Nos. 23-4106 / 23-4107

In the United States Court of Appeals for the Tenth Circuit

GARFIELD COUNTY, UTAH, *ET AL.,*
Plaintiffs-Appellants,

and

ZEBEDIAH GEORGE DALTON, *ET AL.*,
Consolidated Plaintiffs

v.

JOSEPH R. BIDEN, JR., *ET AL.*,
Defendants-Appellees

and

HOPI TRIBE, *ET AL.,*
Defendant Intervenors-Appellees,

ZEBEDIAH GEORGE DALTON, *ET AL.,*
Consolidated Plaintiffs

and

GARFIELD COUNTY, UTAH, *ET. AL.*,
Plaintiffs,

v.

JOSEPH R. BIDEN, JR., *ET AL.,*
Defendants-Appellees,

and

HOPI TRIBE, *ET AL.*,
Defendant Intervenors-Appellees

Appeals from the United States District Court
for the District of Utah
No. 4:22-cv-00059-DN (Hon. David Nuffer)

BRIEF OF BLANDING CITY, UTAH, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Blanding City, Utah, is a governmental corporation, and there is no information to disclose pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A); and the Blanding files this disclosure statement with this brief per 10th Cir. R. 26.1.

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CONSENT TO FILING

Blanding City has conferred with all parties. The plaintiffs-appellants consent to filing this brief, and nearly all of the defendants-appellees consent too. But the following intervenor-defendants-appellees "take no position" on the City filing this brief: Southern Utah Wilderness Alliance, Center for Biological Diversity, Grand Canyon Trust, Great Old Broads for Wilderness, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club, The Wilderness Society, Western Watersheds Project, and WildEarth Guardians.

IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Blanding City is a charming community nestled in the heart of San Juan County, Utah, and it is a place where the vibrant history and rich natural beauty of the region converge. *See* Monson Decl. ¶ 2.[1] The City is very interested in the how this case will affect the City's ability to preserve its local heritage and ensure responsible management of its cherished landscapes and resources. *Id.* ¶¶ 2–3.

In particular, the Bears Ears National Monument plays a pivotal role in the City's identity, culture, stability of resources, and economic well-being. *Id.* ¶ 4. And the City is dedicated to balancing conservation with sustainable resource use, for the prosperity of both the community and its exceptional wilderness. *Id.* ¶ 5.

[1] Blanding City filed the Declaration of Mayor Logan Monson as "Exhibit 2" to its motion asking this Court for leave to file this amicus curiae brief.

Blanding City is especially worried that the President's monument declaration is overly broad and will interfere with the City's ability to manage its water supply. Monson Decl. ¶ 6. Water is critical in the arid West, and it has a unique place in Blanding City's founding and growth. *Id.*

The City takes pride in the protection of antiquities; four distinct cultures have left their history in and around the City, including Anasazi occupation as early as 600 AD. *Id.* ¶ 6. But they did so for a reason, and that reason persists to this day: ***water***. *See id.* ¶¶ 6–8. Utes and Navajo camped in this area because of the water from local springs and seeps. *Id.* at 7. They even called the location "Sagebrush" because water enabled the plant's prolific growth amidst the pinyon and juniper forest at the base of Blue Mountain. *Id.* The City's "pioneer" founders saw potential for a community *because* they could manage local water resources. *Id.* ¶ 8. And in the early 1900s, they dug a canal from a local creek, which was completed in 1905 and still waters livestock, hay, and grain crops today. *Id.*

Blanding City is also mindful of the public-use benefits—*i.e.*, tourism—that monument designations can provide. The City's original livestock and agriculture economy eventually came to include lumber operations. Monson Decl. ¶¶ 9–11. In the 1950s, a uranium and oil boom accounted for new roads, service industries, and an increased population. *Id.* But by the 1980s, these resources were mostly depleted, and the City has come to rely on tourism for its economic base. *Id.*

The public-use benefits of monument designations, however, cannot override Blanding City's need to support its citizens' welfare. An overly broad monument designation—like the designation in this case—hamstrings the City and its local executives, preventing them from protecting their citizens. Monson Decl. ¶¶ 11–12. This monument designation impedes the City's ability to manage its watershed and supply water for its citizens' uses. *Id.* Accordingly, the City writes separately to explain how this designation effects it.

