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

REPLY BRIEF FOR PETITIONER

SCOTT E. GANT
Counsel of Record
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

Attorneys for Petitioner

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"The Framers viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). As James Madison explained to his colleagues in the First Congress: "[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Congress 581 (1789).

Section 2(b) of the Gun Lake Act directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending any generally applicable statute. It was enacted to overcome this Court's decision in *Patchak I* (and *Carcieri v. Salazar*, 555 U.S. 379 (2009)), and "void" Petitioner's lawsuit, H.R. Rep. No. 113-590, at 2, after this Court held that it may proceed. *Patchak I*, 567 U.S. 209, 212 (2012).

The statute upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). Upholding it would leave no meaningful limitation on Congress's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees—and risk deep and lasting damage to our constitutional democracy.

The Court should hold that the Gun Lake Act is unconstitutional, and the judgment of the D.C. Circuit should be reversed.

I. Respondents Ignore the Founders' and This Court's Concern With Intermingled Legislative and Judicial Powers

The Framers of our Constitution "lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. They deliberatively and decisively rejected the practice of colonial legislative review of judicial decisions, believing the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies. *See* Brief for Petitioner ("Pet. Br.") 13 (citing cases). As Madison explained: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 182).

This Court accordingly has long recognized that "Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874); *see* Pet. Br. 14 (citing authorities). This limitation is essential to protecting the independence of the judiciary. *Cf. Miller v. French*, 530 U.S. 327, 350 (2000) ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the

constitutional design."); *see also Stern v. Marshall*, 564 U.S. 462, 482-83 (2011).

Respondents fail to even acknowledge—let alone address—the Founders' concern with intermingled legislative and judicial powers, and the indelible imprint that concern left on both our Constitution's design and this Court's separation of powers jurisprudence. Their silence is telling.

II. Respondents Ignore That Separation of Powers Principles Are Designed to Safeguard Individual Rights

There is no mystery about what transpired here. Confronted with this Court's holdings in *Patchak I* and *Carcieri*, the Tribe sought a way to terminate Petitioner's case, which they perceived as threatening their $241 million casino[1]—which was generating tens of millions of dollars in revenue shared by the Tribe, the State of Michigan, and local government. Wayland Br. 17; Brief of National Congress of American Indians as Amicus Curiae ("NCAI Br.") 13 n.6.

The Tribe and its supporters therefore launched a well-financed campaign[2] to convince Michigan's

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[1] *See* Brief of Wayland Township, et al., as Amici Curiae ("Wayland Br.") 21.

[2] Publicly available campaign finance records show the Tribe contributed nearly $175,000 to members of Congress and affiliated political action committees ("PACs") during the 27-month period between the Court's decision in *Patchak I* and the enactment of the Gun Lake Act. Of those contributions, the Tribe directed more than $50,000 to the campaigns and affiliated PACs of members of the Michigan congressional delegation; $50,000 to the Democratic and Republican House

Senators, members of its House of Representatives delegation, and other key members of Congress, to "void" Petitioner's suit by enacting the Gun Lake Act.

Because the statute would not alter or enact any generally applicable law[3] (applying on its face only to the Bradley Property, and as to pending matters only to Petitioner's lawsuit)[4], Michigan's legislators were able to secure support from almost all of their colleagues in Congress, whose constituents would

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and Senate congressional campaign committees; $15,000 to the PACs of Harry Reid and Nancy Pelosi, then the leaders of the congressional Democratic Party; and $10,000 to the campaigns or affiliated PACs of Doc Hastings, then the Republican representative from Washington's Fourth District, and Jon Tester, the Democratic senator from Montana. Rep. Hastings and Sen. Tester chaired the congressional committees with jurisdiction over the Gun Lake Act during the 113th Congress. In addition, publicly available lobbying disclosure records reveal that during the same period, the Tribe spent approximately $300,000 on outside lobbyists. *See* Ctr. for Responsive Politics, OpenSecrets.org, https://www.opensecrets.org (analysis on file with counsel).

[3] According to H.R. Rep. No. 113-590, the statute also would "not change general Indian law or policy." *Id.* at 2.

