000, Congress authorized the President to designate this area as a coral reef reserve. National Marine Sanctuaries Amendments Act of 2000, Pub. L. No. 106-513, § 5(g)(1), 114 Stat. 2381 (Nov. 13, 2000). Congress further directed the Secretary of Commerce to initiate the designation of the reserve as a marine sanctuary. *Id*. § 5(g)(2). The sanctuary was proposed as required. *See* Robin Kundis Craig, *Are Marine National Monuments Better Than National Marine Sanctuaries?*, 7 Sustainable Dev. L. & Pol'y 27, 31 (2006). However, when this process took too long for the President's liking, President Bush "reached for the Antiquities Act," declaring the

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[5] *See* Congressional Research Service, *Federal Land Ownership: Overview and Data* (Mar. 3, 2017), *available at* https://fas.org/sgp/crs/misc/ R42346.pdf.

[6] *See* NOAA, *The United States is an Ocean Nation* (2011), *available at* https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf.

area the nation's first ocean monument instead. *Id. See* Establishment of the Northwestern Hawaiian Islands Marine National Monument, Pres. Proc. No. 8031 (June 15, 2006).[7]

Rather than a modest boundary push, this designation presaged a fundamental change in the implementation of both the Antiquities Act and the National Marine Sanctuaries Act. Ocean monuments constitute more than 99% of the 760 million acres designated under the Antiquities Act from 2006 to 2017. *See Interior Department Releases List of Monuments Under Review, supra*. This is because ocean monuments have been unprecedentedly huge. *Compare* Papahanaumokuakea Marine National Monument Expansion Proclamation (Aug. 26, 2016)[8] (the largest ocean monument at over 372 million acres) *with* Wrangell-St. Elias National Monument Proclamation 4625 (Dec. 1, 1978) (the largest land-based monument at

[7] This proclamation later had to be amended to remove all of its errant references to the monument as a "sanctuary." Pres. Proc. No. 8112 (Feb. 28, 2007).

[8] https://obamawhitehouse.archives.gov/the-press-office/2016/08/26/presidential-proclamation-papahanaumokuakea-marine-national-monument.

less than 11 million acres, which Congress converted to a national park).

In contrast, 2006 marked the practical demise of the National Marine Sanctuaries Act. Prior to this time, 13 marine sanctuaries were established. *See National Marine Sanctuary System, supra*. *None* has been established since. Instead, the protection of special areas of the marine environment has been completely coopted by the President's interpretation of the Antiquities Act.

Northeast Canyons and Seamounts Marine National Monument

On September 15, 2016, President Obama declared a 5,000-square-mile area of the Atlantic Ocean—more than 100 miles from the nation's coast—to be the Northeast Canyons and Seamounts Marine National Monument. App. 20-21 ¶ 52. The monument consists exclusively of ocean and, at 5,000 square miles, is roughly the size of the State of Connecticut. *Id*.

The proclamation establishing the monument declared three underwater canyons, four seamounts, and the ocean ecosystem to be "objects of historic and scientific interest." App. 21-22 ¶¶ 53-56. The proclamation is silent, however, on how this vast ocean area is either

"land owned or controlled by the federal government" or the smallest area compatible with the protection of any object covered by the Antiquities Act. App. 22 ¶¶ 57-58.

Within the boundaries of the monument is a lucrative fishery. App. 18 ¶¶ 34-39. Prior to the monument, the New England Fishery Management Council and the Atlantic States Marine Fisheries Commission regulated commercial fishing in this area to ensure sustainability and minimize environmental impacts. App. 19 ¶¶ 43-44. In pursuit of these goals, the Council and Commission have worked with fishermen to retire excess fishing permits and shift the industry to more environmentally friendly practices. App. 11-14 ¶¶ 7-13, *id.* 19-20 ¶¶ 47, 49 (noting Plaintiffs' role in these efforts).

When the monument was proposed, commercial fishermen, the Atlantic States Fisheries Commission, the eight Regional Fishery Management Councils, and the Governor of Massachusetts all expressed concern that the monument would be illegal, would frustrate efforts to manage the fishery sustainably, or both. App. 19-20 ¶¶ 47-51. For example, the Regional Fishery Management Councils—charged by Congress with regulating fisheries under the federal Magnuson-Stevens

Act—explained that "[m]arine monument designations can be counterproductive as they may shift fishing effort to less sustainable practices . . . ." App. 20 ¶ 50.

Despite these concerns, the President proclaimed the monument and prohibited most commercial fishing throughout its 5,000-square-mile area beginning on November 14, 2016. App. 22-23 ¶¶ 61-63. Lobster and red crab fishermen were given a temporary reprieve; the proclamation allows the Secretaries of Commerce and Interior to permit this fishing but only for seven years. App. 22-23 ¶ 62. Despite being subject to fewer environmental regulations, recreational fishing is allowed to continue permanently. *Id.*

Procedural History

The Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance (collectively, the Fishermen) filed this lawsuit challenging the monument on March 7, 2017. *See* App. 9. They argue that the monument exceeds the President's power under the Antiquities Act because it consists exclusively of ocean beyond the territorial sea, rather

than any land owned or controlled by the federal government. App. 10-11 ¶¶ 2, *id.* 20-21 ¶ 52, *id.* 24 ¶ 71. In the alternative, they claim that the boundary set is not the smallest area compatible with protecting the identified objects. App. 24-25 ¶¶ 72-75. For relief, they seek a declaration that the proclamation establishing the monument is unlawful and an injunction against the ongoing enforcement of the proclamation's fishing ban.

On October 5, 2018, the district court dismissed the Fishermen's complaint. It reasoned that the Antiquities Act's reference to "land" includes the ocean because presidents have included water features within land-based monuments, some of those monuments have been upheld by courts, and dictionary definitions support the inclusion of features located on land—such as crops or a pond—within references to that land. App. 64-67. The court interpreted the Antiquities Act's reference to federal "control" to require less than plenary authority. App. 72-84. Instead, the court construed "control" to require a comparison of the government's influence with that of other public or private entities. App. 80. Regarding the National Marine Sanctuaries Act, the court concluded that it and the Antiquities Act provide

overlapping authority. App. 68-71. Finally, the court determined that a monument's boundaries could not be challenged under the Antiquities Act's "smallest area" requirement because of the proclamation's reference to the ecosystem within the monument. App. 84-86.

Standard of Review

A district court's dismissal of a complaint is reviewed *de novo*. *See Sickle v. Torres Advanced Enterprise Solutions, LLC*, 884 F.3d 338, 344-45 (D.C. Cir. 2018). In applying this standard, the Court construes the complaint liberally in plaintiffs' favor, assumes the truth of the complaint's allegations, and draws in plaintiffs' favor all reasonable inferences from those allegations. *See id.*

When reviewing claims under the Antiquities Act, courts generally defer to the President's policy judgments inherent in the exercise of the authority granted to him. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002). However, this deference does not extend to "whether statutory restrictions have been violated." *Id.* "'The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress[.]'" *Id.* at 1136 (quoting *Chamber of Commerce of United*

States v. Reich, 74 F.3d 1322, 1327 (D.C. Cir. 1996), and *Stark v. Wickard*, 321 U.S. 288, 310 (1944)). Thus, the President's interpretation of the scope of his Antiquities Act power is entitled to no presumptive weight.

Summary of Argument

In a conspicuous attempt to circumvent the substantive and procedural limits of the National Marine Sanctuaries Act, the President has adopted a strained interpretation of the Antiquities Act expanding his own power at the expense of Congress. That novel interpretation, relied on to designate the Northeast Canyons and Seamounts Marine National Monument, broke from a century of presidential practice under the Antiquities Act. The Constitution's separation of powers does not permit the President to seize power in this way.

