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 PETITIONER

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QUESTION PRESENTED

Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land (the "Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (*Patchak I*), 567 U.S. 209, 212 (2012).

While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the Bradley Property "shall be promptly dismissed," but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

> Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

PARTIES TO THE PROCEEDING

Petitioner is David Patchak, the plaintiff below.

Respondents are Ryan Zinke, Secretary of the Interior, and Michael S. Black, Acting Assistant Secretary of the Interior, as well as the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below. The predecessors of Mr. Zinke (Sally Jewell) and Mr. Black (Lawrence Roberts) were defendants below.

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The Opinion of the United States Court of Appeals for the District of Columbia Circuit was issued on July 15, 2016, is reported at 828 F.3d 995, and is reproduced in the Joint Appendix at JA 24.[1] The D.C. Circuit's July 15, 2016 Judgment is reproduced at JA 46.

The June 17, 2015 Opinion of the United States District Court for the District of Columbia is reported at 109 F. Supp. 3d 152, and is reproduced at JA 50.

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[1] References to the Joint Appendix are in the form "JA 1."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit issued its opinion and entered judgment on July 15, 2016. JA 24-45; JA 46. The Petition for a Writ of Certiorari was filed on October 11, 2016, and granted on May 1, 2017.

CONSTITUTIONAL & STATUTORY PROVISIONS

This case concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913, and whether it violates separation of powers principles. The text of the Gun Lake Act and relevant constitutional provisions are reproduced in the Joint Appendix.[2] JA 72-74.

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[2] Although the Joint Appendix contains only portions of Article III (and Article I), as the Court has observed: "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of . . . the structural imperatives of the Constitution as a whole." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982); *see also Marshall v. Gordon*, 243 U.S. 521, 536 (1917) ("[T]he distinction between legislative, executive and judicial authority . . . is interwoven in the very fabric of the Constitution.").

STATEMENT OF THE CASE

A. Petitioner's Complaint in the District Court

On April 18, 2005, the Department of the Interior announced its intention to employ the Secretary's authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take into trust land (the "Bradley Property") for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe"). 70 Fed. Reg. 25,596 (May 13, 2005). The Gun Lake Tribe had been recognized by the Department of the Interior in October 1998. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1998).

Petitioner is a resident of Wayland Township, Michigan, who lives in close proximity to the Bradley Property. On August 1, 2008, he filed a complaint in the United States District Court for the District of Columbia, asserting a claim under the Administrative Procedure Act (APA) against the then-Secretary and Assistant Secretary of the Interior, challenging the Secretary's authority under the IRA to take the Bradley Property into trust for the Gun Lake Tribe.[3] Petitioner argued that acquisition of the Bradley Property for the Gun Lake Tribe (which had not yet occurred because of unrelated litigation following the announcement of the Interior Secretary's intentions) was unauthorized by the IRA because the Tribe had not

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[3] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

been recognized and "under federal jurisdiction" when the IRA was enacted in 1934. The Gun Lake Tribe filed a motion to intervene, which was granted by the District Court.

While Petitioner's case was pending in the District Court, on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Gun Lake Tribe. *Patchak I*, 567 U.S. 209, 213-14 (2012).

Less than a month after the Bradley Property was taken into trust by the Secretary, this Court issued its decision in *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), holding that the IRA "limits the [Interior] Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

Although *Carcieri* cast substantial doubt on the legality of the Secretary's action taking the Bradley Property into trust for the Gun Lake Tribe, which had obtained federal recognition in 1998, the District Court did not reach the merits of Petitioner's APA claim. Instead, on August 19, 2009, the District Court issued an opinion finding that Petitioner lacked prudential standing, and contemporaneously issued an order granting the United States' motion to dismiss and the Gun Lake Tribe's motion for judgment on the pleadings. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009).

On appeal, the D.C. Circuit reversed the District Court's dismissal of Petitioner's APA claim, finding he had both prudential and Article III standing. *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). The D.C. Circuit also addressed the question of sovereign immunity briefed by the parties, but not decided by the District Court, concluding that sovereign immunity had been waived. *Id.* at 712.

