Not yet scheduled for oral argument

Case No. 15-5200

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK,
Plaintiff-Appellant

v.

S. M. R. JEWELL, in her official capacity as Secretary, United States Department of the Interior; LAWRENCE ROBERTS, in his official capacity as Assistant Secretary, United States Department of the Interior, Bureau of Indian Affairs,
Defendant-Appellees

and

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

On appeal from the United States District Court
for the District of Columbia

RESPONSE BRIEF OF FEDERAL APPELLEES

JOHN C. CRUDEN
Assistant Attorney General

LANE N. MCFADDEN
United States Department of Justice
Environment & Natural Resources Div.
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022

Of counsel:
JAMES V. DeBERGH
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties, intervenors, and *amici* appearing in this Court and the district court are listed in the Brief for Appellant.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

C. Related Cases

This case was previously before this Court in *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011), on appeal from the United States District Court for the District of Columbia. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009). The United States Supreme Court affirmed this Court's decision and remanded to the district court for further proceedings. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

Counsel is aware of no other related cases currently pending in this Court or any other court.

s/ LANE N. MCFADDEN
United States Department of Justice
Environment & Natural Res. Div.
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

*Authorities on which we chiefly rely are marked with asterisks.

STATEMENT OF JURISDICTION

Plaintiff David Patchak filed suit in the United States District Court for the District of Columbia to challenge a decision by the Secretary of the United States Department of the Interior (the "Secretary") to take a parcel of land into trust for the Match-E-Be-Nash-She-Wish Tribe of Pottawatomi Indians (the "Tribe"). Dkt. 1, JA ___-___ (Complaint). Mr. Patchak alleged violations of provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 479, and sought review under the Administrative Procedure Act, 5 U.S.C. §§ 702, 705. The district court properly exercised jurisdiction at the time pursuant to 28 U.S.C. § 1331.

However, after passage of the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014) (the "Gun Lake Act"), the district court no longer had subject-matter jurisdiction over Mr. Patchak's claim. On June 17, 2015, the district court dismissed the case for lack of subject-matter jurisdiction. Dkt. 92, JA ___-___; Dkt. 93, JA ___. Mr. Patchak filed a timely notice of appeal on July 14, 2015, Fed. R. App. P. 4(a)(1)(B), and this Court has jurisdiction to review the district court's final judgment. 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

All pertinent statutes are provided in the Addendum accompanying the opening brief.

STATEMENT OF THE ISSUES

Using authority delegated by Congress in the Indian Reorganization Act of 1934, the Secretary took property into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, on which the Tribe now operates a casino. Mr. Patchak, a non-Indian who lives three miles from the property, challenged the Secretary's decision. While his suit was pending, Congress enacted the Gun Lake Act, which "ratified and confirmed" the Secretary's decision, and also required that any action challenging the trust status of the property could not be maintained in court "and shall be promptly dismissed." Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(a)-(b). The district court then dismissed Mr. Patchak's suit. This appeal presents the following issues:

1. May Congress withdraw the waiver of sovereign immunity for certain cases that it previously granted when enacting the Administrative Procedure Act?

2. Is the Gun Lake Act's provision that challenges to the Secretary's decision may not be heard by a federal court a valid exercise consistent with Congress's plenary authority to define the jurisdiction of the inferior courts under Article III, sec. 2 of the U.S. Constitution? Does it otherwise interfere with the function of courts in violation of the separation of powers established by Article III of the U.S. Constitution?
3. Does the Gun Lake Act violate Mr. Patchak's First Amendment right to petition the government for a redress of his grievances?
4. Does the Gun Lake Act deprive Mr. Patchak of due process guaranteed him by the Fifth Amendment?
5. Is the Gun Lake Act a Bill of Attainder prohibited by Article I, sec. 6 of the U.S. Constitution?
6. Did the district court abuse its discretion in denying Mr. Patchak's motion to strike supplemental documents submitted to the district court by the United States?

STATEMENT OF THE CASE

I. Factual background

A. The Indian Reorganization Act delegates authority to the Secretary to take land into trust for the benefit of Indians.

Mr. Patchak's complaint sought review of a decision by the Secretary to take a parcel of land into trust for the Tribe pursuant to Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465. *See* Dkt. 1, JA ___-___. The Indian Reorganization Act was a "sweeping" piece of legislation intended to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Among its provisions authorizing Indian tribes to adopt their own constitutions, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477, is a provision authorizing the Secretary to acquire lands "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. § 465. The Indian Reorganization Act defines "Indian" for purposes of the Act to include, *inter alia*, "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

B. The Secretary took land into trust for the benefit of the Tribe.

The Tribe is a Band of Pottawatomi Indians, which was led by Chief Match-E-Be-Nash-She-Wish in the early nineteenth century, residing initially near present-day Kalamazoo, Michigan. *See Proposed Findings for Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan*, 62 Fed. Reg. 38,113 (July 16, 1997); *MichGO v. Kempthorne*, 525 F.3d 23, 26 (D.C. Cir. 2008). A series of treaties in the 1820s and 1830s, difficulties with their implementation, and other federal removal efforts resulted in the Tribe being landless. The Tribe was deemed ineligible to organize under the Indian Reorganization Act after its passage in 1934 because the Tribe had no commonly-owned reservation land and because of the Department of the Interior's fiscal concerns with implementing the Indian Reorganization Act on behalf of Indians residing in Lower Michigan.

At that time, the Department of the Interior stopped providing services or benefits to the Tribe, "in great part because of the lack of financial resources of the federal government." *Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as*

Distinct Federally Recognized Tribes, S. Rep. No. 103-260, at 3-4 (1994). A decision in 1940 by the Commissioner of Indian Affairs not to extend recognition under the Indian Reorganization Act to the Indians of Michigan's Lower Peninsula effectively resulted in the withdrawal of federal services for the Tribe. But Congress never took any action to terminate the United States' relationship with the Tribe.

In 1992, the Tribe began pursuing federal acknowledgment under 25 C.F.R. Part 83. The Department of the Interior concluded that it did, and the Department's final determination acknowledging the Tribe became effective in 1999. 63 Fed. Reg. 56,936 (Oct. 23, 1998).

After obtaining federal recognition, the Tribe submitted an application to the Department of the Interior in which it asked the United States to take into trust a 147-acre tract of land in the Township of Wayland, Michigan (the "Bradley Property"). *See Notice of Final Agency Determination to Take Land into Trust 25 CFR Part 151*, 70 Fed. Reg. 25,596 (May 13, 2005). The Department announced its decision to take this land into trust for the Tribe, following a 30-day period during which interested parties could seek judicial review of this determination. *Id.* at 25,597. During that period, an organization known

as Michigan Gambling Opposition ("MichGO") sued the Secretary of the Interior, alleging that the decision to take the Bradley Property into trust for the Tribe violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701. MichGO also alleged that the statute authorizing the Secretary of the Interior to take land into trust for Indians, 25 U.S.C. § 465, is an unconstitutional delegation of legislative authority to the Executive. The district court rejected all of these claims, *MichGO v. Norton*, 477 F.Supp. 2d 1 (D.D.C. 2007), and this Court affirmed. *MichGO*, 525 F.3d 23 (D.C. Cir. 2008).

II. Procedural history of Mr. Patchak's suit

Shortly thereafter, Plaintiff-Appellant David Patchak filed a complaint alleging that the Secretary's decision to take the Bradley Property into trust violated 25 U.S.C. § 465 because the Tribe was not federally recognized when the Indian Reorganization Act was enacted in 1934. Dkt. 1 at 8, JA ___. The complaint sought review of the Secretary's decision pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Mr. Patchak alleged a number of "negative

effects of building and operating the anticipated casino in Mr. Patchak's community," including "an irreversible change in the rural character of the area," "increased traffic," "increased property taxes," "weakening of the family atmosphere of the community," and several other alleged harms. Dkt. 1 at 3 ¶ 9, JA ___.

Two significant events occurred shortly after Mr. Patchak's complaint was filed. First, when *certiorari* was denied in *MichGO*, the Secretary took the Bradley Property into trust for the Tribe and the Tribe began constructing its gaming facility. That facility, the Gun Lake Casino, has now been in operation for approximately five years. The second significant event was a decision by the United States Supreme Court interpreting Section 5 of the Indian Reorganization Act to limit the 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 [Indian Reorganization Act] was enacted in June 1934." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009).

