No. 23-4106 (consolidated with No. 23-4107)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH, et al.,
Plaintiffs – Appellants,

and

ZEBEDIAH GEORGE DALTON, et al.,
Plaintiffs – Appellants,

v.

JOSEPH R. BIDEN, JR., et al.,
Defendants – Appellees,

and

HOPI TRIBE, et al.,

Defendant-Intervenors – Appellees.

On Appeal from the United States District Court
for the District of Utah
Honorable David O. Nuffer, District Judge
Case No. 4:22-cv-00059-DN

BRIEF OF PACIFIC LEGAL FOUNDATION AND AMERICAN FOREST RESOURCE COUNCIL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANTS FOR REVERSAL OF THE DISTRICT COURT'S DECISION

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GLOSSARY

AFRC – American Forest Resource Council

EPA – Environmental Protection Agency

NLRB – National Labor Relations Board

PLF – Pacific Legal Foundation

AMICI CURIAE'S IDENTITY AND INTEREST[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest. PLF defends Americans' liberties when threatened by government overreach. PLF is also 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] PLF also has represented clients and has appeared as amicus curiae in cases involving the Antiquities Act.[3]

The American Forest Resource Council (AFRC) is a nonprofit, regional trade association whose purpose is to advocate for sustained-

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[1] This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person or entity other than Amici or their counsel, contributed money intended to fund this brief's preparation or submission.

[2] *See, e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

[3] *See, e.g.*, *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019); *Am. Forest Res. Council v. United States*, 77 F.4th 787 (D.C. Cir. 2023); *Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023).

yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies, and decisions about access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Nevada, Oregon, and Washington. These businesses provide tens of thousands of family-wage jobs in rural communities. AFRC has a significant interest in preventing presidential abuse of the Antiquities Act. AFRC is a plaintiff in a consolidated case involving an ultra vires challenge to the expansion of the Cascade-Siskiyou National Monument.[4] AFRC also appeared as amicus curiae in a petition for certiorari involving a challenge under the Antiquities Act.[5]

The issue in these consolidated cases is whether the President exceeded his delegated authority under the Antiquities Act by

[4] *AFRC v. United States et al.*, 77 F.4th 787 (D.C. Cir. July 18, 2023).
[5] *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019).

designating the Bears Ears and Grand Staircase-Escalante National Monuments—reserving and withdrawing around 3.23 million acres of public lands from various beneficial uses. Amici submit this brief because the availability of judicial review of the President's actions under the Antiquities Act raises core separation of powers concerns related to the proper sphere of each co-equal branch's power under the Constitution. Amici also submit this brief because the President's actions continue a growing trend of presidential abuses of the Act to limit, without congressional approval, the beneficial uses of natural resources on and within public lands—public lands vital to individuals who use them for their economic livelihoods.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court below held that the President's designations under the Antiquities Act—withdrawing millions of acres of public lands from beneficial uses in the process—are unreviewable by the federal judiciary. That holding raises a core question under the Constitution's Separation of Powers: Does the President have the power—with no judicially

reviewable limits—to issue presidential orders that go beyond what Congress has delegated and rewrite rather than enforce the law?

When the American people ratified the Constitution, they answered no. They delegated some of their power—as described and delimited in the Constitution's text—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."). Put differently, "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).

As relevant here, the people vested Congress—and Congress alone—with the power to make all rules and regulations over 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 generally* U.S. Const. art. I. In contrast, Article II vests

the Executive Branch with the power to enforce those laws if properly enacted. *See generally* U.S. Const. art. II. And the people vested the judiciary with the judicial power to declare when the other two branches venture outside their constitutional lanes. *See generally* U.S. Const. art. III.

The Constitution divided the government's powers this way not merely—or even primarily—to resolve inter-branch conflicts or to ensure efficient government. It was to preserve people's freedom to determine how they would exercise their rights and liberties without arbitrary government interference. 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). Above all, to preserve life, liberty, and the pursuit of happiness—*to protect individual freedom*—it was necessary to divide governmental powers because, the Framers knew, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many," would lead to "tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

The district court's decision flouts this careful design, further enables arbitrary executive rule, and harms the people's rights to use the many natural resources found on and within America's public lands. The district court must be reversed.

First, the decision sanctioned the President's ultra vires and unconstitutional actions by incorrectly invoking sovereign immunity to foreclose judicial review of the President's actions under the Antiquities Act. But 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. He lacks the unbridled discretion to use old laws to go beyond clear congressional limitations in statutes and instill his preferred policies—policies that have not gone through the democratic gauntlet outlined in the Constitution.

