

NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: THE
PRESIDENT'S POWER TO CONSERVE 30 PERCENT OF OUR
NATION'S LANDS BY 2030

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Climate change is an existential threat to the United States, as well as the entire world. The enormity of the problem cannot be overstated, yet the United States has failed to respond to this growing crisis appropriately. Despite the immense importance of land conservation in mitigating the impact of climate change, the United States has only conserved 12% of its land and 23% of its oceans for biodiversity. Land conservation helps protect and restore tracts of land, thereby increasing carbon storage, preventing significant greenhouse gas emissions ("GHGs"), providing habitats for wildlife, and building communities resilient to the effects of climate change.

This Article is the first comprehensive analysis of how the American Antiquities Act, a century-old law, can address contemporary environmental issues and their solutions that are intrinsic to humanity's continued survival. This Article discusses how the Biden Administration can achieve the "30 By 30" plan described in Executive Order 14008, entitled "Tackling the Climate Crisis at Home and Abroad," by single-handedly conserving land across the United States. However, former President Donald Trump's enormous reductions in Grand Staircase-Escalante and Bears Ears National Monuments serve as a reminder that future presidents could significantly reduce national monuments by predecessors, at least based on current case law.

This Article is divided into several parts. Part I provides additional background information relevant to the creation, use, and limitations of the Antiquities Act. Part II described President Biden's Executive Order 14008. Part III examines America's current environmental crises, obstacles to solutions for the crises, and the urgent need for action. Part IV analyzes the Antiquities Act's definitions of "land," "historic or scientific interest," and "smallest area," which limit the president's ability to designate land as national monuments. Part V illustrates the lesser-known barriers to successfully designating national monuments, such as the legal ambiguity surrounding monument abolishment; historical precedents and interpretations; the Youngstown framework for analyzing presidential

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power; legislative attempts, congressional inertia, and the Property Clause; scope and limits of presidential authority; and recent monument reductions and President Biden’s conservation efforts. Lastly, this Article concludes that the Antiquities Act can be utilized to accomplish 30 By 30 with the continued cooperation of individual states or backing by the United States Congress

INTRODUCTION

We have become great because of the lavish use of our resources. But the time has come to inquire seriously what will happen when our forests are gone, when the coal, the iron, the oil, and the gas are exhausted, when the soils have still further impoverished and washed into the streams, polluting the rivers, denuding the fields and obstructing navigation.

– Former President Theodore Roosevelt¹

The United States has only conserved 12% of all its lands and 23% of its oceans for biodiversity.² Yet, nature is one of America’s most precious—and life-sustaining—resources.³ Conserving 30% of lands and oceans by 2030, and thereby achieving the Biden Administration’s “30 By 30” plan described in Executive Order 14008,⁴ would increase the approximately 289

¹ *Theodore Roosevelt Quotes*, NAT’L PARK SERV. (Apr. 10, 2015), <https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-quotes.htm> [<https://perma.cc/7M25-G9QL>].

² See *Conserving and Restoring America the Beautiful*, NAT’L CLIMATE TASK FORCE (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf> [<https://perma.cc/75TP-ET49>] (stating that the United States is one of the top four countries in the world with the most amount of intact natural land); see also *Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future*, U.S. DEP’T INTERIOR (Jan. 27, 2021), <https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands> [<https://perma.cc/7AEW-CWT6>] (stating that “[a]pproximately 60% of land in the continental U.S. is in a natural state, but we are losing a football field worth of it every 30 seconds” and “across the globe, approximately one million animal and plant species are at risk of extinction in the coming decades, including one-third of U.S. wildlife”).

³ See generally *Nature Makes You...*, NAT’L PARK SERV. (May 17, 2019), <https://www.nps.gov/articles/naturesbenefits.htm> [<https://perma.cc/5L6E-6CLH>] (stating that nature makes people smarter, stronger, healthier, happier, and more productive); see also Gregory N. Bratman et al., *Nature and Mental Health: An Ecosystem Service Perspective*, 5 SCI. ADV. 7 (July 24, 2019), <https://www.science.org/doi/10.1126/sciadv.aax0903> [<https://perma.cc/6U99-P576>]; *Water, Air, and Soil*, U.S. FOREST SERV., <https://www.fs.usda.gov/science-technology/water-air-soil> [<https://perma.cc/2K6K-JYQF>].

⁴ Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021).

million acres⁵ of land protected for biodiversity (12% of America) to 729 million acres⁶ (30%) and increase the approximately 798.7 million acres⁷ (26% of marine waters located in Marine Protected Areas) to 921.6 million acres (30%).

This Article is primarily concerned with evaluating whether President Biden will exceed his statutory authority under the Antiquities Act if the Act is used to achieve the 30 By 30 plan, despite Constitutional issues⁸ that some may raise. In short, President Biden can likely use the Antiquities Act of 1906, recognized as 54 U.S.C. § 320301,⁹ to conserve natural spaces as national monuments, thereby singlehandedly accomplishing the 30 By 30 goal without any additional Congressional support. Achieving this conservation goal would allow the United States to affirmatively join a coalition of sixty¹⁰ other countries that support the 30 By 30 conservation target, which was introduced during the United Nations Convention on Biological Diversity¹¹ in 2021.¹²

⁵ See Jacqueline Tran, *Environmental Laws & Executive Orders*, OC HABITATS (Mar. 8, 2021), <https://www.ochabitats.org/post/environmental-laws-executive-orders> [<https://perma.cc/4UMB-DENR>]; see also *Protected Areas*, U.S. DEP'T INTERIOR/GEOLOGICAL SURV., <https://www.usgs.gov/programs/gap-analysis-project/science/protected-areas> [<https://perma.cc/X4M8-8EU8>]. President Biden has designated new national monuments since this calculation. See *infra* notes 287–94.

⁶ See Sarah Gibbens, *The U.S. Commits to Tripling Its Protected Lands. Here's How It Could Be Done*, NAT'L GEOGRAPHIC (Jan. 27, 2021), <https://www.nationalgeographic.com/environment/article/biden-commits-to-30-by-2030-conservation-executive-orders> [<https://perma.cc/DUC2-UHU7>].

⁷ See *Marine Protected Areas 2020: Building Effective Conservation Networks*, NAT'L MARINE PROT. AREAS CTR. (2020), <https://nmsmarineprotectedareas.blob.core.windows.net/marineprotectedareas-prod/media/docs/2020-mpa-building-effective-conservation-networks.pdf> [<https://perma.cc/2N56-JJ7J>] (stating the “U.S. encompasses more than 4.8 million square miles . . . of marine waters”).

⁸ See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002); see also *Tulare Cty. v. Bush*, 306 F.3d 1138, 1141–42 (D.C. Cir. 2002) (raising issue of the Property Clause, U.S. CONST. Art. IV § 3, cl. 2, delegation of congressional authority, and conflicts with other federal statutes).

⁹ National Park Service and Related Programs, 54 U.S.C. § 320301.

¹⁰ See Joe McCarthy, *The World Must Protect 30% of Land and Oceans by 2030. Is It Possible?*, GLOB. CITIZEN (Aug. 16, 2021), <https://www.globalcitizen.org/en/content/30x30-land-and-ocean-by-2030-explainer/> [<https://perma.cc/3X7G-JEWX>].

¹¹ See *Convention on Biological Diversity, Key International Instrument for Sustainable Development*, UNITED NATIONS, <https://www.un.org/en/observances/biological-diversity-day/convention> [<https://perma.cc/Z6H5-R3AG>].

¹² See *A New Global Framework for Managing Nature Through 2030: 1st Detailed Draft Agreement Debuts*, CONVENTION BIOLOGICAL DIVERSITY (July 12, 2021),

I. BACKGROUND INFORMATION ON THE ANTIQUITIES ACT

The Antiquities Act states, “the [p]resident may, in the [p]resident’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”¹³ The law requires that the parcels “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”¹⁴ Furthermore, if the land is situated on “bona fide unperfected claim¹⁵ or held in private ownership,” but the land is “necessary for the proper care and management of the object,” the “Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.”¹⁶

Former President Theodore Roosevelt signed the Antiquities Act into law on June 8, 1906.¹⁷ The first national monument, Devils Tower in Eastern Wyoming, was designated by former President Theodore Roosevelt on September 24, 1906.¹⁸ In the remainder of his term, former President Theodore Roosevelt dedicated seventeen more national monuments.¹⁹ Since Roosevelt signed the Antiquities Act, all but three presidents—Richard Nixon, Ronald Reagan, and George H. W. Bush—have enlarged or dedicated

<https://www.un.org/sustainabledevelopment/blog/2021/07/a-new-global-framework-for-managing-nature-through-2030-1st-detailed-draft-agreement-debuts/> [<https://perma.cc/52DD-6WHB>] (stating that the “framework includes 21 targets for 2030 that call for, among other things: [a]t least 30% of land and sea areas global (especially areas of particular importance for biodiversity and its contributions to people) conserved through effective, equitably managed, ecologically representative and well-connected systems of protected areas (and other effective area-based conservation measures)”; see also *Roadmap to 30x30*, HIGH AMBITION COAL., <https://www.hacfornatureandpeople.org/roadmap> [<https://perma.cc/YXY5-D5V9>]).

¹³ National Park Service and Related Programs, 54 U.S.C. § 320301(a).

¹⁴ *Id.*

¹⁵ *The Antiquities Act of 1906*, NAT’L PARK SERV. (Oct. 25, 2021), <https://www.nps.gov/subjects/archeology/antiquities-act.htm> [<https://perma.cc/Z3BJ-8VSJ>] (meaning “presidents may use the Antiquities Act only to establish national monuments on Federal land”).

¹⁶ National Park Service and Related Programs, 54 U.S.C. § 320301(c).

¹⁷ 16 U.S.C. § 431-433; see ERIN H. WARD, CONG. RSCH. SERV., R45718, *THE ANTIQUITIES ACT: HISTORY, CURRENT LITIGATION, AND CONSIDERATIONS FOR THE 116TH CONGRESS* (2019).

¹⁸ Devils Tower National Monument, Wyoming, 34 Stat. 3236 (Sep. 24, 1906).

¹⁹ Gary Scott, *The Presidents and the National Parks*, WHITE HOUSE HIST. ASS’N, <https://www.whitehousehistory.org/the-presidents-and-the-national-parks> [<https://perma.cc/NMX2-J5E6>].

new national monuments.²⁰ Former President Obama dedicated twenty-six new monuments, more than any president before him.²¹ Further, over the past century, fifteen presidents,²² from both parties, have used the Act to designate 158 national monuments across the United States.²³ Together, these monuments have protected millions of acres of land for the American people.²⁴

The ambitious 30 By 30 initiative requires a significant increase in land conservation across the United States, beyond the current federal land holdings, thereby necessitating a collaborative effort among federal, state, and local governments to achieve its goals or require Congress to act. In total, the federal government owns 640 million acres of land, constituting about 28% of the total 2.27 billion acres in the United States.²⁵ However, achieving 30 By 30 would require a much larger commitment—729 million acres of land.²⁶ If Congress proves unable or unwilling to take action for conservation, states can step forward—as they have been—to fill the gap. Examples of states that have taken action to reach 30 By 30 include California, Nevada, South Carolina, New York, Michigan, Hawaii, New Mexico, and Maine, as well as several local county commissions.²⁷ Through this collective action between the federal, state, and local governments, the United States has the

²⁰ *National Monuments Designated by Presidents 1906-2009*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf [<https://perma.cc/9BPZ-537A>]; see also CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2021).

²¹ Gregory Korte, *Obama's National Monuments are About More than Conservation*, USA TODAY (June 26, 2016, 4:19 PM), <https://www.usatoday.com/story/news/politics/2016/06/26/obamas-national-monuments-more-than-conservation/82931356/> [<https://perma.cc/7WMN-BAXW>] (stating that former President Obama used the Antiquities Act to “recognize sites important to Latinos, labor unions, African Americans, Japanese Americans, and women”); see also Simone Leiro, *President Obama Designates Stonewall National Monument*, OBAMA WHITE HOUSE ARCHIVES (June 24, 2016, 12:00 PM), <https://obamawhitehouse.archives.gov/blog/2016/06/24/president-obama-designates-stonewall-national-monument> [<https://perma.cc/WMH9-MTWC>] (quoting former President Obama as saying that he “believe[s] our national parks should reflect the full story of our country, the richness and diversity and uniquely American spirit that has always defined us. That we are stronger together. That out of many, we are one.”).

²² Scott, *supra* note 19.

²³ CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2021).

²⁴ See Ward, *supra* note 17.

²⁵ CAROL HARDY VINCENT et al., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2020).

²⁶ See *supra* notes 5-6.

²⁷ *Progress Toward 30x30*, ROAD TO 30, <https://www.roadto30.org/30x30progress> [<https://perma.cc/WQM6-33W6>].

potential to conserve a substantial portion of land for environmental conservation and the enjoyment of future generations.