In upholding the President's proclamation of the Northeast Canyons and Seamounts Marine National Monument, the district court errantly assumed that this interpretation merely caused overlap between the Antiquities Act and the National Marine Sanctuaries Act. App. 68-71. But that is not the case. The President's interpretation completely eclipses the National Marine Sanctuaries Act, as any area

that could be designated as a marine sanctuary could be more easily designated as a marine monument. This is not only the plain consequence of the interpretation but is confirmed by experience.

Compounding the separation-of-powers problem is that the President's interpretation cannot be squared with the Antiquities Act's text, history, and purpose. The statute expressly limits designations to "land owned or controlled by the Federal Government." 54 U.S.C. § 320301. This area of ocean is not land, as that term is ordinarily understood, nor is the United States' limited authority to regulate this area sufficient "control" under the Antiquities Act. *See Treasure Salvors*, 569 F.2d at 337-38.

Finally, the dismissal of the Fishermen's "smallest area" claim was improper because they have adequately alleged that the monument's boundary is insufficiently related to the canyons and seamounts on which it is based and, by implication, the ecosystem defined in relation to these objects. The district court treated the proclamation's reference to an "ecosystem" as defeating any such claim as a matter of law. App. 84-86. However, a President's reference to the ecosystem does not relieve him of the obligation to limit monument

boundaries to "the smallest area compatible" with protecting the objects therein. 54 U.S.C. § 320301(b). The ecosystem is described in relation to the canyons and seamounts. Therefore, the Fishermen have sufficiently alleged that the boundaries lack a tight enough fit.

Argument

I. The monument violates the separation of powers

The power to regulate federal lands derives from Congress' Property Clause power. U.S. Const. art. IV, § 3, cl. 2. The power to regulate commercial activity in the exclusive economic zone derives from Congress' Commerce Clause authority. U.S. Const. art. I, § 8, cl. 3. These powers can only be exercised by officials within the Executive Branch pursuant to a valid congressional delegation. *See Mistretta*, 488 U.S. at 371-72. Executive actions contrary to such delegations must be struck down as violating the Constitution's separation of powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

In assessing Congress' intent in delegating power to the Executive, statutes "'cannot be construed in a vacuum.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (quoting *Davis v. Mich. Dep't*

of Treasury, 489 U.S. 803, 809 (1989)). Instead, the words of one statute must be read in relation to others. Where, for instance, "'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions[,]'" that scheme must be given effect. *See RadLAX Gateway Hotel*, 566 U.S. at 645 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)).

This rule has implications for cases where an apparently broad provision could swallow up another directed to the specific issue at hand. In such cases, a "well established canon of statutory interpretation" directs that the specific provision must be followed, with the general one giving way. *See id. See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Thus, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133.

This rule also means that, where Congress has specifically delegated some authority to the President or an Executive Branch official, he may not avoid the limits of that delegation by adopting a

novel interpretation of a "long-extant statute" to claim "unheralded power." *See Utility Air Reg. Gp.*, 573 U.S. at 324. Instead, courts should "greet [the] announcement" of such power "with a measure of skepticism." *Id.*

Such skepticism is called for in this case because the President has adopted a novel interpretation of a century-old statute in a conspicuous attempt to avoid the limits imposed by a comprehensive statute targeting the specific problem with a specific solution. The National Marine Sanctuaries Act does for the ocean, including the exclusive economic zone, what the Antiquities Act does for federal lands: it sets up a process for the Executive Branch to identify and protect special areas. If the Antiquities Act reaches this same area, the National Marine Sanctuaries Act would have no independent effect but would be entirely redundant.

As noted above, the National Marine Sanctuaries Act was enacted in recognition of a gap in earlier conservation laws which, like the Antiquities Act, were "directed almost exclusively to land[.]" 16 U.S.C. § 1431(a)(1). Congress filled this gap by authorizing the designation of special areas of the "marine environment," including the area where

this monument is located, as marine sanctuaries. *Id.* § 1432(3) (defining "marine environment" as "including the exclusive economic zone").

The chief difference between these statutes—other than that one applies to "land," the other the marine environment—is in the substantive and procedural limits Congress imposed on the power delegated to the Executive Branch. The Antiquities Act, like many laws predating the Administrative Procedure Act, imposes no procedural hoops ensuring that decisions are based on adequate evidence and account for public input. To establish a monument under the Antiquities Act, the President need only proclaim it so. *See* 54 U.S.C. § 320301. The National Marine Sanctuaries Act, in contrast, imposes extensive procedural and substantive limits on the powers it delegates, *see* 16 U.S.C. §§ 1433-1435, appropriate checks on the power to designate vast ocean areas including economically significant fisheries. For instance, it requires the Secretary of Commerce to confront the environmental tradeoffs of a sanctuary designation by analyzing these effects under the National Environmental Policy Act. 16 U.S.C. § 1434(a)(2). Here, those tradeoffs include impacts on the regional fishery management councils' efforts to grow fisheries to sustainable

levels. *See* App. 20 ¶ 50 (joint letter from all the councils explaining that monument designations can undermine their environmental protection efforts).

It should not surprise that the President might covet the powers delegated by the National Marine Sanctuaries Act to be paired with the (lack of) procedural requirements of the Antiquities Act. But the Constitution's separation of powers does not permit him to achieve this result through clever interpretation of the Antiquities Act. *See Utility Air Reg. Gp.*, 573 U.S. at 324; *RadLAX Gateway Hotel*, 566 U.S. at 645; *Brown & Williamson*, 529 U.S. at 159. Any presidential dissatisfaction with the limits of the National Marine Sanctuaries Act must be directed to Congress to fix, if it so chooses.

Yet, here, the President has adopted a novel interpretation of a century-old statute to give himself the power Congress specifically delegated under the National Marine Sanctuaries Act but free of the constraints Congress imposed on that delegation. This interpretive move dramatically changed the reach of the Antiquities Act and rendered the National Marine Sanctuaries Act a practical nullity. The President designated no ocean monuments beyond the territorial sea

prior to 2006 and has designated no marine sanctuaries since. This is how the President came to designate the Northeast Canyons and Seamounts Marine National Monument in circumvention of the process Congress established for the protection of special areas of the marine environment. As this interpretation expands the President's Antiquities Act power by several billion acres, Supreme Court precedent counsels significant skepticism of such a claim. *See Utility Air Reg. Gp.*, 573 U.S. at 324.

The district court upheld the President's novel interpretation by assuming that it merely results in overlap with the National Marine Sanctuaries Act. In *Mountain States*, this Court held mere overlap between the Antiquities Act and Endangered Species Act is permissible. 306 F.3d at 1138. That conclusion is correct because both statutes retain independent effect. The former allows national monuments to be designated on federal land and regulated for many purposes, not just the protection of endangered species living within the monument's boundaries. 54 U.S.C. § 320301(a). The Endangered Species Act too retains independent effect, as it allows regulation of endangered species anywhere, including private property. 16 U.S.C. § 1538. *See Nat'l Ass'n*

of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997). Thus, this Court's interpretation in *Mountain States* posed no risk of allowing one statute to eclipse another entirely.

Not so here. The President's interpretation that the Antiquities Act applies to the ocean beyond the territorial sea completely overlaps with the National Marine Sanctuaries Act. There is nothing left for the latter—the comprehensive scheme Congress enacted to address this specific problem—to do. Any area that could be designated as a marine sanctuary could be more easily designated as an ocean monument under the President's interpretation, with the latter approach evading all of the substantive and procedural requirements of the former.

