No. 19-35460
(Consolidated with Nos. 19-35461 and 19-35462)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF CONSERVATION VOTERS, et al.,
Plaintiffs/Appellees,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,
Defendants/Appellants.

Appeal from the United States District Court for the District of Alaska
No. 3:17-cv-00101 (Hon. Sharon L. Gleason)

FEDERAL APPELLANTS' OPENING BRIEF

Of Counsel:

DENNIS DAUGHERTY
SUSAN HOVEN CASON
Attorneys
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ROBERT J. LUNDMAN
SARAH D. HIMMELHOCH
JUSTIN D. HEMINGER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, and Court Rules

Executive and Legislative Materials

Other Authorities

GLOSSARY

API	American Petroleum Institute
APA	Administrative Procedure Act
BOEM	Bureau of Ocean Energy Management
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act

INTRODUCTION

Congress enacted the Outer Continental Shelf Lands Act (OCSLA) in 1953 to promote exploration and production of the Outer Continental Shelf's immense oil and gas reserves. As amended in 1978, OCSLA authorizes the Department of the Interior (Interior) to oversee leasing of the Shelf to private parties through a four-stage process that proceeds from broad-based plans to actual exploration and production of specific tracts.

This case centers on Section 12(a) of OCSLA, which provides that "the President of the United States may, from time to time, withdraw from disposition any" unleased lands of the Shelf, thereby granting the President broad discretion to affect energy development, environmental protection, the economy, and national security. Each of the last four Presidents to make withdrawal decisions acknowledged that these decisions are not set in stone, and both President George W. Bush and President Barack Obama modified prior presidential withdrawals. Consistent with decades of past practice, the President in 2017 issued an Executive Order that modified prior presidential withdrawals, reopening areas of the Shelf for potential oil and gas development to be managed by Interior through OCSLA's leasing process.

Plaintiffs (collectively, the League) sued the President and the Secretaries of Interior and Commerce, asserting that the President lacked authority to modify

prior presidential withdrawals. But the Executive Order did not authorize any actual energy exploration or production activities — it merely terminated the prior withdrawals. Therefore, the League lacks standing, and the case is not ripe because Interior has not decided whether it will even offer any of the previously withdrawn areas of the Shelf for mineral leasing. The League's suit alternatively should have been dismissed because it improperly sued the President directly without a waiver of sovereign immunity and without a congressionally created cause of action. Moreover, the League's proffered interpretation of the President's authority under Section 12(a) departs from OCSLA's text, structure, and purpose, as well as from the understanding and practice of prior Presidents, and it is an interpretation that would eliminate future energy development on 128 million acres of the Shelf, absent new legislation from Congress.

Accordingly, the district court erred in allowing the League's suit to proceed to the merits. The court erred again in ruling that the President exceeded his delegated authority when he modified the prior withdrawals and then in vacating the relevant portion of the Executive Order.

The district court's judgment should be reversed.

STATEMENT OF JURISDICTION

(a) The League invoked the district court's subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1361, asserting claims under the Constitution and

under OCSLA, 43 U.S.C. §§ 1331 et seq. 2 Excerpts of Record (E.R.) 311, 331–32. But as we explain in Sections I.A and I.B of the Argument below (pp. 11–37), the district court lacked jurisdiction.

(b) The district court's judgment was final because it resolved all claims against all defendants. 2 E.R. 64. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on April 1, 2019. 2 E.R. 64. The Federal Appellants filed a notice of appeal on May 28, or 57 days later. 2 E.R. 62. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

This appeal presents two issues:

1. Whether the League has satisfied the threshold requirements for maintaining this suit, including an Article III case-or-controversy, a waiver of sovereign immunity, and a cause of action.

2. Whether the President exceeded his authority under Section 12(a) of the Outer Continental Shelf Lands Act by modifying prior presidential withdrawals of large areas in the Atlantic and Arctic Oceans.

PERTINENT STATUTES AND REGULATIONS

Under Circuit Rule 28-2.7, all pertinent constitutional provisions, statutes, and regulations are set forth in an addendum attached to this brief.

STATEMENT OF THE CASE

A. The Outer Continental Shelf Lands Act

Congress has declared that the oil and natural gas reserves beneath the Outer Continental Shelf (OCS) are "a vital national resource." 43 U.S.C. § 1332(3); *see also id.* § 1331(a) (defining the OCS as "all submerged lands" beyond the lands reserved to the States up to the edge of the United States' jurisdiction and control). In 1945, recognizing the "world-wide need for new sources of petroleum and other minerals," President Truman exercised his Article II powers over national security and foreign relations to assert the United States' jurisdiction and control over the Shelf's natural resources in what became known as the "Truman Proclamation." Proclamation No. 2667 (Sept. 28, 1945), 10 Fed. Reg. 12,303 (Oct. 2, 1945), *reproduced in* 2 E.R. 309.

That same day, President Truman issued another Executive Order to reserve and set aside the Outer Continental Shelf's natural resources under the jurisdiction and control of the Secretary of Interior. Executive Order 9633, 10 Fed. Reg. 12,305 (Oct. 2, 1945). But in January 1953, shortly before Congress enacted OCSLA, President Truman issued a new Executive Order — again, citing his authority as President — that revoked the 1945 Executive Order and set aside the Outer Continental Shelf as a "Naval Petroleum Reserve" to be administered by the Secretary of the Navy. Executive Order 10426, 18 Fed. Reg. 405 (Jan. 16, 1953).

Later in 1953, Congress replaced the Truman Proclamation with OCSLA. The Act's primary purpose was to allow the United States to lease areas of the Shelf to private parties for exploration and production of its resources, especially oil and natural gas. Ch. 345, § 8(a), 67 Stat. 462, 468 (authorizing Interior to lease the Shelf "to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf"). Although Congress amended OCSLA substantially in 1978, the Act's central purpose remains to make the Shelf's oil and gas reserves "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). In the 1978 amendments, Congress created a gradual four-stage process by which Interior makes leasing decisions: First, Interior approves a five-year plan for *potential* lease sales; second, Interior may offer leases on which private parties may bid; third, Interior may authorize exploration activities on the leased areas; and fourth, Interior may authorize the actual production of oil and gas from the leased areas. *Id*. §§ 1344, 1337(a), 1340, 1351.

In OCSLA's original enactment, Congress vested several discretionary powers in the President and in the Secretaries of Interior and Defense and reserved to the United States certain rights in the Shelf's resources. Section 12(a) provides that the "President of the United States may, from time to time, withdraw from

disposition any of the unleased lands of the outer Continental Shelf." 43 U.S.C. § 1341(a). Section 12(b) grants to the President, during time of war, the right of first refusal to purchase some or all of any mineral produced on the Shelf. *Id*. § 1341(b); *see also id*. §§ 1341(e), 1341(f) (reserving for the United States use of all nuclear materials and ownership of all helium).

B. Prior presidential withdrawal decisions

Presidents have invoked Section 12(a) only a handful of times. In 1960, President Eisenhower established the Key Largo Coral Reef Preserve. 2 E.R. 308. In 1969, the Secretary of Interior provided notice of a withdrawal in areas around the Santa Barbara Channel Ecological Preserve. 2 E.R. 306–07. In 1990, President George H.W. Bush withdrew large areas of the Shelf "until after the year 2000." 2 E.R. 303–05; *see also* 2 E.R. 302 (confirming the withdrawal in 1992). In 1998, President Clinton withdrew large areas of the Shelf "through June 30, 2012" and smaller areas designated as marine sanctuaries "for a time period without specific expiration." 2 E.R. 301.

In 2007, President George W. Bush modified President Clinton's withdrawal by altering its size and extending it "through June 30, 2012." 2 E.R. 300. The year after, President Bush modified the 1992, 1998, and 2007 withdrawals by reducing their respective sizes to areas "designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972."

2 E.R. 299. He also established that the modified withdrawals would continue for "a time period without specific expiration." *Id*.

During his two terms in office, President Obama made six withdrawals. 2 E.R. 289–98. In 2010, he withdrew the Bristol Bay, Alaska area "through June 30, 2017." 2 E.R. 298. But in 2014, he revoked his 2010 withdrawal and established a new withdrawal of the same area for "a time period without specific expiration." 2 E.R. 297. In 2015 and 2016, President Obama made four withdrawals, each "for a time period without specific expiration": (1) areas of the Beaufort Sea and Chukchi Sea offshore of Alaska; (2) areas of the North Bering Sea offshore of Alaska; (3) canyons in the Atlantic Ocean; and (4) additional areas of the Beaufort Sea and the remainder of the Chukchi Sea. 2 E.R. 289–96.

C. The President's Executive Order

In April 2017, President Trump issued Executive Order 13795, Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815 (Apr. 28, 2017), *reproduced in* 2 E.R. 285–88. Section 2 of the Executive Order announced that the policy of the United States is "to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible." 2 E.R. 285.

In Section 5 of the Executive Order, President Trump modified three of President Obama's withdrawal decisions. 2 E.R. 286. In an echo of President George W. Bush's 2008 action, the modification reduced the size of President Obama's withdrawals to comprise "those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972." *Id*. The modification effectively reaffirmed President Bush's modest 2008 withdrawal and terminated President Obama's 2015 and 2016 withdrawals involving the Atlantic Ocean, the Chukchi Sea, and the Beaufort Sea, reopening more than 128 million acres of the Shelf for consideration in Interior's future plans for oil and gas leasing. 2 E.R. 317.

D. The League's lawsuit

Ten environmental organizations (collectively, the League) brought suit in the District of Alaska against President Trump and the Secretaries of Interior and Commerce, all in their official capacities (collectively, the United States). The League challenged only the President's decision to re-open for potential leasing areas of the Outer Continental Shelf that President Obama had withdrawn; it did not challenge any final action by the Secretaries. The League asserted two claims: (1) a constitutional claim that the President violated the Property Clause and the doctrine of separation of powers; and (2) a self-styled "*ultra vires*" claim that the President exceeded his authority under OCSLA Section 12(a). 2 E.R. 331–32.

The State of Alaska and the American Petroleum Institute (API) intervened as defendants.

The United States moved to dismiss the complaint for failure to satisfy threshold requirements: (1) no Article III standing and ripeness; (2) no waiver of sovereign immunity; and (3) no private cause of action. API also moved to dismiss the complaint, arguing that exclusive jurisdiction lay elsewhere. The district court denied the motions, holding: (1) the League had standing, and the case was ripe; (2) the League needed no waiver of immunity because it alleged the President had committed unconstitutional or *ultra vires* acts; (3) the League needed no cause of action; and (4) jurisdiction in the district court was proper. 1 E.R. 33–61.

All parties moved for summary judgment. The United States renewed its threshold arguments and also argued on the merits that OCSLA Section 12(a) authorizes the President to modify prior presidential withdrawals of areas of the Outer Continental Shelf. The district court denied the defendants' motions and granted summary judgment to the League: (1) the court declined to revisit its rulings on the threshold issues; (2) the court held that, although Section 12(a) was ambiguous, Congress did not expressly grant the President authority to revoke withdrawals, and so the President's withdrawal decision exceeded his delegated authority; and (3) it "vacated" Section 5 of the Executive Order. 1 E.R. 1–32.

SUMMARY OF ARGUMENT

1. The League directly sued the President for violating the Constitution and exceeding his statutory authority, but it failed to satisfy any of three necessary threshold conditions to maintain the suit. In reaching the merits of the League's claims, therefore, the district court made three independent legal errors, any one of which is a proper basis for dismissal.

First, the League failed to establish the standing and ripeness required for an Article III case or controversy and as a prerequisite to equitable relief. The Executive Order authorizes no exploration or development activities, and so any injury to the aesthetic interests of the League's members is too speculative and remote to constitute an imminent, concrete injury.

