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Law Professor Amicus Brief in Massachusetts Lobstermen's Association v. Ross Regarding the Legality of the Northeast Canyons and Seamounts Marine National Monument

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**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION,
ATLANTIC OFFSHORE LOBSTERMEN'S
ASSOCIATION, LONG ISLAND COMMERCIAL
FISHING ASSOCIATION, GARDEN STATE
SEAFOOD ASSOCIATION, and RHODE ISLAND
FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CONSERVATION LAW FOUNDATION, CENTER FOR
BIOLOGICAL DIVERSITY, and R. ZACK KLYVER,

Defendant-Intervenors.

Case No. 17-cv-00406 (JEB)

**MOTION SEEKING LEAVE TO FILE BRIEF OF AMICI CURIAE LAW
PROFESSORS IN SUPPORT OF INTERVENORS AND FEDERAL DEFENDANTS'
MOTION TO DISMISS**

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Local Civil Rule 7(o)(2), Robin Kundis Craig, Randall S. Abate, Robert T. Anderson, Bret Birdsong, Victor B. Flatt, Richard Hildreth, Blake Hudson, Cymie R. Payne, Zygmunt J.B. Plater, Edward P. Richards, Keith W. Rizzardi, Stephen E. Roady, and Rachael E. Salcido (collectively, the “Proposed Amici”) respectfully request leave to file the accompanying brief in support of Defendant-Intervenors and Federal Defendants’ motion to dismiss.

As this district has recognized, a district court has the “inherent authority” to grant leave to appear as an amicus. *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (citations and internal quotation marks omitted). Such authority is generally granted where “the information offered is timely and useful.” *Ellsworth Assoc., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (citations and internal quotation marks omitted). An amicus brief should normally be allowed “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (citation and internal quotation marks omitted).

The Proposed Amici are professors at law schools across the United States who have recognized expertise in ocean and coastal law. They have decades of experience in marine law and policy, and have researched, published and taught about the laws and public policy interest that apply to the waters, submerged lands, and resources of the United States’ coastal and ocean waters. Amici have a shared interest in providing the Court with a thorough description of how the Antiquities Act applies to submerged lands under domestic law. Amici are uniquely well-suited to opine on whether the president may establish a national monument in the United States’ exclusive economic zone and on the United States’ continental shelf, where the Monument is located—an issue that amici understand could be a significant factor in this Court’s review of the Federal Defendants’ motion to dismiss (ECF No. 32).

The Proposed Amici have sought and obtained consent from all involved parties.

CONCLUSION

For the foregoing reasons, the Proposed Amici respectfully request that the Court grant leave to their motion to appear as amici, and ask that the accompanying brief, attached as Exhibit A, be considered filed as of the date of this Motion's filing.

Dated: May 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically filed a true and correct copy of the foregoing Amici Curiae Brief with the Clerk of the Court by using the appellate CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated: May 4, 2018

/s/ Douglas W. Baruch
Douglas W. Baruch

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DEFENDANT-INTERVENORS AND FEDERAL DEFENDANTS'
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	4
I. The Antiquities Act Applies to Submerged Lands within the EEZ and the Continental Shelf.....	4
A. The United States Exercises “Control” over the EEZ and Continental Shelf for Purposes of the Antiquities Act	4
B. The Seabed Is “Land” for Purposes of the Antiquities Act	9
II. Presidential Authority to Designate National Monuments under the Antiquities Act Extends to Submerged Lands throughout the Full Extent of the EEZ and Continental Shelf.....	11
A. The Antiquities Act Is Not Limited to Federal Land and Territories As They Existed in 1906.....	11
B. For At Least Five Decades, Presidents Have Used the Antiquities Act to Protect Marine Resources, Both Ecological and Cultural.....	12
C. Presidents Can Use the Antiquities Act to Protect Ecological Resources, Including Marine Ecological Resources.....	14
D. Presidential Use of the Antiquities Act in the Ocean Has Provided Vital Protections for Marine Resources, Both Cultural and Ecological	15
III. The President Has Authority to Limit Commercial Fishing within Marine National Monuments in order to Protect Marine Resources	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alaska v. United States</i> , 545 U.S. 75 (2005).....	<i>passim</i>
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976).....	15
<i>United States ex rel. Jordan v. Ickes</i> , 55 F. Supp. 875 (D.D.C. 1943).....	10
<i>Mayhew v. Krug</i> , 98 F. Supp. 338 (D.D.C. 1951).....	10
<i>United States v. California</i> , 332 U.S. 19, 38-39 (1947)	<i>passim</i>
<i>United States v. California</i> , 436 U.S. 32 (1978).....	<i>passim</i>
<i>Wilson v. Cook</i> , 327 U.S. 474 (1946).....	8
 Statutes and Rules	
16 U.S.C. § 410.....	12
16 U.S.C. §§ 1361-1423h	8
16 U.S.C. §§ 1431-1445c.....	8
36 C.F.R. § 2.17(a) (2017) (National Park Service).....	17
Act of Apr. 30, 1900, ch. 339, 31 Stat. 141	11
Act of Mar. 2, 1917, ch. 145, 39 Stat. 951.....	11
Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132.....	12
Antiquities Act of 1906, 54 U.S.C. § 320301(a)	<i>passim</i>
Cal. Const., Art. XII, § 1 (1849).....	6
Endangered Species Act, 16 U.S.C. §§ 1531-1540	8

Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-18848

Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-19510

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b.....5

Pub. L. No. 85–508, 72 Stat. 339 (July 7, 1958)11

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Cedar Breaks National Monument Compendium, §1.5(a)(1)(i), available at <https://www.nps.gov/cebr/upload/CEBRCompendium508.pdf>17

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National Park Service, *Diving in Buck Island Reef National Monument*,
<https://www.nps.gov/submerged/parks/buis.html>.....18

Pres. Proclamation No. 3443,
 76 Stat. 1441-1443 (Dec. 28, 1961), 27 Fed. Reg. 31 (Jan. 4, 1962)12, 13

Pres. Proclamation No. 2667,
 1945 U.S. Code Cong. Serv. 1199 (Sept. 8, 1945)9

Pres. Proclamation No. 4346, 40 Fed. Reg. 5127 (Feb. 4, 1975)13

Pres. Proclamation No. 4614, 43 Fed. Reg. 57,025 (Dec. 5, 1978).....13

Pres. Proclamation No. 4620, 43 Fed. Reg. 57,067 (Dec. 5, 1978).....13

Pres. Proclamation No. 4623, 43 Fed. Reg. 57,087 (Dec. 5, 1978).....13

Pres. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).....5, 7, 8, 9

Pres. Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000).....13, 17

Pres. Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 17, 2001).....13, 16

Pres. Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001).....12, 13, 17

Pres. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006).....13, 16

Pres. Proclamation No. 8327, 73 Fed. Reg. 75,293 (Dec. 5, 2008).....14

Pres. Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009).....14, 17

Pres. Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009).....14

Pres. Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 6, 2009).....14

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Pres. Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016)4, 14, 17, 19

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 Public Lands: A Historical Perspective,” 34 *Public Land & Resources*
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STATEMENT OF INTEREST

The undersigned amici are law school professors who are recognized experts in ocean and coastal law. Amici include legal scholars who have researched, published, and taught about the laws and public policy interests that apply to the waters, submerged lands, and resources of the United States' coastal and ocean territory. Amici collectively have decades of experience in marine law and policy, and several amici direct university centers and institutes devoted to the subject. Amici respectfully submit this brief in support of Defendant-Intervenors and Federal Defendants.

The complaint in this case challenges the presidential designation of the Northeast Canyons and Seamounts National Marine Monument (the "Monument") under the Antiquities Act of 1906, 54 U.S.C. § 320301(a) (formerly 16 U.S.C. § 431(a)) ("Antiquities Act"). Many sets of rules, including multiple federal statutes, apply to the waters, submerged lands, and resources of the United States' coastal and ocean territory, and the relationships among these laws are often complex and non-obvious. The undersigned professors' interest in this litigation is to provide the Court with a thorough description of how the Antiquities Act applies to submerged lands under domestic law, including presidents' historical use of the Antiquities Act to protect nationally significant marine ecological resources. Amici are well-suited to opine on whether the president may establish a national monument in the United States' exclusive economic zone ("EEZ") and on the United States' continental shelf, where the Monument is located—an issue that amici understand could be a significant factor in this Court's review of the Federal Defendants' motion to dismiss (ECF No. 32).

The Supreme Court has recognized the president's authority to establish marine national monuments to protect the seabed and other marine resources that are of historic and scientific interest to the United States. As set forth herein, amici submit that the Monument's creation was consistent with the president's authority under the Antiquities Act to designate national monuments on "land owned or controlled" by the federal government.

A full list of amici is attached as an appendix to this brief.

SUMMARY OF THE ARGUMENT

President Barack Obama established the Monument in 2016 in accordance with the Antiquities Act, pursuant to which "[t]he President may, in the President'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." 54 U.S.C. § 320301(a). The Monument encompasses 4,913 square miles of a sensitive ocean ecosystem and is located approximately 130 miles southeast of Cape Cod, within the United States' EEZ and including the United States' continental shelf. It was created to support vulnerable ecological communities in the seabed and waters above, including endangered species and deep sea corals that live at depths of greater than 12,000 feet. The Plaintiffs have asked this Court to declare the designation of the Monument unlawful and to enjoin enforcement of its prohibitions against commercial fishing. In particular, the Plaintiffs argue that the president exceeded his authority under the Antiquities Act in designating the Monument

because, they contend, the federal government does not “own” or “control” the ocean under the Antiquities Act. 54 U.S.C. § 320301(a).