The district court's assertion that the National Marine Sanctuaries Act has independent effect because it addresses a broader set of values, including recreation, ignores the broad interpretation given to the Antiquities Act. *See Mountain States*, 306 F.3d at 1135 (acknowledging this breadth). Courts have never limited the Antiquities Act to the preservation of antiquities—in fact, this case concerns no such antiquities. On the contrary, Presidents often designate monuments on federal land for a wide variety of purposes, including

protecting recreation interests. *See, e.g.*, Proclamation Establishing the Sand to Snow National Monument (Feb. 12, 2016) (citing the area's "world class outdoor recreation opportunities, including hunting, fishing, hiking, camping, mountain biking, and horseback riding"); Proclamation Establishing San Gabriel Mountains National Monument (Oct. 10, 2014) (citing the "[m]illions [who] recreate and rejuvenate in the San Gabriels each year" and the "hundreds of miles of hiking, motorized, and equestrian trails").

The district court offered no example of an area that could be designated as a marine sanctuary but not an ocean monument under its interpretation. Nor did it suggest any additional authority that could be asserted over a marine sanctuary compared to the same area designated as an ocean monument. This is because no case can be made for either proposition. The President's interpretation of the Antiquities Act allows him to designate any area as an ocean monument that could be designated as a marine sanctuary, without complying with any of the limits imposed on the latter, and without sacrificing any power over

such area.[9] The evasion of these restraints is a significant constitutional problem.

Finally, the district court speculated that Congress has acquiesced in the President's interpretation by not disavowing it legislatively. But courts should be extremely reluctant to draw such inferences from Congress' failure to legislate—both as a matter of logic and because of the constitutional concerns raised by giving effect to legislative inaction.

By constitutional design Congress cannot easily legislate without the President's cooperation, U.S. Const. art. I, § 7 (Presentment and Veto Clauses), which will not likely be forthcoming when Congress seeks to negate power the President unlawfully seized in the first place. *See* Joseph Briggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments In the Outer Continental Shelf*, 22 Tul. Envtl. L.J. 403, 410-11 (2009)

[9] In fact, this interpretation claims power Congress withheld under the National Marine Sanctuaries Act. *See* 16 U.S.C. § 1434(a)(5) (requiring deference to fishery management council determinations on how fishing should be regulated within marine sanctuaries); *see also* App. 19 ¶¶ 43-44 (noting the fishery management councils' criticism of ocean monuments as undermining sustainable fishing regulation).

(arguing that congressional acquiescence should not apply to this question for this precise reason).

Congressional inaction may reflect the constitutional reality that legislative enactments are difficult and that pursuing its remote chance of success imposes legislative opportunity costs—rather than an affirmative desire to "acquiesce" in a presidential power grab. And where the President's statutory interpretation is unreasonable, it is more likely that Congress expects the courts to intervene—especially where, as here, that interpretation is in conflict with existing judicial precedent. *See Treasure Salvors*, 569 F.2d at 340. Thus, it is constitutionally problematic to assume congressional acquiescence when the President acts contrary to the best reading of a statute.

Even if acquiescence can be inferred in some circumstances, such inference requires "'*overwhelming evidence* of acquiescence.'" *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (quoting *Solid Waste Ag. of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001)). Such evidence is lacking here for three reasons.

First, the President did not adopt this interpretation until 2000 or use that power until 2006. *See* 24 Op. O.L.C. 183, 8-10. Thus, Congress

could not have acquiesced to this interpretation when it enacted the National Marine Sanctuaries Act 30 years earlier. On the contrary, that statute was necessary because prior conservation statutes, like the Antiquities Act, were "directed almost exclusively to land" which Congress understood to exclude the ocean. 16 U.S.C. § 1431(a)(1). This language was added in 1984, after the Fifth Circuit's decision in *Treasure Salvors*. *See* Pub. L. No. 98-498, 98 Stat. 2296, § 102 (Oct. 19, 1984). *See also infra* at Part II.C. (discussing *Treasure Salvors*). Congress also amended the National Marine Sanctuaries Act to explicitly include the exclusive economic zone in this interim. *See* Pub. L. No. 102-587, § 2101. Thus, a stronger case can be made that Congress has acquiesced in the Fifth Circuit's interpretation than the President's newer, contrary interpretation. *Cf. Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991) (noting that stare decisis has special force in statutory interpretation cases because Congress could have overturned a decision but chose not to).

Second, Members of Congress have objected to this executive power grab. *See* Dep't of the Interior, Env't, and Related Agencies Approp. Act of 2017, H.R. 5538, 114th Cong., § 499 (2016) (would bar

the application of the Antiquities Act to the exclusive economic zone); *Examining the Creation and Management of Marine Monuments and Sanctuaries: Oversight Hearing Before the Subcommittee on Water, Power and Oceans of the House Committee on Natural Resources*, 115th Cong. 42 (2017) (noting that the Antiquities Act says "situated upon lands" and asking "why are we talking about water right now when the statute says lands?").

Third, Congress' 2014 reorganization of the United States Code is not evidence of acquiescence despite postdating the President's interpretation. There's nothing to suggest that in reorganizing the code Congress considered this interpretation. *See Dames & Moore v. Regan*, 453 U.S. 654, 682 n.10 (1981) (emphasizing legislative history showing that Congress had considered a presidential practice, expressed approval for it, and declined to adopt legislation opposing it). Congress made no substantive amendments to the Antiquities Act in this process. *See Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (finding Congress' repeated amendment of a passport law consistent with the President's interpretation of his power and, therefore, acquiescing in that interpretation). And, finally, Congress explicitly disclaimed

acquiescence, providing that, "[i]n the codification of laws by this Act, the intent is to conform to the understood policy, intent, and purpose of Congress *in the original enactments*[.]" Pub. L. No. 113-287, § 2(b), 128 Stat. 3094 (Jan. 4, 2014) (emphasis added).

II. The Antiquities Act does not apply to the ocean beyond the territorial sea

The President's violation of the separation of powers is made more apparent when the Northeast Canyons and Seamounts Marine National Monument confronts the Antiquities Act's text. The statute limits designations to objects "situated on land owned or controlled by the Federal Government." 54 U.S.C. § 320301. As the only court to previously consider this question correctly held, the ocean beyond the nation's territorial sea—where this monument is entirely located—is not land owned or controlled by the federal government. *See Treasure Salvors*, 569 F.2d at 337-38.

A. The ordinary meaning of "land" excludes the ocean

The Antiquities Act does not define "land." Thus, the term must be given its contemporaneous, ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[W]ords will be interpreted as taking their ordinary, contemporary, common meaning."). Contemporaneous

dictionaries, other statutory text, and Congress' consistent use of the term demonstrate that the ordinary meaning of "land" excludes the ocean.

First, contemporaneous dictionary definitions speak directly to this issue and consistently exclude ocean from the meaning of land. Webster's International Dictionary, published in 1890 and 1900, defines "land" as "the solid part of the surface of the earth; — opposed to water as constituting a part of such surface, especially to oceans and seas[.]" Webster's International Dictionary 827 (1900). This meaning did not change between 1900 and the Antiquities Act's 1906 adoption. Webster's New International Dictionary, published in 1909, defines "land" the same way: "the solid part of the surface of the earth, as distinguished from water constituting a part of such surface, esp. from oceans and seas[.]" Webster's New International Dictionary 1209 (1909) (Webster's First). Webster's Second Edition, published a few decades later, put an even finer point on the issue, contrasting the Earth's 55,000,000 square miles of "land" with its 142,000,000 square miles of ocean. Webster's Second New International Dictionary 1398 (1934). This is not due to any idiosyncrasy of Webster's. The Oxford English Dictionary

defines "land" as "the solid portion of the earth's surface as opposed to sea, water," a definition that it traces back to circa 900 A.D. *See* Oxford English Dictionary 617 (2d ed. 1989). Such consistency across dictionaries and over time is convincing evidence of a term's ordinary meaning. *See MCI Telecomms. Corp. v. Am. Tel. Co.*, 512 U.S. 218, 225 (1994).