Second, the League has identified no applicable waiver of sovereign immunity authorizing suit against the President, and its reliance on a questionable exception to sovereign immunity should be rejected.

Third, the League has no cause of action, either express or implied in equity.

2. If the Court nonetheless reaches the merits, it should uphold Section 5 of the Executive Order. The President's interpretation of Section 12(a) of OCSLA to grant discretion to modify and undo prior presidential withdrawals is supported by the text of that provision, by OCSLA's structure and purpose, and by evidence from presidential practice, congressional acquiescence, and legislative history. The

district court's ruling that the President lacks such discretion is rife with errors, and it converts a single sentence in OCSLA into a sweeping and irreversible power that threatens to swallow the statute whole.

The judgment of the district court should be reversed.

STANDARD OF REVIEW

This Court reviews de novo the district court's order denying the motions to dismiss, accepting as true the League's allegations of material fact and construing the facts in the light most favorable to the League. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899, 903 (9th Cir. 2009). The Court likewise reviews de novo the district court's ruling on summary judgment. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

ARGUMENT

I. This action should be dismissed because it fails to satisfy three threshold requirements.

To maintain a suit against the President, a plaintiff must establish at least all of the following: (1) an Article III case or controversy and ripe claim; (2) a waiver of sovereign immunity; and (3) a cause of action. Here, the League lacks all three, and its suit should be dismissed on any one of these grounds.

A. The League has no Article III case-or-controversy or ripe claim.

Article III of the Constitution grants federal courts jurisdiction to hear cases or controversies. An Article III case or controversy requires both standing, "which

concerns *who* may bring suit," and ripeness, "which concerns *when* a litigant may bring suit." *Habeas Corpus Resource Center v. U.S. Department of Justice*, 816 F.3d 1241, 1247 (9th Cir. 2016). Standing requires the plaintiff to show an injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Ripeness requires "fitness of the issues" for judicial resolution and "hardship to the parties" from withholding judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967).

In many cases, constitutional ripeness "coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Here, the League lacks standing because it cannot establish an injury-in-fact caused by the President's Executive Order. For similar reasons, its suit is not ripe under Article III. At a minimum, the dispute is not ripe for purposes of a suit seeking equitable relief, because the Executive Order imposes no hardship on the League's members, and because OCSLA provides for judicial review once a ripe, concrete dispute is presented. Without an Article III case-or-controversy or an otherwise ripe claim, the League's suit should now be dismissed. But if the League establishes standing in the future (and if its claims ripen), then it may seek judicial review of the Executive Order by challenging a final agency action implementing the President's decision.

1. The League has not established an Article III injury-in-fact caused by the Executive Order.

The League must show that at least one of its members will suffer an invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560 (internal quotation marks omitted). The League asserts that the Executive Order "catalyzes" energy companies to take future actions that will harm the natural resources and wildlife of the Outer Continental Shelf, thereby harming its members' aesthetic interests. 2 E.R. 68–77. But this "theory of *future* injury" is too speculative to show a threatened injury that is "certainly impending" or to show a "substantial risk" of injury. *Clapper v. Amnesty International USA*, 568 U.S. 398, 401, 414 n.5 (2013). Nor does the League's catalyst theory establish a harm that is concrete and particularized, meaning that it affects at least one of its members "in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n.1.

The League does not claim that it is directly regulated by the Executive Order, or that the Order will directly and personally harm its members. Nor could it. By modifying presidential withdrawals, the Executive Order merely authorized Interior to *consider* including previously withdrawn areas of the Outer Continental Shelf in its plans for future oil and gas leasing. Instead, the League alleges only that the Order "catalyzes" or "enables and promotes" oil and gas exploration and development activities that threaten to harm the natural resources and wildlife of

the Shelf, which in turn threaten its members' aesthetic, economic, recreational, and subsistence interests in the natural resources and wildlife. 2 E.R. 68–77.

At summary judgment, the League provided standing declarations from its members asserting that (1) they plan to use areas of the Shelf to enjoy marine animals and the natural environment; and (2) they fear that the Executive Order will lead to energy exploration activities on areas of the Shelf, which will harm the animals and the environment enjoyed by the members. 2 E.R. 78–282. But the League's argument and standing declarations suffer from a fundamental flaw: the Executive Order authorized no energy development activities of any kind on the Shelf — none at all. As elaborated below, any such activities depend on future (and currently unknown) actions by third parties and by Interior. Therefore, the League's standing fails because it has no imminent, concrete, and particularized injury, and its assertions rest on impermissible speculation about future actions.

Interior manages energy development activities on the Outer Continental Shelf through the four-stage process established in the 1978 amendments to OCSLA: (1) preparation of a five-year program of proposed lease sales; (2) lease sales; (3) exploration; and (4) development and production. 43 U.S.C. §§ 1344, 1337(a), 1340, 1351; *see also* https://www.boem.gov/BOEM-OCS-Oil-Gas-Leasing-Process (Interior's visual depiction of these four steps). The four stages are "pyramidic in structure, proceeding from broad-based planning to increasingly

narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). Each stage involves a regulatory review "that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities." *Secretary of Interior v. California*, 464 U.S. 312, 337 (1984).

Congress designed this four-stage framework precisely to "forestall *premature* litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production." *Id.* at 341 (emphasis added); *accord North Slope Borough v. Andrus*, 642 F.2d 589, 595 (D.C. Cir. 1980) ("In fact, a purpose of OCSLA is to permit an expedient resolution of preliminary matters in the development of oil lands while preserving administrative and judicial review *for future times* when potential threats to the environment are readily visualized and evaluated." (emphasis added)). Given this framework, the League does not suffer the required actual and imminent injury from the Executive Order. At present, any such injury is uncertain and unknowable for three reasons.

First, the Executive Order precedes the five-year plan and lease sales stages, which themselves do not authorize on-the-ground activities of which the League complains. 43 U.S.C. §§ 1344, 1337(a). As this Court has recognized, Interior's decisions regarding the five-year plan and lease sales have no actual effects on the

Outer Continental Shelf. *See Village of False Pass v. Clark*, 733 F.2d 605, 612 (9th Cir. 1984) ("The lease sale decision itself could not directly place gray or right whales in jeopardy, and the plan insures that the many agency actions that may follow indirectly from the sale will not either."); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1194 (9th Cir. 1988) (noting that the risks to endangered species "during the lease sale stage are virtually nonexistent"); *accord California*, 464 U.S. at 340 ("Since 1978, the purchase of an OCS lease, standing alone entails no right to explore, develop or produce oil and gas resources on the OCS."). At this juncture, before Interior has even issued a five-year plan that includes previously withdrawn areas of the Outer Continental Shelf for *potential* leasing, the League's members face no concrete and imminent risk of harm to their aesthetic interests in those areas.

Second, any harm depends on future decisions by independent actors. No one can now know whether Interior will include any previously withdrawn areas in a future five-year program and, if it does, whether it will include any of those areas in a lease sale. Likewise, no one can now know if private parties will bid for and acquire leases, or if those parties then will seek and obtain Interior's approval to explore and develop those leases. *See California*, 464 U.S. at 342 ("Leases are sold before it is certain if, where, or how exploration will actually occur."). In other words, the exploration and production activities that the League fears could

harm the Shelf's resources in any particular location depend on future actions that are not imminent and may never occur at all. *See Bova v. City of Medford*, 564 F.3d 1093, 1096–97 (9th Cir. 2009) (no standing where alleged injury turned on future events that may not occur). Thus, the League's members face no certainly impending risk of harm to their aesthetic interests in the Shelf's resources.

Third, even if the future contingencies happen exactly as the League speculates, it cannot point to a specific previously withdrawn area that it knows will be impacted. The League must show that at least one of its members has concrete and particularized plans to use a specific area of the Shelf covered by the Executive Order that will be affected by energy development activities, *Summers v. Earth Island Institute*, 555 U.S. 488, 494–95 (2009), and any suit must focus on and be limited to that specific area. But the Executive Order reversed withdrawals covering a vast expanse of the Shelf — 128 million acres, an area roughly 20 percent larger than the entire State of California. 2 E.R. 317. Nor can the League establish that its members intend to visit a specific area of the Outer Continental Shelf where their aesthetic interests will be diminished because the League does not know where exploration and production activities may occur. *Summers*, 555 U.S. at 495 (concluding there was no Article III injury where the affidavit did not identify a particular timber sale project that would impede a specific and concrete plan to enjoy the national forests, which "occupy more than 190 million acres").

The district court correctly placed little to no weight on the League's broad assertions of future injury from energy development activities. 1 E.R. 45–56. But the court held that the League's members did suffer an Article III injury from a narrow subset of activities known as "seismic surveying," which sends sound pulses across the ocean floor to locate oil and gas deposits. *Id.* The court accepted the League's assertions that the Executive Order motivated firms to conduct seismic surveying independent of OCSLA's four-stage process, potentially harming marine wildlife and fish, which in turn would harm its members' aesthetic interests. *Id.*[1]

This was error. The League's allegations of seismic surveying injuries suffer from the same lack of imminence, concreteness, and particularity that defeat its generalized allegations of harm from the mere issuance of the Executive Order. The seismic surveying of which the League complains requires that a private party obtain a permit from Interior. 43 U.S.C. § 1340(a)(1); 30 C.F.R. Part 551. Before permitting seismic surveys, Interior must ensure that its decision will comply with other governing federal laws besides OCSLA, including the Endangered Species

[1] In moving to dismiss the complaint, the United States represented that none of the pending permit applications requested authorization to conduct seismic surveying in areas of the Shelf that were previously withdrawn. Although the United States later filed an errata correcting this representation, 2 E.R. 65–66, the district court stated that the errata did not affect its reasoning, 1 E.R. 9. Subsequently, Interior discovered proposed survey routes would intersect with more of the previously withdrawn areas than indicated in the errata. But none of the permit applications establishes standing for the reasons explained in the text.

Act, 16 U.S.C. §§ 1531 et seq., and the National Environmental Policy Act, 42 U.S.C. §§ 4231 et seq. And to avoid potential criminal liability under the Marine Mammal Protection Act, permit applicants must also separately seek authorization from the National Marine Fisheries Service for any unintentional take of marine mammals that may occur. 16 U.S.C. § 1371(a)(5)(A); *Tribal Village of Akutan*, 869 F.2d at 1195 ("Geophysical contractors conducting these surveys are subject to regulation under the Marine Mammal Protection Act . . . , which flatly prohibits the taking of any marine mammal on the high seas except under circumstances not applicable here."). Consequently, possible injury from seismic surveying rests on a chain of future decisions made by independent actors that are not before the Court. *See Clapper*, 568 U.S. at 413 (reaffirming Court's reluctance "to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

Where, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" to establish standing. *Defenders of Wildlife*, 504 U.S. at 562. "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well." *Id*. Then the plaintiff's burden is "to adduce facts showing that those choices have been or will be made in such manner

as to produce causation and permit redressability of injury." *Id*. Under the League's "catalyst" theory, which the district court accepted, the Executive Order created economic incentives for third parties to seek permission to conduct seismic surveying, and Interior is certain to grant those requests. But the Order neither authorized any seismic surveys, nor opened up any new areas to surveying, and so it is not a direct cause of any surveying.[2] Granted, a separate provision of the Executive Order (that the League did not challenge) directed Interior to expedite *consideration* of certain seismic surveying permits, but it did not direct Interior to approve those permits. 2 E.R. 287.