Plaintiffs’ stated interpretation of the Antiquities Act is simply erroneous. As a matter of law, the federal government controls the seabed and waters above (referred to as the “water column”) within the EEZ, which extends up to 200 nautical miles from the coastline of the United States and its territories. Moreover, it also controls a 200-nautical-mile-wide continental shelf.¹ The federal government routinely exercises this control through, *inter alia*, fishing regulations, offshore oil and gas leasing, national marine sanctuaries, and marine national monuments. Further, both the seabed within the EEZ and the continental shelf qualify as “land” for purposes of the Antiquities Act.

Plaintiffs also ignore that presidents, both Republican and Democrat, have exercised their authority under the Antiquities Act to designate national monuments that protect marine resources. Presidents have established national monuments that protect ocean resources since 1925, and they have established “marine national monuments”—national monuments created primarily to protect ocean resources and ecosystems—since 1961. The Supreme Court also has long acknowledged presidential authority to use the

¹ Under international and U.S. domestic law, nations control a 200-nautical-mile-wide continental shelf legally, even if the actual geologic continental shelf does not extend that far. United Nations Convention on Law of the Sea Art. 76(1), 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) (“The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”)

Antiquities Act to protect marine ecosystems. *Alaska v. United States*, 545 U.S. 75, 102-03 (2005); *United States v. California*, 436 U.S. 32, 36 (1978).

Finally, the protections that national monument designations provide to objects, wildlife, and geological features of historic and scientific interest to the United States require concomitant federal authority to regulate human activity that would damage or destroy those resources. A holding to the contrary would undermine presidential authority under the Antiquities Act. Accordingly, presidential authority to designate the Monument necessarily includes the authority to regulate human use of the water column—including regulation of commercial fishing—in order to fully realize the Monument’s goals of protecting “geological, ecological, and biological resources.” Pres. Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016).

ARGUMENT

I. The Antiquities Act Applies to Submerged Lands within the EEZ and the Continental Shelf

Under the Antiquities Act, “[t]he President may, in the President’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.*” 54 U.S.C. § 320301(a) (emphasis added). The seabed within the United States’ EEZ and the United States’ continental shelf clearly are “land” that is “controlled by the Federal Government.”

A. The United States Exercises “Control” over the EEZ and Continental Shelf for Purposes of the Antiquities Act

The United States explicitly has asserted control over the continental shelf since at least 1945. In that year, President Harry Truman issued a presidential proclamation

asserting that “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, *subject to its jurisdiction and control.*” Pres. Proclamation No. 2667, 1945 U.S. Code Cong. Serv. 1199 (Sept. 8, 1945) (emphasis added).

Soon after President Truman’s proclamation, the Supreme Court affirmed that the federal government may exercise jurisdiction over the continental shelf and the ocean. In its landmark 1947 decision, *United States v. California*, the Court acknowledged that the federal government has a paramount interest in the continental shelf as compared to coastal states. 332 U.S. 19, 38-39 (1947).² It described the federal government’s interests and rights in the continental shelf as “transcending” “mere legal title”:

The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these

² The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, was enacted in response to the Supreme Court’s 1947 *California* decision, and was intended to “transfer[] dominion over [the one-mile belt that had been at issue in *California*] to California.” *California*, 436 U.S. at 37. This statute and Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b (“OCSLA”), both enacted in 1953, settle that states have title to an approximately 3-mile wide “belt” of land seaward of the coastline—but always subject to paramount federal control when the federal government chooses to assert its interests. 43 U.S.C. §§ 1301(a)(1), 1302, 1311(a), (d), 1313, 1314. Under OCSLA and President Reagan’s EEZ proclamation (Pres. Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983)), the federal government controls the United States waters and seabed seaward of the belt, which is where the Monument is located.

constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.

California, 332 U.S. at 29. Given these national defense and international law considerations, the Supreme Court concluded “that the Federal Government rather than the state has paramount rights in and power over [the seabed], an incident to which is full dominion over the resources of the soil under that water area, including oil.” *Id.* at 38-39.

President Truman’s proclamation and the Supreme Court’s 1947 *California* decision were consistent with the country’s longstanding and expanding notions of the federal government’s authority over marine areas beyond its coasts. By the end of the 19th century, the United States (and most of the rest of the world) had accepted national control over the first three miles of ocean (both the submerged lands and the water column); indeed, such an assertion of jurisdiction was included in California’s 1849 constitution. Cal. Const., Art. XII, § 1 (1849); *see also California*, 332 U.S. at 29-35 & nn. 15-17 (discussing the progress of international acceptance of coastal nation jurisdiction over this “belt” and concluding that it emerged as a generally accepted principle sometime between the late 18th century and approximately 1872-1876).