Thus, in order to achieve the 30 By 30 plan, President Biden will need to dedicate additional or new land as national monuments, and either partner with the state governments to conserve land²⁸ or encourage Congress to increase federal lands through the Fifth Amendment's Takings Clause.²⁹

II. PRESIDENT BIDEN'S EXECUTIVE ORDER 14008

The Biden Administration signed Executive Order 14008 (the "Order") on January 27, 2021, because the "United States and the world face a profound climate crisis."³⁰ The Biden Administration, claiming to have a "narrow moment to pursue action at home and abroad to avoid the most catastrophic impacts of that crisis and seize the opportunity that tackling climate change presents," executed the Order to tackle these growing domestic and international challenges.³¹ This Order was intended to place the climate crisis "at the center of United States foreign policy and national security."³²

The Order directs "[t]he Secretary of the Interior, in consultation with the Secretary of Agriculture, the Secretary of Commerce, the Chair of the Council on Environmental Quality, and the heads of other relevant agencies" to submit a report to the National Climate Task Force "recommending steps that the United States should take, working with [s]tate, local, [t]ribal, and territorial governments, agricultural and forest landowners, fishermen, and other key stakeholders, to achieve the goal of conserving at least 30 percent of our lands and waters by 2030."³³ The report "shall propose guidelines for determining whether lands and waters qualify for conservation" and "shall establish mechanisms to measure progress towards the 30-percent goal"

²⁸ *Id.*; see generally *Support for 30x30*, AM. NATURE CAMPAIGN, <https://www.natureamerica.org/supporters> [<https://perma.cc/J23Z-EMB5>] (showing "86% of voters in the United States support a national 30x30 goal").

²⁹ See *Juliana v. U.S.*, 947 F.3d 1159, 1165 (9th Cir. 2020); see also U.S. CONST. amend. V.

³⁰ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

³¹ *Id.*

³² *Id.*; see Stephanie Meredith, *Tackling the Climate Crisis from the Inside*, AM. FOREIGN SERV. ASS'N, <https://afsa.org/tackling-climate-crisis-inside> [<https://perma.cc/Z5HW-A4MS>]; see also John Kerry, *Tackling the Climate Crisis, Together*, U.S. DEP'T STATE (Nov. 19, 2021), https://www.state.gov/tackling_climate_crisis_together [<https://perma.cc/TA5N-RX9X>] (concluding that "[w]e can still secure cleaner air, safer water, and a healthier planet. Let's get to work.").

³³ Exec. Order No. 14008, *supra* note 30.

through “annual reports.”³⁴ The Preliminary Report recommended a “ten-year, locally[-]led campaign to conserve and restore the lands and waters upon which we all depend, and that bind us together as Americans,” called the “America the Beautiful campaign.”³⁵

III. NAVIGATING THE CLIMATE CRISIS AMID CONGRESSIONAL DYSFUNCTION

Climate change poses an existential threat to the United States, as well as the entire world. Yet, amid this crisis, Congress remains paralyzed. Despite efforts by the Biden Administration to address climate change, effective and long-term solutions continue to be hindered by partisanship, limited time, and political division.

The urgency of the climate crisis is further highlighted by scientific research that reveals the detrimental effect climate change has on human health.³⁶ The Centers for Disease Control and Prevention, for instance, stated the health effects of physical, biological, and ecological system disturbances, originating in the United States and elsewhere, include “increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, changes in the prevalence and geographical distribution of food- and water-borne illnesses and other infectious diseases, and threats to mental health.”³⁷ Troublingly, the health risks caused by climate change are “unevenly distributed and both create new inequities and exacerbate those that already exist.”³⁸

This evidence underscores the desperate need for immediate action to conserve land and tackle climate change, a task made impossible by congressional dysfunction. The direct connection between Congress’s

³⁴ *Id.*

³⁵ *Conserving and Restoring America the Beautiful*, *supra* note 2.

³⁶ *See generally* *Climate Effects on Health*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/climateandhealth/effects/default.htm> [<https://perma.cc/FKW2-7MMQ>].

³⁷ *Id.*

³⁸ Kristie Ebi & Jeremy Hess, *Health Risks Due to Climate Change: Inequity in Causes and Consequences*, HEALTH AFFS. (Dec. 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.01125> [<https://perma.cc/3GDG-9ZS4>]; *see generally* Rachel Baird, *The Impacts of Climate Change on Minorities and Indigenous Peoples*, MINORITY RTS. GRP. INT’L, <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-524-The-Impact-of-Climate-Change-on-Minorities-and-Indigenous-Peoples.pdf> [<https://perma.cc/3SGD-QW2C>] (summarizing that “[i]t should not be surprising that minority groups and indigenous peoples are especially badly hit by climate change, that they get less help coping with its effects and that they have to fight harder to influence decisions about mitigating and adapting to climate change. Their needs, problems and voices are all too easily ignored at every stage”).

legislative inaction and the worsening health risks associated with climate change demonstrates the pressing need for a decisive and immediate response.

A. The Obstacles of Partisanship, Limited Time, and Political Division

The Biden Administration's Order seeks input from relevant stakeholders and requires that all relevant agencies cooperate and support the conservation goal. More importantly, the plan will most likely need either state government cooperation or the bipartisan support of Congress, which currently requires 60 Senators to end debate and consider the proposal.³⁹ In today's polarized political environment, the use of cloture motions⁴⁰—which are used to indicate a filibuster in the Senate—is significantly⁴¹ higher than during the 20th and 21st centuries. For example, there have been more than 2,000 cloture motions filed since 1917, with about half occurring in just the last 12 years.⁴² Therefore, without bipartisan support, it is very unlikely that the Biden Administration will be able to overcome the Senate filibuster and successfully implement the 30 By 30 plan through federal legislation.

Furthermore, months after President Biden signed Executive Order 14008, Republican opponents attempted to block 30 By 30 through 117 H.R. 5042.⁴³ The bill, introduced by former Representative Liz Cheney, would have expressly overridden the Order so it would have “no force or effect.”⁴⁴ Despite dying shortly after introduction, the bill continues to symbolize the polarized response to President Biden's Order and highlights the unlikelihood that the Order's goal can be achieved via bipartisan legislation.

³⁹ See Molly Reynolds, *What is the Senate Filibuster, and What Would it take to Eliminate it?*, BROOKINGS (Sep. 9, 2020), <https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/> [<https://perma.cc/UQC5-5GUF>]; see also *About Filibusters and Cloture*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> [<https://perma.cc/FJ92-M7KH>].

⁴⁰ CHRISTOPHER DAVIS, CONG. RSCH. SERV., RL98-425, INVOKING CLOTURE IN THE SENATE (2017).

⁴¹ Reynolds, *supra* note 39.

⁴² *Cloture Motions*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/clotureCounts.htm> [<https://perma.cc/ULH5-GWBH>]; see generally Tim Lau, *The Filibuster, Explained*, BRENNAN CENTER (Apr. 26, 2021), <https://www.brennancenter.org/our-work/research-reports/filibuster-explained> [<https://perma.cc/LFS5-2895>] (stating that “the 26 least populous states are home to just 17 percent of the U.S population,” meaning “a group of senators representing a small minority of the country can use the filibuster to prevent the passage of bills with broad public support”).

⁴³ H.R. 5042, 117th Cong. (2021).

⁴⁴ *Id.*

B. The Need for Immediate Action

The Intergovernmental Panel on Climate Change⁴⁵ (“IPCC”) released the Climate Change 2021⁴⁶ Summary for Policymakers (“Summary”), which states it is “unequivocal that human influence has warmed the atmosphere, ocean and land” and that “widespread and rapid changes have occurred.”⁴⁷ The Summary further stated that “human influence has warmed the climate at a rate that is unprecedented in at least the last 2000 years” and is “already affecting many weather and climate extremes in every region across the globe.”⁴⁸ Global warming dangers “include increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation, . . . agricultural and ecological droughts in some regions, . . . intense tropical cyclones; and reductions in Arctic Sea ice, snow cover, and permafrost.”⁴⁹ Furthermore, many of the changes caused by GHGs—namely, changes in the ocean, ice sheets, and global sea level—are irreversible for centuries to millennia.⁵⁰

The dangers highlighted in the report are best summarized by the U.N. Secretary-General, António Guterres, who described the report as “a code red for humanity.”⁵¹ As a consequence, the IPCC Working Group I Co-Chair Panmao Zhai urged countries to reduce GHG emissions, reach net-zero CO2 emissions, and limit other GHGs and air pollutants to avoid further harm from an increasingly warming planet.⁵²

Moreover, the effects of climate change are already impacting the world. The average global temperature in 2019 was “1.1°C above the pre-

⁴⁵ See INT’L PANEL CLIMATE CHANGE, <https://www.ipcc.ch/> [<https://perma.cc/ZY4X-NZEY>] (stating that the “IPCC was created to provide policymakers with regular scientific assessments on climate change, its implications and potential future risks, as well as to put forward adaptations and mitigation options”).

⁴⁶ Richard P. Allan et al., *Climate Change 2021: The Physical Science Basis*, INT’L PANEL CLIMATE CHANGE (Aug. 7, 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [<https://perma.cc/8WSE-GHPW>].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; see generally *Ice is Melting and the Sea Level is Rising*, UNIV. EDINBURGH, SCH. GEOSCIENCES RSCH. (Nov. 4, 2021), <https://www.ed.ac.uk/geosciences/research/impact/ipcc/ar6-report/oceans> [<https://perma.cc/PY7Z-D4PC>].

⁵¹ Allan et al., *supra* note 46.

⁵² *Id.*

industrial level,”⁵³ according to the World Meteorological Organization (“WMO”), an intergovernmental organization with a membership of 193 Member States and Territories. Consequently, the increased global temperature has led to more frequent and extreme weather events, ranging “from heat waves, droughts, flooding, winter storms, hurricanes, and wildfires.”⁵⁴

Programs have been proposed to monitor and stifle the growing threat of climate change. For instance, the Paris Agreement⁵⁵ was enacted by concerned countries, aiming to “limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.”⁵⁶ Still, the difference between 1.5 degrees and 2 degrees is from “destructive to catastrophic.”⁵⁷ At a 2°C increase in pre-industrial level temperatures, “1.7 billion more people will experience severe heat waves at least once every five years, seas will rise almost 4 inches, up to several hundred million more people become exposed to climate-related risks and poverty, coral reefs that support marine environments around the world could decline by 99 percent, and global fishery catches could decline by another 1.5 million tons.”⁵⁸

Solutions are within reach, such as protecting remaining natural environments that would conserve biodiversity and sequester carbon.⁵⁹ Tropical forests, for instance, are home to more than half of all species on

⁵³ *Climate Action is a Priority and a Driver of World Affairs: UN Chief*, WORLD METEOROLOGICAL ORG. (Feb. 4, 2020), <https://public.wmo.int/en/media/news/climate-action-priority-and-driver-of-world-affairs-un-chief> [<https://perma.cc/FM72-3LHU>].

⁵⁴ *Facts about the Climate Emergency*, U.N. ENV’T PROGRAMME, <https://www.unep.org/explore-topics/climate-action/facts-about-climate-emergency> [<https://perma.cc/SL7J-YDYL>].

⁵⁵ *The Paris Agreement*, UNITED NATIONS, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> [<https://perma.cc/H6CF-5FE2>] (stating the Paris Agreement is a legally binding international treaty on climate change, which was adopted by 196 Parties at COP 21 in Paris, on December 12, 2015, and went into effect on November 4, 2016).

⁵⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [<https://perma.cc/U3YM-JY27>].

⁵⁷ *Why is 1.5 Degrees the Danger Line for Global Warming?*, CLIMATE REALITY PROJECT (Mar. 18, 2019, 10:22 AM), <https://www.climaterealityproject.org/blog/why-15-degrees-danger-line-global-warming> [<https://perma.cc/BF3C-VTJB>].

⁵⁸ *Id.*

⁵⁹ Nicole Schwab & Kristin Rechberger, *We Need to Protect 30% of the Planet by 2030. This Is How We Can Do It*, WEFORUM (Apr. 22, 2019), <https://www.weforum.org/agenda/2019/04/why-protect-30-planet-2030-global-deal-nature-conservation/> [<https://perma.cc/6ZHJ-XZDG>].

land and capture more carbon pollution than any other terrestrial ecosystem.⁶⁰ Additionally, mangroves and seagrass beds are sites of great biodiversity and absorb and store large quantities of GHG carbon dioxide from the atmosphere.⁶¹ As such, these locations are vitally important lands to prevent catastrophic levels of global warming, but their protection should not be to the exclusion of other important ecosystems.⁶² As the global rate of species loss exceeds the natural extinction rate by a factor of 1000, well-managed protected areas throughout the world are effective in safeguarding biodiversity and increasing the resilience of ecosystems, both on land and in the ocean.⁶³ Therefore, land conservation is vital to slowing the effects of global warming. Scientists believe halting the loss and degradation of natural systems and promoting their restoration have the potential to contribute over one-third of the total climate change mitigation required by 2030.⁶⁴

Land cover changes can occur in response to both human and climate drivers. For example:⁶⁵

The demand for new settlements often results in the permanent loss of natural and working lands, which can result

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*; see Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 *SCI.* 987, available at https://www.researchgate.net/publication/262787160_The_biodiversity_of_species_and_their_rates_of_extinction_distribution_and_protection [<https://perma.cc/MR3P-8APB>]; but see Gerardo Ceballos et al., *Accelerated Modern Human-induced Species Losses: Entering the Sixth Mass Extinction*, 1 *SCI. ADVANCES* 5 (Jun. 19, 2015), <https://www.science.org/doi/10.1126/sciadv.1400253> [<https://perma.cc/D4CC-9LG9>] (stating that even under “extremely conservative assumptions . . . the average rate of vertebrate species loss over the last century is up to 100 times higher than the background rate,” which reveals an “exceptionally rapid loss of biodiversity over the last few centuries, indicating that a sixth mass extinction is already under way”).