Second, the Antiquities Act's other provisions reinforce this understanding. The statute authorizes the President to reserve "parcels of land" for the protections of designated monuments. 54 U.S.C. § 320301. This phrase uses land in the sense described above, distinguishing it from ocean. Unlike land, the ocean is not divided into parcels. Instead, "parcel" has a very different meaning in the ocean context. At sea, a "parcel" is a rope wrapped in narrow slips of canvas that have been dipped in tar, which protect the rope from deteriorating in water. *See* Webster's International Dictionary 1042 (1890).

Third, other statutes reveal that Congress uses "land" in this ordinary sense. Congress explained that the National Marine Sanctuaries Act was necessary because earlier conservation laws were "directed almost exclusively to land[,]" thereby omitting consideration of ocean conservation. 16 U.S.C. § 1431(a)(1). The Antiquities Act is one

such law. 54 U.S.C. § 320301(a). Furthermore, Congress, in defining the National Marine Sanctuaries Act's reach, did not refer to the ocean as land. 16 U.S.C. § 1432(3).

To reach a contrary conclusion, the district court relied on dictionary definitions acknowledging that, in some contexts, references to land can include objects and rights inextricably tied to the land. Black's Law Dictionary 684 (1st ed. 1891). For instance, a deed transferring some "land" to a new owner will likely include the rights to any crops growing on it, nonnavigable water features located on it, and air rights above it. *See Ill. Cent. R. Co. v. City of Chicago*, 176 U.S. 646, 660 (1900) (acknowledging this sense of the "land," while noting that the word's use generally excludes navigable waters).

Congress sometimes uses "land" in this specialized way. However, Congress statutorily defines the term in such circumstances to set aside land's ordinary meaning. For instance, in the Alaska National Interest Lands Conservation Act, Congress defined "land" as "lands, waters, and interests therein." 16 U.S.C. § 3102(1). That this law so defines land is illuminating. The reference to "land" within the definition refers to the ordinary meaning. Waters must be separately enumerated because they

would not otherwise be understood as included by the reference to "land." *Cf. Sturgeon*, 2019 WL 1333260, at *7 (emphasizing that the Act defines "land" as including associated "waters").

The district court's competing definition is unhelpful for another reason: it provides no indication of whether "land" is ordinarily understood to include the ocean. The *only* definitions that speak to whether the ocean is within the ordinary meaning of "land" unequivocally say that it is not. In fact, the Fishermen's and the district court's competing definitions can be reconciled easily. "Land" refers to the Earth's non-ocean surface and, within this context, can include features connected to that surface.

B. The federal government does not "control" the ocean beyond the territorial sea

Neither is the ocean where this monument is located "owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). No one argues that the government owns this area. Therefore, the only question is whether the federal government's limited authority to regulate constitutes "control."

As with "land," the Antiquities Act does not define "control." Therefore, it must be interpreted according to the ordinary rules of

statutory interpretation. Admittedly, dictionaries define "control" imprecisely, referencing both high degrees of authority as well as far weaker forms of influence. *See* Webster's First at 490 (defining it as the power "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb; subject; overpower"). This could suggest that the authority required by the Antiquities Act is minimal.

However, "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012). The statute's text, history, and purpose all demonstrate that the Antiquities Act uses "control" in a narrower sense, meaning a high degree of authority similar to the plenary authority which the federal government exercises over the land that it owns.

Here, this narrower sense of control follows from the rule that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Grouping "controlled" with "owned," suggests that Congress intended these to have similar meanings. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

This interpretation also avoids rendering the inclusion of "owned" redundant. *See Gustafson*, 513 U.S. at 574-75. If controlled merely requires some degree of authority or "unrivaled" authority irrespective of degree, "owned" has no independent effect. All federally owned land would be covered under these broad interpretations of "control." But by interpreting "controlled" in relation to "owned," each is given effect. Control refers to land that the government does not own but over which it, nonetheless, exercises similar authority. "Owned," too, has an effect under this interpretation, as it provides the necessary context to interpret the extent of authority required.

The district court rejected this textual argument by asserting that these interpretative canons are categorically inapplicable when statutes only group two or three terms together, as opposed to much longer lists. App. 73-74. But no such rule exists. The Supreme Court routinely applies the rule that "a word is known by the company it keeps" in cases where Congress groups together two or three terms. *See, e.g.*, *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) (applying the rule to two related terms); *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) (three related terms); *Bullock v. BankChampaign,*

N.A., 569 U.S. 267, 274-75 (2013) (two related terms); *Freeman v. Quicken Loans*, 566 U.S. 624, 634-35 (2012) (three related terms). Similarly, the Supreme Court applies this rule to terms connected by an "or"—not just "and." *See Life Technologies*, 137 S. Ct. at 740; *Yates*, 135 S. Ct. at 1077; *BankChampaign*, 569 U.S. at 274-75; *Quicken Loans*, 566 U.S. at 634-35; *but see* App. 73-74 (asserting that this rule is inapplicable when words are connected by the disjunctive "or").

That words grouped together inform the interpretation of each other is "'not an inescapable rule'"—it can be overcome by other indications of meaning. *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). But it is nonetheless "'often wisely applied where a word is capable of many meanings"—as here—"in order to avoid the giving of unintended breadth to the Acts of Congress.'" *McDonnell*, 136 S. Ct. at 2368 (quoting *Jarecki*, 367 U.S. at 307).

The Fishermen's interpretation is reinforced by other statutory text. Such plenary authority is necessary to comply with the mandate that regulations be adopted that are adequate to protect antiquities and other objects. 54 U.S.C. § 320301(c). Where federal authority is

constrained, even weakly, this duty cannot be satisfied because the statute would compel the adoption of a regulation that exceeds Congress' authority.

The Antiquities Act's history and purpose also confirm the narrower meaning of "controlled." The legislative debates over this language reveal that the chief concern was ensuring that the Antiquities Act would apply to Indian lands. *See* Hearing Before the Subcomm. of the Senate Committee on Public Lands, 58th Cong. Doc. No. 314, 24 (Apr. 28, 1904);[10] *Sturgeon*, 2019 WL 1333260, at *7 (interpreting "public lands" as federally owned lands, excluding Native lands). The House Report accompanying the Antiquities Act also supports this understanding, explaining that land "owned or controlled" means land in "the public domain or in Indian reservations." H. Rep. No. 2224, at 2 (1906). Antiquities Act scholars have also observed that this was Congress' intent. *See* Lee, *The Story of the Antiquities Act*, *supra*, ch. 6.

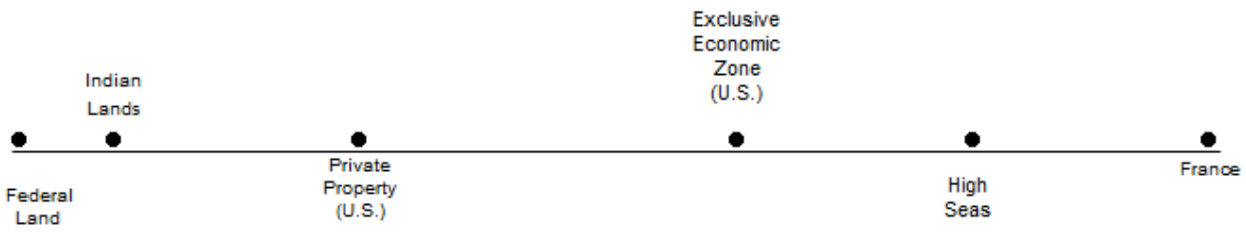
[10] *Available at* https://coast.noaa.gov/data/Documents/OceanLawSearch/Senate%20Hearing_Committee%20%20on%20Public%20Lands%20Apr.%2028%2C%201904.pdf.