B. This Court's Prior Decision in this Case

This Court granted certiorari, 565 U.S. 1092 (2011), to review two questions arising from Petitioner's lawsuit: whether the United States had sovereign immunity by virtue of the Quiet Title Act, 86 Stat. 1176, and whether Petitioner had prudential standing to challenge the Interior Secretary's acquisition of the Bradley Property. The Court determined that sovereign immunity had been waived and that Petitioner had prudential standing, and "therefore h[e]ld that Patchak's suit may proceed." *Patchak I*, 567 U.S. at 212.

C. Congress's Action to Terminate Petitioner's Lawsuit

Following this Court's decision in *Patchak I*, while Petitioner's case was moving forward in the District Court, Congress took up consideration of what became the Gun Lake Trust Land Reaffirmation Act (the "Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913.[4]

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[4] The full text of the statute is reproduced at JA 73-74.

Section 2(a) provides:

> 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.

Section 2(b) provides:

> 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.[5]

The bill that became the Gun Lake Act originated in the Senate, as S. 1603, with a single sponsor and one co-sponsor (both Senators from Michigan, where the Bradley Property is located).

The Senate Committee on Indian Affairs held a hearing during May 2014. At that hearing, the Gun Lake Tribe's Chairman urged passage of the bill because the trust status of his Tribe's land "is now threatened by a U.S. Supreme Court opinion [*Patchak I*] that has allowed one individual to challenge the authority of the Secretary of Interior to

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[5] The statute does not contain a severability provision.

take land into trust for our Tribe," and because "it is now time for this dispute to come to an end." *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509, at 55 (2014) (statement of David K. Sprague).

At the same Senate hearing the Assistant Secretary–Indian Affairs from the Department of the Interior also pressed for enactment of the bill, contending that this Court's decision in *Patchak I* "undermines the primary goal of Congress in enacting the Indian Reorganization Act" and "imposes additional burdens and uncertainty on the Department's long-standing approach to trust acquisitions . . . ." The Assistant Secretary expounded on his criticism of this Court's opinion in *Patchak I*, opining on the need for "legislation to address *Patchak*." *Id.* at 9 (statement of Kevin Washburn).

The Senate Report addressing the bill observed that Petitioner's lawsuit "currently pending before a federal district court . . . places in jeopardy the Tribe's only tract of land held in trust . . . . The bill would provide certainty to the legal status of the land" and "would extinguish all rights to legal actions relating to the trust lands." S. Rep. No. 113-194, at 2, 3 (2014). The Report also stated that enactment "will not make any changes in existing law." *Id.* at 4.

The Senate approved S. 1603 by voice vote on June 19, 2014.

The legislation then moved to the House, where the Subcommittee on Indian and Alaska Native Affairs held a hearing during July 2014. At that

hearing, the Gun Lake Tribe's Chairman and the Assistant Secretary–Indian Affairs provided testimony substantively identical to their testimony before the Senate Committee on Indian Affairs. *See Legislative Hearing on S. 1603 Before the Subcomm. on Indian and Alaska Native Affairs of the H. Comm. on Natural Resources* (July 15, 2014) (statement of David K. Sprague) (testimony of Kevin Washburn).

The House Report addressing the bill observed "[t]he need for S. 1603 stems from what is now understood to be a likely unlawful acquisition of land by the Secretary for the Gun Lake Tribe," and "S. 1603 would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property . . . filed by a neighboring private landowner named David Patchak." H.R. Rep. No. 113-590, at 2 (2014). The House Report also noted that "S. 1603 is necessary because there is no consensus in Congress on how to address *Carcieri* [555 U.S. 379 (2009)]," and—like the Senate Report—stated that enactment "would make no changes in existing law." *Id.* at 2, 5.

On September 16, 2014, the House voted 359-64 in favor of the bill.

The President signed the Gun Lake Act on September 26, 2014. 128 Stat. at 1914.

D. Decisions Below Concerning the Gun Lake Act

Because summary judgment briefing was underway in the District Court when the Gun Lake Act became law, the parties addressed its constitutionality in conjunction with other issues and arguments relevant to those motions.

Petitioner argued to the District Court that the Gun Lake Act is unconstitutional for several reasons—including that it violates separation of powers principles and the Fifth Amendment, as well as the First Amendment's right to petition, and the prohibition on bills of attainder. The District Court, however, rejected each of these arguments, and found that "the Gun Lake Act is constitutional" and that "the Act's plain language and legislative history manifest a clear intent to moot this litigation." JA 57, 59. Believing it "lack[ed] jurisdiction to reach the merits of plaintiff's claim," the District Court granted the Gun Lake Tribe's motion for summary judgment. JA 59, 71.