⁶⁴ *Forests and Climate Change*, INT’L UNION CONSERVATION NATURE (Feb. 2021), <https://www.iucn.org/resources/issues-briefs/forests-and-climate-change> [<https://perma.cc/2FY9-TDP8>] (stating that “[a]pproximately 2.6 billion tonnes of carbon dioxide, one-third of the CO₂ released from burning fossil fuels, is absorbed by forests every year”).

⁶⁵ James Wickham et al., *Land Cover and Land-Use Change: Chapter 5*, FOURTH NAT’L CLIMATE ASSESSMENT, <https://nca2018.globalchange.gov/chapter/5/> [<https://perma.cc/6WCW-J9DG>].

in localized changes in weather patterns,⁶⁶ temperature,⁶⁷ and precipitation.⁶⁸ Aggregated over large areas, these changes have the potential to influence Earth's climate by altering regional and global circulation patterns,⁶⁹ changing the albedo (reflectivity) of Earth's surface,⁷⁰ and changing the amount of carbon dioxide (CO₂) in the atmosphere.⁷¹

⁶⁶ Roger Pielke Sr., *Land Use and Climate Change*, 310 *SCI.* 1625, 1625–26, <https://www.science.org/doi/10.1126/science.1120529> [<https://perma.cc/5QNL-AXLD>]; see also William Cotton & Roger Pielke Sr., *Human Impacts on Weather and Climate*, CAMBRIDGE UNIV. PRESS (June 5, 2012), <https://doi.org/10.1017/CBO9780511808319.015> [<https://perma.cc/P3D6-PEHK>].

⁶⁷ Eugenia Kalnay & Ming Cai, *Impact of Urbanization and Land-Use Change on Climate*, 423 *NATURE* 528, 528–31 (May 29, 2003), <https://www.nature.com/articles/nature01675> [<https://perma.cc/P57Z-UXB7>]; see also Robert C. Hale et al., *Land Use/Land Cover Change Effects on Temperature Trends at U.S. Climate Normals Stations*, 33 *GEOPHYSICAL RSCH. LETTERS* 1, 1–4 (June 3, 2006), <https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2006GL026358> [<https://perma.cc/3WZD-ZH4J>].

⁶⁸ Roger Pielke Sr. et al., *An Overview of Regional Land-Use and Land-Cover Impacts on Rainfall*, 59 *TELLUS B: CHEMICAL & PHYSICAL METEOROLOGY* 587, 588–91 (May 11, 2007), <https://www.tandfonline.com/doi/pdf/10.1111/j.1600-0889.2007.00251.x> [<https://perma.cc/Y6T7-FHUV>].

⁶⁹ M. Zhao et al., *The Impact of Land Cover Change on the Atmospheric Circulation*, 17 *CLIMATE DYNAMICS* 467, 467–77 (Mar. 2001), <https://link.springer.com/article/10.1007/PL00013740> [<https://perma.cc/8ZZZ-55BJ>]; see also Rezaul Mahmood et al., *Land Cover Changes and their Biogeophysical Effects on Climate*, 34 *INT'L J. CLIMATOLOGY* 929, 937 (June 21, 2013), available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1444&context=natrespapers> [<https://perma.cc/L6FR-8JGU>]; Alvaro Salazar et al., *Land Use and Land Cover Change Impacts on the Regional Climate of Non-Amazonian South America: A Review*, 128 *GLOB. & PLANETARY CHANGE* 103, 104 (May 2015), <https://www.sciencedirect.com/science/article/abs/pii/S0921818115000557> [<https://perma.cc/GQ4W-KMWX>].

⁷⁰ R. A. Betts et al., *Climate and Land Use Change Impacts on Global Terrestrial Ecosystems and River Flows in the HadGEM2-ES Earth System Model using the Representative Concentration Pathways*, 12 *BIOGEOSCIENCES* 1317, 1317 (Mar. 3, 2015), <https://bg.copernicus.org/articles/12/1317/2015/> [<https://perma.cc/L5UM-66QB>]; see Christopher Barnes & David Roy, *Radiative Forcing over the Conterminous United States due to Contemporary Land Cover Land Use Albedo Change*, 35 *GEOPHYSICAL RSCH. LETTERS* 1, 1–5 (May 9, 2008), <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2008GL033567> [<https://perma.cc/8TVS-988Q>].

⁷¹ R. A. Houghton et al., *The U.S. Carbon Budget: Contributions from Land-Use Change*, 285 *SCI.* 574, 574–78 (July 23, 1999), <https://www.science.org/doi/10.1126/science.285.5427.574> [<https://perma.cc/K2TX-43GC>]; see Richard Houghton, *Carbon Flux to the Atmosphere from Land-Use Changes 1850-2005*, CARBON DIOXIDE INFO. ANALYSIS CTR. (2008), <https://cdiac.ess-dive.lbl.gov/trends/landuse/houghton/houghton.html> [<https://perma.cc/NCG4-U2E8>].

Conversely, climate change can also influence land cover, resulting in a loss of forest cover from climate-related increases in disturbances,⁷² the expansion of woody vegetation into grasslands,⁷³ and the loss of coastal wetlands and beaches due to increased inundation and coastal erosion amplified by rises in sea level.⁷⁴

Therefore, climate change is, indeed, a “code red” for humanity and immediate action must be taken to protect human life.⁷⁵

IV. CONSERVING 30% OF AMERICA’S LAND AND OCEAN WITH THE ANTIQUITIES ACT

By passing the Antiquities Act, Congress delegated “broad power” to the president in the designation of national monuments and reservation of land for those monuments.⁷⁶ Accordingly, the Antiquities Act grants the president substantial flexibility to preserve historical landmarks, expressly leaving the definition of a monument and its boundaries to the president’s

⁷² Mike Flannigan et al., *Impacts of Climate Change on Fire Activity and Fire Management in the Circumboreal Forest*, 14 GLOB. CHANGE BIOLOGY 1, 1 (Nov. 7, 2008), [available at https://sites.ualberta.ca/~flanniga/publications/2009Impact%20of%20climate%20change%20on%20fire%20activity%20and%20fire%20management%20in%20the%20circumboreal%20forest.pdf](https://sites.ualberta.ca/~flanniga/publications/2009Impact%20of%20climate%20change%20on%20fire%20activity%20and%20fire%20management%20in%20the%20circumboreal%20forest.pdf) [https://perma.cc/C2X2-XXMC]; see Barbara J. Bentz et al., *Climate Change and Bark Beetles of the Western United States and Canada: Direct and Indirect Effects*, 60 BIOSCIENCE 602, 602 (Sep. 2010), <https://www.jstor.org/stable/10.1525/bio.2010.60.8.6> [https://perma.cc/K95M-MHPC]; LeRoy Westerling, *Increasing Western US Forest Wildfire Activity: Sensitivity to Changes in the Timing of Spring*, 371 PHIL. TRANSACTIONS ROYAL SOC’Y B 1, 1 (June 5, 2016), <https://royalsocietypublishing.org/doi/10.1098/rstb.2015.0178> [https://perma.cc/6UMV-ARND].

⁷³ Andrew Kulmatiski & Karen Beard, *Woody Plant Encroachment Facilitated by Increased Precipitation Intensity*, 3 NATURE CLIMATE CHANGE 833, 833 (May 26, 2013), <https://www.nature.com/articles/nclimate1904> [https://perma.cc/AK96-Q32Z].

⁷⁴ Sean Vitousek et al., *Doubling of Coastal Flooding Frequency within Decades due to Sea-Level Rise*, 7 SCI. REPS. 1, 1 (May 18, 2017), <https://www.nature.com/articles/s41598-017-01362-7> [https://perma.cc/G2YA-E3TX] (stating “even gradual sea-level rise can rapidly increase the frequency and severity of coastal flooding” and that the “10 to 20 cm of sea-level rise expected no later than 2050 will more than double the frequency of extreme water-level events in the Tropics, impairing the developing economies of equatorial coastal cities and the habitability of low-lying Pacific island nations”).

⁷⁵ Allan et al., *supra* note 46.

⁷⁶ *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2019 WL 2070419, at *8 (D. Or. Apr. 2, 2019), *report and recommendation adopted*, No. 1:17-CV-00285-CL, 2019 WL 4231217 (D. Or. Sept. 5, 2019), *aff’d sub nom. Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023).

discretion.⁷⁷ Upon a claim of abuse of the Antiquities Act, “judicial review of the presidential decision making is limited to: (1) ensuring that the actions by the [p]resident are consistent with constitutional principles,^[78] and (2) ensuring that the [p]resident has not exceeded [their] statutory authority.”⁷⁹ Therefore, the question of whether federal lands are included within a national monument raises “a question only of [p]residential intent, not of [p]residential power.”⁸⁰ Despite the broad powers allocated to the president, Congress can override a president’s decision to dedicate federal land as a national monument and can approve actions that use federal lands despite their status as national monuments.⁸¹

The Antiquities Act states “[t]he [p]resident may . . . declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments,”⁸² and that the parcels “shall be confined to the smallest area.”⁸³ Ambiguity over the Antiquities Act’s words of limitation—“land,” “historic or scientific interest,” and “smallest area”—is frequently examined in court and will determine whether or not the Biden Administration can lawfully use the Antiquities Act to achieve 30 By 30.

As discussed in detail below, President Biden’s dedication of national monuments to accomplish the 30 By 30 initiative comports with Congress’s broad delegation of power under the Antiquities Act.

A. *Land Definition*

The explicit language in the Antiquities Act allows only for the preservation of “land.”⁸⁴ Yet, in order to lawfully use the Antiquities Act to accomplish 30 By 30, the Antiquities Act must confer the president authority to preserve both land and ocean.

Case law has interpreted the word “lands” broadly, including:

⁷⁷ *Id.*

⁷⁸ *Id.* (stating presidents only need to have invoked the correct statutory standards under the Antiquities Act and made explicit findings consistent with those standards).

⁷⁹ *Id.*

⁸⁰ *U.S. v. California*, 436 U.S. 32, 36 (1978).

⁸¹ *Am. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184, 192 (D.D.C. 2019).

⁸² *National Park Service and Related Programs*, 54 U.S.C. § 320301(a). Land can be owned by private and other nonfederal landowners, if donated. *See* CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2021).

⁸³ *National Park Service and Related Programs*, 54 U.S.C. § 320301(b).

⁸⁴ *Id.*

[E]verything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers and waters of every description by which such lands, or any portion of them, may be submerged.⁸⁵

Therefore, “[a]lthough the Antiquities Act refers to ‘lands,’ [the Supreme Court] has recognized that it also authorizes the reservation of waters located on or over federal lands.”⁸⁶ Additionally, the federal government can claim “land” that lies outside the three-mile geographical boundaries of coastal states.⁸⁷ The U.S. Exclusive Economic Zone (“EEZ”), established by former President Ronald Reagan, extends federal ownership from a “line 3 miles off the coast of the United States and its island territories out to 200 nautical miles,” the equivalent of 3.9 billion acres of marine land.⁸⁸ Ergo, the federal government could lawfully conserve marine environments between the three geographical mile boundaries of coastal states and the maximum distance of 200 nautical miles from the coastline. Furthermore, courts interpret “land” to also include submerged lands, such as glaciers.⁸⁹

Although the Antiquities Act limits national monuments to “land” situated on land owned or controlled by the federal government, previous presidents and courts have construed this word liberally, arguing that “land” applies to oceans as well.⁹⁰ In *Cappaert v. United States*, the Supreme Court first held that the Antiquities Act reaches submerged lands and associated waters at the national monument designation of the Devil’s Hole—which included an underground pool of water near Death Valley that housed a rare species of fish.⁹¹ In *United States v. California*, the Supreme Court reaffirmed this holding, stating that there “can be no serious question that the [p]resident . . . had power under the Antiquities Act to reserve the submerged lands and

⁸⁵ Ill. C. R. Co. v. Chicago, 176 U.S. 646, 659 (1900).

⁸⁶ U.S. v. California, 436 U.S. 32, 36 n. 9 (1947).

⁸⁷ See *id.* at 36.

⁸⁸ *Federal Offshore Land*, BUREAU OCEAN ENERGY MGMT., <https://www.boem.gov/oil-gas-energy/leasing/federal-offshore-lands> [<https://perma.cc/JJ8N-MRZN>]; see *The Exclusive Economic Zone: An Exciting New Frontier*, U.S. DEP’T INTERIOR/GEOLOGICAL SURV., <https://pubs.usgs.gov/gip/7000049/report.pdf> [<https://perma.cc/8YGG-4UX6>] (comparing the new 3.9 billion acre area to the “Louisiana Purchase of 1803, which doubled the area of our country by extending its border west to the Rocky Mountains”).

⁸⁹ *Alaska v. U.S.*, 545 U.S. 75, 103 (2005).

⁹⁰ See *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, J., concurring in denial of certiorari).