As the 1947 *California* Court also noted, the infant United States asserted jurisdiction over the ocean more than three miles offshore: “The Continental Congress did for example authorize capture of neutral and even American ships carrying British goods, ‘if found within three leagues (about nine miles) of the coasts.’ Journ. of Cong. 185, 186, 187 (1781).” 332 U.S. at 32 n. 15. In addition, as far back as 1939, the United States claimed the right to be free “from a hostile act in a zone 300 miles from the American coasts” pursuant to the Declaration of Panama. *Id.*

In 1953, Congress acknowledged that the federal government’s control of the seabed extends beyond three miles by enacting the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, and OCSLA, 43 U.S.C. §§ 1331-1356b. The Submerged Lands Act transferred most of the first three geographical miles of submerged lands, and control over the ocean waters above them, to the states—but subject to paramount federal control when the federal government chooses to assert its interests. 43 U.S.C. §§ 1301(a)(1), 1302, 1311(a), 1311(d), 1313, 1314. Simultaneously, OCSLA establishes federal control over what it defines as the “Outer Continental Shelf”—i.e., “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title [the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” 43 U.S.C. § 1331(a). Under this statute, “the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter” 43 U.S.C. § 1332(1). Moreover, under the Act, the Bureau of Ocean Energy Management within the U.S. Department of the Interior “manages approximately 1.7 billion acres . . . of this federally owned offshore area,” with “[f]ederal jurisdiction generally end[ing] around 200 nautical miles from the coastline.”³

Today, the federal government’s jurisdiction and control over the seabed extends to the outer boundary of the EEZ, up to 200 nautical miles offshore in accordance with international law, pursuant to a 1983 proclamation by President Ronald Reagan. Pres.

³ Bureau of Ocean Energy Management, *Oil and Gas Leasing on the Outer Continental Shelf* 1 (n.d.), https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

Proclamation No. 5030; *see also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 55-57, 76-78, *supra* n. 1.⁴ The federal government exercises control of the seabed and water column within the area in myriad ways, including, *inter alia*, fishing regulation under the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884; permitting of incidental take of marine species under both the Endangered Species Act, 16 U.S.C. § 1531-1540, and Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h; designations of national monuments, 54 U.S.C. § 320301(a), and national marine sanctuaries, 16 U.S.C. §§ 1431-1445c; and offshore national security and defense activities. This assertion of control extends to all U.S. territories and possessions. *See* Pres. Proclamation No. 5030.⁵

⁴ Although the United States is not a party to the Convention, it acknowledges the Convention’s jurisdictional provisions to be customary international law, and it has passed a number of domestic laws through which it recognizes and actively manages its authority over its own EEZ. *See, e.g.*, “Statement of Admiral Samuel J. Locklear: The Law of the Sea Convention: Perspectives from the U.S. Military,” Testimony before the Senate Foreign Relations Committee (June 14, 2012); *The UN Convention on the Law of the Sea: Hearing Before the S. Foreign Relations Comm.*, 110th Cong. (2007) (written testimony of John D. Negroponte, Deputy Secretary of State).

⁵ OCSLA, which governs oil and gas leasing on federal lands, provides that “the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter” 43 U.S.C. §§ 1331-1356b, 1332(1).

No federal court has yet defined “control” for purposes of the Antiquities Act. However, in *Wilson v. Cook*, a case involving the continuing right of Arkansas to legislate regarding lands within the state owned by the federal government, the U.S. Supreme Court made clear that the act of legislating lands is a primary way in which governments exercise “control” over their lands. 327 U.S. 474, 488 (1946) (noting that Arkansas had “*conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands* acquired by the United States in Arkansas” (emphasis added)).

Thus, the federal government actively manages—*controls*—both the submerged lands of the seabed and the water column out to 200 nautical miles from the United States’ shorelines. Accordingly, the ocean and seabed clearly fall within the purview of the Antiquities Act. 54 U.S.C. § 320301(a) (formerly 16 U.S.C. § 431(a)).

B. The Seabed Is “Land” for Purposes of the Antiquities Act

The federal government has long considered the seabed to be “land” under federal law. In his 1945 proclamation, President Truman justified federal control over the continental shelf in part because “the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it” Pres. Proclamation No. 2667, 1945 U.S. Code Cong. Serv. 1199 (Sept. 8, 1945). President Reagan likewise clearly envisioned the seabed of the EEZ as “land” subject to both development and ecological protection, on which the United States would have “jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.” Proclamation No. 5030. In 1997, Bob Armstrong, then Assistant Secretary for Land and Minerals, U.S. Department of the Interior, classified both the seabed and the continental shelf as a form of land, noting:

While many people do not think of the submerged lands of our nation’s outer continental shelf as public lands, the United States has jurisdiction over the nearly 2 billion acres of the seabed and subsoil of our submerged lands. Congress, in 1978, declared that those lands were “a vital national resource reserve held by the Federal government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards” 43 U.S.C. § 1332.