Blanding City wants to help the Court understand the impacts of overly broad federal monument designations on local governance. Monson Decl. ¶¶ 12–14. But there is no venue for affected parties like the City to challenge overly broad monument designations—this case, like others before it, could not even get past the courthouse doors. *See id.*; *see also, e.g.*, *Mass. Lobstermen's Ass'n v. Ross*, No. 1:17-cv-406 (D.D.C. Oct. 5, 2018). Dismissal at the pleadings stage leaves local executives like Mayor Monson and the Blanding City Council with no means to challenge whether a federal monument designation is "confined to the smallest area compatible with the proper care and management of the objects to be protected," which federal law requires. *See* Monson Decl. ¶¶ 12–14; 54 U.S.C. § 320301(b).

But smalltown mayors and council members like Mayor Monson and the Blanding City Council must have recourse to the courts so that they can protect their citizens. *See* Monson Decl. ¶¶ 12–14. Rulings like the dismissal below in this case

make local executives unable to assert that the President did not follow Congress's most important Antiquities Act limit, making Mayor Monson, Blanding's City Council, and others like them helpless in the face of a federal bureaucratic steamroller. Monson Decl. ¶¶ 12–14.

As Mayor Monson's declaration explains, it is important for the Court to consider and understand the stakes for local executives when the President makes overly broad monument designations, but they have *no chances* to appeal. The district courts routinely kick monument challenges out at the pleadings stage. The City hopes its brief will help the Court see that reversal of the decision, order, and judgment below dismissing the case is necessary, so that local governments in the West at least have *a chance* to challenge overly broad monument designations.

FED. R. APP. P. 29(A)(4)(E) STATEMENT

No party's counsel authored the brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

"The creation of a national monument is of no small consequence." *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting cert denial). It is of great consequence to local governments.

When the President creates or expands a monument, from the designation flow "myriad restrictions." *Id.* at 981. But despite the great and *grave* consequences Blanding City and other local governments face when confronted by land-use restrictions accompanying "a trend of ever-expanding antiquities," *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980, the federal district courts have increasingly and repeatedly slammed their doors to cases and controversies.

The thrust of the courts' reasoning is straightforward, the Antiquities Act, now codified at 54 U.S.C. §§ 320101–320303, "vests in the President" a "broad authority." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980. But the authority has a critical limit: the 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) (emphasis added).

Despite local governments and others repeatedly trying to hold the President to the legal limit of his power, the district courts have refused to acknowledge the controversies that overbroad monument designations cause.

> Somewhere along the line . . . this restriction has ceased to pose any meaningful restraint. A statute permitting the President in his sole discretion to designate as monuments "landmarks," "structures," and "objects"—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.

Mass. Lobstermen's Ass'n, 141 S. Ct. at 981. And that is the case here.

But while prior Antiquities Act cases have evaded meaningful review, this Court can change that trend. It can remand the case back to the district court so that the district court—and potentially this Court and the Supreme Court—can "address[] the questions . . . about how to interpret the Antiquities Act's 'smallest area compatible' requirement," *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981, and in doing so, can give local governments an opportunity *at least to make a case* that a Presidential proclamation is unlawful because it ignores the "smallest area" limit and injures the local governments as a result.

This case is the latest in which a district court applied a tautological approach to reviewing a "smallest area" challenge. The "courts have largely refused to enforce" this provision of the Act. *See* James McElfish et al., *Antiquities Act: Legal Implications for Executive & Congressional Action*, 48 Envtl. L. Rep. News & Analysis 10187, 10192 (2018) (noting that "courts have given presidents broad discretion," "[a]lthough the Antiquities Act says that monuments must be the smallest area compatible with the protection of the object"). But local governments like Blanding City suffer the brunt of the President's ever-expanding use of his Antiquities Act powers. And the district court rubberstamped the President's designation by deciding that the President acted within the "smallest area compatible" limit to his authority while refusing to interpret the limit, which was an error.

