

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE WILDERNESS SOCIETY, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 17-2587 (TSC)

GRAND STAIRCASE ESCALANTE
PARTNERS, *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 17-2591 (TSC)

CONSOLIDATED CASES

**MOTION OF MEMBERS OF CONGRESS FOR LEAVE TO
FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS’
OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

Amici curiae members of Congress respectfully move for leave to file the attached brief in support of Plaintiffs’ memoranda opposing Defendants’ motion to dismiss. In support of this motion, *amici* state:

1. *Amici curiae* are members of Congress who are familiar with the Antiquities Act of 1906 and with other laws and regulations governing the use and disposition of federally owned lands. A full listing of *amici* appears in the Appendix to the attached brief.

2. As members of Congress, *amici* have a strong interest in ensuring that presidents respect the limits of the authority delegated to them by the legislative branch, including the authority conferred by the Antiquities Act. Because the Constitution vests Congress with plenary power over federal lands and other property belonging to the United States, any power exercised by the President in this area must come from a delegation of Congress. In the Antiquities Act, Congress authorized presidents to designate notable historic and scientific landmarks as national monuments, and to reserve federal lands as part of such monuments, in order to prevent irreversible damage to these unique American treasures—thus maintaining the status quo and preserving Congress’s options with respect to the historic and scientific landmarks in question. Congress did not, however, grant presidents the discretion to abolish or diminish the size of existing national monuments, instead reserving that power to itself. Moreover, subsequent Congresses did not, and could not, change the meaning of the Antiquities Act by “acquiescing” in past presidential modifications of national monument boundaries, as Defendants claim.

3. *Amici* thus have an interest in this case—an interest in guarding the prerogatives Congress reserved to itself in the Antiquities Act, and an interest in ensuring more generally that presidents cannot alter the meaning of a duly enacted statute by repeatedly violating that statute and then relying on Congress’s supposed “acquiescence” in those violations.

4. This Court has “broad discretion” in deciding whether to allow the filing of *amicus curiae* briefs. *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (citing *United States v. Microsoft Corp.*, No. 98-1232, 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002)). “The filing of an *amicus* brief should be permitted if it will assist the judge ‘by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.’” *N. Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1

(D.D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)); *In re Search of Info. Associated with [redacted]@mac.com*, 13 F. Supp. 3d 157, 167 (D.D.C. 2014) (same); *Iacangelo v. Georgetown Univ.*, No. 05-2086, 2009 WL 10693231, at *2 n.4 (D.D.C. June 11, 2009) (same). Courts have permitted third parties to participate as *amici curiae* when they “are of aid to the court and offer insights not available from the parties,” *United States v. El-Gabrowni*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994), and when they have “relevant expertise and a stated concern for the issues at stake in [the] case,” *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). “The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public.” *Russell v. Bd. of Plumbing Exam’rs.*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999); *see Nat’l Ass’n of Home Builders*, 519 F. Supp. 2d at 93 (granting leave to file because “the court may benefit from [the *amicus*’s input”); *Potomac Elec. Power Co.*, 826 F. Supp. 2d at 237 (same); *Microsoft Corp.*, 2002 WL 319366, at *3 (same).

5. The proposed, attached *amici curiae* brief plainly satisfies these standards. It may be of assistance to the Court in two primary ways.

6. First, the *amici* brief presents the unique perspective of members of Congress concerning the structure of the Antiquities Act and how that structure serves Congress’s institutional interests. In claiming the power to diminish national monuments unilaterally, Defendants have asserted that “recognition of presidential modification authority here appropriately puts the Executive on equal footing with the Legislature.” Def. Mem. 29. But when it comes to power over federal lands, the Constitution does not put the Executive on equal footing with the Legislature. As noted, the Property Clause lodges that power firmly in Congress, giving presidents only the authority Congress chooses to delegate. The attached *amici* brief explains why,

in passing the Antiquities Act, it served Congress's interests to delegate to the President only a one-way power to establish, but not diminish, national monuments. By authorizing presidents to protect notable American landmarks from damage quickly and with minimal procedural hurdles, the Act enables presidents to maintain the status quo and ensure that cherished places and objects will not be destroyed before Congress has a chance to decide their fate. This structure preserves Congress's options and thus safeguards its prerogatives under the Property Clause. By contrast, diminishing a national monument lacks any comparable urgency, because there is no need for quick action to prevent irreversible damage. It was therefore sensible for Congress to retain this power, subjecting decisions about shrinking or eliminating monuments to the more deliberative legislative process.

7. Second, the *amici* brief may aid the Court by providing a thorough discussion of when congressional inaction does—and does not—have legal significance. Defendants rely heavily on the existence of prior instances in which presidents modified the boundaries of national monuments without congressional response. According to Defendants, Congress's inaction in the wake of these modifications indicates that it has acquiesced in the view that presidents may diminish national monuments unilaterally. But while Defendants discuss these prior modifications at length, they offer no persuasive reason from a doctrinal perspective why those incidents should have any bearing on this Court's interpretive task—construing the meaning of the Antiquities Act of 1906. And to the extent Defendants do cite case law in which judicial analysis relies on congressional inaction or “acquiescence,” Defendants conflate two distinct types of cases—those involving the interpretation of statutes and those involving the scope of executive power in the absence of legislation. The attached *amici* brief explains why historical practice can be significant to the latter but is largely irrelevant to the former. As the brief describes, there is little room in

statutory interpretation for considering events that occurred after a statute's enactment, or a subsequent Congress's "acquiescence" in those events. And pure *inaction* by a subsequent Congress is never grounds for concluding that presidential conduct has altered the meaning of a statute. By discussing these matters in depth, the *amici* brief may help the Court evaluate Defendants' argument that Congress could change the meaning of the Antiquities Act by *not* amending it.

8. Counsel for *amici* contacted counsel for the parties to determine whether they would consent to the filing of this brief. Counsel for the Plaintiffs have consented to the filing of this brief. Counsel for the Defendants oppose the filing of this brief.

For the foregoing reasons, leave to file the attached *amici curiae* brief should be granted. A proposed order is enclosed with this motion.

Respectfully submitted,

Dated: November 19, 2018

/s/ Brianne J. Gorod
Brianne J. Gorod

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: November 19, 2018

/s/ Brianne J. Gorod
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