[4] There can be no genuine doubt the Gun Lake Act's *purpose* was to overcome "a U.S. Supreme Court opinion [*Patchak I*] that ha[d] allowed one individual to challenge the authority of the Secretary of Interior to take land into trust," and to "end" Petitioner's lawsuit. *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509, at 55 (2014) (statement of David K. Sprague); *see also id.* at 9 (legislation was "to address *Patchak [I]*") (statement of Kevin Washburn); 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva) ("[T]he Patchak case has [] put a Michigan tribe's trust land, upon which its casino supports approximately 1,000 much-needed jobs was constructed, very much in jeopardy.").

not be directly affected by (or likely have knowledge about) the statute.[5]

With no ability to counter the other side's political heft, Petitioner—an individual, with modest financial resources—did not stand a chance. The Senate approved S. 1603 by voice vote, and the House voted 359-64 in favor.

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Embracing "a sharp necessity to separate the legislative from the judicial power," *Plaut*, 514 U.S. at 221, the Framers recognized—as has this Court—that "'there is no liberty [] if the power of judging be not separated from the legislative and executive powers.' [But] liberty . . . would have everything to fear from its union with either of the other departments." The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 181); "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Respondents, however, neglect that "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011)). And in so doing, Respondents ignore that threats to individual

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[5] The Tribe also made contributions to members of Congress outside the Michigan delegation. *See supra* note 2.

rights are particularly acute when the political branches intrude upon the judicial power.[6]

This case highlights the importance of Article III safeguards designed to ensure a litigant's "right to have claims decided by judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980). "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1219 (2015) (Thomas, J., concurring).

III. Section 2(b) of the Gun Lake Act Violates Separation of Powers Principles Regardless of What Congress Intended to Accomplish in Section 2(a)

Petitioner maintains that Section 2(a) did not put the Bradley Property into trust. *See* Pet. Br. 19-20. But, more importantly, the presence of Section 2(a) in the Gun Lake Act does not cure the separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA

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[6] While Respondents fail to address the role of separation of powers in protecting individual rights, some of Respondents' amici concede "the separation of powers does protect an individual litigant from a legislative majority that would seek to decide his case alone." Brief of Amici Curiae Federal Courts and Federal Indian Law Scholars ("Indian Law Scholars Br.") 28.

case. *See* Pet. Br. 20. However, with Section 2(b), Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts. *See* Pet. Br. 21 (citing cases).

But Respondents are correct: Section 2(a) "is not directly at issue here" and "[t]he portion of the Act in dispute is Section 2(b)." FR Br. 13; Tribe Br. 4.

* * *

Separation of powers cases should be decided not by "formalistic and unbending rules," but "with an eye to the practical effect" the practice "will have on the constitutionally assigned role of the federal judiciary." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).[7] Mechanical checklists, which the Court has eschewed in other contexts, *see*, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983), rarely have utility in separation of powers cases. *See Schor*, 478 U.S. at 857 ("[O]ur Article III precedents . . . counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries.").

Ignoring both the Founders' and this Court's concern with intermingled legislative and judicial powers, and the role of separation of powers principles in safeguarding individual rights, Respondents defend the constitutionality of the Gun

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[7] *Cf.* NCAI Br. at 30 (urging Court to "read the Gun Lake Act in full context"); Wayland Br. 3, 7 (urging Court to employ "a functional approach" to assessing statute's constitutionality).

Lake Act using the kind of formalistic tests and mechanical checklists (along with a few strawmen[8]) that obscure rather than illuminate a separation of powers analysis.

For example, they defend the Gun Lake Act with the claim that "Congress has the authority to change the law applicable to a pending case." Brief for the Federal Respondents ("FR Br.") 29; *see also* Brief for Respondent Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe Br.") 35. But that general proposition does not provide much guidance here. Respondents acknowledge separation of powers considerations can render such legislative action unconstitutional. And while they contend *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016), recognized a "narrow exception" to Congress's authority, nothing in that decision suggested it provided an exhaustive list of statutes which could violate separation of powers principles. *Cf. Plaut*, 514 U.S. at 218 (finding statute offends "deeply rooted" "postulate of Article III" separate from two types of legislation "[o]ur decisions *to date* have identified") (emphasis added). Moreover, Petitioner's arguments that the Gun Lake Act is unconstitutional are fully consistent with the majority's decision in *Bank Markazi*, where the statute at issue "changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested and uncontested) found by the court." *Bank Markazi*, 136 S.Ct. at 1326. In

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[8] *See*, *e.g.*, Tribe Br. 14, 45-46 (distorting Petitioner's arguments, and portraying as proposed "rules").

contrast, here, Congress took Petitioner's case from the federal courts after they had issued substantive rulings, without changing any generally applicable law.

