No. 23-4107

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH; et al.,
Plaintiffs-Appellants,

ZEBEDIAH GEORGE DALTON, et al.,
Consolidated Plaintiffs-Appellants,

v.

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

HOPI TRIBE, et al.,
Defendants-Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Utah, No. 4:22-CV-0059 (Hon. David O. Nuffer)

BRIEF OF AMICI CURIAE ARIZONA SENATE PRESIDENT WARREN PETERSEN AND ARIZONA HOUSE SPEAKER BEN TOMA IN SUPPORT OF PLAINTIFFS-APPELLANTS AND CONSOLIDATED PLAINTIFFS-APPELLANTS AND REVERSAL

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> This right, thus newly vested in the crown, was exerted with the utmost rigour, at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the conqueror made, by laying together vast tracts of country depopulated for that purpose, and reserved solely for the king's royal diversion.

2 William Blackstone, *Commentaries* *415–16.

Unfortunately for William the Conqueror, he did not have President Biden's unrestrained vision of the Antiquities Act to aid him. The Act permits the President to declare, as relevant here, certain "objects" to be national monuments. According to President Biden, "objects" in the Antiquities Act means whatever he wants it to mean—such as plants, animals, qualities and experiences, and geological features. It can even mean an entire landscape. The result: a bird, a blade of grass, a quiet spot with a bit of shade, and an interesting rock can all be national monuments. And if President Biden likes a particular view on federal land, he can now declare it a monument.

This view of the Antiquities Act is little more than a modern-day version of the forest laws of medieval England. It permits the President to reserve millions of acres of land—indeed, all federal land—"solely for the [federal government's] royal diversions." *Id.* at *416.

That is what happened here. It has also happened in Arizona. On August 8, 2023, President Biden issued a proclamation declaring over 917,000 acres of land in Northern Arizona to be a national monument (the "Northern Arizona Designation"). *See generally* 88 Fed. Reg. 55,331, 55,331–344 (Aug. 8, 2023). Like this case, he did so by declaring that the animals, plants, geological features, and entire landscapes are a national monument. *See id.* at 55,338. Like this case, the Northern Arizona Designation withdraws the land from further development and new, productive uses. *See id.* at 55,339. And like this case, the result has been to impose costs on the State of Arizona and her citizens in the form of the lost productive capacity of the designated land.

Amici curiae Senator Warren Petersen and Representative Ben Toma are the President of the Arizona Senate and the Speaker of the Arizona House of Representatives. They file this brief in their official capacity as presiding officers of the legislative branch of the State of Arizona. Ariz. Const. art. IV, pt. 2 §8; Ariz. Rev. Stat. §41-1102; Ariz. Senate Rule 2(N); Ariz. House of Reps. Rule 4(K). President Petersen and Speaker Toma do not believe that Congress, in passing the Antiquities Act, gave to the President a royal prerogative to turn millions

of acres of federal land located in Arizona, Utah, and numerous other States into a presidential forest. Rather, Congress provided that the President can designate items that fall within the objective definitions of the Antiquities Act's enumerated list of items—and no more.[1]

ARGUMENT

I. The President does not have discretion to declare anything an "object" under the Antiquities Act.

The Antiquities Act provides the President with discretion only to "declare" that a particular "historic landmark[], historic and prehistoric structure[], [or] other object[] of historic or scientific interest that [is] situated on land owned or controlled by the Federal Government" is a national monument. 54 U.S.C. § 320301(a). What the text does not do is vest the President with discretion to radically redefine the meanings of "object," "structure," "landmark," and other terms in the Act. Those terms have clear and fixed meanings adopted by Congress.

[1] *Amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. *Amici* have filed, with this brief, a motion for leave to file.

As Utah (in No. 23-4106) and the Individual Plaintiffs (in No. 23-4107) (together, the "Appellants") show through careful analysis of text, context, history, and precedent, the Act imposes clear, commonsense, enforceable limits on the President. *See* Br. Plaintiff-Appellants, No. 23-4106, at 25–27; Br. Individual Pls.', No. 23-4107, at 15–25. President Petersen and Speaker Toma agree with that analysis. They write to show that such a reading is consistent with how Congress drafted statutes like the Antiquities Act at the time the Act was passed and to underscore that constitutional principles fully support Appellants' interpretation.

A. The Antiquities Act is a type of conditional legislation that limits the President to ascertaining whether something is objectively an object of historic or scientific interest.

