

NOT YET SCHEDULED FOR ORAL ARGUMENT

**United States Court of Appeals
for the District of Columbia Circuit**

Case No. 15-5200

DAVID PATCHAK,

Plaintiff-Appellant,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and CARL J. ARTMAN, in his official capacity as Assistant Secretary of the United States Department of the Interior, Bureau of Indian Affairs,

Defendant-Appellees.

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor for Defendant-Appellees.

*On Appeal from the United States District Court for the District of Columbia
Case No. 1:08-CV-01331-RJL (Hon. Richard J. Leon, U.S. District Judge)*

REPLY BRIEF FOR APPELLANT

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28 U.S.C. § 2401(a)

SUMMARY OF ARGUMENT

This case concerns Congress's enactment of a new rule for a single pending case, a rule that has no prospective effect beyond dismissal of Appellant's action. The Gun Lake Act applies exclusively to Mr. Patchak's case, and by its terms, it changes the law in a manner that violates separation of powers. Deciding individual cases is a judicial function, not a legislative one. In their responsive pleadings, both the Federal Appellees and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Gun Lake Tribe" or "the Tribe") rely heavily on the misplaced notion that the District Court properly dismissed Mr. Patchak's lawsuit because the District Court lacked jurisdiction over the case, and that this ends all inquiry into the matter. This conclusion fails to directly address the constitutional issues presented. While the Gun Lake Act certainly purports to remove the jurisdiction of the District Court by dictating dismissal, the significant constitutional infirmities to which it fails prey render the Act, and any removal of

jurisdiction it intended to effect, invalid. The District Court erred in finding otherwise. The Appellees' conclusion is then that, even where constitutional violations exist that would invalidate the Act, the Court should simply construe the Gun Lake Act in a manner which upholds its constitutionality and maintains the removal of federal jurisdiction for Mr. Patchak's claim. This argument too is misguided, as there is no manner in which the Court may properly construe the Gun Lake Act, in whole or in part, to avoid rendering it unconstitutional. The sections of the Gun Lake Act are so interwoven and reliant upon one another that they are not able to be segregated in their reading.

The Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009), makes clear that the authority of the Secretary of the Interior Department to take land into trust on behalf of an Indian tribe is limited, and does not expand as broadly as the Federal Appellees and the Tribe assert. Specifically, *Carcieri* limits this authority under the Indian Reorganization Act ("IRA") to permit the Secretary to take land into trust only for Indian tribes that were under Federal jurisdiction in June of 1934, when the IRA was enacted. No argument asserted in either of the Appellees' response briefs alters this, nor could any argument do so. Similarly, the United States' and the Tribe's arguments do not and cannot change the factual history of the Gun Lake Tribe such that the record could establish that the Tribe was under Federal jurisdiction as of June 1934. As such, no

authority existed for the Secretary of the Interior to take any land into trust on behalf of the Gun Lake Tribe, including the land at issue in Mr. Patchak's lawsuit, the Bradley Tract, and the decision to do so was in contravention of both the IRA and *Carcieri*. The decision to have done so exceeded the Secretary's authority, and constituted an abuse of discretion on the part of the agency. It should therefore have been set aside by the United States District Court for the District of Columbia. *See* 5 U.S.C. § 706(2)(A) and (C)(a reviewing court must set aside an agency decision where the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if the decision is "in excess of statutory jurisdiction, authority, or limitations.").

The Appellees' arguments fail to credibly dispute Mr. Patchak's assignment of error to the District Court's denial of Plaintiff's Motion to Strike the Administrative Record Supplement. The Memorandum Opinion makes clear that, although the District Court denied Plaintiff's Motion to Strike without legal analysis, the District Court also relied upon, and cited to, the Administrative Record Supplement in reaching the decision to grant the Tribe's Motion for Summary Judgment. As set forth in Mr. Patchak's opening brief, well-established principles of agency law required the District Court to review the Secretary's decision based only upon the materials which were before the agency, and considered by the agency, at the time of the decision to take into trust the Bradley

Tract. Where the District Court specifically cited to the Administrative Record Supplement in a memorandum opinion in support of its decision, this requirement was not fulfilled. The District Court abused its discretion when it declined to conduct a thorough inquiry into the agency's decision-making process and permitted extraneous materials to be included in its review of the agency's decision.

