No. 16-498

In The
Supreme Court of the United States

DAVID PATCHAK,
Petitioner,
v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

Conly J. Schulte
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Dr.
Louisville, CO 80027

Nicole E. Ducheneaux
FREDERICKS PEEBLES & MORGAN LLP
2610 North 163rd Plz.
Omaha, NE 68116

Pratik A. Shah
Counsel of Record
James E. Tysse
G. Michael Parsons, Jr.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
(202) 887-4000
pshah@akingump.com

Counsel for Respondent

QUESTION PRESENTED

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (*Patchak I*), this Court held that, under then-existing law, when a plaintiff like Petitioner brings a suit challenging the federal government's decision to take a parcel of land into trust on behalf of an Indian tribe, "it falls within the [Administrative Procedure Act's] general waiver of sovereign immunity." *Id*. at 224. The Court recognized that the argument for foreclosing judicial review was "not without force, but it must be addressed to Congress," which had barred some, but not all, suits challenging the government's land ownership. *Id*. at 223. "Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. *** [T]hat is for Congress to tell us, not for us to tell Congress." *Id*. at. 224.

In response, Congress introduced the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014), which (*inter alia*) barred all federal suits concerning the land at issue in *Patchak I*.

The question presented is:

Does a statute that bars all federal actions (pending and future) concerning a parcel of land taken into trust by the federal government violate the Constitution's separation-of-powers principles?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the constitutionality of Section 2(b) of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014). That Act, and additional statutory and constitutional provisions, are included in the addendum to this brief. Add. 1a-7a.

INTRODUCTION

Seeking to conjure a constitutional separation-of-powers problem, Petitioner ignores the context in which the Gun Lake Act—in particular, Section 2(b)—was enacted. Taking its cue from this Court's decision in *Patchak I*, which denied federal sovereign immunity under the Quiet Title Act but invited Congress to revisit that conclusion, Congress restored federal sovereign immunity for all suits relating to the trust land at issue. Intended as a "broad grant of immunity," Section 2(b) of the Act provides—in language mirroring the Administrative Procedure Act's initial waiver of sovereign immunity—that actions like Petitioner's (pending and future) "shall not be filed or maintained in a Federal court" and "shall be promptly dismissed." Because it is well established that Congress has the power to restore sovereign immunity "at any time," Section 2(b) adheres to, rather than evades, separation-of-powers principles. Accordingly, Petitioner's challenge—predicated on the false premises (i) that the Gun Lake Act did not amend the preexisting law and (ii) that this Court in *Patchak I* forever insulated this suit from a dismissal for immunity—fails at the start.

In any event, Section 2(b) does not otherwise transgress any of the separation-of-powers limitations that this Court has recognized. Even if Section 2(b) is read as excluding jurisdiction and "nothing more," it falls squarely within Congress's authority to define the jurisdiction of lower federal courts. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871). Unlike the provision in *Klein* (Petitioner's primary authority), Section 2(b) does not condition jurisdiction on any judicial merits

determination, interfere with any exercise of a coequal branch's power, or otherwise prescribe an unconstitutional rule of decision. For that reason, Section 2(b)'s withdrawal of jurisdiction over the class of cases relating to the federal land at issue passes constitutional muster.

STATEMENT OF THE CASE

A. Legal Framework

1. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA), waives the United States' sovereign immunity from suit for actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity," *id.* § 702. But that waiver is subject to congressional limitation: the APA does not "affect[] other limitations on judicial review," *id.*, "confer[] authority to grant relief" where another "statute that grants consent to suit expressly or impliedly forbids the relief which is sought," *id.,* or apply where other "statutes preclude judicial review," *id.* § 701(a)(1).

2. Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA), to promote economic development for Indians and tribal self-government. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). To further those objectives, the IRA authorizes the Secretary of the Interior, in his or her discretion, "to acquire *** any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, *** for the purpose of providing land for Indians." 25 U.S.C. § 5108. "Title to any lands or rights acquired pursuant to" the IRA

"shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.*[1]

3. The Gun Lake Trust Land Reaffirmation Act, signed by the President on September 26, 2014, comprises a naming section (Section 1) and a substantive section (Section 2) divided into three subsections. Section 2(a) provides that "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians" via a May 13, 2005 Department of Interior (DOI) notice "is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Add. 1a. Section 2(c) preserves the Tribe's future rights to seek additional trust-land acquisitions. Add. 2a.

The portion of the Act in dispute is Section 2(b), which provides: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed." Add. 2a.

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[1] Congress often authorizes the taking of land into trust for specific Indian tribes through legislation, including "tribe-specific" legislation. *See* 1-15 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07 (2017) ("In addition to §5 of the IRA, there are many other tribe-specific statutes that authorize trust land acquisitions."); *see, e.g.*, Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988).

B. Factual and Procedural Background

1. Since its first interactions with the federal government, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (also known as the Gun Lake Tribe) has sought to protect its sovereign character, nationhood, culture, and community. J.A. 53, 161-162. In 1795, the Tribe was first recognized by the federal government as a party to the Greenville Treaty, which, along with numerous subsequent treaties (including the Treaty of Chicago (1821) and the Treaty of St. Josephs (1827)), officially established tribal rights to live, hunt, fish, and gather on land ceded to the United States. J.A. 53, 89-97. Starting in 1855, however, the government began to implement policies that divested the Tribe of its ancestral lands. J.A. 53-54.

After more than a century without its own land, the Tribe sought to reaffirm its sovereign status under the government's modern acknowledgment procedures. J.A. 54. In 1998, the Tribe succeeded, and, in 2001, the Tribe identified a 147-acre parcel of land in Wayland Township, Michigan, to acquire as part of its initial reservation (the Bradley Property). *Id.* The parcel was less than three miles from land that the Tribe has historically occupied. J.A. 162. To generate revenue for the tribal government, promote self-sufficiency, and provide essential services such as housing, healthcare, education, and cultural preservation, the Tribe included a request to construct a gaming facility in its trust application. J.A. 54, 165.

In 2005, DOI published notice of the Secretary's decision to take the Bradley Property into trust. J.A. 54. The notice gave interested parties thirty days to

appeal the Secretary's decision. J.A. 163. An anti-gambling organization called Michigan Gambling Opposition (MichGO) filed suit. *Id.* Over the next three years, the Secretary and the Tribe litigated the case as it traversed the federal courts, and the D.C. Circuit affirmed the district court's judgment in the Tribe's favor. *Id.* The case concluded when this Court denied a petition for writ of certiorari. *Michigan Gambling Opposition v. Kempthorne*, 555 U.S. 1137 (2009). Nine days later, the Secretary acquired the Bradley Property on the Tribe's behalf. J.A. 54-55.

2. As one case ended, however, another began. One week after the D.C. Circuit denied MichGO's petition for rehearing, Petitioner David Patchak (an individual affiliated with MichGO) filed this lawsuit. J.A. 163-164. Commenced more than three years after the DOI published notice (but within the APA's general six-year statute of limitations), the suit alleged that the transfer was unlawful. J.A. 27. Petitioner argued that the Tribe was not under federal jurisdiction in 1934—as required by this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)—and claimed that the Tribe's acquisition would disturb his "quiet life" in a rural part of Wayland Township. J.A. 27.[2]

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[2] In 2014, DOI acquired two other nearby parcels of land in trust for the Tribe. J.A. 75-78. In its Amended Notice of Decision accompanying that acquisition, DOI "evaluated whether the Secretary can exercise her authority to take the land in trust given the Supreme Court's decision in *Carcieri*." J.A. 82. DOI "conclude[d] that," consistent with *Carcieri*, "the Band was under federal jurisdiction in 1934." J.A. 85.

The district court dismissed the case for lack of prudential standing, but the D.C. Circuit reversed. The D.C. Circuit held that Petitioner possessed standing and further held that the APA waived the government's sovereign immunity despite the reservation of immunity for actions respecting tribal lands in the Quiet Title Act (QTA). 632 F.3d 702 (D.C. Cir. 2011).

