No. 19-35921

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MURPHY COMPANY and MURPHY TIMBER INVESTMENTS, LLC.,

Plaintiffs – Appellants,

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States of America, et al.,

Federal Defendants – Appellees,

SODA MOUNTAIN WILDERNESS COUNCIL, et al.,

Intervenor-Defendants – Appellees.

On Appeal from the United States District Court
for the District of Oregon
Honorable Michael J. McShane, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CIRCUIT RULE 29(a)(4)(A) STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 29(a)(4)(A), Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, states it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

CIRCUIT RULE 29(a)(4)(E) STATEMENT

This amicus brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amicus or its counsel, contributed money to fund this brief's preparation or submission. Amicus sought and obtained consent to file this amicus brief from both Plaintiffs-Appellants and Federal Defendant-Appellees, but Intervenor Defendant-Appellees' took no position on the filing.

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AMICUS CURIAE'S IDENTITY AND INTEREST[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest. PLF defends American's liberties when threatened by government overreach and is the most experienced public-interest legal nonprofit, both as lead counsel and amicus curiae, in cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers.[2]

This case is about whether the President may override Congress's clear directives within the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act) through a Presidential Proclamation under the Antiquities Act. PLF submits this brief because the President's actions raise significant issues under the Constitution's

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[1] This amicus brief is filed under FRCP 29 and Circuit Rule 29-2.

[2] *See, e.g.*, *Sackett v. EPA* (*Sackett II*), 143 S.Ct. 1322 (2023); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016); *Sackett v. EPA* (*Sackett I*), 566 U.S. 120 (2012). PLF also has represented clients in cases involving the Antiquities Act of 1906, 54 U.S.C. § 320301, *et seq*., the subject matter at issue. *See, e.g.*, *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019).

Separation of Powers and the judiciary's vital role in providing a meaningful check on abuses of executive power.

PLF is differently situated and brings a different perspective than Plaintiffs-Appellants. This amicus brief will thus complement but not duplicate the arguments made in Plaintiffs-Appellants' brief, will help address the importance of the issues involved, and will help the Court decide the need for en banc review.

INTRODUCTION

President Obama quipped during his time in office: "I will do everything in my power right now to act on behalf of the American people, with or without Congress. We can't wait for Congress to do its job. So where they won't act, I will."[3]

The President stayed true to his word and issued Presidential Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017), under the Antiquities Act of 1906 and expanded the Cascade-Siskiyou National Monument. In doing so, the President unilaterally withdrew over 40,000 acres of public land that Congress reserved for timber production under the O&C Act. In other words, the President used the Antiquities Act to

[3] 2 PUBLIC PAPERS OF THE PRESIDENTS 1350 (2011) (Oct. 26, 2011).

unilaterally nullify a direct requirement from Congress in the O&C Act that certain lands be available for an explicit use.

The President's unilateral action and the panel majority's decision upholding it raise a fundamental and reoccurring question under the Constitution: "Who decides?" *NFIB v. DOL*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). Under the Constitution's Separation of Powers, does the President have the power to override a congressionally prescribed law—a law passed through the people's representatives—with the flick of a pen? And under the Constitution's Separation of Powers, should the judiciary review presidential actions through the lens of boundless discretion allowing the President to make rather than enforce the law?

When the American people ratified the Constitution, they answered no to both questions. They delegated some of their power—as described and delimited in the Constitution's text and structure—to each federal branch, respectively. *See* James Wilson, State House Yard Speech (Oct. 6, 1787), *reprinted in* 1 *Collected Works of James Wilson* 171, 172 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011) (The federal government's power is "collected, not from tacit implication, but from the

positive grant expressed in the instrument of union."). In other words, "the legislative, executive and judicial departments are each formed in a separate and independent manner; and [] the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

The people vested Congress—and Congress alone—with the power to make all rules and regulations regarding public lands. U.S. Const. art. IV, § 3, cl. 2. Those rules and regulations must go through the democratic process outlined by Article I of the Constitution before becoming law. *See* U.S. Const. art. I. By contrast, the people vested the President with the executive power to enforce those laws. *See* U.S. Const. art. II. And the people vested the judiciary with the power to declare when the other two branches venture outside their constitutional lanes. *See* U.S. Const. art. III.

The Constitution divided the government's powers this way not merely to resolve inter-branch conflicts or to ensure efficient government. Rather, the "doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise

of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

The panel majority's decision flouts these first principles by setting a precedent giving the President unbounded discretion to override laws regulating millions of acres of public land within this Circuit. En banc review is warranted.