ARGUMENT

I. The Court cannot construe the Gun Lake Act in a manner which avoids rendering it unconstitutional.

As set forth in Mr. Patchak's opening brief, and further detailed herein, the Gun Lake Act fails to pass constitutional muster for a number of reasons. The Act violates well-established constitutional principles that require separation of powers. By its terms, the Gun Lake Act only applies to Mr. Patchak's case. The Gun Lake Act also violates other individual, constitutionally protected rights of Mr. Patchak, including his right First Amendment right to petition, his Fifth Amendment right to due process, and the Act constitutes an unlawful bill of attainder, prohibited by Article I, section 9 of the Constitution. Despite these various and significant constitutional infirmities, the Appellees assert that the Gun Lake Act may simply be read by the Court in a manner that eliminates the offending provisions, yet still results in the removal of jurisdiction of the federal courts to hear Mr. Patchak's claim or decide it on the merits.

Contrary to the suggestions of the Appellees, no reading of the Gun Lake Act can serve to uphold the Act. At the time that the Gun Lake Act was passed, it is undisputed that Mr. Patchak's case was pending, and this was, in fact, noted by Congress in the legislative history of the Act.¹ Subsection (b) of the Gun Lake Act specifically refers to subsection (a):

SEC.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 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.

Pub. L. No. 113-179 (2014). The “land described in subsection (a)” clearly, and

¹ The record shows that testimony pertaining to the Gun Lake Act which was given before the House Committee on Natural Resources plainly acknowledged that the Gun Lake Act “would void a pending lawsuit [by neighboring landowner David Patchak].” Dkt. No. 92, Memorandum Opinion, p. 8. Moreover, given the timing of the Act, the six-year statute of limitations applicable to APA cases had expired, thus no other challenge by any other claimant could possibly be legitimately asserted.

only, refers to the Bradley Tract. It is clear that the Act, in its entirety, results in violations of Mr. Patchak's constitutional rights, and only Mr. Patchak's rights, as discussed in both the opening brief and Sections III-V, *infra*.

The Federal Appellees, in particular, attempt to advance an argument that it is irrelevant whether or not the Bradley Tract was taken into trust under an improper and capricious exercise of the Secretary of the Interior's authority, because Congress, as a result of its constitutionally granted powers, could have taken the Bradley Tract into trust on its own, outside of any statutorily created authority and regardless of whether the Gun Lake Tribe meets the requirements of the IRA and *Carcieri*. While this may be so, it is not what happened here. Congress did not exercise its plenary powers to place the land into trust. Instead, it did something quite different: It "ratified" and "reaffirmed" the actions of the Secretary of the Interior. Appellees do not advance the argument that the Secretary's power is plenary, and nor could they. Appellees' argument is conclusory, and reads congressional intent to take the land into trust under Congress's plenary powers, where the statute states that Congress has "ratified and confirmed" the actions of the Secretary of the Interior. The two are not the same. To argue that Congress acted under its constitutionally granted authority is in contravention of well-established principles of statutory interpretation. Had Congress intended to utilize the Gun Lake Act to take the Bradley Tract into trust

for the Tribe under its constitutional power to do so, then the statute would have said as much. Instead, Congress made the measured decision to act in a limited fashion and to “ratify and confirm” the Secretary’s actions. The Appellees cannot succeed in their argument to reach the sweeping conclusion that the taking of the Bradley Tract into trust for the Tribe, as effected by the Secretary of the Interior and challenged by Mr. Patchak, was proper because Congress “could have done so anyway.”

II. The Gun Lake Act does not render the waiver of sovereign immunity granted under the APA inapplicable to Mr. Patchak’s case.