On appeal, the D.C. Circuit rejected all arguments that the Gun Lake Act is unconstitutional, and affirmed the District Court's disposal of the case because "if an action relates to the Bradley Property, it must promptly be dismissed." JA 34-35.

SUMMARY OF ARGUMENT

"The leading Framers of our Constitution 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 during a debate 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).[6]

In the years since the Founding, "[o]ur national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

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[6] *See also* Gordon S. Wood, The Idea of America: Reflections on the Birth of the United States 180 (2011) ("As important as the idea of a written constitution distinguishable from ordinary statute law was in the eighteenth century, however, it was not the most significant constitutional deviation the Americans made from their inherited English traditions. More important in distinguishing American constitutionalism from that of the English . . . was the idea of separation of powers."); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 249 (1996) ("to affirm the principle of separated powers" was one of "two great lessons" drawn by those drafting the Constitution "[f]rom the memory of the wrongs inflicted by generations of royal governors and the belief that ambitious monarchs and their ministers regularly threatened liberty").

This case concerns the constitutionality of a statute through which Congress has intruded upon the judicial power.

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

If Congress may direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.[7]

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[7] Respondents' briefs opposing the Petition for Certiorari defended the Gun Lake Act without identifying any limitation on the legislature's authority. *Cf. United States v. Alvarez*, 567 U.S. 709, 723 (2012) (rejecting purported governmental power with "no clear limiting principle"); *University of Penn. v. EEOC*, 493 U.S. 182, 194 (1990) (rejecting argument with "no limiting principle"); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982) ("The flaw in appellants' analysis is that it provides no limiting principle.").

The Gun Lake Act violates separation of powers principles—and the D.C. Circuit's decision to the contrary was incorrect.

ARGUMENT

I. The Gun Lake Act Is Unconstitutional

It is difficult to imagine a more direct invasion of the judicial power than occurred here: Congress, without amending underlying substantive or procedural laws, directed that any case relating to the parcel of property which was the subject of Petitioner's APA claim "shall be promptly dismissed," after this Court expressly held that his "suit may proceed." *Patchak I*, 567 U.S. at 212.

Although "it can sometimes be difficult to draw the line between legislative and judicial power," *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting), this is not such a case. And "the entire constitutional enterprise depends on there *being* such a line." *Id.*

A. Section 2(b) of the Gun Lake Act Impermissibly Mandated that Petitioner's Lawsuit Be "Promptly Dismissed" Without Amending Underlying Substantive or Procedural Laws

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. And they deliberatively and decisively "rejected th[e] practice [of colonial legislative review of judicial decisions] . . . because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and

controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment." *Id.* at 265-66 (Stevens, J., dissenting); *see also Marshall v. Gordon*, 243 U.S. 521, 534 (1917) ("Clear also is it . . . that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt . . . ."); *id.* at 535 (provisions in Maryland and Massachusetts constitutions "point[] to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons . . . ."); The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (citing 1 Montesquieu, The Spirit of Laws 182) ("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*.").

Adhering to the Framers' intention and constitutional design, the Court has repeatedly confirmed that the judicial power cannot be shared with another branch of government. *See*, *e.g.*, *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982); *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The Court also long ago 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 also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 413 (1792) (citing Letter from Iredell, J., and Sitgreaves, D.J., to President George Washington (June 8, 1792)) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested."); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of the Government."); The Federalist No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case . . . .").

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; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("the judicial function [is] deciding cases"); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . ."); *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Accordingly, one of the "basic constraints" on Congress imposed by the Constitution is that it may not "invest itself or its Members with either executive power or judicial power." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991); *Freytag*, 501 U.S. at 891 (finding Tax Court "exercises judicial power," noting "[i]ts decisions are not subject to review by either the Congress or the President").