The evidence that the League submitted to support its catalyst theory fails to show that the Executive Order will either cause companies to seek more seismic surveying permits in previously withdrawn areas or compel Interior to grant any permits. 2 E.R. 67–282. Energy exploration is a speculative, time-consuming, and resource-intensive endeavor, and courts are ill-equipped to predict how companies will calculate economic incentives, regulatory requirements, and technological developments in deciding whether to conduct seismic surveying and if so, when

---

[2] Parties may conduct seismic surveying in areas that are not open to leasing. Thus, Interior has issued permits allowing seismic surveying activities in the Flower Garden Banks National Marine Sanctuary, even after the Sanctuary was withdrawn under OCSLA Section 12(a). Permit L02-40, Stipulations at 6–7 (Oct. 18, 2002), https://www.data.bsee.gov/PDFDocs/Scan/GGPERMITS/1/1194.pdf; Permit L10-043, Environmental Protective Measure #14 (Dec. 2, 2010), https://www.data.bsee.gov/PDFDocs/Scan/GGPERMITS/2/2033.pdf.

and where. Nor can courts reliably predict whether Interior will grant or deny a particular permit. Consequently, projected injury in any particular location is speculative, meaning that the Executive Order is not the cause of the injury.

Unless and until Interior grants a permit to conduct seismic surveying in a specific area of the Shelf reopened by the Executive Order — and the League establishes that its members use that area to observe marine wildlife and that the Order will materially reduce their ability to do so — the League cannot link its members' aesthetic interests to a particular area that a private party will survey. The League's inability to identify which of the Shelf's 128 million acres reopened by the Executive Order — 200,000 square miles — will be surveyed is fatal to its claim of standing because "it is possible that none of the public lands affected by" future seismic surveying activities "will be ones that [the League's members] use and enjoy." *Wilderness Society v. Griles*, 824 F.2d 4, 15 (9th Cir. 1987).

At the motion to dismiss stage, the district court erred in holding that the League had sufficiently pleaded a concrete and particularized injury. 1 E.R. 45–56. The court doubled down on that error at the summary judgment stage by giving the League's standing declarations only a perfunctory review. 1 E.R. 8–9. The court summarized the declarations by observing that the League's members "visit or otherwise use and enjoy the lands at issue in this litigation." 1 E.R. 9. But a plaintiff's burden at summary judgment "is not satisfied by averments which

state only that the declarant uses unspecified portions of a large metropolitan area, on some portions of which hazardous substances might be transported or disposed." *People for Ethical Treatment of Animals v. Department of Health & Human Services*, 917 F.2d 15, 17 (9th Cir. 1990).

By presuming that seismic surveying would occur "in the same areas" of the Outer Continental Shelf that the League's members use and enjoy and that the surveys would happen when the members visited, the district court erred. *Id*.; *see also Wilderness Society*, 824 F.2d at 16 (holding that plaintiffs failed to establish personal injury at summary judgment because, although they used and enjoyed public lands, they could not specify whether those lands would actually be affected by the challenged policy). The possibility, even the probability, that the supposed incremental increase in seismic surveying claimed to be prompted by the Executive Order would coincide with a member's enjoyment of an unspecified part of an area larger than the State of California is far too attenuated a basis for standing.

The district court also erred in applying this Court's standing jurisprudence. The court relied heavily on *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018), *see* 1 E.R. 47–52, but the League here faces nothing like the imminent threat of future injury faced by the victims of a data breach in that case. In *Zappos*, this Court held that the plaintiffs faced a substantial risk of harm because the hackers who stole their sensitive personal information were likely to commit identify fraud

or theft. 888 F.3d at 1026–29. That makes some logical sense because presumably the purpose of stealing sensitive information, including credit card numbers, is to use it for fraud or identity theft. *Id*. at 1027. Moreover, nothing else had to happen before the hackers could use the stolen information to harm the plaintiffs. By contrast, here a private party must apply for a permit that it would not have sought but for the Executive Order; then Interior must approve the permit; and finally, one of the League's members must visit (or have concrete plans to visit) the specific area of the Shelf in which seismic surveying is authorized at a time when the temporary effects of surveying are felt. That is no "imminent risk" of injury. *Id.* at 1028.

Likewise, the district court misapplied *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009). 1 E.R. 53–56. *Kempthorne* held that the plaintiffs had standing to challenge the Fish and Wildlife Service's regulations authorizing the incidental "take" of polar bears and walrus in the Beaufort Sea because the plaintiffs alleged that their members enjoyed viewing those species in the region and planned to visit again to see them. *Id*. at 707–08. The district court read *Kempthorne* to stand for the principle that "the degree of geographic specificity required [for Article III standing] depends on the size of the area that is impacted by the government's action." 1 E.R. 53–54. But that principle does not address the fatal flaw that the League's claims are too speculative because a third

party must apply for a permit — and Interior must approve that permit — before their members could possibly be injured.

In any event, *Kempthorne* does not articulate the broad standing principle identified by the district court. This Court held that the plaintiffs' members had established a "geographically specific" injury and thus were not challenging the regulation "in the abstract." 588 F.3d at 708 (internal quotation marks omitted). The Court also emphasized that the plaintiffs alleged that letters of authorization under the take regulations "have been issued" and that if the harm to their interests "has not resulted already, it is imminent." *Id*. at 708–09. In contrast, the League cannot identify an injury with any degree of specificity because no one knows whether, where, and when seismic surveying may occur across 128 million acres of the Outer Continental Shelf. And here the League does challenge the Executive Order "in the abstract." In *Summers*, the Supreme Court held that the plaintiffs had no injury-in-fact where they brought an abstract challenge to regulations that applied to the national forests, which "occupy more than 190 million acres, an area larger than Texas." 555 U.S. at 495. Here, there "may be a chance, *but is hardly a likelihood*, that [the] wanderings" of a member of the League "will bring him to a parcel about to be affected by" the Executive Order. *Id.* (emphasis added).

The district court supported its reading of *Kempthorne* with a quotation from *Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd on other*

grounds, 551 U.S. 644 (2007): "[I]n light of the statewide impact of the EPA's transfer decision, alleging an injury-in-fact covering large areas within the state simply reflects the relatively broad nature of the potential harm." 1 E.R. 54. But that decision undercuts the district court's holding. In *Defenders of Wildlife*, this Court found that the plaintiffs' standing declarations "mention specific subareas within the state where they engage in activities related to particular listed species and where development is occurring," and the Court held that its cases "required no greater precision." 420 F.3d at 957. That same degree of precision is entirely missing here because the League cannot pinpoint a single previously withdrawn subarea within the entire Beaufort Sea, Chukchi Sea, or Atlantic Ocean that its members plan to visit and that will be imminently impacted by seismic surveying.

In sum, the League lacks the injury-in-fact required for Article III standing to challenge the Executive Order.

2. This suit is not ripe because Interior has taken no concrete action, and the League faces no hardship.

For the same reasons that the League has failed to establish an injury-in-fact, its suit is unripe: in asserting a facial challenge to an Executive Order that causes its members no harm, it has jumped the gun. The ripeness requirement, both under Article III and as a constraint on a court's exercise of equitable authority, prevents courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and protects agencies from

"judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148–49. "When addressing the sufficiency of a showing of injury-in-fact grounded in potential future harms, Article III standing and ripeness issues often boil down to the same question." *Coons v. Lew*, 762 F.3d 891, 897 (9th Cir. 2014) (internal quotation marks omitted). In that sense, "ripeness can be characterized as standing on a timeline." *Id*. (same).

On any timeline, the Executive Order itself authorizes no activities on the Outer Continental Shelf and inflicts no hardship on the League. The League's suit is analogous to seeking pre-enforcement review of an agency's regulations, but the League is missing a necessary ingredient for that review. Unlike regulations that "can immediately affect 'primary conduct' " by requiring regulated parties to choose between compliance and penalties, *Habeas Corpus Resource Center*, 816 F.3d at 1252, the Executive Order regulates no primary conduct and imposes no consequences on anyone, including the League. It merely authorizes Interior to consider previously withdrawn areas for inclusion in a future leasing program.

Unlike a ripe pre-enforcement challenge to regulations, the League seeks review of the Executive Order based on alleged harms that could arise only from future agency actions that would themselves be subject to judicial review — for instance, Interior's actually granting a permit to conduct seismic surveying. The

League's suit therefore fails for the same reason as the unripe challenge to the Forest Service's broad management plan for a national forest in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). To be sure, the Executive Order is not a precondition to the seismic surveying that the League fears, so in that sense it is even *less* ripe than the management plan that was unripe in *Ohio Forestry*. *Id*. at 730. But even if the Order might result in some incremental increase in surveys or other energy development activities in the future, it does not do so of its own force, does not "create adverse effects of a strictly legal kind," and "does not give anyone a legal right" to conduct those activities. *Id*. at 733. If Interior were to approve exploration or seismic surveying permits in a previously withdrawn area of the Shelf, the League "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id*. In other words, the League must wait to seek judicial review of a final agency action that threatens it with actual, concrete harm.[3]

Moreover, channeling ripe challenges through OCSLA's judicial review provisions when Interior takes an action that Congress expressly subjected to such review accords with OCSLA's four-stage framework — the stair-step approach

---

[3] In *Ohio Forestry*, the Supreme Court stressed that Congress' failure to provide for pre-implementation judicial review of forest plans further supported its holding that the plaintiff's claims were not ripe. 523 U.S. at 737. As discussed in Section I.C below (pp. 38-45), Congress failed to provide for pre-implementation judicial review of Section 12(a) withdrawal decisions.

that Congress set up precisely to avoid "premature" litigation. *California*, 464 U.S. at 341; *accord North Slope Borough*, 642 F.2d at 595. Congress provided for judicial review at each of the four leasing stages. 43 U.S.C. § 1349. The ripeness doctrine and OCSLA's review provisions thus "dovetail neatly, and not necessarily by mere coincidence." *Reno v. Catholic Social Services*, 509 U.S. 43, 60 (1993).

Following Congress' intentional framework, the D.C. Circuit rejected as unripe certain claims under the National Environmental Policy Act and the Endangered Species Act challenging Interior's five-year leasing program for 2007-2012. *See Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d. 466, 480–81 (D.C. Cir. 2009). The court reasoned that before Interior authorized leasing at the second stage of the OCSLA process, "no harm will yet have occurred to the animals or their environment." *Id*. at 481. The court rejected the petitioners' claim that the five-year program would lead to additional seismic surveying, reasoning that the program *itself* did not authorize this surveying, and the surveying required a separate permit from Interior. *Id*. at 481 n.1. So here, the Executive Order authorizes no seismic surveying, and any claims challenging it on that basis are not ripe.

We stress that if the League's claims were to ripen in the future (and if the League established standing), it may challenge the Executive Order's application through an otherwise reviewable final agency action. Thus, if Interior eventually

includes any previously withdrawn areas of the Outer Continental Shelf in its next final five-year program, the League may seek review of that program in the D.C. Circuit and challenge the Executive Order to the extent that the program depends on an application of the Order. *See Center for Biological Diversity*, 563 F.3d at 483–84 (holding that OCSLA-based claims challenging five-year program were ripe). In that vein, at least one commenter on Interior's 2019-2024 draft proposed program has questioned Interior's legal authority to lease previously withdrawn areas. Comments of Columbia Law School Sabin Center for Climate Change Law at 9–10 (Mar. 9, 2018), https://www.regulations.gov/document?D=BOEM-2017-0074-10942.

Similarly, the League may separately challenge any seismic surveying permit issued by Interior or any incidental take authorization issued by the National Marine Fisheries Service — just as one of its number (Plaintiff Center for Biological Diversity) recently did. Complaint (ECF No. 1), *Cook Inletkeeper v. Ross*, No. 3:19-cv-00238, 2019 WL 4235206 (D. Alaska Sept. 4, 2019). Of course, the League must show standing and ripeness to challenge the Executive Order in any prospective suit. But if Interior has taken a final agency action, the League may show that it will suffer hardship tied to a concrete application of the Order.