SUMMARY OF ARGUMENT

First, en banc review is warranted because the panel majority's decision sanctioned the President's violation of the Constitution's Separation of Powers. The President is not a king. He oversees the Executive Branch and "take[s] care that the Laws be faithfully executed." U.S. Const. art. II, § 3. But he lacks the discretion to use old laws to thwart clear congressional directives in later enacted statutes to instill his preferred policies. Yet the President did just that by issuing Proclamation 9564 under the Antiquities Act. Indeed, the President contradicted Congress's clear directives by withdrawing thousands of acres of public lands mandated by Congress for timber production. Nothing in the Antiquities Act gives the President this unbounded lawmaking power. Thus, by changing the law outside the Constitution's

requirements, the President strayed beyond his delegated authority and violated the Constitution.

Second, en banc review is warranted because the panel majority did not meaningfully review the President's actions. Instead, it applied a level of deference that cannot be squared with the federal judiciary's constitutional duty to meaningfully check the Executive Branch. Under Article III of the Constitution, the federal judiciary must independently confront questions involving the Constitution's government-structuring provisions. Put another way, it is the solemn responsibility of the Judicial Branch "to say what the law is" under the Constitution's Separation of Powers. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Yet the panel majority took great pains to skirt its duty and allow the President near absolute discretion to override a law passed by Congress.

Third, en banc review is warranted because the panel majority's failure to meaningfully scrutinize the President's actions sets a precedent with severe consequences for the communities surrounding O&C lands and anyone affected by the laws governing public land use in this Circuit. In recent years, the President has declared vast land and ocean areas as

"antiquities" to instill his preferred policies. Proclamation 9564 is another expansion of the President's power grab under the Act. If left intact, the panel majority's holding would subject millions of acres of federal property within this Circuit's jurisdiction to the whims of the President's pen.

* * * * *

At bottom, the panel majority's decision lets the President become both a lawmaker and law executor in violation of the Constitution. And the panel majority's lack of meaningful judicial review over presidential actions under the Antiquities Act fails to provide the essential check on executive overreach demanded by Article III—resulting in almost unfettered executive discretion to change the laws governing public lands. This Court should grant the en banc petition and vacate the panel majority's judgment.

ARGUMENT

I. This Case warrants en banc review because the panel majority's holding raises fundamental separation-of-powers issues.

A. The panel majority's opinion sanctions a violation of the Constitution's Separation of Powers.

Under the Constitution's Property Clause, Congress, not the Executive Branch, is vested with the power to make laws regulating federal lands. *See* U.S. Const. art. IV, § 3, cl. 2. Like any other law, laws passed under the Property Clause must follow the Constitution's procedures outlined in Article I. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring) ("Article I requires . . . every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . .") (cleaned up).

This process is essential to the Constitution's promise to preserve people's freedom and ensure overzealous officials do not alter their rights with impunity: The Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019)

(Gorsuch, J., dissenting). Excessive lawmaking was "one of the diseases to which our governments are most liable. To address that tendency, the framers went to great lengths to make lawmaking difficult." *Id.* (cleaned up). If Congress could delegate its lawmaking power to the Executive Branch, the "vesting clauses" and the "entire structure of the Constitution would make no sense." *Id.* at 2134–35 (cleaned up).

Executive Branch officials—including the President—may only act through a validly enacted delegation from Congress prescribing the law's execution. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 420–21 (1935). And actions by the Executive Branch—including the President—exceeding congressional delegations are lawmaking, are ultra vires, and violate the Constitution's Separation of Powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The Antiquities Act allows the President "[to] declare by public proclamation historic landmarks . . . situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301. The President may also reserve land for a monument's protection, but that land must "be confined to the smallest area

compatible with the proper care and management of the objects to be protected." *Id.*

Nowhere in this delegation does Congress authorize the President to amend later enacted statutes like the O&C Act. Indeed, "[t]he Antiquities Act says nothing specific about managing O&C timberland. As such, it cannot be understood to nullify the timber harvest mandates imposed by Congress in the O&C Act." *Murphy Co. v. Biden*, 65 F.4th 1122, 1140 (9th Cir. 2023) (Tallman, J., concurring in part, dissenting in part) (quoting *Am. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184, 193 (D.D.C. 2019). Nor could "an affirmative act of Congress . . . grant the President the power to indefinitely modify or nullify duly enacted law." *Murphy Co.*, 65 F.4th at 1141 (citing *Clinton v. City of New York*, 524 U.S. 417, 436–47 (1998)). Yet that is what the President sought to accomplish by withdrawing timber lands from the O&C Act's purview. This direct amendment of the O&C Act violates fundamental separation-of-powers principles mandated by our Constitution.