⁹¹ *Cappaert v. U.S.*, 426 U.S. 128, 141 (1976).

waters” of the Channel Islands National Monument.⁹² Additionally, in *Massachusetts Lobstermen's Association v. Ross*, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the commercial-fishing associations’ challenge to a marine national monument, which was created under the Antiquities Act, because the Act reaches submerged lands and the waters associated with them.⁹³ Lastly, in *Alaska v. United States*, the Supreme Court held that the Antiquities Act of 1906 empowered the president of the United States to reserve submerged lands, even if those lands were within the boundaries of the state.⁹⁴ Therefore, the Court held that the president lawfully expanded Glacier Bay National Monument.⁹⁵ Taken together, these cases indicate that “land” includes features upon the land, including any water.

The land, however, does need to be “owned or controlled by the Federal Government to be national monuments.”⁹⁶ This rule is best illustrated by *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, where two Florida corporations sued for possession and confirmation of title to an unidentified wrecked and abandoned vessel, thought to be the *Nuestra Senora de Atocha*, which sank in the Marquesas Keys in 1622 while en route to Spain.⁹⁷ There, the Supreme Court held that the cargo, worth a contemporary value of \$250 million, was located on the outer continental shelf of the United States and, therefore, beyond the scope of the Antiquities Act’s limiting terms of “lands owned or controlled by the Government of the United States.”⁹⁸

Additionally, the Supreme Court in *United States v. California* ruled that the State of California does not own the land, minerals, and other things of value underlying the Pacific Ocean outside the 3-mile belt seaward from the ordinary low watermark.⁹⁹ Consequently, the federal government owns and operates land, minerals, and other valuables beyond the 3-mile

⁹² U.S. v. California, 436 U.S. 32, 36 (1978); see *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 56 (D.D.C. 2018) (reasoning that “[h]ad later Congresses understood the Antiquities Act not to reach submerged lands in the oceans . . . one might expect them to have effectuated that understanding somewhere in the U.S. Code”).

⁹³ *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 544 (D.C. Cir. 2019).

⁹⁴ *Alaska v. U.S.*, 545 U.S. 75, 107, 110 (2005).

⁹⁵ *Id.* at 109–11.

⁹⁶ National Park Service and Related Programs, 54 U.S.C. § 320301(a).

⁹⁷ *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 333 (5th Cir. 1978).

⁹⁸ *Id.* at 337.

⁹⁹ U.S. v. California, 436 U.S. 32, 42 (1978).

boundary¹⁰⁰ and up to the boundary of the outer continental shelf.¹⁰¹ The Court believed that this allocation of jurisdiction between the state and the federal government would ensure the protection of state rights and resources, while also allowing the federal government to protect and control national interests.¹⁰² However, under *Pollard v. Hagan*, the Supreme Court held that California retained ownership of the shores of its navigable waters, and the soils under them, even after admission into the Union.¹⁰³ Therefore, the federal government has legal rights to the land beyond the 3-mile mark off coastal states, allowing for marine national monuments and marine land preservation beyond that point.

When applied to the Biden Administration's possible use of the Antiquities Act to accomplish the 30 By 30 plan, "land" designations apply to both physical landforms and the ocean. Already, administrations have construed "land" to include land beneath oceans bordering the United States: Papahānaumokuākea Marine National Monument,¹⁰⁴ Mariana Trench Marine National Monument,¹⁰⁵ Pacific Remote Islands Marine National Monument,¹⁰⁶ Rose Atoll Marine National Monument,¹⁰⁷ and The Northeast Canyons and Seamounts Marine National Monument¹⁰⁸ exhibit this practice and its legality.¹⁰⁹

¹⁰⁰ *Id.*

¹⁰¹ *Federal Offshore Land*, *supra* note 88.

¹⁰² *Id.*; see *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (stating "it is quite apparent that if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the [p]resident a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"); see also *U.S. v. Maine*, 469 U.S. 504, 513 (1985) (stating "[w]aters landward of the coastline therefore are internal waters of the State, while waters up to three miles seaward of the coastline are also within a State's boundary as part of the 3-mile ring referred to as the marginal sea").

¹⁰³ *Pollard v. Hagan*, 44 U.S. 212, 230 (1845).

¹⁰⁴ Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36441 (June 15, 2006).

¹⁰⁵ Establishment of the Marianas Trench Marine National Monument, 74 Fed. Reg. 1555 (Jan. 6, 2009).

¹⁰⁶ Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 6, 2009).

¹⁰⁷ Establishment of the Rose Atoll Marine National Monument, 74 Fed. Reg. 1577 (Jan. 6, 2009).

¹⁰⁸ Northeast Canyons and Seamounts Marine National Monument, 81 Fed. Reg. 65159 (Sep. 15, 2016).

¹⁰⁹ See *Marine National Monuments*, U.S. FISH & WILDLIFE SERV. <https://www.fws.gov/glossary/marine-national-monument> (last visited Mar. 19, 2024).

Opponents argue that the ordinary meaning of the word “land” excludes oceans.¹¹⁰ However, such arguments have been repeatedly rejected, such as in *Massachusetts Lobstermen's Association v. Ross*, where the United States District Court for the District of Columbia court questioned, “what about that part of the earth that lies beneath the seas?”¹¹¹ To answer this question, opponents of a broad definition of land point to the plain definition of the term.¹¹² Yet, the Supreme Court has already expressly defined “lands” as including “everything which the land carries or which stands upon it, . . . carries all pools and ponds, non-navigable water, and waters . . . [and] may be submerged.”¹¹³ As stated in *Queen v. Leeds & L. Canal Co.*, “[l]ands are not the less land for being covered with water.”¹¹⁴ Therefore, the Antiquities Act protects both dry and wet lands.¹¹⁵

In total, the Supreme Court has concluded—on three separate occasions—that the Antiquities Act does reach submerged lands and the water associated with them.¹¹⁶ Furthermore, the Court in *Alaska* created a two-part test to determine whether the federal government had title to the submerged lands: first, it asked whether the federal government clearly intended to include submerged lands within a federal reservation; second, it inquired whether the federal government had expressed its intent to retain federal title to submerged lands within the reservation.¹¹⁷ Thus, opponents of a broad definition of “land” cannot correctly argue that the inclusion of submerged lands is merely *dictum*; it was a holding.¹¹⁸ Nevertheless, even if

(showing that there are “four marine national monuments in the Pacific Ocean and one in the Atlantic”) [<https://perma.cc/MT9F-9ZRS>].

¹¹⁰ See, e.g., *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 57 (D.D.C. 2018).

¹¹¹ *Id.* at 57.

¹¹² Establishment of the Pacific Remote Islands Marine National Monument, 74 Fed. Reg. 1565 (Jan. 6, 2009).

¹¹³ *Id.*

¹¹⁴ *Id.*; *Queen v. Leeds & L. Canal Co.*, 7 Ad. & El. 671, 685.

¹¹⁵ See *Queen*, 7 Ad. & El. at 685.

¹¹⁶ See *Cappaert v. U.S.*, 426 U.S. 128, 131, 141–42 (1976) (concluding that Devil’s Hole was properly reserved under the Antiquities Act); see also *U.S. v. California*, 436 U.S. 32, 36 (1978) (holding that there “can be no serious question . . . that the [p]resident . . . had power under the Antiquities Act to reserve the submerged lands and waters . . . as a national monument”); *Alaska v. U.S.*, 545 U.S. 75, 103 (2005) (affirming that the “Antiquities Act empowers the [p]resident to reserve submerged lands”).

¹¹⁷ *Alaska*, 545 U.S. at 100.

¹¹⁸ *Dictum*, Black’s Law Dictionary 1102 (8th ed. 2004) (stating “dictum” is “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”); see *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 56–57.

the statement was treated as *dictum*, the language of the Supreme Court must still be treated as authoritative.¹¹⁹

Likewise, arguments that other acts, such as the National Marine Sanctuaries Act, have impliedly repealed the Antiquities Act's applicability to oceans have been rejected¹²⁰ because "repeals by implication are not favored"¹²¹ and courts do not infer a statutory repeal unless the later statute "expressly contradict[s] the original act" or unless such a construction "is absolutely necessary in order that the words of the later statute shall have any meaning at all."¹²²

Furthermore, and as indicated, past presidents frequently dedicated submerged lands as national monuments, including Devil's Hole, Channel Islands, Glacier Bay monuments, Fort Jefferson National Monument, Buck Island Reef National Monument, and Papahānaumokuākea Marine National Monument.¹²³

Therefore, under current court precedent, "land" has been interpreted to include both dry and wet land. Thus, the federal government may be able to lawfully preserve 30% of America's lands through the Antiquities Act.

B. Historic or Scientific Interest Definition

The Antiquities Act explicitly states that land may only be dedicated as a national monument for the preservation of a "historic or scientific interest."¹²⁴ Therefore, to accomplish the 30 By 30 goal using the Antiquities Act, the Biden Administration must show that at least 30% of America's lands and oceans are of historic or scientific interest.

¹¹⁹ See *U.S. v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997).

¹²⁰ See *id.* at 58–60 (stating that the Antiquities Act does not "conflict with the National Marine Sanctuaries Act, which gives the Executive Branch the authority to designate certain areas of the marine environment as 'national marine sanctuaries' and to issue regulations protecting those areas," despite the plaintiffs' claims that the "Sanctuaries Act impliedly repealed the Antiquities Act, at least as it applied to the oceans" and that "oceans are excluded from the reach of the Antiquities Act"); see also *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1138 (2002) (stating that the contention that the presidential proclamations establishing national monuments "facially defy congressional intent regarding the scope and purpose of 'a host' of other statutes enacted to protect various archeological and environmental values . . . misconceives federal laws as not providing overlapping sources of protection").

¹²¹ *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

¹²² *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

¹²³ See *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 57 (D.D.C. 2018).

¹²⁴ National Park Service and Related Programs, 54 U.S.C. § 320301(a).

The Antiquities Act intends to facilitate the preservation of objects of historical importance.¹²⁵ The Act also intends to promote the “public interest in and respect for the culture and heritage of [N]ative Americans [which] requires protection of their sacred places, past and present, against commercial plundering.”¹²⁶ However, presidential authority under the Antiquities Act is not limited to protecting only archeological sites; it includes items such as ecosystems and scenic vistas as well.¹²⁷ Additionally, the “interest” can include water preservation because it is a feature of the reservation of national monuments.¹²⁸ Furthermore, the president does not need to fulfill any detailed requirement to justify a historic or scientific interest and designate a national monument.¹²⁹

The Antiquities Act’s broad language, illustrating Congress’s desire for the designation and protection of national monuments of “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,”¹³⁰ has long facilitated the conservation of varied landscapes throughout the United States. For instance, in *Cappaert*, the Court held that “the pool in Devil's Hole [National Monument] and its rare inhabitants are ‘objects of historic or scientific interest.’”¹³¹ Additionally, because the president designated the area as a national monument to include water, the Court held that the United States acquired “water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement” the president’s national monument proclamation.¹³² Similarly, in *Mountain States Legal Foundation v. Bush*, the United States Court of Appeals for the District of

¹²⁵ See *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 341 (5th Cir. 1978).

¹²⁶ *U.S. v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

¹²⁷ See *Cappaert v. U.S.*, 426 U.S. 128, 141–42 (1976); see also *Mountain States Legal Found. v. Bush*, 353 U.S. App. D.C. 306, 311 (2002) (holding the argument that “Congress intended only that rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, were to be designated” failed “as a matter of law in light of Supreme Court precedent”).

¹²⁸ See *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976).

¹²⁹ See *Tulare Cty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002) (stating the Antiquities Act authorizes the president, “in [their] discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and that “identifying historic sites and objects of scientific interest located within the designated lands” is all that is required to “advert[] to the statutory standard”); see also *infra* notes 140–44. *But see infra* notes 205–07.

¹³⁰ *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Jan. 27, 2021).

¹³¹ *Cappaert*, 426 U.S. at 142; see *Cameron v. U.S.*, 252 U.S. 450, 455 (1920) (holding that the Grand Canyon is an object of “unusual scientific interest”).

¹³² *Cappaert*, 426 U.S. at 147.

Columbia Circuit rejected the plaintiffs' assertion that "Congress intended only that rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts, were to be designated" because the Supreme Court interpreted the Act to authorize the president to designate the Grand Canyon and similar sites as national monuments.¹³³ Therefore, these two cases make clear the Act's pivotal role in conserving diverse landscapes, not only for preserving the nation's cultural heritage but also its natural heritage.

Montana Wilderness Association v. Connell, which initially appears as an outlier because it presented a different question than in *Cappaert* and *Mountain States Legal Foundation*, still reached a similar conclusion.¹³⁴ There, plaintiffs argued that the Bureau of Land Management ("BLM") had not adequately protected the Upper Missouri River Breaks National Monument's Bullwhacker area, "as opposed to the wildlife habitat and archeological and historic sites *within* the Bullwhacker area, *an object of the Monument*."¹³⁵ The national monument proclamation, however, only described an "array of biological, geological, and historical objects of interest," never explicitly referencing the need to protect the area itself—only the objects within that area.¹³⁶ Consequently, the court upheld the BLM's interpretation of only needing to protect the *objects* of the monument because the court deemed it a reasonable interpretation of the proclamation and one entitled to deference under *Kester v. Campbell*.¹³⁷ Thus, despite nuanced arguments, caselaw is clear the primary purpose of the Act is to conserve objects and areas the president declares to be of interest, thereby delegating broad authority to grant protections to both cultural and natural features.