Federal Appellees assert that the waiver of sovereign immunity effectuated by the Administrative Procedure Act has been revoked through Congress’s enactment of the Gun Lake Act, and in light of this revocation, Mr. Patchak’s suit cannot proceed. Federal Appellees’ Response Br. at 19-22. The government’s argument that sovereign immunity is revoked ignores the plain language of the APA.

The APA is a general waiver of the federal government’s immunity from suit “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.” 5 U.S.C. § 702. As authorized under the APA, Mr. Patchak’s suit objects to an official action and determination of the Secretary of the Interior and seeks only non-monetary relief. The APA also provides that its waiver

of sovereign immunity is inapplicable “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” The government seeks to apply this “carve out” provision here and asserts that, by virtue of the Gun Lake Act requiring dismissal of Mr. Patchak’s case, sovereign immunity bars Mr. Patchak’s actions under the APA. To demonstrate that the government’s arguments are ill-conceived, we need look no further than the language of the Gun Lake Act itself.

Waivers of sovereign immunity are to be strictly construed and “cannot be implied but must be unequivocally expressed.” *United States v. King*, 395 U.S. 1, 4 (1969). In order for the APA’s carve-out provision to apply, the Gun Lake Act, if it survives Mr. Patchak’s constitutional challenges, must itself be a statute that “grants consent to suit.” Moreover, it must expressly, not impliedly, grant consent to suit. In fact, the Gun Lake Act does just the opposite. By its terms, it bars Mr. Patchak’s suit and therefore is not a statute that grants consent to suit as expressly required by the carve-out provision of the APA upon which the government relies. Under these circumstances, the waiver of sovereign immunity permitting Mr. Patchak’s suit under the APA is not affected by the Gun Lake Act.

III. The Gun Lake Act violates Article III provisions pertaining to separation of powers between Congress and the judiciary because it directs an outcome in a judicial matter.

The Federal Appellees gloss over the relevance of *U.S. v. Klein*, 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871), despite the fact that *Klein* both remains good

law, and, as recognized by the District Court in the Memorandum Opinion at issue herein, is the “seminal case” on the issue of separation of powers where the legislature has impermissibly coopted judicial powers and responsibilities by enacting legislation which mandates a particular outcome of a legal matter. Dkt. No. 92, Memorandum Opinion, p. 10.

Despite Appellees’ attempt to portray his arguments otherwise, Mr. Patchak has given full recognition to the fact that Congress may amend substantive laws, even when doing so will affect pending litigation. However, he is equally correct in his assertion that there is an important and notable difference between an amendment to an existing law which will effectuate a change in the underlying law and a new law, which compels a particular finding or result. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.E.2d 328 (1995); *Jung v. Ass’n of Am. Medical Colleges*, 184 Fed.Appx. 9, 12 (D.C. Cir. 2006) (“Congress may amend substantive laws, even when doing so affects pending litigation”); *Nat’l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001) (internal citations omitted). Furthermore, as discussed in Section I, *supra*, Congress did not exercise its plenary authority to take the Bradley Tract into trust on behalf of the Gun Lake Tribe when it passed the Gun Lake Act, as the language of the Act makes clear that, instead of stating that Congress was taking the land into trust as

an exercise of its constitutional authority, Congress “ratified and confirmed” the decision of the Secretary of the Interior. That decision, as argued in Mr. Patchak’s opening brief and herein, was in excess of the Secretary’s authority, was in contravention of the law, and was therefore arbitrary, capricious, and an abuse of discretion.

Appellees also overlook another crucial event in the procedural and legal history of this case, which serves as important support for Mr. Patchak’s argument that the Gun Lake Act violates constitutionally mandated separation of powers. As discussed in greater detail in Section V, *infra*, Mr. Patchak has obtained a final judgment in this matter, in the Supreme Court’s June 18, 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012), where it was decided that Mr. Patchak had prudential standing to bring a lawsuit which challenged the Secretary of the Interior Department’s 2005 decision to take the Bradley Tract into trust on behalf of the Gun Lake Tribe. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012). In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995), the Supreme Court examined the issue of whether the FDIC Improvement Act violated constitutional principles of separation of powers where it required federal courts to reopen and reexamine previously settled cases. The Court found that Article III of the United

States Constitution clearly establishes that the judiciary has the sole power to render judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-28, 115 S. Ct. 1447, 1456-57, 131 L. Ed. 2d 328 (1995). Where the judiciary has rendered a final judgment, “a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227, 115 S. Ct. 1447, 1457, 131 L. Ed. 2d 328 (1995) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976)). As *Plaut* makes clear, Congress cannot retroactively change the law applicable to the final decision of the judiciary that Mr. Patchak has standing to bring the instant lawsuit.

