

UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

<p>THE WILDERNESS SOCIETY et al,  Plaintiffs,  v.  DONALD J. TRUMP, in his official capacity as President of the United States, et al,  Defendants.</p>
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Civil Action No. 1:17cv-02587 (TSC)

<p>GRAND STAIRCASE ESCALANTE PARTNERS, et al,  Plaintiffs,  v.  DONALD J. TRUMP, in his official capacity as President of the United States, et al,  Defendants.</p>
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Civil Action No. 1:17cv-02591 (TSC)

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AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF  
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## STATEMENT OF INTEREST

## SUMMARY OF ARGUMENT

President Clinton established Grand Staircase in 1996 in accordance with the Antiquities Act, pur

continued conservation of the resources within the Monument as established by the Grand Staircase Proclamation and ratified by Congress. Plaintiffs have alleged that the Trump Proclamation creates a risk of imminent harm to historical and scientific resources in the lands that would be removed from the Monument. For instance, the Trump Proclamation subjects the lands removed from protection to the General Mining Law of 1872, which permits a wide range of explorative activities that could occur with minimal or no notice irreparably damaging sensitive resources. The resulting risk of imminent harm clearly

P D N H V 3 O D L Q W L I I V ¶ F R P S O D L Q W V U L S H I R U M X G L F L D O U H

As argued by amici law professors in a separate matter before this Court regarding the Bears Ears National Monument, which President Trump similarly sought to reduce by presidential proclamation, the authority that Congress delegated to the President under the Antiquities Act does not include the authority to modify or revoke national monument designations made by prior presidents. For this reason, the Trump Proclamation is ultra vires and must not be allowed to stand. Further, Congress has enacted legislation ratifying Grand Staircase affirming its conservation purpose and expanding its boundaries. Accordingly, the Trump Proclamation is in contravention of the exercise of Congress's authority with respect to the Monument and, if permitted to stand, would be an action contrary to the will of Congress as expressed by statute. For these reasons, the Court should

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<sup>4</sup> 30 U.S.C. §§ 2 et seq

ARGUMENT

I. THE PLAINTIFFS FACE RISK OF IMMINENT INJURY DUE TO EXPLORATIVE USES PERMITTED UNDER THE GENERAL MINING LAW OF 1872, MAKING THIS CASE RIPE FOR JUDICIAL REVIEW

Plaintiffs correctly assert that the Trump Proclamation creates a risk of imminent harm to their recreational, aesthetic, scientific and other interests in the protected resources within Grand Staircase-Plateau National Monument. Plaintiffs in *The Wilderness Society v. Trump*, allege inter alia, that under the General Mining Law of 1872, 30 U.S.C. §§ 21 seq., public lands removed from the protection of the Monument by the Trump Proclamation will be immediately vulnerable to the risk that prospectors will engage in exploration activities. *See* *Public Lands and Mining Claims*, 30 U.S.C. §§ 21-22; *Swady, Partners v. Trump*, 2017 WL 1000000 (D. Utah, 2017). Plaintiffs in *Swady, Partners v. Trump*, allege inter alia, that the Mining Law

standingest.<sup>8</sup> The Mining Law authorizes citizens of the United States to enter unreserved and unappropriated public lands to explore for valuable mineral deposits, such as gold or copper, and to stake claims to any deposits they discover, which can create vested private property rights within such public lands.

argument that Plaintiff V DOOHJHG la@Mxfrdn fuure, v White agency  
dHFLVLRQV ' )HG 'HI 07' DW HPSKDVLV DGGHG

L Q L W L<sup>11</sup> Z W W R K R X W Q R W L F H W R % / 0 I R U D Q \ D F W L Y L W L H V L  
43 C.F.R. §3809 Casual use activities encapsulate a broad array of actions that disturb  
the landscape, including W K H F R O O H F W L R Q R I J H R F K H P L F D O U R F N  
using hand tools; hand paining; or non P R W R U L J H G W K H X F L H Q R I<sup>3</sup> V P D O O S R F  
V X F W L R Q G U H G J H V - o p e r a t e d v e h i c l e u s e E D P R W R U L J H G Y H K L F O H  
43 C.F.R. § 8341.1(a). The Trump Proclamations explicit regarding the ability of the  
public to engage in offroad vehicle use with the nearly 900,000 acres of federal land  
stripped of protection, as it provides that the Secretary of the Interior may O O R Z P R W R U L J H G  
and nonmechanized vehicle use on roads and trails existing immediately before the  
issuance of [the Grand Staircase Proclamation] @ D Q G P D L Q W D L Q U R D G V D Q G W U  
Proclamation No. 9682, 82 Fed. Reg. at 58094.