This Court affirmed. 567 U.S. 209 (2012) (*Patchak I*). Distinguishing between a plaintiff who personally claims title and a plaintiff (such as Petitioner) who "bring[s] a different claim, seeking different relief," the Court interpreted the QTA to reserve immunity for the former type of claims only. *Id.* at 222. Because no other statute "expressly or impliedly forb[ade] the relief which [Petitioner] sought," 5 U.S.C. § 702, his suit "f[ell] within the APA's general waiver of sovereign immunity," 567 U.S. at 224.

Before remanding, the Court acknowledged that there might be good reasons to retain sovereign immunity "when a plaintiff like Patchak brings a suit like this one." 567 U.S. at 224. Because the "harm is the same whether or not a plaintiff claims to own the land himself," the Court recognized that "perhaps" such litigation should be foreclosed regardless. *Id.* at 223-224. The Court held, however, that the Tribe's remedy was political, not judicial: "[The Tribe's] argument is not without force, but it must be addressed to Congress." *Id.* at 223; *see id.* at 224 ("Perhaps Congress would—perhaps Congress should—make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call.").

3. In response, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913 (2014). As noted, Section 2(a) of the Act "reaffirm[s]" the Bradley Property as trust land and "ratifie[s] and confirm[s]" the acquisition "taking that land into trust." Section 2(b) then forecloses litigation (both pending and future) over the Bradley Property by stating that any action "relating to the [Bradley Property] *** shall not be filed or maintained in a Federal court and shall be promptly dismissed."

The House Report reflects that the Gun Lake Act was intended to provide "an unusually broad grant of immunity" from suits relating to the Bradley Property. H.R. REP. NO. 113-590, at 2 (2014) (House Report). The Senate Committee on Indian Affairs describes the Act as designed to "prohibit *any* lawsuits" relating to "lands taken into trust by the *** DOI[] for the benefit of *** Pottawatomi Indians in the state of Michigan." S. REP. NO. 113-194, at 3 (2014) (Senate Report) (emphasis added). And the Senate Report notes that the Act was meant to "provide certainty to the legal status of the land, on which the Tribe has begun *** economic development for its community"—a status that had been "place[d] in jeopardy" by *Patchak I*. *Id.* at 2; *see also* House Report at 1 ("If [the Act] fails to be enacted, the continued operation of the Gun Lake Tribe casino will be placed in jeopardy.").[3]

[3] The Tribe incurred approximately $195,000,000 in debt to develop the land and open the Gun Lake Casino, and the casino now employs over 1,000 people—making it one of the largest employers in the county. J.A. 54-55, 166.

4. Meanwhile, following this Court's *Patchak I* decision in 2012, the case sat dormant in district court as Petitioner failed to pursue his claims for over two years. It was only after the President signed the Gun Lake Act into law that Petitioner filed for summary judgment; Respondents cross-moved for summary judgment. Petitioner challenged the constitutionality of the Gun Lake Act—specifically, that it violated separation of powers, the First Amendment, the Fifth Amendment, and Article I's prohibition of bills of attainder. J.A. 57.

The district court rejected all of Petitioner's constitutional challenges, upholding the Act and dismissing the suit for lack of jurisdiction. J.A. 59-71. The court held "the Act's plain language and legislative history manifest a clear intent" to keep the Bradley Property free from suit by "withdraw[ing] this Court's jurisdiction." J.A. 59, 63. "This," the court explained, "Congress most assuredly can do." J.A. 63.

The D.C. Circuit affirmed. J.A. 24-45. The D.C. Circuit rejected Petitioner's separation-of-powers challenge. Citing *Bank Markazi v. Peterson*, among other precedents, the court of appeals noted that "Congress is generally free to direct district courts to apply newly enacted legislation in pending civil cases," including "when the newly enacted legislation in question removes the judiciary's authority to review a particular case or class of cases." J.A. 31; *see* J.A. 31-34 (discussing *United States v. Klein*, *Robertson v. Seattle Audubon Society*, and *National Coalition To Save Our Mall v. Norton*). Turning to the statute before it, the court of appeals "conclude[d] that the Gun Lake Act has amended the substantive

law applicable to Mr. Patchak's claims," including through its "clear withdrawal of subject matter jurisdiction in Section 2(b)." J.A. 34. Under the "new legal standard" the court was "obliged to apply," "if an action relates to the Bradley Property, it must properly be dismissed." J.A. 34-35. And because Congress "exercised its 'broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive,'" the court of appeals held it "ought to defer to the policy judgment reflected therein." J.A. 35 (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)).

The D.C. Circuit also acknowledged the government's proffered "alternative ground on which [the court] could rule"—namely, "that the Gun Lake Act provides an exemption to the APA's waiver of sovereign immunity." J.A. 43. The court of appeals viewed federal sovereign immunity as tied up with jurisdiction because the immunity argument went "to the court's authority to hear" the case, and "the 'terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). But because the court of appeals had already "conclude[d] that the Gun Lake Act is not constitutionally infirm, and that subject matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn," the court stated that it "need not consider the matter further." *Id.* The court of appeals therefore did not reach the argument that the case should be resolved on narrower immunity grounds. Gov't C.A. Br. 19-22.

The D.C. Circuit rejected Petitioner's other constitutional claims for violation of the First Amendment, the Fifth Amendment, and Article I's Bill of Attainder Clause. J.A. 35-43. None of those issues is before this Court.

SUMMARY OF ARGUMENT

Whether viewed as a reinstatement of federal sovereign immunity or as an exercise of Congress's power to define the jurisdiction of lower federal courts, Section 2(b) of the Gun Lake Act hews to this Court's precedents and does not violate the Constitution's separation-of-powers principles.

I. Section 2(b) of the Gun Lake Act is best read as doing what this Court in *Patchak I* contemplated that Congress "could" (and perhaps "should") do: reinstating the government's sovereign immunity from suit over the Bradley Property.

It is well established that the United States cannot be sued without the consent of Congress and that Congress can withdraw its consent to be sued *at any time*—including during the pendency of an ongoing suit. This Court repeatedly has declined jurisdiction in such circumstances.

In *Patchak I*, this Court held that Petitioner's claim challenging the federal government's acquisition of the Bradley Property could proceed because it fell within the APA's general waiver of sovereign immunity and no other statute (such as the Quiet Title Act) foreclosed the claim. As the Court then recognized, however, Congress was free to reinstate federal sovereign immunity through legislation for suits (like Petitioner's) that challenge title to trust lands without claiming a competing

interest in the property: "that is for Congress to tell us, not for us to tell Congress." 567 U.S. at 224.

Congress accepted this Court's invitation by enacting the Gun Lake Act. Section 2(b) of the Act expressly forecloses suits, both pending and future, involving the Bradley Property—including any possible suit challenging the United States' trust title. Though Section 2(b) never uses the term "immunity," neither does the APA, the Quiet Title Act, the Tucker Act, or any number of other statutes under which Congress has defined the scope of the United States' immunity. Section 2(b), moreover, *reinstates* immunity using language that is the mirror image of the language that *waives* sovereign immunity in the APA: while the APA directs that pending suits "shall not be dismissed," Section 2(b) provides that they "shall be promptly dismissed." Finally, the legislative history of Section 2(b) confirms that the provision is a "broad grant of *immunity*." House Report at 2 (emphasis added).

The canon of constitutional avoidance removes any doubt that Section 2(b) should be construed as reinstating sovereign immunity. That construction is at least "fairly possible," and because a reinstatement of sovereign immunity permissibly changes the law, it wholly avoids the need to consider the sometimes difficult-to-draw line "between legislative and judicial power." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting).

II. Alternatively, Section 2(b) can be upheld as an exercise of a core legislative function: defining the jurisdiction of the lower federal courts.

Article III expressly delegates to Congress the power to establish the jurisdiction of the "inferior" federal courts as a check on judicial authority. This Court therefore has acknowledged that Congress may invest or withhold jurisdiction in whatever manner it deems fit (subject only to other constitutional limits not at issue here). And when Congress's removal of jurisdiction touches a pending case, that case must be dismissed.

