No. 23-525

IN THE

Supreme Court of the United States

MURPHY COMPANY, *et al.*,
Petitioners,

v.

JOSEPH R. BIDEN, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF ARIZONA FARM BUREAU FEDERATION AND THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Arizona Farm Bureau Federation ("AZFB") is Arizona's largest farm and ranch organization with members representing agriculture throughout the State. AZFB's core beliefs include freedom and dignity of the individual, government by legislative and constitutional law, and appropriate limitations on government power.

Over 40% of Arizona land is owned by the federal government, including over 11,000,000 acres of rangeland. Many of AZFB's approximately 2,400 members have been and are likely to be harmed by presidential monument declarations that alter land uses. National monuments in Arizona cover more than 4,000,000 of Arizona's nearly 73,000,000 acres.

In August 2023, the President established the Baaj Nwaajo I'tah Kukveni–Ancestral Footprints of the Grand Canyon National Monument ("Baaj Nwaajo Monument").[2] This monument spans 917,000 acres. The President's proclamation called for reservation of "entire landscapes" and requires creation of a new management plan to "protect" the area with specified priorities. *Id*. While the new management plan has yet to be released, in AZFB's experience new federal land use plans generally result in lower amounts of approved grazing.

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity, other than *amici curiae*, paid for the brief's preparation or submission. Counsel for *amici curiae* notified the parties of intention to file this brief on December 4, 2023.

[2] Proclamation No. 10606, 88 Fed. Reg. 55,331 (Aug. 15, 2023).

Amicus curiae New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredations. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government) and due process of law. These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—because Congress, presidents, federal administrative agencies, and even sometimes the judiciary, have neglected them for so long.

NCLA defends civil liberties primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a different sort of government—a type, in fact, the Constitution was designed to prevent. This unconstitutional administrative state is where NCLA trains its primary focus.

The relatively recent presidential practice of not only designating national monuments and reserving land for such use, but also affirmatively preventing specific and otherwise lawful uses by executive proclamation contravenes the statutorily expressed will of Congress.

SUMMARY OF ARGUMENT

Presidential monument designations have become their own land use codes that conflict with statutes. Here, the conflict focuses on Congress's express will for specific parcels of land. As such, this case[3] presents a useful, relatively narrow, vehicle for this Court to determine what law prevails when edicts in monument designations conflict with statutes.

Amici agree with Petitioners that the presidential declarations related to the Cascade-Siskiyou National Monument,[4] "countermanded [a] specific command of … the Oregon and California Railroad and Coos Bay Wagon Road Land Grants Act of 1937 (O&C Act)."[5] *See* Pet. at 2. We write separately to emphasize, as Judge Tallman recognized in his partial dissent, that the issue "is whether the President, through an Antiquities Act proclamation, may direct a subordinate to disregard duties prescribed by another act of Congress." Pet.App.35a (Tallman, J., concurring in part and dissenting in part). The question, placed in a more arcane but settled framework, is whether the government's chief executive has the power to dispense with legislation. He does not.

The conflict between the O&C Act and the monument proclamations is direct. The majority of

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[3] The argument and analysis here apply equally to the concomitantly filed petition in *American Forest Resource Council, et al., v. United States*, No. 23-524.

[4] Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000); Proclamation No. 9564, 82 Fed. Reg. 6,145 (Jan. 12, 2017).

[5] Pub. L. No. 75-405, 50 Stat. 874 (1937).

the Ninth Circuit panel, however, "reconciled" the conflict away. It held that Congress's explicitly prioritized use for the specific land was not absolute acre by acre and so could be disregarded in part and replaced with a new presidential priority. *Id*. at 22a–23a. Such "reconciliation" unlawfully dispenses with the O&C Act for tens of thousands of acres of land.

And while English monarchs once used royal prerogatives to negate the effect of statutes, suspending and dispensing powers were eventually eliminated in the English system. Such prerogatives have *never* been among the powers granted to the president or his executive officers in the Constitution. Monument proclamations are no exception.