The Antiquities Act is a "form of conditional legislation." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in judgment). "That form of legislation 'makes … the going into operation of other provisions of an Act of Congress depend upon the action of the President based upon … the ascertainment by him of certain facts, to be made known by his proclamation.'" *Id.* (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 683 (1892)). Specifically, the Act conditions the President's authority to declare something a monument on

two factual ascertainments: (1) that the object is on federal land; and (2) that it falls into one of the three categories of listed objects (landmarks, structures, or (as relevant here) "other objects of historic or scientific interest"—with this phrase interpreted in light of the two first items, *see United States v. Phillips*, 543 F.3d 1197, 1206 (10th Cir. 2008) (discussing the *ejusdem generis* canon)). If one of those conditions fails—for example, if a landmark is not on federal land—the President lacks the discretion to declare it a monument. The same holds for whether something is an "object of historic or scientific interest." That is a question of fact that turns on what the phrase means and on application of that meaning to a particular object. It does not turn on whether the President, in his discretion, concludes that something is such an object—which is the federal government's position. Thus, the phrase imposes a real, enforceable limit on the President.

History supports that conclusion. When Congress passed the Antiquities Act in 1906, it engaged in conditional lawmaking, *see Department of Transportation*, 575 U.S. at 78 (Thomas, J., concurring in judgment) (noting "most 'delegations' … had taken the form of conditional legislation"); it did not give the President the extensive

discretion he argues for here, *see* J.A. Vol. II at 438–42. Four cases illustrate the point.

First, *Field* involved an 1890 Act that allowed the President to suspend a law permitting free introduction of certain goods from a foreign country if he determined that country imposed "'reciprocally unequal and unreasonable'" tariffs. 143 U.S. at 680 (quoting the law). All that meant, the Court said, was that the President is "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 693. "Nothing involving the expediency or the just operation of such legislation was left to" him. *Id.*

Next, the Court relied on *Field* in upholding an 1897 law authorizing the Secretary of the Treasury to determine "what teas may be imported." *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute." *Id.* It fixed "a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute." *Id.*

Another case involved the River and Harbor Act of 1899, which said "'[t]hat whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, is an unreasonable obstruction to the free navigation of such waters'" based on certain criteria, he shall take action to ameliorate the issue. *Union Bridge Co. v. United States*, 204 U.S. 364, 366 (1907) (quoting the law). The Court held that there was no delegation problem because all the law did was commit "to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the water ways of the United States, were unreasonable obstructions to free navigation." *Id.* at 386.

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928), is similar to those cases. That case involved a 1922 law that, like the law in *Field*, permitted the President to increase or decrease tariffs to equalize relative costs of production between foreign and domestic goods if he determined that existing duties did not. *See id.* at 401 (quoting the law). The Court upheld the law, relying on *Field* and its conclusion that the law at issue there did not allow the President to pass on the

"expediency or just operation of such legislation" but instead to determine if certain facts existed that then allowed a change in duties. *Id.* at 410; *see Dep't of Transp.*, 276 U.S. at 81 (Thomas, J., concurring in judgment) ("*J.W. Hampton* can be read to adhere to the 'factual determination' rationale from *Field*.").

J.W. Hampton—and *Field* and *Buttfield*, for that matter—represent the outer limit of the discretion Congress typically gave the President around the turn of the 20th Century. Those cases involved tariffs or foreign commerce, which implicate "the external relations of the United States," and so do not involve the President in "an exercise of core legislative power." *Dep't of Transp.*, 575 U.S. at 80 (Thomas, J., concurring in judgment); *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936) ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."); *see also Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111

(1940) (similar). Indeed, *Buttfield* "expressly relied on this rationale . . . ." *Dep't of Transp.*, 575 U.S. at 80 n.5 (Thomas, J., concurring in judgment).

More importantly, the conditional legislation analyzed in those cases was not unusual. "The practice of conditional legislation dates back at least to the Third Congress in 1794." *Dep't of Transp.*, 575 U.S. at 78 (Thomas, J., concurring in judgment); *see The Aurora*, 11 U.S. (7 Cranch.) 382, 388 (1813) ("[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."); *see also Field*, 143 U.S. at 683–89 (gathering examples of such laws dating back to the Founding).

That long practice, which continued up through passage of the Antiquities Act in 1906, supports Appellants. It indicates that when Congress enacted the Antiquities Act, its typical practice—informed by constitutional concerns, *see infra* Argument §I.B—was to give the President power to act only after he determined certain congressionally defined factual conditions existed. *See*, *e.g.*, *Union Bridge Co.*, 204 U.S. at 386 ("By the statute in question Congress declared in effect that

navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects.").