Bob Armstrong, “Our Federal Public Lands,” 12 *Natural Resources & Envt.* 3, 4 (Summer 1997).

Congress also has long considered the seabed to be “land.” In drafting OCSLA, which asserted federal authority over oil and gas leases on the Outer Continental Shelf,⁶ Congress directly paralleled the terrestrial federal lands statutes, including the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-195; and OCSLA’s legislative history clearly illustrates that Congress viewed the seabed as federal “land.” *See, e.g.*, H.R. Rep. No. 83-215 (March 27, 1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1388, 1434; 43 U.S.C. § 1331(q) (incorporating terrestrial federal lands statutes into the offshore definition of “minerals”); Craig, *supra* n.6, at 76-79. Authority to implement the Outer Continental Shelf leasing program is assigned to the U.S. Department of the Interior, the same department that administers all terrestrial federal public lands except the national forests. 43 U.S.C. §§ 1331(b), 1334.

The Supreme Court likewise has concluded that submerged land is “land” for purposes of the Antiquities Act. In examining President Calvin Coolidge’s 1925 designation of Glacier Bay National Monument, the Court concluded that excluding submerged lands would undermine the purposes that led to that monument’s creation. *Alaska*, 545 U.S. at 102. Specifically, such an exclusion would “impair scientific study of the majestic tidewater glaciers surrounding the bay,” impair research about and preservation of interglacial forests—“which can be found both above and below the tideline”—and “compromise the goal of safeguarding the flora and fauna that thrive in

⁶ *See United States ex rel. Jordan v. Ickes*, 55 F. Supp. 875, 875 (D.D.C. 1943); *Mayhew v. Krug*, 98 F. Supp. 338, 338 (D.D.C. 1951); *see also* Robin Kundis Craig, “Treating Offshore Submerged Lands as Federal Public Lands: A Historical Perspective,” 34 *Public Land & Resources L. Rev.* 51, 62-68 (2013) (“Craig”).

Glacier Bay’s complex and interdependent ecosystem.” *Id.* Thus, “the Glacier Bay National Monument . . . included the submerged lands underlying Glacier Bay” because the submerged lands were necessary to the core purpose of the monument. *Id.*

Accordingly, there can be no dispute that the seabed is “land” that is controlled by the federal government as contemplated by the Antiquities Act.

II. Presidential Authority to Designate National Monuments under the Antiquities Act Extends to Submerged Lands throughout the Full Extent of the EEZ and Continental Shelf

A. The Antiquities Act Is Not Limited to Federal Land and Territories As They Existed in 1906

The most natural reading of the Antiquities Act, both intuitively and as demonstrated by congressional intent and presidential practice, is that the Antiquities Act can apply to any land owned or controlled by the United States *at the time of the national monument designation*, regardless of when the federal government acquired such ownership and control. The United States acquired several new domains in the years before Congress enacted the Antiquities Act, including Alaska,⁷ Hawaii,⁸ Puerto Rico, Guam, and the Philippines,⁹ making it impossible for Congress as it was enacting the Antiquities Act to assume that the lands under the federal government’s ownership and control would

⁷ The United States had purchased Alaska in 1867 from Russia, but it did not become an official U.S. territory until 1912 and did not become a state until 1959. Pub. L. No. 85–508, 72 Stat. 339 (July 7, 1958).

⁸ Hawaii was annexed in 1898 and became an official U.S. territory in 1900, Act of Apr. 30, 1900, ch. 339, 31 Stat. 141, but it did not become a state until 1959. Pub. L. No. 86–3, 73 Stat. 4 (Mar. 18, 1959).

⁹ The United States acquired Puerto Rico, Guam, and the Philippines from Spain in 1898 at the conclusion of the Spanish-American War. Puerto Rico became a U.S. territory in 1917. Act of Mar. 2, 1917, ch. 145, 39 Stat. 951.

remain static into the future. As intended by Congress, presidents have applied the Antiquities Act to territories that the United States acquired after 1906. The most prominent example is the U.S. Virgin Islands, which remained a Danish possession until 1917, when the United States purchased them. Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132. Despite the fact that United States acquired these islands after 1906, President John F. Kennedy, Jr., established the Buck Island Reef National Monument in the Virgin Islands in 1961. Pres. Proclamation No. 3443, 76 Stat. 1441-1443 (Dec. 28, 1961), 27 Fed. Reg. 31 (Jan. 4, 1962). Forty years later, President William J. Clinton added the Virgin Islands Coral Reef National Monument. Pres. Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001). The designation of the Monument is consistent with this prior use of the Antiquities Act to establish national monuments in lands owned or controlled by the federal government after 1906, as the federal government has asserted control over the EEZ and continental shelf since at least 1983.