Monument designations made pursuant to the Antiquities Act of 1906[6] were once short simple statements that reserved land from appropriation. Indeed, the Antiquities Act specifically enables designation and reservation. Several more recent proclamations, however, embellish the designations with prohibitions and directives that exceed the Antiquities Act and evade or even counter land use legislation. Still, courts routinely deny review of or challenges to the provisions in these designations, holding that the Administrative Procedure Act ("APA"), with its administrative process and judicial review, and other statutes are not applicable to presidential action. However, even without a statutory cause of action, it is *constitutionally*

[6] An Act for the Preservation of American Antiquities, Pub. L. No. 59-209, 34 Stat. 225 (1906).

improper for the President of the United States to dispense with duly enacted statutes.

REASONS FOR GRANTING THE PETITION

I. PRESIDENTIAL PROCLAMATION NO. 9564 CONFLICTS WITH THE O&C ACT

The land use restrictions in the presidential proclamations that created and then expanded the Cascade-Siskiyou National Monument directly conflict with the O&C Act and its precursor, the Chamberlain-Ferris Revestment Act.[7] The Ninth Circuit purported to reconcile the presidents' actions with these statutes, asserting it was compelled to do so by this Court's direction.[8] In reality, the court allowed the executive to dispense with legislation.

In 1937, Congress designated eligible timberlands at issue in this case for "permanent forest production" to provide a "permanent source of timber supply," with further direction that the Secretary of Interior may subdivide the land so long as the units established would provide "a permanent source of raw materials for the support of dependent communities and local industries of the region." O&C Act, § 1, 50 Stat. at 874. The presidential proclamations, however, prohibit "commercial harvest of timber" except for ecological projects "aimed at meeting

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[7] Pub. L. No. 64-86, 39 Stat. 218 (1916).

[8] *See* Pet.App.21a ("The Supreme Court has counseled, 'when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

protection and old growth enhancement objectives." Proc. No. 7318; *see* Proc. No. 9564. The conflict is patent and unavoidable.

A majority of the Ninth Circuit panel, however, found no conflict. First, the court started at a high level of generality, asking if explicit conflict existed between the O&C Act and the Antiquities Act. *See* Pet.App.20a–23a. But the Antiquities Act does not expressly address *withdrawing* land from public uses, only *reserving* the land from appropriation for a primary public use. *See* 34 Stat. 225. Since the O&C Act did not prohibit a power not explicit in the Antiquities Act, the court found no conflict.[9] *See* Pet.App.21a. The panel majority failed to consider whether the Antiquities Act permitted presidential withdrawals from use as opposed to appropriation or whether the O&C Act limited the discretion available under the Antiquities Act.

The Ninth Circuit then found no conflict between the monument proclamations and the O&C Act because the O&C Act had granted some land management flexibility. The O&C lands were vast, and not every acre had to be subject to timber harvest. *Id*. at 23a–27a. In essence the court reasoned that if Congress left the Secretary of Interior with discretion,

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[9] The Ninth Circuit bolstered its reasoning by noting that Congress had not countermanded the monument designations and that the Supreme Court has never overturned a monument designation. Pet.App.22a–23a. The first part of this logic conflicts with the Congressional overturning of a case finding implied presidential authority to withdraw uses, *see infra* III.B; the second part emphasizes the need for this Court to address withdrawals within monument designations when they conflict with statutes.

there was no harm in the President's directing the Secretary to prohibit timber harvest for some sections of land. *Id.*

The Ninth Circuit stated that the O&C Act empowered the Secretary to "classify and manage" the lands "for several purposes—predominantly, but not exclusively, timber production." *Id.* at 24a. The court found that the O&C Act permits the Secretary to determine which portions of land should be subject to logging and which should not. *Id.* at 24a–25a. This reasoning, however, fails to take account of the constraints Congress placed on the Secretary.

In the Chamberlain-Ferris Revestment Act, Congress directed the Secretary to classify lands by the smallest legal subdivision as power-site lands, timberlands, or agricultural lands. § 2, 39 Stat. at 219. Power-site lands were "*only* such lands as are chiefly valuable for water-power sites[.]" *Id.* (emphasis added). Congress defined timberlands as those "bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." *Id.* Agricultural lands were whatever was left. *Id.* The timberlands were to be logged and the funds used to pay local counties that had previously been deprived of taxes. *See id.* § 4, 39 Stat. at 219–20; *id.* § 10, 39 Stat. at 222. The cleared timberlands would be reclassified as agricultural land and sold, creating a new tax base for the local governments. *See id.* § 5, 39 Stat. at 220. The Act allowed rights of way to be created for timber harvest and forbade the sale of timberlands until the timber had been removed. *See id.* § 4, 39 Stat. at 219; *id.* § 2, 39 Stat. 219. Further, the Act appropriated $100,000

in 1916 dollars to enable the Secretary to classify the land. *See id.* § 12, 39 Stat. at 223.