Section 2(b) fully comports with that authority. In jurisdictional terms, Section 2(b) provides that no action relating to the Bradley Property shall "be filed or maintained in a Federal court," and that any pending action "shall be promptly dismissed." As with sovereign immunity, Congress need not employ "magic words" to exercise that authority. And Section 2(b) warrants respectful review given that it implicates Congress's expansive powers to dispose of federal properties and to regulate Indian affairs.

Reading Section 2(b) as an exercise of Congress's authority to define the jurisdiction of the federal courts steers clear of every separation-of-powers limitation announced or contemplated by this Court: Section 2(b) does not instruct courts to interpret or apply law in a particular way, vest review of judicial decisions in a coordinate branch, or command the courts to reopen a final judgment. That is all the more true in this case because no court—not the district court, not the court of appeals, and not this Court—ever rendered a judgment (or even any finding) on the merits of Petitioner's APA claim.

Petitioner nonetheless contends that Section 2(b) runs afoul of *United States v. Klein*. But Section 2(b) is not similar to the extreme law at issue in

Klein; that law both impinged on the President's pardon power and directed courts to dismiss cases only if they first made dispositive findings adverse to the government. Nor is it similar to a law (like "Smith wins") directing a particular outcome on the merits; Section 2(b) simply removes jurisdiction altogether and "nothing more." And it makes no constitutional difference whether Congress removed jurisdiction by amending a "generally applicable statute" versus a more targeted enactment. This Court has squarely rejected the contention that legislation is unconstitutional just because it is particularized; regardless, this statute encompasses a class of cases broader than the one at issue here—namely, *all* suits (pending or future) relating to the Bradley Property.

Petitioner's proposed separation-of-powers rule—that Congress can "direct the result" in a case so long as it *also* "amends the law"—is both unclear and unworkable. Petitioner's rule would encourage separation-of-powers challenges almost any time Congress limited federal court jurisdiction in a way that affected pending cases—requiring an amorphous inquiry into whether the underlying law was amended—even though the Court has "regularly" applied such enactments. In any event, Section 2(b) satisfies even Petitioner's rule, in that it does amend the underlying law: it either reinstates sovereign immunity or otherwise imposes a new jurisdictional limit. Under Section 2(b)'s standard, courts are required to dismiss a case whenever an action relates to the Bradley Property. Application of that standard is no less an exercise of the judicial power because it is straightforward or uncontested.

ARGUMENT

I. SECTION 2(B) REINSTATES FEDERAL SOVEREIGN IMMUNITY FOR ACTIONS RELATING TO THE BRADLEY PROPERTY

Because Section 2(b) of the Gun Lake Act should be read as reinstating the government's sovereign immunity from suit—an enactment well within Congress's authority, as contemplated in *Patchak I*—it avoids any separation-of-powers concerns.

A. Congress Is Free To Withdraw Consent To Be Sued At Any Time.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). That "elementary" proposition, *United States v. Mitchell*, 445 U.S. 535, 538 (1980), has been "well settled and understood" since the time of the Constitutional Convention, *Williams v. United States*, 289 U.S. 553, 573 (1933); *see, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts *** without its consent and permission.") (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)). Consent to suit, moreover, is a "prerequisite for jurisdiction" in the federal courts, *United States v. Mitchell*, 463 U.S. 206, 212 (1983), and "the 'terms of [the] *** consent to be sued in any court define that court's jurisdiction to entertain the suit,'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also United States v. White Mountain Apache Tribe*,

537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity[.]").

Because any sovereign immunity waiver is "altogether voluntary on the part of the sovereign[], it follows that it may prescribe the terms and conditions on which it consents to be sued *** and may withdraw its consent whenever it may suppose that justice *** requires it." *Hans*, 134 U.S. at 17; *see e.g.*, *Lynch v. United States*, 292 U.S. 571, 581-582 (1934) ("Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time."); *Cummings v. Deutsche Bank und Disconto-Gesselschaft*, 300 U.S. 115, 119 (1937) ("The consent of the United States to be sued [is] revocable at any time."); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 432 (1866) (Congress may "at any time withdraw a particular case" from the "cognizance" of the Court of Claims); *see also Maricopa Cty. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations.").

Congress's authority to reinstate sovereign immunity by withdrawing consent "at any time" does not exclude pending suits. In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), claimants had sued under a statute that consented to suit against the District regarding certain public works contracts and made judgments payable by the United States. After judgment had been entered in favor of claimants—and while an appeal and motion for a new trial were pending—Congress repealed the statute and provided

that "*all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid*." *Id.* at 64 (citation omitted). This Court dismissed for lack of jurisdiction. It held that it "was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury," and Congress had subsequently "directed the Secretary not to pay any judgment." *Id.* at 65. Accordingly, "[a] proceeding against the Secretary *** would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the government." *Id.*

The APA, under which Petitioner brings this action, is an example of a limited waiver of sovereign immunity that permits actions against the United States seeking declaratory relief. *See* 5 U.S.C. § 702; *see also Patchak I*, 567 U.S. at 220 (Petitioner brought "garden-variety APA claim"). But the APA's immunity waiver is subject to an important exception: It neither applies where any other "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), nor "affects other limitations on judicial review," *id.* § 702. The former provision in particular "limits application of the entire APA to situations in which judicial review is not precluded by statute." *Webster v. Doe*, 486 U.S. 592, 599 (1988) (citing 5 U.S.C. § 701(a)(1)).

B. *Patchak I* Invited Congress To Reinstate Sovereign Immunity.

In *Patchak I*, this Court confronted, and rejected, the argument that the QTA was a statute that "'impliedly preclude[d]' judicial review" of Petitioner's claim within the meaning of the APA.

567 U.S. at 222 (citation omitted). That is because "[i]n the QTA, Congress made a judgment about how far to allow quiet title suits," but "Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses." *Id.* at 222-223. Accordingly, the Court concluded, the QTA's "reservation of sovereign immunity from actions respecting Indian trust lands" did not bar Petitioner's suit. *Id.* at 220.

Yet in reaching that conclusion, the Court recognized that Congress could legislate a broader immunity than the one the QTA provides: "Perhaps Congress would—perhaps Congress should—make the identical [immunity] judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call." *Patchak I,* 567 U.S. at 224. And with regard to whether "plaintiffs like Patchak" should be permitted to challenge trust-land determinations like this one, *Patchak I* gave the same answer: That is "for Congress to tell us, not for us to tell Congress." *Id.*

This Court's meaning was thus clear: Although the QTA did not preclude litigation over the trust status of the Bradley Property, Congress was free to achieve that result by reinstating federal sovereign immunity through legislation.[4]

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[4] Even Petitioner agreed with that proposition at oral argument in *Patchak I*:

> JUSTICE SCALIA: Of course, the government can fix that [susceptibility to suit for up to 6 years under the APA]. I mean, if this is indeed an inconvenient situation, that we think the government should not

C. Congress Through Section 2(b) Accepted *Patchak I*'s Invitation.

1. In the Gun Lake Act, Congress accepted this Court's invitation to restore the government's sovereign immunity for this action and others like it. Section 2(b) of the Act provides that, "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed." That is, "notwithstanding" the APA or any other law, no "action" relating to the Bradley Property—including this pending action against the United States—may be heard in federal court.

Congress's chosen language, in fact, is a mirror image of the immunity waiver in the APA itself: While the APA waives immunity by providing that suits against the United States "shall *not* be dismissed," 5 U.S.C. § 702 (emphasis added), the Gun Lake Act reinstates sovereign immunity by requiring that suits involving the Bradley Property "shall be promptly dismissed," Act § 2(b). Accordingly, whatever else Section 2(b) might accomplish, at a

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> be in doubt for 6 years afterwards, I guess Congress can simply change it; right?
>
> [PETITIONER'S COUNSEL]: Yes, Your Honor.
>
> JUSTICE SCALIA: Totally within the control of Congress. We *** don't have to make up some limitation to protect *** the United States.
>
> [PETITIONER'S COUNSEL]: I agree, Your Honor.

