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,

v.

AMERICAN PETROLEUM INSTITUTE and STATE OF ALASKA,
Intervenors/Defendants/Appellants.

Appeal from U.S. District Court, District of Alaska, Anchorage
Honorable Sharon L. Gleason
No. 3:17-cv-00101

INTERVENOR STATE OF ALASKA'S REPLY BRIEF

KEVIN G. CLARKSON
ATTORNEY GENERAL
Laura Fox
Mark D. Tyler
Assistant Attorneys General
1031 W. 4th Ave, Ste. 200
(907) 269-5275
laura.fox@alaska.gov
Attorneys for the State of Alaska

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

OCSLA's Section 12(a) means that the President can, in his discretion, choose not to offer unleased OCS lands for lease. It does not mean that he can permanently remove them from the entire program Congress created to govern OCS lands, thereby requiring a new act of Congress to deal with them. The language, context, structure, history and purpose of OCSLA confirm this: they all indicate that Congress did not delegate to the President—in a single sentence with no standards or guidance—the power to undo its legislative work.

ARGUMENT

I. The text of Section 12(a) authorizes revoking withdrawals.

As explained in the opening briefs, Section 12(a)'s words "may, from time to time, withdraw" authorize each president to decide what areas should be on and off the table for potential leasing by the Secretary under OCSLA. These words do not require—or even allow—withdrawals to be permanent.

Alaska's opening brief offered examples demonstrating that the power to "withdraw" something generally includes the power to put it back on the table. Alaska Brief 14-18. The League tries to distinguish Alaska's cases by asserting that because some involved non-statutory withdrawals, they "have no bearing on what authority Congress intended to convey when it used 'withdraw' *in a statute*." Answering Brief 65 n.12 (emphasis in original). But the use of a word "in a

statute" is not divorced from other usage. If a power to withdraw generally includes the power to revoke or modify the withdrawal, that is likely what Congress had in mind when using "withdraw" in a statute. The cited cases—statutory or not—support this interpretation. Alaska Brief 16-17.

Congress's use of the words "from time to time" to modify "withdraw" further support this interpretation. The League asserts that Alaska's examples "just indicate that 'from time to time' means 'occasionally.'" Answering Brief 60-61. But this is part of the point: a power cannot be exercised "occasionally" if it can be exhausted in one single use, as would be possible if the President could permanently withdraw all unleased OCS land from Congress's OCS leasing program, leaving future office-holders powerless to do anything. The phrase "from time to time" thus shows that Congress did not intend to confer a power that could be exhausted in a single swipe of the President's pen. Alaska Brief 8.

Alaska also cited examples showing that the phrase "from time to time" is generally interpreted as meaning a government action is subject to change. Alaska Brief 9-12. The League counters that the actions at issue in Alaska's examples of this are "inherently impermanent," rather than rendered impermanent by that phrase. Answering Brief 60-61. But the fact that "from time to time" is generally used in conjunction with actions that are subject to change supports the interpretation that Section 12(a) withdrawals are likewise subject to change.

Moreover, the actions at issue in Alaska's examples—which include rates, regulations, appointments, and even the establishment of entire new courts—are no more "inherently impermanent" than land withdrawals. All could either be left in place or changed, and that they may be done "from time to time" supports the interpretation that they are subject to change. Alaska Brief 9-12.

The League fails to grapple with the point that "from time to time" says something not just about the presidential decisions to withdraw lands, but about the withdrawals themselves. Alaska Brief 6-13. In other words, withdrawals under Section 12(a) occur "from time to time." This does not mean that the President must set an end date for a withdrawal, but it does mean that Section 12(a) withdrawals do not operate in perpetuity but rather are impermanent in their nature. This language makes clear that future presidents can modify or terminate them.

The League continues to side-step the question of whether—as both the district court and past presidents have thought—Section 12(a) authorizes presidents to make time-limited withdrawals rather than requiring withdrawals to be permanent as the League believes. Answering Brief 62-63. But the Court cannot coherently interpret Section 12(a) and resolve the meaning of "from time to time" without answering this question. The district court correctly recognized that "from time to time" means withdrawals need not be permanent, but erred in concluding that a withdrawal must stopped and started by the same president, rather than being

subject to change by a future office-holder. Under a correct reading of Section 12(a), each new president can revisit withdrawals to decide if they are still warranted, or if circumstances have changed.