Although the explicit desire of Congress was to protect Native American cultural sites, the Act has been used to protect against the "commercial plundering" of public lands.¹³⁸ Two cases best illustrate this proactive approach to land protection. First, *Cappaert v. United States* illustrates that the Act not only protects the land and objects within a national monument but also the "unappropriated appurtenant water *sufficient to maintain*" the scientific value of designated national monuments.¹³⁹

¹³³ *Mountain States Legal Found. v. Bush*, 353 U.S. App. D.C. 306, 311 (2002).

¹³⁴ *See Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1000–01 (9th Cir. 2013).

¹³⁵ *Id.* at 1000 (emphasis added).

¹³⁶ *Id.*

¹³⁷ *See id.* *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981) (holding that courts review agency interpretations of executive orders with "great deference").

¹³⁸ *See U.S. v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974); *see also* *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, J., concurring in denial of certiorari) (stating "[t]he Antiquities Act originated as a response to widespread defacement of Pueblo ruins in the American Southwest").

¹³⁹ *Cappaert v. U.S.*, 426 U.S. 128, 147 (1976) (emphasis added).

Additionally, the Supreme Court found in that case that the president's Antiquities Act authority is not limited to protecting only archeological sites.¹⁴⁰ Second, in *Tulare County v. Bush*, the United States Court of Appeals for the District of Columbia Circuit held "[n]o such requirement exists" for the president to "include a certain level of detail" in a national monument proclamation.¹⁴¹ Further, the court held that the Act leaves "'other objects of historic or scientific interest'" at the president's discretion, thereby making it difficult to argue a proclamation includes "nonqualifying objects for protection."¹⁴² Therefore, a proclamation's inclusion of objects such as "ecosystems and scenic vistas" does not violate the terms of the Antiquities Act.¹⁴³

Similarly to the Court's acceptance of using the Antiquities Act to protect Devil's Hole's "pool and its rare inhabitants"¹⁴⁴ as "objects of historic or scientific interest," the Court in *Cameron v. United States* held that the Grand Canyon was found to be an "object of unusual scientific interest" because of its status as the greatest eroded canyon in the United States.¹⁴⁵ Likewise, the United States Court of Appeals for the District of Columbia Circuit held the Sonoran Desert was also an "object of unusual scientific interest" as it is a "desert ecosystem containing an array of biological, scientific, and historic resources."¹⁴⁶

The Antiquities Act has been used by presidents to conserve areas of the natural environment for a variety of different reasons. The purpose has not been limited to the preservation of Indian reservations or Indian relics.¹⁴⁷ Thus, the president has broad authority in designating national monuments for an array of "historic and scientific interest[s]."¹⁴⁸ This broad authority would likely include the authority to conserve oceans and lands to rectify environmental concerns.

¹⁴⁰ *Id.* at 141–42.

¹⁴¹ *Tulare Cty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002).

¹⁴² *Id.* at 1141–42.

¹⁴³ *Id.* at 1142.

¹⁴⁴ *Cappaert*, 426 U.S. at 142.

¹⁴⁵ *Cameron v. U.S.*, 252 U.S. 450, 455, 465 (1920).

¹⁴⁶ *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002).

¹⁴⁷ *Cappaert*, 426 U.S. at 147. *But see* *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, J., concurring in denial of certiorari) (referencing an "antiquity" to be "defined as a 'relic or monument of ancient times,' Webster's International Dictionary of the English Language 66 (1902)").

¹⁴⁸ *Cameron*, 252 U.S. at 455, 465–66; *see also Cappaert*, 426 U.S. at 142; *U.S. v. California*, 436 U.S. 32, 33 (1978).

With the passage of time and the escalating severity of climate change effects, both existing and potential future national monuments are increasingly vulnerable, further justifying the president's need to use the Antiquities Act.¹⁴⁹ Global warming has the potential to affect historical sites, national landmarks, essential services, and human and natural life; consequently, there is no greater or more pressing issue than addressing this pending crisis. The Biden Administration, upon nominating land for national monuments, may successfully claim that the dangers and consequences of global warming are so apparent that the prevention of further harm is of historical or scientific importance.¹⁵⁰ The growing trend of environmental law cases, specifically climate change litigation, illustrates the growing concern over global warming and its harmful effects.¹⁵¹

In the United States, the most predominant case is *Juliana v. United States*, wherein plaintiffs claimed that the president, the United States, and federal agencies, violated: “(1) the plaintiffs’ substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs’ rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs’ rights under the Ninth Amendment; and (4) the public trust doctrine” for failing to combat climate change.¹⁵² “The district court denied the government’s motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a ‘climate system capable of sustaining human life.’”¹⁵³ The Ninth Circuit, however, reversed the district court’s order and remanded the case with instructions to dismiss for lack of Article

¹⁴⁹ See Rachel Hartigan, *Climate Change Threatens National Landmarks*, NAT’L GEOGRAPHIC (May 20, 2014), <https://www.nationalgeographic.com/science/article/140520-threatened-historic-landmarks-climate-change> [<https://perma.cc/FLB3-E72U>].

¹⁵⁰ See *supra* notes 66-75.

¹⁵¹ *Global Trends in Climate Change Litigation: 2020 Snapshot*, LONDON SCH. ECON. & POL. SCI. (2020), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf [<https://perma.cc/A4XS-K93J>] (stating “1,587 cases of climate litigation have been identified as being brought between 1986 and the end of May 2020,” with the “majority of climate litigation cases recorded since 1986 have occurred from the mid-2000s onwards”).

¹⁵² *Juliana v. U.S.*, 947 F.3d 1159, 1165 (9th Cir. 2020); see generally *Comment on: Juliana v. United States*, 134 HARV. L. REV. 1929, 1936 (Mar. 10, 2021), <https://harvardlawreview.org/2021/03/juliana-v-united-states/> [<https://perma.cc/WLL9-R7R3>] (stating the decision “may come to stand for broad and significant limitations on the powers of federal district courts sitting in equity”).

¹⁵³ *Juliana*, 947 F.3d at 1165.

III standing due to a lack of redressability.¹⁵⁴ Plaintiffs sought “not only to enjoin the [president] from exercising discretionary authority expressly granted by Congress, . . . but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands.”¹⁵⁵ Even the plaintiffs conceded this would not, alone, solve global climate change.¹⁵⁶ Therefore, the court held that the “plaintiffs’ case must be made to the political branches or to the electorate at large,” and not an Article III court, which would have difficulty supervising and enforcing their desired remedy.¹⁵⁷

Judge Staton dissented from the order, stating that “[n]o case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists,” but that the “Constitution does not condone the Nation’s willful destruction.”¹⁵⁸ Judge Staton argued that “determining when a court must step in to protect fundamental rights is not an exact science” and one that has been illustrated by the Supreme Court’s decision to desegregate schools ninety-one years after the Emancipation Proclamation in *Brown v. Board of Education*.¹⁵⁹

Therefore, despite the loss experienced by environmental activists in *Juliana*, the Biden Administration could help provide the remedy plaintiffs sought by taking affirmative steps to stabilize the global climate.¹⁶⁰ As noted by the Ninth Circuit in *Juliana*, the case record made it “increasingly difficult . . . for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions.”¹⁶¹ Thus, President Biden may capitalize on the fact that there is “little basis for denying that climate change is occurring at an increasingly rapid pace,”¹⁶² as noted by the Ninth Circuit Court of Appeals, and further justify the scientific and/or historical need to dedicate more lands as national monuments to stave off climate change.

More recently in the United States, climate activists won a monumental case in *Held v. Montana*.¹⁶³ There, sixteen young climate

¹⁵⁴ *Id.* at 1171.

¹⁵⁵ *Id.* at 1170.

¹⁵⁶ *Id.* at 1171.

¹⁵⁷ *Id.* at 1173, 1175.

¹⁵⁸ *Id.* (Staton, J., dissenting).

¹⁵⁹ *Id.* at 1191 (stating “arc of the moral universe is long, but it bends towards justice”).

¹⁶⁰ *See id.* at 1173, 1175; Hartigan, *supra* note 149, *supra* notes 65-74.

¹⁶¹ *Juliana*, 947 F.3d at 1175.

¹⁶² *Id.* at 1166.

¹⁶³ Zahra Hirji, *Youths Sued Montana over Climate Change and Won. Here’s Why it Matters*, SUN J. (Aug. 20, 2023), <https://www.sunjournal.com/2023/08/20/youths-sued->

activists sued the state of Montana over a provision in the Montana Environmental Policy Act that limits climate change considerations during environmental reviews of proposed fossil fuel projects.¹⁶⁴ The activists alleged that the law conflicted with Montana’s Constitution, which states that the “state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”¹⁶⁵ After a trial, the Montana state judge ruled in favor of the activists, holding that the state law limiting the consideration of climate change in environmental reviews was unconstitutional.¹⁶⁶ Although the ruling applies only to the State of Montana, and an appeal is all but guaranteed, the decision is important because it could influence other climate cases in the future, creates a roadmap for future lawsuits, and illustrates the movement behind climate change litigation.¹⁶⁷ Aside from Montana, at least six other states—including Hawaii, Illinois, Massachusetts, New York, Pennsylvania, and Rhode Island—have an express, constitutionally protected right to a healthy environment.¹⁶⁸

Abroad, in *Urgenda Foundation v. State of the Netherlands*, a Dutch environmental group, the Urgenda Foundation, and nine hundred Dutch citizens sued the Dutch government to require more action to prevent global climate change.¹⁶⁹ The case centered on whether the Dutch government was required to limit its GHG emissions to 25% below its 1990s levels by 2020 to help reach the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions.¹⁷⁰ In a landmark ruling, the Supreme Court of the Netherlands held that the Dutch government had a duty to take climate change mitigation measures due to the “severity of the consequences of climate change and the great risk of climate change occurring.”¹⁷¹

Yet, courts have foreshadowed that not all interests may qualify as “historic or scientific interest” under the Antiquities Act.¹⁷² In *Wyoming v. Franke*, the United States District Court for the District of Wyoming posed a hypothetical, stating that “if a monument were to be created on a bare stretch

montana-over-climate-change-and-won-heres-why-it-matters/ [https://perma.cc/C869-RW4R].

¹⁶⁴ *Id.*

¹⁶⁵ Mont. Const. Art. IX, § 1.

¹⁶⁶ Hirji, *supra* note 163.

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ Hof’s-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See, e.g., Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).

of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act.”¹⁷³ This proposition is *dicta* but foreshadows that monument designations across bare stretches of land—without substantial evidence of historic or scientific interest—are likely outside the scope of the Antiquities Act. Yet even there, the court noted that “evidence of experts and others as to what the area contains in regard to objects of historic and scientific interest” will bind a court in finding that the monument designation was justified.¹⁷⁴

Further, the court in *Wyoming v. Franke* stated that “if the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.”¹⁷⁵ Congress has delegated its authority to the president to establish national monuments under the condition that the objects reserved be of historic or scientific interest—a broad limitation that is under the sole discretion of the president.¹⁷⁶ Therefore, as long as there is evidence of some historic and scientific interest, the designation is proper. If Congress disagrees with the president’s use of its delegated authority, then it is up to Congress—not the courts—to step in and rectify its intent.

Even if the courts do step in, plaintiffs who wish to challenge a national monument designation on the grounds of lack of “historic or scientific interest” must allege facts to support the claim that the president acted beyond their authority under the Antiquities Act.¹⁷⁷ This is a high burden to meet, as a presidential proclamation that identifies particular objects or sites of interest and recites grounds for the designation comports with the Act’s policies and requirements.¹⁷⁸ Furthermore, courts typically

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 895–96.

¹⁷⁵ *Id.* at 896 (emphasis added).

¹⁷⁶ See generally *Martin v. Mott*, 25 U.S. 19, 31 (1827) (stating “[t]he law does not provide for any appeal from the judgment of the [p]resident, or for any right in subordinate officers to review his decision, and in effect defeat it”).

¹⁷⁷ See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002); see also *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004).

¹⁷⁸ *Mountain States Legal Found.*, 306 F.3d at 1137; *Utah Ass’n of Ctys.*, 316 F.Supp.2d. at 1178.

resort to discerning congressional intent in interpreting an ambiguous statute, a circumstance that is not applicable to the straightforward Antiquities Act.¹⁷⁹

Therefore, it is likely that the Biden Administration could successfully preserve large tracts of land with a historic or scientific interest in climate change resilience in order to accomplish the 30 By 30 plan, especially because the Supreme Court itself has held that “[t]he harms associated with climate change are serious and well recognized” and that “a number of environmental changes have already inflicted significant harm.”¹⁸⁰ Since scientists have reached a “strong consensus” that climate change will result in a rise in sea levels by the end of the century, a significant reduction in water storage in winter snowpack in mountainous regions, an increase in the spread of disease, and rising ocean temperatures, the requirement that monument designations be made for historic or scientific interests will likely be met.¹⁸¹ Moreover, presidential proclamations that dedicate national monuments for “natural resources and ecosystems” have already been upheld by the courts to fulfill a portion of the Act’s requirement.¹⁸² Similar language could be used to protect lands across the country, allowing for the protection and dedication of scientific and historically valuable natural resources and ecosystems as national monuments, which would help stave off climate change and fulfill the goal of the 30 By 30 plan.