A. The district court first dismissed for lack of standing.

The district court dismissed Mr. Patchak's suit for lack of prudential standing, holding that his alleged injuries were not within the "zone of interests" protected by the relevant provision of the Indian Reorganization Act. Dkt. 56 at 8-10, JA ___. The district court also expressed serious reservations about its subject-matter jurisdiction, given that the Quiet Title Act reserves the United States' sovereign immunity to suits challenging its title to Indian trust lands. *Id.* at 10 n.12. This Court reversed, however, and the United States Supreme Court affirmed this Court's reversal. *Match-E-Be-Nash-She-Wish Band of Pottawatomi v. Patchak*, 132 S. Ct. 2199 (2012). The Supreme Court held that Mr. Patchak had established standing to allege "a garden-variety APA claim" that the Secretary's decision to take the Bradley Property into trust violated the Indian Reorganization Act. *Id.* at 2208. The Supreme Court also held that Mr. Patchak's suit could proceed despite the APA's provision that its waiver of immunity to suit "does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." *Id.* at 2204-05. The Quiet Title Act's waiver of sovereign immunity "does not apply

to trust or restricted Indian lands," 28 U.S.C. § 2409a(a), but the Supreme Court held that the APA did not preclude Mr. Patchak's suit because he claims no real property interest in the Bradley Property and is therefore not bringing a quiet title action.

The United States expressed great concern that "allowing challenges to the Secretary's trust acquisitions would pose significant barriers to tribes' ability to promote investment and economic development on the lands." *Patchak*, 132 S. Ct. at 2209. The Supreme Court found "[t]hat argument is not without force, but it must be addressed to Congress." *Id.* In 2014, Congress spoke to this question with respect to the Bradley Property. Congress enacted the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), confirming that the Bradley Property is appropriately considered trust land. Pub. L. 113-179. And it further provides that a federal court must dismiss any pending action relating to that decision. *Id.*

The Gun Lake Act reads in relevant part:

> (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. 25,596 (May 13, 2005)) is reaffirmed as trust

> land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS. – Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. 113-179, 128 Stat. 1913, Sec. 2 (2014).

B. On remand, the district court dismissed for lack of jurisdiction pursuant to the Gun Lake Act.

Shortly after this statute was enacted, the parties filed cross-motions for summary judgment. The district court granted summary judgment to the United States and the Tribe, holding that the Gun Lake Act deprived it of any jurisdiction over Mr. Patchak's claim. Dkt. 92, JA ___. Although Mr. Patchak had argued that the Gun Lake Act was unconstitutional for a number of reasons, the district court disagreed. First, the district court held that the statute did not violate the separation of powers doctrine by improperly imposing on the function of the judiciary. Dkt. 92 at 12, JA ___. The Gun Lake Act does not "mandate a particular finding of fact or application of law to fact," but instead "withdraws this Court's jurisdiction to make any

substantive findings whatsoever." *Id.* Relying on an analogous case from this Court, *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001), the district court held that the Gun Lake Act's jurisdiction-stripping provision was an appropriate exercise of Congress's authority to "define and limit the jurisdiction of the inferior courts of the United States." *Id.* at 13 (quoting *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938)).

Mr. Patchak also asked the court to invalidate the Gun Lake Act as an impermissible attempt by Congress to "direct the court how to interpret or apply pre-existing law." *Id.* at 13 (citation omitted). The district court declined, finding that in the Gun Lake Act, "Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same." Dkt. 92 at 14, JA ___. It also held that the statute did not violate Mr. Patchak's First Amendment Right to Petition, as that right does not entitle Mr. Patchak to a lawsuit in federal court where nothing restricts his right to petition federal agencies directly. *Id.* at 16, JA ___. Nor did the Gun Lake Act violate Mr. Patchak's Fifth Amendment right to Due Process, as "no authority" supports "the proposition that the ability to bring a lawsuit constitutes

the type of vested property right that the Fifth Amendment due process clause protects." *Id.* at 17-18, JA ___-___. Finally, the district court held that the Gun Lake Act is not an unconstitutional Bill of Attainder, prohibited by Article I § 9, clause 3 of the Constitution. *Id.* at 18-19, JA ___-___. The court therefore held the Gun Lake Act to be constitutionally permitted, and dismissed the case for lack of jurisdiction. Mr. Patchak timely appealed to this Court.

SUMMARY OF ARGUMENT

The district court lacked jurisdiction over this matter and properly dismissed the complaint. It did so in response to Congress's clear and direct statutory command, contained in the Gun Lake Act. Pub. L. 113-179, sec. 2(b). Notably absent from Mr. Patchak's opening brief is any argument that this Act does not apply to the single claim put forward in Mr. Patchak's complaint. Also missing is any attempt to address the theory on which the district court upheld the constitutionality of the Gun Lake Act, which is that subsection (b) is nothing more than an exercise of Congress's inherent authority to determine the contours of the jurisdiction of the inferior federal courts. U.S. Const. Art. III § 2, cl.

1. Although Mr. Patchak reargues the merits of this case in his opening brief, those issues are not before this Court on appeal.

The opening brief's position that the Gun Lake Act violates the separation of powers doctrine is mistaken. However, this Court, wary as it must be of unnecessarily invalidating statutes on constitutional grounds unnecessarily, need not address that question directly. This case arises under the Administrative Procedure Act, which waives the United States' sovereign immunity to certain suits against it. But Congress retains the power to amend or withdraw that waiver, and it has done so here with respect to this particular complaint. Congress's power to do so does not derive directly from the Constitution, and the opening brief identifies nothing in the Constitution that would forbid Congress's exercise of that power here. Therefore, the separation of powers issues raised in the opening brief, which might be raised in the context of a suit between two private parties, need not be addressed here because of the existence of sovereign immunity. Congress has no longer waived its immunity to suits challenging the trust status of the Bradley Property, the APA expressly precludes a suit where the APA's

general waiver is undone by another statute, 5 U.S.C. § 702, and the district court may therefore be affirmed.

Even if this Court addresses the separation of powers issue, however, it may readily affirm the district court. Congress acted in subsection (a) of the Gun Lake Act to use its own inherent authority to declare land to be in trust for the benefit of Indians, and thus amended the applicable law in a way that changes the outcome of Mr. Patchak's original lawsuit. This is well within the boundaries of Congress's power to legislate without infringing on the authority of the courts to decide cases or controversies. Additionally, Congress declared that no suit could be maintained to challenge that trust status decision, avoiding any concern that it might be directing the courts to reach a particular decision. Instead, this is simply not a case or controversy that falls within the Article III jurisdiction of the district court or this Court, and it was properly dismissed.

The opening brief's other objections to the Gun Lake Act may be quickly dispensed with. Mr. Patchak has demonstrated no infringement on his First Amendment right to petition the Government for a redress of his grievances, as that right does not include a guarantee that every

grievance may be subjected to judicial review in federal courts. Nor does it guarantee a favorable outcome as a result of petitioning a federal agency. Furthermore, consistent with controlling authority on that issue, the Gun Lake Act leaves Mr. Patchak with other avenues to express his displeasure with the Government's decision, and the First Amendment requires no more than that here. Nor has the Gun Lake Act deprived Mr. Patchak of a property interest in violation of the Due Process Clause, as Mr. Patchak has no constitutionally-protected property interest at issue here. He has never received a final judgment in his favor, and makes no claim whatsoever to the title of the land at issue. Finally, Mr. Patchak's request that this Court reverse a procedural ruling by the district court regarding the submission of supplemental material would have no effect on the outcome of this case even if Mr. Patchak were correct on the substance. The district court's opinion should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* Mr. Patchak's claims that the Gun Lake Act is unconstitutional. *See Al Bahlul v. United States*, 792 F.3d 1, 3-4 (D.C. Cir. 2015) (reviewing *de novo* an Article III separation-of-powers claim); *United States v. Popa*, 187 F.3d 672, 674 (D.C. Cir. 1999) (reviewing *de novo* a claim that a statute violates the First Amendment); *Brown v. Plaut* 131 F.3d 163, 166 (D.C. Cir. 1997) (reviewing *de novo* a district court's dismissal of a Due Process claim). *See also Grimes v. District of Columbia*, 794 F.3d 83, 88-89 (D.C. Cir. 2015) ("We review *de novo* a district court's grant of a motion for summary judgment.").

