No. 16-____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PATCHAK,
Petitioner,
v.
SALLY JEWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ("the Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) (*"Patchak I"*).

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

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

2. Does a statute which does not amend any generally applicable substantive or procedural laws, but deprives Petitioner of the right to pursue his pending lawsuit, violate the Due Process Clause of the Fifth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is David Patchak, the plaintiff below.

Respondents are Sally Jewell, Secretary of the Interior, and Lawrence Roberts, Assistant Secretary of the Interior, both defendants below, as well as the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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The Opinion of the United States Court of Appeals for the District of Columbia Circuit addressing issues presented in this Petition was issued on July 15, 2016, is reported at 828 F.3d 995, and is reproduced in the separately bound Appendix to this Petition as Appendix A at 1a.[1] The D.C. Circuit's July 15, 2016 Judgment is reproduced as Appendix B at 23a.

The June 17, 2015 Opinion of the United States District Court for the District of Columbia, addressing issues presented in this Petition, is reported at 109 F. Supp.3d 152 (D.D.C. 2015), and is reproduced as Appendix D at 27a.

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[1] References to the Appendices to this Petition are in the form "1a."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit issued its opinion and entered Judgment on July 15, 2016. *See* Appendix A and B.

CONSTITUTIONAL & STATUTORY PROVISIONS

This Petition concerns the constitutionality of the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act), Pub. L. No. 113–179, 128 Stat. 1913, addressing whether it violates separation of powers principles and the Fifth Amendment to the United States Constitution. The text of the Gun Lake Act and relevant constitutional provisions are reproduced in the accompanying Appendix.[2]

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[2] Although the Appendix contains only portions of Article III (and Article I), as the Court has observed: "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of . . . the structural imperatives of the Constitution as a whole." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982).

INTRODUCTION

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991). "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

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

Section 2(b) of the statute at issue, the Gun Lake Act, directed the federal courts to "promptly dismiss[]" Petitioner's pending case after this Court had reviewed it, and held that his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2203 (2012) (*"Patchak I"*). The statute—which concerns only the one piece of property at issue in Petitioner's lawsuit, and affected only his case—mandated dismissal without amending underlying substantive or procedural laws.

The D.C. Circuit concluded the Gun Lake Act is constitutional. Petitioner respectfully submits that conclusion was erroneous—and sets a dangerous precedent, permitting Congress to encroach upon and exercise powers reserved for the judiciary. If Congress may direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or

procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees.

The Court should grant this Petition to address the exceptionally important separation of powers issues presented, and clarify aspects of the boundary between the legislative and judicial powers not directly addressed by the Court's prior decisions. *See* SUP. CT. R. 10(c).

STATEMENT OF THE CASE

A. Petitioner's Complaint in the District Court

On April 18, 2005, the Department of the Interior announced its intention to employ the Secretary's authority under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, to take into trust land ("the Bradley Property") for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Gun Lake Tribe"). 70 Fed. Reg. 25596 (May 13, 2005). The Gun Lake Tribe had been recognized by the Department of the Interior in October 1998. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1998).

Petitioner is a resident of Wayland Township, Michigan, who lives in close proximity to the Bradley Property. On August 1, 2008, he filed a complaint in the United States District Court for the District of Columbia, asserting a claim under the Administrative Procedure Act (APA) against the then-Secretary and Assistant Secretary of the Interior, challenging the Secretary's authority under

the IRA to take the Bradley Property into trust for the Gun Lake Tribe.[3] Petitioner argued that acquisition of the Bradley Property for the Gun Lake Tribe (which had not yet occurred because of unrelated litigation following the announcement of the Interior Secretary's intentions) was unauthorized by the IRA because the Tribe was not recognized and "under federal jurisdiction" when the IRA was enacted in 1934. The Gun Lake Tribe filed a motion to intervene, which was granted by the District Court.

While Petitioner's case was pending in the District Court, on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Gun Lake Tribe. *Patchak I*, 132 S.Ct. at 2204.

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

Although *Carcieri* cast substantial doubt on the legality of the Secretary's action taking the Bradley Property into trust for the Gun Lake Tribe, which had obtained federal recognition in 1998, the District Court did not reach the merits of Petitioner's APA claim. Instead, on August 19, 2009, the District

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

Court issued an opinion finding that Petitioner lacked prudential standing, and contemporaneously issued an order granting the United States' motion to dismiss and the Gun Lake Tribe's motion for judgment on the pleadings. *Patchak v. Salazar*, 646 F. Supp.2d 72 (D.D.C. 2009).

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

B. This Court's Prior Decision in this Case

This Court granted the Petitions for certiorari, seeking review of the D.C. Circuit's judgment. 132 S.Ct. 845. The Court considered two questions arising from Petitioner's lawsuit: whether the United States has sovereign immunity by virtue of the Quiet Title Act, 86 Stat. 1176, and whether Petitioner has prudential standing to challenge to Interior Secretary's acquisition of the Bradley Property. The Court determined that sovereign immunity had been waived, and that Petitioner has prudential standing, and "therefore h[e]ld that Patchak's suit may proceed." *Patchak I*, 132 S.Ct. at 2203.