Twenty-one years later, the O&C Act directed that the remaining timberlands be managed by the Secretary, not sold. *See* § 1, 50 Stat. at 874. Together with "power-site lands valuable for timber," the lands were to be managed for "permanent forest production," a "permanent source of timber supply," and a "permanent source of raw materials for the support of the dependent communities and local industries." *Id*. The O&C Act called for the "annual productive capacity" of the lands to be "determined and declared as promptly as possible[,]" and for the sale of timber to *not be less than* the annual sustained yield capacity. *Id*. The Act also provided that agricultural land could be reclassified as timberland, reversing the progression of classifying land away from timber use. *Id*. § 3, 50 Stat. at 875.

Ignoring the repeated references to "permanent" classification as timberland, the explicit power to redesignate agricultural land but not timberland, the Secretary's obligation to classify the land one of three ways, and the specific statutory definition of timberland, the Ninth Circuit panel found that because the statute referred to land "heretofore" classified, the land could be reclassified, meaning the land need not be used for timber production. Pet.App.24a (quoting § 1, 50 Stat. at 874). This faithless interpretation renders Congress's direction meaningless. When the Secretary "heretofore" or "hereinafter" classified the lands, he was obligated to do so according to statute—if it supported "a growth of timber not less than three hundred thousand feet

board measure on each forty-acre subdivision[,]" it was timberland. *See* § 2, 39 Stat. at 219.[10]

Congress mandated that O&C lands eligible for timberland classification be used permanently for sustained timber harvest. The presidential monument designations prohibited commercial timber harvest on tens of thousands of acres of O&C land. The Ninth Circuit "reconciled" these competing directives by finding that Congress's statutory mandate could be dispensed with for any given parcel of land. But dispensing power does not exist in the executive branch of our constitutional government.

II. THE PRESIDENT OF THE UNITED STATES MAY NOT SUSPEND OR DISPENSE WITH STATUTES

Executive dispensing power was definitively eliminated in England before the United States was formed, and it has no place under the United States Constitution or the rule of law.

A. Use and Elimination of Suspending and Dispensing Powers in England

Dispensing power is the power of a ruler to selectively, and in advance, excuse persons of the duty

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[10] The Ninth Circuit supported its reasoning by noting efforts the Secretary had taken to comply with later environmental *statutes*, such as the Endangered Species Act, that had the effect of limiting timber harvest. Pet.App.26a–27a. Those instances, however, involve balancing competing statutory imperatives. The Secretary's obligation to satisfy overlapping statutes does not justify dispensing with statutory mandates by presidential decree.

of conforming to law.[11] The claimed power to dispense with laws rested on the reasoning that rulers, as imitations of God, were above the law and could therefore issue dispensations from the law. *See* Hamburger, *supra* n.11, at 65. Not surprisingly, English monarchs' claim of the power to dispense with the binding effect of law "came to be viewed as the epitome of the absolute and unconstitutional prerogative[,]" *id.*,[12] and was itself dispensed with in the English Bill of Rights and the United States Constitution.

The English Parliament denounced dispensing power no later than 1624. Hamburger, *supra* n.11, at 67. Then, in 1689, shortly after deposing a king for his attempt to exercise such power, the Parliament drafted the English Bill of Rights declaring, "the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal[.]" An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1689); Hamburger, *supra* n.11, at 68–69; The Parliamentary History of England 267 (T.C. Hansard ed. 1813) ("the duty of [the executive] is to see the execution of the

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[11] *See* Philip Hamburger, Is Administrative Law Unlawful? 65, 76 (U. Chicago Press 2014); *see also* Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597–1689*, 29 Am. J. Legal Hist. 197, 198–99 (1985).

[12] "Prerogative" refers to powers that vested in the executive and were not governed by law. *See* John Locke, Treatises of Government 375 (Peter Laslett ed. 1988) ("This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative.").

laws, which can never be done by dispensing with or suspending them").