B. For At Least Five Decades, Presidents Have Used the Antiquities Act to Protect Marine Resources, Both Ecological and Cultural

In 1925, President Calvin Coolidge established the Glacier Bay National Monument in Alaska, which is now Glacier Bay National Park; it includes fjord waters, intertidal glaciers, and the marine life of Alaska's Inside Passage, along with the fjord cliffs and resident animals that live on land. Pres. Proclamation No. 1733 (Feb. 26, 1925); 16 U.S.C. § 410hh-1(1). Ten years later, President Franklin D. Roosevelt established the Fort Jefferson National Monument in Florida, a deep water fort, which Congress redesignated as the Dry Tortugas National Park in 1992. Pres. Proclamation No. 2112 (Jan. 4, 1935); 16 U.S.C. § 410xx.

In 1961, President John F. Kennedy designated Buck Island Reef National Monument and became the first president to exercise his authority under the Antiquities Act primarily to protect marine resources. President Kennedy explained that the monument designation was intended to protect both the island and its surrounding coral reef ecosystem because “its adjoining shoals, rocks, and undersea coral reef formations possess one of the finest marine gardens in the Caribbean Sea.” Pres. Proclamation No. 3443. Following expansions by President Gerald Ford (1975) and President Clinton (2001), today this monument protects the 176-acre tropical island, rare marine life, coral reef ecosystems, and historic shipwrecks. *See id.*; Pres. Proclamation No. 4346, 40 Fed. Reg. 5127 (Feb. 4, 1975); Pres. Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 17, 2001).

After President Kennedy, presidents of both political parties have used the Antiquities Act to create 12 additional national monuments that protect important marine resources, both cultural and ecological: (1) Bering Land Bridge National Monument (Alaska), Pres. Proclamation No. 4614, 43 Fed. Reg. 57,025 (Dec. 5, 1978) (President James Carter); (2) Kenai Fjords National Monument (Alaska), Pres. Proclamation No. 4620, 43 Fed. Reg. 57,067 (Dec. 5, 1978) (President Carter); (3) Misty Fjords National Monument (Alaska), Pres. Proclamation No. 4623, 43 Fed. Reg. 57,087 (Dec. 5, 1978) (President Carter); (4) California Coastal National Monument, Pres. Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000) (President Clinton); (5) Virgin Islands Coral Reef National Monument, Pres. Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001) (President Clinton); (6) Papahānaumokuākea (Northwestern Hawaiian Islands) Marine National Monument, Pres. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (President George W. Bush); (7) World War II Valor in the Pacific National Monument

(Pearl Harbor, HI), Pres. Proclamation No. 8327, 73 Fed. Reg. 75,293 (Dec. 5, 2008) (President Bush); (8) Marianas Trench Marine National Monument (Northern Marianas Islands and Guam), Pres. Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009) (President Bush); (9) Pacific Remote Islands Marine National Monument (Wake, Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll), Pres. Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009) (President Bush); (10) Rose Atoll Marine National Monument (off American Samoa), Pres. Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 6, 2009) (President Bush); (11) San Juan Islands National Monument (Puget Sound, WA), Pres. Proclamation No. 8947, 78 Fed. Reg. 18,789 (March 25, 2013) (President Obama); and (12) Northeast Canyons and Seamounts Marine National Monument (Atlantic Ocean off the coast of New England), Pres. Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016) (President Obama).

C. Presidents Can Use the Antiquities Act to Protect Ecological Resources, Including Marine Ecological Resources

The Supreme Court has long recognized the president's authority to reserve submerged federal lands for national monuments under the Antiquities Act. For example, the Court upheld the application of the Antiquities Act to the ocean by acknowledging the extension of Glacier Bay National Monument's borders beyond Alaska's coastline, emphasizing the importance of including submerged lands to protect the "majestic tidewater glaciers" and "Glacier Bay's complex and interdependent ecosystem." *Alaska*, 545 U.S. at 102–03. Similarly, when examining the Channel Islands National Monument, the Court recognized that "the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument,

since they were then ‘controlled by the Government of the United States.’” *California*, 436 U.S. at 36.

Supreme Court precedent establishes that presidents have authority under the Antiquities Act to designate national monuments for the protection of marine resources, including those located above the seabed within the water column. In 1976, the Court held that the protection of fish is a valid reason to designate a national monument. *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (finding that President Dwight G. Eisenhower properly exercised his authority under the Antiquities Act when he designated the deep cavern in Nevada as Devil’s Hole National Monument, and that “[t]he pool in Devil’s Hole and its rare inhabitants [pupfish] are ‘objects of historic or scientific interest.’”). Likewise, in *Alaska*, the Supreme Court recognized that “[a]n essential purpose of monuments created pursuant to the Antiquities Act . . . is ‘to conserve the scenery and the natural and historic objects and the *wildlife* therein.’” 545 U.S. at 103 (emphasis added) (citing 54 U.S.C. § 100101).