The Gun Lake Act impermissibly operates to do just that, in violation of Article III’s separation of powers. Leaving nothing for the court to adjudicate, Congress chose to change the rules for only a single person and a single case, improperly enacting a statute that had no forward-looking effect beyond requiring the court to dismiss Mr. Patchak’s case. The Constitution grants Congress broad legislative authority under Article I; however, the power to decide individual cases and controversies belongs to the judiciary under Article III. Article III grants the judiciary, not Congress, the power to decide “cases” and “controversies.” The

Framers of the Constitution chose those two words to distinguish the judicial power of deciding specific cases from the legislative power of enacting general law. Legislation that purports to change the law for a single pending case, with no prospective impact beyond the dismissal of that case, is inconsistent with that design; that is exactly the effect of the Gun Lake Act. The Gun Lake Act effectively dictates the outcome of one case. It directs the court to ignore otherwise governing law and follow a different rule, in this one case.

While Article III “safeguards the role of the Judicial Branch,” *CFTC v. Schor*, 478 U.S. 833, 850 (1986), “[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed,” *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). “When structure fails, liberty is always in peril.” *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment). The Gun Lake Act is a structural failure of great proportions.

Finally, simply because Appellees’ disagree with Mr. Patchak’s constitutional challenges to the Gun Lake Act, this does not conclusively establish their position to be true, and similarly does not mean that Mr. Patchak’s just exceptions arguments, which distinguish his case from *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), are to be disregarded or automatically fail. The fact remains that, in the *National Coalition to Save Our*

Mall decision, this Court clearly distinguished the matter from *Klein*, on the grounds that the statute at issue in *Klein* was subject to constitutional infirmities, whereas no such problems existed with respect to the statute at issue in *National Coalition to Save Our Mall*. *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (quoting *Klein*, 80 U.S. at 147). It was an error for the District Court to ignore this important distinction. *National Coalition to Save Our Mall* does not dictate the results in this case, as Appellees argue it does and as the District Court incorrectly concluded.

IV. The Gun Lake Act violates Mr. Patchak's First Amendment right to petition because it forecloses any meaningful options to challenge governmental decisions in this matter.

The Appellees' arguments that Mr. Patchak has failed to credibly assert a violation to his First Amendment right to petition relies heavily upon their argument that, because Congress has plenary authority to alter the jurisdiction of the federal courts, Mr. Patchak could not possibly raise any viable challenge to the Gun Lake Act, the Secretary's decision regarding the Bradley Tract, or any other issue in this matter. As Mr. Patchak has repeatedly argued, this is not true.

The Tribe appears to argue that, because it does not agree with Mr. Patchak's legal claims and arguments, its conclusion must be accepted as correct, which in this instance is that Mr. Patchak is entitled to no First Amendment protections of his right to petition the government in a meaningful way to redress

the improper decision regarding the Bradley Tract. Tribe's Response Br. at 35. This position, that because Mr. Patchak's claims may not ultimately succeed in a court of law, they are not entitled to be heard, is similar to the position of the Federal Appellees, and that of the District Court in rendering its decision on this issue. The Federal Appellees argue that, since Mr. Patchak has acknowledged that the First Amendment does not guarantee any right to a favorable outcome, his arguments that other avenues of petitioning are futile and insufficient, are therefore not credible. The District Court adopted the same faulty reasoning in reaching the conclusion that the Gun Lake Act does not abridge Mr. Patchak's First Amendment right to petition the government, as the District Court focused only on whether the Gun Lake Act prohibits Mr. Patchak from receiving a *favorable* outcome in his petition. This position fails to examine the fundamental issue, which is that the First Amendment right to petition guarantees citizens, such as Mr. Patchak, the right to actively participate in a democratic government. *American Bus. Ass'n v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011). It is difficult to accept the assertion that a citizen has access to "active participation" where doors to the courts are closed, grievances to executive agencies fall upon deaf ears, and where Congress has effectuated many of these restrictions. At a minimum, the government must have a mechanism for receiving complaints and grievances from the public in order to protect the right to petition. It is a long-standing and well-