Tr. 51 (Apr. 24, 2012).

minimum it reveals Congress's unmistakable intent to foreclose challenges to the federal trust property at issue.[5]

It is true that the Act does not use the term "immunity." But that is of no moment. As an initial matter, any immunity waiver is "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see United States v. Williams*, 514 U.S. 527, 531 (1995) (Court will "construe ambiguities in favor of immunity" of United States). More fundamentally, this Court takes a functional, rather than formalistic, approach to analyzing immunity legislation. *See, e.g.*, *FAA v. Cooper*, 566 U.S. 284, 291 (2012) ("Congress need not state its intent [regarding sovereign immunity] in

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[5] Because "[a] proceeding against property in which the United States has an interest is a suit against the United States," the United States "is an indispensable party defendant" in any suit challenging title to the Bradley Property. *Minnesota v. United States*, 305 U.S. 382, 386-388 (1939). In *Minnesota*, this Court affirmed dismissal of a State condemnation proceeding of trust lands because, "[i]n its capacity as trustee for the Indians[,] [the United States] is necessarily interested in the outcome of the suit," and yet the State "cannot maintain this suit against the United States" without its consent. *Id.* at 387-388. Thus, any "action" relating to the trust status of the Bradley Property (including Patchak's) will necessarily involve the United States. *See id.*; *see also* FED. R. CIV. P. 19(a) (requiring party joinder if, *inter alia*, "in that person's absence, the court cannot accord complete relief among existing parties"); 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 19.05(2)(c) (2017) ("In determining whether a party is indispensable, a necessary party's immunity from suit is an important factor.").

any particular way. We have never required that Congress use magic words.").

Indeed, this Court has long construed a number of statutes as affecting federal sovereign immunity despite not using that term. As noted above, the APA is well understood to enact a "general waiver of sovereign immunity," *Patchak I*, 567 U.S. at 221, yet does not use the term "immunity." *See* 5 U.S.C. § 702 (providing that action "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party"). Neither does the QTA, which likewise "waives the Government's sovereign immunity." *Patchak I*, 567 U.S. at 215; *see* 28 U.S.C. § 2409a(a) (providing that "[t]he United States may be named as a party defendant in a civil action under this section").[6]

When Congress specifically acts to *preserve* sovereign immunity, it often does so without using the term "immunity" as well. Despite the QTA's general waiver of sovereign immunity for land claims, the QTA affirms immunity for certain claims through the use of language akin to that used in the Gun Lake Act. *See* 28 U.S.C. § 2409a(h) ("*No civil action may be maintained* under this section by a

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[6] The same is true of the Tucker Act, 28 U.S.C. § 1491(a)(1) (granting the Court of Claims jurisdiction "to render judgment upon any claim against the United States" under specified circumstances), and the Federal Tort Claims Act, 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]").

State with respect to defense facilities" if a head of a Federal agency determines that they are being used for certain purposes, and "[t]he decision of the head of the Federal agency is *not subject to judicial review*.") (emphasis added). As noted, this Court has also upheld a statute that revoked "consent" to suit and payment of judgments from the treasury by requiring that "*all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid*." *Eslin*, 183 U.S. at 64 (citation omitted).

In addition, Congress on multiple occasions has chosen language nearly identical to that of the Gun Lake Act in statutes conferring "immunity" on private parties. For instance, the Foreign Intelligence Surveillance Act provides that, in some circumstances, "a civil action *may not lie or be maintained* in a Federal or State court against any person for providing assistance to an element of the intelligence community, and *shall be promptly dismissed*." 50 U.S.C. § 1885a(a) (emphasis added); *see In re Nat'l Sec. Agency Telecomm. Records Litig.*, 671 F.3d 881, 890 (9th Cir. 2011) (this "immunity" provision "passes constitutional muster"), *cert. denied*, 568 U.S. 958 (2012).[7]

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[7] Other examples include: the Protection of Lawful Commerce in Arms Act, which provides that certain qualified suits "shall be immediately dismissed by the court in which the action was brought or is currently pending," 15 U.S.C. § 7902(b), and which has been understood to "immunize[] a specific type of defendant from a specific type of suit," *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2d Cir. 2008) (rejecting separation-of-powers challenge); and the Cybersecurity Information Sharing Act of 2015, which provides that "[n]o

2. The Gun Lake Act's legislative history, particularly read in light of *Patchak I*, confirms that Congress intended Section 2(b) as a "broad grant of *immunity*." House Report at 2 (emphasis added). As one sponsor put it: "This bill is really quite simple. It merely reaffirms [DOI's] action of taking this land into trust *** and prevents any future frivolous legal action on this matter." 160 CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Rep. Upton). Continuous litigation "casts a cloud of uncertainty on lands acquired in trust *** and ultimately inhibits and discourages the productive use of tribal trust land itself." *The Gun Lake Trust Land Reaffirmation Act: Hearing on S. 1603, S. 1818, S. 2040, S. 2041 and S. 2188 Before the S. Comm. on Indian Affairs*, 113th Cong. 9 (2014) (statement of Kevin Washburn, Asst. Secretary, Indian Affairs, U.S. Dep't of Interior). Congress believed that, "since *Carcieri* *** there has been an uptick in frivolous suits against tribal lands," and that "unless and until we have a *Carcieri*-fix legislation enacted, these types of piecemeal bills will become routinely needed to protect tribal lands that are rightfully held in trust." 160 CONG. REC. H7485 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva).

By placing all suits relating to the Bradley Property within the carve-out to the APA's general waiver of sovereign immunity, Section 2(b)

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cause of action shall lie or be maintained in any court against any private entity, and such action *shall be promptly dismissed*, for the monitoring of an information system *** conducted in accordance with this subchapter," 6 U.S.C. §§ 1501, 1505(a) (emphasis added).

withdraws the government's consent to suit in such cases. That is the sort of legislative remedy that the Court invited in *Patchak I* when decreeing that it is up to Congress to revise the scope of immunity.

D. The Canon Of Constitutional Avoidance Compels Reading Section 2(b) As Reinstating Sovereign Immunity.

1. Because the D.C. Circuit directly confronted and rejected Petitioner's separation-of-powers challenge to Section 2(b), it never reached the "alternative" argument that the Act could be upheld as a reinstatement of sovereign immunity. J.A. 43 (because Act "not constitutionally infirm, *** we need not consider the matter further"). But "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (alternation in original) (citation and quotation marks omitted).

Consistent with the "traditional presumption in favor of the constitutionality of statutes enacted by Congress," *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988), "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (alteration in original) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo*, 485 U.S. at 575.

Indeed, "when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,'" this Court's "'*duty* is to adopt the latter.'" *Gonzalez v. United States*, 553 U.S. 242, 251 (2008) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002)) (emphasis added). The Court follows this "cardinal principle," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), even when an interpretation requires going beyond the statutory text, *see, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014).

2. Interpreting the Gun Lake Act as a sovereign immunity provision, however, requires no judicial creativity. Although Petitioner claims that the Act violates separation-of-powers principles because it purportedly directs a result "without amending underlying substantive or procedural laws," Pet. Br. i (Question Presented), the Gun Lake Act plainly *did* amend underlying law—namely, by negating the APA's waiver of sovereign immunity in this and similar cases.

In *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), this Court employed the canon of constitutional avoidance to avoid reaching a separation-of-powers question in a similar circumstance. The challenger had argued that a statute "was unconstitutional under [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] because it directed decisions in pending cases without amending any law." 503 U.S. at 441. Because it was "possible"

to interpret the statute as "amend[ing] applicable law," however, the Court decided that it "need not consider whether [the challenger's] reading of *Klein* is correct" or otherwise "address any broad question of Article III jurisprudence." *Id.*

Interpreting the Gun Lake Act as amending the underlying law of sovereign immunity leads to the same result. Unlike in *Bank Markazi*, which involved private litigants, this Court has no need to consider the sometimes difficult-to-draw line "between legislative and judicial power." 136 S. Ct. at 1336 (Roberts, C.J., dissenting). Whatever else Section 2(b) does (if anything), it is best read—and at a minimum "reasonabl[y]" can be read, *Edward J. DeBartolo,* 485 U.S. at 575—as reflecting Congress's policy judgment to reinstate sovereign immunity from suit over the Bradley Property.