As for Respondents' premise that Section 2(b) actually "changed the law," they and their amici concede the statute did not alter or enact any generally applicable statute. So the purported change in the law is limited to the words in Section 2(b), which applies only to cases "relating to" the Bradley Property. But if a freestanding statute's command to dismiss a pending case were *itself* sufficient to constitute a "change in the law" capable of immunizing it from separation of powers scrutiny then the "change-in-the-law"-limitation on Congress's authority to direct outcomes in pending cases would be eviscerated. "The law" is different before and after *any* statute is enacted. But the pertinent question is whether it is different in any sense relevant to the inquiry before the Court.[9]

Respondents also claim "Congress may amend the law in a way that makes the outcome of a pending case virtually certain *so long as* it leaves courts with *some* adjudicatory function to perform." FR. Br. 29 (emphasis added). But it is only in a

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[9] Respondents' cases bear little resemblance to this matter. *See*, *e.g.*, *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (applying new treaty to pending case where "no doubt" had been expressed about its constitutionality); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992) (statute "replaced [] legal standards . . . without directing particular applications under either the old or the new standards.").

tautological sense that the Gun Lake Act leaves something for the courts to do: every statute requiring dismissal of a pending case would have to specify the case(s) to which it applied—and a court would always have to make the determination whether a matter before it was such a case (even the hypothetical "Smith wins" statute, which all members of the *Bank Markazi* Court agreed would be invalid). Even more troublesome, however, is the suggestion that determining whether an action "relates to the Bradley Property" leaves the court a *meaningful* "adjudicatory function" sufficient to ward off separation of powers concerns. The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19. It is fanciful to characterize Section 2(b) as having left the courts to carry out their Article III function in Petitioner's case.

Respondents also suggest the Gun Lake Act can be upheld because its command that the courts "promptly dismiss" was directed more broadly than Petitioner's pending case.[10] While it is true the words of Section 2(b) apply to "an[y] action . . . relating to" the Bradley Property, the statute's application to cases pending "as of the date of enactment" "only affected [Petitioner's] lawsuit," as the D.C. Circuit correctly acknowledged. JA 35; *see*

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[10] *See* Brief for the U.S. House of Representatives as Amicus Curiae ("House Br.") 12 ("section 2(b) is not addressed solely to petitioner's lawsuit").

also JA 59 (District Court finding Congress had "a clear intent to moot this litigation"); H.R. Rep. No. 113-590, at 2 ("S. 1603 would void [Petitioner's] pending lawsuit").[11] Again, this stands in contrast to *Bank Markazi*, which concerned "a category of postjudgment execution claims filed by numerous plaintiffs" ("more than 1,000 victims") in "multiple civil actions" ("16 suits"). *Bank Markazi*, 136 S.Ct. at 1317. The Gun Lake Act's narrow focus evidences that its purpose and effect was to "void" Petitioner's lawsuit, H.R. Rep. No. 113-590, at 2, stripping him of the right to continue pursuing his "garden variety APA claim." *Patchak I*, 132 S.Ct. at 2208.

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[11] The Court has routinely explained it does not focus on a statute's words to the exclusion of considering its practical effects. *See*, *e.g.*, *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1795 (2015) (considering "not the formal language" of the statute "but rather its practical effect"); *United States v. Hatter*, 532 U.S. 557, 573 (2001) ("The practical upshot is that the law permitted nearly every current federal employee, but not federal judges, to avoid the newly imposed financial obligation."); *Schor*, 478 U.S. at 851 ("[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."). Even some of Respondents' amici acknowledge the Gun Lake Act should be found unconstitutional if the Court "concludes that the *practical results* of the statute exceed Congress's powers under the Constitution." *See* Wayland Br. 7 (emphasis added).