Yet the President has done just that by seeking to expand his authority under the Antiquities Act. The statute gives the President limited authority to designate only historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interests as national monuments. And the President has limited authority to reserve land for a monument's protection, but that land must be limited

to the smallest area compatible with the proper care and management of the objects to be protected.

Here, the President is attempting to expand his authority over what "objects" can be designated as, or as part of, national monuments. In doing so, the President is directly negating Congress's clear limitations in the Antiquities Act by designating entire landscapes, ecosystems, and certain living species as objects protectable as national monuments. He is then using those illegal designations to expand his authority to reserve exceedingly more federal property than is necessary to protect those ostensible "monuments."

The district court's failure to engage with the President's unlawful actions cannot be squared with the federal judiciary's constitutional duty to meaningfully check the Executive Branch and its officers when acting outside of congressional delegations. Under Article III of the Constitution, federal courts must independently confront questions involving the Constitution's government-structuring provisions. Indeed, it is the solemn responsibility of the Judicial Branch "to say what the law is" under the Constitution's Separation of Powers and act as a check on government excesses of power. *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)); *see also Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (finding courts must make sure presidential proclamations follow constitutional principles and do not exceed the President's statutory authority under the Antiquities Act). Yet the district court took great pains to skirt its duty and allow the President absolute discretion to alter the rights and privileges of the people who use the lands within the designated monument areas.

Second, if Congress granted the President the unreviewable discretion to determine what will be national monuments and unreviewable discretion to determine how much federal property is needed to protect those "monuments" under the Antiquities Act, then Congress has unconstitutionally delegated its power under the Constitution's Property Clause. Congress must give executive officials boundaries that guide their enforcement of the law and that provide the judiciary with limiting principles to ensure that those officials cannot make legislative policy choices entrusted to the Legislative Branch by the Constitution.

Third, if this Court upholds the district court's failure to scrutinize the President's actions, it will set a precedent in this Circuit that furthers the growing trend of presidential abuse of the Antiquities Act. This will have severe consequences for the communities, businesses, and individuals who depend on the natural resources on and within federal lands in the states within the Circuit.

In recent years, presidents have declared vast areas of land and ocean as "antiquities" as a pretext to instill their preferred policies—policies that have not passed through the Constitution's prescribed procedures. The Bears Ears and Grand Staircase- Escalante Proclamations are another example of a president's power grab under the Act. But the district court's decision, if upheld, would enable the President to go even further. The decision would leave the President's actions (and future presidents' actions) in monument designations entirely unchecked. And in the process, it would subject millions of more acres of federal property to withdraw at the flick of the President's pen.

At bottom, this Court must reverse the district court and clarify that federal courts must exercise their duty to provide a check on the President's executive lawmaking under the Antiquities Act.

ARGUMENT

Sovereign Immunity Does Not Bar Federal Courts from Determining Whether the President Has Acted Outside His Delegated Authority Under the Antiquities Act.

A. Article III courts have a judicial duty to determine when the President has exceeded his powers under Federal Law and the Constitution.

The district court held that it could not judicially review whether the President exceeded his authority under the Antiquities Act. Not so. Judicial review of ultra vires and unconstitutional presidential actions is compelled by Article III of the Constitution: Federal courts must provide a constitutional check on the political branches' excesses of power. *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 the duty to exercise independent judgment under Article III to ensure a law's execution does not exceed the law passed by Congress. *See* The Federalist No. 78 (Alexander Hamilton) (The judicial duty entails the "interpretation of the laws," which is the "proper and peculiar province of the courts."). And 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). 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).

For executive overreach, the federal courts thus must look to "the compatibility of [executive] actions with enabling statutes." *Perez*, 575 U.S. at 126 (Thomas, J., concurring) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 313–16 (2014)). And this duty is no less essential when the President is executing the law Congress has passed. *Id.* at 125 ("[I]f a case involved an executive effort to extend a law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution.") (citing *Marbury*, 5 U.S. at 157–158 (noting the case's consideration of the scope of the President's constitutional power of appointment)).

This is why courts, since the birth of the Republic and before, have engaged in judicial review and provided a "check" on executive officials'—including presidents'—ultra vires and unconstitutional actions. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("The

ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.") As Justice Jackson eloquently explained in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring):

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. ¶ Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[6]

Judicial review of presidents' actions under the Antiquities Act is not an exception. Every circuit court reviewing a challenge to a president's designations under the Act has applied this foundational constitutional principle and addressed their legality. *See Murphy Co. v. Biden*, 65 F.4th 1122, 1130–31 (9th Cir. 2023); *Am. Forest Res. Council v. United States*,

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[6] *See also id.* n.27:

> We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be under the law—which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the law.'" (citation omitted)

77 F.4th 787, 799 (D.C. Cir. 2023); *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 540 (D.C. Cir. 2019); *Mountain States*, 306 F.3d at 1132. The district court's outlier application of sovereign immunity here therefore not only skirts the foundations of the rule of law, but if upheld would also create a direct circuit split.