II. Section 12(a) is not superfluous if withdrawals are not permanent.

The League argues that Section 12(a) is superfluous if its withdrawals are not permanent, because the President could accomplish a temporary withdrawal by commanding the Secretary not to offer an area for leasing under Section 8. Answering Brief 55-56. But without Section 12(a), the President's power would be limited by Section 8's administrative process. And history helps further explain Congress's choice to specify a separate withdrawal power.

First, although leasing under Section 8 is not mandatory, the Secretary's leasing decisions are made through an administrative process, not by presidential dictate. The original OCSLA authorized the Secretary to adopt regulations to govern this process, Pub.L.No. 83-212 § 5(a)(1), 67 Stat. 462, 464 (1953), and the 1978 amendments added more statutory guidance and structure. Pub.L.No. 95-372 § 208, 92 Stat. 629 (1978); *see also State of Cal. By & Through Brown v. Watt*, 668 F.2d 1290, 1297-98 (D.C. Cir. 1981) (describing the post-1978 leasing process). The President heads the executive branch, but that does not mean that he can override any agency's administrative processes at any time for any reason. Even discretionary agency actions are constrained by statute and regulation, and

may be subject to some level of judicial review. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) ("A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable."); *see also Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 484-89 (D.C. Cir. 2009) (reviewing Section 8 leasing decisions). Surely the League would not take the position that—absent statutory authorization—the President can short-circuit any agency's processes and dictate the ultimate outcome by unexplained fiat. Section 12(a) serves a purpose by explicitly authorizing this kind of presidential override, the legality of which would otherwise be at least subject to question.

Second, the history of oil and gas exploration and development on federal uplands helps explain Congress's choice to include an explicit presidential withdrawal power outside of Section 8's leasing program. Congress in OCSLA intended to give the President a withdrawal authority "comparable to that which is vested in him with respect to federally owned lands on the uplands." S. Rep. No. 83-411, at 26 (1953). At the time, it would have seemed natural to put this in a separate provision because on the uplands, the comparable withdrawal power was separate from—and long predated—the leasing program.

The relevant history dates back to the Mining Law of 1872, which governed mineral development on federal land for decades but proved inadequate to handle

oil and gas. *See* Laura Lindley, *Of Teapot Dome, Wind River and Fort Chaffee: Federal Oil and Gas Resources*, 10-SUM Nat. Resources & Env't 21 (1995) (giving a general history). Under the 1872 law, private citizens could acquire rights to minerals—and the land they were on—simply by exploring, recording claims, and paying minimal fees. *See id*. In the early 20th century, military and private demand for oil began to increase and, concurrently, extensive oil claims were staked in the West. *See id*. And because—unlike with hardrock minerals—extraction from one lot might drain adjacent land, claimants rushed to extract oil quickly. *United States v. Midwest Oil Co*., 236 U.S. 459, 466-67 (1915).

In 1909, the chief of the U.S. Geological Survey advised the Secretary that soon "the government will be obliged to repurchase the very oil" to run the Navy "that it has practically given away." *Id.* at 466-67. So despite lacking statutory authorization, President Taft withdrew millions of acres of federal land from new mineral claims. *Id*. at 467. The Supreme Court later held that the President possessed the necessary power to do this based on a history of congressional acquiescence to such withdrawals. *Id*. at 483.

In the meantime, Congress passed the Pickett Act, confirming that the President can temporarily withdraw federal lands from disposal for any reason. Pub.L.No. 61-303, 36 Stat. 847 (1910). Most of the unclaimed public mineral land was soon withdrawn from new claims pending the enactment of a better

framework for oil and gas development. *See* Lindley, *supra* at 22-23. With the Mineral Leasing Act of 1920, Congress finally devised this framework, replacing the earlier system with leases that preserved the government's ownership of the land and gave it more control over production. *See id.*; Pub.L.No. 66-146, 41 Stat. 437 (1920), *codified as amended*, 30 U.S.C. § 181 *et. seq*.