B. The panel majority's decision implicates the major questions doctrine.

The Supreme Court recently held that "both separation of powers principles and a practical understanding of legislative intent" should

make courts "reluctant to read into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up). There must be "something more than a merely plausible textual basis"—there must be a "clear congressional authorization" before courts presume broad congressional delegations. *Id.* And courts should be skeptical when the Executive Branch attempts to "bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (rejecting an executive agency's claim of "jurisdiction to regulate an industry constituting a significant portion of the American economy" without explicit congressional authorization).

This principle applies here. The Constitution delegates Congress the power to manage federal lands under the Property Clause. *See* U.S. Const. art. IV, § 3, cl. 2. Congress delegated some authority to the President to execute the law and establish national monuments through the Antiquities Act. *See* 54 U.S.C. §§ 320301–320303. But congressional delegations of power to the President must have some "boundaries" to

prevent him from seizing legislative powers reserved for Congress. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 426 (1944).

If this Court does not grant en banc review and allows the President's nullification of the O&C Act, it leaves in place a precedent giving the President boundless and transformative power under the Antiquities Act. There will be no limiting principle on future expansions of national monuments onto public land reserved for other purposes by Congress. *See Murphy Co.* 65 F.4th at 1141 ("Indeed, the far-reaching implications of the majority's interpretative rule are sobering: every federal land management law that does not shield itself from the Antiquities Act is now subject to executive nullification by proclamation. I can find no limiting principle within the majority opinion that counsels otherwise.").

C. If there is no meaningful limit on the President's power, then the Antiquities Act violates the nondelegation doctrine.

A limitation on the President's Antiquities Act authority that forbids unilaterally altering uses mandated by Congress would avoid the constitutional problem that arises. But if the panel majority's opinion stands, and the Antiquities Act is read to create such a sweeping

delegation of power to the President to manage federal land under the Property Clause, it represents an improper delegation of power. *See, e.g.*, *Yakus*, 321 U.S. at 426.

Indeed, if Proclamation 9564 is lawful, Congress effectively delegated its power to legislate federal land use under the Property Clause to the President—creating a "delegation running riot." *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552–53 (1935) (Cardozo, J., concurring). Under the panel majority's reasoning, the Antiquities Act is a blank check under which the President may fill in his preferred policy and Congress will have effectively "designated a lawmaker, not a law interpreter."[4]

Courts should not interpret the Act to allow the President to wield Congress's Property Clause power whenever he pleases. Instead, it should be read with a clear limiting principle—the President acts ultra vires when he seeks to expand a national monument onto lands already reserved for another purpose by Congress. Under the Constitution, the people delegated Congress the power to manage federal lands. U.S.

[4] G. Lawson & G. Seidman, *"A Great Power of Attorney": Understanding the Fiduciary Constitution* 126 (2017).

Const. art. IV, § 3, cl. 2. No interpretation of the Antiquities Act should obliterate that constitutional mandate.

II. Under Article III, federal courts have a judicial duty to meaningfully review Presidential action.

The panel majority correctly found that the federal courts have jurisdiction to determine when the President has exceeded his statutory and constitutional authority under the Antiquities Act. *Murphy Co.*, 65 F.4th at 1128–31. That ruling is not extraordinary—it is required by the Constitution's mandate that the federal courts provide a vital check on the political branches' excesses of power. Yet the majority's decision quickly went off the rails by applying deference to the President's actions that made its review toothless.

The Framers envisioned that the judiciary—not the Executive Branch—would determine a law's meaning. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 125 (2015) ("The Framers expected Article III judges to engage . . . by applying the law as a 'check' on the excesses of both the Legislative and Executive Branches.") (Thomas, J., concurring). Federal judges are thus constitutionally charged with exercising independent judgment under Article III.

This constitutional principle mandates that courts not "defer to the other branches' resolution" of separation of powers issues. *See NLRB v. Noel Canning*, 573 U.S. 513, 571–72 (2014) (Scalia, J., concurring). And the judiciary's "role is in no way lessened because it might be said that the two political branches are adjusting their own powers between themselves." *Id.* (cleaned up). In the context of executive overreach, the federal courts must look to "the compatibility of [executive] actions with enabling statutes." *Perez*, 575 U.S. at 1221 (Thomas, J., concurring) (citing *Util. Air Regulatory Grp.*, 573 U.S. at 313–16).