Finally, as in *Reno*, the League seeks injunctive and declaratory judgment remedies that "are discretionary, and courts traditionally have been reluctant to

apply them . . . unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties." 509 U.S. at 57. And as in *Reno*, the League has not shown that OCSLA's judicial review provisions are inadequate for review of the Executive Order. *Id*. at 60–61. Thus, even if the case were constitutionally ripe, this Court should defer review as an equitable matter because the Executive Order cannot be felt in a concrete way by the League or its members.

In sum, the League has no Article III case-or-controversy or ripe claim.

B. The League has no waiver of sovereign immunity.

Alternatively and independently, the League's suit is barred by the United States' sovereign immunity. Because this immunity limits a federal court's subject matter jurisdiction, the Court may order dismissal of the suit on sovereign immunity grounds without reaching either standing or ripeness. *Al-Haramain Islamic Foundation, Inc. v. Obama*, 705 F.3d 845, 850 n.2 (9th Cir. 2012).

Sovereign immunity bars suits against the United States and its officials sued in their official capacity unless Congress expressly waives that immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996). A plaintiff suing the United States must establish that its suit "falls within an unequivocally expressed waiver of sovereign immunity by Congress." *Dunn v. Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007). An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Thus,

absent a congressional waiver, sovereign immunity extends to any suit against a federal official in an official capacity.

The League sued the President "in his official capacity" as President of the United States for "official actions," that is, for modifying presidential withdrawals in Section 5 of the Executive Order. 2 E.R. 317, 331–32. Yet the League failed to identify any waiver of sovereign immunity. That is because Congress has not enacted one. The League's attempt to circumvent sovereign immunity by invoking "nonstatutory review" should be rejected, especially in a suit against the President.

1. Congress declined to waive sovereign immunity for this suit.

Congress has not waived sovereign immunity for this suit. The two statutes in which it logically would have done so for claims challenging withdrawals under OCSLA Section 12(a) are OCSLA itself and the Administrative Procedure Act (APA). But neither statute contains an express and unequivocal immunity waiver authorizing judicial review of those decisions. Indeed, the district court conceded that under *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), the League's claims against the President were not reviewable under the APA. 1 E.R. 40. Nor did the court identify any waiver of sovereign immunity waiver in OCSLA. 1 E.R. 40–42. That should have ended the case.

OCSLA's text does not waive sovereign immunity for the League's claims. Although OCSLA identifies categories of agency action that are subject to judicial

review, 43 U.S.C. § 1349, presidential withdrawal decisions under Section 12 are not among them. Where Congress has waived immunity, courts must respect the scope of that waiver. *Al-Haramain*, 705 F.3d at 850–52 (adhering to the precise scope of Congress' sovereign immunity waiver for violations of certain Foreign Intelligence Surveillance Act provisions but not others).

Nor does the APA waive sovereign immunity. In many cases, a claim that an Executive Branch officer acted without statutory authority would be subject to judicial review under the APA. 5 U.S.C. § 706(2)(B) (authorizing review of agency action "contrary to constitutional right"); *id*. § 706(2)(C) (authorizing review of agency action "in excess of statutory . . . authority); *see also Clouser v. Espy*, 42 F.3d 1522, 1528 n.5 (9th Cir. 1994) (explaining that the APA "is a framework statute that provides the generally applicable means for obtaining judicial review of actions taken by federal agencies," including a claim that agency actions "were taken without statutory authority"). To this end, when Congress amended the APA in 1976, it waived sovereign immunity for non-monetary relief against the United States. 5 U.S.C. § 702. But that waiver does not apply to suits against the President. *Franklin*, 505 U.S. at 800–01.[4]

[4] The League named the Secretaries of Interior and Commerce as defendants, but it has identified no reviewable action taken by those officers. E.R. 310–33. Rather, the League is challenging Section 5 of the President's Executive Order. Thus, in every relevant respect, the League's suit is directly against the President alone.

Although the text of OCSLA and the text of the APA are clear, the order in which Congress enacted and amended those two statutes "further confirms" the conclusion "from the text alone" that neither statute waives sovereign immunity for presidential decisions under OCSLA Section 12(a). *Al-Haramain*, 705 F.3d at 852 (internal quotation marks omitted). Congress enacted the APA in its original form in 1946, without a sovereign immunity waiver. In 1953, Congress enacted OCSLA without specifying that presidential withdrawal decisions would be subject to judicial review. Ch. 345, § 4(b), 67 Stat. at 463. In 1976, Congress amended Section 702 of the APA to waive sovereign immunity for non-monetary relief. But because "the APA does not expressly allow review of the President's actions," those actions "are not subject to its requirements." *Franklin*, 505 U.S. at 801. Two years later, Congress amended OCSLA to include the extensive judicial review provision that remains largely the same today. Pub. L. No. 95-372, § 208, 92 Stat. 629, 657-59 (1978) (adding 43 U.S.C. § 1349). Yet Congress once again chose not to waive the government's sovereign immunity for the President's withdrawal decisions.

In sum, Congress has repeatedly declined to include in either OCSLA or the APA a waiver of sovereign immunity that would authorize federal courts to directly review presidential withdrawal decisions under Section 12(a). The Court should honor Congress' policy choices and dismiss the League's suit on sovereign

immunity grounds. Such a dismissal would not insulate the challenged presidential action from review: "Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring in part). But any suit seeking review of agency action based on the Executive Order is not ripe now and must wait for final agency action under OCSLA or the APA.

2. The *Larson* exceptions to sovereign immunity do not apply.

The district court erred in holding that, under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949), the President is not immune to a suit alleging that he acted *ultra vires* (beyond statutory authority) or unconstitutionally. 1 E.R. 40–42. This holding and the League's suit hinge on what the Supreme Court has labeled a "narrow and questionable exception" — an exception that the Court has applied rarely (and not since 1963 in the context of federal sovereign immunity) and has never endorsed as a proper vehicle for review of presidential action. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 116 (1984); *see also E.V. v. Robinson*, 906 F.3d 1082, 1091 n.9 (9th Cir. 2018).

Larson identifies two exceptions to sovereign immunity: (1) when an "officer's powers are limited by statute," and he acts "beyond those limitations"; and (2) when an officer "take[s] action in the sovereign's name" that is "claimed to be unconstitutional." 337 U.S. at 689–90. The League's complaint asserts two

corresponding claims: (1) that the President exceeded his authority under Section 12(a) of OCSLA; and (2) the President violated the Constitution. 2 E.R. 331–32. Even if the 1976 amendments to the APA did not abrogate the *Larson* exceptions, neither claim fits within its exceptions.[5]

As to *Larson*'s first exception for *ultra vires* conduct, the officer must act beyond the statute's limits, and a "claim of error in the exercise of that power is therefore not sufficient." 337 U.S. at 689–90. "[U]nlike constitutional violations, there is no per se divestiture of sovereign immunity when statutes or regulations are violated *while an agent is pursuing his authorized duties*." *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986) (emphasis added). Instead, the officer must act "completely outside his governmental authority" to lose immunity. *Id*. at 859. In *Dalton v. Specter*, 511 U.S. 462, 474 (1994), the Supreme Court assumed for argument's sake that some claims that the President has violated a statutory *mandate* are judicially reviewable, but the Court pointed to "longstanding authority" that judicial review is "not available when the statute in question commits the decision to the discretion of the President."

---

[5] Although this Court recently held otherwise, *Robinson*, 906 F.3d at 1092, the United States' position is that the 1976 amendments to APA Section 702 abrogated the *Larson* exceptions. *Robinson*'s holding departs from Supreme Court precedent on sovereign immunity, and *Robinson* did not address whether *Larson* should apply to claims against the President. Finally, OCSLA represents a "precisely drawn, detailed statute" that under *Block v. North Dakota*, 461 U.S. 273, 275 n.1, 284–85 (1983), overrides the general remedy afforded by the *Larson* exceptions.

So here, OCSLA Section 12(a) authorizes the President, in his discretion, to make withdrawal decisions, and he invoked that authority in the Executive Order when he modified prior presidential withdrawals. As explained in Section II below (pp. 45–77), that decision is within the President's delegated authority, and the League's *ultra vires* claim fails because the President has not violated OCSLA at all. But even if this Court were to disagree on that point (if it proceeded to decide that question), the President's decision at most amounts to an "incorrect decision as to law or fact," *Larson*, 337 U.S. at 695, not an act "completely outside his governmental authority," *Yakima*, 806 F.2d at 859. *See Aminoil U.S.A., Inc. v. California Water Resources Board*, 674 F.2d 1227, 1233–34 (9th Cir. 1982) (rejecting application of *Larson* exception based on argument that Administrator of the Environmental Protection Agency had incorrectly determined that company's property was subject to federal jurisdiction). Because the President's decision did not "conflict with the terms of his valid statutory authority" — the issue is at least debatable — it remains the action of the sovereign and thus "cannot be enjoined." *Larson*, 337 U.S. at 695.

As to *Larson*'s second exception for unconstitutional acts by an officer, the League claims that the President violated the Constitution. *Franklin* recognized that courts may review the President's actions for constitutionality. 505 U.S. at 801. But "claims simply alleging that the President has exceeded his statutory

authority are not 'constitutional' claims, subject to judicial review under the exception recognized in *Franklin*." *Dalton*, 511 U.S. at 473–74; *see also id*. at 471 (rejecting the principle that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine").

The League's complaint confirms that its constitutional claim is merely a repackaging of its theory that the President exceeded his authority under OCSLA. The League's theory is (1) the Property Clause grants exclusive power over the Outer Continental Shelf to Congress; (2) Congress delegated only some of its Property Clause power to the President in Section 12(a); (3) the President exceeded his authority under Section 12(a); and (4) therefore, the President exceeded his constitutional authority under Article II and violated the separation of powers. 2 E.R. 331. Because the League's constitutional claim is an attempt to convert its statutory claim into a constitutional one, *Dalton* compels its dismissal.[6]

In sum, sovereign immunity independently bars this suit.

---

[6] To the extent that the interlocutory decision in *Sierra Club v. Trump*, 929 F.3d 670, 696–97 (9th Cir. 2019), bears on this issue — which the United States does not concede — the Supreme Court has granted the government's request for a stay of that decision pending further proceedings, observing that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary of Defense's compliance" with the statute. *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (S. Ct. July 26, 2019); *see also Sierra Club*, 929 F.3d at 707, 709–10 (Smith, J., dissenting) (opining that the majority's approach is "flatly contradicted by *Dalton* and related cases").

C. The League has no cause of action.

Alternatively and independently, the League's suit must be dismissed because it has no viable legal or equitable cause of action. The League claimed that it has "a right of action to redress unlawful official action by the President that exceeds his statutory authority," and that it has "a right of action to seek redress for official actions by the President that violate the Constitution." 2 E.R. 331–32. The district court held that the League needed no express congressional authorization to maintain either its *ultra vires* or its constitutional causes of action, 1 E.R. 42–43, but this holding conflicts with Supreme Court precedent.

1. Congress has not established a cause of action to sue the President for OCSLA withdrawal decisions.

The League's *ultra vires* claim fails because OCSLA grants no private cause of action to seek relief against the President. Private parties may bring suits to vindicate federal statutory provisions only if Congress creates a private cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). But nothing in OCSLA provides private parties with a cause of action against the President for alleged violations of Section 12(a), and the League disclaimed any reliance on the causes of action (including the citizen suit provision) that Congress created in OCSLA, 43 U.S.C. § 1349. 2 E.R. 284. The district court reasoned that *Sandoval* did not control because the plaintiffs there sought to enforce federal law against *third* parties, not the government. 2 E.R. 42–43. This is wrong for three reasons.