Thus, for the uplands, the President's general withdrawal power—originating in congressional acquiescence and then the Pickett Act—preceded and was separate from the applicable leasing program. And the withdrawal power had been a subject of legal controversy all the way up to the Supreme Court. *Midwest Oil*, 236 U.S. 459. So when Congress set about drafting a law to govern offshore oil and gas—which was not covered by the Mineral Leasing Act of 1920[1]—explicitly stating the President's withdrawal power to prevent controversy would have seemed wise, and keeping it separate from the leasing program—just as the Pickett Act and the Mineral Leasing Act of 1920 are separate—would have seemed logical. Section 12(a)'s existence as a separate provision thus does not suggest that Congress intended withdrawals to be permanent.

[1] *See Justheim v. McKay*, 123 F. Supp. 560, 561 (D.D.C 1954) (describing the Solicitor of the Department of the Interior's opinion that the Mineral Leasing Act did not authorize oil and gas leases on submerged areas).

Indeed, the above history suggests the opposite: that Congress intended Section 12(a) withdrawals to be revocable, just as the parallel withdrawals under the general withdrawal power on the uplands (pursuant to congressional acquiescence and then the Pickett Act) were. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 330-31 (1942) (observing that it was "common practice" for reservations created under the President's congressional acquiescence withdrawal power to be revoked by the President); 36 Stat. 847 (1910) (providing that withdrawals continue "until revoked by" the President); S. Rep. No. 83-411 at 26 (explaining that Section 12(a) created authority "comparable to that which is vested in [the President] with respect to federally owned lands on the uplands.").

The League argues that there is no reason to suppose that OCSLA's legislative history refers to the Pickett Act when mentioning the President's authority "with respect to federally owned lands on the uplands." Answering Brief 53-54. But only the Pickett Act (and the antecedent practice) allowed presidential withdrawals for any reason, which is what Section 12(a) did once Congress removed language limiting withdrawals to those necessary for "security requirements." S. Rep. No. 83-411 at 26. Thus, when the committee report said that removing that restriction resulted in an authority "comparable" to that on the uplands, it must have been referring to this general withdrawal authority, not the

more specific—and thus not "comparable"—authorities under other uplands statutes like the Antiquities Act.

III. Language about revocation authority in other statutes does not imply a lack of revocation authority in Section 12(a).

A cornerstone of the League's argument is that if Congress had intended to allow presidents to modify or revoke Section 12(a) withdrawals, it would have said so more precisely, as it did in some other statutes. Answering Brief 49-50. In other words, they think all withdrawals must by default be permanent unless Congress explicitly spells out otherwise. But this default rule does not exist, and each statute should be examined in its own context to determine Congress's intent.

The League agrees that the Pickett Act is relevant here, but they invoke it for a different reason than the defendants: they argue that the Pickett Act expressly delegates revocation authority by saying withdrawals continue "until revoked by" the President. Answering Brief 49; 36 Stat. 847 (1910). They assert that Congress would have used similar words if it intended OCSLA withdrawals to be revocable. *Id*. But the Pickett Act's phrase "until revoked by" does not actually explicitly delegate revocation authority; instead, it assumes that such authority *already exists*, which is consistent with the acquiesced-in practice leading to the Pickett Act's enactment, as discussed above. *Supra* at 6-7. The full phrase reads, "until revoked by him *or by an act of Congress*," and clearly the second part of this phrase refers to Congress's *pre-existing* power to revoke a withdrawal, rather than *creating* this

power. So too with the first part of the phrase. The Pickett Act does not suggest that withdrawals are permanent absent this language.

Nor does the Forest Reserve Act, which Congress amended to add more precise language about the President's power to revoke forest reservations. Answering Brief 4, 50. Congress added this language not because the President necessarily otherwise lacked this authority, but to "remove any doubt" about it, because President McKinley was hesitant to revoke massive, problematic forest reserves that had been created by his predecessor, and some members of Congress disagreed about his authority to do so. *See* 30 Stat. 11, 34 (1897) ("to remove any doubt which may exist pertaining to the authority of the President thereunto…"); 30 Cong. Rec. 1006-07 (1897) (Rep. Ellis) (noting that the President "may feel some timidity about undoing the work of his predecessor") (Rep. Knowles) ("The president has power to revoke it. There is no question about that at all. There is already a precedent for it."). The insertion of a provision "to remove any doubt" does not show that it was necessary to establish the President's authority.