Having been conceived and justified as above the law, and not consistent with either legislating or administering the law, dispensing power was viewed as an extralegal power, incompatible with the rule of law. *See* Hamburger, *supra* n.11, at 66–67, 74; *id.* at 69 ("[T]o say '[the King] has a dispensing power' is to say "there is no law.'"; "'Is there anything more pernicious than the dispensing power? There is an end of all the legislative power, gone and lost.'") (citations omitted); *id.* at 71 (power to dispense with the law creates the "danger that 'discretion denigrates into despotism.'") (citation omitted).

Thus, the English had experienced, decried, and prohibited dispensing power within the century prior to the founding of the United States.

B. The President Lacks Dispensing Power

Presidential power to execute the laws does not carry with it the power to prohibit carrying out the law. The dispensing power is inconsistent with the Constitution's Take Care Clause[13] and has never been attributed to the president of the United States by courts. *See* Hamburger, *supra* n.11, at 74–77, 79–81. In the late 1790's, for example, Congress authorized the seizing of U.S. vessels bound for French ports. President John Adams went further, advising commanders that they could also seize vessels traveling to the U.S. from French harbors. Chief

[13] U.S. CONST. art II, § 3. (the president "shall take care that the Laws be faithfully executed[]").

Justice Marshall rejected the attempted expansion of what had been permitted by statute, holding that a presidential instruction could not make otherwise unlawful conduct lawful. *See Little v. Barreme*, 6 U.S. 170, 179 (1804).

In another early example, when denying that President Thomas Jefferson provided authorization to violate the law, his counsel asserted that the president "cannot suspend [a statute's] operation, dispense with its application, or prevent its effect .... If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature." *United States v. Smith*, 27 F. Cas. 1192, 1203 (C.C.D.N.Y. 1806); *see also* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q., 865, 873–74 (1994) ("The duty to execute the laws faithfully means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce statutes … ."); *Texas v. Biden*, 20 F.4th 928, 978–79 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098 (2022), and *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022) (quoting Michael McConnell, The President Who Would Not Be King: Executive Power Under the Constitution 118 (2020) ("[I]t would be hard to imagine language that would preclude those prerogatives more effectively" than does the Take Care Clause.)).

This Court has previously acknowledged that "vesting in the President a dispensing power[]" would result in "clothing the President with a power entirely

to control the legislation of congress, and paralyze the administration of justice." *Kendall v. United States*, 12 Pet. 524, 613, 9 L. Ed. 1181 (1838). Further, a president's "power is at its lowest ebb[]" when he "takes measures incompatible with the expressed or implied will of Congress[.]" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

In this case, the portions of the presidential proclamations that prohibit land use Congress previously designated contravene the express will of Congress. In purporting to reconcile the presidents' proclamations with the O&C Act, the Ninth Circuit panel determined that Congress's mandate could be dispensed with. The semantics of reconciliation cannot disguise the negating effect of the ruling below. Such violation of separation of powers and the rule of law should not be permitted by courts. *See O.P.M. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (the "Executive Branch does not have the dispensing power on its own[]" and "should not be granted such a power by judicial authorization[]" (citation in first quote omitted)).

III. PRESIDENTIAL MONUMENT DESIGNATIONS AND THEIR RECENT MISUSE TO DISPENSE WITH STATUTES

Many monument designations from the last quarter century evince an intent to dispense with the will of Congress and to legislate by prohibiting otherwise legal uses of public land. Nonetheless, lower courts generally find protective statutes

inapplicable to presidential action and capaciously defer to presidential declarations.

For decades after the Antiquities Act, presidential monument proclamations were short documents that simply identified the historic or scientific interest at stake, named the monument, reserved it from appropriation by the public, specified the area of land affected, and, later, turned it over to an agency for management according to statute. Around the 1970s, monument designations became more loquacious, but were substantively similar to prior proclamations.

In the early 2000's, however, after comprehensive and procedurally demanding land use statutes were passed in the 1960s and 1970s, monument designations started adding a new twist, explicitly or implicitly prohibiting specific uses.

Thousands of local governments, businesses, and individuals, including *amicus curiae* AZFB and its members, are negatively impacted when presidential proclamations supersede statutory protections and forbid existing lawful industry. The relatively recent—albeit burgeoning—presidential misuse of Antiquities Act designations to dispense with land use and other statutes warrants this Court's immediate attention. And, while the problems with recent monument designations are legion, this case presents a specific conflict between congressional will and presidential action.