accepted legal premise that “the law does not require the doing of a futile act.” *Ohio v. Roberts*, 448 U.S. 56, 74 (1980); *United States v. Tirado-Tirado*, 563 F.3d 117, 123 (5th Cir. 2009); *see also*, *N.Y., New Haven & Hartford R.R. Co. v. Iannotti*, 567 F.2d 166, 180 (2d Cir. 1977); *Cary v. Curtis*, 44 U.S. 236, 246 (1845). It should therefore follow that the law does not recognize the doing of a futile act as an appropriate substitution for a constitutionally protected right.

V. The Gun Lake Act violates Mr. Patchak’s Fifth Amendment right to due process because he has a protected property interest in this litigation.

In an event far more significant than the Federal Appellees and the Tribe wish to acknowledge, in its June 18, 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012), the United States Supreme Court determined that Mr. Patchak had standing to challenge the Secretary of the Interior Department’s 2005 decision to take the Bradley Tract into trust on behalf of the Gun Lake Tribe. *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S.Ct. 2199, 183 L.E.2d 211 (2012). That decision also determined that Mr. Patchak may proceed with his instant lawsuit pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, and remanded the case back to the District Court. *Id.* Both Appellees question Mr. Patchak’s reasoning in addressing this earlier decision, and take the position that the Supreme Court’s decision does not create any protections or rights which would give rise to a Fifth Amendment due process claim. Federal Appellees’

Response Br. at 52-53; Tribe's Response Br. at 38-39. These assertions are without merit, however, as a further examination of the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* supports Mr. Patchak's position that he has a vested right in pursuing his lawsuit. The *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* decision is a final, unreviewable judgment by the highest court in the land which "settle[d] the rights of the parties and dispose[d] of all issues in controversy" in that particular matter.² The right of the party, Mr. Patchak, was determined: he had standing to proceed with his lawsuit. The issue of whether Mr. Patchak had such standing was the sole "issue in controversy" in that matter, and it was decided by the Supreme Court of the United States. Nothing could be more "final and unreviewable," yet the Federal Appellees and the Tribe maintain that, somehow, no final judgment resulted from this decision. Federal Appellees' Response Br. at 52; Tribe's Response Br. at 38-39. The decision reached in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* satisfies the elements to represent a final judgment in which Mr. Patchak may assert a property right and challenge the lack of due process with which that property right was extinguished.

² Examining the decision within the elements of a "final judgment" as defined by Black's Law Dictionary to be "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment," a definition cited by the Tribe in support of its argument, actually supports Appellant's position, not Appellee's position. Tribe's Response Br. at 38, footnote 9.

The Tribe's attempt to use *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) to its advantage is unsuccessful as well. In that decision, the Supreme Court explained that “[a]rguably,” a state tort claim is a “species of ‘property’ protected by the Due Process Clause.” *Martinez v. California*, 444 U.S. 277, 281-282, 100 S.Ct. 553, 556-557, 62 L.Ed.2d 481 (1980). Merely because the Supreme Court declined to specifically determine whether or not the right to sue constituted a species of property in that case and context does not, as the Tribe seems to argue, mean that the Supreme Court conclusively held that the right to sue does *not* constitute property. Tribe's Response Br. at 39. It means simply that: the Court declined to render a decision at that time and in that matter. Nothing about this prevents a court from doing so in a future case, the instant one included.