Other statutes with precise language about revoking withdrawals also do not suggest that withdrawals are by default permanent absent such language. Answering Brief 49-50. Public land law was long a morass of niche statutes, as Congress observed in 1976 when it consolidated and replaced many of them with the Federal Land Policy and Management Act (FLPMA). *See* H.R. Rep. No. 94-

1163 (1976) (observing that "Congress has enacted thousands of public land laws" of which "[m]ore than 3,000 remain on the books today" and which "do not add up to a coherent expression of Congressional policies adequate for today's national goals."). The League invokes the FLPMA as an example of a statute with more precise language about revoking withdrawals, Answering Brief 50, but the FLPMA's precision is unsurprising given that its purpose was to provide clarity and fix problems with earlier statutes. *See* 43 U.S.C. § 1701. And, of course, the Congress that enacted OCSLA two decades earlier did not have in mind the FLPMA's more precise language. Nor did the Congress that enacted OCSLA likely have in mind the various niche statutes the League cites: for example, a 1902 statute about irrigation works,[2] or a 1935 statute about water use studies on the Rio Grande River. Answering Brief 49-50. The League's assumption that Congress always uses the same words whenever it means the same thing is unwarranted in the face of many diverse statutes spanning decades.

Other statutes lacking precise language about revoking withdrawals shed similarly little light on Congress's intent in OCSLA. The League and amici point to the Antiquities Act, for example, which does not explicitly say that withdrawals

[2] Moreover, this statute—the Reclamation Act of 1902—*required* the Secretary to restore lands to public entry when no longer needed. Pub.L.No. 57-161, § 3, 32 Stat. at 388. This does not grant *broader* authority than a permanent withdrawal power—on the contrary, it is a restriction.

can be revoked. Answering Brief 50-51; Law Prof. Brief 8-14. But the Antiquities Act and OCSLA have very different purposes, and each must be interpreted in light of its own. Congress might have intended Antiquities Act withdrawals to be permanent given the purpose of that act, which was to protect sites from looting and destruction. *See* Law Prof. Brief 10. But inferring the same congressional intent in OCSLA would not make sense given OCSLA's entirely different purpose, which—as discussed below—was to open the OCS to much-needed mineral leasing after a decade during which it was mired in jurisdictional controversy.

And contrary to the League's assertion, Congress was not actually "silent" on this issue in OCSLA. Answering Brief 47. The words "may, from time to time, withdraw" indicate withdrawals' impermanence. *Supra* at 1-4. The fact that Congress could have used different (perhaps more precise) words does not mean that it intended withdrawals to be permanent. When considering the words Congress used in conjunction with OCSLA's purpose and history, it is clear that Congress did not intend Section 12(a) withdrawals to be permanent.

IV. OCSLA's history and purpose confirm that Congress did not delegate unguided discretion to permanently withdraw land from the very program that Congress created to govern that land.

Instead of looking at different statutes like the Antiquities Act, the Court should look at the history and purpose of OCSLA itself. When recently interpreting OCSLA, the Supreme Court considered the "overall statutory scheme" and "the

historical development of the statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888-89 (2019). This Court should do the same. Given OCSLA's history, it makes no sense to presume—based just on Congress's failure to better spell out a power to modify withdrawals—that Congress intended to delegate unguided discretion to the President to permanently withdraw land from the very program that Congress created to govern that land. Where permanent withdrawals could nullify the statute's animating purpose, it is that more extreme power that one would expect Congress to have precisely spelled out.

OCSLA's entire point was to open the OCS up to mineral leasing: Congress authorized leasing to "meet the urgent need for further exploration and development of [OCS] oil and gas deposits," Pub.L.No. 83-212, § 8(a), 67 Stat. 462, 468, after a decade during which offshore development was stymied by a jurisdictional controversy between coastal states and the federal government. *See* Dr. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 Envtl. L. 209, 212-14 (1988) (describing the controversy); H.R. Rep. No. 80-1778, at 7 (1948) (noting the "endless confusion and multitude of problems" and "retardment of the much-needed development of the resources in these lands"). Before this "tidelands controversy" arose, it had been assumed that coastal states could authorize development within three miles offshore, and—as extracting oil and gas there became feasible—they began doing so. *See* H.R. Rep. No. 83-413, at 2 (1953)

("This Nation's claim to the natural resources was strengthened by the earlier action of some of the States in leasing, and consequently bringing about the actual use and occupancy of the Continental Shelf.").