The lands protected with Grand Staircase contain geological, archeological,  
ecological, and other sensitive resources that could be severely degraded even the least  
invasive of the causal use activities permitted under the Mining Law. To take just one  
example, the Grand Staircase Proclamation identifies<sup>3</sup> > I @ U D J L O H F U \ S W R E L R W L F  
ecological feature of P V L J Q L I L F D Q W E L W R O R R H L M F O D U M T Q W H W K H W S O D \  
a critical role throughout the monument, stabilizing the highly erodible desert soils and  
S U R Y L G L Q J Q X W<sup>10</sup> U S H F R W U G W C R J S W O R D Q W W 1 D W L R Q D O 3 D U N 6  
soils can take anywhere from a few years to 6 H U D O G H F D G H V R U O R Q J H U W  
they are compacted.<sup>13</sup> Mineral exploration activities, including offroad vehicle use and

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<sup>11</sup> <sup>3</sup> 6 H D Q L W L D W L R Q ' K D V O R Q J E K 0 P K 0 P y @ `



imminent risk of harm to sensitive geological, archeological, ecological, and other resources. \* L Y H Q 3 O S I E N T I F I C I N T E R E S T S I N C L U D I N G A E S T H E T I C A N D O T H E R I N T E R E S T S T H E

0 R Q X P H Q W † V U H V R X U F H V W K H S R W E I R Q W K B O R L W P E R B I Q W K D

3 F D V X D O X V p e r m i t t e d u n d e r t h e M i n i n g L a w i s s u f f i c i e n t f o r t h e C o u r t t o f i n d t h a t P l a i n t i f f a l l e g a t i o n s a r e r i p e f o r j u d i c i a l r e v i e w .

II. THE TRUMP PROCLAMATION EXCEEDS THE AUTHORITY DELEGATED TO THE PRESIDENT BY CONGRESS UNDER THE ANTIQUITIES ACT

The Constitution vests plenary authority over the public lands in Congress.

Const. art, IV, † F O 3 7 K H & R Q J U H V V V K D O O K D Y H 3 R Z H U W R

5 X O H V D Q G 5 H J X O D W L R Q V U H V S H F W L Q J W K H 3 U R S H U

6 X S U H P H & R X U W K D V F K D U D F W H U L J H G & R Q J U H V V † V D X W

P r R S H U W \ & O D X V H D V 3 7 U S C § 3 2 0 3 0 1 ( a ) ( c i t i n g U n i t e d S t a t e s v . S a n F r a n c i s c o 1 0 U . S . 1 6 , 2 9 ( 1 9 4 0 )

(citing United States v. San Francisco 10 U.S. 16, 29 (1940)) Accordingly, presidential

authority over public lands is limited to that which specifically has been delegated by

Congress.

In the case of the Antiquities Act, the President has the authority R U L W \ W R 3 U H V H U Y H ´ S

lands. 54 U.S.C. § 320301(a) However, Congress

Abolish or Diminish National Monuments 103 Va. L. Rev. Online 55 (2017). The brief submitted by amici law professors in consolidated cases before this Court concerning Bears Ears National Monument (Case Nos. 1:17-cv-02590 (TSC), 1:17-cv-02605 (TSC), and 1:17-cv-02606 (TSC)) WKH 3 (DHUJ \$ PLFXMly%ULH for the legal and historical bases for these arguments, which apply to Grand Staircase just as they do to the Bears Ears National Monument. As discussed in detail in that brief WKH 3 UHV LGHQW attempt to substantially reduce the boundaries of Grand Staircase by nearly 900,000 acres is ultra vires and beyond the authority delegated to him by the Congress under the Antiquities Act. , Q RUGHU WR UHVSHFW WKH &RXUW V WLPH D arguments, we hereby incorporate the arguments set forth in the Bears Ears Amicus Brief regarding presidential authority with respect to the Bears Ears National Monument, which also apply to Grand Staircase

III. CONGRESSIONAL RATIFICATION OF ) 7+( 02180(17 6 BOUNDARIES PRECLUDES MODIFICATION BY PRESIDENTIAL DECLARATION

As referenced above and discussed Plaintiffs and other amici, the President lacks authority under the Antiquities Act to reduce the scope of a national monument. In the case of the Monument, the President lacks this authority by virtue of the fact that Congress has, by legislation, exerted its authority and expressed clear intent as to the 0RQXPHQW V ERXQG DULHV DQG FRQVHUYDWLRQ SXUSRVH to reduce the scope of the Monument.