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

Following this Court's decision in *Patchak I*, while Petitioner's case was moving forward in the District Court, Congress took up consideration of

what became the Gun Lake Trust Land Reaffirmation Act (the Gun Lake Act). Pub. L. No. 113–179, 128 Stat. 1913.[4]

Section 2(a) provides: "IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."

Section 2(b) provides: "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed."[5]

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

The Senate Committee on Indian Affairs held a hearing during May 2014. At that hearing, the Gun Lake Tribe's Chairman urged passage of the bill because the trust status of his Tribe's land "is now threatened by a U.S. Supreme Court opinion

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[4] The full text of the statute is reproduced as Appendix E at 50-51a.

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

[*Patchak I*] that has allowed one individual to challenge the authority of the Secretary of Interior to take land into trust for our Tribe," and because "it is now time for this dispute to come to an end." *Hearing on S. 1603 Before the S. Comm. on Indian Affairs*, S. Hrg. 113-509 at 55 (2014) (statement of David K. Sprague).

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

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

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

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

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

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

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

The Gun Lake Act was signed by the President on September 26, 2014.

D. Decisions Below Concerning the Gun Lake Act

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

Petitioner argued to the District Court that the Gun Lake Act is unconstitutional for several reasons—including that it violates separation of powers principles and the Fifth Amendment, as well as the First Amendment's right to petition, and the prohibition on bills of attainder. The District Court, however, rejected each of these arguments, and found that "the Gun Lake Act is constitutional" and that "the Act's plain language and legislative history manifest a clear intent to moot this litigation." Appx. D at 34a, 36a. Believing it "lack[ed] the jurisdiction to reach the merits of plaintiff's claim," the District Court granted the Gun Lake Tribe's motion for summary judgment. Appx. D at 36a.

On appeal, the D.C. Circuit rejected all arguments that the Gun Lake Act is unconstitutional, and affirmed the District Court's disposal of the case because "if an action relates to the Bradley Property, it must promptly be dismissed." Appx. A at 11a-12a.

REASONS FOR GRANTING THE PETITION

I. The Court Must Guard Against Separation of Powers Violations

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

Consistent with this "responsibility to enforce the [separation of powers] principle when necessary," *Metropolitan Washington Airports*

Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991), the Court has numerous times found constitutional violations based on separation of powers considerations. *See*, *e.g.*, *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (finding unconstitutional vesting in bankruptcy court powers reserved for Article III judges); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding unconstitutional statute requiring federal courts to reopen final judgments); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (Congress "intruded into the executive function"); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (finding "legislative veto" unconstitutional); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (finding statute's assignment of certain powers to bankruptcy judges unconstitutional as "unwarranted encroachment" on the "judicial power"); *United States v. Klein*, 13 Wall. 128, 147 (1871) ("Congress has inadvertently passed the limit which separates the legislative from the judicial power.").

This Court's vital function as guardian of separation of powers safeguards and principles includes reviewing and deciding cases raising serious separation of powers questions—even if the Court ultimately concludes no violation has occurred. *See*, *e.g.*, *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016); *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

II. The Questions Presented Are Exceptionally Important

"Time and again" this Court has "reaffirmed the importance in our constitutional scheme of the separation of government powers into the three coordinate branches." *Morrison*, 487 U.S. at 693.

Section 2(b) of the Gun Lake Act upsets "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut*, 514 U.S. at 224. It directed the federal courts to "promptly dismiss" Petitioner's lawsuit without amending the IRA, the APA, or any other generally applicable statute. And it did so in order to overcome this Court's decision in *Patchak I*.

If Congress is permitted to direct federal courts that a pending case "shall be promptly dismissed," without any modification of generally applicable substantive or procedural laws, then there is no meaningful limitation on the legislature's authority and ability to effectively review and displace judicial decisions it finds inconvenient or with which it disagrees. And the threat to the judicial power posed by the Gun Lake Act is particularly grave because it was enacted with the purpose and effect of "void[ing]" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, after this Court expressly held that it "may proceed." *Patchak I*, 132 S.Ct. at 2203.

III. The Case is an Ideal Vehicle to Address Unresolved Issues Concerning the Separation of Powers, and Clarify When Congress Has Infringed the Judicial Power

Section 2(b) of the Gun Lake Act is an unprecedented intrusion on the judicial power. While Petitioner contends the Gun Lake Act should have been declared unconstitutional based on this Court's existing decisional law, the statute and the circumstances giving rise to it unquestionably test the limits of Congress's authority to act without intruding upon the judicial power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10(c).

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

Nor should the Court wait for Congress to again invade the judicial power as it has with Section 2(b) of the Gun Lake Act. "It is not every day that [the

Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches—which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2617 (2014) (Scalia, J., concurring).