The federal government initially recognized coastal states' offshore jurisdiction within the historical three-mile limit, but reversed course as war revealed the value of offshore oil to the military and the country. *See* H.R. Rep. No. 80-1778, at 4 & 13-18 (describing the history of federal recognition of state jurisdiction); Fitzgerald, *supra* at 213. In 1945, President Truman proclaimed United States "jurisdiction and control" over "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States." Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945). He thereby asserted the United States' (and, more specifically, the federal government's) claim to offshore resources, encompassing not only the three-mile strip historically controlled by states, but also an area extending much further out into the ocean. Coastal states disputed the federal government's claim to the three-mile strip, but the federal government prevailed in the Supreme Court. *See United States v. California*, 332 U.S. 19 (1947), *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

Although the federal government had thus succeeded in asserting legal control of the country's offshore resources, many citizens—and members of

Congress—continued to believe that coastal states, rather than the federal government, should govern offshore development. *See* H.R. Rep. No. 80-1778, at 2-6, 16-21 (describing support for state control and opining that "it would not be in the public interest for this Congress to destroy the highly developed, experienced, and efficient State organizations now controlling the submerged oil deposits by transferring such resources to a Federal bureau which has no facilities, no intimate knowledge of the complex local problems, and no laws or established rules or practices under which operations can be carried on"). Congress attempted to quitclaim offshore lands back to the states, but President Truman—who strongly favored federal control—exercised his veto power. *See id*. at 5; *Veto of Bill Concerning Title to Offshore Lands*, 8A Pub. Papers 381 (May 29, 1952) ("I see no good reason for the Federal Government to make an outright gift, for the benefit of a few coastal States, of property interests worth billions of dollars"). Just before leaving office in 1953, in a final bid to maintain federal control and highlight the oil's military importance, President Truman issued an executive order declaring the OCS to be a "Naval Petroleum Reserve," to be administered by the Navy. Exec. Order No. 10,426, 18 Fed. Reg. 405 (Jan. 16, 1953).

Despite the vigorous disagreement over who should govern offshore development—the states or the federal government—there was no disagreement over whether or not that development should occur: everyone agreed that it was

necessary to meet the country's increasing need for oil. *See* H.R. Rep. No. 80-1778, at 18 (expressing the views of members favoring state control and quoting the defense secretary's statement that "undeveloped oil fields provide no power for the machines of either war or peace"); & at 28-29 (expressing the views of members opposing state control and observing that "[o]il is essential to the maintenance and use of both the Army and the Navy"); *Veto of Bill Concerning Title to Offshore Lands*, 8A Pub. Papers 383 (May 29, 1952) (expressing President Truman's view that "it is of great importance that the exploration of the submerged lands—both in the marginal sea belt and the rest of the Continental Shelf—for oil and gas fields should go ahead rapidly, and any fields discovered should be developed in an orderly fashion.").

But despite the consensus about the need for offshore development, there was no existing statutory authority that would allow the federal government to actually authorize it. *See Justheim v. McKay*, 123 F. Supp. 560, 561 (D.D.C 1954) (describing the Solicitor of the Department of the Interior's 1947 opinion that the Mineral Leasing Act did not authorize leases on submerged areas below the low tide line); H.R. Rep. No. 83-413, at 2-3 (noting in 1953 that federal officers, states, and developers "were unanimously of the opinion" that no law existed "whereby the Federal Government can lease those submerged lands, the development and operation of which are vital to our national economy and security").