The Federal Appellees also misapply the analysis in their cited cases. The Federal Appellees assert that *Logan v. Zimmerman Brush Co.*, and the string cite of preceding cases addressing the similar issue of what process is owed to a plaintiff when the legislature extinguishes their interest in a tort cause of action,³ stand for the proposition that, so long as the legislature has acted to pass a law, sufficient

³ Specifically, the Federal Appellees cite to *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979); *Flemming v. Nestor*, 363 U.S. 603, 609-610 (1960); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312, n.8, 315-316 (1945); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), in support of their argument.

process has been given and no plaintiff could argue otherwise. This suggests that, under no set of facts or circumstances, could a citizen challenge the enactment of any legislation. This cannot be, and to give the Federal Appellees' overreaching argument this credence would weaken, if not eliminate, the guarantee of basic fairness which forms the cornerstone of the Due Process Clause.

A closer examination of some of the cases on which the Federal Appellees rely is illustrative of the Federal Appellees' overreach in their conclusion. In *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915), a case cited within *Logan v. Zimmerman Brush Co.*, the Court examined "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S. Ct. 141, 142, 60 L. Ed. 372 (1915). The Court went on to explain that "[w]here a rule of conduct applies to *more than a few people*, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole." *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S. Ct. 141, 142, 60 L. Ed. 372 (1915) (emphasis supplied). This is

plainly distinguishable from the instant matter, wherein Mr. Patchak was the *sole* person to which the legislature's "rule of conduct applied." *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) does not address any issues of due process. In *Flemming v. Nestor*, 363 U.S. 603 (1960), which examined whether defeasance of accrued interests in Social Security benefits violated the Due Process Clause of the Fifth Amendment for those persons covered by the Social Security Act, the Supreme Court specifically acknowledged that, while under the facts and circumstances of this particular case no due process violations had occurred, "[t]his is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint." *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960). This is in notable contrast to the Federal Appellees' assertion that this, and the other cited cases, hold that where the legislature has acted, any process that is owed has been satisfied.

The Due Process Clause of the Fifth Amendment requires basic fairness in proceedings which deprive citizens of their property rights. This fairness can be granted through notice, the opportunity for the citizen to be heard at a meaningful time, and in a meaningful way, and for the citizen to receive a decision with evidentiary support. The final judgment which resolved the issue of whether Mr. Patchak had standing to bring the instant lawsuit entitled Mr. Patchak to the

reasonable expectation that he would, and could, be heard in his APA challenge to the Secretary's decision to take the Bradley Tract into trust.⁴ This standing provided Mr. Patchak with a non-trivial interest in his pending legal action, which is entitled to constitutional protection. *Martinez v. California*, 444 U.S. 277, 281-282, 100 S.Ct. 553, 556-557, 62 L.Ed.2d 481 (1980); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485, 108 S. Ct. 1340, 1345, 99 L. Ed. 2d 565 (1988) (explaining that, although an appellant's interest in an unpaid debt constitutes an "unsecured claim," "[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment"). Mr. Patchak had a legitimate claim of entitlement to his challenge to the Secretary's determination, and the enactment of the Gun Lake Act constituted an unlawful deprivation of his property interest in pursuing his rights. The District Court erred in its determination to the contrary.

⁴ An analogous situation may be found in *Stone v. F.D.I.C.*, 179 F.3d 1368 (Fed. Cir. 1999), in which the court found a government employee to have a protected property interest in his continued employment, under the applicable federal statutory scheme. The court noted that, while "Congress need not confer a property interest in public employment," that "once it does confer such an interest, it may not remove it without constitutional safeguards. *Stone v. F.D.I.C.*, 179 F.3d 1368, 1375 (Fed. Cir. 1999). Similar to the case at hand, where the APA has created a right to challenge agency decisions, and where the Supreme Court has rendered a final judgment that an individual – Mr. Patchak – has standing to bring that challenge, constitutional safeguards must exist to protect that interest.

VI. The Gun Lake Act constitutes a bill of attainder because it is undeniably specific to Mr. Patchak and adversely affects his property right.