A. Federal Land Reservations and the Antiquities Act of 1906

To facilitate Manifest Destiny and settlement of the West, the United States once provided many ways for members of the public to obtain private title to public land. These methods included the Preemption Act of 1841, the Donation Act of 1850, the Homestead Act of 1862, the Mining Act of 1872, the Timber Culture Act of 1873, and the Desert Land Act.[14]

Concomitant with encouraging private appropriation, the government was setting aside land for its own purposes. Reserves were made for Indian Tribes, military installations, irrigation, national parks, forests, and wildlife, among other purposes. *See* Forest Reserve Act of 1897, Pub. L. No 55-2, 30 Stat. 11, 35; *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Some of these reservations were indefinite while others were temporary until the land could be classified according to its value for a particular use. *See* Reclamation Act of 1888, Pub. L. No. 50-1069, 25 Stat. 526 (temporarily reserving land potentially valuable for irrigation).

The Antiquities Act also permitted a reservation of land and originated as a response to widespread theft and destruction of artifacts in the Southwest before Arizona and New Mexico became states. *See*

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[14] Preemption Act of 1841, Pub. L. No. 27-16, 5 Stat. 453; Donation Act of 1850, Pub. L. No. 31-76, 9 Stat. 496; Homestead Act of 1862, Pub. L. No. 37-75, 12 Stat. 392; Mining Act of 1872, Pub. L. No. 42-152, 17 Stat. 91; Timber Culture Act of 1873, Pub. L. No. 42-277, 17 Stat. 605; and Desert Land Act of 1877, Pub. L. No. 44-107, 19 Stat. 377.

Dept. of Interior, Nat. Park Serv., R. Lee, The Antiquities Act of 1906, pp. 33, 48 (1970) (there was "scarcely an ancient dwelling site" in the area that had not been "vandalized by pottery diggers for personal gain").

The Antiquities Act had four sections and covered less than a page of the statutes at large. The first section made it illegal to "appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument[]" on federal land. § 1, 34 Stat. at 225. The second section empowered the president to proclaim a "historic landmark[], historic and prehistoric structure[], and other objects of historic or scientific interest … to be national monuments." *Id.* § 2. As part of the declaration, the president could "reserve" for the monument "parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected[.]" *Id.* Sections 3 and 4 provided for scientific preservation of objects and the development of related rules and regulations by the Secretaries of Interior, Agriculture, and War. *See id.* §§ 3-4.

Nothing in the Antiquities Act empowered the president to dispense with other statutes or to make any land use decision beyond reserving the land from appropriation for the purpose of a monument.

For decades, declarations creating monuments were short documents that recited the president's statutory authority, identified the interest to be protected, named and set aside, or reserved the monument, specified the affected land, and gave

warning, generally, "not to appropriate, injure or destroy any feature" of the monument and not to "locate or settle upon any of the lands reserved." Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906). *See*, *e.g.*, Proclamation No. 799, 35 Stat. 2180 (Feb. 7, 1908); Proclamation No. 2232, 50 Stat. 1827 (Apr. 13, 1937). After the National Park Service ("NPS") was established in 1916, the proclamations routinely provided for "supervision, management, and control" according to the statute establishing the NPS. *See*, *e.g.*, Proclamation No. 1650, 42 Stat. 2295 (Jan. 24, 1923).

In instances where the *president* had already reserved the underlying land for a different purpose, the declarations specified whether one reservation was withdrawn or both were applicable. *See, e.g.*, Proclamation No. 799, 35 Stat. 2180 (Feb. 7. 1908) (land reserved for monument and forest, with the monument as the dominant reservation). None of the early monument proclamations purported to elevate a presidential reservation over a purpose Congress had specifically established for the land.

Even so, presidential land reservations were not without controversy. Reserving land prevented it from becoming subject to state and local taxes. As a result, some states, including Oregon, were able to obtain statutory protection from certain reservations. *See* Act of Mar. 4, 1907, Pub. L. No. 59-242, 34 Stat. 1256, 1271 ("no forest reserve shall be created, nor shall any additions be made … within the limits of the States of Oregon, Washington, … except by Act of Congress.").