Nothing indicates the Antiquities Act bucks that practice and gives the President the discretion to determine if something *can be* declared a monument as well as the discretion to declare it a monument. Instead, the Act permits the President to exercise his discretion to declare something a national monument if, and only if, it is in fact a landmark, structure, or "other object[] of historic or scientific interest," 54 U.S.C. § 320301(a) as Congress defined those words in 1906—not as defined by the President doing the proclaiming. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2075 (2018) ("[E]very statute's *meaning* is fixed at the time of enactment."). In other words, the terms in the Act have objective meanings that constrain the President's discretion. Only if something falls within those objective meanings does the President have the discretion to make a designation.

B. Constitutional concerns underscore the need to limit the President's discretion under the Act.

Underpinning that analysis are structural concerns—in particular, non-delegation concerns. *Field*, *Buttfield*, *Union Bridge*, and *J.W. Hampton* all involved non-delegation challenges to federal law. The

Court concluded that those laws passed muster because "Congress create[d] the rule of private conduct, and the President [made] the *factual* determination that cause[d] that rule to go into effect." *Dep't of Transp.*, 575 U.S. at 79 (Thomas, J., concurring in judgment). That interpretation strongly supports Utah's and the Individual Plaintiffs' interpretation of the Act because it avoids a non-delegation concern—one that would have been particularly acute at the time the Act was passed. *See United States v. Hanson*, 599 U.S. 762, 781 (2023) (discussing the constitutional avoidance canon).

Bolstering that interpretative conclusion is the major-questions doctrine. "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine." *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring). In cases like this one, it "helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority." *U.S. Telecom. Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

The power that the President claims here is an expansive and aggressive assertion of executive authority. If his reading of the Antiquities Act is right, the only thing preventing the President from declaring *all* federal land a national monument is his self-restraint; after all, all federal lands have landscapes that, according to President Biden, are an "object[] of historic or scientific interest . . . ." 54 U.S.C. § 320301(a). Such a power, with its attendant consequences for the use of the land, is plainly one "of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (quotations omitted).

Economically, a monument designation can strain businesses who rely on their ability to use the designated land and can "put severe pressure on the environment . . . ." *Mass. Lobstermen's Ass'n v. Raimondo (Lobstermen)*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., respecting the denial of certiorari); *see also Garfield County v. Biden*, 2023 WL 52180375, at *1 (D. Utah Aug. 11, 2023). The Northern Arizona Designation is an example. It prevents developing uranium and critical minerals found in that land, *see* 88 Fed. Reg. at 55,339, with the

attendant loss of economic development in Arizona and the nation as well as revenue for the State.

The political issues are also significant. As these cases show, the scope of the President's power to designate land as a national monument on the bases he sets forth is a matter of "earnest and profound debate." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). Congress, for example, has interceded to limit the President's power in response to aggressive designations. *See Garfield County*, 2023 WL 5180375, at *2 (giving examples).

Furthermore, the power to declare *all* federal land a national monument would permit the President to accomplish via the Antiquities Act what Congress "conspicuously and repeatedly decline[s] to" do. *West Virginia*, 142 S. Ct. at 2610. The Northern Arizona Designation, for example, prohibits new mining on the designated lands, *see* 88 Fed. Reg. at 55,339, something that has, since at least 2008, been the subject of numerous failed bills introduced in the U.S. House, *see* Natural

Resources Committee Democrats, *History of Efforts to Protect the Grand Canyon* (last visited Nov. 3, 2023).[2]

In a similar vein, the President's reading of the Act is "'incompatible' with 'the substance of Congress' [land use] scheme.'" *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 322 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)). Congress has enacted numerous statutes saying if and how "the Executive Branch may preserve portions of land . . . ." *Lobstermen*, 141 S. Ct. at 980 (Roberts, C.J., respecting denial of certiorari). Those rules will have limited bite if the President can declare birds, plants, and even entire landscapes to be national monuments. If the President has the discretion to determine what can be a monument, his authority under the Antiquities Act "stands in [even more] marked contrast to" those other laws. *Id.* Similarly, he could avoid laws requiring the Executive Branch to manage federal land "on the basis of multiple use and sustained yield . . . ." 43 U.S.C. § 1701(a)(7).