At bottom, "Article III judges cannot opt out of exercising their check" of unlawful presidential designations under the Antiquities Act. *Cf. Perez*, 575 U.S. at 125 (Thomas, J., concurring). To do so would let the President act as a law-maker-in-chief and cast doubt on the notion of the Constitution's restraint on arbitrary power. The district court should be reversed.

B. If there are no judicially enforceable limitations on the President's authority under the Antiquities Act, then the statute violates the separation of powers doctrine.

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 uphold the Constitution's promise to preserve people's freedom and ensure overzealous officials do not change 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). And 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—thus 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.*, 343 U.S. at 637 (1952) (Jackson, J., concurring). Congressional delegations of power to the President thus must have some judicially reviewable "boundaries" to prevent him from seizing the legislative powers—including those in the Property Clause—reserved for Congress. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 426 (1944); *see also Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

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 the statute, properly understood, cabins the President's power when executing the law and provides meaningful boundaries for courts to gauge whether he has exceeded his authority. The Act allows the President to declare only historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interests as 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.* But nowhere in this delegation does Congress authorize the President to designate entire landscapes, amorphous ecosystems, or living organisms as "objects" that may be protected as national monuments. And if the President is allowed to exceed his statutory authority over what "objects" may be designated, then there is no limit on how much federal property may be "reserved" because all federal lands have landscapes, ecosystems, or living organisms.

If this Court upholds the district court's decision that there is no judicial review available to ensure these congressional limits are enforced, it will leave 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. And it will effectively give the President unlimited authority to regulate federal land how he sees fit, despite any uses already designated for the land by other federal statutes.

This sweeping delegation of unreviewable authority to the President to manage federal land under the Property Clause would be an improper delegation of power. *See, e.g.*, *Yakus*, 321 U.S. at 426. Indeed, if there are no boundaries on the President's decisionmaking and there is no judicial review to enforce those boundaries, then 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).

Put another way, under the district court's reasoning, the Antiquities Act is essentially a blank check under which the President may fill in his preferred policy and Congress will have effectively enacted a law that is "nothing except a raw delegation to enact rules."[7] It will have "designated a lawmaker, not a law interpreter."[8]

In sum, courts cannot allow the President to wield Congress's Property Clause power whenever he pleases with no judicial review. Instead, courts should engage in meaningful judicial review and construe

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[7] Gary S. Lawson & Guy I. Seidman, *"A Great Power of Attorney:" Understanding the Fiduciary Constitution* 126 (2017).

[8] *Id.*

the Antiquities Act to have clear limiting principles. The President acts ultra vires and outside of his authority to enforce the law when he seeks to designate things not enumerated in the Act as monuments. And he acts ultra vires and outside of his authority when he designates more federal land than is necessary to protect properly designated objects. Under the Constitution, the people delegated Congress the power to manage federal lands. U.S. Const. art. IV, § 3, cl. 2. Allowing the district court's decision to stand would obliterate that constitutional mandate.

C. The district court's opinion expands on an already troubling trend of Presidential lawmaking and harms those who rely on public lands for their economic livelihoods.

The district court's application of sovereign immunity to foreclose judicial review of the President's designations flouts basic constitutional principles and expands an already profoundly troubling trend of Antiquities Act abuses. And in the process, the decision expands the threat to those who depend on those lands. It is thus vital that this Court reverse the district court and ensure the President's authority under the Antiquities Act is not an unbounded power to make law outside the democratic process.

Presidents rarely gain power through grand usurpations. Presidents usually 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.

The Antiquities Act and judicial review of presidents' actions provide a perfect example. Under the Antiquities Act, 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 slowly swallowed more power through the Antiquities

Act's implementation with little or—as is the case here—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."[9] According to the Clinton administration, these unnamed ecosystems were themselves "objects" the President could designate as a "monument." *See Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (explaining the president's reasoning). All told, President Clinton established 19 monuments and expanded three others, totaling 5.9 million acres.[10]

And the expansion of presidents' power under the Antiquities Act is not a partisan affair. President George W. Bush expanded on his

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[9] 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.