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving v. United States*, 517 U.S. 748, 757 (1996).

IV. The Gun Lake Act Violates Separation of Powers Principles Regardless of Whether It Is Properly Characterized as a Jurisdictional Statute

Respondents defend the constitutionality of the Gun Lake Act by arguing the statute is jurisdictional. Petitioner maintains the statute is best viewed as non-jurisdictional. *See* Pet. Br. 22-23.[12] But Section 2(b) of the Gun Lake Act would violate the separation of powers *even if* the statute

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[12] Respondents rely on *Keene Corp. v. United States*, 508 U.S. 200 (1993), but the statute at issue there divested the Court of Federal Claims of jurisdiction using language that does not require mind-reading or imagination, stating the court "shall not have jurisdiction" over certain claims. *Id.* at 207. *Keene* reflects that Congress knows how to "clearly state" a statute is jurisdictional. And, as the Court noted in *Keene*, it has a "duty to refrain from reading a phrase into [a] statute when Congress has left it out." *Id.* at 208.

were "jurisdictional."

Congress's broad authority to define the jurisdiction of the federal courts must be exercised consistent with all of the Constitution's requirements—including its separation of powers principles. *See* Pet. Br. 24 (citing cases).[13]

Even a purportedly jurisdictional statute may not impair the judiciary in the performance of its constitutionally-assigned responsibilities or intrude upon the central prerogatives of the judicial branch. With Section 2(b) of the Gun Lake Act, Congress undertook a form of legislative review of judicial decisions abhorred by the Founders—and upset "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut*, 514 U.S. at 224. Respondents have not cited any decision by this Court rejecting a separation of powers challenge to a statute stripping federal courts of jurisdiction in a particular pending case where the courts had already issued substantive rulings.[14]

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[13] Respondents concede Congress's authority to define jurisdictional limits is "not unlimited" and may "not [be] extended beyond the boundaries fixed by the Constitution." FR Br. 27; Tribe Br. 30 ("Congress must exercise this power 'within limits' . . . imposed by the Constitution."); *see also* Indian Law Scholars Br. 15 ("Congress's authority to legislate with respect to pending cases, including by withdrawing jurisdiction, is not unlimited.").

[14] Respondents' cases are inapposite. *See*, *e.g.*, *Merchants' Ins. Co. v. Ritchie*, 72 U.S. (5 Wall.) 541, 543 (1866) (no constitutional challenge to repealing statute); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) (no constitutional

Moreover, despite all of their musings about *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), neither Respondents nor their amici can credibly deny *Klein* directly refutes any claim that Congress's power to alter the jurisdiction of the federal courts necessarily precludes finding a particular jurisdiction-stripping statute violates separation of powers principles. There, the Court held that Congress had invaded the judicial power with a statute providing the Court would "have no further *jurisdiction* of the cause" and "shall dismiss the same for want of jurisdiction." *Id.* at 143 (emphasis added). As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction still constitutes a separation of powers violation.

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challenge to repealing statute); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) (no constitutional challenge to repealing statute); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (Congress may "withhold or restrict" jurisdiction in accordance with "the boundaries fixed by the Constitution"); *Bruner* v. *United States*, 343 U.S. 112, 114 (1952) (Congress' "power to withhold jurisdiction" was "not challenged"). They also cite *District of Columbia v. Eslin*, 183 U.S. 62 (1901) and *In re Hall*, 167 U.S. 38 (1897), but neither addressed a separation of powers challenge to Congress's action. Moreover, in stark contrast to the Gun Lake Act, in those cases the status of pending cases was altered by the complete repeal of a generally applicable statute—as the Tribe concedes (Tribe Br. 39).

V. The Gun Lake Act Did Not Restore Sovereign Immunity, But Is Unconstitutional Even If That *Post-Hoc* Interpretation of the Statute Were Credited

Respondents also defend the constitutionality of the Gun Lake Act by portraying it as a restoration of sovereign immunity which had been waived by the United States. This reinterpretation of the statute—never mentioned by either Respondent in opposing the Petition for Certiorari—is unavailing.