These limitations are essential to protecting the independence of the judiciary. *See 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."); *Stern*, 564 U.S. at 482-83; *cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) ("Judges cannot, without sacrificing the autonomy of their office, put onto the scales of justice some predictive judgment about the probability that an administrator might reverse their rulings."); *Williams v. United States*, 535 U.S. 911, 921 (2002) (Breyer, J., dissenting from denial of certiorari) (discussing the "special nature of the judicial enterprise" and the necessity for "freedom

from subservience to other Government authorities").[8]

Although this Court has not previously confronted an intrusion on the judicial power quite like that effected by Section 2(b) of the Gun Lake Act, the principles recognized and secured in the Court's prior decisions instruct that the Gun Lake Act invades and weakens the judicial power, and thereby violates the separation of powers.

For example, Section 2(b) of the Gun Lake Act is similar to a portion of the statute at issue in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" that courts "shall forthwith dismiss" pending cases without altering applicable legal standards. *Klein*, 80 U.S. (13 Wall.) at 147; *see* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

This case and *Klein* stand apart from those where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them. *See*, *e.g.*, *Bank Markazi*, 136 S.Ct. at 1323-24 (contrasting that case with *Klein*); *id.* at 1326 (no separation of powers violation because statute "changed the law by establishing new substantive standards, entrusting to the

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[8] *See also* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009) ("Court curbing in Congress may affect judicial decision making independent of any threat of enactment.").

District Court application of those standards to the facts (contested and uncontested) found by the court"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992) (no separation of powers violation because statute "replaced the legal standards . . . without directing particular applications under either the old or the new standards"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (addressing effect of change in underlying law by Congress).

While dissimilar to the statute actually at issue in *Bank Markazi*, the Gun Lake Act resembles the hypothetical statute discussed by Chief Justice Roberts in his *Bank Markazi* dissent, which directed that "Smith wins" his pending case, *Bank Markazi*, 136 S.Ct. at 1334-35 (Roberts, C.J., dissenting)—a statute which all members of the Court agreed "would be invalid." *Bank Markazi*, 136 S.Ct. at 1326 (noting potential constitutional infirmities, including Congress impermissibly compelling results "under old law" without "supply[ing] any new legal standard"). Indeed, Section 2(b) of the Gun Lake Act did precisely what this Court said had been impermissible in *Klein*: it "infringed the judicial power . . . because it attempted to direct the result without altering the [applicable] legal standards." *Id.* at 1324.

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).

B. Congress's Historical Practices Support the View that the Gun Lake Act Is Unconstitutional

The Gun Lake Act is unusual. This Court has not previously confronted an intrusion on the judicial power like that effected by Section 2(b) of the Gun Lake Act, which directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws.

That Congress has not previously enacted a statute with these characteristics—and only rarely enacted even a similar statute, *see Klein*, 80 U.S. (13 Wall.) 128—further supports the view that the Gun Lake Act is unconstitutional. *See Plaut*, 514 U.S. at 230 (Congress's "prolonged reticence would be amazing if such interference [with the judicial power] were not understood to be constitutionally proscribed."); *Printz v. United States*, 521 U.S. 898, 905 (1997) (from Congress's failure to employ "this highly attractive power, we would have reason to believe that the power was thought not to exist"); *see also Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'") (quoting *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2559 (2014)); *Luis v. United States*, 136 S.Ct. 1083, 1099 (2016) (Thomas, J., concurring) ("lack of

historical precedent" is indicative of a "constitutional problem"); *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts, C.J.) ("[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action.") (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

C. Section 2(b) of the Gun Lake Act Is Unconstitutional, Regardless of What Congress Intended to Accomplish in Section 2(a)

Section 2(a) of the Gun Lake Act provided that the Bradley Property "is reaffirmed as trust land," and "the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." The meaning and effect of this language is hardly self-evident. The Court of Appeals viewed Section 2(a) as having "changed the law," JA 34—although it did not explain how.

Petitioner believes Section 2(a) did not put the Bradley Property into trust. As the statute itself clearly states, it was enacted to "[t]o reaffirm that certain land *has been* taken into trust"—that is, it conveyed Congress's post-hoc endorsement of the Interior Secretary's decision (which the House Report described as "likely unlawful"[9]), seemingly without *itself* changing the legal status of the property. For that reason, both the House and Senate Reports concerning the Gun Lake Act stated

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[9] H.R. Rep. No. 113-590, at 2.

the statute would make no "changes in existing law." *See* H.R. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014); *see also* JA 34 (D.C. Circuit noting Section 2(a) ratified and confirmed "*the Department of the Interior's* decision to take the Bradley Property into trust") (emphasis added).