D. Presidential Use of the Antiquities Act in the Ocean Has Provided Vital Protections for Marine Resources, Both Cultural and Ecological

Just as the Antiquities Act empowers the President to reserve submerged lands, *California*, 436 U.S. at 36, it authorizes the preservation of wildlife, ecosystems, and all the designated objects within the monument’s borders. *See Alaska*, 545 U.S. 75 at 103. To hold otherwise would jeopardize not only the marine ecosystems that many marine national monument designations were clearly intended to protect, but also objects of crucial importance to our nation’s history and national identity that are located within the water column.

For example, the World War II Valor in the Pacific National Monument is home to the *USS Arizona* and *USS Utah* memorials, which commemorate the sacrifices of service men and women at Pearl Harbor. The Papahānaumokuākea Marine National Monument, which is located in the Northwestern Hawaiian Islands and includes the Midway Atoll, affords protection to sunken ships and downed aircraft that serve “as a final resting place for the more than 3,000 people lost during the [B]attle [of Midway]”—one of the most significant and decisive naval battles of World War II. Pres. Proclamation No. 9478, 81 Fed. Reg. 60,227, 60,229 (Aug. 26, 2016) (expanding the monument). Presidential invocation of the Antiquities Act to create and expand the Buck Island Reef National Monument has extended protections over at least two 18th and 19th century slave ships that carried hundreds of enslaved Africans across the Atlantic as part of the Trans-Atlantic slave trade. *See* Pres. Proclamation No. 7392, 66 Fed. Reg. 7335, 7335-36 (Jan. 17, 2001) (expanding the monument in part to protect these shipwrecks and other objects of cultural and historic significance).

Presidents also have used the Antiquities Act to protect marine resources of scientific interest, including across areas much larger than the area encompassed by the Monument: Papahānaumokuākea’s 442,781 square miles of marine waters, unique coral reefs and deep-sea ecosystems, Pres. Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), Pres. Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016); California Coastal National Monument’s fragile geologic formations extending 1,100 miles along California’s coast and marine mammal habitat extending 12 nautical miles out to sea, Pres. Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000); the mangrove and coral ecosystems of the Virgin Islands, each home to multiple endangered and threatened

species, Pres. Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001); the rare interactions between photosynthetic and chemosynthetic life forms within the Marianas Trench Marine National Monument, which covers approximately 95,216 square miles of submerged lands and waters. Pres. Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009); and—at issue in this case—crucial feeding grounds for endangered and non-endangered whales and migrating fish that are created by the dynamic currents of Northeast Canyons and Seamounts Marine National Monument. Pres. Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016). Like the Monument, each of these marine national monuments contains “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” in need of protection and preservation. 54 U.S.C. § 320301.

III. The President Has Authority to Limit Commercial Fishing within Marine National Monuments in order to Protect Marine Resources

National monument designations inherently include the authority for the federal government to manage monument resources and regulate human activities that could impact protected resources. To this end, for example, within terrestrial national monuments, the National Park Service, Bureau of Land Management, and U.S. Forest Service all regulate human uses of the airspace, from airplane and helicopter use to parachuting and hang-gliding to the flying of drones and model planes.¹⁰

¹⁰ See, e.g., 36 C.F.R. § 2.17(a) (2017) (National Park Service); National Park Service, Policy Memorandum 14-05 (June 19, 2014), *available at* https://www.nps.gov/policy/PolMemos/PM_14-05.htm; Cedar Breaks National Monument Compendium, §1.5(a)(1)(i), *available at* <https://www.nps.gov/cebr/upload/CEBRCompendium508.pdf>; Bureau of Land Management, *Upper Missouri Breaks National Monument Record of Decision and Approved Resource Management Plan* 8 (Dec. 2008), *available at* <https://eplanning.blm.gov/epl-front-office/projects/lup/75546/101175/123248/>

Even more than terrestrial airspace, the water column is an inextricable part of marine ecosystems and the authority to protect fish and other objects within the water column cannot be separated from the presidential authority to designate national marine monuments under the Antiquities Act. Anyone who has visited the site of the *USS Arizona* within the World War II Valor in the Pacific National Monument is well aware of how carefully the National Park Service controls access to this submerged and hallowed national treasure.¹¹ Similarly, the Service regulates diving in Buck Island Reef National Monument, prohibiting specimen collecting and spearfishing and limiting scuba diving to certain areas.¹²

Federal agencies' authority to regulate human use of the water column, including commercial fishing, is absolutely essential to ensure that precious ecological resources within marine national monuments can be protected. Far more than on land, marine organisms live in three dimensions. In addition to corals and animal species that inhabit the seabed, marine canyons, and seamounts, numerous marine flora and fauna spend their lives within the water column. Within the Monument, for example, zooplankton rise to the surface each night, bringing with them nutrients that sustain numerous species of fish and

UMRBNM_ROD_and_Approved_RMP_(Part_1)_ (December_2008).pdf; U.S. Forest Service, *Land and Resource Management Plan: Tongass National Forest* 3-21 (Dec. 2016), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd527907.pdf.

