No. 23-524

In The
Supreme Court of the United States

AMERICAN FOREST RESOURCE COUNCIL, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PACIFIC LEGAL FOUNDATION'S AMICUS BRIEF IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In 1937, Congress passed the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), which set aside nearly 2.6 million acres of Oregon forestland as a permanent trust for local governments to fund public services. Congress mandated that these timberlands "shall" be managed for "permanent forest production" and that timber thereon be cut and sold under "the princip[le] of sustained yield" to generate revenue for the affected counties. 43 U.S.C. §§ 2601, 2605. Despite this clear congressional mandate, the President used the Antiquities Act of 1906 to add tens of thousands of O&C timberland acres into a national monument where sustained-yield timber harvest is prohibited. Similarly, the Bureau of Land Management (BLM) issued management plans for the entirety of the O&C forestlands that dedicated 80% of the O&C lands to no harvest "reserves" for conservation purposes.

The questions presented are:

Whether the President can use an Antiquities Act Proclamation to override Congress's plain text in the O&C Act to repurpose vast swaths of O&C timberlands as a national monument where sustained-yield timber production is prohibited.

Whether the Secretary of the Interior can override the O&C Act by designating 80% of the O&C timberlands as conservation "reserves" where sustained yield timber harvest is prohibited.

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AMICUS CURIAE'S INTEREST[1]

Founded in 1973, the Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest and defend American's liberties when threatened by government overreach. PLF 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]

The issue here is whether the President has unilateral authority under the Antiquities Act to override Congress's clear directives within the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act). PLF submits this brief because this issue raises significant concerns about the Constitution's Separation of Powers and the

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[1] Rule 37 Statement: All parties received timely notice of Amicus's intent to file this brief. No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

[2] *See, e.g.*, *Sackett v. EPA* (*Sackett II*), 598 U.S.651 (2023); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018); *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*. *See, e.g.*, *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019).

judiciary's important role in providing a meaningful check on abuses of executive power.[3]

INTRODUCTION[4]

President Obama quipped during his time in office: "I intend to 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."[5] Staying true to his word, he issued Presidential Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017). Relying on the Antiquities Act, the Proclamation expanded the Cascade-Siskiyou National Monument and withdrew thousands of acres of public land that Congress specifically reserved for timber production under the O&C Act. In other words, the President used the Antiquities Act to unilaterally nullify a direct requirement from Congress that certain lands be available for an explicit use.

Judicial review of the President's Proclamation should have been straightforward. Congress included a non-obstante clause in the O&C Act: "All Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and

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[3] Amicus will only address in this brief the first question presented: "Whether the President can use an Antiquities Act Proclamation to override Congress's plain text in the O&C Act to repurpose vast swaths of O&C timberlands as a national monument where sustained-yield timber production is prohibited." *See supra*, i.

[4] While the arguments Amicus provides here are materially the same as the arguments made in the amicus brief being filed concurrently in *Murphy Co. v. Biden*, No. 23-525, this brief focuses on the D.C. Circuit's reasoning where appropriate.

[5] 2 PUBLIC PAPERS OF THE PRESIDENTS 1350 (Oct. 26, 2011).

effect to this Act." Act of Aug. 28, 1937, ch. 876, 50 Stat. 874, 876. The critical question is thus whether Proclamation 9564 "conflicts" with the O&C Act. If it does, then the Proclamation cannot stand because the President has no authority to nullify Congress's legislative directives. And "[e]ven a perfunctory review of the plain text of the Proclamation and the O & C Act reveals an obvious conflict." *Murphy Co. v. Biden*, 65 F.4th 1122, 1139 (9th Cir. 2023) (Tallman, J., dissenting). On one hand, "[t]he O & C Act requires sustained yield calculation for all O & C timberlands"; on the other, "Proclamation 9564 removes O & C timberlands from the sustained yield calculation." *Id.*

Yet the decision below ignored this clear conflict. Instead, it applied circular logic to find that the President could—implicitly—reclassify public lands under the Antiquities Act and thus those lands were no longer "timberlands" under the O&C Act. Pet.App. 24a. In essence, the D.C. Circuit's judicial sleight of hand transforms the Antiquities Act from an ordinary delegation of power to execute the law into a super statute allowing Executive Branch amendment of all land management statutes.