A threshold flaw with this argument is its incompatibility with Section 2(b)'s mandate that the courts "promptly dismiss." As the Court of Appeals explained, "if an action relates to the Bradley Property, it must promptly be dismissed." JA 34-35.[15] On its face, Section 2(b) of the Gun Lake Act forecloses judicial consideration of *any* "alternative" argument for dismissal of a pending case "related to" the Bradley Property.[16] And it is Section 2(b) which gives rise to the separation of powers problem before this Court.[17]

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[15] *See also* FR Br. 29 ("Upon a court's conclusion that an action relates to the Bradley Property . . . the action shall be promptly dismissed."), 34.

[16] Respondents appear to concede their sovereign immunity argument is an "alternative" one, separate from the separation of powers question. *See* FR Br. 24 ("The argument nevertheless provides an alternative ground on which to affirm the court's decision."); Tribe Br. 24. The D.C. Circuit never reached the "alternative" sovereign immunity argument. *See* JA 43; FR Br. 10.

[17] Even if the Gun Lake Act had sought to restore sovereign immunity, statutes concerning sovereign immunity (like those addressing federal court jurisdiction) are subject to

A second flaw with the sovereign immunity defense of the Gun Lake Act is that it is counterfactual. Sovereign immunity is not mentioned anywhere in the statute, which does not even refer—or limit itself—to suits against the United States. Nor is sovereign immunity mentioned in the legislative history,[18] or the White House's statement when signed by the President.[19] There is no canon of statutory interpretation which could support Respondents' *post-hoc* characterization of the Gun Lake Act. *See Richlin Sec. Serv. Co. v.*

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constitutional constraints, and can violate separation of powers principles.

[18] *See also* 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (no mention of sovereign immunity by any members of the House addressing the legislation); *id.* (statement of Rep. Upton) ("This bill is really quite simple. It merely reaffirms the U.S. Department of Interior's action of taking this land into trust for the Gun Lake Tribe and prevents any future frivolous legal action on this matter."). Recognizing the legislative history is devoid of references to sovereign immunity, neither the Federal Respondents nor the House of Representatives suggest otherwise. The Tribe, however, seizes on a solitary reference to the word "immunity" in H.R. Rep. No. 113-590. *See* Tribe Br. 8, 12. But the House Report was merely noting that Section 2(b)'s requirement of dismissal of "any action . . . relating to the land . . ." confers "an unusually broad grant of immunity from lawsuits pertaining to the Bradley Property," H.R. Rep. No. 113-590 at 2, and the context makes clear that use of the term "immunity" was not a reference to "sovereign immunity."

[19] "On Friday, September 26, 2014, the President signed into law . . . . S. 1603, the 'Gun Lake Trust Land Reaffirmation Act,' which reaffirms the status of certain land that has been taken into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatami [*sic*] Indians . . . ." Press Release, The White House (Sept. 26, 2014), https://obamawhitehouse.archives.gov.

Chertoff, 553 U.S. 571, 589-90 (2008) ("traditional tools of statutory construction" apply when evaluating sovereign immunity); *see also Cummings v. Deutsche Bank*, 300 U.S. 115, 120 (1937) ("In the absence of unmistakable expression of purpose to that end, it may not reasonably be inferred that Congress intended to withdraw" consent to be sued); *cf. Patchak I*, 567 U.S. at 222 (finding "faulty" argument that QTA restored sovereign immunity by "negative implication").[20]

The counterfactual nature of this argument may explain why *neither* the Federal Respondents nor the Tribe made it before the District Court (and why the Tribe also did not make the argument before the Court of Appeals). JA 43.[21]

Third, even if the Gun Lake Act sought to rescind the APA's sovereign immunity waiver, it is

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[20] Parting ways with the Federal Respondents, the Tribe contends the doctrine of constitutional avoidance supports their alternative sovereign immunity argument. Tribe Br. 12, 24. But the doctrine is "an interpretive tool," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), "for choosing between competing *plausible* interpretations of a provision." *McFadden v. United States*, 135 S.Ct. 2298, 2307 (2015) (emphasis added). For the reasons explained in this section, the interpretation proffered by Respondents is implausible. The doctrine is also irrelevant because, for the reasons explained above, construing the Gun Lake Act as attempting to restore sovereign immunity would not avoid or cure the separation of powers problems posed by the statute—thus, there is no "avoidance" to be had.