But even if the *intent* of Section 2(a) was to put the Bradley Property into trust, this would have led to numerous legal issues ***to be decided by the courts***—including (1) whether Section 2(a) actually did take the land into trust; and (2) if Section 2(a) did take the land into trust, how that impacted Petitioner's pending APA claim (including his entitlement to relief requested in his Complaint, such as a declaration that *the IRA* did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees—neither of which are obviously impacted by Section 2(a), regardless of how it is interpreted).

Among the issues confronting a court interpreting and applying Section 2(a) would have been any purported retroactive effect of Congress taking the Bradley Property into trust long after Petitioner filed his APA claim and subsequent to this Court's decision that his APA claim "may proceed." *See Johnson v. United States*, 529 U.S. 694, 701 (2000) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (requiring clear statement for retroactive civil legislation).

Yet the lower courts *could not* address any unresolved legal questions arising from Section 2(a) —including the meaning and effect of that provision,

and its potential retroactive application—because Congress precluded the Courts from deciding any of these when, in Section 2(b), it directed that Petitioner's pending case "shall be promptly dismissed." The D.C. Circuit—while mistaken about the constitutionality of the Gun Lake Act—made clear Section 2(b) was dictating the outcome of Petitioner's appeal, explaining: "if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action." JA 34-35.

Thus, the presence of Section 2(a) in the Gun Lake Act does not cure the profound 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 case. 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. *Cf. Bank Markazi*, 136 S.Ct. at 1323 (expressing "no doubt" Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it."); *Klein*, 80 U.S. (13 Wall.) at 146-47 (explaining "we do not at all question what was decided in" *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), where "the court was left to apply its ordinary rules to the new circumstances created by the act"); *see also* Brief of Federal Courts Scholars as Amici Curiae in Support of Petitioner at 18 (certiorari stage) ("even assuming *arguendo* that section 2(a) *did* change substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow

that the change would be implemented by the *courts*").

Perhaps Section 2(a) would have aided the Secretary in defending against Petitioner's APA claim on the merits. But Congress decided Petitioner's case by itself when mandating that it be "promptly dismissed"—and in so doing exercised the judicial power reserved for the federal courts by Article III. *See Ex Parte Slater*, 246 U.S. 128, 133 (1918) ("exercise of the judicial function" is "applying recognized legal and equitable principles to the facts in hand"); *cf. Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1667 (2015) ("the role of judges differs from the role of politicians").

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

The D.C. Circuit mistakenly viewed the Gun Lake Act as "removing *jurisdiction* from the federal courts over any actions relating to [the Bradley Property]." JA 25 (emphasis added). In opposing the Petition for Certiorari Respondents also relied heavily on their contention that the statute is jurisdictional. Although the statute violates separation of powers principles regardless of whether it is properly deemed jurisdictional, both the D.C. Circuit and Respondents are incorrect.

The Court has adopted a "bright line" test treating statutory limitations as nonjurisdictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Arbaugh v. Y&H Corp.*, 546 U.S. 500,

515-16 (2006). This test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997).

The Gun Lake Act does not state (clearly or otherwise) that it is jurisdictional. To the contrary, the word "jurisdiction" does not appear anywhere in its title, headings or text. *Cf. Stern*, 564 U.S. at 480 ("we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such").

And the Gun Lake Act's legislative history corroborates that the statute is not jurisdictional. The House and Senate Reports each state the statute would not make any "changes in existing law." H.R. Rep. No. 113-590, at 5; S. Rep. No. 113-194, at 4.[10] The sections of the U.S. Code conferring subject matter jurisdiction over Petitioner's case were unaltered by the Gun Lake Act. *Cf. Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (subject matter jurisdiction concerns "the court's authority to hear a given *type* of case") (emphasis added).

But Respondents' argument about jurisdiction made in opposition to the Petition for Certiorari failed to address a more fundamental point: Section

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[10] After noting the Gun Lake Act would "void" Petitioner's lawsuit, the House Report referred to it as "an unusually broad grant of immunity from lawsuits pertaining to the Bradley property"—without any mention of jurisdiction. H.R. Rep. No. 113-590, at 2.