First, *Sandoval* made no distinction between enforcing private rights against third parties and against the federal government. 532 U.S. at 286–87 (explaining that without statutory authorization, "a cause of action does not exist and courts may not create one"). In any event, the district court (and the League) overlooked *San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005), in which this Court turned to *Sandoval* to decide whether a federal statute provided a private cause of action against *the United States*. *See id.* at 1093 (considering *Sandoval* to determine whether a provision of the National Historic Preservation Act provides a private cause of action against the United States).

Second, *Larson* itself refutes the district court's ruling that the League may proceed without a cause of action. *Larson* stressed that even if sovereign immunity posed no barrier to specific relief against an officer, the plaintiff still must have a cause of action to pursue this relief. 337 U.S. at 692–93 (recognizing that it is a "prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened"). Without a cause of action, the plaintiff's suit "must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally." *Id.* at 693. The League must drink the bitter with the sweet: having embraced *Larson* to escape sovereign immunity, it must abide by *Larson*'s requirement to plead a viable cause of action. *Id.* (recognizing that a plaintiff must claim "an invasion of his recognized legal

rights," and if he does not then "he has not stated a cause of action"). But the League has no viable cause of action, and so its *ultra vires* claim fails.

Third, the district court rationalized its holding by observing that courts have "on occasion adjudicated causes of action alleging that the President has exceeded his constitutional or statutory authority." 1 E.R. 42–43. True, but none of the cited decisions addressed the need for a viable private cause of action to challenge acts of the President, much less to sue him directly. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), involved a pure question of constitutional power because the only authority asserted was the inherent constitutional authority. *See Sierra Club*, 929 F.3d at 710 (Smith, J., dissenting) ("[C]ases such as *Youngstown* involve constitutional violations, because [t]he only basis of authority asserted was the [executive's] inherent constitutional power." (internal quotation marks and citations omitted)). *NLRB v. Noel Canning*, 573 U.S. 513, 520 (2014), raised Appointments Clause questions in a challenge to a National Labor Relations Board order under a *statutory* judicial review provision. *Dames & Moore v. Regan*, 453 U.S. 654, 666–67 (1981), involved the Treasury Department's action implementing Executive Orders, not a suit directly against the President. And the Supreme Court qualified its decision by disclaiming an attempt to establish "general 'guidelines' covering other situations not involved here" and by seeking to "confine the opinion only to the very questions necessary to decision of the case." *Id.* at 661.

2. The Court should decline to recognize a new equitable cause of action.

The League also lacks a cause of action for its constitutional claim. The Constitution does not provide an express cause of action for alleged violations of the Property Clause. *See, e.g.*, *Alexander v. Trump*, 753 Fed. Appx 201, 206 (5th Cir. 2018) ("Although there have been a few notable exceptions, the federal courts . . . have been hesitant to find causes of action arising directly from the Constitution."), *cert. denied*, 139 S. Ct. 1200 (2019). Nor do courts recognize a generic right to sue a federal official for acting inconsistently with more general separation-of-powers notions.

Moreover, the Supreme Court has recently cautioned that inferring a cause of action is a "significant step under separation-of-powers principles" because it intrudes upon Congress' "substantial responsibility to determine" whether suit should lie against individual officers and employees. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). Any "flexibility" that federal courts have to grant equitable relief "is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999); *accord id*. at 318 (limiting equity jurisdiction to historical practices of the English Court of Chancery); *Michigan Corrections Organization v. Michigan Department of Corrections*, 774 F.3d 895, 903–04 (6th Cir. 2014) (refusing to imply a cause of action for declaratory relief under the Fair Labor Standards Act).

Implied equitable claims against government officers have typically involved suits that "permit potential defendants in legal actions to raise in equity a defense available at law." *Michigan Corrections*, 774 F.3d at 906; *see, e.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 491 n.2 (2010). Such suits ordinarily do not pose separation-of-powers concerns because they merely shift the timing and posture of litigating a legal question that Congress has already authorized federal courts to adjudicate. Here, by contrast, the district court created an equitable cause of action even though the League's members "are not subject to or threatened with any enforcement proceeding." *See Douglas v. Independent Living Center of Southern California, Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting).

The equitable cause of action asserted by the League is not a proper exercise of traditional equitable jurisdiction, as where the government directly infringes on a plaintiff's personal property or liberty interests. Rather, the League urges the Court to create a universal "right of action to seek redress" for official actions by the President that either "violate the Constitution" or "exceed[] his statutory authority." 2 E.R. 331–32. The League's attempt to wield the Constitution as a "cause-of-action-creating *sword*" poses serious separation-of powers concerns. *Michigan Corrections*, 774 F.3d at 906. By fashioning a novel implied equitable cause of action, the district court improperly overlooked those concerns.

3. The district court improperly granted equitable relief against the President.

The district court correctly declined to award injunctive relief against the President. 1 E.R. 31, 44.[7] Nevertheless, the court "vacated" Section 5 of the Executive Order, which relief is a form of, or essentially the equivalent of, an injunction. 1 E.R. 30–32, 64. By issuing such relief against the President, the district court engaged in an impermissible exercise of its equitable authority and transgressed separation-of-powers principles embodied in the Constitution.

Out of proper respect for the separation of powers, courts have properly declined to issue injunctive or declaratory relief directly against the President. *See Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." (citations omitted)); *Swan v. Clinton*, 100 F.3d 973, 976 n.1, 978 (D.C. Cir. 1996) (concluding where plaintiff requested injunctive relief against the President that "similar considerations regarding a court's power to issue relief against the President himself apply to [plaintiff's] request for a declaratory judgment"); *Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) ("Sound separation-of-power principles counsel the Court against granting"

[7] The district court also correctly declined to issue injunctive relief against the Secretaries of the Interior and Commerce Departments. 1 E.R. 31. Among other defects, the League failed to establish standing and ripeness to support that relief and to identify any reviewable final agency action by the Secretaries.

injunctive or declaratory relief "against the President directly."). These decisions rest on the constitutional imperative that the courts must avoid intruding on the President's constitutionally assigned duties. *See Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment) ("The apparently unbroken historical tradition supports the view, which I think implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested — viz., the President and the Congress (as opposed to their agents) — may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary. For similar reasons, I think we cannot issue a declaratory judgment against the President.").

The district court, however, expressed no hesitation in vacating part of the Executive Order, misplacing reliance on *Youngstown*, 343 U.S. at 589. 1 E.R. 30. In *Youngstown*, the Supreme Court affirmed a preliminary injunction against the *Secretary of Commerce*, not against the President, *id*. at 583, 589, whereas the vacatur here operated directly against the President's action. The district court also leaned on *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010), for the notion that vacatur is a less drastic remedy than an injunction. 1 E.R. 31. But vacatur is a species of, or at least the functional equivalent of, an injunction. In any event, *Monsanto* was an APA suit reviewing *agency* action, and so it could not justify vacatur of a *presidential* decision because the APA's grant of

jurisdiction to set aside final agency actions does not apply to the President. The district court's vacatur of the President's action violated the separation of powers.

* * * * *

At the threshold, this action should be dismissed on any of three independent grounds. Judicial review of the Executive Order should await the time and place of Congress's express choosing.

II. OCSLA grants the President authority to modify and undo presidential withdrawals of areas of the Outer Continental Shelf.

As discussed in Section I above, the Court need not reach the merits of the district court's decision. But if the Court does reach the merits, it should reverse. The text, structure, and purpose of OCSLA all confirm that the President properly exercised authority vested in him under Section 12(a) to modify and undo prior presidential withdrawals. Even if the provision were ambiguous (as the district court found), the President's interpretation is reasonable and comports with prior presidential practice, congressional acquiescence, and legislative history.

A. Section 12(a)'s text grants the President broad discretionary authority over withdrawals, including their size, purpose, and duration.

Section 12(a) of OCSLA confers on the President broad authority to make withdrawal decisions on the Outer Continental Shelf: "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." 42 U.S.C. § 1341(a). The provision grants broad

discretionary power to the President to make withdrawals of differing sizes, for many purposes, with either specific or indefinite durations. And in so doing, it grants to the President similarly broad authority to modify, undo, and otherwise reconsider prior withdrawals. In the Executive Order, the President properly exercised that authority to end three indefinite withdrawals that were "for a time period without specific expiration."

1. The President "may, from time to time," withdraw "any" unleased areas of the Outer Continental Shelf.

In Section 12(a), Congress chose simple language that leaves the nature, purpose, and duration of withdrawals to the President's judgment. This highly discretionary authority necessarily includes both the power to establish time-limited withdrawals from availability for leasing and the power to modify, undo, and reconsider those withdrawals.

By providing that the President "may" withdraw from disposition "any" of the unleased lands of the entire Outer Continental Shelf, Section 12(a) grants sweeping discretionary authority to the President. The provision leaves to the President's judgment the decision to withdraw, the reasons for doing so, and the size of the withdrawal. Congress' considered judgment to authorize the President to withdraw "any" unleased area of the Outer Continental Shelf is notable both for its breadth and for its lack of express limitations. Each President holds the power to withdraw as much as the entire Shelf (except areas then leased), for any reason,

at any time. And Section 12(a)'s text imposes no requirement that any such withdrawal be permanent.

To the contrary, Congress' express inclusion of the phrase "from time to time" confirms the President's wide latitude over the timing and duration of withdrawals. The phrase also shows that Congress contemplated withdrawals could be for limited periods of time, rather than permanent. Contemporaneous dictionary definitions confirm that when Congress enacted OCSLA in 1953, it understood "from time to time" to mean "occasionally," "once in a while," "now and again," "at more or less regular intervals," and "sometimes." *Webster's New International Dictionary of the English Language* 2649 (2d ed. 1947); *The Oxford English Dictionary* 2940 (1933); *Funk & Wagnalls New Standard Dictionary of the English Language* 2520 (1945). By authorizing Presidents to withdraw areas of the Shelf "once in a while," Congress must have expected that the withdrawals might be for discrete intervals of time. Put differently, if withdrawal decisions could only be made once for all time, one would not expect them also to be made "now and again."

The phrase "from time to time" also signals Congress' intent to allow each President flexibility to modify, undo, and otherwise reconsider withdrawals to respond to changing circumstances, such as the Nation's shifting energy needs and new threats to national security. If Congress had intended withdrawal decisions to

be unalterable by the President, then Presidents would be more reluctant to exercise that authority in the first place, because withdrawals would have greater effect on the administration of OCSLA. Under the League's theory, once a President withdraws an area, Interior may never again consider it for leasing unless Congress enacts new legislation. With enough presidential withdrawals, moreover, no areas of the Shelf would be left to lease under OCSLA.

Not surprisingly, therefore, each of the last four Presidents understood that Presidents have authority to alter or terminate prior withdrawals. Both President George H.W. Bush and President Clinton stated that their withdrawal decisions were "subject to revocation" by the President in "the interest of national security." 2 E.R. 301–05. Although President George W. Bush and President Obama did not include similar language in their withdrawal decisions, they both specified that the duration of six of their eight withdrawals was "for a time period without specific expiration." 2 E.R. 289, 290, 291–95, 296, 297, 299. A withdrawal "without *specific* expiration" is one that does not expire on a predetermined day but that may expire at any time that a President decides it is appropriate to allow some (or all) of the withdrawn area to again be considered by Interior for leasing.