[2] *Available at* https://democrats-naturalresources.house.gov/imo/media/doc/history_of_efforts_to_protect_the_grand_canyon.pdf.

Compounding the issue is that this circumvention of congressional authority represents a fairly new, "transformative expansion" of the President's power under the Act. *UARG*, 573 U.S. at 324. For example, "[s]ince 2006"—a hundred years after Congress passed the Antiquities Act—"Presidents have established five marine monuments alone whose total area exceeds that of all other American monuments combined." *Lobstermen*, 141 S. Ct. at 980 (Roberts, C.J., respecting the denial of certiorari).

Taken together, the sweeping and controversial nature of President Biden's unlimited reading of the Act "stand[s] in stark contrast to the unanimity with which Congress passed the" Antiquities Act. *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023); *see* Erin H. Ward, Cong. Research Serv., R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress* 5 (2019). One of the focuses of congressional debate in the lead-up and passage of the Act was how much land the President could designate under the law—with the bill's proponents emphasizing how little Western land would be affected. *See* Ward, *supra*, at 4–5. If asked whether Congress implicitly gave the President the power to determine whether, for example, a landscape

could be designated as a national monument, "[w]e can't believe the answer would be yes." *Nebraska*, 143 S. Ct. at 2374. The Act certainly would not have "unanimously pass[ed]" if Congress had such a "power in mind." *Id.* at 2374.

And all that is before addressing the federalism issues. The major-questions doctrine and federalism clear statement rule "often travel together" and provide independent reasons to reject an expansive interpretation of executive authority. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring). Important here is that the Constitution recognizes the federalism concerns involved in federal land policy. The federal government's authority over federal land is found in the Property Clause of Article IV, *see* Section 3, Clause 2, and Article IV involves the relationship between the States and the federal government. So even if congressional power over federal land "is without limitations," *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quotations omitted)—and it is doubtful that is so—the inference from the placement of Property Clause in Article IV is that rules respecting federal lands touch on the "balance of federal and state powers" as a matter of constitutional design. *Bond v. United States*, 572 U.S. 844, 858 (2013) (quotations omitted). It follows

that allowing the President to designate unilaterally all federal land as federal monuments would necessarily impact the federal-state balance, and so there must be a clear statement that Congress gave the President that power. *See*, *e.g.*, *id.*

That the Antiquities Act involves federal land is irrelevant to the application of these structural clear-statement rules. The Supreme Court, for example, rejected the argument that the major-questions doctrine applies only to regulatory programs in striking down the Biden administration's student-debt relief program. *See Nebraska*, 143 S. Ct. at 2375. And the Fifth and Sixth Circuits used the doctrine to evaluate the validity of COVID vaccine mandates issued under the auspices of the Federal Property and Administrative Services Act. *See Louisiana v. Biden*, 55 F.4th 1017, 1033 (5th Cir. 2022); *Kentucky v. Biden*, 23 F.4th 585, 607 (6th Cir. 2022).

That is because the major-question doctrines and the federalism clear statement rules vindicate the Constitution's structural design. Thus, "major questions 'have arisen from all corners of the administrative state,'" *Nebraska*, 143 S. Ct. at 2375 (quoting *West Virginia*, 142 S. Ct. at 2608), because in all corners of the administrative

state the question is whether "Congress entrusted" the Executive Branch with a particular power, *id.* *See also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it.").

And what the major-question doctrine requires is more than a mere "intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion). Such a principle cannot justify a President's claim of expansive power because it does not show that "Congress legislated on the subject as far as was reasonably practicable, and, from the necessities of the case, was compelled to leave to executive officials" the claimed power. *Union Bridge Co.*, 204 U.S. at 385. All an "intelligible principle" does is show that a claimed authority has "a merely plausible textual basis," which is insufficient when major questions are involved. *West Virginia*, 142 S. Ct. at 2609.

Here, the federal government's position is that Congress gave the President unfettered discretion to determine whether something is a "historic landmark[], historic and prehistoric structure[], [or] other object[] of historic or scientific interest … ." 54 U.S.C. § 320301(a).

Nothing in the law expressly says the President has such discretion. It is not even plausible.

That is especially so since it was "reasonably practicable," *Union Bridge Co.*, 204 U.S. at 385, for Congress to cabin the President's discretion by defining the objects that he could declare to be monuments—which is proven by the fact it took the time to do so, as the Individual Plaintiffs note (at 19–22) in discussing the Act's legislative history, and by the fact that it is fairly easy to describe, as a matter of normal English, what should constitute a monument or antiquity, *see Lobstermen*, 141 S. Ct. at 980 (Roberts, C.J., respecting the denial of certiorari).