The President's unilateral action and the D.C. Circuit's decision raise a fundamental and reoccurring question under the Constitution: "Who decides?" *NFIB v. DOL*, 595 U.S. 109, 121 (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

letting the President make rather than enforce the law?

When the American people ratified the Constitution, they answered no to both questions. The people 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."). "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 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. U.S. Const. art. I. By contrast, the people vested the President with the executive power to enforce those laws if properly enacted. U.S. Const. art. II. And the people vested the judiciary with the judicial power—and the judicial duty—to declare when the other two branches venture outside their constitutional lanes. U.S. Const. art. III.

The Constitution divided powers this way to preserve the people's freedom to exercise their rights

and liberties without arbitrary government interference. Indeed, 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 decision below flouts these first principles. It sets a precedent giving presidents unilateral authority to "suspend the operation of another act of Congress." *Murphy*, 65 F.4th at 1139 (Tallman, J., dissenting). And without this Court's intervention, this unbounded discretion to override laws regulating public lands will continue to apply to millions of acres of property—property that millions of people depend on for their economic livelihoods. This Court should step in now and provide meaningful limits on this presidential abuse of power.

SUMMARY OF ARGUMENT

First, this Court should grant certiorari because the D.C. Circuit'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 expand his power 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 issuing Proclamation 9564 under the Antiquities Act. Indeed, the President directly contradicted Congress's clear directives by withdrawing thousands of acres of public lands that Congress mandated be available for timber

production. But nothing in the Antiquities Act nor the Constitution gives the President this unbounded lawmaking power.

Second, certiorari is warranted because the D.C. Circuit 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)); *see also Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (finding courts must ensure that presidential proclamations follow constitutional principles and do not exceed the President's statutory authority under the Antiquities Act). Yet the court below took great pains to skirt its duty and sanction near absolute presidential discretion to override a later enacted law passed by Congress.

Third, this Court's review is warranted because the D.C. Circuit's failure to meaningfully scrutinize the President's actions continues the troubling trend of judicial abdication over the Executive Branch's abuse of the Antiquities Act. The President's actions here are not an isolated overreach. In recent years, presidents have declared vast land and ocean areas as "antiquities" to instill their preferred policies—policies not passed through the Constitution's prescribed procedures. Proclamation 9564 is just the

latest example of the Executive Branch's power grab. What is more, the D.C. Circuit's decision sets a precedent that will have severe consequences for the communities that depend on the surrounding O&C lands and for anyone affected by the laws governing public land use in the United States. If left intact, the decision will allow the President to release a "timber rattler poised to strike at any land management law" he dislikes. *Murphy Co.*, 65 F.4th at 1139, 1142 (Tallman, J., dissenting).

* * * * *

At bottom, the D.C. Circuit's decision lets the President become both a lawmaker and law executor in violation of the Constitution. And the court'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—giving the President almost unfettered discretion to change the laws governing public lands. The consequences of this abdication of the Constitution's mandates for the millions of people who depend on public lands cannot be overstated. This Court should thus grant the petition and clarify that neither the Antiquities Act nor the Constitution lets the Executive Branch subject millions of acres of federal property to the whims of the President's pen.

REASONS FOR GRANTING CERTIORARI

I. Certiorari is warranted because the D.C. Circuit's holding raises fundamental separation-of-powers concerns.

A. The decision below sanctions Executive Branch lawmaking in 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 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 presidents—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 presidential actions—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).

Here, the Antiquities Act allows the President only "[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(a). 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.* § 320301(b).

But 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.*, 65 F.4th at 1140 (Tallman, J., dissenting) (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." *Id.* 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 here by withdrawing timber lands from the O&C Act's purview. This direct amendment of the O&C Act violates the fundamental separation-of-powers principles mandated by our Constitution.