Only two withdrawal decisions by the last four Presidents did *not* include either revocation language or establish a time period "without specific expiration." In 2007, President Bush modified the size and duration of President Clinton's 1998

time-limited withdrawal, extending it through June 30, 2012. 2 E.R. 300. Then in 2008, President Bush modified the size and duration of the 2007, 1998, and 1992 withdrawals. 2 E.R. 299. In 2010, President Obama withdrew the North Aleutian Basin Planning Area, including Bristol Bay — but only through June 30, 2017. 2 E.R. 298. Then in 2014, President Obama *revoked* his 2010 withdrawal and entered into a new withdrawal of the same area "for a time period without specific expiration." 2 E.R. 297. Thus, all four Presidents agreed on the scope of their authority: the President who made the withdrawal decision or a future President could alter the withdrawal's duration.

The district court got it half right. It correctly concluded that the phrase "from time to time" gave the President "discretion to withdraw lands at any time and *for discrete periods*." 1 E.R. 18 (emphasis added). But the court did not grasp the full import of that conclusion: if Presidents may make temporary withdrawals, then (for similar reasons) Congress must have intended for Presidents to possess authority to modify the duration and size of withdrawals. That is, if Presidents may establish a withdrawal for a specific time period, then they must also have authority to shorten or extend its duration and to expand or contract its size.

Although the district court acknowledged that the phrase "from time to time" *could* be interpreted "more broadly to accord to each President the authority to revoke or modify any prior withdrawal," it found that this breadth merely rendered

Section 12(a) ambiguous. 1 E.R. 17–18. In finding this ambiguity, the court appeared to place stock in what it believed was President Obama's intentions that the 2015 and 2016 withdrawals "extend indefinitely, and therefore be revocable only by an act of Congress." 1 E.R. 12–13. But the actual wording of these three withdrawals contradicts that conclusion. President Obama did not state that the withdrawals were "permanent" or "without expiration"; instead, he stated that the withdrawals were "without *specific* expiration." *See supra* p. 48. The language chosen by President Obama reflects the meaning of Section 12(a) as he and his predecessors in office understood it. And as discussed below, even if Section 12(a) were ambiguous, the President's interpretation should be upheld.

The League interprets "from time to time" merely to mean that the President can withdraw areas at any time. 1 E.R. 11. But that meaning is readily apparent from the remaining text, which provides that the President "may" withdraw areas. Although the League avoided the issue of time-limited withdrawals in its district court briefing, the logical implication of its position is that Section 12(a) does not authorize them. Yet every one of the last four Presidents established temporary withdrawals with a definitive end date. Even the district court rejected a reading of Section 12(a) that allows *only* withdrawals with no end date. E.R. 11, 18.

A reading of Section 12(a) that precludes the President from modifying or reversing withdrawals also would lead to absurd results that conflict with

OCSLA's text and purpose. Without a doubt, Congress intended Presidents to administer OCSLA for generations and "from time to time" to make withdrawal decisions to promote responsible use of the Outer Continental Shelf's natural resources, including oil and gas deposits. But if Section 12(a) authorizes Presidents only to withdraw areas — with no ability to reconsider those decisions — then the day after President Eisenhower signed OCSLA into law, he could have withdrawn the entire Outer Continental Shelf from leasing, removing all of the Shelf's energy resources from development and nullifying OCSLA's purpose. Nothing in OCSLA suggests Congress intended such an irrational result.

2. The authority to "withdraw" may be temporary.

In interpreting Section 12(a), the district court fixated on the term "withdraw" and what it believed would be a distinct authority to modify or undo a withdrawal by formally "revoking" it. 1 E.R. 11. This interpretation is best summarized by these two sentences: "The text of Section 12(a) refers only to the withdrawal of lands; it does not expressly authorize the President to revoke a prior withdrawal. Congress appears to have expressed one concept — withdrawal — and excluded the converse — revocation." *Id.* That is, the court assumed that a withdrawal meant a lasting set aside that could be revoked by the President only if Congress separately granted express authority to revoke. But that interpretation is flawed for three reasons.

First, the district court made no effort to ascertain the plain meaning of "withdraw." *Cf. Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc) (A "fundamental canon of construction provides that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks omitted)). Had the court done so, it would have concluded that the word's ordinary usage does not imply permanence. In contemporaneous dictionaries, "withdraw" has many meanings: "to take back or away (something that has been given, granted, allowed, possessed, enjoyed, or experienced)"; "to recall or retract"; "to hold back"; "to withhold"; or "to keep or abstract from use; place or keep apart; as, land withdrawn from tillage by tides." *Webster's New International Dictionary of the English Language* 2649 (2d ed. 1947); *The Oxford English Dictionary* (1933); *Funk & Wagnalls New Standard Dictionary of the English Language* 2724 (1945). None of these definitions establishes that a "withdrawal" is permanent. Only when the term is paired with the explicit modifier "permanently" does it take on that meaning — for instance, "to withhold *permanently*."

Likewise, none of the dictionary definitions suggests that a withdrawal may be modified or undone only by a separate, formal "revocation" based on separate authority. Rather, a withdrawal also may expire naturally when one takes action that has the effect of undoing the withdrawal. In common parlance, an army may

withdraw from the battlefield one day only to return to fight on the same ground the next day. One may withdraw funds from a bank only later to deposit them again. Or consider a lawyer who withdraws a question during a deposition or trial; the lawyer may still ask the question later. In none of these instances does one need to take a distinct, formal act to "revoke" the withdrawal; simply acting reverses the withdrawal. In common usage, the ability to alter or reverse a withdrawal is a natural part of the withdrawal itself.

This plain language interpretation comports with the common understanding in public lands law that a withdrawal temporarily suspends operation of the laws governing the use or disposition of the public land — similar to a Section 12(a) withdrawal "from disposition" under OCSLA's leasing procedures. *See, e.g.*, *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 784 (10th Cir. 2005) (A withdrawal "temporarily suspends the operation of some or all of the public land laws, preserving the status quo while Congress or the executive decides on the ultimate disposition of the subject lands."); *Transfer to Treasury Department Jurisdiction Over Portion of Naval Reservation*, 37 Op. Att'y Gen. 431, 432 (1934) (The President's implied withdrawal power under *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), "necessarily implies the power to restore the land to the public domain when it has served the purpose for which it was withdrawn, and again withdraw the same land for new uses.").

Second, a sound interpretation of "withdraw" should account for one of the foundational principles of administrative law: inherent in the power to decide is the power to reconsider. *See Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."). Agencies often reconsider their decisions, and without this authority, the modern administrative state would struggle to function. To this end, courts recognize that agencies possess inherent reconsideration authority unless Congress expressly limits it. *See Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (recognizing that "it is generally accepted that *in the absence of a specific statutory limitation*, an administrative agency has the inherent authority to reconsider its decisions" (emphasis added)); *accord GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1313 (Fed. Cir. 2015).

When it enacted Section 12(a) to grant the President authority to withdraw areas of the Outer Continental Shelf, Congress necessarily understood the implied authority that agencies have to reconsider decisions. *See, e.g.*, *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (recognizing, several years before OCSLA, that the "power to reconsider is inherent in the power to decide" and accepting that authority "in the absence of statutory prohibition"). The interpretive principle that applies to the whole of the Executive Branch should apply with especial force to its

Chief Executive. Because Section 12(a) does not explicitly limit the President's inherent authority to reconsider withdrawals, Congress should be presumed to have preserved that inherent authority in its delegation.

Third, aside from ordinary usage, when Congress enacted OCSLA in 1953, public lands law also recognized a distinction between temporary and permanent withdrawals. *See Withdrawal of Public Lands*, 40 Op. Att'y Gen. 73, 76 (1941) (distinguishing between "temporary withdrawals for public purposes" and "the President's power of permanent withdrawal for public uses" and pointing out "a recognized difference between the two kinds of withdrawals"). Consequently, a "withdrawal of lands and their reservation for a present *use* rendered necessary for the discharge of the responsibilities vested in the Executive branch of Government is said to be permanent." *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 444–45 (9th Cir. 1971) (quoting John W. Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 Rocky Mt. Mineral Law Inst. 55, 62 (1958)). In contrast, a withdrawal of lands "for a public *purpose*, as distinguished from use, is said to be temporary." *Id.* (quoting same). Section 12(a) of OCSLA belongs in the category of temporary withdrawals for a public purpose, not of permanent withdrawals with an attendant reservation for public use. In authorizing the President to withdraw "any" areas of the Outer Continental Shelf, the statute does not also authorize the President to designate the area for a specific and

distinct use. Logically then, Congress expected that the President would not need to satisfy any particular purpose or condition before the withdrawal ended.

The district court lacked a solid textual footing for its conclusion that Congress used the term "withdraw" in Section 12(a) to necessarily mean that the President lacks authority to modify or undo withdrawals absent an express delegation of a distinct power to "revoke" those withdrawals. The more natural reading of "withdraw" is that Congress contemplated that withdrawals might be temporary and expire of their own terms or be modified or reversed by further action of the President. Indeed, another provision of Section 12 declares that the United States "reserves and retains the right" of the Secretary of Defense, with the President's approval, to "designate as areas restricted from exploration and operation that part of the Shelf needed for national defense." 43 U.S.C. § 1341(d). Although that provision likewise does not *expressly* authorize revocation of such a designation, its reference to time — "so long as such designation remains in effect" and "any such suspension period" — confirms that such designations would be temporary and terminable by the Executive Branch. *Id*.

Not surprisingly, reading Section 12(a) to allow modification and reversal of withdrawals aligns with well-established presidential practice. President George H.W. Bush, President Clinton, President George W. Bush, and President Obama each issued withdrawals that were set to expire by their own terms on a set date.

President George W. Bush twice modified prior withdrawals. 2 E.R. 299, 300. President Obama formally "revoked" his own prior, time-limited withdrawal of Bristol Bay. 2 E.R. 297. President Obama's revocation of his prior withdrawal decision confirms his understanding — shared with every other modern President — that Congress authorized him to do so under Section 12(a).

3. The withdrawal power belongs to "The President of the United States."

No textual analysis of Section 12(a) would be complete without addressing Congress' decision to assign the withdrawal power to "The President of the United States." Consider the roots and ramifications of this choice.

First, assigning withdrawal decisions directly to the President (as opposed to the Secretary of Interior or other subordinate officer) built upon the actions of President Truman, who first asserted authority over the Outer Continental Shelf on behalf of the United States and then revoked his own Executive Order. Congress confirmed that authority and entrusted the President with maximum flexibility to fulfill OCSLA's purpose of responsibly developing the natural resources of the Outer Continental Shelf. As Chief Executive, the President is responsible for the Nation's security and foreign relations and protection of the Nation's borders and adjacent areas. He is uniquely positioned to leverage the entire Executive Branch's vast knowledge and deep expertise to respond to changing circumstances, including fluctuating global energy supplies, threats to national security, evolving

environmental concerns, and swings in the economy. In Section 12(a), Congress accordingly charged the President to use the withdrawal authority to superintend the natural resources of the Outer Continental Shelf for the Nation's benefit, consistent with OCSLA's core purpose of energy development.

Because the President occupies a unique position in the constitutional structure, legislation "regulating presidential action . . . raises serious practical, political, and constitutional questions that warrant careful congressional and presidential consideration." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (internal quotation marks omitted). Consequently, when Congress "decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear." *Id*. If Congress' intent in Section 12(a) had been to grant the President authority to withdraw areas of the Outer Continental Shelf but no concomitant authority to modify or reverse those decisions, it easily could have (and should have) said so. The district court's textual analysis improperly assumed the opposite — that a President could enter into either time-limited or non-time-limited withdrawals, but Congress' silence meant that the same President or any successor may not alter those withdrawals. But Congress conspicuously omitted any limits on the Section 12(a) power (other than carving out leased lands).