As with federally owned property, the Supreme Court has "consistently described" Congress' power to legislate in respect to Indian tribes and tribal lands "as plenary and exclusive[.]" *See United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976) (similarly describing Congress' authority over federally owned lands). Congress may, for instance, regulate these lands in ways that require the abrogation of treaties or even the dissolution of the tribes' sovereignty. *See id.*; *United States v. Wheeler*, 435 U.S. 313, 323 (1978). In exercising this authority, Congress must consider the interests of tribes and their members. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980); App. 76 (noting that tribes exercise significant de facto authority over Indian lands).[11] But this does not change the scope of Congress' authority over these lands, which remains plenary. *See Lara*, 541 U.S. at 200.

[11] States enjoy significant authority to regulate activities occurring on federal land. *See California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987). But they do so at the discretion of Congress, which is free to restore exclusive federal authority over this land. *See Kleppe*, 426 U.S. at 540-41.

Compare this high degree of authority to Congress' authority to regulate state or private lands. These lands are excluded because, although Congress' power to regulate activities in these areas is significant, it falls short of the plenary authority that Congress enjoys over federal and Indian lands. *See United States v. Morrison*, 529 U.S. 598 (2000) (limiting Congress' power under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (same). Below, the government argued that the degree of authority required by "control" is minimal. But this interpretation would include private lands and, therefore, cannot be reconciled with congressional intent.

Thus, the Fishermen's interpretation best fits Congress' intent. The federal government's authority over an area can be understood as a spectrum, from greatest authority to least. "Controlled" connotes those areas on the extreme left, over which the federal government exercises plenary authority. This includes federal lands and Indian lands, but not private property, the high seas, or foreign countries.



The federal government does not exercise control, so understood, over the ocean where the monument is located. More than 100 miles from the nation's coast, this area constituted high seas when the Antiquities Act was enacted. International law has evolved in the subsequent 113 years,[12] now recognizing the area between the territorial sea and 200 miles from the coast as an "exclusive economic zone" over which nations exercise some authority. *See* Restatement (Third) of Foreign Relations Law § 514 (2019). However, the United States does not enjoy sovereignty over this area, only limited regulatory authority. *See id.* § 514 cmt. C ("The coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose[.]"); *see also* Statement on United States Oceans Policy, 1 Pub. Papers of Ronald Reagan at 379 (Mar. 10, 1983) (statement accompanying President Reagan's proclamation asserting the exclusive economic zone, explaining that it "enable[s] the United

[12] A similar evolution has occurred with regard to "space resources." *See* SPACE Act of 2015, Pub. L. No. 114-90, 129 Stat. 704 (Nov. 25, 2015). Despite increased federal interest in such areas, the federal government neither owns nor controls space and it would be absurd to interpret the SPACE Act to extend the President's power under the Antiquities Act.

States to take *limited* additional steps to protect the marine environment" (emphasis added)).

Principally, this authority is limited to regulating economic activities to protect the marine environment—precisely the purpose Congress addressed under the National Marine Sanctuaries Act. *See* Third Restatement § 514; 16 U.S.C. § 1801(c)(1) (exercising this authority to regulate fishing in the exclusive economic zone while "maintain[ing] without change" the government's limited authority over this zone "for all [other] purposes"). It excludes the power to regulate navigation, the installation of cables or pipelines, and—most relevant here—the salvage of historic artifacts and objects. *See* Third Restatement § 514. At a minimum, the Antiquities Act's reference to control must mean sufficient authority to effect the statute's central purpose of protecting antiquities, yet this power is absent in the exclusive economic zone. In sum, recalling the diagram above, the United States authority over this area may exceed its authority over more distant ocean or France, but it is less than its authority over

private property[13] and far less than that over Indian lands and federal property.

The district court adopted neither the Fishermen's narrow interpretation of "control" nor the government's broad interpretation. Instead, it proposed that what matters is not the extent of federal authority but a comparison between federal authority and the influence of others. App. 80-82. Thus defined, the federal government could control an area over which it exercises limited authority, so long as no one else competes with it. In the case of private property, the owner's authority competes with the federal government's, even though the latter can regulate in ways the owner opposes.

The Fishermen contend that this novel "unrivaled authority" theory does not align with the ordinary meaning of "controlled," which requires a minimum degree of control rather than a comparison. For

[13] Under current Commerce Clause precedent, the federal government enjoys broad authority to regulate natural resources on private property. *See Hodel v. Indiana*, 452 U.S. 314, 329 (1981). It also enjoys other authority over this land, not applicable to the exclusive economic zone, including the power to regulate the collection and sale of artifacts and antiquities. *See Andrus v. Allard*, 444 U.S. 51 (1979); *see also Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

instance, one would not ordinarily describe someone as having "control" of their dog if it obeys his commands in only one case out of ten. This is so even if the dog never minds anyone else. Instead, control requires that commands are always or almost always obeyed.

The "unrivaled authority" theory presents several other problems. First, it leads to the anomalous result that of two areas, one over which the government exercises greater power than the other, the latter may be "controlled" for purposes of the Antiquities Act but not the former solely because someone else asserts some competing authority. Nothing in the statute's text or history supports this result. Instead, the statute's text requires plenary authority over an area to comply with the mandate that regulations be adopted to adequately protect antiquities and other objects. 54 U.S.C. § 320301(c).

Second, this theory would include the exclusive economic zone at the expense of excluding Indian land. The district court observed that "'[t]ribes and individual Indians have acquired significant control over their land and its resources.'" App. 76 (quoting American Indian Law Deskbook § 3.8 (May 2018)). Thus, tribes and individual Indians rival the federal government's authority over Indian land similar to private

property owners on their land. *See* App. 84. But excluding Indian lands would be absurd. Congress' intention to include Indian lands is indisputable and in sharp contrast with the lack of any indication whatsoever that Congress wished to include the ocean beyond the territorial sea. *See* H. Rep. No. 2224, at 2; 58th Cong. Doc. No. 314, 24; *see also* Lee, *The Story of the Antiquities Act*, *supra*, ch. 6.

C. The limited precedent on this question supports the Fishermen

The question at issue here—whether the ocean beyond the territorial sea is "land owned or controlled by the federal government—has previously been considered only once, by the Fifth Circuit in *Treasure Salvors*. 569 F.2d 330. That case concerned title to a seventeenth-century shipwreck, which the United States claimed under the Antiquities Act. *Id.* at 333, 337-40. If the ocean beyond the territorial sea had been land owned or controlled by the federal government, the salvage would have violated the Antiquities Act and ownership of the treasure would have passed to the federal government. *Id.* at 337-38.

Although acknowledging some federal authority to regulate activity in this area, the Fifth Circuit nonetheless concluded that the

ocean beyond the territorial sea is beyond the Antiquities Act's reach. *Id.* At that time, the United States claimed authority to regulate the extraction of resources from this area under a presidential proclamation, statute, and international law—claims which no other nation could make. *See id.* at 338-39 (discussing a 1945 presidential proclamation, the Convention on the Continental Shelf, and the Outer Continental Shelf Lands Act). Despite these assertions of unrivaled regulatory authority, the Fifth Circuit held that the "limited scope of American control" requires the conclusion that the ocean is not "lands owned or controlled by the United States under the provisions of the Antiquities Act." *Id.* at 340.

As the only decision considering this question, *Treasure Salvors* is persuasive authority. Applying its logic requires the same conclusion in this case: that the monument is not located on land owned or controlled by the federal government. Although the United States claims somewhat more authority over the area than it did in 1978, that authority remains of "limited scope" and is insufficient to constitute "control" under the Antiquities Act. *See id.* at 340.

The district court rejected *Treasure Salvors*' analysis for two reasons. First, the court suggested that *Treasure Salvors* is no longer good law because it predates President Reagan's proclamation defining the exclusive economic zone. *See* App. 82. But this provides no persuasive distinction because President Truman had previously proclaimed limited federal authority over this area, which the Fifth Circuit considered and rejected as sufficient to show control. *See Treasure Salvors*, 569 F.2d at 338-39. President Reagan's proclamation asserted somewhat greater authority than President Truman's but this is irrelevant under the district court's unrivaled authority theory. This increased authority could only be relevant if "controlled" requires a minimum extent of federal authority, which could not be satisfied here because the federal government's authority over the exclusive economic zone is quite limited. *See, supra,* at Part II.B.