B. The decision below implicates the major questions doctrine.

This 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 a broad congressional delegation. *Id.* And courts should be skeptical when the Executive Branch tries 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 limited authority to the President to execute the law and establish national monuments through the Antiquities Act. *See* 54

U.S.C. §§ 320301–320303. Properly understood, the Act's text cabins presidential power and provides meaningful boundaries for courts to gauge whether a president has exceeded his authority. But if presidents can unilaterally nullify provisions of land management statutes like the O&C Act, Congress will have delegated a transformative—and near limitless—power under the Antiquities Act.

Courts should not assume Congress would delegate presidents an unbounded power to later amend federal statutes. Congressional delegations of power to the presidents must have some "boundaries" to prevent them from seizing the legislative powers 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). Yet under the D.C. Circuit's reasoning—that a president may "reclassify" public land specifically reserved by Congress for a different use in a later enacted statute—there is no limiting principle on future expansions of national monuments. And it will effectively give presidents unlimited authority to regulate federal land how they see fit—despite any uses already designated for the land by statute. *Cf. Murphy Co.*, 65 F.4th at 1141 (Tallman, J., dissenting) ("The far-reaching implications of the majority's interpretative rule are sobering: every federal land management law that does not expressly 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 congressionally prescribed land uses would avoid the constitutional problems outlined above. But if the D.C. Circuit's opinion stands, and the Antiquities Act is read to create a sweeping delegation of power to presidents to manage federal land under the Property Clause, it will represent an improper delegation of power. *See, e.g.*, *Yakus*, 321 U.S. at 426.

Indeed, if Proclamation 9456 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). Put differently, under the D.C. Circuit's reasoning, the Antiquities Act is essentially a blank check through which presidents may fill in their preferred policies and Congress will have effectively enacted a law that is "nothing except a raw delegation to enact rules."[6] It will have "designated a lawmaker, not a law interpreter."[7]

In sum, courts should not interpret the Antiquities Act to let presidents wield Congress's Property Clause power whenever they please. Instead, it should be read with a clear limiting principle—presidents act ultra vires and outside of

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

[7] *Id.*

their constitutional authority to enforce the law when they seek 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. 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 D.C. Circuit correctly found that the federal courts have jurisdiction to determine when presidents exceed their statutory and constitutional authority under the Antiquities Act. Pet.App. 16a–19a. That ruling is not extraordinary—it is required by the Constitution's mandate that federal courts provide a vital check on the political branches' excesses of power. Yet the decision quickly went off the rails by interpreting the Antiquities Act to allow the President to "implicitly" "reclassify" and withdraw public lands from the purview of later congressionally prescribed statutory commands. In other words, the decision made judicial review of the President's actions 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 constitutionally charged with exercising independent judgment under Article III. *See* The

Federalist No. 78 (Alexander Hamilton) (J. Cooke ed., 1961) (The judicial duty entails the "interpretation of the laws," which is the "proper and peculiar province of the courts.").

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.* at 571 (cleaned up). With 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 D. C. Circuit's decision turned the judiciary's duty to check executive excesses on its head. Rather than provide meaningful judicial review, the decision "reconciled" the Antiquities and O&C Acts through a judicial aggrandizement of the President's power to "reclassify" lands reserved for another purpose by Congress. But "nowhere does [the Antiquities Act] remotely purport to grant [presidents] authority to suspend the operation of another act of Congress." *Murphy Co.*, 65 F.4th at 1139 (Tallman, J., dissenting).

At bottom, Congress could not have intended the President to 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 certiorari and ensure

that judicial review by lower courts reflects the foundational constitutional principle that the judiciary is bound to provide a meaningful check on the Executive Branch.

III. The D.C. Circuit's opinion further perpetuates presidential abuse of the Antiquities Act with severe consequences for people who depend on public lands.

The D.C. Circuit's lack of meaningful judicial review flouts basic constitutional principles and expands an already profoundly troubling trend of Antiquities Act abuses. It is thus vital that this Court grant certiorari and clarify the limits of presidential authority under the Antiquities Act.