In the district court's view, its reading of Section 12(a) prevents the President from overstepping a congressional delegation, 1 E.R. 16, 30, and thus

operates as a check by the Judicial Branch on the Executive Branch's intrusion into the Legislative Branch's exclusive domain under the Property Clause. But in reality, the district court's ruling redistributes power not between Branches but rather among Presidents. For example, by holding that President Obama's withdrawal decisions were irreversible absent new legislation, the district court conferred on a single President a sweeping unilateral power not contemplated by the statute's text, while depriving future Presidents of modification or reversal authority. But Congress vested the withdrawal power in the "President of the United States." The withdrawal power runs with the office of the Chief Executive, and Congress expected a succession of officeholders to exercise that power "from time to time."

If the district court were correct, then a President could withdraw nearly the entire Outer Continental Shelf from leasing without recourse by himself or by any future President, absent congressional action. But the district court discovered this absolute power in a single sentence of OCSLA, more than six decades after it was enacted. The district court was untroubled by the import of its ruling, suggesting that although all future Presidents would be helpless to revisit any predecessor's withdrawal decision, Congress "could readily reverse such an action." 1 E.R. 27–28. To the contrary, Congress would not have imbued a single sentence in OCSLA with enough power to effectively repeal the statute absent a clear statement to that

effect — by providing, say, that the President could "*permanently* withdraw" unleased areas of the Shelf. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency"). In this respect, the district court's ruling gives one President a power far exceeding the statute's grant of discretion, and each successor far less.

Second, the Congress that enacted OCSLA should be presumed aware of the President's inherent Article II power to undo or modify prior presidential decisions. The reconsideration power, like the power to remove executive officers, is intrinsic in the "executive Power" vested by Article II, Section 1, Clause 1, because the President is politically accountable for executing the laws. *See Free Enterprise Fund*, 561 U.S. at 513 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so."). So it is with countless decisions that the President must make every day that draw upon judgment, policy convictions, and political assessments. For this reason, no President can unilaterally bind himself, much less his successors' exercise of this constitutional power. *See id.* at 497 ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers . . . ."). Congress was keenly aware of

these principles when it enacted OCSLA because President Truman had exercised inherent Article II reconsideration power in his early decisions about the Outer Continental Shelf.

To be sure, when Congress vests authority in the President, it may expressly limit that authority or bind future Presidents. But out of respect for the President's inherent reconsideration power, Congress should be expected to speak in express terms when it intends to do so. If "textual silence is not enough to subject the President to the provisions of the APA," then neither should silence be enough for Congress to restrict Presidents from reconsidering prior withdrawal decisions in Section 12(a). *Franklin*, 505 U.S. at 800; *cf. Armstrong*, 924 F.2d at 289 (finding "compelling reasons to apply the [clear statement] rule to statutes that significantly alter the balance between Congress and the President").

B. OCSLA's structure and purpose confirm that the President may reconsider presidential withdrawals.

If there were any question about the flexibility conferred by Section 12(a)'s broad text, OCSLA's structure and purpose resolve that uncertainty in favor of the President's interpretation of the provision. As the Supreme Court recognized in a recent case interpreting OCSLA, where "two terms standing alone do not resolve the question before us" and "given their indeterminacy in isolation, the terms should be read together and interpreted in light of the entire statute." *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019);

accord Wilderness Society, 353 F.3d at 1060 ("If necessary to discern Congress's intent, we may read statutory terms in light of the purpose of the statute. Thus, the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions."). Here, OCSLA's structure and purpose confirm that the President's authority in Section 12(a) includes power to modify and undo withdrawal decisions. The district court misconstrued the statute's structure and purpose, which led to its erroneous conclusion that any ambiguity in Section 12(a) should be resolved in favor of the most environmentally protective effect.

As to structure, OCSLA's provisions are directed at *developing* the Outer Continental Shelf's resources. Both as originally enacted in 1953 and as amended in 1978, the statute is crafted to establish and sustain the federal government's management of private industry's extraction of the vast energy resources of the Shelf. The statute promotes the responsible use of the Shelf's natural resources.

Like the statute's structure, OCSLA's purpose supports the President's interpretation of Section 12(a) and refutes the district court's interpretation. The statute's primary purpose could not be clearer: "The overall purpose of OCSLA was to allow for the orderly and productive development of energy resources." *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 700 (9th Cir. 1984); *accord* H.R. Rep. No. 83-413, at 2 (1953) ("The principal purpose of [OCSLA] is to authorize the leasing by the Federal Government of . . . the shelf."). The 1978

amendments — arising in the midst of the 1970s energy crisis — reaffirmed that OCSLA "establishes a national policy of making the outer continental shelf 'available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.'" *Tribal Village of Akutan*, 869 F.2d at 1187 (quoting 43 U.S.C. § 1332(3)). Section 12(a) must be given a flexible reading that aligns with Congress' clear purpose in enacting OCSLA.

The President's interpretation of Section 12(a) conforms to OCSLA's structure and purpose. Under that interpretation, each President has discretion to modify or undo withdrawals if he determines that previously withdrawn areas of the Outer Continental Shelf should again be made available for possible future leasing. Thus, the Executive Order makes an additional 128 million acres of the Shelf available for potential leasing. 2 E.R. 317. The Executive Order makes clear that any exploration and production activities must be conducted in a "safe and environmentally responsible" manner through OCSLA's four-stage leasing process. 2 E.R. 285. Accordingly, the President's interpretation aligns with OCSLA's framework for safe and responsible exploration and production of the Shelf's oil and gas resources.

In contrast, the district court's interpretation of Section 12(a) conflicts with OCSLA's structure and purpose. Under its interpretation, President Obama's

withdrawal decisions prohibited any future energy development activities in virtually the entire Arctic Ocean and in canyon areas of the Atlantic Ocean absent new legislation. This interpretation does not merely give Section 12(a) additional bite; it brushes aside OCSLA's central provisions that otherwise would apply to the 128 million acres of the Outer Continental Shelf that were withdrawn and would require legislative action before leasing could take place on that acreage.

That cannot be a correct reading of OCSLA. It is "implausible that Congress would give" to a single President "through these modest words the power to determine" whether any leasing could ever happen again on these areas of the Shelf. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). But the district court's reading of Section 12(a) alters OCSLA's fundamental structure by placing areas of the Shelf outside the reach of all of its other provisions, absent new legislation. *See Parker Drilling*, 139 S. Ct. at 1889, 1888–89 (concluding from the "place in the overall statutory scheme" of a single OCSLA provision that defendant's interpretation of that provision "would make little sense").

Even if the district court's "hypertechnical reading" of Section 12(a) is "not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum." *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with

a view to their place in the overall statutory scheme." *Id.* Here, the League's interpretation is "implausible at best," *id.* at 810, because it places the future of the entire OCSLA leasing program into each President's hands without an express textual commitment. Boiled down, the League's position is that by *omitting* language that the President may revoke withdrawals, Congress intended to give the President a far greater withdrawal power than he otherwise would have. This interpretation departs from the way Congress designed OCSLA to work.

Similarly, the district court's interpretation would have significant and lasting economic consequences because, absent new legislation, it would prevent all oil and gas development activities across a broad swath of the Outer Continental Shelf. Interior estimates that the withdrawn Chukchi Sea Planning Area alone contains resources of approximately 15 billion barrels of oil and 77 trillion cubic feet of gas. *See* Bureau of Ocean Energy Management (BOEM), *Assessment of Undiscovered Oil and Gas Resources of the Nation's Outer Continental Shelf* 3, Table 1 (2016), https://www.boem.gov/2016a-National-Assessment-Fact-Sheet/. The economic value of these resources is enormous. Interior has estimated that at $100 per barrel of oil and $5.34 per thousand cubic feet of natural gas, the net value of oil and gas resources in the Chukchi Sea is $121.2 billion. BOEM, *2019-2024 National OCS Oil and Gas Leasing Draft Proposed Program* 5-25, Table 5-3 (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

In its brief structural analysis, the district court tried to distill the original 1953 version of OCSLA down to two provisions with opposing purposes, "with Section 8 promoting leasing and Section 12(a) being 'entirely protective.'" 1 E.R. 19. From this observation, the court determined that "OCSLA's structure promotes the view that Section 12(a) did not grant revocation authority to the President." 1 E.R. 20. But the better reading of OCSLA's structure is that *every* provision addresses leasing in some way because the statute's very purpose is to promote energy development.

The district court never explained precisely *what* Section 12(a) protects. Presumably, it believed that Congress intended the provision to protect the marine wildlife and natural environment on which the League premised its purported Article III standing. But that gloss is not apparent from the provision's text, from the structure of Section 12, the rest of OCSLA, or from the legislative history. In fact, Congress separately authorized the Secretary of Interior to issue regulations "to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf." Ch. 345, § 5(a)(1), 67 Stat. at 464. As this Court has confirmed, that provision requires the Secretary to conserve "marine life, recreational potential, and aesthetic values, *as well as the reserves of oil and gas*." *Union Oil Co. v. Morton*, 512 F.2d 743, 749 (9th Cir. 1975) (emphasis added). In other words, if Section 12(a) withdrawals may be used to protect marine wildlife,

they equally may be used to conserve reserves of oil and gas for disposition when a future President concludes such resources should be made available, e.g., as a national security measure to ensure that the Nation has adequate energy reserves — akin to the Strategic Petroleum Reserve. *See The Strategic Petroleum Reserve: Authorization, Operation, and Drawdown Policy* 1–2 & n.4, CRS Report (May 1, 2017), https://crsreports.congress.gov/product/pdf/R/R42460. If the district court were correct that the purpose of Section 12(a) is "entirely protective," then (at a minimum) it must protect what OCSLA regulates, namely, the Shelf's natural resources, including oil and gas. Therefore, the district court's reading of Section 12(a) as a pure environmental protection provision is erroneous because withdrawing areas of the Shelf to conserve oil and gas reserves would be counterproductive if the withdrawal operated to block a future President from determining that it was time to make those reserves available for potential leasing.

The district court also distorted the meaning of Section 12, suggesting that "most of the provisions of that section address restrictions on the private use of OCS lands, and no subsection expands private sector use of these lands." 1 E.R. 18–19. But Section 12 deals in the main with concerns over national security and establishing the United States' rights in the Outer Continental Shelf's natural resources. To illustrate, subsection (b) provides that "[i]n time of war, or when the President shall so prescribe," the United States has a right of first refusal to

purchase any mineral produced on the Shelf. 43 U.S.C. § 1341(b). Subsection (c) requires leases to include a national security clause that allows the Secretary of Defense, "during a state of war or national emergency declared by the Congress or the President," to suspend operations on any lease. *Id*. § 1341(c). Subsection (d) provides that the United States "reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense." *Id*. § 1341(d). Collectively, these provisions undermine the district court's attempt to interpret Section 12(a) to be solely concerned with environmental protection.

The district court acknowledged OCSLA's purpose to facilitate development of the Shelf's resources but then promptly dismissed its relevance to Section 12(a) because, while "Congress clearly sought more leasing, it did not seek unbridled leasing." 1 E.R. 26. But that unremarkable proposition is irrelevant because Section 12(a) does not itself provide for any leasing, unbridled or otherwise. The court then stated that "Congress included Section 12 — 'Reservations' — to limit leasing activity." *Id*. But that does not accurately capture the rest of Section 12. Take Section 12(b), which gives the United States "in time of war" the right to first refusal for any mineral resources produced from the Shelf. That provision may motivate the United States to *increase* leasing activities.

The district court also reasoned that its reading of Section 12(a) was "*not inconsistent* with the second purpose of OCSLA as enacted in 1953." 1 E.R. 27. But that is not a proper way to reconcile the meaning of a provision with Congress' purpose in a statute. The court should have interpreted Section 12(a) to be affirmatively consistent with OCSLA's purpose of promoting energy development on the Outer Continental Shelf. *United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.").