Second, the district court distinguished *Treasure Salvors* because that case concerned an object of historic interest whereas this monument concerns objects proclaimed to be of scientific interest. App. 82-83. But this assertion is unconvincing for three reasons. First, the Antiquities Act's text does not set different standards for different

objects but requires that all covered objects—whether historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest—be "situated on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). In other words, "owned or controlled" is a characteristic of the place; land cannot be owned for purposes of historic objects, but not scientific ones. Second, if the federal government can control an area for some purpose but not others, "controlled" would merely require some federal regulatory authority. This would imply that the federal government controls private property to the extent that it has authority to regulate such property. Third, it treats the federal government's lack of power to protect antiquities in this area as an argument in favor of applying the Antiquities Act when logic dictates the opposite. Protecting antiquities is the core purpose of the statute; thus any interpretation of the act should reflect that purpose. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (statutes should be read in context and in light of their purpose).

Finally, the district court concluded that its interpretation is supported by several Supreme Court cases which—although not

concerning the question presented in this case—contain broad language about the statute. These cases are *Cappaert v. United States*, 426 U.S. 128 (1976), *United States v. California*, 436 U.S. 32 (1978), and *Alaska v. United States*, 545 U.S. 75 (2005). The issue in *Cappaert* was how the reserved water rights doctrine applies to a monument of federal land overlaying a subterranean pool. 426 U.S. at 135. The issue in *California* was whether the United States' transfer of title to areas of the territorial sea included a monument established during the United States' ownership of the area. 436 U.S. at 33-35. And, in *Alaska*, the Court considered whether ownership of Glacier Bay transferred to Alaska at statehood, as would normally be the case for inland waters. 545 U.S. at 96.

None of these cases presented any dispute over the meaning of "land owned or controlled by the federal government." But two contained a few, isolated sentences discussing the Antiquities Act's application to water.[14] *California* contained a footnote asserting that, "[a]lthough the Antiquities Act refers to 'lands,' this Court has

[14] *Cappaert*, the exception, addresses only whether the pool located on federal land could be an object of scientific interest. 426 U.S. at 141-42.

recognized that it also authorizes the reservation of waters located on or over federal lands." 436 U.S. at 36 n.9. Citing this, *Alaska* asserts that "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands." 545 U.S. at 103.[15]

These dicta omit discussion of the statute's text, context, or legislative history. *Cf. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (explaining what makes dicta "carefully considered"). Nevertheless, the Fishermen appreciate that this Court may be hesitant to discount them. Fortunately, all three cases can easily be distinguished on several grounds.

First, they all concerned monuments containing federal land, with adjacent waters included within larger land-based monuments. *See*

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[15] The district court found this statement not to be dicta based on a misreading of the case. The Court described as "a necessary part of [its] reasoning" the *fact* that the President included the bay within the Glacier Bay National Monument proclamation, which was undisputed. 545 U.S. at 101. The scope of the President's monument designation authority was not presented. *See* Report of the Special Master on Six Motions for Partial Summ. J., *Alaska v. United States*, 2004 WL 5809425, at *230 (U.S. Mar. 2004) (describing Alaska's arguments). In other words both *California* and *Alaska* raised a "question only of Presidential intent, not of Presidential power." *California*, 436 U.S. at 36.

Cappaert, 426 U.S. at 131 (a monument consisting of 40 acres of federally owned land overlying a cavern pool); *California*, 436 U.S. at 35 (a monument consisting of two large islands, several smaller lands, and surrounding waters); *Alaska*, 545 U.S. at 101 (a monument consisting of 1,820 square miles of uplands, islands, and the bay). Thus, these cases at most suggest a boundary problem concerning the President's authority to include adjacent waters within a designation of federal land. But this potential gray area does not suggest that the President can declare a monument that omits entirely any federal land.

Consider, as a comparison, the Clean Water Act's application to "waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has acknowledged that this may include land in instances where it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742 (plurality opinion). But this blurred line in some instances does not suggest that "waters" has no meaning. "Waters of the United States" does not include, for instance, land far removed from any waters. *See id.* at 748 (plurality opinion); *id.* at 766-67 (Kennedy, J., concurring). A similar principle applies here. The Executive Branch cannot assert all land as water or all water as land,

whichever would expand its power in a particular instance. This is so even if there are some borderline cases—which this case is not.

Second, *Cappaert*, *California*, and *Alaska* all concerned areas that the federal government owned when the monument was designated, thereby shedding no light on the meaning of "controlled." In *Cappaert*, the federal government had owned the land overlying the pool since 1848 and, thus, also owned water rights protecting the pool. 426 U.S. at 131. In *California*, the federal government owned the Channel Islands and surrounding territorial sea until Congress transferred title to the state. 436 U.S. at 40. *See United States v. California*, 332 U.S. 19, 38-39 (1947) (holding that the federal government, not California, owns the territorial seas). Finally, in *Alaska*, the federal government owned the lands and bay when the monument was declared and continued to do so after statehood. 545 U.S. at 104-06.

Finally, none of these cases concerned the application of the Antiquities Act to the ocean beyond the territorial sea. As explained above, the ordinary meaning of land excludes the ocean even if it may include certain inland waters. And the federal government's authority over this area is categorically different from its authority over federal

and Indian land. Nothing in *Cappaert*, *California*, or *Alaska* suggests any resolution of either issue. The only court to have considered either question is the Fifth Circuit in *Treasure Salvors*, which correctly concluded that the ocean beyond the territorial sea is not land owned or controlled by the federal government.

III. Dismissal of the Fishermen's "smallest area" claim was erroneous

In addition to challenging the President's power to establish this monument, the Fishermen also allege that the monument violates the Antiquities Act's "smallest area" requirement. App. 24-25 ¶¶ 72-75. To support this claim, they allege that the proclamation provides no justification for the boundaries selected. App. 22 ¶ 58. They also allege that the boundaries cannot be justified by the canyons and seamounts for which the monument was created. App. 20-21 ¶ 52, App. 24 ¶¶ 73-74. Although these objects are within the boundaries of the monument, the "smallest area" requirement calls for more than mere inclusion. It requires a tight fit between the objects and the boundary. 54 U.S.C. § 320301(b). That fit is lacking here because the boundaries include areas dozens of miles from the nearest canyon or seamount, while excluding areas far closer. App. 20-21 ¶ 52, App. 24 ¶¶ 73-74.

The Fishermen's complaint acknowledges that the proclamation also refers to highly migratory marine species but alleges that these are not objects of historic or scientific interest "situated" on federal land. App. 24-25 ¶ 75. No court has yet considered the Antiquities Act's application to highly migratory species, such as these, nor interpreted the statute's "situated" requirement. The ordinary meaning of "situated" is permanently fixed in a place, as opposed to being transitory. *See* Webster's Second 1347 (defining "situated" as "having a site, situation, or location; being in a relative position; permanently fixed; placed; located; as, a town *situated*, or *situate*, on a hill or on the seashore"). Congress considered eliminating this requirement in the 1930s to extend the Antiquities Act to migratory species, but declined to do so. *See* H.R. 8912 (1938); *see also* Letter from Harold L. Ickes, Sec. of Interior, to Hon. Rene L. DeRouen, Chairman, House Committee on Public Lands (Apr. 12, 1938), *reproduced in* Report of the Committee on the Public Lands No. 2691 (June 10, 1938) (acknowledging that "situated" upon the land "mean[s] objects which are immobile and permanently affixed to the land"). Thus, a monument's boundaries cannot be based on highly migratory species.