C. *Smallest Area Definition*

The final limitation on the president’s dedication of national monuments is that the monuments must be the “smallest area compatible with the proper care and management of the objects to be protected.”¹⁸³ While courts have described the Act as intended for “small land areas surrounding specific objects,” case law unequivocally illustrates that the judicial inquiry does not extend to determining “whether the [p]resident’s designation best fulfill[s] the general congressional intention embodied in the Antiquities Act.”¹⁸⁴

Early versions of the Act included a maximum size limitation of 640 acres, but that provision was deleted before the final passage and enactment

¹⁷⁹ See *Utah Ass’n of Ctys*, 316 F. Supp. 2d at 1186.

¹⁸⁰ *Mass. v. Env’t Prot. Agency*, 549 U.S. 497, 521 (2007).

¹⁸¹ See *id.* at 521–22.

¹⁸² See *Mass. Lobstermen’s Ass’n v. Ross*, 945 F.3d 535, 544 (2019); see also *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (2002) (stating “[i]nclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features”).

¹⁸³ National Park Service and Related Programs, 54 U.S.C. § 320301(b).

¹⁸⁴ *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004).

of the law.¹⁸⁵ Thus, Congress clearly manifested an intention to delegate decision-making to the sound discretion of the president, so “how the [p]resident chooses to exercise the discretion Congress has granted [them] is not a matter for [judicial] review.”¹⁸⁶

Although national monuments must still be of the smallest area,¹⁸⁷ neither the legislature nor the courts have defined this phrase, illustrating that such designation is within the president’s *sole* discretion.¹⁸⁸ This idea is reflected in *Massachusetts Lobstermen’s Association v. Ross*, wherein the United States District Court for the District of Columbia held that to “obtain judicial review of claims about a monument’s size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem within its boundaries.”¹⁸⁹ There, the Lobstermen’s Association argued that the Northeast Canyons and Seamounts Marine National Monument reserved large areas of ocean beyond the objects the Proclamation designated for protection.¹⁹⁰ However, the court rejected the commercial-fishing associations’ position, holding it was “based on the incorrect factual assumption that the only objects designated for protection are the canyons and seamounts themselves,” despite the Proclamation’s inclusion of the phrase “the natural resources and ecosystems *in and around them*.”¹⁹¹ Therefore, the bar establishing a national monument is relatively low: as long as the national monument designation is of a size that protects the items of interest and purpose for the proclamation, it is likely sufficient under the Act.¹⁹²

Opponents argue that presidents have incorrectly used the Act to carry out their environmental agendas, contrary to the original congressional intent.¹⁹³ These accusations are insufficient alone; instead, opponents must “allege that some part of the [m]onument did not, in fact, contain natural

¹⁸⁵ *Utah Ass’n of Ctys. v. Clinton*, No. 2:97-cv-479, 1999 U.S. Dist. LEXIS 15852, at *10 (D. Utah Aug. 11, 1999); H.R. REP. No. 59-2224, at 1 (1906).

¹⁸⁶ *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

¹⁸⁷ 54 U.S.C. § 320301.

¹⁸⁸ *See Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, J., concurring in denial of certiorari) (stating the Supreme Court “may be presented with other and better opportunities to consider this issue without the artificial constraint of the pleadings in this case”).

¹⁸⁹ *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 67 (D.D.C. 2018).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 67–68 (emphasis added).

¹⁹² *See id.*

¹⁹³ *See Utah Ass’n of Ctys.*, 316 F. Supp. 2d at 1186; *see also Wyoming v. Franke*, 58 F. Supp. 890, 894 (D. Wyo. 1945).

resources that the [p]resident sought to protect.”¹⁹⁴ Accordingly, the accusation must offer specific, nonconclusory factual allegations establishing a problem with the national monument’s boundaries.¹⁹⁵ This is most clearly illustrated by *Tulare County*, where the court ruled that, despite a determination that only six percent of the Giant Sequoia National Monument comprised sequoia groves, the plaintiffs had failed to demonstrate that the monument exceeded the “smallest area.”¹⁹⁶ Upon appeal, the United States Court of Appeals for the District of Columbia Circuit emphasized that the president’s intentions in the proclamation were to safeguard both giant sequoias and the surrounding ecosystem.¹⁹⁷ Similarly to *Tulare County*, in *Massachusetts Lobstermen's Association v. Ross*, the fishermen alleged that the national monument improperly reserved large areas of submerged land beyond just the canyons and seamounts.¹⁹⁸ There, the court held the monument was designated to protect “the natural resources and ecosystems in and around” the specific items of significance, which satisfied the Act’s requirements.¹⁹⁹ Together, these cases illustrate the difficult burden opponents face when challenging a president’s dedication of a national monument under a theory of being “grossly oversized.”²⁰⁰

Nevertheless, critics persist in referencing congressional records in an effort to capture Congress’s alleged intention of restricting national monuments to small land areas surrounding specific objects.²⁰¹ House Report No. 2224 states that “there are scattered throughout the southwest quite a large number of very interesting ruins . . . the bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics.”²⁰²

¹⁹⁴ *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002), *cert. denied*, 540 U.S. (U.S. Oct. 6, 2003) (No. 02-1623); *see* *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 544 (2019).

¹⁹⁵ *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 67 (D.D.C. 2018).

¹⁹⁶ *Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 25 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

¹⁹⁷ *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); Establishment of the Giant Sequoia National Monument, 65 Fed. Reg. 24095 (Apr. 15, 2000).

¹⁹⁸ *Mass. Lobstermen's Ass'n*, 945 F.3d at 544.

¹⁹⁹ *Id.*

²⁰⁰ *Tulare Cnty.*, 306 F.3d at 1142 (internal quotation marks omitted).

²⁰¹ *See* *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004) (declining “plaintiffs’ invitation to substitute its judgment for that of the [p]resident, particularly in an arena in which the congressional intent most clearly manifest is an intention to delegate decision-making to the sound discretion of the [p]resident”).

²⁰² *Id.*; H.R. REP. NO. 59-2224, at 1 (1906).

The Supreme Court, as illustrated in *Massachusetts Lobstermen's Association v. Raimondo*, remains skeptical of the Antiquities Act, stating that the “smallest area compatible” requirement does not “pose any meaningful restraint.”²⁰³ Specifically, the Court stated, “[a] statute permitting the [p]resident in his sole discretion to designate as monuments ‘landmarks,’ ‘structures,’ and ‘objects’—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.”²⁰⁴ Thus, as noted by the Supreme Court, the creation of marine national monuments “demonstrates how far we have come from indigenous pottery.”²⁰⁵ Despite all these comments, the Court nevertheless denied the petition for a writ of certiorari, which asked the Supreme Court to define the “smallest area compatible,” because the petition did not “satisfy [the Court’s] usual criteria for granting certiorari”—i.e., no court of appeals has yet addressed the question.²⁰⁶

Despite the Supreme Court’s sudden concerns about the potential unchecked power under the Act, the Court fails to acknowledge the long history of presidents utilizing the Act to conserve large tracts of land. Notably, in 1978, Former President Jimmy Carter designated the Wrangell-St. Elias National Monument,²⁰⁷ which encompassed a monumental 10,950,000 acres.²⁰⁸ Furthermore, Congress later adopted Wrangell-St. Elias National Monument as a national park and even increased the size of the protected lands to a total of 13.2 million acres, affirmatively approving of the president’s discretion.²⁰⁹ Therefore, the Court’s concerns as to an allegedly unchecked power of the president are unsubstantiated; Congress already provides a meaningful check as to the president’s power.

Despite the clear history of the Act, the opposition will likely argue that the dedication of an aggregated 440 million acres of national monuments is antithetical to the Antiquities Act’s intent. However, presidents have used the Antiquities Act to protect well over 100 land and marine areas, totaling

²⁰³ *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, J., concurring in denial of certiorari).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Wrangell-St. Elias National Monument*, 93 Stat. 1470 (Dec. 1, 1978).

²⁰⁸ *Mission and Purpose of Wrangell-St. Elias*, NAT’L PARK SERV. (Apr. 14, 2015), <https://home.nps.gov/wrst/learn/management/mission-and-purpose.htm> [<https://perma.cc/N39F-CF9Q>].

²⁰⁹ *See America’s Largest National Park*, NAT’L PARK SERV. (Oct. 13, 2020), <https://www.nps.gov/wrst/index.htm> [<https://perma.cc/CX8W-G5CH>].

hundreds of millions of acres.²¹⁰ Former President Obama, who has designated more land, by hundreds of millions of acres, than any other president, designated 8.8 million acres in new monuments and added 544.7 million acres of land to existing monuments—a total of 553.6 million acres within his two four-year terms.²¹¹ More importantly, all of former President Obama’s proclamations have been upheld by the courts, including the expansion of Papahānaumokuākea Marine National Monument by 283.4 million acres on August 26, 2016.²¹²

In sum, the Biden Administration will likely be able to designate sufficient national monuments to accomplish 30 By 30 by utilizing the analysis of various district courts and appeals courts across America but might be limited by the Supreme Court, which has already implied—through *dicta*—its inclination to limit the scope of the Antiquities Act.²¹³ Thus, this is the toughest hurdle for the Biden Administration, or any future administration, to overcome.

V. THE LESSER-KNOWN BARRIERS

When a president designates a national monument under the Antiquities Act, Congress,²¹⁴ the courts,²¹⁵ and future presidents²¹⁶ can

²¹⁰ ALEXANDRA M. WYATT, CONG. RSCH. SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS (2016); see Robert Lawrence, *The Antiquities Act, Graphed*, COGNITIVE FEEDBACK LOOP (Jan. 27, 2017), <https://cognitivefeedbackloop.com/https-medium-com-cognitive-feedback-loop-2017-01-27-6c92f373a996> [<https://perma.cc/2M46-UG4Y>] (stating the Antiquities Act has preserved over “843 million acres of federal land”).

²¹¹ CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2021).

²¹² See *id.*; see also *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 55 (D.D.C. 2018) (stating that “review would be available only if the plaintiff were to offer plausible and detailed factual allegations that the [p]resident acted beyond the boundaries of authority that Congress set” and that “Plaintiffs have not offered sufficient factual allegations to succeed”); but see *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980–81 (2021) (Roberts, J., concurring in denial of certiorari) (stating the Antiquities Act “transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea” and that “[n]o court of appeals has addressed . . . how to interpret the Antiquities Act’s ‘smallest area compatible’ requirement”).

²¹³ See *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, J., concurring in denial of certiorari).

²¹⁴ H.R. 5042, 117th Cong. (2021).

²¹⁵ *Wyo. v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945); *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, J., concurring in denial of certiorari).

²¹⁶ *Modifying the Grand Staircase-Escalante National Monument*, 82 Fed. Reg. 58089 (Dec. 4, 2017); *Review of Designations Under the Antiquities Act*, 82 Fed. Reg. 20429 (Apr. 26, 2017); Nadja Popovich, *Bears Ears National Monument Is Shrinking. Here’s*

provide a meaningful check to a president's designation power. The Biden Administration's goal to conserve 30% of the United States' land and oceans by 2030 can be accomplished,²¹⁷ but there are additional barriers to achieving this goal, such as legal ambiguity surrounding the abolition of national monuments; historical precedents and interpretations; the *Youngstown* framework for analyzing presidential power²¹⁸; legislative attempts, congressional inertia, and the Property Clause; and recent monument reductions as well as President Biden's conservation actions.

A. Legal Ambiguity Surrounding Monument Abolishment

The Antiquities Act grants the president sole authority to designate national monuments, which will then be cared for by federal agencies.²¹⁹ The Act does not delegate power to the president to reduce, let alone abolish, national monuments.²²⁰ Therefore, under a narrow interpretation, presidents likely cannot abolish or significantly reduce the size of national monuments, meaning that the Biden Administration's creation of national monuments to achieve the 30 By 30 plan could be successful despite a future change in administrations.

B. Historical Precedents and Interpretations

The historical inquiry led by former President Franklin D. Roosevelt and Attorney General Homer Cummings in 1938, along with the application of the nondelegation doctrine, demonstrates the long-established belief that presidents lack the authority to abolish national monuments, as they are considered equivalent to acts of Congress and the Act did not provide an intelligible principle for the abolition of national monument designations. As analyzed in other legal scholarship,²²¹ former President Franklin D.

What Is Being Cut, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/interactive/2017/12/08/climate/bears-ears-monument-trump.html> [<https://perma.cc/3Y4K-H5CC>].

²¹⁷ See Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021).

²¹⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

²¹⁹ See *Kester v. Campbell*, 652 F.2d 13, 16 (9th Cir. 1981) (holding that an agency's interpretation is considered reasonable unless plainly erroneous or inconsistent); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that there must be a rational connection between the facts found and the choice made by agencies).

²²⁰ National Park Service and Related Programs, 54 U.S.C. § 320301.