The known and intended purpose of the constitutional prohibition on bills of attainder is to prevent “trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442 (1965). Yet that is precisely what has occurred to Mr. Patchak with the passage of the Gun Lake Act.

It is undisputed that Mr. Patchak can easily meet the first element of the two-step inquiry involved in analyzing whether a law, here, the Gun Lake Act, constitutes an unconstitutional bill of attainder. This first step of the analysis examines whether the law applies with specificity. *Foretich v. United States*, 352 F.3d 1198, 1217 (D.C. Cir. 2003). The District Court recognized in its Order that “the Gun Lake Act applies specifically to suits involving the Bradley Tract,” and the record clearly establishes that Mr. Patchak’s case was, at all times, the only lawsuit pending in the courts which dealt with the Bradley Property. Dkt. No. 92, Memorandum Opinion, p. 19. The Federal Appellees similarly acknowledge that “Mr. Patchak is correct that as a factual matter, his lawsuit was the only challenge to the Secretary’s decision pending when the [Gun Lake Act] was enacted,” and that Congress was “clearly aware” of Mr. Patchak’s pending lawsuit. Federal Appellees’ Response Br. at 55. The Tribe declines to even address the specificity requirement as applied to Mr. Patchak, perhaps in recognition of the fact that there can be no doubt that this element has been met.

While acknowledging that Mr. Patchak has met the burden to establish specificity, the Federal Appellees' argument that Mr. Patchak must somehow show that he is a "target" of the Gun Lake Act, a fact that is established, nonetheless misstates the requisite legal analysis, and also ignores the undisputed facts and circumstances of this matter.⁵ Federal Appellees' Response Br. at 55. The law requires that the Gun Lake apply with "specificity" to Mr. Patchak, and that is clearly shown. Additionally, at the time that the Gun Lake Act was enacted, on September 26, 2014, the statute of limitations applicable to bringing any actions challenging the Secretary's 2005 decision to take the Bradley Tract into trust had long since passed.⁶ Even where the Gun Lake Act purports to eliminate a cause of action for any and all claimants seeking to challenge the Secretary's decision, it is clear that the only such claimant was, and ever could be, Mr. Patchak.

With respect to the second element of analysis for a bill of attainder, which looks to whether the law at issue imposes a punishment upon the "specific" individual, courts will assess whether a statute inflicts punishment within "the historical meaning of legislative punishment." *Foretich v. United States*, 352 F.3d

⁵ Mr. Patchak maintains that Congress did, in fact, seek to target him for challenging the Secretary of the Interior Department's decision to take the Bradley Property into trust on behalf of the Tribe, as asserted in his opening brief; however, there is no such requirement to prove that he was a "target," rather he must merely prove that the law applied with specificity, a burden he has easily met.

⁶ 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

1198, 1217-18 (D.C. Cir. 2003). The definition of “legislative punishment” has been judicially expanded throughout the years to include “legislative acts that sentenced specific persons to penalties short of death,⁷ including banishment, deprivation of the right to vote, corruption of blood, or confiscation of property.” *Foretich*, 351 F.3d at 1217 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810); *United States v. Brown*, 381 U.S. 437, 441-42 (1965)). As the lone target of the Gun Lake Act, Congress intentionally punished Mr. Patchak for bringing the suit and pursuing it to the Supreme Court, no different from the exposure of the Appellant (with reputational injuries) in the *Foretich* case. Mr. Patchak was singled out for legislative punishment, and rather than act comprehensively with a legislative fix for *Carciari*, Congress chose to target Mr. Patchak for simply exercising his rights.

As discussed in both his opening brief and in Section V, *supra*, Mr. Patchak has a property interest in the pending litigation, one that is directly and intentionally affected in an adverse manner by the passage of the Gun Lake Act. Where the law seeks to, and effectively does, extinguish the protected property

⁷ In the early days of United States legal history, the law defined a bill of attainder as “a legislative act that sentenced a named individual to death without benefit of a judicial trial.” *Foretich*, 351 F.3d at 1216-17 (citing *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998)). This definition was later expanded to include other widely-recognized forms of punishment established by the legislature.

right of one, specific individual, it clearly amounts to an impermissible and unconstitutional bill of attainder.