Interpreting "situated" otherwise leads to absurd results. The fin whale and sei whale, both referenced in the proclamation, migrate annually between the artic and the tropics, throughout both the Atlantic and Pacific Oceans. *See* NOAA Fisheries, *Fin Whale (Balaenoptera physalus): About the Species*[16] (mapping the species' migratory range as almost the entirety of the earth's oceans); NOAA Fisheries, *Sei Whale (Balaenoptera borealis): About the Species*[17] (identifying a similar range). Basing a monument's boundaries on these species' migratory patterns would allow the designation of billions of acres of ocean in one fell swoop.

The district court did not dismiss the Fishermen's "smallest area" claim on either of these grounds. Instead, the dismissal was based on the proclamation's reference to an "ecosystem." App. 85-86. The district court's ruling on this issue is incorrect for two, independent reasons. First, a proclamation's mere reference to an ecosystem does not absolve

[16] https://www.fisheries.noaa.gov/species/fin-whale (last visited Apr. 2, 2019).

[17] https://www.fisheries.noaa.gov/species/sei-whale (last visited Apr. 2, 2019).

the President of his duty to comply with the Antiquities Act's smallest area requirement. To dismiss a case on these grounds is to practically immunize any proclamation vaguely referencing an ecosystem from judicial review. *But see Mountain States*, 306 F.3d at 1136 ("It would be 'untenable' . . . 'to conclude that there are no judicially enforceable limitations on presidential actions . . . so long as the President *claims* that he is acting pursuant to' a statutory directive." (quoting *Chamber of Commerce of United States*, 74 F.3d at 1332).

Second, the district court's ecosystem analysis identifies no deficiency in the Fishermen's allegations. The ecosystem referenced in the proclamation is described in relation to the canyons and seamounts. *See* App. 86 (acknowledging that the ecosystem is defined in relation to "'corals' and 'other structure-forming fauna such as sponges and anemones' that physically rest on, and are otherwise dependent on, the canyons and seamounts themselves."); *see also* App. 43. Thus, the same deficiency that makes the boundary a poor fit with the canyons and seamounts necessarily makes it a poor fit for an ecosystem described in relation to these objects. The district court provides no explanation how this reasonable implication of the Fishermen's allegation is insufficient.

Conclusion

This case concerns a brazen violation of the Constitution's separation of powers. Rather than complying with the substantive and procedural limits Congress imposed on the Executive Branch's authority to set aside special areas of the marine environment, the President has adopted a novel interpretation of a long-extant statute to authorize him to do the same thing without these limits. That interpretation is also a poor fit for the Antiquities Act's text because the ocean beyond the territorial sea is not "land owned or controlled by the federal government." The district court's dismissal of this case was therefore in error and should be vacated, with the matter remanded for proceedings on the merits.

DATED: April 8, 2019.

Respectfully submitted,

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Addendum

16 U.S.C. § 1431, Findings, purposes, and policies; establishment of system

(a) Findings

The Congress finds that—

(1) this Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high-water mark;

(2) certain areas of the marine environment possess conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities which give them special national, and in some cases international, significance;

(3) while the need to control the effects of particular activities has led to enactment of resource-specific legislation, these laws cannot in all cases provide a coordinated and comprehensive approach to the conservation and management of special areas of the marine environment; and

(4) a Federal program which establishes areas of the marine environment which have special conservation, recreational, ecological, historical, cultural, archeological, scientific, educational, or esthetic qualities as national marine sanctuaries managed as the National Marine Sanctuary System will—

(A) improve the conservation, understanding, management, and wise and sustainable use of marine resources;

(B) enhance public awareness, understanding, and appreciation of the marine environment; and

(C) maintain for future generations the habitat, and ecological services, of the natural assemblage of living resources that inhabit these areas.

(b) Purposes and policies

The purposes and policies of this chapter are—

(1) to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System;

(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities;

(3) to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes;

(4) to enhance public awareness, understanding, appreciation, and wise and sustainable use of the marine environment, and the natural, historical, cultural, and archeological resources of the National Marine Sanctuary System;

(5) to support, promote, and coordinate scientific research on, and long-term monitoring of, the resources of these marine areas;

(6) to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities;

(7) to develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas;

(8) to create models of, and incentives for, ways to conserve and manage these areas, including the application of innovative management techniques; and

(9) to cooperate with global programs encouraging conservation of marine resources.

(c) Establishment of system

There is established the National Marine Sanctuary System, which shall consist of national marine sanctuaries designated by the Secretary in accordance with this chapter.

16 U.S.C. § 1432, Definitions

As used in this chapter, the term—

(1) "draft management plan" means the plan described in section 1434(a)(1)(C)(v) of this title;

(2) "Magnuson-Stevens Act" means the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.);

(3) "marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law;

(4) "Secretary" means the Secretary of Commerce;

(5) "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States;

(6) "damages" includes—

(A) compensation for—

(i)(I) the cost of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and

(II) the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource; or

(ii) the value of a sanctuary resource if the sanctuary resource cannot be restored or replaced or if the equivalent of such resource cannot be acquired;

(B) the cost of damage assessments under section 1443(b)(2) of this title;

(C) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources;

(D) the cost of curation and conservation of archeological, historical, and cultural sanctuary resources; and

(E) the cost of enforcement actions undertaken by the Secretary in response to the destruction or loss of, or injury to, a sanctuary resource;

(7) "response costs" means the costs of actions taken or authorized by the Secretary to minimize destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss, or injury, including costs related to seizure, forfeiture, storage, or disposal arising from liability under section 1443 of this title;

(8) "sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archeological, scientific, or aesthetic value of the sanctuary;

(9) "exclusive economic zone" means the exclusive economic zone as defined in the Magnuson-Stevens Act; and

(10) "System" means the National Marine Sanctuary System established by section 1431 of this title.

16 U.S.C. § 1433, Sanctuary designation standards

(a) Standards

The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary determines that—

(1) the designation will fulfill the purposes and policies of this chapter;

(2) the area is of special national significance due to—

(A) its conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities;

(B) the communities of living marine resources it harbors; or

(C) its resource or human-use values;

(3) existing State and Federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(4) designation of the area as a national marine sanctuary will facilitate the objectives stated in paragraph (3); and

(5) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) Factors and consultations required in making determinations and findings

(1) Factors

For purposes of determining if an area of the marine environment meets the standards set forth in subsection (a), the Secretary shall consider—

(A) the area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, maintenance of critical habitat of endangered species, and the biogeographic representation of the site;

(B) the area's historical, cultural, archaeological, or paleontological significance;

(C) the present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(D) the present and potential activities that may adversely affect the factors identified in subparagraphs (A), (B), and (C);

(E) the existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this chapter;

(F) the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(G) the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(H) the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development;

(I) the socioeconomic effects of sanctuary designation;

(J) the area's scientific value and value for monitoring the resources and natural processes that occur there;

(K) the feasibility, where appropriate, of employing innovative management approaches to protect sanctuary resources or to manage compatible uses; and

(L) the value of the area as an addition to the System.

(2) Consultation

In making determinations and findings, the Secretary shall consult with—

(A) the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Secretaries of State, Defense, Transportation, and the Interior, the Administrator, and the heads of other interested Federal agencies;

(C) the responsible officials or relevant agency heads of the appropriate State and local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a national marine sanctuary;

(D) the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson-Stevens Act (16 U.S.C. 1852) that may be affected by the proposed designation; and

(E) other interested persons.