2(b) of the Gun Lake Act would violate the separation of powers *even if* the statute were ostensibly "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 City of Arlington v. FCC*, 133 S.Ct. 1863, 1868 (2013) ("Congress has the power *(within limits)* to tell the courts what *classes* of cases they may decide.") (emphasis added); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 125 (1981) (Brennan, J., concurring) ("Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress."); *United States v. Bitty*, 208 U.S. 393, 399-400 (1908) (explaining Congress may determine the Court's jurisdiction "having of course due regard to all the provisions of the Constitution"); *see also Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (statute denying federal courts jurisdiction to hear certain habeas corpus actions pending at the time of the statute's enactment effected an unconstitutional suspension of the writ of habeas corpus).

Respondents failed to identify any decision from this Court holding that Congress's general power to alter the jurisdiction of the federal courts precludes finding a particular jurisdiction-stripping statute violates separation of powers principles.

Moreover, *Klein*, 80 U.S. (13 Wall.) 128, would directly refute any such claim. There, the Court held that Congress had invaded the judicial power with a statute providing the Court "shall have no further jurisdiction of the cause, and shall dismiss the same

for want of jurisdiction." *Id.* at 143. 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.

Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction does not permit it to exercise judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities.[11]

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[11] Respondents claim the Gun Lake Act's "purpose" was to "provide certainty to the legal status of the [Bradley Property]," with Federal Respondents insisting that "[e]conomic certainty and the finality of governmental decisions are legitimate governmental purposes." Brief for the Federal Respondents in Opposition to the Petition 17; Intervenor-Respondent Tribe's Opposition to the Petition 6. While the Gun Lake Act certainly sought to settle "the legal status" of the property, its purpose was also 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); JA 59 (district court finding Congress had "a clear intent to moot this litigation"). The Gun Lake Act provided "certainty" only by "extinguish[ing] all rights to legal actions relating to the trust lands," S. Rep. No. 113-194, at 3, and "void[ing]" Petitioner's lawsuit. H.R. Rep. No. 113-590, at 2.

E. Petitioner Has Been Deprived of Individual Rights Which Structural Separation of Powers Principles Are Designed to Safeguard

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Having experienced and rejected a system of intermingled legislative and judicial powers, *Plaut*, 514 U.S. at 219, 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); *see also Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (it is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty'") (quoting *Bond*, 564 U.S. at 223). "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).

The threat to individual rights is particularly acute when the political branches intrude upon the judicial power. Separation of the judiciary was "to guarantee that the process of adjudication itself remained impartial," *Northern Pipeline*, 458 U.S. at 58, and Article III safeguards litigants' "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); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (Article III, Section 1's "guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal" interests); *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1219 (2015) (Thomas, J., concurring) ("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."); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 91 (1868) ("[T]o adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.").

The aspiration to secure a separate, independent judiciary was among the grounds for declaring independence from Great Britain. *See* The Declaration of Independence ¶¶ 10, 11 (1776); *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) ("The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department . . . was foreshadowed, and its vital character attested, by the Declaration of Independence . . . .").

Here, with Section 2(b)'s mandate that Petitioner's pending case be "promptly dismissed," Congress arrogated to itself the judicial role of deciding Petitioner's APA claim—and did so after this Court had already determined that his "suit may proceed." In so doing, Congress's separation of powers violation stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.

II. The Court Must Guard Against Separation of Powers Violations

"Time and again" this Court has "reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

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*, 133 S.Ct. at 1886 (Roberts, C.J., dissenting).[12] "[The

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[12] This Court's decisions are frequently shaped by a commitment to avoid encroaching on the powers assigned to the legislative and executive branches. *See, e.g., SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 960 (2017) ("applying laches within a limitations period

Court] may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring). "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring)).

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

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specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power"); *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) ("In order to remain faithful to th[e] tripartite structure [of the federal government], the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

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 next time Congress takes judicial power from Article III courts, the encroachments may not be so modest . . . ." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting).

CONCLUSION

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983). With the Gun Lake Act, Congress has "passed the limit which separates the legislative from the judicial power," but "[i]t is of vital importance that these powers be kept distinct." *Klein*, 80 U.S. (13 Wall.) at 147.

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,

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