Consistent with the ordinary rule permitting Congress to pass "outcome-altering legislation in pending civil cases," *Bank Markazi*, 136 S. Ct. at 1325, and pursuant to this Court's invitation in *Patchak I*, 567 U.S. at 224, Congress in Section 2(b) exercised its authority to reinstate sovereign immunity "at any time." That construction avoids the separation-of-powers concerns posed by Petitioner and is reason enough to affirm the judgment below.

II. SECTION 2(B) IS CONSTITUTIONAL AS A JURISDICTION-DEFINING PROVISION

Even if Section 2(b) of the Gun Lake Act is not read to reinstate sovereign immunity, it survives constitutional scrutiny as an exercise of a core legislative function: defining the jurisdiction of the

lower federal courts. With the exception of cases involving fundamental rights or suspect classes, this Court has upheld Congress's authority to withdraw jurisdiction over a class of cases (including cases pending on appeal after a judgment) in every single decision but one: *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), a case involving a statute so convoluted, intrusive, and extreme that it rightfully stands alone in the annals of separation-of-powers precedent. Section 2(b) falls nowhere close.

A. Congress Permissibly Withdrew Jurisdiction Over A Class Of Cases Relating To The Bradley Property.

1. Congress has broad authority to define the jurisdiction of federal district courts.

Article III of the Constitution vests the judicial power in the Supreme Court "and in such inferior Courts as the Congress may *** ordain and establish." U.S. CONST. art. III, § 1. "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of th[is] authority *** conferred on Congress[.]" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *see Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("except in enumerated instances," "the judicial power of the United States *** [is] dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress"); *see also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 125 (1981) ("The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court.").

Because "Article III left Congress free to establish inferior federal courts or not as it thought appropriate," *Lockerty*, 319 U.S. at 187, the Constitution does not create a freestanding "right of a litigant to maintain an action in a federal court," *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922). Instead, this Court has long recognized that the "power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction [or] *** withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Lockerty*, 319 U.S. at 187 (quoting *Cary*, 44 U.S. at 245).

Article III's broad grant of legislative authority—and its consequent check on judicial power—reflects "a deliberate compromise *** offered by James Madison and accepted by the Convention" to resolve a dispute between those who "favored requiring the creation of lower federal courts" and those who opposed their creation. Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power To Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 143 n.70 (1995). Far from "an abstract generalization in the minds of the Framers," the separation of powers "was woven into the document" they negotiated. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). "The judicial power of the United States [wa]s a constituent part of those concessions[.]" *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). Thus, "when a Court is created, and its operations confined to certain specific objects," it cannot "assume to itself a jurisdiction" without violating limits adopted by the Framers and ratified by the people. *Id.*; *see* THE FEDERALIST NO.

47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (defending the "partial agency" provided to the branches over "the acts of each other").

Just as Congress is empowered to confer jurisdiction, "jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall." *Kline*, 260 U.S. at 234. Accordingly, this Court "ha[s] regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the *** suit was filed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994); s*ee, e.g.*, *Bruner v. United States*, 343 U.S. 112, 117 (1952); *Hallowell v. Commons*, 239 U.S. 506, 508-509 (1916) (case dismissed on appeal after Congress removed the courts' jurisdiction to ascertain the heirs to tribal property); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (case dismissed on appeal after change to jurisdictional diversity requirements); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (case dismissed on appeal—between the time of Supreme Court oral argument and decision—after Congress repealed its grant of jurisdiction).

In *Bruner*, for example, this Court encountered a claim for overtime compensation brought by a federal civilian fire chief appointed under authority delegated by the Secretary of War. *See* 343 U.S. at 113. Because the law at the time barred district court jurisdiction over "cases brought to recover fees, salary, or compensation for official services of officers of the United States," the petitioner contended that he was only an employee and not an "officer of the United States." *Id.* at 113-114 (citation omitted).

"After certiorari had been granted in th[at] case," however, Congress passed a law removing jurisdiction over claims brought by "employees" as well. *Id.* at 114.

The Court upheld the targeted removal of jurisdiction, confirmed its "consistent[]" practice of giving jurisdictional statutes immediate effect on pending cases, and dismissed the action for want of jurisdiction. *Bruner*, 343 U.S. at 116-117. Noting the common rule that "when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction," the Court found it "equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." *Id.* at 116 (quoting *Merchant's Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1866)). The fact that the bare removal of jurisdiction applied to a specific class of cases and impacted a pending matter did not dictate a different conclusion.

To be sure, Congress must exercise this power "within limits" (*e.g.*, equal protection) imposed by the Constitution. Pet. Br. 24 (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)); *see, e.g., Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (holding that statute withdrawing federal jurisdiction to hear certain habeas corpus actions pending at the time of enactment unlawfully suspends writ). Petitioner fails, however, to cite a single case drawing into question a straightforward removal of federal jurisdiction like the one at issue.

2. Section 2(b) duly excludes jurisdiction over a class of suits.

Whether read as a reinstatement of the United States' sovereign immunity from suit, or instead as a jurisdiction-defining provision *simpliciter*, Section 2(b)'s effect is clear: No federal court has jurisdiction over any action relating to the Bradley Property. *See* J.A. 43 (noting relationship between sovereign immunity and subject matter jurisdiction); p. 16, *supra* (same).

"Subject-matter jurisdiction *** concerns a court's competence to adjudicate a particular category of cases." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006); *see Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017) ("[A] court's subject-matter jurisdiction defines its power to hear cases.") (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Section 2(b) expresses Congress's plain—indeed, singular—intent to prevent the federal courts from "adjudicat[ing] a particular category of cases": those involving the Bradley Property. As the court of appeals recognized, Section 2(b) is thus properly read as a permissible exercise of Congress's "jurisdictional" authority. J.A. 30; *see Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 394 (1982) (designating as jurisdictional a statute that "speak[s] in jurisdictional terms").

Congress's withdrawal of jurisdiction here "warrants respectful review," *Bank Markazi*, 136 S. Ct. at 1317, for the additional reason that the legislation relates to two core congressional functions: Congress's power under Article IV "to dispose of *** Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, as well as its

"plenary" power to regulate Indian affairs, *Lara*, 541 U.S. at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"). As the D.C. Circuit explained, that Congress acted in furtherance of other constitutional powers lends further support to the validity of its exercise of jurisdiction-defining authority. *See* J.A. 35 (recognizing deference owed to "policy judgment" involving Indian affairs); *see also Bank Markazi*, 136 S. Ct. at 1317 (fact that political branches enacted legislation "in furtherance of their stance on a matter of foreign policy" "[a]dd[s] weight to our decision").

Petitioner argues that the D.C. Circuit "mistakenly" viewed the Act as "removing jurisdiction from the federal courts over any actions relating to" the Bradley Property. Pet. Br. 22 (emphasis omitted) (citing J.A. 25). But given that Section 2(b) explicitly prevents such actions from being "filed or maintained in a federal court," Congress could hardly have been doing anything else (other than restoring sovereign immunity, which has the same jurisdiction-removing effect). Certainly the Act is not identifying the elements of a claim, given that it creates none. Nor can the Act be read as a claims-processing rule, which would have set forth steps for *Petitioner* to satisfy. *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("'[C]laims-processing rules' *** requir[e] that the parties take certain procedural steps at certain specified times.") (citation omitted); *Reed Elsevier Inc. v. Muchnick*, 559 U.S. 154, 166 (2010) ("[The Court has] treated as nonjurisdictional *** threshold requirements that claimants must complete[.]"). Instead, the text of Section 2(b) is directed at courts,

not claimants, and reflects an intent to foreclose all federal court adjudication of suits relating to the Bradley Property.