I. Local governments like Blanding City suffer the brunt of the President's ever-expanding interpretation of his power despite the "smallest area" limit.

In 1906, Congress passed the Antiquities Act and delegated to the President the power to designate, through public proclamation, "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," so long as the President's designation is "confined to the smallest area compatible with the proper care and management of the objects to be protected." *See* 54 U.S.C. § 320301. The limitation embedded in the Act—that designations cover only the "smallest area" necessary—protects local governments by ensuring that monument designations do not eviscerate local control.

Recently, however, Presidents have wielded their power under the Act to name not just specific "landmarks," "structures," and "other objects of . . . interest," but also, for example, the "resources and ecosystems" surrounding them. Presidents have gone farther and farther afield from actual monuments with no check by the district courts. For example, more than two decades ago, President Clinton used the Act to designate 327,769 acres of sequoia groves and surrounding "habitats," notwithstanding that the groves sought to be protected were not contiguous and no one in the President's administration "made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest." *Tulare Cty. v. Bush*, 306 F.3d 1138,

1142 (D.C. Cir. 2002). In *Tulare*, the D.C. Circuit held that the Act "does not impose upon the President an obligation to make any particular investigation" as to the size of the area designated for protection. *Id.* That cannot be right; it should be tested.

Astoundingly, the en banc D.C. Circuit affirmed dismissal in *Tulare* and, in a one-paragraph order, went further: The en banc court held that "[t]he allegation that Sequoia groves comprise only six percent of the Monument might well have been sufficient if the President had identified only Sequoia groves for protection, but he did not; the Proclamation covered natural resources present throughout the Monument area." *See Tulare Cty. v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003). In other words, where a President broadly designated an amorphous habitat of natural resources not even contiguous with an area of particular interest, his designation was totally insulated from a challenge under the "smallest area" limit.

Other cases have likewise uniformly granted dismissal of a "smallest area" challenge to a Presidential designation under the Act. *See, e.g.*, *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (upholding proclamations for six national monuments in the west even though one proclamation *merely stated* the 164,000-acre area was the "smallest area compatible"); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1182, 1186 (D. Utah 2004) (dismissing a challenge to designation of 1.7 million acres as Grand Staircase in Utah although there was "virtually no advance consultation with Utah's federal or state officials,

which may explain the decision to make the announcement in Arizona"). As these decisions make clear, lower courts are not countenancing challenges to broad designations under the Act. But the "smallest area" limit in the Act should have meaning, and courts should enforce it.

Of course, large designations may sometimes be permissible under the Act. For example, President Theodore Roosevelt designated the entire Grand Canyon "an object of unusual scientific interest" under the Act (in one of its very first uses). *See* Proclamation No. 794, 35 Stat. 2175, 2175 (Jan. 11, 1908). But, in that designation, the entire Grand Canyon was *itself* the area of interest to be protected.

We are now far afield from President Roosevelt and the Grand Canyon, with Presidents increasingly wielding their Antiquities Act power for political reasons; but the district courts' deference to the President in this respect "has profound consequences for how our government operates." *See Buffington v. McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from the denial of certiorari). As with Bears Ears, the district courts' deference to the President "encourages executive officials to write ever more ambitious" monument designations "on the strength of ever thinner statutory terms . . . ." *See id.*

A President's desire to designate monuments for political reasons, however, cannot nullify the Act's "smallest area" limit. "In this country, we like to boast that persons who come to court are entitled to have independent judges, not politically

motivated actors, resolve their rights . . . we promise, individuals may appeal to neutral magistrates to resolve their disputes about 'what the law is.'" *Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from the denial of certiorari).

Faced with litigation over politically motivated attempts by the President to make massive designations under the Antiquities Act, federal courts are abdicating their obligation to enforce the "smallest area" limit by closing the courthouse doors to any challenge under this provision. But following the district court's approach in this case, no "smallest area" challenge could *ever* stand to *any* designation.