Mr. Patchak also appeals the district court's denial of his motion to strike supplemental documents that the United States provided to the district court. Opening Br. at 3, 39-42. That denial is reviewed only for an abuse of discretion. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (rulings relating to the contents of an administrative record are reviewed only for an abuse of discretion).

II. This Court should construe the Gun Lake Act in a manner that avoids rendering it unconstitutional.

Although the Gun Lake Act divests this Court of jurisdiction to hear the merits of an action relating to the Secretary's land-into-trust decision, Pub. L. No. 113-179, 128 Stat. 1913, Sec. 2(ba)-(b), this Court nevertheless retains the authority to consider whether the Gun Lake Act violates the Constitution of the United States. Several important principles guide that consideration. First, federal statutes are presumptively constitutional. *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988). Only "the most compelling constitutional reasons" may justify invalidating "a statutory provision that has been approved by both Houses of Congress and signed by the President." *Mistretta v. United States*, 488 U.S. 361, 384 (1989).

Furthermore, if this Court finds language in the Gun Lake Act to be subject to more than one interpretation, it must follow a "cardinal principle" of statutory interpretation requiring "a construction of the statute . . . by which the constitutional questions may be avoided." *Johnson v. Robison*, 415 U.S. 360, 367 (1974) (alterations in original omitted). In addition to that overarching principle, canons of construction relevant to Indian law apply here as well. *City of Roseville*

v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003). Any ambiguity that this Court may find in the Gun Lake Act (although the United States believes there is none) must be construed in favor of the Tribe. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

III. The APA's limited waiver of sovereign immunity does not apply to Mr. Patchak's claim.

Although Mr. Patchak discusses subsection (b) of the Gun Lake Act as an imposition on the judiciary that violates the separation of powers established by Article III of the constitution, this Court may affirm without addressing those arguments. While the APA provides that a plaintiff may seek judicial review of federal agency action that would otherwise be immune to suit, that provision does not include cases addressed by "any other statute" that "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Gun Lake Act is just such a statute, and the APA therefore provides no cause of action here.

"It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584,

586 (1941) (alterations omitted)). *See also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). This immunity derives not directly from the U.S. Constitution, but from prior centuries of English law that assumed that "the King can do no wrong." *See* 5 Kenneth Davis, Administrative Law Treatise 6-7 (2d ed. 1984); 2 Charles H. Koch, Jr., Administrative Law and Practice 210 (1985). The doctrine has been recognized by the federal courts since the earliest days. In 1821, drawing on already well-established precedent, Justice Marshall declared that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821). *See also United States v. Thompson*, 98 U.S. 486, 489 (1878) (*accord*).

In the modern era, of course, Congress has waived the United States' sovereign immunity from suit in a number of circumstances. But any ambiguity over whether Congress has effected a waiver of sovereign immunity is construed for the government and against a determination that sovereign immunity has been waived. "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"

Mitchell, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Relevant to this case is the APA, which expressly waives the United States' sovereign immunity to suits "seeking relief other than money damages," 5 U.S.C. § 702, as a result of "final agency action for which there is no other adequate remedy in a court."[1] 5 U.S.C. § 704. However, the APA also contains an important limitation precluding review of Mr. Patchak's claim in this case. "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

The Gun Lake Act is just such a statute. It provides that "[n]otwithstanding any other provision of law, an action . . . 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. 113-179, Sec. 2(b). Thus, in enacting the Gun Lake Act, Congress enacted a statute that expressly forbids a suit for review of the Secretary's decision here. The Gun Lake Act therefore places Mr. Patchak's complaint within 5 U.S.C. § 702, which the Supreme Court described as an "important

[1] The Supreme Court has already held that Mr. Patchak's sole claim on the merits in this case is "a garden-variety APA claim." *Patchak*, 132 S. Ct. at 2208.

carve-out" of the general waiver of sovereign immunity in the APA. *Patchak*, 132 S. Ct. at 2204.

The APA provides no other basis for Mr. Patchak to proceed. "'[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy' – including its exceptions – to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Id.* at 2205 (quoting *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286 n. 22 (1983) (alterations in original). Without the APA, Mr. Patchak lacks a cause of action against the United States for the claim brought in his complaint, and this Court may therefore affirm the district court's dismissal on that basis.

IV. The Gun Lake Act does not violate the Constitution's separation of powers.

Mr. Patchak's primary argument on appeal is that the Gun Lake Act violates the separation of powers doctrine by requiring the court to reach a specific decision (dismissal) in this case, thus infringing on the judicial power to decide cases or controversies. Opening Br. at 23-29. But the Gun Lake Act does not direct the courts to evaluate evidence in a particular way or to reach a particular legal conclusion. Instead,

Congress has removed the courts' subject-matter jurisdiction over the particular claim that Mr. Patchak wishes to bring, consistent with Congress's powers under Article III, § 2, cl. 1. Just as Congress had authority to waive the United States' immunity from suit, Congress has authority to modify or eliminate all or part of that waiver. The district court thus correctly granted summary judgment on the basis of Congress's authority to enact jurisdiction-stripping legislation such as the Gun Lake Act, but Mr. Patchak's opening brief contains no discussion of this issue.

Instead, the opening brief focuses on the nineteenth-century case of *United States v. Klein*, 80 U.S. 128, 146-47 (1871), and attempts to demonstrate that the Gun Lake Act either unconstitutionally prescribes a rule of decision to the federal courts or impermissibly imposes Congress's interpretation of the Indian Reorganization Act. It does neither. The court is not required to agree with Congress's assessment of the legality of the Bradley Property's trust status – that question simply is no longer a case or controversy that the court may resolve. Furthermore, Congress's exercise of its own inherent Constitutional authority to declare the legal status of the Bradley Property – as trust

land for the Tribe – is a change in the substantive law that does not violate the separation of powers doctrine. The Supreme Court has long held that Congress may pass laws that affect the outcome of pending litigation, so long as the new laws do not improperly direct a particular decision by the courts on a legal question or require the courts to apply Congress's own *post hoc* interpretation of statutory language. The Gun Lake Act does neither. Although the opening brief suggests that Congress was required to amend the Indian Reorganization Act, rather than rely on its own inherent Constitutional authority to convert land to trust status or limit judicial review, that position has no basis in law. The Gun Lake Act does not violate the separation of powers, and the district court's judgment should be affirmed.

A. Congress's withdrawal of federal court jurisdiction over Mr. Patchak's claim does not violate the separation of powers required by Article III.

1. Congress provided specific language demonstrating its intent to withdraw jurisdiction over this claim.

The opening brief objects that the Gun Lake Act should not preclude consideration of the merits of this case because the APA

"provides for a 'strong presumption' of reviewability of agency decisions." Opening Br. at 16 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). But the brief then almost immediately concedes that "[t]his presumption of reviewability may 'be overcome by . . . specific language or specific legislative history that is a reliable indicator of congressional intent.'" *Id.* (quoting *Bowen*, 476 U.S. at 673). And here, the Gun Lake Act contains specific language reliably indicating Congress's intent. In a provision entitled "no claims," Congress declared that an action relating to the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." Pub. L. 113-179, Sec. 2(b).

The district court correctly held that this language applies to the single legal claim in Mr. Patchak's complaint. Dkt. 92 at 7-9, JA ___-___. Mr. Patchak has not challenged (and has therefore conceded) that conclusion, and the only issue left for this Court is to determine whether this withdrawal of jurisdiction is within the constitutional authority of Congress.

2. Congress has plenary power to shape the jurisdiction of the inferior courts.

Article III of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States." U.S. Const. Art. III § 2, cl. 1. But this language does not provide a Constitutional "right of a litigant to maintain an action in a federal court" on that ground. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922). "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." *Id.* at 234 (citing *The Mayor v. Cooper*, 6 Wall. 247, 252 (1867)). "And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." *Id.* (citing *Assessors v. Osborne*, 9 Wall. 567, 575 (1869)). Congress has complete authority to "give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Kline*, 260 U.S. at 234 (citing *Turner v. Bank of North America*, 4 Dall. 8, 10 (1799); *United States v. Hudson & Goodwin*, 7 Cranch 32 (1812); *Sheldon v. Sill*, 8 How. 441, 448 (1850); *Stevenson v. Fain*, 195 U.S. 165 (1904)). In the Gun Lake Act, Congress withdrew the jurisdiction of the inferior federal courts

over Mr. Patchak's claim and others like it, Pub. L. 113-179, Sec. 2(b), an act well within Congress's Constitutional authority.