Petitioner also contends that Section 2(b) cannot be jurisdictional because "the word 'jurisdiction' does not appear anywhere in its title, headings or text." Pet. Br. 23. But as with sovereign immunity (p. 21 *supra*), Congress need not "incant magic words" to exercise its jurisdictional power. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *see, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (recognizing that the phrase "an appeal may not be taken to the court of appeals *** from [a particular order]" employs "jurisdictional terms") (citing 28 U.S.C. § 2253); *cf. Keene Corp. v. United States*, 508 U.S. 200, 208-209 (1993) (characterizing statutory change from "[n]o person shall file or prosecute" to "shall not have jurisdiction" as "nothing more than a change 'in phraseology'") (alteration in original) (citing 28 U.S.C. § 1500). In *National Coalition To Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002), a statute provided that certain administrative decisions shall "not be subject to judicial review"; even though that statute (like Section 2(b)) did not use the term "jurisdiction," it was considered a valid withdrawal of "subject matter jurisdiction" over a pending case. *Id.* at 1094; *see also Bank Markazi*, 136 S. Ct. at 1328 (citing *National Coalition* approvingly as an example of a decision holding that a targeted law can be a valid exercise of Congress's legislative power).

In any event, the question on appeal is *not* whether Section 2(b) allows Petitioner's action to survive; it is whether the Constitution allows Section

2(b) to survive. The Court's recent efforts to "bring some discipline" to its own "use of the term 'jurisdictional,'" *Gonzalez*, 565 U.S. at 141, do not disturb this Court's "plain duty" to adopt any "possible interpretation[] of a statute" that will allow the Court to uphold the law, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see* pp. 24-26, *supra* (discussing canon of constitutional avoidance). That duty is all the plainer in a structural challenge to Congress's jurisdictional authority. *See Steel Co.*, 523 U.S. at 101-102 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

B. Section 2(b) Comports With Well-Established Separation-Of-Powers Principles.

Against the backdrop of Congress's broad powers to define the jurisdiction of the federal courts, Section 2(b) of the Act must be construed as consistent with separation-of-powers principles. "[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [a coequal branch] from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Through Section 2(b)'s removal of federal jurisdiction over all claims relating to the Bradley Property without more, Congress exercised its own constitutional functions while steering clear of those assigned to the judiciary.

1. Section 2(b) does not transgress any separation-of-powers limitation recognized by this Court.

This Court "affirmed" last Term that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases" without intruding on the judiciary's constitutional function. *Bank Markazi*, 136 S. Ct. at 1325 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995), and *Robertson*, 503 U.S. at 441). In *Robertson*, for example, Congress faced a complex policy question raised by pending litigation. 503 U.S. at 431-434. "In response to this ongoing litigation," Congress enacted a narrow statute that applied only "within a geographically and temporally limited domain," and that identified the "pending cases *** by name and caption number." *Id.* at 433, 440. Although the amendment had a case-dispositive effect on "two pending cases," this Court rejected the argument that the law "purported to direct the results" in those cases and instead unanimously upheld the law. *Id.* at 436.

Later, in *Bank Markazi* itself, this Court held that a statute rendering a specific set of assets available to satisfy specific creditors in a specific proceeding (identified by docket number) was constitutional, because Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." 136 S. Ct. at 1317.

In reaching its conclusion, *Bank Markazi* identified three clear principles for determining whether Congress has required federal courts to exercise the judicial power in an unconstitutional

manner. *See* 136 S. Ct. at 1323. First, Congress may not "usurp a court's power to interpret and apply the law to the [circumstances] before it." *Id.* (alteration in original) (citation omitted). Second, Congress may not "vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut,* 514 U.S. at 218 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 409 (1792)). Third, Congress may not "retroactively command[] the federal courts to reopen final judgments." *Id.* at 219.

Section 2(b) of the Gun Lake Act does none of these things. It does not: (1) instruct courts to interpret existing law (or apply it to the facts) in a particular way; (2) vest review of judicial decisions in the Executive Branch; or (3) command the courts to reopen a final judgment (as none had been entered in this case).

Petitioner's argument instead is that Section 2(b) runs afoul of other purported "principles recognized and secured in the Court's prior decisions," primarily *United States v. Klein*. Pet. Br. 16. *Klein*'s infamous opacity notwithstanding, *see Bank Markazi*, 136 S. Ct. at 1323, Section 2(b) fits well within the limits of *Klein* and the cases applying it.

"*Klein* involved Civil War legislation providing that persons whose property had been seized and sold in wartime could recover the proceeds of the sale in the Court of Claims upon proof that they had 'never given any aid or comfort to the present rebellion.'" *Bank Markazi*, 136 S. Ct. at 1323 (quoting Act of March 3, 1863, ch. 120, § 3, 12 Stat. 820). Though Klein had given comfort to the rebellion, he had received a pardon from President Lincoln, which this

Court held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869), was sufficient to constitute evidence of loyalty. The executor of Klein's estate therefore sought to recover the value of property seized by the United States under the Court of Claims legislation.

While Klein's case was pending, Congress enacted new legislation providing that if a claimant had been offered a presidential pardon as proof that he had not given aid, it would instead be construed as proof of the opposite. *Klein,* 80 U.S. at 143-144. Moreover, the Act created a jurisdictional withdrawal conditioned on a merits determination: "*on proof of such pardon and acceptance*, *** the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." Act of July 12, 1870, § 1, 16 Stat. 230, 235 (emphasis added). Congress adopted a similar rule for cases on appeal: "[I]n all cases where judgment shall have been heretofore rendered in the court of claims *in favor of any claimant* on any other proof of loyalty than such as is above required and provided *** the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Klein*, 80 U.S. at 134.

This Court offered a few rationales in holding the statute unconstitutional. First, the Court was unanimous that the statute "infring[ed] the constitutional power of the Executive" by "impairing the effect of a pardon," *Klein*, 80 U.S. at 147; *see also id.* at 148 (Miller, J., dissenting) ("I do agree *** the [A]ct, is unconstitutional, so far as it attempts to prescribe *** the effect to be given to an act of pardon."). Second, the majority faulted Congress's

conditioning of jurisdiction on a particular merits determination. *Id.* at 147 (Congress cannot require a court to decline jurisdiction "because and only because" the court makes a decision that will favor one party). Third, the majority reasoned that the law prescribed an unconstitutional rule of decision—namely, it forced the courts to destroy a vested right. *Compare id.* at 142 ("[Once the] conditions [of the pardon] *** had been satisfied, *** [t]he restoration of the proceeds became the absolute right of the persons pardoned[.]"), *with id.* at 150 (Miller, J., dissenting) ("[W]here the property has already been seized and sold," pardon did not restore vested right.).

The Gun Lake Act conflicts with none of *Klein's* rationales: the Act does not interfere with an Executive function (or any other freestanding constitutional provision); it does not condition removal of jurisdiction on a particular merits determination; and Petitioner claims no vested right.

2. Petitioner's arguments overread Klein.

Petitioner argues that Section 2(b) offends *Klein* in multiple ways. None has merit.

a. Petitioner first argues that Section 2(b) is an "unusual" intrusion on the judicial power because, "similar to a portion" of the statute at issue in *Klein*, Pet. Br. 16, 18, it "directed the federal courts to 'promptly dismiss' a pending lawsuit following substantive determinations by the courts," purportedly "without amending underlying substantive or procedural laws," *id.* at 18. According to Petitioner, "Congress has not previously enacted a statute with these characteristics," and "[t]his Court

has not previously confronted" a provision like Section 2(b). *Id.*

Petitioner is incorrect. Beyond the long line of authority cited in Part II.A.1, *supra*, this Court has in fact dismissed an action after Congress withdrew jurisdiction and directed that "*all proceedings pending shall be vacated*." *Eslin*, 183 U.S. at 64. The Court came to the same conclusion (with respect to the same judgment-vacating statute) in *In re Hall*, 167 U.S. 38 (1897). These cases clearly involved congressional action following "substantive determinations by the courts": in one, a "final judgment" awaited motions for a new trial and an appeal, *Eslin*, 183 U.S. at 65; in the other, the parties were awaiting entry of judgment after remand from this Court, *Hall*, 167 U.S. at 41-43. And although Congress repealed the underlying enactment in its entirety (including the jurisdictional grant), the repealed law did not leave "the courts to apply new legal standards to the cases before them." Pet. Br. 16. Instead, the Court's rulings were explicitly based on Congress's decision "to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed"—something "*congress had power to do*." *Hall*, 167 U.S. at 42 (emphasis added).