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<sup>16</sup> \$ PLFXV & XULDH %ULHI RI /DZRO @ ð 0 D Fp ^gŽ;`1 õ € Ài8.59 Tmg 0 044>9<0

A. The President may not exercise authority delegated by Congress in a manner that is contrary to Congressional intent

It is axiomatic that, when exercising delegated authority, Presidents prohibited from acting in a manner that is contrary to the will of Congress expressed in statute. Little v. Barreme 6 U.S. (2 Cranch) 170, 177 (1804) (rejecting presidential order to seize ships sailing from French ports when statute authorized seizure only of ships sailing from French ports); Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579, 586 (1952) (finding Taft-Hartley Act); Food and Drug Administration v. Brown & Williamson Tobacco Corp 529 U.S. 120, 155 (rejecting asserted authority of FDA to regulate tobacco products where expressed or implied will of Congress is power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over Youngstown, 343 U.S. 637 (Jackson, J., concurring); see Dames & Moore v. Regan 453 U.S. 654, 686 (1981) (employing the framework set forth by Justice Jackson in Youngstown)

Under this principle, even assuming arguendo that the President was delegated authority under the Antiquities Act to reduce the boundaries of a national monument (he was not) that authority could not be exercised in contravention of legislation by Congress establishing or ratifying the scope of such a monument, because Congress has ratified and modified the boundaries of the Monument through legislation, the President may not now, by proclamation or otherwise, shrink those boundaries and open those public lands to uses in direct contravention of Congressional intent.





Law and Policy 129-145 (3d ed. 2016). The school land grant policy was premised on an expectation that the state parcels, like the federal land that surrounded them, would eventually pass into private hands or be leased for development, with the proceeds benefiting the state. However, the American West's defining feature limited the potential uses over large tracts of public land, and as a result,

owned tracts that were beyond the jurisdiction of the federal land managers, even though many of them contained significant cultural, geological and biological resources of the kind identified in the Grand Staircase Proclamation. See Lands Exchange Act § 2(a)

At the time negotiations were underway between the State of Utah and the federal government to exchange state lands within several other federally protected areas in Utah for unprotected federal lands outside those areas. President Clinton's Proclamation alluded to the negotiations, and suggested that the designation of the Monument would specifically, President Clinton directed the Secretary of the Interior to comply with all exchange requests that his administration specifically linked the exchange with the following steps, we can both protect the natural heritage of Utah and ensure the quality educational heritage.<sup>25</sup>

In 1998, Utah and the federal government reached an agreement which Utah would convey lands to the federal government to further federal conservation interests, including state lands within Grand Staircase in exchange for federal lands of equal value to be developed.



UHVHUYDWLRQV DQG RWKHU SURYLVLQRQV RI WKH \$JUH  
FRPPLWPHQWV RI WKH SDUWLHM. at § 3(b) On 12/11/15, U RI )HG

Congress affirmed and specifically enumerated the conservation benefits derived by  
including the state tracts within the Monument, stating that

[c]ertain State school trust lands within the Monument, like the Federal lands comprising the Monument, have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources, including ancient Native American archeological sites and rare plant and animal communities.

Lands

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protect resources within Grand Staircase, precluding Presidential

CONCLUSION

3 U H V L G H Q W & O L Q W C R O U S T A I C A S E P R O T E C T A W I D E R A N G E of  
 important scientific and historic resources V R X W K H U Q 8 W D K Z D V U D W L I L H G  
 enactment of the Lands Exchange Act in 1998. The Trump Proclamation purporting to  
 reduce the area of the Monument and open formerly protected public lands to exploration  
 and exploitation creates a risk of imminent harm by virtue of the operation of the Mining  
 / D Z P D N L Q J 3 O D L Q W L I I V ¶ F R P S O D L Q W V U L S H I R U U H Y L H Z  
 ultra vires, as the President lacks the authority under the Antiquities Act to shrink a national  
 monument, and directly contracts the intention of Congress as expressed by legislation  
 ratifying the Monument and affirming its conservation purpose. For reasons, Federal  
 Defendants ¶ motion to dismiss must be denied.

Respectfully Submitted: November 19, 2018

/s/ Douglas W. Baruch  
Douglas W. Baruch (D.C. Bar No. 414354)

Appendix A

ON BEHALF OF THE FOLLOWING LAW PROFESSOR SIGNATORIES:

B

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