This Court has repeatedly upheld Congress's withdrawal of jurisdiction over claims that could previously be brought in federal courts. In *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989), this Court upheld the United States' withdrawal from federal court jurisdiction the tort claims of some three thousand residents of the Marshall Islands seeking damages for personal injuries and death due to radiation associated with nuclear tests conducted by the United States. *Id.* at 372. This Court held that Congress could remove jurisdiction over those claims, noting that "[i]t is axiomatic in our federal jurisprudence that inferior courts, including the District Court and this Court, have only that jurisdiction afforded them by Congress." *Id.* at 373. As this Court pointed out, a unanimous Supreme Court relied on over fifty years of precedent in an 1850 opinion holding that "[t]he Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the [inferior] Court[s]; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the

Constitution, unless it confers powers not enumerated therein." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850), *as quoted in Antolok*, 873 F.2d at 374.

In a more recent (and more factually analogous) case, this Court upheld a statutory provision removing from federal court jurisdiction review of federal actions that might otherwise have been subject to challenge under the APA. *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). In that case, a group of organizations sought to enjoin construction of the World War II Memorial on the National Mall. *Id.* at 1093. They sued a number of federal agencies for alleged violations of a number of federal statutes. *Id.* at 1093-94. While the suit was pending in the district court, Congress enacted a statute holding that the federal agency decisions being challenged "shall not be subject to judicial review." *Id.* at 1094 (quoting Pub. L. No. 107-11.) The district court dismissed the suit for lack of subject-matter jurisdiction, *Nat'l Coalition to Save Our Mall v. Norton*, 161 F. Supp. 2d 14 (D.D.C. 2001), and this Court affirmed.

In that case, the plaintiffs argued that the jurisdiction-stripping provision at issue exceeded Congress's authority under Article III of the

Constitution, making arguments very similar to those advanced now by Mr. Patchak. 269 F.3d at 1095-96. This Court held that Congress's withdrawal of jurisdiction over those claims did not violate Article III. 269 F.3d at 1095-96. That holding controls the outcome of this case as well. The opening brief asks this Court to distinguish *Nat'l Coalition to Save our Mall* on the basis that it considered a statute that "did not violate any substantive provision of the Constitution, unlike the Gun Lake Act." Opening Br. at 27. This attempt to distinguish requires that this Court first assume the correctness of Mr. Patchak's other arguments (that the Gun Lake Act violates the First Amendment, Fifth Amendment, or the Bill of Attainder clause). Simply alleging a violation of a "substantive provision of the Constitution" cannot be enough to require a different outcome than that reached in *Nat'l Coalition to Save our Mall*. After all, Article III of the Constitution is a "substantive" constitutional provision, and violation of the separation of powers was indeed an issue that concerned this Court in that case.

For reasons further explained below, this Court should not find that the Gun Lake Act violates any *other* provisions of the Constitution. But for purposes of determining whether the Gun Lake Act's

jurisdiction-stripping provision is Constitutional, *Antolok* and *Nat'l Coalition to Save our Mall* hold that it is. These cases demonstrate that Congress may grant and withdraw such jurisdiction as it chooses. Congress has chosen to remove Mr. Patchak's claim from the federal courts' jurisdiction, which it may do, and this Court must therefore affirm the district court's dismissal of that claim.

B. The Gun Lake Act does not prescribe a rule of decision to the judiciary or infringe on its authority to decide cases.

The opening brief never directly addresses Congress's constitutional authority to remove a particular type of case or controversy from the jurisdiction of the federal courts. Instead, Mr. Patchak asks this Court to invalidate the Gun Lake Act for violating the separation of powers doctrine by unconstitutionally infringing on the role of the judiciary to decide cases. But as discussed above, Congress expressly avoided any potential infringement by simply removing the courts' jurisdiction over this matter. In that fashion, Congress has avoided directing the courts to make any particular findings, issue any particular judgment, or adhere to Congress's own

post hoc interpretation of another statute, all of which Mr. Patchak alleges have occurred here.

The opening brief relies primarily on *United States v. Klein*, 80 U.S. 128, 146-47 (1871), to argue that the Gun Lake Act infringes on the authority of the judiciary under Article III to decide cases and controversies. *See* Opening Br. at 23. In that case, the Supreme Court invalidated a Congressional directive requiring it to reach a particular legal conclusion when presented with particular evidence. *Klein*, 80 U.S. at 146-47. The Supreme Court held that Congress may exceed its authority if it attempts to "prescribe rules of decision to the Judicial Department . . . in cases pending before it." *Id.* More recently, the Supreme Court has refined the holding of *Klein* to mean that Congress is prohibited by Article III of the Constitution to "direct any particular findings of fact or applications of law, old or new, to fact." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). In this case, Congress did none of those things, and the Gun Lake Act is constitutional.

1. *Klein* is readily distinguishable from the present case.

A brief history of *Klein* illuminates how the problems present in that case are not present here.[2] The case arose out of efforts during Reconstruction by parties (known as the "cotton claimants") suing for recovery of property seized and sold by the army during the Civil War. The administrator of Klein's estate sued under a statute permitting recovery by an owner under proof of loyalty, which the Supreme Court had previously held could be shown by receipt of a presidential pardon. But after Klein's success in the Court of Claims, Congress passed a law requiring the courts to consider receipt of a presidential pardon as proof of a claimant's *disloyalty*. The statute expressly prohibited introduction of this evidence in the Court of Claims and provided, in part:

> That no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put

[2] This history is brief indeed, drawing largely from this Court's opinion in *Nat'l Coalition to Save Our Mall*, 269 F.3d at 1095-96. For a more detailed background of the events leading to the Supreme Court's opinion, see Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in Federal Court Stories at 87 (2010).

> in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the Court of Claims, or on appeal therefrom[.]

Klein, 80 U.S. at 129.

The statute further provided that in any pending case where a Presidential pardon had already served as proof of loyalty by a claimant,

> such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant[.]

Klein, 80 U.S. at 129. The Supreme Court struck down this statute as unconstitutionally infringing on the proper role of the judiciary. But it did so for reasons that do not apply to the Gun Lake Act.

The statute at issue in *Klein*, like the Gun Lake Act, contains a provision directing that a court shall no longer have jurisdiction over particular claims and that they therefore must be dismissed. But the statute challenged in *Klein* did much more as well, and the Supreme

Court's opinion explains that those additional directives to the Court are what doomed the statute. 80 U.S. at 144-45. Had the statute done nothing but remove the courts' jurisdiction over a particular class of cases, the statute would likely have been upheld as a valid exercise of the authority of Congress. After all, only two years earlier, the Court upheld a statute repealing the grant of appellate jurisdiction by which a case had come to the Court, and admonished that courts "are not at liberty to inquire into the motives of the legislature" when Congress shapes the jurisdiction of the federal courts. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). Consistent with that opinion, Justice Chase wrote in *Klein* that "[u]ndoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect." 80 U.S. at 145.

But that statute at issue in *Klein did* do more. Just prior to *Klein,* the Supreme Court held that the President had an inherent Presidential power to pardon participants in the Civil War and that a pardon granted by the President was proof of loyalty to the United States. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). In

Klein, the Supreme Court held that Congress could not direct a federal court to rule otherwise, and could not tell a court what conclusion it must draw from evidence of a pardon. 80 U.S. at 145. Crucial to the Court's opinion in *Klein* was direct Congressional interference with the Executive's pardon authority that the Constitution had "granted without limit" to the President. 80 U.S. at 147. In contrast, Mr. Patchak alleges no interference with any inherent powers of the executive branch here.

Thus the separation of powers argument presented to this Court is exclusively about whether Congress, in enacting the Gun Lake Act, has usurped the Article III authority of federal courts to decide cases and controversies. Congress acted within its authority here. The separation of powers principles implicated in *Klein* mean that Congress may amend existing laws even in ways that alter the legal standards applied by a court in an ongoing case, so long as it does not "direct any particular findings of fact or applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438.