So as a political compromise that would allow much-needed offshore development to go forward, Congress enacted the Submerged Lands Act and OCSLA soon after President Truman left office in 1953. *See* Pub.L.No. 83-31, 67 Stat. 29 (1953), *codified as amended at* 43 U.S.C. § 1301 *et seq*.; Pub.L.No. 83-212, 67 Stat. 462 (1953), *codified as amended at* 43 U.S.C. § 1331 *et seq*. The Submerged Lands Act gave states control over the submerged lands within the historical three-mile limit, and OCSLA provided the necessary authority to allow federal mineral leasing on the many miles of outer continental shelf beyond that. *Id*. OCSLA's purpose was thus to finish the necessary congressional work to authorize offshore leasing, fulfilling "the duty of the Congress to enact promptly a leasing policy for the purpose of encouraging the discovery and development of the oil potential of the Continental Shelf." H.R. Rep. No. 83-413, at 3, & 2 (stating that the bill's "principal purpose" is "to authorize the leasing by the Federal Government" of the "remaining 90 percent of the shelf" not given to states).

The League asserts that by including Section 12(a) in OCSLA, Congress made a "deliberate choice" to allow the President to permanently withdraw OCS land from this leasing program and thereby require another act of Congress to re-authorize leasing. Answering Brief 45. But such a choice would have been inconsistent with this history. Given that Congress's goal was to create offshore leasing authority after many years in which this authority was lacking, it would not

have made sense to empower the President to unilaterally eliminate this authority and thereby send Congress back to the drawing board. In the context of this history, a permanent withdrawal power would be a *more* significant delegation to the President than simply a power to decide what lands are open or closed to leasing at any given time. Although Congress did not *require* the executive branch to issue leases, neither did it allow the President to destroy leasing authority.

The League claims that "Congress understood" that a president might go so far as to entirely nullify OCSLA by permanently withdrawing the whole OCS from leasing. Answering Brief 58. But the evidence they cite for this—President Truman's earlier proclamation of the OCS as a naval petroleum reserve—supports the opposite conclusion. Truman's proclamation was not a move to withdraw the OCS from development, but rather to keep it in federal (rather than state) control during the tidelands controversy. *Supra* at 14-16. Congress reversed the proclamation by granting the three-mile belt to the states and delegating OCS leasing authority to the Secretary of the Interior rather than the Navy. This does not suggest that Congress "understood" that its work might be undone by a future proclamation like Truman's; on the contrary, it suggests that OCSLA was Congress's assertion of its superior authority and its instruction to the executive branch on how it wanted the OCS to be administered. And it likely would not have

even occurred to the 1953 Congress that a president might want to *un*-authorize development of the OCS once the tidelands controversy had been settled.

Moreover, if Congress had meant to give the President the power to undo its legislative work by eliminating leasing authority for parts (or all) of the OCS, presumably it would have provided at least some guidance for the exercise of that consequential power. But Section 12(a) provides no standards whatsoever. The League's position thus requires the Court to accept that the 1953 Congress—having finally managed to pass legislation about the OCS—intended to delegate to the President the power to unilaterally undo that legislation for any reason. OCSLA's history and purpose strongly support the opposite conclusion.

V. Congress addressed environmental concerns in further legislation.

The League theorizes that the 1953 Congress intended to "strike[] a balance" between "resource extraction" and "resource conservation and preservation," and included a permanent presidential withdrawal power as a "protective complement" to Section 8's leasing authority. Answering Brief 54, 71. But this is inconsistent with the history described above, which shows a Congress focused on authorizing much-needed offshore development, not on protecting areas from such development. Later Congresses recognized the lack of environmental and other protections in the original OCSLA and enacted further legislation that is—unlike Section 12(a)—actually targeted at such concerns.

The League infers a broad protective purpose behind Section 12(a) from the fact that during OCSLA's drafting, the Senate deleted limiting language that would have confined withdrawals to those necessary for national security. Answering Brief 69. But this does not show that the 1953 Congress had environmental concerns in mind nor that it intended presidential withdrawals to be permanent. Rather, it suggests that Congress wanted to give the President discretion to withdraw areas from the leasing program for any reason, and also that it intended those withdrawals to remain operative at the office-holder's discretion—as would make sense in the case of a national security withdrawal or other such discretionary executive action unguided by any statutory standards. Although the President could use this discretionary power for environmental reasons, that does not mean Congress intended withdrawals to be permanent.