[10] Cong. Rsch. Serv., RL30528, *National Monuments and the Antiquities Act: President Clinton's Designations and Related Issues* 4 (updated June 28, 2001), https://www.everycrsreport.com/files/20010628_RL30528_51e7ee36b7368d6934398c5f4f14f92bb11a201a.pdf.

predecessor's innovation in executive authority by taking ecosystem monuments to new domains. A 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 Hawaiian Islands Marine National Monument in the Pacific Ocean.[11] 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

[11] 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.

Nation's coast, over which nations exercise concurrent authority that falls far short of sovereign dominion.[12]

Not to be outdone, President Obama expanded three of President Bush's marine monuments 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.[13]

These two 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.[14] And these monuments have severely limited the people's ability to ply their trade and earn a living within the designations.

As discussed above, the inherent problem with ecosystem monuments is that there's no limiting principle. This is so because every

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[12] *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.

[13] President Obama expanded the Pacific Remote Islands Marine National Monument by 261.3 million acres and the Papahanaumokuakea Marine National Monument by 283.4 million acres.

[14] Carol Hardy Vincent, Cong. Rsch. Serv., *National Monuments and the Antiquities Act*, R41330, Appendix B (May 3, 2023), https://sgp.fas.org/crs/misc/R41330.pdf.

square inch of the earth has or is part of an ecosystem—*all* public "lands" or oceans' seabed are designable "monuments" under the President's reading of the law.[15] In this way, ecosystem monuments obviate the Antiquity 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). Yet this limitation becomes meaningless when courts let the President merely draw shapes on a map and designate an entire ecosystem as a "national monument." These continual transgressions of power through several presidential proclamations—with little to no judicial scrutiny of the President's authority when they happen—have let presidents become constitutional "pickpockets" of Congress's power under the Property Clause. *See* Prakash, *The Living Presidency* 9.

It should thus be no surprise that the President is now seeking to expand his power even further in the Bears Ears and Grand Staircase-Escalante National Monuments. But that extraordinary power must be checked. As Judge Tallman recently explained, unchecked presidential

[15] *See* National Geographic, *Ecosystem*, Resource Library: Encyclopedia ("The whole surface of Earth is a series of connected ecosystems."), https://education.nationalgeographic.org/resource/ecosystem/.

actions under the Antiquities Act not only contribute to "economic impact" on local communities that depend on federal lands for part of their economic livelihood, but also let presidents amend "every land management law" that does not explicitly forbid his use of the Act. *Murphy Co.*, 65 F.4th at 1141 (Tallman, J., concurring in part, dissenting in part). And under the district court's view, a president may do so with *no judicial review whatsoever*.

In the states covered by this Circuit alone, the district court's opinion and the precedent it sets may affect a significant intrusion by the President into millions of acres of federal land—and harm the thousands of Americans who depend on those lands. Unlike in many other circuits, where federal property ownership is comparatively de minimis, in the six states that comprise the Tenth Circuit, the Federal Government owns millions of acres that the President may withdraw from beneficial uses with the flick of a pen.[16]

[16] To be exact, 112,108,572 out of 355,890,560 acres. Carol Hardy Vincent, et al., Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 8 (updated Feb. 21, 2020), *available at* https://sgp.fas.org/crs/misc/R42346.pdf.

	Total Federal Acreage	Total Acreage in State	Federal Acreage's % of State
Colorado	24,100,247	66,485,760	36.20%
Kansas	253,919	52,510,720	.5%
New Mexico	24,665,774	77,766,400	31.70%
Oklahoma	683,289	44,087,680	1.5%
Utah	33,267,621	52,696,960	63.01%
Wyoming	29,137,722	62,343,040	46.70%
10th Circuit Total	112,108,572	355,890,560	31.55%

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

Even so, presidents' unbounded expansion of power has been noticed. As the Chief Justice observed, the Antiquities Act's limited delegation has not yet been meaningfully delineated by courts, resulting in increasingly absurd interpretations of the Act. *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980–81 (2021) (Roberts, C.J., statement respecting the denial of certiorari) (noting that past presidents' interpretations of the Antiquities Act strain the bounds of "ordinary English"). As the Chief Justice tacitly acknowledged, the Antiquities Act has morphed into limitless power never envisioned by Congress when it passed the statute over 100 years ago. *See id.* at 981. Despite these warnings, the district court's opinion inappositely goes in a different direction by precluding all judicial review of the President's unlawful actions.

This Court must reverse and provide the judicial check on the President the Constitution requires. The Antiquities Act is not, and constitutionally cannot be, a delegation that lets the President ignore Congress's clear legal directives.

CONCLUSION

For all these reasons, this Court should reverse the district court.

DATED: November 6, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), this brief contains 4,945 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

s/ Frank D. Garrison
FRANK D. GARRISON

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I certify that on November 6, 2023, I electronically filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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