State and local governments, including Blanding City, are suffering the brunt of these broad over-designations, which often occur with no local input. The Court should reverse the decision below to restore balance to designations and clarify that the "smallest area" limit means what it says.

II. The district court erred by deciding that the President acted within the "smallest area compatible" limit to his authority while refusing to interpret the limit.

The Antiquities Act is neither long nor complicated. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 476 (2003) ("Perhaps the most remarkable feature of the Antiquities Act of 1906 is its brevity."). It grants broad authority to the President to designate a monument for protection subject to an important limitation: The designation must 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). The meaning of this "smallest area" limit should be obvious: the President must make monument designations as small as possible.

But the district courts—including the district court here—refuse to address the controversies arising when the President ignores the "smallest area" limit. *See, e.g.*, *Mass. Lobstermen's Ass'n v. Ross*, No. 1:17-cv-406 (D.D.C. Oct. 5, 2018); J.A. 982.[2]

Why? Interpreting the limit could be straightforward, and it is the courts' job to do so. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Courts should apply the words of the statute as written—it is "the most basic of all canons of statutory construction that statutes mean what they plainly say." *Watt v. Alaska*, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting). "The text of the law is the law." Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2118 (2016). And "when the text of the statute is clear, a court should not turn to other principles of statutory interpretation . . . ." *Id.* at 2135. To be sure, the district court here acknowledged that "when Congress has wished to restrict the President's Antiquities Act authority, it has done so expressly." J.A. 968.

Here however, the district court refused to interpret the "smallest area" limit, and the district court's decision not to hear the case makes the "smallest area" limit

[2] To assist the Court, Blanding City cites to the Joint Appendix that the plaintiffs-appellants filed in this appeal on October 30, 2023.

a nullity. From the start, the plaintiffs-appellants raised specific allegations that the President did not satisfy the "smallest area" limit in the Act. J.A. 56, 122, 131–32. But rather than say "what the law is," *see Marbury*, 5 U.S. at 177, the district court just shrugged its shoulders, *see* J.A. 982. Why? Because, according to the district court, "No court of appeals has addressed how to interpret the . . . 'smallest area compatible' requirement." J.A. 982.

The district court went further though. Rather than step in to interpret the "smallest area" limit and apply it to this case, the district court put its thumb on the scale in favor of the President. It said that because no court of appeals has interpreted the "smallest area" limit and because the district court would not interpret the limit here, therefore the President must have stayed ***within*** the limit. J.A. 982 ("without additional guidance from Congress or a higher court, the President's actions are not *ultra vires*").

How could the district court have decided that the President acted within the limit to his authority under the Antiquities Act while simultaneously refusing to interpret the limit and apply it to this case? Under the district court's legal approach, no local government like Blanding City could ever bring the President into court for an overbroad Antiquities Act designation. The President's unadorned, unchecked, and unreasonable decision to designate a monument would be sufficient for a court to kill any challenge under the "smallest area" limit. Every district court would just

rubberstamp the monument designation. But that cannot be the right path.

CONCLUSION

At base, Blanding City writes separately in this appeal asking the Court to reject the district court's underlying premise, which is that local governments have no recourse to the federal district courts when the President makes an Antiquities Act designation. Doing so will go a long way to redressing the harms that local governments—particularly those in the West—suffer from excessively broad designations under the Act.

And for the foregoing reasons, Blanding City respectfully asks the Court to reverse the decision, order, and judgment below dismissing the case.

DATED this 6th day of November 2023.

Respectfully submitted,

/s/ Ivan L. London

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CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of the Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it contains 3,024 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED this 6th day of November 2023.:

/s/ Ivan L. London
Ivan L. London

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that the foregoing has been scanned for viruses with Sentinel One, updated November 6, 2023, and is free of viruses according to that program.

In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this 6th day of November 2023.

/s/ Ivan L. London
Ivan L. London

CERTIFICATE OF SERVICE

I certify that on November 6, 2023, I caused the foregoing to be filed through the Court's CM/ECF system, with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

DATED this 6th day of November 2023.

/s/ Ivan L. London
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