VII. The Court should remand this matter to the District Court with instructions to vacate the Secretary's decision.

As set forth in his opening brief, Mr. Patchak respectfully asks to have the case remanded to the District Court. Because the Gun Lake Act is unconstitutional, for the reasons set forth in Mr. Patchak's opening brief, as well as herein, and Mr. Patchak asks that the remand to the District Court be accompanied by instructions from this Court to vacate the Secretary of the Interior's decision to take the Bradley Tract into trust on behalf of the Tribe, as such a decision exceeded the scope of her authority under the Indian Reorganization Act, as interpreted by the Supreme Court in *Carciari. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009). Such action constitutes an abuse of discretion on the part of the Secretary and the agency, and cannot withstand review under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) and (C).

VIII. The District Court abused its discretion when it relied upon the Administrative Record Supplement in reaching its decision, and then improperly denied Plaintiff's Motion to Strike the Administrative Record Supplement without analysis.

Contrary to the assertions of the Federal Appellees and the Tribe, the District Court both consulted, and relied upon, the Administrative Record Supplement in reaching its decision below. The Memorandum Opinion makes this clear. On page

6 of the Memorandum Opinion, the District Court notes that an event which “altered the legal landscape” of this case occurred on September 3, 2014, the day on which the Secretary issued an Amended Notice of Decision pertaining to two other parcels of land to be taken into trust on behalf of the Tribe, citing to the “SAR” in support thereof. Dkt. No. 92, Memorandum Opinion, p. 6. The Memorandum Opinion also included footnote 4, which explains that “[r]eferences to “SAR” are to the Administrative Record Supplement.” *Id.* It is improper for the Federal Appellees to represent that the supplemental record was not relied upon in the District Court’s decision, or for the Tribe to state that the issue of the Administrative Record Supplement is not properly before this Court on appeal. Federal Appellees’ Response Br. at 65, 67-68; Tribe’s Response Br. At 48.

Compounding the fact that the District Court plainly incorporated the Supplemental Administrative Record into its decision to deny Plaintiff’s Motion for Summary Judgment and to grant Intervenor-Defendant’s Motion for Summary Judgment, the District Court also plainly failed to conduct any meaningful legal analysis, or any real analysis at all, before denying Plaintiff’s Motion to Strike the Administrative Record Supplement. The law is clear that the record must reflect reasoned decision-making on the part of the deciding agency, and any decisions which do not meet this requirement may be found to be arbitrary and capricious. *City of Kansas City v. Dep’t of Hous. & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir.

1991). Where, as here, a court reviewing an agency's decision-making conducts no analysis at all, that court cannot be found to have fulfilled its obligation to conduct a thorough inquiry into the agency's decision-making process. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The District Court failed to meet its obligations with respect to review of the Secretary of the Interior's decision-making process in this matter. This constitutes an abuse of discretion, warranting reversal and instructions from this Court that the Administrative Record Supplement be stricken from further proceedings in this matter.

CONCLUSION

WHEREFORE, Appellant, David Patchak, respectfully requests that the District Court's Order be REVERSED and that the Court find that the Gun Lake Act is unconstitutional as described herein. Mr. Patchak also requests that this honorable Court REMAND the case to the United States District Court for the District of Columbia, with instructions to VACATE the Secretary of the Interior's decision to take the Bradley Tract into trust on behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians because the decision to do so exceeded the scope of the Secretary's legal authority. Mr. Patchak also respectfully asks this Court to REVERSE the District Court's denial of his Motion to Strike the Administrative Record Supplement and instruct that the Administrative Record

Supplement not be considered in any further review by the District Court of the Secretary's decision.

Respectfully submitted,

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March 7, 2016

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**United States Court of Appeals
for the District of Columbia Circuit**
David Patchak v. Sally Jewell, No. 15-5200
CERTIFICATE OF SERVICE

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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Any required paper copies will be filed with the Court on the same date via Express Mail.

March 7, 2016

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