²²¹ See, e.g., Christian Termyn, *No Take Backs: Presidential Authority and Public Land Withdrawals*, 19 SUSTAINABLE DEV. L. & POL'Y 4, 9-10 (2019); John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENVTL. L. REV. 1, 30-31 (2019); Kevin O. Leske, "Un-

Roosevelt asked Attorney General Homer Cummings to consider whether he could abolish Castle Pinckney National Monument.²²² After review, Attorney General Cummings concluded that the president does not have the authority to abolish national monuments because national monument designations are equivalent to acts of Congress, although earlier presidents have reduced the size of monuments.²²³ Therefore, Attorney General Cummings was “of the opinion that the president is without authority to issue” an order to abolish national monuments.²²⁴

Another framework for interpreting the potential caveats in the Act is the nondelegation doctrine, whereby Congress is allowed to delegate legislative power—subject to limitations.²²⁵ The nondelegation doctrine is “rooted in the principle of separation of powers that underlies our tripartite system of Government.”²²⁶ In accordance with the doctrine, authority may be delegated as long as the delegation contains an “intelligible principle,” or a minimum standard on how the delegated authority should be exercised.²²⁷ Where a president wishes to abolish national monuments, there is no intelligible principle that allows a president to remove national monument protections; there is only an intelligible principle providing for the president to enact more national monuments.²²⁸ Therefore, the absence of such intelligible principle, which delegates the power to reduce or remove national monument protections by the president, illustrates Congress’s sole retention of such an important power.

C. *Youngstown Framework for Analyzing Presidential Power*

For half a century, Former Justice Jackson’s concurrence from *Youngstown* has provided courts with a framework for analyzing the extent of presidential power under the Constitution.²²⁹ The framework divides presidential actions into three categories. First, when the president is acting

Shelving” Lands Under the Outer Continental Shelf Lands Act (Ocsla): Can A Prior Executive Withdrawal Under Section 12(a) Be Trumped by A Subsequent President?, 26 N.Y.U. ENVTL. L.J. 1, 38 (2017).

²²² See 39 Op. Att’y Gen. 185, 185–86.

²²³ *Id.* at 188.

²²⁴ *Id.* at 189.

²²⁵ *Mistretta v. U.S.*, 488 U.S. 361, 371–72 (1989) (emphasizing that the “separation-of-power principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches”).

²²⁶ *Id.* at 371.

²²⁷ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

²²⁸ See *id.*

²²⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); see also Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U.L. REV. 1917, 1919–20.

under statutory authorization, his constitutional power is at its maximum because it includes both inherent and statutory authority.²³⁰ Therefore, the only limitation to this presidential authority is when the “federal government as undivided whole lacks power.”²³¹ Second, when the president acts in the absence of either a congressional grant or denial of authority, then the president’s only authority comes from their Article II constitutional powers.²³² In this category, there is a “zone of twilight” where the president has concurrent authority with Congress where “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”²³³ The third category is when the president acts in defiance of Congress and where the president’s power is at its weakest.²³⁴ In this category, the president can only act when his or her power is exclusive.²³⁵

Applied to the Antiquities Act, if the president has the authority to *reduce or eliminate* national monuments, the power must be in the first or second *Youngstown* category.²³⁶ If the power falls under the third *Youngstown* category, and because the Constitution gives Congress plenary authority over public lands, then the president lacks the authority to reduce national monuments entirely because the power is not exclusive.²³⁷ Therefore, presidents’ actions to reduce or revoke a national monument are likely considered to be within *Youngstown*’s second category, where “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”²³⁸

Even if the president does have the authority to reduce the size of national monuments, the scope of that authority is unclear. For example, some scholars argue that the “smallest area compatible” requirement only gives the president authority to correct mistakes in the original designation or to clarify indeterminate boundaries,²³⁹ while others suggest that the

²³⁰ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–36 (Jackson, J., concurring).

²³¹ *Id.* at 636–37.

²³² *Id.* at 637–38.

²³³ *Id.* at 637.

²³⁴ *Id.* at 637–38.

²³⁵ *Id.*

²³⁶ See *id.* at 635–37.

²³⁷ See *id.* at 637–38.

²³⁸ *Id.* at 635–38.

²³⁹ See Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. 55, 69 (2017) (stating that similar acts, such as the Forest Service Organic Act of 1897 authorized the president to make modifications

requirement gives the president broad authority to reduce national monuments entirely.²⁴⁰ There is conflicting evidence for each proposal as presidents have, historically, reduced the size of national monuments, both as a result of border inaccuracies and for the sole purpose of cutting the size, and Congress has repeatedly failed to enact a more explicit statute.²⁴¹ All the more challenging, no presidential decision to reduce the size of a national monument has made its way through the court systems, so no court has ever affirmatively ruled on the legality of such an action.²⁴²

The Antiquities Act does not explicitly establish that a president may reduce, revoke, or eliminate a national monument but this has not prevented presidents from doing so.²⁴³ In total, there have been more than 250 occasions where presidents have used the authority of the Antiquities Act to protect land,²⁴⁴ but there have only been a few times where a president has diminished, reduced, or modified the size of national monuments.²⁴⁵ Nevertheless, no national monument has been abolished in its entirety by a president.²⁴⁶ In summary, despite the more than two hundred times that the Act has been used to designate national monuments, the rare instances of

to reduce the area, change the boundary lines of such reserve, or vacate altogether any order creating such reserve).

²⁴⁰ See Richard Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 579 (2018) (stating that there has never once been a legal challenge over president's reducing a national monument and Congress knew of them, compelling the conclusion that the Antiquities Act authorizes the president to reduce national monuments); see generally John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Y. J. ON REG. 617, 665 (2018) (concluding that “[i]f [p]residents choose not to protect their policies through Congress's bicameral process, they leave those policies vulnerable to their successors by constitutional design”).

²⁴¹ See S. Rep. No. 69-423 (1926); S. 3826, 68th Cong. (1925); S. 2703, 69th Cong. (1926); S. 3840, 68th Cong. (1925); H.R. 11357, 68th Cong. (1925); S. 4617, 71st Cong. (1930); H.R. 3990, 115th Cong. (2017); *National Monument Facts and Figures*, NAT'L PARK SERV. (Oct. 26, 2021), <https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm> [<https://perma.cc/S93M-DBFZ>]; see also Ruple, *supra* note 221, at 38.

²⁴² See *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, J., concurring in denial of certiorari).

²⁴³ See *National Monument Facts and Figures*, *supra* note 241.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Abolished National Monuments*, NAT'L PARK SERV. (Feb. 17, 2021), <https://www.nps.gov/articles/000/abolished-national-monuments.htm> [<https://perma.cc/GA2J-HDUN>] (“Most often, the abolishment occurred because the nationally important resources for which the monument was established originally became diminished or were found to be of less than national significance,” while “[s]ome national monuments were abolished because they were publicly inaccessible or ill-suited to park development” or “abolished due to mismanagement”).

presidential modification or revocation of national monuments illustrate the Act's resilience and inability for a president to abolish a national monument by a later executive order.

D. Legislative Attempts, Congressional Inertia, and the Property Clause

First, Congress's repeated refusal to grant the president the power to *reduce* the size of national monuments has exacerbated uncertainties surrounding presidential authority.²⁴⁷ Members of Congress have introduced legislation on seven occasions seeking to explicitly permit presidents to eliminate or reduce national monuments, yet all of these attempts have met significant opposition and failed to pass.²⁴⁸

Second, Congress has enacted subsequent legislation, such as the Federal Land Policy and Management Act ("FLPMA"), to "modernize and streamline the management of federal lands."²⁴⁹ Through FLPMA, Congress repealed twenty-nine different statutes that authorized the president to make withdrawals of federal land and even repealed the Supreme Court's decision in *United States v. Midwest Oil Company*.²⁵⁰

In *Midwest Oil Company*, the Supreme Court held that congressional delegation of power to the president can be found where Congress has acquiesced to prior related executive actions.²⁵¹ The Court concluded that congressional acquiescence to 109 executive orders establishing or enlarging military reservations, 99 executive orders establishing or enlarging Indian reservations, and 44 executive orders establishing bird refuges indicated acquiescence in an implied power to reserve public lands from development.²⁵² Because presidents had issued "a multitude of orders extending over a long period, and affecting vast bodies of land, . . . [and t]hese orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved" the court reasoned that, if Congress had objected to the withdrawals, it would not have allowed these "unauthorized

²⁴⁷ See James Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MT. L. INST. 21, 21–22 (2017) (stating that Congress successfully amended the Antiquities Act on two occasions "without moving to limit the president's power either to proclaim or to revoke or to modify").

²⁴⁸ See S. Rep. No. 69-423 (1926); S. 3826, 68th Cong. (1925); S. 2703, 69th Cong. (1926); S. 3840, 68th Cong. (1925); H.R. 11357, 68th Cong. (1925); S. 4617, 71st Cong. (1930); H.R. 3990, 115th Cong. (2017). See also Ruple, *supra* note 221, at 38.

²⁴⁹ Ward, *supra* note 17, at 26.

²⁵⁰ See *id.*

²⁵¹ *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915).

²⁵² *Id.* at 470, 475 (noting that "[i]ts acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen").

acts . . . to be so often repeated as to crystallize into regular practice.”²⁵³ Therefore, inaction by Congress raised the presumption that “the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the [president] in the management of public lands,” demonstrating “acquiescence . . . equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.”²⁵⁴

Thus, by enacting FLPMA, Congress overruled the Supreme Court’s interpretation of implied executive authority.²⁵⁵ This is important because FLPMA explicitly eliminated the “implied authority of the [p]resident to make withdrawals and reservations resulting from [the] acquiescence of the Congress,” which commentators have often cited in an attempt to diminish the power of the Antiquities Act.²⁵⁶ To be clear, Congress’s enactment of the FLPMA did not revoke the president’s *Antiquities Act* power, which solely addresses the president’s authority to *designate* national monuments.²⁵⁷

Nonetheless, the Supreme Court has made clear that “[p]ast practice does not, by itself, create power.”²⁵⁸ Therefore, although presidents have reduced the size of national monuments in the past, that does not necessarily give current and future presidents the legal right to do so. Historical practice, however, is important for courts to analyze because courts “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”²⁵⁹ A prime example of such an agreement was in *Medellin v. Texas*, where former President Bush argued that presidents had historically used their constitutional authority to make treaties and resolve disputes with foreign nations and could, therefore, act to incorporate the International Court of Justice’s decisions into binding domestic law.²⁶⁰ The Court, examining whether Congress had acquiesced to this specific action, found no evidence that it did.²⁶¹ Thus, the Court declined to find authority through Congress’s acquiescence to other uses of the president’s treaty and dispute resolution powers, which the Court viewed as

²⁵³ *Id.* at 475.

²⁵⁴ *Id.* at 481.

²⁵⁵ See Congressional Declaration of Policy, 43 U.S.C. § 1701.

²⁵⁶ Federal Land Policy and Management Act of 1976, 94 Pub. L. 579, 90 Stat. 2743 (1976); see, e.g., *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002).

²⁵⁷ See generally National Park Service and Related Programs, 54 U.S.C. § 320301(a).

²⁵⁸ *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

²⁵⁹ *NLRB v. Canning*, 573 U.S. 513, 550 (2014).

²⁶⁰ *Medellin v. Texas*, 552 U.S. 491, 503 (2008).

²⁶¹ *Id.* at 532.

dissimilar.²⁶² Under this standard, courts must define any claim of congressional acquiescence in very narrow terms.²⁶³ Particularly, the president must show acquiescence to the action in the particular situation and not just a generalized claim of congressional acquiescence in an entire field.²⁶⁴

Third, the United States Constitution's Property Clause allocates exclusive authority to Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."²⁶⁵ However, Congress "may delegate this authority as it deems appropriate."²⁶⁶ Claims that the Antiquities Act, or the Biden Administration's 30 By 30 plan, is a "federal land grab"²⁶⁷ overlook the clear statutory and case precedent, which reflect that Congress has constitutionally delegated the power to designate monuments to the president and that the lands are already under Federal ownership.²⁶⁸ Courts have repeatedly upheld delegations of land as national monuments where the "[p]resident exercised . . . delegated powers under the Antiquities Act, and [the] statute include[d] intelligible principles to guide the [p]resident's actions."²⁶⁹ Therefore, the president may designate national monuments on federal land without violating the United States Constitution's Property Clause.²⁷⁰

On the other hand, the Antiquities Act does not expressly delegate presidential authority to *revoke* or *diminish* national monuments in the Antiquities Act; therefore, any significant reductions to a monument are likely per se unconstitutional. This is evidenced by *Utah Association of Counties v. Bush*, where the Utah District Court held that Congress may

²⁶² *Id.*; see *Dames & Moore v. Regan*, 453 U.S. at 686; see also *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

²⁶³ *Medellin*, 552 U.S. at 532.

²⁶⁴ *Id.* at 524-25.

²⁶⁵ U.S. CONST. Art. IV § 3, cl. 2.

²⁶⁶ *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004); see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

²⁶⁷ See *Remarks by President Trump at Signing of Executive Order on the Antiquities Act*, TRUMP WHITE HOUSE ARCHIVES (Apr. 26, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-signing-executive-order-antiquities-act/> [<https://perma.cc/T8RG-ENDY>] (suggesting the "massive federal land grab . . . [has] gotten worse and worse and worse, and now we're going to free it up, which is what should have happened in the first place. This should never have happened.").

²⁶⁸ See, e.g., *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (2002).

²⁶⁹ *Id.* at 1137.