[21] The Court should not entertain a defense of Gun Lake Act based on an interpretation of the statute never advanced in the District Court—particularly when it was never mentioned in either Respondent's brief opposing the Petition for Certiorari. *See* SUP. CT. R. 15.2.

doubtful that would affect Petitioner's case. Sovereign immunity does not protect federal officials from suits for injunctive relief founded on a claim they have acted in excess of statutory authority. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are ultra vires his authority and therefore may be made the object of specific relief."); *see also* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 894 (7th ed. 2015) ("Larson and its progeny appear to state the currently controlling law on the conditions under which a suit against a government officer that has not been authorized by statute may be barred on the ground that it is really one against the sovereign and thus falls under the doctrine of federal sovereign immunity."). Here, Petitioner sued two federal officials seeking equitable relief, alleging they had acted in excess of their authority under the Indian Reorganization Act.[22]

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[22] See *Patchak I*, 567 U.S. at 213 (Petitioner's suit "requested only a declaration that the decision to acquire the land violated the IRA and an injunction to stop the Secretary from accepting title,"); FR Br. 3 ("Petitioner alleged that the Secretary's decision to take the Bradley Property into trust exceeded the authority provided by Congress").

VI. Congress's Lawmaking Authority Over Indian Affairs Cannot Cure the Gun Lake Act's Constitutional Deficiencies

Respondents make passing reference to Congress's "plenary" power to legislate in the area of Indian affairs. FR Br. 14; Tribe Br. 31-32. But neither contend that separation of powers principles do not apply to laws concerning Indian affairs. Nor could they make such a claim. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83 (1977).[23]

Any lawful action by Congress must flow from a power conferred to it by the Constitution. *See NFIB v. Sebelius*, 567 U.S. 519, 535 (2012). But even when empowered to legislate in a certain area, Congress's actions must be consistent with all of the Constitution's *other* requirements.[24] It is therefore unsurprising that the Court has found statutes violated separation of powers principles even when there was no question about Congress's authority to legislate in the area in question. *See, e.g.*, *Stern*, 564 U.S. at 482; *Plaut*, 514 U.S. at 225-26; *Bowsher v. Synar*, 478 U.S. 714, 732 (1986); *Northern Pipeline*

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[23] Notably, the NCAI does not invoke or rely on Congress's plenary power over Indian affairs in its amicus brief.

[24] Apparently overlooking this distinction, the House of Representatives incorrectly claims "[t]his case presents the question whether the legislative power conferred on Congress by the Constitution is sufficient to sustain legislation directing courts to 'promptly dismiss' any lawsuit relating to the Bradley property." House Br. 2.

Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982).

As with other areas of lawmaking, statutes concerning Indian affairs must comply with the Constitution's prescriptions and proscriptions. *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987) (unconstitutional taking); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) ("[T]he idea that relations between this Nation and the Indian tribes are a political matter not amenable to judicial review . . . has long [] been discredited."); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (government's power over tribe "was subject . . . to pertinent constitutional restrictions").

Nor can the Gun Lake Act be saved by the contention that Congress enacted the statute to address what it perceived to be an important problem.[25] Noble intentions do not immunize a statute from constitutional review. *Plaut*, 514 U.S. at 228. The Constitution's restraints apply with full force, even when Congress aims to resolve a perceived problem affecting large numbers of Indian tribes. *See Babbitt*, 519 U.S. at 237; *Hodel*, 481 U.S. at 708, 718 (finding unconstitutional a statute enacted to remedy a "serious public problem" which was "disastrous for the Indians").

And the Court has made clear that separation of powers problems will not be overlooked when Congress pursues an expedient path to achieve

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[25] *See* Tribe Br. 8; NCAI Br. 23-25; Wayland Br. 19-20.

objectives rather than lawful means more politically-challenging to secure.[26] *See INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 449 (2010) (citing *Chadha*); *Bowsher*, 478 U.S. at 736 (citing *Chadha*); *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 948 (2017) (Thomas, J., concurring) ("We cannot cast aside the separation of powers and the Appointment Clause's important check on executive power for the sake of administrative convenience or efficiency.").