Petitioner's argument fails for an additional reason: dismissal here did not in fact "follow[] substantive determinations by the courts." Pet. Br. 18. To the contrary, no court had made *any* substantive determinations with respect to Petitioner's claims. *See Patchak I*, 567 U.S. at 214 n.2 ("The merits of Patchak's case are not before this Court."); Pet. Br. 4 (noting that "the District Court

did not reach the merits of Petitioner's APA claim" before *Patchak I*); Pet. Br. 9 (noting that the district court dismissed because it "lack[ed] jurisdiction to reach the merits of plaintiff's claim") (alteration in original). After this Court had confirmed Petitioner's standing and rejected QTA immunity in *Patchak I*, the case remained dormant for two years on remand until enactment of the Gun Lake Act. And Congress in no way undid any constitutional or merits determination from *Patchak I*: this Court's statement that Petitioner's "suit may proceed" was based only on the Court's confirmation of prudential standing (which the Gun Lake Act did not disturb) and its statutory interpretation as to sovereign immunity (which the Court invited Congress to reconsider, *see* pp. 18-19, *supra*).

b. Petitioner next contends that Section 2(b) "compel[s] results 'under old law'" akin to a statute directing that "'Smith wins' his pending case." Pet. Br. 17 (citation omitted). All agree, of course, that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *Bank Markazi*, 136 S. Ct. at 1323 n.17 (citation omitted); *see id.* at 1334-1335 (Roberts, C.J., dissenting). In other words, Congress cannot prescribe a particular merits outcome under the preexisting law in a particular case. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980) (Congress does "no[t] interfere[] with th[e] court's judicial function in deciding the merits of [a] claim" when it "in no way attempt[s] to prescribe the outcome of *** [a] review of the merits").

But that is not what the Gun Lake Act does. Section 2(b) did not compel a result on the merits;

rather, Congress removed federal court jurisdiction over a class of cases. *See* J.A. 63 ("There is a difference *** between a statute that dictates a particular decision on the merits, *** and a statute that altogether withdraws jurisdiction to reach the merits."). Congress in Section 2(b) therefore did not "commandeer[] the courts to make a political judgment look like a judicial one." *Bank Markazi*, 136 S. Ct. at 1337 (Roberts, C.J., dissenting). By "wholly excluding the federal courts" from deciding these cases, Congress here "los[t] its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes"—precisely the choice that *amici* supporting Petitioner say Congress must make to *avoid* an unconstitutional intrusion on judicial power. *Amici* Br. 15 (citation omitted).

c. Petitioner relatedly argues that Section 2(b) is "an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction," akin to that found in *Klein*. Pet. Br. 25. Here, too, Petitioner fails to recognize that Congress does not impermissibly "imped[e] the judiciary from carrying out its *** responsibilities" simply by removing jurisdiction. *Id.* That is an argument against Article III's allocation of authority, not an argument against the Gun Lake Act.

Klein itself recognized Congress's broad powers to define federal jurisdiction, noting that "[u]ndoubtedly" Congress may "confer or withhold" jurisdiction as it sees fit. 80 U.S. at 145. If a statute "simply denie[s]" jurisdiction "in a particular class of cases, there c[an] be no doubt that it must be regarded as an exercise of the power of Congress"—"[a]nd if th[e] act d[oes] nothing more, it [is the

Court's] duty to give it effect." *Id.*; *see Ex parte McCardle*, 74 U.S. at 514 ("We are not at liberty to inquire into the motives of the legislature.").

The offending feature of the statute in *Klein*—the "something more"—was that, on its face, it *granted* jurisdiction over claims for certain property but then *removed* jurisdiction if (and only if) a claimant had been pardoned for taking part in the rebellion—a fact otherwise dispositive to judgment *in the claimant's favor*. *See Klein*, 80 U.S. at 143-146 ("The court has jurisdiction *** to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease[.]"). That conditional "heads I win, tails you lose" jurisdictional approach made it impossible for the Court to enter final judgment in any way but one:

> We are directed to dismiss the appeal, *if* we find that the judgment must be affirmed[.] *** Can [Congress require] *** the court [to] deny to itself the jurisdiction [previously] conferred, *because and only because* its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

Id. at 146-147 (emphasis added); *see also Loving v. United States*, 517 U.S. 748, 757 (1996) (describing *Klein* as a case in which Congress "deprive[d] court[s] of jurisdiction *based on* the outcome of a case") (emphasis added). Just as Congress cannot direct a judicial result on the merits with a law providing that "Smith wins," Congress cannot do so by saying "Smith wins or case dismissed."

Again, the Gun Lake Act does no such thing. Section 2(b) does not grant jurisdiction *on the condition* that a court finds the Bradley Property to be trust land; it unconditionally removes jurisdiction over *any* action relating to the property. As one of the *amici* supporting Petitioner has written elsewhere: "Whatever else may be said about" laws that "foreclose judicial review" altogether, "*Klein* simply isn't offended by them." Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251, 259 (2011) (discussing, *inter alia*, 50 U.S.C. § 1885a, which states that an "action may not lie or be maintained in a Federal or State court against any person for *** assist[ing] *** the intelligence community, and shall be promptly dismissed"). Or as the scholars supporting Petitioner explained in this very case: "It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate." *Amici* Br. 15 (citation omitted). It is indisputable that Section 2(b) falls in the first (constitutionally permissible) category.

d. Lastly, Petitioner suggests that Congress violated the separation of powers by enacting the Gun Lake Act as a standalone statute, rather than amending a "generally applicable statute" like the APA or IRA. Pet. Br. 11 (The Act "directed the federal courts to 'promptly dismiss' Petitioner's lawsuit without amending [the IRA, the APA, or] any [other] generally applicable statute."). Petitioner never explains why amending a "generally applicable statute" or enacting a "private bill" makes any

constitutional difference. It does not. *See Bank Markazi*, 136 S. Ct. at 1328 ("This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects."); *Robertson*, 503 U.S. at 439-440 (Court "fail[ed] to appreciate the significance of" observation that "Congress might have modified [generally applicable law] directly" instead of "enact[ing] an entirely separate statute."); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.06[2] (2017) ("Between 1836 and 1946, Congress enacted 142" special jurisdictional statutes that "grant[ed] the Court of Claims jurisdiction, waiv[ed] sovereign immunity, and often also waiv[ed] otherwise applicable statutes of limitations for specific claims."). Nor does Petitioner offer any reason why the Constitution would allow Congress to immunize *all* federal properties from suit, *see Patchak I*, 567 U.S. at 224, but not select individual federal properties.

C. Petitioner's Proposed Rule Undermines Separation Of Powers And Overlooks How The Act Operates.

1. Petitioner's test does not solve separation-of-powers concerns.

Under Petitioner's view of *Klein*, Congress apparently can "direct the result" in a pending case *if* it "amend[s] *** substantive or procedural laws." *E.g.*, Pet. Br. 12. This confuses the Court's rule *for avoiding Klein* with a rule *interpreting Klein*. Indeed, it is Petitioner's interpretation, not Respondents' or the D.C. Circuit's, that would compromise the judicial function.

In *Robertson*, this Court upheld a statute because it "compelled changes in law, not findings or results under old law." 503 U.S. at 438. The holding avoided the need to interpret *Klein*. *See Plaut*, 514 U.S. at 218 ("Whatever the precise scope of *Klein*, *** its prohibition does not take hold when Congress 'amend[s] applicable law.'") (second alteration in original) (quoting *Robertson*, 503 U.S. at 441). The lesson is simple: if Congress provides new law (a legislative function) and courts apply that law to arrive at a new result (a judicial function), then *Klein* is not implicated. The lesson is *not* that Congress can "direct the result" in a pending case as long as it *also* provides new law.