2. Congress did not direct any particular findings of fact or applications of law in the Gun Lake Act.

In the Gun Lake Act, Congress has not directed the court to make "any particular findings of fact," nor has it required the court to make any "applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438. In subsection (a), Congress directly addressed the trust status of the Bradley Property. Pub. L. 113-179, sec. 2(a). But subsection (b) removes the obligation of the federal courts to consider the correctness of that decision. As the district court correctly observed, "Congress lent its imprimatur to the Secretary's decision, but stopped short of requiring the judiciary to do the same." Dkt. 92 at 14, JA ___.

Amending the law controlling the case or controversy before the court in a way that changes the outcome of the case is within Congress's constitutional authority. *Robertson*, 503 U.S. at 441-42. In *Robertson*, both environmental groups and the timber industry challenged the management of timber harvests on federal lands within forests in the Pacific Northwest that were home to the northern spotted owl, a species protected by the Endangered Species Act, 16 U.S.C. § 1531. 503 U.S. at 432-33. In response to the ongoing litigation, Congress enacted a comprehensive set of rules governing timber harvesting within the

thirteen national forests where spotted owls were known to live. *Id.* at 433. The statute provided that adherence to these new rules "is adequate consideration for the purpose of meeting the statutory requirements that are the basis for" two cases that the statute provided by caption and docket number. *Id.* at 434-35. The plaintiffs objected that this statute "purported to direct the results in two pending cases, [and] violated Article III of the Constitution." *Id.* at 436. But the Supreme Court held that it did not.

So long as Congress did not "direct any particular findings of fact or applications of law, old or new, to fact," it was free to alter the legal standards to be considered by a court in pending cases. *Id.* at 438. And the Supreme Court held that there was no distinction between Congress enacting a new law that affected the outcome and Congress having enacted an amendment to the actual statute that previously controlled. *Id.* at 439. In *either case*, Congress has altered the underlying law in a permissible fashion. *Id.* Congress need only amend the "applicable law," *id.* at 440, and if that is all it does, it has committed no separation of powers violation as understood in *Klein* and the cases that have followed it.

C. Congress was not required to amend the Indian Reorganization Act, and could instead act on its own inherent authority to administer Indian lands.

Despite the holding of *Robertson* that Congress may impact pending litigation either by enacting new legislation or by amending old legislation, 503 U.S. at 439, Mr. Patchak insists that the only constitutionally-available course Congress had before it in this case was to directly amend either the Indian Reorganization Act or the APA. *See* Opening Br. at 24-25. That premise is doubly mistaken. First, it ignores that Congress may simply remove from the federal courts jurisdiction to resolve a particular claim, without directing any particular finding or legal conclusion. *Supra* at 26. Second, it is contrary to *Robertson* and has no support in any other opinion.

Subsection (a) of the Gun Lake Act provides that "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians," and identified as 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." Pub. L. 113-179 Sec. 2(a). The Gun Lake Act does not interpret or amend the Indian Reorganization Act, nor did it have to. Instead,

Congress chose to speak directly to the trust status of the Bradley Property, confirming that the land is to be held in trust for the Tribe. In so doing, Congress was not limited to the specific authority it delegated to the Secretary of the Interior in the Indian Reorganization Act.

The Indian Commerce Clause, Article I, sec. 8, "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 200 (2004) (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). Although Congress has delegated some of its authority to the Secretary of the Interior, "the primary responsibility for choosing land to be taken in trust still lies with Congress." *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997). Thus Congress may declare a property to be held in trust for an Indian tribe, and in so doing need not apply the more limited set of standards it provided to the Secretary of the Interior in the Indian Reorganization Act.[3] Congress

[3] The Gun Lake Act is by no means the first time that Congress has declared by statute that land is to be taken into trust for a particular tribe. A recent example includes Pub. L. 106-568, 114 Stat. 2868, sec. 819 (2000), in which Congress required the Secretary to accept into trust a specific parcel of land, "[n]otwithstanding any other provision of law." *See also* The Santa Fe Indian School Act, Pub. L. 106-568, 114 Stat. 2919, sec. 821 (2000); The California Indian Land Transfer Act,

properly confirmed the trust status of the Bradley Property in the Gun Lake Act and was not required to amend (or even apply) the Indian Reorganization Act in order to do so.

Therefore, Mr. Patchak's lengthy discussion in his opening brief (at pages 18-23) about whether the Bradley Property could properly be taken into trust under the Indian Reorganization Act is wholly misplaced. That question is not presented to this Court on appeal, and the Gun Lake Act's ratification of the Bradley Property's trust status has rendered that question moot. Although the Secretary maintains the property was properly taken into trust initially, ultimately the property's trust status does not depend on an answer to that question. "It is well settled that Congress may, by enactment not otherwise inappropriate, ratify acts which it might have authorized, and give the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United States,* 300 U.S. 297, 301-02 (1937).

Pub. L. 106-568, 114 Stat. 2921-23, sec. 902 (2000) (requiring similar). In enacting 25 U.S.C. § 1300h-5(a), Congress directed the Secretary to accept into trust any lands within Gogebic County, Michigan, conveyed by the Keweenaw Bay Indian Community, without reference to the Indian Reorganization Act. These are but a few examples.

V. The Gun Lake Act does not infringe on Mr. Patchak's First Amendment Right to Petition.

Mr. Patchak next alleges that "the Gun Lake Act imposes a significant and impermissible burden" on his right to petition the government for redress of grievances, as guaranteed by the First Amendment. Opening Br. at 30. But Mr. Patchak is mistaken. There is no authority for the proposition that the First Amendment guarantees that he may sue the United States government in federal court, in order to redress a perceived wrong. The simple fact that the United States has sovereign immunity to a wide range of such suits that might otherwise be brought by citizens readily disproves this argument. The district court correctly noted that Mr. Patchak has other avenues he may pursue, including petitioning the Department of the Interior directly, and the Gun Lake Act therefore does not violate the First Amendment.

Mr. Patchak notes correctly that "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." Opening Br. at 30 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984)). But none of the authorities on which Mr. Patchak relies goes so far as to suggest that Mr. Patchak has a

constitutional right to pursue this particular claim in federal court. He does not. To hold otherwise would, as the district court observed, directly conflict with Congress's long-established plenary power to define the jurisdiction of the inferior federal courts. Dkt. 92 at 16 (citing *Lauf*, 303 U.S. at 330), JA ___.

The cases relied on in the opening brief are inapposite. In both *California Motor Transport Co. v. Trucking Unlimited, et al.*, 404 U.S. 508, 510 (1972), and *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), the Supreme Court held that when interpreting a potentially ambiguous statute, the court should avoid a reading that would preclude "the right of access to the courts." In *California Motor Transport Co.*, the Supreme Court "construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a 'mere sham' filed for harassment purposes." *Bill Johnson's Restaurants*, 461 U.S. at 741 (discussing *California Motor Transport Co.*, 404 U.S. at 511). In the later case, *Bill Johnson's Restaurants*, the Supreme Court avoided reading the National Labor Relations Act in such a way as to prohibit an employer from filing a "well-founded lawsuit," even when

the lawsuit was motivated by a desire for retaliation. 461 U.S. at 742-43.

But the case before this Court is different. This Court is not asked to interpret an ambiguous statute in a manner that would avoid foreclosing access to courts. Congress has plainly spoken of its intent to remove the federal courts' jurisdiction over a specific set of challenges, which it may do. *Supra* at 26. Nor is this case like *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 131 S. Ct. 2488 (2011), in which the Supreme Court considered whether a municipality's directives instructing a police chief how to perform his duties was in retaliation for a grievance he had filed. The police chief "just as easily could have alleged" infringement of his rights under the Speech Clause of the First Amendment, and the opinion proceeds to engage in a free speech analysis. *Id.* at 2494, 2496-99. Mr. Patchak has not alleged that the Gun Lake Act was enacted in retaliation for his engaging in his First Amendment rights, and there is no evidence whatsoever that it was. As discussed further below, the purpose of the statute was to "provide certainty to the legal status of the land, on which the Tribe has begun

gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014).