B. Congressional Land Use Dictates Limit Presidential Power

With the West settled and the states established, the 1960s and 1970s witnessed new federal land policy priorities with an emphasis on managing the land and accommodating various uses rather than disposing of and reserving land. The controlling statutes provided quintessentially legislative balancing of competing policy considerations and ultimately provided multiple procedural protections for land use decisions and mandated use as well as conservation. Presidential proclamations that prohibit use and evade protections for stakeholders not only exceed the power in the Antiquities Act but evade or counter the will of Congress.

The most notable and comprehensive general land use statute of the era was the Federal Land Policy Management Act ("FLPMA") of 1976. Pub. L. No. 94-579, 90 Stat. 2743. The FLPMA identified 13 explicit guiding policies, including the policies that public lands would generally remain in federal ownership, and that all prior and subsequent land use classifications would undergo periodic review and the establishment of land use plans subject to public input and judicial review. *See Id.* § 102, 90 Stat. at 2744-45; *id.* § 202, 90 Stat. at 2747-48. Management of the land was to be based on multiple use and sustained yield, to protect ecological, environmental, and other values, and to "recognize[] the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands[.]" *Id.* § 102, 90 Stat. at 2745.

In the FLPMA, Congress explicitly declared it to be the policy of the United States that it be Congress that would "exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action[.]" *Id.* § 102(a)(4), 90 Stat. at 2744.[15]

The FLPMA reinforced Congressional control over withdrawals in several ways. First, Congress provided that any land management decision or action that excluded "one or more of the principal or major uses for two or more years"[16] for 100,000 acres "shall be reported by the Secretary to the House of Representatives and the Senate[]" and be subject to a legislative veto. *Id.* § 202(e), 90 Stat. at 2749.

Second, Congress provided that the Secretary could not withdraw land aggregating 5,000 acres[17] except by following a rigorous process involving public notice, public hearings, the preparation of a Secretarial report satisfying 12 criteria, and notice to Congress with a 90-day window for a legislative

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[15] "Withdrawal" meant "withholding an area of Federal land from … some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program[.]" *Id.* § 103(j), 90 Stat. at 2746.

[16] "Principal or major uses" were "livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production." *Id.* § 103(l), 90 Stat. at 2747.

[17] Withdrawals that affected less than 5,000 acres were limited as to purpose and time. *Id.* § 204(d), 90 Stat. at 2753.

veto.[18] The Ninth Circuit later held the FLPMA's legislative veto provisions unconstitutional. *See Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017).

Finally, Congress repealed executive withdrawal authority in dozens of statutes. *Id.* § 704, 90 Stat. at 2792. But Congress went even further, legislating that any "implied authority of the President to make withdrawals and reservations, resulting from acquiescence of the Congress" such as that found in a prior Supreme Court decision, was also repealed. *Id.* (citing *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915)).

Despite Congress's statutorily declared policy and substantive and procedural protections limiting executive withdrawal of land, presidents started withdrawing land from principal and major uses when "reserving" monuments.

C. Presidents Now Misuse Monument Designations to Evade Statutory Imperatives

For the last quarter century, presidential monument designations have evolved, continually expanding prohibitions on use and dispensing with statutes.[19] There is a dire need for this Court to arrest

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[18] *Id.* § 204(c), 90 Stat. at 5752-53; *id.* § 204(b), 90 Stat. at 2751; *id.* § 204(h), 90 Stat. at 2754.

[19] Since early 2000, it has been commonplace for presidential monument designations to prohibit offroad vehicle use. *See*, *e.g.*, Proclamation No. 7263, 65 Fed. Reg. 2,817, 2,818 (Jan. 11, 2000) (prohibiting "motorized and mechanized vehicle use off road"); Proclamation No. 7265, 65 Fed. Reg. 2,825 (Jan. 11, 2000) (same).

the trend toward arrogating executive power and violating the Constitution. This case and the related case, No. 23-524, present a limited and relatively straightforward conflict as to specific uses for specific parcels of land and so present an excellent vehicle to serve that purpose.