16 U.S.C. § 1434, Procedures for designation and implementation

(a) Sanctuary proposal

(1) Notice

In proposing to designate a national marine sanctuary, the Secretary shall—

(A) issue, in the Federal Register, a notice of the proposal, proposed regulations that may be necessary and reasonable to implement the proposal, and a summary of the draft management plan;

(B) provide notice of the proposal in newspapers of general circulation or electronic media in the communities that may be affected by the proposal; and

(C) no later than the day on which the notice required under subparagraph (A) is submitted to the Office of the Federal Register, submit a copy of that notice and the draft sanctuary designation documents prepared pursuant to paragraph (2), including an executive summary, to the Committee on Resources of the House of Representatives, the Committee on Commerce, Science, and Transportation of the Senate, and the Governor of each State in which any part of the proposed sanctuary would be located.

(2) Sanctuary designation documents

The Secretary shall prepare and make available to the public sanctuary designation documents on the proposal that include the following:

(A) A draft environmental impact statement pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(B) A resource assessment that documents—

(i) present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial, governmental, or recreational uses;

(ii) after consultation with the Secretary of the Interior, any commercial, governmental, or recreational resource uses in the areas that are subject to the primary jurisdiction of the Department of the Interior; and

(iii) information prepared in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator of the Environmental Protection Agency, on any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary.

Public disclosure by the Secretary of such information shall be consistent with national security regulations.

(C) A draft management plan for the proposed national marine sanctuary that includes the following:

(i) The terms of the proposed designation.

(ii) Proposed mechanisms to coordinate existing regulatory and management authorities within the area.

(iii) The proposed goals and objectives, management responsibilities, resource studies, and appropriate strategies for managing sanctuary resources of the proposed sanctuary, including interpretation and education, innovative management strategies, research, monitoring and assessment, resource protection, restoration, enforcement, and surveillance activities.

(iv) An evaluation of the advantages of cooperative State and Federal management if all or part of the proposed sanctuary is within the territorial limits of any State or is superjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 et seq.).

(v) An estimate of the annual cost to the Federal Government of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education.

(vi) The proposed regulations referred to in paragraph (1)(A).

(D) Maps depicting the boundaries of the proposed sanctuary.

(E) The basis for the determinations made under section 1433(a) of this title with respect to the area.

(F) An assessment of the considerations under section 1433(b)(1) of this title.

(3) Public hearing

No sooner than thirty days after issuing a notice under this subsection, the Secretary shall hold at least one public hearing in the coastal area or areas that will be most affected by the proposed designation of the area as a national marine sanctuary for the purpose of receiving the views of interested parties.

(4) Terms of designation

The terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. The terms of designation may be modified only by the same procedures by which the original designation is made.

(5) Fishing regulations

The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the Exclusive Economic Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this chapter and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson-Stevens Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals

and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations. The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.

(6) Committee action

After receiving the documents under subsection (a)(1)(C), the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate may each hold hearings on the proposed designation and on the matters set forth in the documents. If within the forty-five day period of continuous session of Congress beginning on the date of submission of the documents, either Committee issues a report concerning matters addressed in the documents, the Secretary shall consider this report before publishing a notice to designate the national marine sanctuary.

(b) Taking effect of designations

(1) Notice

In designating a national marine sanctuary, the Secretary shall publish in the Federal Register notice of the designation together with final regulations to implement the designation and any other matters required by law, and submit such notice to the Congress. The Secretary shall advise the public of the availability of the final management plan and the final environmental impact statement with respect to such sanctuary. The Secretary shall issue a notice of designation with respect to a proposed national marine sanctuary site not later than 30 months after the date a notice declaring the site to be an active candidate for sanctuary designation is published in the Federal Register under regulations issued under this Act, or shall

publish not later than such date in the Federal Register findings regarding why such notice has not been published. No notice of designation may occur until the expiration of the period for Committee action under subsection (a)(6). The designation (and any of its terms not disapproved under this subsection) and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which such notice is published unless, in the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.

(2) Withdrawal of designation

If the Secretary considers that actions taken under paragraph (1) will affect the designation of a national marine sanctuary in a manner that the goals and objectives of the sanctuary or System cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not certified under paragraph (1) shall take effect.

(3) Procedures

In computing the forty-five-day periods of continuous session of Congress pursuant to subsection (a)(6) and paragraph (1) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain are excluded.

(c) Access and valid rights

(1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease,

permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.

(2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

(d) Interagency cooperation

(1) Review of agency actions

(A) In general

Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.

(B) Agency statements required

Subject to any regulations the Secretary may establish each Federal agency proposing an action described in subparagraph (A) shall provide the Secretary with a written statement describing the action and its potential effects on sanctuary resources at the earliest practicable time, but in no case later than 45 days before the final approval of the action unless such Federal agency and the Secretary agree to a different schedule.

(2) Secretary's recommended alternatives

If the Secretary finds that a Federal agency action is likely to destroy, cause the loss of, or injure a sanctuary resource, the Secretary shall (within 45 days of receipt of complete information on the proposed agency action) recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere, which can be taken by the Federal agency in implementing the agency action that will protect sanctuary resources.

(3) Response to recommendations

The agency head who receives the Secretary's recommended alternatives under paragraph (2) shall promptly consult with the Secretary on the alternatives. If the agency head decides not to follow the alternatives, the agency head shall provide the Secretary with a written statement explaining the reasons for that decision.

(4) Failure to follow alternative

If the head of a Federal agency takes an action other than an alternative recommended by the Secretary and such action results in the destruction of, loss of, or injury to a sanctuary resource, the head of the agency shall promptly prevent and mitigate further damage and restore or replace the sanctuary resource in a manner approved by the Secretary.

(e) Review of management plans

Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques and strategies, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this chapter. This review shall include a prioritization of management objectives.

(f) Limitation on designation of new sanctuaries

(1) Finding required

The Secretary may not publish in the Federal Register any sanctuary designation notice or regulations proposing to designate a new sanctuary, unless the Secretary has published a finding that—

(A) the addition of a new sanctuary will not have a negative impact on the System; and

(B) sufficient resources were available in the fiscal year in which the finding is made to—

(i) effectively implement sanctuary management plans for each sanctuary in the System; and

(ii) complete site characterization studies and inventory known sanctuary resources, including cultural resources, for each sanctuary in the System within 10 years after the date that the finding is made if the resources available for those activities are maintained at the same level for each fiscal year in that 10 year period.

(2) Deadline

If the Secretary does not submit the findings required by paragraph (1) before February 1, 2004, the Secretary shall submit to the Congress before October 1, 2004, a finding with respect to whether the requirements of subparagraphs (A) and (B) of paragraph (1) have been met by all existing sanctuaries.

(3) Limitation on application

Paragraph (1) does not apply to any sanctuary designation documents for—

(A) a Thunder Bay National Marine Sanctuary; or

(B) a Northwestern Hawaiian Islands National Marine Sanctuary.

54 U.S.C. § 320301, National Monuments

(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.

(c) Relinquishment to Federal Government.—When an object is situated on a parcel covered by a bona fide unperfected claim or held in private ownership, the parcel, or so much of the parcel as may be necessary for the proper care and management of the object, may be relinquished to the Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.

(d) Limitation on extension or establishment of national monuments in Wyoming.—No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

54 U.S.C. § 320302, Permits

(a) Authority to grant permit.—The Secretary, the Secretary of Agriculture, or the Secretary of the Army may grant a permit for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity on land under their respective jurisdictions to an institution that the Secretary concerned considers properly qualified to conduct the examination, excavation, or gathering, subject to such regulations as the Secretary concerned may prescribe.

(b) Purpose of examination, excavation, or gathering.—A permit may be granted only if—

(1) the examination, excavation, or gathering is undertaken for the benefit of a reputable museum, university, college, or other recognized scientific or educational institution, with a view to increasing the knowledge of the objects; and

(2) the gathering shall be made for permanent preservation in a public museum.

54 U.S.C. § 320303, Regulations

The Secretary, the Secretary of Agriculture, and the Secretary of the Army shall make and publish uniform regulations for the purpose of carrying out this chapter.