Yet here, the panel majority turned the judiciary's duty to check executive excesses on its head. Rather than provide meaningful judicial review, it "appears to have fashioned its own rule that where Congress wishes to restrict the President's Antiquities Act authority, it must do so expressly." *Murphy Co.*, 65 F.4th at 1140–41. But this "argument belies foundational principles of constitutional law and misconstrues the role of courts in our tripartite system of government." *Id.* at 1141. Indeed, Congress could not have intended the President have a veto power over later enacted statutes under such a cryptic delegation as that found in the sparse language of the Antiquities Act. And there is no basis for

courts assuming Congress would do so. The Court should grant en banc review and ensure that the Circuit's precedent reflects the foundational constitutional principle that the judiciary is bound to provide a meaningful check on the executive branch.

III. The panel majority's opinion further perpetuates presidential abuse of the Antiquities Act with severe consequences for public land use in this Circuit.

The panel majority's lack of meaningful judicial review flouts basic constitutional principles and expands an already profoundly troubling trend of Antiquities Act abuses. It is vital that this Court grant en banc review and cabin the President's authority under the Antiquities Act.

Presidents rarely gain power through grand usurpations, but instead engage in "creative destruction"—unchecked violations of the law that expand their power over time. *See* Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 8 (2020). This is essentially a "practice-makes-perfect" form of executive lawmaking in which Presidents "claim to have the authority to change federal law via repeated violations." *Id.* at 9. This abuse is partly enabled by "a judicial system that acts as only a partial, fitful check on

the executive, and the weakness of the check has consequences for the actions the executive is willing to take." *Id.* at 73.

Judicial review of presidential actions under the Antiquities Act provide a perfect example. Presidents may designate "National Monuments" on certain public lands. 54 U.S.C. § 320301. Congress intended the Act to be a quick way to protect archaeological artifacts from vandalism and looting. *See* Richard H. Seamon, *Dismantling Monuments*, 70 Fla. L. Rev. 553, 561–67 (2018) (discussing the Antiquities Act's legislative purpose). But since at least the 1990s, presidents have swallowed more power through the Act's implementation with little to no judicial check on their power.

For example, during President Clinton's tenure, the statute's scope broadened from protecting specific "objects" to regulating nebulous "ecosystems."[5] According to the Clinton administration, these unnamed

[5] Bruce Babbitt, Secretary, Department of Interior, Address at the Sturm College of Law of the University of Denver, *From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLM*, 3 U. Denv. Water L. Rev. 223, 229 (2000) (describing the evolution of presidential regulation under the Antiquities Act, starting with the designation of "curiosit[ies]" and, during the Clinton administration, expanding to the protection of entire ecosystem). https://core.tdar.org/document/374192/from-grand-staircase-to-grand-canyon-parashant-is-there-a-monumental-future-for-the-blm.

ecosystems were themselves "objects" that could be designated as a "monument." *See Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (2002). All told, President Clinton established 19 monuments and expanded three others, totaling 5.9 million acres.[6]

And the expansion of the President's power under the Act is not a partisan affair. President George W. Bush expanded on his predecessor's innovation in executive authority by taking ecosystem monuments to new domains. The President's regulatory reach is textually limited to property on "land" "owned or controlled" by the federal government. 54 U.S.C. § 320301. During the law's first 100 years, courts understood that limitation to mean only those land areas subject to U.S. sovereignty, such as public lands or the land within the territorial seas. *See United States v. California*, 436 U.S. 32, 35–36 (1978) (recognizing that Presidents only designated monuments in areas where the federal government exercised "full dominion and power"). But in 2006, President Bush adopted a broader reading and established the 89-million-acre Northwestern

[6] *National Monuments and the Antiquities Act: President Clinton's Designations and Related Issues*, Congressional Research Service 4 (June 28, 2001) https://www.everycrsreport.com/files/20010628_RL30528_51e7ee36b7368d6934398c5f4f14f92bb11a201a.pdf.

Hawaiian Islands Marine National Monument in the Pacific Ocean.[7] Under President Bush's interpretation of "land" that is "owned or controlled" by the federal government, the President's authority extends to the Oceans' seabed in the "exclusive economic zone"—an area between the territorial sea and 200 miles from the Nation's coast, over which nations exercise concurrent authority that falls far short of sovereign dominion.[8]

Not to be outdone, President Obama expanded two marine monuments[9] and created the Northeast Canyons and Seamounts National Monument—which designated millions of acres of the Atlantic Ocean as a national monument and banned commercial fishing. *See Mass. Lobstermen's Ass'n*, 945 F.3d at 538–39.