Even if Mr. Patchak's rights to petition included a right to proceed in federal court, he concedes that his First Amendment right does not include a right to receive a favorable outcome. Opening Br. at 30. Nevertheless, the entire premise of his First Amendment argument is that non-judicial venues, such as petitioning the Department of the Interior directly, are futile (and therefore constitutionally suspect) because a favorable outcome is unlikely. This Court has previously considered, and rejected, this position. *American Bus Ass'n v. Rogoff*, 649 F.3d 734, 739-740 (D.C. Cir. 2011).

In that case, Seattle's public transportation system (the King County Metro) provided special local bus services to Seattle Mariners' baseball games, in violation of federal law governing eligibility for federal transportation funds. Congress then enacted an appropriations rider forbidding the Federal Transit Administration from expending any funds to enforce the funding provision that the King County Metro's bus service to baseball games violated. 649 F.3d at 736. A group of

private bus operators challenged this law, alleging that it violated their right to petition under the First Amendment. *Id.* at 737.

The bus operators advanced the same position that Mr. Patchak now repeats in his opening brief. After the objectionable statute was enacted, the bus operators remained free to complain to the Federal Transit Administration, to seek advisory opinions and ask for cease and desist orders, but the new law did not "allow the FTA to issue the plaintiffs a favorable ruling." *Id.* at 739. Thus, the futility of this process (from the bus operators' perspective) was pre-ordained. Nevertheless, this Court upheld the provision and did not find a violation of the First Amendment. So long as the bus operators could express their grievances to the Government, their right to petition was satisfied even when the Government's refusal to act in response was assured. *Id.*

Nothing about the Gun Lake Act limits Mr. Patchak's ability to "speak freely about his grievances, to advocate ideas through requests for redress, and to actively participate in a democratic government." Opening Br. at 30. The Gun Lake Act forecloses the possibility of a judicial remedy for this *particular* grievance, but that foreclosure is consistent with the United States' immunity to suits to which it has not

consented, and is well within the power of Congress to control the jurisdiction of the inferior courts. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). Loss of that particular remedy does not implicate the First Amendment. Mr. Patchak may express his grievances to the Department of the Interior, as well as to Congress itself.

Although Mr. Patchak objects that complaining to the Department of the Interior "would clearly be futile and meaningless," that result is nevertheless consistent with the First Amendment (assuming for sake of argument that this claim is even true). The Petition Clause "does not even 'guarantee[] a citizen's right to receive a government *response* to *or* official *consideration* of a petition for redress of grievances." *American Bus Ass'n*, 649 F.3dd at 740 (quoting *We the People Foundation, Inc. v. United States*, 485 F.3d 140, 141 (D.C. Cir. 2007)) (alterations and emphases in original). "Nothing in the First Amendment . . . suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984).

That Mr. Patchak believes time spent petitioning the Department of the Interior would be wasted, Opening Br. at 32-33, does not mean that he has lost his Constitutional right to petition. During the administrative process leading to the Secretary's initial decision, Mr. Patchak submitted comments to the Secretary, AR011529, JA ___, to President Bush, AR0111000, AR010944, JA ___, ___, and to the Midwest Regional Office of the Bureau of Indian Affairs. AR011324, JA ___. Nothing in the Gun Lake Act prohibits him from doing the same again, or from contacting other federal agencies, or Congress, about this matter. The Gun Lake Act does not violate Mr. Patchak's rights under the First Amendment.

VI. The Gun Lake Act does not violate Mr. Patchak's Fifth Amendment right to Due Process.

Mr. Patchak next asks this Court to invalidate the Gun Lake Act because he alleges that it violates his Due Process rights guaranteed by the Fifth Amendment. Opening Br. at 33. It is unclear how he believes this violation specifically to have occurred. A Due Process challenge requires the court to determine whether Mr. Patchak "was deprived of a protected property interest and, if so, what process was his due." *Logan*

v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Mr. Patchak alleges that the Gun Lake Act has deprived him of a property interest, Opening Br. at 33, but then defines that property interest in several different ways, none of which support a claim of unconstitutional deprivation.

Mr. Patchak first suggests that the Gun Lake Act is unconstitutional because it has affected his "interest in this pending litigation, and his rights to challenge the 2005 decision of the Secretary to take the Bradley Property into trust." *Id.* But of course, asserting that he has "rights" to sue the Secretary about this particular decision does not make it so. *See supra* at 41. Elsewhere, Mr. Patchak suggests that he has a property interest, protected by the Fifth Amendment, in his "unadjudicated cause of action." Opening Br. at 33-34. But the authorities cited for this proposition do not hold that a pending cause of action, for which no final judgment has issued, is a property interest protected by the Fifth Amendment. Mr. Patchak also states that he "has brought suit to protect his interests in real property," Opening Br. at 35, but as he has previously asserted to the Supreme Court, Mr. Patchak makes no claims to title or interest in any real property in this litigation. *Patchak*, 132 S. Ct. at 2206. And if he did claim a real

property interest, that claim would need to be asserted pursuant to the Quiet Title Act, rather than the APA.

Mr. Patchak has described no property interest of a type that Congress may not deprive him without violating the Fifth Amendment. But even if he had, the law is clear that Mr. Patchak has received all of the process due to him under the Fifth Amendment so long as the deprivation is the result of duly-enacted legislation.

No case holds that dismissal of a suit that has not resulted in a final judgment offends the Due Process clause. Mr. Patchak cites two Supreme Court opinions for the proposition that "even an unadjudicated cause of action can create a constitutionally protected property interest," Opening Br. at 33-34, but it does not follow from either of those opinions that the much broader Due Process argument being advanced here is correct. Although a cause of action is sometimes described as a "species of property," *Logan*, 455 U.S. at 428, "a party's property right in any cause of action does not vest 'until a final unreviewable judgment is obtained.'" *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989).

The first case, *Mullane v. Central Hanover Bank & Trust Co.*, addressed what type of notice was due to beneficiaries of a trust before their assets were disposed of. 339 U.S. 306, 313 (1950). Because the beneficiaries' property (*i.e.*, their money) was at stake, the Supreme Court held that "[c]ertainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process." *Id.* At no point did the Supreme Court suggest that their constitutionally-protected property interest was their participation in the proceeding itself. Instead, the case stood for the proposition that the trustees could not "terminate every right" the beneficiaries had to protect their own interests "unless constitutionally adequate hearing procedures were established before the settlement process went into effect." *Logan*, 455 U.S. at 429 (quoting *Mullane*, 339 U.S. at 311, 315 (internal alterations omitted)).

In the second case, *Logan v. Zimmerman Brush Co.*, the Supreme Court once again held that a state-provided cause of action (this time, for employment discrimination) could not be taken away from a claimant simply because the State respondent failed to comply with its own mandatory deadlines in the proceeding. 455 U.S. at 428-32. But in

so holding, the Supreme Court took care to note that while a State must provide sufficient process before depriving someone of a statutorily-created property right, "the State remains free to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily-created causes of action altogether." *Id.* at 432.

When a state grants itself immunity from certain types of state tort claims, it may "arguably" deprive the plaintiffs of a protected property interest, but it does not do so in violation of the Due Process Clause. *Martinez v. California*, 444 U.S. 277, 282 (1980). The Court noted in *Logan* that in many other cases it had upheld legislative changes that took away or modified a previously-existing cause of action, and in each case "the legislative determination provides all the process that is due." *Logan*, 455 U.S. at 433 (citing *U. S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980); *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, 445-446 (1915)). Although *Logan* discussed State action, the Supreme Court has held similarly with respect to

Congress's authority to confer or revoke a public benefit (such as welfare). "The procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (citation and internal quotation marks omitted). Analogously, Congress may alter the jurisdiction of the federal courts, consistent with Article III of the Constitution, and when it does so it does not act unconstitutionally and therefore does not violate any procedural rights guaranteed to Mr. Patchak by the Fifth Amendment.

Those cases are clear: Congress could require dismissal of Mr. Patchak's unadjudicated claim without violating the Due Process Clause. Where no decision on the merits has been reached and no unappealable final judgment has been issued, Mr. Patchak has no vested property interest that cannot be removed without violating the Fifth Amendment. *Grimesy*, 876 F.2d at 743. But even if this Court were to hold otherwise, the long line of Supreme Court precedent discussed in *Logan*, as well as the more recent decision in *Martinez*,

make clear that Mr. Patchak has received all of the process that the Constitution requires.