At least five monument designations, including two related to the monument at issue here, purport to explicitly ban the FLPMA principal and major uses of timber production or livestock grazing. *See* Proclamation No. 7318, 65 Fed. Reg. 37,249, 37,250-51 (June 9, 2000) (prohibiting "commercial harvest of timber or other vegetative material[,]" demanding study of whether grazing was inconsistent with "objects of biological interest" and if so, retirement of grazing allotments); Proclamation No. 9565, 82 Fed. Reg. 6,151, 6,155 (Jan. 12, 2017) (subjecting expanded monument to same laws and regulations as the rest of the monument). *See also* Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000) (barring future timber production); Proclamation No. 9194, 79 Fed. Reg. 62,303 (Oct. 10, 2014) (timber harvest allowed only for fire, insect, and disease management or public safety); Proclamation No. 7319, 65 Fed. Reg. 37,253 (June 9, 2000) (prohibiting grazing).

These withdrawals would be unlawful if done by a Secretary, but courts have rejected judicial challenges, holding that the APA's judicial review does not apply to presidential actions, that the FLPMA and various other land use statutes do not provide a private right of action, and that the FLPMA is directed only to the Secretary, not the president. *See Tulare Cty. v. Bush*, 306 F.3d 1138, 1143 (D.C.

Cir. 2002) (holding APA not applicable to presidential actions and that other statutes did not provide cause of action); *Garfield Cty. v. Biden*, No. 4:22-cv-00059, 2023 WL 5180375, *7-8 (D. Utah Aug. 11, 2023) (holding alleged presidential violation of Antiquities Act not judicially reviewable, APA not applicable to presidential action, and presidential error in exercising authority not reviewable); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 1172, 1194-95 (D. Utah 2004), *appeal dismissed, Utah Ass'n of Ctys v. Bush,* 455 F.3d 1094 (10th Cir. 2006) (holding the FLPMA and other statutes did not provide right of action).

Courts also find that challengers either have not alleged enough to challenge discretionary aspects of the designation, such as its size or scientific value, or find that exercise of discretion granted to the president is unreviewable. *See Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 544 (D.C. Cir. 2019) (where monument designation protected natural resources and ecosystems surrounding objects of interest, plaintiff required to plead that designated land had no natural resources or ecosystems); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135-36 (D.C. Cir. 2002) (noting "separation of powers concerns … bar review for abuse of discretion altogether[]" and courts are more "sensitive to pleading requirements" when reviewing presidential action).

Emboldened by an unbroken string of successfully overcoming challenges to monument proclamations, the proclamations now read more like land use codes. For instance, the recent Baaj Nwaajo Monument proclamation spends approximately 45 paragraphs

identifying various interests that are subject to protection. Proclamation No. 10606, 88 Fed. Reg. 55,331, 55,339 (Aug. 15, 2023). The proclamation then dedicates another 25 paragraphs to the management of the Baaj Nwaajo Monument. *Id.* It proclaims and reserves the lands and interests in lands as a monument, withdraws them from all forms of "entry, location, selection, sale, or other disposition," demands management according to the "terms, conditions, and management direction" provided in the proclamation, calls for the creation of a new management plan with new rules and regulations, and calls for taking into account "to the maximum extent practicable, maintaining the undeveloped character of the lands" and "minimizing impacts from surface-disturbing activities[.]" *Id.* Further, the proclamation directs the Secretary to explore "co-stewardship," "cooperative agreements," or other contracts and opportunities with and temporary closures of the Baaj Nwaajo Monument for Tribal Nations. The proclamation calls for the creation of a Federal Advisory Committee as well as a separate Commission to assist in the development and carrying out of a management plan. *Id.* at 55,340. The proclamation continues, demanding "to the maximum extent permitted by law" protection of sacred and cultural sites and cultural, spiritual, and customary Tribal uses. *Id.* at 55,341. And on and on the proclamation goes, addressing dozens of principal or sub-uses.

Presidential monument declarations that purport to dictate land management decisions exercise more power than the Antiquities Act granted and contravene statutory mandates. In many such cases

executive interference with legislative dictates is merely implicit, but here it is plain as day.

CONCLUSION

When presidents use monument proclamations to withdraw federal land from permissible uses, they dispense with statutes and avoid protections Congress provided for stakeholders such as *amicus curiae* AZFB. Here, the President dispensed with a Congressional mandate for the primary use of specific land, and review by this Court is warranted to arrest this disturbing trend.

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Respectfully submitted,

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