¹¹ See National Park Service, *World War II Valor in the Pacific National Monument: Frequently Asked Questions*, <https://www.nps.gov/valr/faqs.htm>.

¹² See National Park Service, *Diving in Buck Island Reef National Monument*, <https://www.nps.gov/submerged/parks/buis.html>.

marine mammals; endangered sperm whales breathe at the water's surface and descend to depths of over 3,000 feet to hunt; and beaked whales dive to depths of nearly 10,000 feet.¹³

If the president has authority to designate a marine national monument, but lacks the ability to regulate human activity, such as commercial fishing, that could harm protected scientific and cultural resources, the Antiquities Act would be meaningless. Without such authority, the president's power under the Antiquities Act would be nullified. Further, failing to uphold the president's authority under the Antiquities Act to restrict human activity within the water column would ignore clear legal and historical precedent and severely limit the president's authority under the Act by illogically fragmenting interdependent marine resources—in this case, the corals on the seabed, organisms within the water column, and the geologic and geothermal features upon which they depend. *See California*, 436 U.S. at 36; *Alaska*, 545 U.S. at 102–03.

President Obama's proclamation creating the Monument emphasized that the objects of historic and scientific interest "are the canyons and seamounts themselves, and the natural resources and ecosystems in and around them." The proclamation acknowledged that many of the habitats within the Monument, especially its deep sea coral ecosystems, "are extremely sensitive to disturbance from extractive activities." Pres. Proclamation No. 9496, 81 Fed. Reg. 65,161, 65,161-62 (Sept. 15, 2016). To give effect to the proclamation, the protection of the marine ecosystems within the Monument must permit presidents to regulate human activity within the water column.

¹³ *See* Brad Sewell, "America's Deep Sea Treasures: The Northeast Canyons and Seamounts Marine National Monument," NRDC (April 26, 2017), <https://www.nrdc.org/sites/default/files/northeast-canyons-and-seamounts-marine-national-monument-fs.pdf>.

CONCLUSION

Multiple presidents and the Supreme Court have concluded that the continental shelf and the seabed are land under federal control and hence are subject to the Antiquities Act, authorizing presidents to designate national monuments in the marine space subject to the United States' jurisdiction. The history of the Antiquities Act illustrates that it applies to any land under federal control at the time of the national monument's designation, so that the Act applies throughout the United States' EEZ and continental shelf. Finally, the federal government can regulate—and has regulated—human activity in the water column to adequately protect the objects of historic and scientific interest for which the Monument was designated.

The undersigned law professors therefore respectfully urge the Court to find in favor of the Intervenor-Defendants and Federal Defendants and to dismiss Plaintiffs' complaint challenging President Obama's designation of the Monument and the restrictions on commercial fishing therein.

Dated: Washington, D.C.
May 4, 2018

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the District of Columbia*

Appendix A

ON BEHALF OF THE FOLLOWING LAW PROFESSOR SIGNATORIES:

ROBIN KUNDIS CRAIG (drafter)

James I. Farr Presidential Endowed Professor of Law
Affiliated Faculty, Wallace Stegner Center for Land, Resources, and Environment
Affiliated Faculty, Global Change and Sustainability Center
University of Utah S.J. Quinney College of Law

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University of the Pacific, McGeorge School of Law

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION,
ATLANTIC OFFSHORE LOBSTERMEN'S
ASSOCIATION, LONG ISLAND COMMERCIAL
FISHING ASSOCIATION, GARDEN STATE
SEAFOOD ASSOCIATION, and RHODE ISLAND
FISHERMEN'S ALLIANCE,

Plaintiffs,

v.

WILBUR ROSS, BENJAMIN FRIEDMAN, RYAN
ZINKE, DONALD J. TRUMP, and JANE DOE,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CONSERVATION LAW FOUNDATION, CENTER FOR
BIOLOGICAL DIVERSITY, and R. ZACK KLYVER,

Defendant-Intervenors.

Case No. 17-cv-00406 (JEB)

[PROPOSED] ORDER

WHEREAS, Robin Kundis Craig, Randall S. Abate, Robert T. Anderson, Bret Birdsong, Victor B. Flatt, Richard Hildreth, Blake Hudson, Cymie R. Payne, Zygmunt J.B. Plater, Edward P. Richards, Keith W. Rizzardi, Stephen E. Roady, and Rachael E. Salcido (collectively, the "Proposed Amici") have moved for leave of court to file the attached brief amicus curiae in this matter, and

- (1) The Proposed Amici brief complies with the requirements of Local Civil Rule 7(o),
and
- (2) the Proposed Amici's position is not adequately represented by either Party, and
- (3) the matters asserted in the brief are relevant to the disposition of this case,

THEREFORE, it is ORDERED this _____ day of _____, 2018, that the Proposed Amici are granted leave to file an amicus curiae brief.

Hon. James E. Boasberg
United States District Judge