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[7] Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), https://www.federalregister.gov/documents/2006/06/26/06-5725/establishment-of-the-northwestern-hawaiian-islands-marine-national-monument.

[8] *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (establishing the EEZ), https://archives.federalregister.gov/issue_slice/1983/3/14/10605-10606.pdf#page=1.

[9] Pacific Remote Islands Marine National Monument (261.3 million acres); Papahanaumokuakea Marine National Monument (283.4 million acres).

These Ocean monuments now encompass almost 750 million acres of seabed. That is nearly ten times the area of total acreage regulated during the first 100 years of the Antiquities Act.[10] And these monuments have severely limited the people's ability to ply their trade and earn a living within the designations.

Of course, the inherent problem with ecosystem monuments is that there's no limiting principle. This is because every inch of the earth contains or is part of an ecosystem—*all* public "lands" or Oceans' seabed are designable "monuments" under the President's reading of the law.[11] In this way, ecosystem monuments obviate the Act's primary constraint on executive authority—that a designation must be limited to the "smallest area compatible" with a monument's preservation. 54 U.S.C. § 320301(b). This limitation becomes meaningless when courts permit the President to merely draw shapes on a map and designate an entire

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[10] *National Monuments and the Antiquities Act*, Congressional Research Service R41330 Appendix B (updated July 11, 2022), https://sgp.fas.org/crs/misc/R41330.pdf.

[11] *See* National Geographic, *Ecosystem*, Resource Library: Encyclopedia ("The whole surface of Earth is a series of connected ecosystems."), https://www.nationalgeographic.org/encyclopedia/ecosystem/print/#:~:text=The%20whole%20surface%20of%20Earth,types%20of%20biomes%2C%20for%20example.

ecosystem as a "national monument." In essence, these continual transgressions of power through several presidential proclamations—with little to no judicial scrutiny of the President's authority when they happen—allow the President to become a constitutional "pickpocket" of Congress's power under the Property Clause. *See* Prakash, *The Living Presidency* 9.

It should be no surprise that the President now seeks to expand his power even further by claiming the authority to override clear statutory mandates. But that extraordinary power must be checked. As Judge Tallman observed, the President's actions, and the panel majority's sanction of that action, not only contribute to the "economic impact" on local communities that depend on the O&C Act for their economic livelihood but extends to "every federal land management law" that does not explicitly forbid the President's use of the Act. *Murphy Co.*, 65 F.4th at 1141.

Indeed, in the states covered by this Circuit alone, the panel majority's precedent may affect a significant intrusion into millions of acres of federal land. Unlike in other Circuits, where federal property ownership is comparatively de minimis, in the ten states that comprise

the Ninth Circuit, the Federal Government owns 53.6% of all land—nearly 500 million acres.[12]

Table 1. Total Federal Land in the United States Administered by Five Agencies, by State, 2018—Selected States

	Total Federal Acreage	Total Acreage in State	Federal Acreage's % of State
Alaska	222,666,580	365,481,600	60.90%
Arizona	28,077,992	72,688,000	38.60%
California	45,493,133	100,206,720	45.40%
Hawaii	829,830	4,105,600	20.20%
Idaho	32,789,648	52,933,120	61.90%
Montana	27,082,401	93,271,040	29.00%
Nevada	56,262,610	70,264,320	80.10%
Oregon	32,244,257	61,598,720	52.30%
Utah	33,267,621	52,696,960	63.10%
Washington	12,192,855	42,693,760	28.60%
9th Circuit Total	490,906,927	915,939,840	53.60%

Even so, the President's unbounded expansion of power has been noticed, including by the Chief Justice. *See Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980–81 (2021) (Mem) (noting that past presidents' interpretations of the Antiquities Act strain the bounds of "ordinary English"). And as a result, the Antiquities Act has morphed

[12] 490,906,927 acres out of 915,939,840 to be exact. Congressional Research Service, *Federal Land Ownership: Overview and Data* 8 (updated Feb. 21, 2020), *available at* https://sgp.fas.org/crs/misc/R42346.pdf.

into limitless power never envisioned by Congress when it passed the statute over 100 years ago. *See id.* at 981.

CONCLUSION

This Court should heed these observations and provide the judicial check on the President the Constitution requires. The Antiquities Act is not, and constitutionally cannot be, a delegation that allows the President to ignore Congress's clear legal directives. En banc review is warranted.

DATED: June 20, 2023.

Respectfully submitted,

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