Section 12(a)'s lack of statutory standards for withdrawals or any framework to govern withdrawn areas suggests that Congress did not intend it as a way to permanently protect those areas. Other legislation crafted for such purposes stands in stark contrast to Section 12(a). For example, the National Marine Sanctuaries Act, enacted in 1972, authorizes the Secretary of Commerce to designate an area as a marine sanctuary based on its "conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational, or esthetic qualities." 16 U.S.C. § 1433(a)(2). It provides standards for when a designation is appropriate,

a public process involving consultation of state and local governments, and a statutory structure for managing a sanctuary once it is designated. 16 U.S.C. § 1433 *et seq*. This protective legislation is quite unlike Section 12(a), which is a single sentence with no standards or framework whatsoever. Older protective legislation similarly contrasts with Section 12(a): even the 1906 Antiquities Act provides at least some guidance as to when a national monument designation is appropriate and how protected areas might be managed. *See* Pub.L.No. 59-209, 34 Stat. 225 (1906) (providing that the President may declare "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" as monuments and delegating regulatory authority).

The League correctly observes that the 1978 amendments to OCSLA were directed in part toward environmental concerns, Answering Brief 68-69, but this does not support reading Section 12(a)—which the amendments did not touch—as an environmental protection. On the contrary, this suggests that the 1978 Congress recognized that the 1953 Congress did not have environmental protection in mind, and wished to add some. *See* H.R. Rep. No. 95-590, 53 (1977) (explaining that the amendments create a "new statutory regime" that "will expedite the systematic development of the OCS, while protecting our marine and coastal environment"). The 1978 amendments did this in part by interfacing with other environmental legislation that had been enacted in the years since OCSLA's passage, such as the

National Environmental Policy Act, 42 U.S.C. §§ 4321-70 (1970). *See Secretary of the Interior v. California*, 464 U.S. 312, 338 (1984) (explaining that under the amended OCSLA, "[r]equirements of the National Environmental Protection Act and the Endangered Species Act must be met" before a lease sale); H.R. Rep. No. 95-590, at 166-67 (discussing NEPA's applicability to OCS leasing). The 1978 amendments and other modern legislation thus added significant protection against environmental harm. *See Village of False Pass v. Watt*, 565 F. Supp. 1123, 1131 (D. Alaska 1983), *aff'd sub nom. Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984) (explaining that the amendments "provide[] for an intricate combination of studies, reports, consultations, permits, plans, and licenses covering every aspect of the leasing and development process").

Adopting the League's reading of Section 12(a) as a standardless presidential power to permanently withdraw areas from leasing would deprive states and local communities of some of the other intended benefits of the 1978 amendments, like increased state and local input. *See* H.R. Rep. No. 95-590, 54 (recognizing that "[d]ecisionmaking for the development of offshore oil and gas must be opened so that the coastal and other States affected by offshore oil and gas activities may participate in the process on a regular basis and so that affected local communities and the public at large may have an opportunity to be heard."). The 1978 amendments recognized that states like Alaska "are entitled to an opportunity

to participate" in federal decisions about the OCS, 43 U.S.C. § 1332(4)(C), and added several avenues for such participation. *See, e.g.*, 43 U.S.C. § 1344(c)-(d) (allowing state and local comments during and after the preparation of a leasing program); § 1345 (a governor "may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale," and the Secretary shall accept them if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State"). State and local involvement is warranted both because OCS development can impact coastal environments and because such development may be very important to state and local economies, as explained in Alaska's opening brief. Alaska Brief 23-28. If the President could permanently withdraw vast areas of the OCS from leasing without any explanation or public process, states and localities would be deprived of any opportunity to participate in OCS decision-making. Such an interpretation of Section 12(a) contravenes the intent of both the 1953 and 1978 Congresses.

CONCLUSION

For these reasons and those stated in the opening briefs, the Court should reverse the district court's decision.

Date: March 31, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

/s/ Laura Fox
Laura Fox
Mark D. Tyler

Attorneys for Appellant/Intervenor/Defendant State of Alaska

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) No. 19-35460

I am the attorney or self-represented party.

This brief contains 5495 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/ Laura Fox* **Date** March 31, 2020.
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 31, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

/s/ Laura Fox
Laura Fox
Mark D. Tyler

Attorneys for Appellant/Intervenor/Defendant State of Alaska