C. Even if OCSLA is ambiguous, the President can reconsider presidential withdrawals.

Because the district court believed Section 12(a) was ambiguous, it surveyed an assortment of extra-statutory materials to divine the provision's meaning. 1 E.R. 20–30. For all the reasons explained above, that exercise was unnecessary. But even if extra-statutory materials could shine additional light on the provision's meaning, the district court gave too little weight to the most compelling evidence and conversely assigned too much weight to the least relevant evidence.

1. The history of presidential conduct confirms the President's authority.

"The longstanding 'practice of the government' can inform" a court's "determination of 'what the law is.' " *Noel Canning*, 573 U.S. at 514 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819), and *Marbury v.*

Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Here, consistent past presidential practice reinforces the conclusion that modification of prior withdrawals is within the President's authority under OCSLA Section 12(a).

In the six decades since Section 12(a) became law, no President has claimed the authority to permanently withdraw areas of the Outer Continental Shelf, and the last four Presidents each have made withdrawal decisions interpreting the provision in a flexible manner. Of the twelve prior withdrawals under Section 12(a), three involved express modifications: President George W. Bush's 2007 modification of President Clinton's withdrawal; his 2008 modification of the withdrawals by President Clinton, President George H.W. Bush, and himself; and President Obama's 2014 revocation of his own 2010 withdrawal. *See supra* pp. 6–7. In addition, Presidents George H.W. Bush and Clinton both stressed that their withdrawals were subject to revocation by "the President" "in the interest of national security." *See supra* p. 48. Likewise, Presidents Clinton, George W. Bush, and Obama each made withdrawals "for a time period without specific expiration." *See supra* pp. 6–7. The district court incorrectly took this phrase to mean that the Presidents intended their withdrawals to be permanent, absent an Act of Congress. 1 E.R. 13. But if that were so, then the withdrawals should have been "without expiration" or "permanent." The better reading is that the Presidents intended these withdrawals to continue for an indefinite period unless and until a

future President (or Congress) modified or ended them — as the President did in the Executive Order.

In sum, the history of presidential practice supports the interpretation of Section 12(a) that allows the President to modify and undo withdrawals.

2. Congress has acquiesced in the President's authority.

By its silence, Congress has acquiesced in the presidential interpretations of Section 12(a) authority just described. *See Midwest Oil Co.*, 236 U.S. at 474 (courts presume congressional consent to presidential action that is "known to and acquiesced in by Congress" over an extended period of time). Although OCSLA was last substantially amended in 1978, Congress has periodically amended the statute over the last several decades, including as recently as 2013. *See* Pub. L. No. 113-67, § 304, 127 Stat. 1165, 1182–83 (2013); Pub. L. No. 111-212, § 3013, 124 Stat. 2302, 2341–42 (2010).[8] But Congress has not reversed the presidential interpretations of Section 12(a), including President George W. Bush's modifications of withdrawals in 2007 and 2008. *See AFL-CIO v. Khan*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc) (holding that the "President's view of his own authority under a statute is not controlling, but when that view has been acted upon

[8] *See also* Pub. L. No. 109-58, §§ 321(a), 346, 384, 388, 119 Stat. 594, 694, 704, 739-47 (2005); Pub. L. No. 105-362, § 901(*l*)(1), 112 Stat. 3280, 3290 (1998); Pub. L. No. 104-185, § 8(b), 110 Stat. 1700, 1717 (1996).

over a substantial period of time without eliciting congressional reversal, it is entitled to great respect").

The district court found that the small number of prior modifications "fall short of the high bar required to constitute acquiescence," and it also noted that Congress had made no amendments to Section 12(a) in particular. 1 E.R. 28–30. But acquiescence should not require many examples when there are few occasions to exercise the authority over the 65-year history of the provision. *See Haig v. Agee*, 453 U.S. 280, 302 (1981). Here, the number of express modifications is a substantial fraction of the total number of withdrawals — 3 out of 12. That Congress has left Section 12(a) untouched while amending OCSLA in other ways suggests acquiescence to the Presidents' interpretation.

In any event, other actions by Congress confirm its acquiescence. Beginning in fiscal year 1982 and again in each fiscal year through 2008, Congress imposed moratoria on areas of the Outer Continental Shelf through appropriations language that prohibited Interior from expending funds on leasing activities in those areas. *See* Adam Vann, *Offshore Oil and Gas Development: Legal Framework* 3–4, CRS Report (Apr. 13, 2018), https://crsreports.congress.gov/product/pdf/RL/RL33404. On several occasions, Presidents made withdrawals to mirror these moratoria. President George H.W. Bush exercised his Section 12(a) withdrawal authority to conform to a congressional moratorium, *id*., as did President Clinton, 2 E.R. 301.

When President George W. Bush modified President Clinton's withdrawals in 2008 to remove one obstacle to potential leasing in large areas of the Outer Continental Shelf, a congressional moratorium remained in place. Vann, *supra*, at 3–4. But in fiscal year 2009, Congress omitted the moratorium from the appropriations bill, *id*., suggesting that Congress approved of President Bush's withdrawal modification.

3. The district court's extra-statutory analysis was flawed.

While the district court failed to give appropriate weight to presidential practice, it also erroneously relied on opinions of the Attorney General addressing the President's authority under other statutes with distinct language and dissimilar purposes. 1 E.R. 23–24. But even if these opinions were relevant, they support the President's exercise of authority under Section 12(a).

For instance, in 1938, before OCSLA's enactment, Attorney General Cummings concluded that the President lacked authority to abolish presidentially created national monuments under the Antiquities Act. *See Proposed Abolishment of Castle Pinckney National Monument*, 39 Op. Att'y Gen. 185 (1938). Although Attorney General Cummings' opinion states that the President may not *abolish* a monument, it also recognizes that the President "from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom." *Id.* at 188. Even in the Antiquities Act context,

therefore, the President has recognized authority to reconsider and modify past presidential actions.

What is more, the same Attorney General concluded in another opinion that the general or implied authority of the President "to withdraw land from the public domain for public purposes . . . necessarily implies the power to restore the land to the public domain when it has served the purpose for which it was withdrawn." *Transfer to Treasury Department Jurisdiction Over Portion of Naval Reservation*, 37 Op. Att'y Gen. 431, 432 (1934). Similarly, another Attorney General opinion from the same era recognized the President's broad authority over withdrawals. *See Withdrawal of Public Lands*, 40 Op. Att'y Gen. 73, 81 (1941) (opining that "the withdrawal now contemplated and any other permanent withdrawal, may be temporary in the very broad sense that they may be subsequently revoked *by the President* or by the Congress" (emphasis added)). To the extent that the Attorney General opinions have any relevance, they support the President's proper exercise of authority to reconsider withdrawals.

Further, OCSLA is a use statute, while the Antiquities Act is a conservation statute. OCSLA's purpose is to promote the exploration, development, and sale of the oil and gas on the Outer Continental Shelf, while the Antiquities Act authorizes the President to designate national monuments. It is entirely consistent to interpret OCSLA to allow the President to modify or revoke prior Section 12(a) withdrawals

to promote its purpose of energy development, while interpreting the Antiquities Act to grant the President authority not to abolish a monument but to modify monument boundaries to ensure that the lands that are reserved "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). The district court failed to appreciate how OCSLA's distinct purpose should inform its interpretation of Section 12(a).

4. Legislative history supports the President's authority.

Finally, although the legislative history is thin and inconclusive, it provides some support for the President's authority to modify withdrawals. That history shows that Congress originally conceived of the President's withdrawal authority as a tool to provide for national security, not for environmental protection.

For example, the provision that became Section 12(a) appears to have originated from the Truman Administration's desire to ensure that the President could respond to national security concerns by establishing oil reserves "for future military use." Joint Hearings on S. 1988 and Similar House Bills Before the Committees on the Judiciary, 80th Cong., 2d Sess. 737 (1948) (statement of Interior Secretary Julius Krug, describing the Truman Administration's draft bill). Accordingly, an early version of Section 12(a) provided that the "President may, from time to time and after consultation with the National Security Resources Board, withdraw from disposition any of the submerged coastal lands and reserve

them for the use of the United States in the interest of national security." S. 2165, § 3(d), 80th Cong. 2d Sess. (Feb. 17, 1948).

Later, the Eisenhower Administration objected to the proposed provision as unnecessary and suggested at least striking the limitation that the President could withdraw unleased lands "and reserve them for the use of the United States in the interest of national security." S. Rep. 83-411, at 39 (1953) (comments from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel). The Senate Committee on Interior and Insular Affairs agreed that the President's withdrawal authority "should not be limited to security requirements" and struck the clause. *Id.* at 26.

The Committee also stated that the President's withdrawal authority was "comparable to that which is vested in him with respect to federally owned lands on the uplands." *Id*. Most likely this refers to the General Withdrawal Statute (Pickett Act), ch. 420 § 1, 36 Stat. 847, 847 (1910), which granted the President express authority to revoke prior presidential withdrawals. *See* 43 U.S.C. § 141 ("[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and reserve the same for [various purposes], and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."), *repealed by* Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976).

This legislative history confirms that Congress intended the President to have authority to temporarily withdraw lands and to revoke those withdrawals.

* * * * *

On the merits, OCSLA grants the President authority to modify and undo presidential withdrawals of areas of the Outer Continental Shelf. The President properly exercised that authority in Executive Order 13795.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

s/ Justin D. Heminger

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ROBERT J. LUNDMAN
SARAH D. HIMMELHOCH
JUSTIN D. HEMINGER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

DENNIS DAUGHERTY
SUSAN HOVEN CASON
Attorneys
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior

November 7, 2019
DJ Number 90-1-18-14968

STATEMENT OF RELATED CASES

As indicated on the cover page, this brief concerns three consolidated cases in this Court: Nos. 19-35460, 19-35461, and 19-35462. *See* Order, Dkt. Entry 10 in No. 19-35460 (Sept. 3, 2019) (granting joint motion to consolidate). All three cases are appeals by distinct parties from the same final judgment entered by the district court in No. 3:17-cv-00101-SLG (D. Alaska).

Counsel is aware of no other related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-35460

I am the attorney or self-represented party.

This brief contains 17,889 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[X] complies with the length limit designated by court order dated September 3, 2019 (Case No. 19-35460, Dkt. Entry 10).

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Justin D. Heminger

Date November 7, 2019

ADDENDUM

Executive Vesting Clause of the United States Constitution
Article II, Section 1, Clause 1

The executive Power shall be vested in a President of the United States of America.

Property Clause of the United States Constitution
Article IV, Section 3, Clause 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Outer Continental Shelf Lands Act
43 U.S.C. § 1341 — Reservation of lands and rights

(a) Withdrawal of unleased lands by President

The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.

(b) First refusal of mineral purchases

In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.

(c) National security clause

All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

(d) National defense areas; suspension of operations; extension of leases

The United States reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on any part of the surface of such area except with the concurrence of the Secretary of Defense; and if operations or production under any lease theretofore issued on lands within any such restricted area shall be suspended, any payment of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

(e) Source materials essential to production of fissionable materials

All uranium, thorium, and all other materials determined pursuant to paragraph (1) of subsection (b) of section 5 of the Atomic Energy Act of 1946, as amended, to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the subsoil or seabed of the outer Continental Shelf are reserved for the use of the United States.

(f) Helium ownership; rules and regulations governing extraction

The United States reserves and retains the ownership of and the right to extract all helium, under such rules and regulations as shall be prescribed by the Secretary, contained in gas produced from any portion of the outer Continental Shelf which may be subject to any lease maintained or granted pursuant to this subchapter, but the helium shall be extracted from such gas so as to cause no substantial delay in the delivery of gas produced to the purchaser of such gas.

Outer Continental Shelf Lands Act
43 U.S.C. § 1349 — Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section —

> (A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or
>
> (B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal 1 for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of Title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.