The opening brief also asserts that Congress has "reviewed a prior decision of an Article III tribunal" and "eviscerated the finality of that judgment as determined by the United States Supreme Court." Presumably Mr. Patchak refers to the Supreme Court's holding that he had established sufficient *standing* to bring his APA challenge to the Secretary's decision to take the Bradley Property into trust, and that the Quiet Title Act did not bar this claim. *Patchak*, 132 S. Ct. at 2212. But Congress did not disturb, let alone "eviscerate," those holdings by enacting the Gun Lake Act. Even if it had, the opening brief does not explain how such a result could give rise to a Fifth Amendment violation. In any event, the Supreme Court never held that the Fifth Amendment guaranteed Mr. Patchak a ruling on the merits of his APA claim by a federal court, and Congress acted well within its authority when it enacted the Gun Lake Act.

VII. The Gun Lake Act is not an unconstitutional Bill of Attainder.

Mr. Patchak's final objection to the Gun Lake Act is that it violates the Constitution's edict that "[n]o Bill of Attainder . . . shall be passed." U.S. Const. art. 1 § 6, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). This constitutional provision ensures that an individual can contest accusations made against them in the judicial system, without a "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). The Supreme Court has said that a statute is not a bill of attainder if it "incorporates no judgment censuring or condemning any man or group of men." *Id.* at 453-54. The Gun Lake Act does not censure or condemn Mr. Patchak (or anyone else) and for that reason alone it is not a bill of attainder.

Nevertheless, Mr. Patchak suggests that because he can no longer pursue his lawsuit challenging whether the Bradley Property is validly held in trust, he is being punished, and that this punishment "was in

fact specifically directed at him" in violation of the Bill of Attainder Clause. Opening. Br. at 37. Mr. Patchak is incorrect on both counts.

Modern case law holds that a law is a constitutionally-prohibited bill of attainder "if it (1) applies with specificity, and (2) imposes punishment." *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) (quoting *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998)). Mr. Patchak maintains that the "specificity" requirement is met here because the report of the House Committee on Natural Resources observed that the Gun Lake Act "would void a pending lawsuit challenging the lawfulness of the Secretary's original action to acquire the Bradley Property," and later mentions Mr. Patchak by name. Opening Br. at 37 (citing *Gun Lake Trust Land Reaffirmation Act*, H.R. Rep. 113-590 at 2 (2014)). To be sure, Congress was clearly aware of the pending lawsuit. And Mr. Patchak is correct that as a factual matter, his lawsuit was the only challenge to the Secretary's decision pending when the statute was enacted. Opening Br. at 38 n.5. But Mr. Patchak is not the individual "target" of this statute, Opening Br. at 37, which does not name him and which broadly states that "no claims" relating to

the trust status of the Bradley Property may be maintained in federal court. Pub. L. 113-179, Sec. 2(b).

In any event, whether or not the Gun Lake Act applies with "specificity" to Mr. Patchak is not dispositive of whether it is an unconstitutional bill of attainder. This Court "has upheld statutes against bill of attainder challenges even where the disputed statutes applied to specifically named parties." *Foretich*, 351 F.3d at 1217 (citing *BellSouth*, 162 F.3d at 684). The crucial element is whether the Gun Lake Act punishes Mr. Patchak in a manner prohibited by the Bill of Attainder Clause. *Id.* It does not.

"Early in our country's history, a bill of attainder was seen to refer to 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)). The types of punishments prohibited by the Bill of Attainder were later broadened to include "legislative acts that sentenced specific persons to penalties short of death, 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); *Brown*,

381 U.S. at 441-42). Physical punishment is no longer necessarily required, as the Supreme Court has subsequently "invalidated as bills of attainder legislation barring specified persons or groups from pursuing various professions, where the employment bans were imposed as a brand of disloyalty." *Foretich*, 351 F.3d at 1217 (citing *Nixon*, 433 U.S. at 474-75).

The Supreme Court has laid out three aspects of a law that must be considered in order to determine whether it imposes punishment so severe that it is unconstitutional:

> (1) Whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;" and (3) whether the legislative record 'evinces a congressional intent to punish.'"

Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (citation omitted). The Gun Lake Act does not meet any of these three standards with respect to its effect on Mr. Patchak.

The Gun Lake Act does not fall within the historical meaning of legislative punishment. Traditionally, that punishment took the form of a death sentence or other criminal penalty, or a restriction on a named individual's freedom to engage in specific professions. *Foretich*, 351 F.3d

at 1218 (referring to the traditional "checklist" of punishments). To that list, this Court in *Foretich* added a form of severe reputational injury. The statute in question deprived Mr. Foretich, individually, of his parental rights while at the same time proclaiming him "a criminal child abuser." *Id.* at 1220. Where Congress had conducted a "trial by legislature," *id.* at 1216, and determined Mr. Foretich to be guilty of criminal sexual abuse without a court reaching that conclusion after judicial proceedings, this Court found that Congress had enacted a prohibited bill of attainder and invalidated the statute. *Id.* at 1226.

That situation, and indeed *all* of the situations encompassed by the traditional "checklist" of punishments, differ greatly from the effect that the Gun Lake Act has on Mr. Patchak. The Gun Lake Act accuses him of nothing and imposes no penalties on him. The opening brief's claim that the statute is "a directed extinguishment of Mr. Patchak's right to pursue a valid lawsuit" is circular. Opening Br. at 37. By altering the jurisdiction of the federal courts, Congress has rendered his lawsuit no longer sustainable. But no authority suggests that doing so is "tantamount" to a bill of attainder, Opening Br. at 37, even if only a single plaintiff is affected. *Foretich*, 351 F.3d at 1217 (reiterating that

"a law may be so specific as to create a 'legitimate class of one' without amounting to a bill of attainder unless it also satisfies the 'punishment' element of the analysis") (quoting *Nixon*, 433 U.S. at 469-73).

The Gun Lake Act also survives the second prong of the punishment analysis, which asks whether the statute "reasonably can be said to further nonpunitive legislative purposes." *Selective Serv. Sys.*, 468 U.S. at 852. This factor "invariably appears to be the most important of the three." *BellSouth Corp.*, 162 F.3d at 684 (citation omitted). To survive a bill of attainder challenge, a statute must have a "legitimate nonpunitive purpose and a rational connection between the burden imposed" and that nonpunitive purpose. *Foretich*, 351 F.3d at 1221. The Gun Lake Act contains both.

The express purpose of the Act was to "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 113-194 at 2 (2014). There is no dispute that this certainty and finality is a legitimate governmental interest, and it is by no means a "punitive" purpose. That the incidental effect of the statute is to prevent Mr. Patchak from maintaining a challenge to the trust status of the

Bradley Property is neither within the historical meaning of punishment nor an irrational means of achieving Congress's nonpunitive purpose. Ratifying the Secretary's decision to take the land into trust clearly has a rational connection to eliminating uncertainty about that decision. Mr. Patchak's only objection on this point is that Congress did not "alter the framework for review of the Secretary's actions." Opening Br. at 37. We understand this to be a repetition of Mr. Patchak's earlier argument that Congress was somehow *required* to amend the Indian Reorganization Act in response to *Carcieri*. For the reasons explained above, *supra* at 38, this is incorrect, has no basis in the law, and does not demonstrate that Congress's actions were irrational.

Similarly, the jurisdiction-stripping provision of subsection (b) accomplishes Congress's stated goal of providing certainty to the legal status of the land. Pub. L. 113-179, Sec. 2(b). Mr. Patchak's view is that Congress has "made a judgment, in effect a crippling and punitive policy, depriving Mr. Patchak of the right to maintain his legal action." Opening Br. at 38. But as discussed above, Congress made no "judgment" as to the merits of Mr. Patchak's claims about whether the

Bradley Property could be taken into trust under the Indian Reorganization Act, instead ratifying the property's trust status to put an end to the continued uncertainty. To the extent Mr. Patchak feels "punished" by Congress changing the law in a way that means he will no longer be able to litigate the legal status of the Bradley Property, that is only as an indirect result of Congress achieving the indisputably legitimate purpose of providing certainty to benefit the economic development of the Tribe.