Thus, Appellants' reading of the Antiquities Act is correct as a matter of constitutional law, as implemented by structural clear-statement rules like the major-questions doctrine. The Antiquities Act authorizes the President to ascertain "the existence of a particular fact[s]," *Field*, 143 U.S. at 693—such as whether an object is on federal land and whether the object is a historic landmark, historic or prehistoric structure, or object of scientific or historic significance, *see* 54 U.S.C. § 320301(a). He has no discretion in defining the meaning of those terms;

he can only determine if something meets Congress's objective criteria. Only then does the Act give the President discretion—and then, only the discretion to designate the object as a national monument.[3]

II. Courts are not powerless to stop the President's clear abuses of power.

President Biden is in no way exercising authority lawfully given, and thus the district court improperly dismissed Appellants' *ultra vires* claim. *See Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1032 (9th Cir. 2013) (per curiam) (noting that the arguments can merge, citing *Wash. Legal Found v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901–02 (D.C. Cir. 1996)).

This, too, is linked to the non-delegation issues that plague the President's reading of the Antiquities Act, as well as the fact that the Act is a form of conditional legislation that permits the President to exercise discretion to designate something as a national monument only *after* he has ascertained that the object meets Congress's provided criteria. "That type of factual determination seems similar to the type of factual

[3] The President may also "reserve parcels of land as a part of the national monument," but "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). This, too, is a limit on the President's power. But as the Individual Plaintiffs explain (at 32–35), the designations themselves are so fatally flawed that they fall *in toto*.

determination on which an enforcement action is conditioned: Neither involves an exercise of policy discretion, and both are subject to review by a court." *Dep't of Transp.*, 575 U.S. at 78–79 (Thomas, J., concurring in judgment).

An *ultra vires* action for injunctive relief will thus lie, *see*, *e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949), at least against "the officers who attempt to enforce the President's" unlawful proclamations, *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and concurring in judgment). *See also St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 641 (1881) ("The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law.").

Indeed, this highlights further constitutional problems with the President's interpretation of the Antiquities Act. In claiming that the Act vests in him unreviewable discretion to determine both the objects that can be designated, and the designation decision, the President seeks to insulate his Antiquities Act designations from judicial review—

something the district court here incorrectly affirmed. *See Garfield County*, 2023 WL 5180375, at *6. But "leaving [plaintiffs] without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions." *Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001). Rejecting the President's interpretation, however, provides a means for judicial review—and so avoids that concern.

***

In short, President Biden's interpretation of the Antiquities Act contradicts the plain meaning of the Act and raises grave constitutional concerns. There is no reason to accept it or to accept the Proclamations at issue here, which are the fruit of the President's erroneous reading.

This is not the first time that this Administration has engaged in plainly unlawful action and then attempted to insulate its actions from judicial review. It did so (and failed) with the student-loan forgiveness plan. *See* Josh Blackman, *How Do You Challenge a Student Loan Forgiveness Rule That Does Not Exist?* (Sept. 30, 2022, 1:26 AM) (detailing how the administration repeatedly altered the rule to moot

legal challenges).[4] It is attempting to do so again here. There is no reason to accept this maneuver. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) ("[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). The presumption of the "availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies" holds and allows Utah and the Individual Plaintiffs to seek relief. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in judgment).

CONCLUSION

> The cruel and insupportable hardships, which those forest laws created … occasioned our ancestors to be … jealous for their reformation … and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter … many forests were disafforested, or stripped of their oppressive privileges.

2 William Blackstone, *Commentaries* *416.

There is no need for a new forest charter to limit similar abuses. There is only a need for judicial review to vindicate the limits that

[4] *Available at* https://reason.com/volokh/2022/09/30/how-do-you-challenge-a-student-loan-forgiveness-rule-that-does-not-exist/.

already appear in the text of the Antiquities Act. Appellants are right on the jurisdictional issue and the merits. President Biden lacks the power to make the Proclamations at issue, and the district court's decision should be reversed.

Dated: November 6, 2023

Respectfully submitted,

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I hereby certify that on November 6, 2023, I electronically filed the original of the foregoing brief of *amici curiae* with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

Dated: November 6, 2023 */s/ D. John Sauer*