VII. *Klein* Supports the Conclusion That the Gun Lake Act Is Unconstitutional, But the Statute Is Unconstitutional Regardless of How *Klein* Is Understood

Respondents and their amici dedicate considerable attention to divining the meaning of *Klein*, 80 U.S. (13 Wall.) 128. But the Gun Lake Act is unconstitutional, regardless of how *Klein* is

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[26] *See* NCAI Br. 28 (Congress "reverted to *ad hoc* legislation" because "[t]o date, Congress has not had the votes necessary to pass an across-the-board solution"); *see also* H.R. Rep. No. 113-590, at 2 (2014) ("S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri*"); FR. Br. at 7 (same); 160 Cong. Rec. H7485-01 (daily ed. Sept. 15, 2014) (statement of Rep. Grijalva) ("I think unless and until we have a *Carcieri*-fix legislation enacted, these types of piecemeal bills will become routinely needed . . . .").

understood—and would be unconstitutional even if *Klein* had never been decided.

Nevertheless, two observations about *Klein* are warranted.

First, neither Respondents nor their amici have identified *any* decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding that a particular jurisdiction-stripping statute violates separation of powers principles. They also overlook that *Klein directly refutes* any such claim. However "puzzling" certain aspects of *Klein* may be, that point is unassailable.

Second, Respondents downplay *Klein's* relevance to the Gun Lake Act on the ground that *Klein* involved not only Congress's exercise of judicial power, but also implicated the relationship between Congress and the President. *See* Tribe Br. 13-14; FR Br. 32. But *Klein* cannot plausibly be read to avoid the Court's clear holding that Congress had "passed the limit which separates the legislative from the judicial power"—and did so, at least in part, because it directed dismissal of pending cases. *Klein*, 80 U.S. (13 Wall.) at 147; *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 7 (cautioning against reading *Klein* "simply as a case about the pardon power").

VIII. The Court Did Not "Invite" Congress to Enact the Gun Lake Act

The Tribe and some amici imply the Gun Lake Act should be upheld because it was "invited" by this Court.[27] That suggestion is nonsense.

In *Patchak I* the Court observed: "[p]erhaps Congress would—perhaps Congress should"—change the law to proscribe "the full range of lawsuits pertaining to the Government's ownership of land." 567 U.S. at 224. That remark, however, is a far cry from an "invitation" of any sort—and certainly not an endorsement of the later-enacted Gun Lake Act. *Cf. Babbitt*, 519 U.S. at 243 (finding statute unconstitutional and rejecting characterization of it as having "effectively anticipated the concerns expressed in the Court's [prior] opinion," *Hodel*, 481 U.S. at 718). And the Gun Lake Act itself is a far cry from the hypothetical legislative action the Court described, which imagined enactment of a generally applicable law covering "the *full range* of lawsuits pertaining to the Government's ownership of land." 567 U.S. at 224 (emphasis added); *cf. Boumediene v. Bush*, 553 U.S. 723, 735 (2008) (although *Hamdan* "noted that 'nothing prevented the President from returning to Congress to seek the authority he believes necessary' . . . [n]othing in that opinion can

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[27] Tribe Br. 19 ("Congress Through Section 2(b) Accepted *Patchak I*'s Invitation"); NCAI Br. 29 ("The Gun Lake Act should be construed as acceptance by Congress of this Court's offer to rectify the uncertainty and lack of finality injected into the trust acquisition process by *Carcieri* and *Patchak I*."); Indian Law Scholars Br. 2 ("The Gun Lake Act is . . . a direct response to this Court's invitation . . . .").

be construed as an invitation for Congress to suspend the writ").

CONCLUSION

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

While the adverse impact of the Gun Lake Act on Petitioner may not itself rise to the level of national significance, "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'" *Stern*, 564 U.S. at 502-03 (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957)). "We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Id.* at 503.

The Court should hold that the Gun Lake Act is unconstitutional, and the judgment of the D.C. Circuit should be reversed and the case remanded for further proceedings.

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Respectfully submitted,

SCOTT E. GANT
Counsel of Record
AARON E. NATHAN
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

Attorneys for Petitioner