The final and third aspect of the bill of attainder inquiry asks whether the congressional record "evinces a Congressional intent to punish." *Selective Serv. Sys.*, 468 U.S. at 852 (citation omitted). Of course, the statute does not punish Mr. Patchak as that term is historically understood in this context, so the answer to this inquiry must also be "no." Although Mr. Patchak alleges that Congress purposefully targeted him in retaliation "for even raising the issue" of the legality of the Secretary's decision, Opening Br. at 37, he provides no evidence for this allegation beyond the House Committee Report's straightforward observation that the statute would require dismissal of his claim. That same report, as well as the Senate Committee's report,

then explains the reason Congress desired to have Mr. Patchak's claims dismissed: not to punish him, but to put an end to years of uncertainty about the status of property that is of major economic significance to the Tribe. H.R. Rep. 113-590; S. Rep. No. 103-260. Contrary to Mr. Patchak's unfounded assertions, the congressional record provides no evidence that Congress acted punitively toward Mr. Patchak. The Gun Lake Act is not an unconstitutional bill of attainder.

VIII. If this Court finds that subsection B of the Gun Lake Act is unconstitutional, it should remand to the district court.

Should this Court nevertheless find some constitutional defect in the Gun Lake Act, the entire Act need not be invalidated as a result. "[W]hen confronting a constitutional flaw in a statute," a court must "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks and citations omitted). Thus, if one of the two subsections of the Gun Lake Act is unconstitutional, this Court "must retain those portions of the act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's

basic objective in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (internal quotation marks and citation omitted).

If this Court were to find subsection (a) unconstitutional (although the opening brief provides no reason for such a conclusion), then the district court's dismissal should be affirmed because subsection (b) would continue to require dismissal. However, if this Court finds that subsection (b) is unconstitutional, then it does not follow that this Court should address the merits of Mr. Patchak's claim. Although the opening brief spends several pages on the merits, the district court did not address those issues on summary judgment and they are not presented to this Court on appeal. The appropriate remedy, then, is to remand to the district court for further consideration in light of subsection (a)'s language that the property at issue is "reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." Pub. L. 113-179, Sec. 2(a).

IX. The district court's consideration of supplemental documentation did not prejudice Mr. Patchak or contravene rules governing the contents of administrative record.

The final pages of the opening brief seek review of the district court's denial of Mr. Patchak's motion to strike supplemental documents submitted by the United States to inform the district court of subsequent events that occurred many years after the complaint was first filed. Mr. Patchak's view is that the district court was limited to considering the administrative record for the Secretary's May 2005 decision to take land into trust, and that all subsequent materials must be ignored. The opening brief correctly lays out the general rules governing record-review cases brought under the APA. But it then mischaracterizes both the United States' motion and the district court's response, and fails to identify any prejudice to Mr. Patchak that would justify reversing the district court's ruling on that motion.

The supplemental documents in question related to a September 3, 2014, decision by the Secretary to take two other parcels (not the one at issue here) into trust for the Tribe. In that decision, the Secretary considered for the first time whether the Tribe was "under federal jurisdiction" in 1934, as required by *Carcieri*, concluding that the Tribe

was and that the land could be taken into trust. *See* Supplemental AR 00617-58, JA ___-___. The United States submitted to the district court this decision, along with historical documents considered by the Secretary that related to the Tribe's relationship with the United States. Dkt. 75 at 1, JA ___. Mr. Patchak objected that the documents were not properly part of the administrative record, raising the same arguments made to this Court in the opening brief. Dkt. 76, JA ___.

In response, the United States explained that it submitted these documents because the only remaining issue in the case was whether the Tribe was "under federal jurisdiction" in 1934, and that this recent decision by the Secretary was the only record of the Government's view on that question. Dkt. 77, JA ___. The response explained that "[t]he filing is not intended as a formal supplementation of the administrative record," *id.* at 2, JA ___, but because the question asked of the court was a mixed question of law and fact, the documents might well be relevant to a determination on the merits. Instead, the district court did not rely on the supplemental documents, reaching no conclusion on the merits because of the Gun Lake Act's declaration that the court no longer had jurisdiction over this case. In the order dismissing the action, the

district court denied Mr. Patchak's motion to strike the supplemental documents without further discussion.

Mr. Patchak now seeks to have that ruling reversed because he believes that "the District Court placed an undue emphasis on a September 3, 2014 decision made by the Secretary . . . in reaching a conclusion that the Secretary therefore also had the authority to take the Bradley Property into trust." Opening Br. at 41-42 (citing Dkt. No. 92 at 6, JA ___). That page of the district court's opinion contains, as Mr. Patchak concedes, "the only real, and very brief," mention of any of the supplemental materials in the district court's opinion. Opening Br. at 41. And that mention does not place "undue emphasis" on that later decision – in fact, it places no emphasis on the decision at all. It is mentioned in a chronological recitation of facts, and then not relied on at all for any legal conclusions. Dkt. 92 at 6, JA ___.

But more than that, the fundamental premise of Mr. Patchak's objection is mistaken. The district court *never* concluded that the Secretary had the authority to take the Bradley Property into trust under the Indian Reorganization Act. The court expressly did not reach that question, because it instead dismissed Mr. Patchak's complaint for

lack of subject-matter jurisdiction pursuant to the Gun Lake Act. Dkt. 92 at 19, JA ___. An order from this court reversing the district court's denial of the motion to strike would have no effect on that outcome. Although the opening brief spends several pages asking this Court to reverse that decision, it never once explains why. A reversal of that ruling would not provide Mr. Patchak any relief of any kind. The district court would still have no jurisdiction to entertain the merits of his claim as laid out in the complaint. Pub. L. 113-179, sec. 2(b).

In any event, given the very limited reference to the September 3, 2014, decision in the district court's opinion, there is no basis for holding that the district court abused its discretion in mentioning the existence of that document. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (rulings relating to the contents of an administrative record are reviewed only for an abuse of discretion). A district court has considerable discretion to manage its limited time and resources as best it sees fit. *See, e.g.*, *in re Vitamins Antitrust Class Action*, 327 F.3d 1207, 1210 (D.C. Cir. 2003). Where the content of the documents was not relevant to the outcome of the case, because the court lacked jurisdiction, the district court did not abuse its discretion

by declining to provide a fulsome explanation of the reasoning behind its denial of the motion to strike. The opening brief provides no basis for reversal, as a reversal would grant Mr. Patchak no form of relief of any kind, and the district court's decision on this matter should therefore be affirmed.

CONCLUSION

The Gun Lake Act is constitutional, and expressly revokes the district court's jurisdiction over this case. The district court's order dismissing the case should therefore be affirmed.

JOHN C. CRUDEN
Assistant Attorney General

s/ LANE N. MCFADDEN
United States Dept. of Justice
Environment & Natural
Resources Div.
PO Box 7415
Washington, DC 20044
(202) 353-9022

Of counsel:
JAMES V. DeBERGH
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

February 2016

90-6-24-00981

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of compliance with type-volume limitation,
Typeface requirements, and type style requirements

1. This brief complies with the type-volume limitation of Fed. R. app. P. 32(a)(7)(B) because:

   - This brief contains **13,753** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   - This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century font.

s/ LANE N. MCFADDEN
United States Department of Justice
Environment & Natural Resources Div.
PO Box 7415, Ben Franklin Station
Washington, DC 20044
(202) 353-9022
Lane.mcfadden@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2016, I served a copy of the foregoing Response Brief of the Federal Appellees on each counsel of record in this case (listed below) by use of this Court's CM/ECF system.

Sharon Yvette Eubanks
Bordas & Bordas c/o Peridot Solutions
Suite 2150
7927 Jones Branch Drive
McLean, VA 22102
(703) 217-2685
sharonyeubanks@gmail.com
Counsel for Plaintiff-Appellant

Nicole E. Duchenaux
Fredericks Peebles & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4053
nducheneaux@ndnlaw.com
Counsel for Intervenor-Defendant-Appellee

Conly J. Schulte
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
(303) 673-9600
cschulte@ndnlaw.com
Counsel for Intervenor-Defendant-Appellee

s/ LANE N. MCFADDEN
United States Department of Justice
Environment & Natural Res. Division
PO Box 7415, Ben Franklin Station
Washington DC 20044
(202) 353-9022
Lane.mcfadden@usdoj.gov