Petitioner's mashup of concepts creates a standard too narrow to protect the Judiciary and too broad to avoid unnecessary conflict with the Legislature. On the one hand, the rule is too narrow because it would seemingly allow Congress to pass a law directing entry of "judgment for Smith" on the merits, *so long as* it was tucked into a statute amending the law underlying "Smith v. Jones." Indeed, as Professors Hartnett and Chemerinsky have observed, Petitioner's proposed rule (the same one proposed by the losing side in *Bank Markazi*) "runs headlong into" *Klein* itself because Congress *did* amend generally applicable law in that case. Br. of Constitutional Law and Fed. Courts Scholars at 5, *Bank Markazi*, No. 14-770 (U.S. Dec. 23, 2015).

As this Court observed in *Bank Markazi*, any law directing judgment for one party on the merits would likely raise two concerns: (1) it "may well be irrational and, therefore, unconstitutional" for reasons other than "separation-of-powers issues," and

(2) it may "fail[] to supply any new legal standard effectuating the lawmakers' reasonable policy judgment." 136 S. Ct. at 1326. Those problems are not avoided simply because Congress amends a "generally applicable statute" in the process of directing judgment.

On the other hand, Petitioner's rule is too broad because, by requiring an amendment of "substantive" law in any legislation that affected the outcome of a pending lawsuit, the rule would encourage challenges to a range of statutes that do nothing more than define the jurisdiction of the federal courts—even though this Court applies such statutes to pending cases "regularly." *Landgraf*, 511 U.S. at 274. Such a rule cannot be reconciled with *Klein*'s parallel recognition of a "duty to give *** effect" to a law that "simply denied the right of appeal in a particular class of cases" and "nothing more." 80 U.S. at 145.

In short, Petitioner's rule does not offer the kind of "clear distinctions" necessary for the separation of powers to provide a strong "structural safeguard." *Plaut*, 514 U.S. at 239 (emphasis omitted). Instead, adopting Petitioner's vague rule would "simply prolong[] doubt and multipl[y] confrontation" between the branches. *Id*. at 240.

2. Per Petitioner's rule, the Gun Lake Act changes underlying law and provides a new standard.

Even accepting Petitioner's interpretation of *Klein* as requiring a change in "underlying substantive or procedural law" before Congress withdraws jurisdiction, the Gun Lake Act easily satisfies that requirement. That is because the Act

amends underlying law. Primarily, Section 2(b) amends the underlying law of sovereign immunity, as explained above. *See* pp. 19-24, *supra*.

Alternatively, as the court of appeals held, the Gun Lake Act's "clear withdrawal of subject matter jurisdiction in Section 2(b)" also "changed the law." J.A. 34. Under Section 2(b), no action that relates to the Bradley Property may be heard in federal court. To trigger that bar, a *court* must decide whether a case "relates to" the Bradley Property. *See* J.A. 34-35 (Under "new legal standard" that the court was "obliged to apply," "if an action relates to the Bradley Property, it must promptly be dismissed."). Congress thus provided a new legal standard for all such actions going forward.[8]

True, the parties here agree that their case relates to the Bradley Property. But a threshold finding is no less relevant because it is straightforward, "uncontested[,] or incontestable." *Bank Markazi,* 136 S. Ct. at 1325. "[A] statute does not impinge on judicial power when it directs courts

[8] Petitioner misconstrues the meaning of the statement in the legislative history that the Gun Lake Act makes no "changes in existing law." House Report at 5; Senate Report at 4. As the Senate Report makes plain, that statement was made "[i]n compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate," *id.*, which requires a committee report to include a "comparative print" showing through "appropriate typographical devices" any insertions or omissions of text that would need to be made to an *existing statute*. The Act made no such textual changes. The Report's language obviously does not say or imply that the new law *itself* paradoxically effectuated no change in law more generally or otherwise lacked any practical effect.

to apply a new legal standard to undisputed facts." *Id.* Whether "the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether" a case relates to the property and, if so, to dismiss for lack of jurisdiction. *Pope v. United States*, 323 U.S. 1, 11-12 (1944).

Amici supporting Petitioner resist this conclusion, arguing that Section 2(b) does not leave "any room for judicial construction *other than the threshold determination*" of whether the action relates to the Bradley Property. *Amici* Br. 20 (emphasis added). But the same could be said of the "threshold determination" of whether the sum or value at issue in a diversity case exceeds $75,000. 28 U.S.C. § 1332(a). That a "threshold determination" of jurisdiction may often be simple or undisputed does not make it any less a "judicial construction" or finding.

Amici eventually advance a narrower argument: While "the first clause of section 2(b) [that an action relating to the Bradley Property shall not be maintained] *** is constitutional" because it turns upon a judicial decision, the second clause of Section 2(b) is unconstitutional because it requires that such cases "be promptly dismissed." *Amici* Br. 20-21. That is a distinction without a difference. The "imperative tone" of a statute does not determine its constitutionality—the functional legal effect does. *Robertson*, 503 U.S. at 439. Section 2(b)'s dismissal "command" is still triggered by a *judicial* finding. Read "in the context of § [2(b)] as a whole," the second clause "simply imposes the consequences of the court's application of the new legal standard" in the first clause. *Miller v. French*, 530 U.S. 327, 349

(2000); *see also Ex parte McCardle*, 74 U.S. at 514 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). And even if the second clause ("and shall be promptly dismissed") were somehow deemed constitutionally problematic, it would make no difference: The Court could simply sever *that specific clause*—leaving Section 2(b)'s first clause (and jurisdictional limit) in place.[9]

[9] If the Court nonetheless decides Section 2(b) as a whole is unconstitutional, it should remand the case for application of Section 2(a) on the merits. The only question presented to the Court pertains to Section 2(b), *see* Pet. Br. i; neither Petitioner's certiorari petition nor merits brief challenges the severability of Section 2(b), *cf.* Pet. Br. 6 n.5; and remanding would allow the district court in the first instance "to apply its ordinary rules to the new circumstances created by" Section 2(a), *Klein*, 80 U.S. at 147. Section 2(a) ratifies and confirms a land transfer, and there is no doubt Section 2(a) can still operate as Congress intended without Section 2(b). *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-686 (1987) (rejecting a "presumption against severability" in absence of a severability clause); *see also Swayne & Hoyt v. United States*, 300 U.S. 297, 301-302 (1937) (Congress can "ratify" and "give the force of law to official action unauthorized when taken" by passing "a curative statute").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Conly J. Schulte
Nicole E. Ducheneaux
FREDERICKS PEEBLES & MORGAN LLP

Pratik A. Shah
Counsel of Record
James E. Tysse
G. Michael Parsons, Jr.
AKIN GUMP STRAUSS HAUER & FELD LLP

Counsel for Respondent
Match-E-Be-Nash-She-Wish Band of Pottawatomi-Indians

September 11, 2017

ADDENDUM

ADDENDUM

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United States Public Laws

113th Congress—Second Session

Public Law No. 113-179, 128 Stat. 1913

September 26, 2014

Gun Lake Trust Land Reaffirmation Act

An Act To reaffirm that certain land has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Gun Lake Trust Land Reaffirmation Act".

SECTION 2. REAFFIRMATION OF INDIAN TRUST LAND.

(a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.

(b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

(c) RETENTION OF FUTURE RIGHTS.—Nothing in this Act alters or diminishes the right of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians from seeking to have any additional land taken into trust by the United States for the benefit of the Band.

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 2253. Appeal

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * *

United States Code

Title 5. Government Organization and Employees

Part I. The Agencies Generally

Chapter 7. Judicial Review

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States Code Annotated

Title 25. Indians

Chapter 45. Protection of Indians and Conservation of Resources

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made

pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.