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 presidential actions provide a perfect example. Under the 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). Yet since at least the 1990s, presidents have slowly swallowed more power through the Antiquities Act's implementation with little to no judicial check.

For example, during President Clinton's tenure, the statute's scope broadened from protecting specific "objects" to regulating nebulous "ecosystems."[8] According to the Clinton administration, these unnamed ecosystems were themselves "objects" presidents 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.[9]

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[8] 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.

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

And the expansion of presidential 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. A president's regulatory reach is textually limited to property on "land" "owned or controlled" by the federal government. 54 U.S.C. § 320301. And during the law's first 100 years, courts understood that limitation meant 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 of Act's reach. He established the 89-million-acre Northwestern Hawaiian Islands Marine National Monument in the Pacific Ocean.[10] Under President Bush's interpretation of "land" that is "owned or controlled" by the federal government, a 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.[11]

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[10] 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.

[11] *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.

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 within the area. *See Mass. Lobstermen's Ass'n*, 945 F.3d at 538–39.[12] 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.[13] 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 so because every square inch of the earth has or is part of an ecosystem—*all* public "lands" or Oceans' seabed are designable "monuments" under this reading of the law.[14] 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). Indeed, this limitation becomes meaningless when

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

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

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

courts let presidents merely draw shapes on a map and designate an entire ecosystem as a "national monument."

In essence, these continual transgressions of power through several presidential proclamations—with little to no judicial scrutiny of presidential authority when they happen—have let presidents become a constitutional "pickpocket" 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 by claiming the authority to override clear statutory mandates. But that extraordinary power must be checked. As Judge Tallman explained dissenting in *Murphy*, the President's actions not only contribute to the "economic impact" on local communities that depend on the O&C Act for part of their economic livelihood, but also extends to "every federal land management law" that does not explicitly forbid the President's use of the Antiquities Act. *Murphy Co.*, 65 F.4th at 1141 (Tallman, J., dissenting). Indeed, the D.C. Circuit's opinion and the precedent it sets may affect a significant intrusion by presidents into millions of acres of federal land.[15]

Now is the time for this Court to step in and put a stop to this troubling trend. As the Chief Justice of this Court 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.*

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[15] *See* Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 8 (updated Feb. 21, 2020), https://sgp.fas.org/crs/misc/R42346.pdf.

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 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.

This case is the latest example of the pathology that has allowed these constitutional transgressions to fester for decades. But this Court now has a chance to once and for all provide a meaningful limiting principle on presidential power under the Antiquities Act. And in doing so, the Court can provide the lower courts with guidance to ensure they act as the judicial check the Constitution requires. The Court should thus grant the petition and clarify that the Antiquities Act is not, and constitutionally cannot be, a delegation of power that allows presidents to ignore Congress's clear legal directives.

CONCLUSION

Since the birth of the Republic, courts have engaged in judicial review and provided a "check" on executive officials'—including presidents'—ultra vires and unconstitutional actions. As Justice Jackson eloquently explained: "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." *Youngstown Sheet & Tube Co.*, 343 U.S. at 655 (Jackson, J., concurring). To date, this first principle has not been applied to presidential actions under the Antiquities Act. This Court should thus grant the petition for writ of certiorari and make clear that presidents are not

above the law and cannot amend congressional statutes.

DATED: December 2023.

Respectfully submitted,

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No. 23-524

In the
Supreme Court of the United States

AMERICAN FOREST RESOURCE COUNCIL, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that PACIFIC LEGAL FOUNDATION'S AMICUS BRIEF IN SUPPORT OF PETITIONERS contains 4,973 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 2023.

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No. 23-524

AMERICAN FOREST RESOURCE COUNCIL, et al.,
Petitioners,
v.
UNITED STATES OF AMERICA, et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Renee Goss, of lawful age, being duly sworn, upon my oath state that I did, on the 15th day of December, 2023, send out from Omaha, NE 3 package(s) containing 3 copies of the PACIFIC LEGAL FOUNDATION'S AMICUS BRIEF IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 15th day of December, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

State of Nebraska – General Notary
ANDREW COCKLE
My Commission Expires
April 9, 2026

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