²⁷⁰ *Supra* note 8.

delegate its authority as it deems appropriate.²⁷¹ However, because Congress included no grant of presidential authority to *revoke or substantially diminish* national monuments in the text of the Antiquities Act, it is likely that the power was not delegated.

E. Recent Monument Reductions and President Biden's Conservation Actions

The largest, and most recent, reduction to a national monument involved Grand Staircase-Escalante and Bears Ears. Former President Clinton designated Grand Staircase-Escalante as a national monument with 1.7 million acres.²⁷² In 2017, former President Trump reduced the size of the monument via Executive Order 13792, which directed the Secretary of the Interior to review all national monument designations since 1996 that were greater than 100,000 acres.²⁷³

In response, Secretary Zinke claimed that previous presidents arbitrarily defined object protection in national monuments by utilizing objects such as “viewsheds” and “ecosystems” to circumvent the legislative process, thereby failing to make the land available for economic development.²⁷⁴ In essence, Secretary Zinke concluded that previous presidents failed to comply with the requirement that monuments be “the smallest area compatible with the proper care and management of the

²⁷¹ Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 11991 (D. Utah 2004) (holding that “the non-delegation doctrine is not violated, nor is the Property Clause, which has repeatedly been construed as allowing Congress to delegate its authority to the [E]xecutive and [J]udicial [B]ranches”).

²⁷² Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sep. 18, 1996); see *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona*, AM. PRESIDENCY PROJECT (Sept. 18, 1996), <https://www.presidency.ucsb.edu/documents/remarks-announcing-the-establishment-the-grand-staircase-escalante-national-monument-grand> [<https://perma.cc/TS7T-Y8S8>] (quoting former President Clinton as saying “[i]n protecting it, we live up to our obligation to preserve our natural heritage. We are saying very simply, our parents and grandparents saved the Grand Canyon for us; today we will save the grand Escalante Canyons and the Kaiparowits Plateaus of Utah for our children. Sometimes progress is measured in mastering frontiers, but sometimes we must measure progress in protecting frontiers for our children and all children to come”).

²⁷³ Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58089 (Dec. 4, 2017); Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429 (Apr. 26, 2017).

²⁷⁴ Ryan Zinke, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act*, DEP'T INTERIOR, at 7, https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf [<https://perma.cc/3QMF-7XRD>].

objects” in the monuments and that some designations were “likely politically motivated.”²⁷⁵ Therefore, Secretary Zinke recommended former President Trump use his “lawful exercise of . . . discretion granted by the Act” to amend or revise the boundaries of ten national monuments.²⁷⁶ In pertinent part, Secretary Zinke suggested:

The Act has been used to designate or expand national monuments on Federal lands more than 150 times. It has also been used at least 18 times by [p]residents to reduce the size of 16 national monuments, including 3 reductions of the Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres, and a reduction of the Navajo National Monument by President Taft from its original 360 acres to 40 acres. President Franklin Roosevelt also modified the reservation of the Katmai National Monument to change management of the Monument.²⁷⁷

Interestingly, unlike the previous proclamations by presidents which modified the boundaries of national monuments, former President Trump thoroughly explained the reductions to Grand Staircase-Escalante.²⁷⁸ Executive Order 13792, issued by former President Trump, stated that determining the appropriate protective area involves “examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws.”²⁷⁹ Under this “factors test”—created by the president, not a court or Congress—the monument was not of any “unique or distinctive scientific or historic significance” because similar geologic features and archeological objects are prevalent throughout the region.²⁸⁰ The proclamation also claimed

²⁷⁵ *Id.* at 1–2. *But see* Utah Ass’n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004) (stating “[f]or the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains”) (quoting U.S. v. George S. Bush & Co., 310 U.S. 371, 380 (1940)); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) (stating “[n]either can the Court take any judicial interest in the motives which may have inspired the Proclamation described as an attempt to circumvent the Congressional intent and authority in connection with such lands”).

²⁷⁶ Zinke, *supra* note 274, at 9–18.

²⁷⁷ *Id.* at 4.

²⁷⁸ *See* Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58089 (Dec. 4, 2017).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 58089–90.

that many of the objects in the original monument do not need to be protected because they are already adequately protected by other laws.²⁸¹ Consequently, the proclamation excluded 861,974 acres from Grand Staircase and divided it into three separate monuments: Grand Staircase, Kaiparowits, and Escalante Canyons.²⁸²

Bears Ears National Monument, another national monument, was dedicated by former President Obama and consisted of approximately 1.35 million acres.²⁸³ In 2017, and in a similar fashion as before, former President Trump modified Bear Ears by almost 85%, from 1.35 million acres to 201,876 acres.²⁸⁴ Again, former President Trump claimed that existing federal laws, like the Wilderness Act, FLPM, and the National Forest Management Act adequately protected many of the objects and areas identified in the original monument.²⁸⁵ The history of the Grand Staircase-Escalante and Bears Ears National Monuments serve as a reminder that future presidents could significantly reduce national monuments by predecessors, at least based on current case law.

However, during his first year as president, President Biden restored the lands of both national monuments to be consistent with Obama's executive order.²⁸⁶ President Biden has designated additional national

²⁸¹ *Id.* at 58090.

²⁸² *Id.* at 58091-93; see generally *Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area, Utah*, BUREAU LAND MGMT. (Feb. 2020), https://www.blm.gov/sites/blm.gov/files/Utah_GSENM_Infographic.pdf [<https://perma.cc/NWS9-PHV6>].

²⁸³ Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

²⁸⁴ Nadja Popovich, *Bears Ears National Monument Is Shrinking. Here's What Is Being Cut*, N.Y. (Dec. 8, 2017), <https://www.nytimes.com/interactive/2017/12/08/climate/bears-ears-monument-trump.html> [<https://perma.cc/3Y4K-H5CC>].

²⁸⁵ Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081, 58085 (Dec. 8, 2017).

²⁸⁶ Bears Ears National Monument, 86 Fed. Reg. 57321 (Oct. 15, 2021); see *Fact Sheet: President Biden Restores Protections for Three National Monuments and Renews American Leadership to Steward Lands, Waters, and Cultural Resources*, WHITE HOUSE (Oct. 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/07/fact-sheet-president-biden-restores-protections-for-three-national-monuments-and-renews-american-leadership-to-steward-lands-waters-and-cultural-resources/> [<https://perma.cc/WW8N-T2Q6>]; *President Biden Signs Historic Proclamation to Restore and Expand the Bears Ears National Monument*, NAVAJO NATION (Oct. 8, 2021), <https://www.navajonnsn.gov/News%20Releases/OPVP/2021/Oct/FOR%20IMMEDIATE%20RELEASE%20-%20President%20Biden%20signs%20historic%20proclamation%20to%20restore%20>

monuments as well. The first national monument President Biden designated was the Camp Hale – Continental Divide National Monument in Colorado, a 53,804-acre monument.²⁸⁷ The monument was designated to “honor our nation’s veterans, Indigenous people, and their legacy by protecting this Colorado landscape.”²⁸⁸ The second national monument that President Biden designated was Avi Kwa Ame in Nevada, known as “Spirit Mountain,” which is considered sacred by a dozen tribes.²⁸⁹ The 506,814-acre monument was dedicated to “honor Tribal Nations and Indigenous peoples,” protect “one of the world’s largest Joshua tree forests, and provide continuous habitat or migration corridors for species such as the desert bighorn sheep, desert tortoise, and Gila monster.”²⁹⁰ The third national monument President Biden designated was Castner Range in Texas, a former Army artillery facility.²⁹¹ The 6,600-acre national monument was designated to “protect the cultural, scientific and historic objects found within the monument’s boundaries, honor our veterans, servicemembers, and Tribal Nations, and expand access

and%20expand%20the%20Bears%20Ears%20National%20Monument.pdf [https://perma.cc/7V2A-635Z] (praising the “historic signing of the proclamation and restoration of the Bears Ears National Monument” as a “victory for our people, our ancestors, and future generations” because it is “home to many of our historical and cultural sites, plants, water, traditional medicines, and teachings for our people”); *BLM, Forest Service and Five Tribes of the Bears Ears Commission Commit to Historic Co-management of Bears Ears National Monument*, U.S. DEP’T INTERIOR (June 21, 2022), <https://www.doi.gov/pressreleases/blm-forest-service-and-five-tribes-bears-ears-commission-commit-historic-co-management> [https://perma.cc/NYP6-9249] (detailing the Inter-governmental Cooperative Agreement between the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Pueblo of Zuni, in a historic and unprecedented agreement to share management responsibilities for the Bears Ears National Monument).

²⁸⁷ *FACT SHEET: President Biden Designates Camp Hale – Continental Divide National Monument*, WHITE HOUSE (Oct. 12, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/12/fact-sheet-president-biden-designates-camp-hale-continental-divide-national-monument/> [https://perma.cc/U8NU-YZVN].

²⁸⁸ *Id.*

²⁸⁹ Ximena Bustillo, *Biden is Creating New National Monuments to Protect Land in Nevada and Texas*, NAT’L PUBLIC RADIO (Mar. 21, 2023, 5:50 PM), <https://www.npr.org/2023/03/21/1164885621/biden-national-monuments-nevada-texas> [https://perma.cc/YZP7-TXRE].

²⁹⁰ *FACT SHEET: President Biden Designates Avi Kwa Ame National Monument*, WHITE HOUSE (Mar. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-president-biden-designates-avi-kwa-ame-national-monument/> [https://perma.cc/L59N-H5FN].

²⁹¹ Bustillo, *supra* note 289; see Ellen Montgomery & Luke Metzger, *Castner Range Should be a National Monument*, ENV’T AMERICA (Mar. 26, 2022), <https://environmentamerica.org/articles/castner-range-should-be-a-national-monument/>.

to outdoor recreation on our public lands.”²⁹² The fourth, and most recent, national monument that President Biden designated was the Emmett Till and Mamie Till-Mobley National Monument, comprising 5.70 acres of land across three separate historic sites in Illinois and Mississippi.²⁹³ Through this designation, the Biden Administration seeks to “tell the story of the events surrounding Emmett Till’s murder, their significance in the civil rights movement and American history, and the broader story of Black oppression, survival, and bravery in America.”²⁹⁴ With these four new national monuments, which have a combined total of half a million acres of federal land, the Biden Administration has made progress towards accomplishing 30 By 30.

President Biden is reportedly in the process of designating a new national monument, a marine sanctuary, of “777,000 square miles of islands, reefs[,] and diverse marine life” around the Pacific Remote Islands southwest of Hawaii.²⁹⁵ It would be the largest marine sanctuary on the planet if designated and would accomplish half of the 30 By 30 conservation goal by exceeding 30% of marine land preservation.²⁹⁶

In summary, based on the evaluation of other statutes, legislative history, and prior legal opinions, it is likely that the president does not have the authority to outright abolish a national monument or weaken the protections afforded by a proclamation declared by a predecessor; however, presidents have previously downsized national monuments and will likely continue to do so, without clarification by courts and/or Congress, endangering the possibility of using the Antiquities Act to provide long-term protection to America’s natural lands. Despite this risk, the Biden Administration can successfully accomplish its 30 By 30 initiative and

²⁹² *FACT SHEET: President Biden Designates Castner Range National Monument*, WHITE HOUSE (Mar. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-president-biden-designates-castner-range-national-monument/> [https://perma.cc/DZ3W-KNYD].

²⁹³ *FACT SHEET: President Biden Designates Emmett Till and Mamie Till-Mobley National Monument*, WHITE HOUSE (July 25, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/25/fact-sheet-president-biden-designates-emmett-till-and-mamie-till-mobley-national-monument/> [https://perma.cc/H9JJ-NXX5].

²⁹⁴ *Id.*

²⁹⁵ Bustillo, *supra* note 289; see *FACT SHEET: Biden-Harris Administration Takes New Action to Conserve and Restore America’s Lands and Waters*, WHITE HOUSE (Mar. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-biden-harris-administration-takes-new-action-to-protect-and-restore-americas-lands-and-waters/> [https://perma.cc/SP6V-HA9V].

²⁹⁶ Bustillo, *supra* note 289; see *supra* note 7.

preserve land across America by utilizing the Antiquities Act and complying with Congress's broad delegation of authority to act expeditiously in protecting America's natural resources and heritage.

CONCLUSION

Congress enacted the Antiquities Act in 1906, delegating sole discretion to the president of the United States to designate land within Federal ownership, with an object of historic or scientific interest, and of the smallest size compatible, as national monuments. Since courts have been able, thus far, to interpret Congress's delegation of power, the Antiquities Act needs no revisions. The president already has the authority, based on current precedent, to use the Antiquities Act to designate the lands needed to achieve the 30 By 30 goal without modification.

To address the urgent and existential threat of global warming facing humanity, the Executive Branch must take proactive measures to safeguard America's interests, allies, and citizens. The Antiquities Act, which encourages national monuments designation for historic or scientific interest, presents a viable avenue to advance the 30 By 30 plan. Achieving the Biden Administration's goal of conserving 30% of U.S. lands and oceans by 2030, would require designating an additional 440 million acres of land and 123 million acres of marine land. Moreover, the expedited accomplishment of 30 By 30 would depend on the continued cooperation of individual states or support from the United States Congress. Nonetheless, such conservation efforts would not only preserve America's remaining wild places and natural resources but also protect the health and well-being of Americans from the deadly threats posed by climate change and other man-made disasters.