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013) (Roberts, C.J., dissenting). "[The Court] may not—without imperiling the delicate balance of our constitutional system—forego [its] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Department of Transp. v. Association of American Railroads*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Chadha*, 462 U.S. at 951. "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Public Citizen v. Department of Justice*, 491 U.S.

440, 468 (1989) (Kennedy, J., concurring in judgment)).[6]

IV. The D.C. Circuit's Decision is in Tension With Ninth Circuit Law

The D.C. Circuit's decision below is in tension with the Ninth Circuit's decision in *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), which held that a statutory provision directing decisions in pending cases without amending any law was unconstitutional under this Court's decision in *Klein*, 13 Wall. 128 (1871). Although this Court reversed that Ninth Circuit decision in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992) on other grounds, it did "not consider whether this reading of *Klein* is correct." *Id.* at 441.

The Ninth Circuit has continued to rely on its reading of *Klein* after this Court's decision in *Robertson*, 503 U.S. 429. *See*, *e.g.*, *The Ecology Center v. Casaneda*, 426 F.3d 1144, 1148 (9th Cir. 2005); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993) ("This Court has interpreted *Klein* and related Supreme Court authority . . . as establishing a two-part, disjunctive test: The constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly

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[6] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See, e.g., Bank Markazi*, 136 S.Ct. 1310; *Stern*, 564 U.S. 462; *Loving*, 517 U.S. 748; *Plaut*, 514 U.S. 211; *Robertson*, 503 U.S. 429; *Freytag*, 501 U.S. 868; *Morrison*, 487 U.S. 654; *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919; *Northern Pipeline*, 458 U.S. 50; *Nixon*, 433 U.S. 425; *Klein*, 13 Wall. 128.

directed certain findings in pending litigation, without changing any underlying law,' or (2) 'a challenged statute [is] independently unconstitutional on other grounds.'") (quoting *Robertson*, 914 F.2d at 1315-16). *Cf. United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) ("When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it."); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight . . . .").

Granting the Petition would allow this Court to address and resolve tension between the D.C. Circuit's decision in this case and Ninth Circuit law. *See* SUP. CT. R. 10(a).

V. The Gun Lake Act Is Unconstitutional, and the D.C. Circuit's Decision to the Contrary Was Incorrect

It is difficult to imagine a more direct invasion of the judicial power than occurred here: Congress, without amending underlying substantive or procedural laws, directed that any case relating to the parcel of property which was the subject of Petitioner's APA claim "shall be promptly dismissed," after this Court expressly held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. If Congress had the power to intervene and dictate the

outcome in this case by enacting the Gun Lake Act, then it has the same, seemingly unlimited, power with respect to any pending case.

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

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

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

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut*, 514 U.S. at 219. And they deliberatively and decisively "rejected the practice [of colonial legislative review of judicial decisions] . . . because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment." *Id.* at 265-66 (Stevens, J., dissenting).

Adhering to the Framers' intention and constitutional design, the Court has repeatedly

confirmed that the judicial power cannot be shared with another branch of government. *See*, *e.g.*, *Stern*, 564 U.S. at 483; *Northern Pipeline*, 458 U.S. at 58; *United States v. Nixon*, 418 U.S. 683, 704 (1974). The Court also long ago recognized that "Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government." *United States v. O'Grady*, 89 U.S. 641, 648 (1874); *see also Hayburn's Case*, 2 Dall. 409, 413 (1792) (citing Letter from Iredell, J., and Sitgreaves, D.J., to President George Washington (June 8, 1792)) ("[N]o decision of any court of the United States can under any circumstances . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested."); *Plaut*, 514 U.S. at 218 (*Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."). The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19.

Accordingly, one of "basic constraints on the Congress" imposed by the Constitution is that it may not "invest itself or its Members with either executive power or judicial power." *Metropolitan Washington Airports Authority*, 501 U.S. at 274; *see also Miller*, 530 U.S. at 350 ("[S]eparation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design."); *Freytag*, 501 U.S. at 891 (finding Tax Court "exercises judicial power," noting "[i]ts decisions are

not subject to review by either the Congress or the President"); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.").

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

For example, Section 2(b) of the Gun Lake Act is similar to a portion of the statute at issue in *United States v. Klein*, 13 Wall. 128, 147 (1871), where the Court held that Congress had "passed the limit which separates the legislative from the judicial power," when it "directed" the courts "to dismiss" pending cases without altering applicable legal standards.

This case and *Klein* stand apart from those where the Court rejected separation of powers challenges to statutes which amended existing laws, and left the courts to apply new legal standards to the cases before them. *See*, *e.g.*, *Bank Markazi*, 136 S.Ct. at 1323-24 (contrasting that case with *Klein*), 1326 (no separation of powers violation because statute "changed the law by establishing new substantive standards, entrusting to the District Court application of those standards to the facts (contested and uncontested) found by the court"). *Robertson*, 503 U.S. at 437 (no separation of powers

violation because statute "replaced legal standards . . . without directing particular applications under either the old or the new standards"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (addressing effect of change in underlying law by Congress).

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

When Congress directed the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including a determination by this Court that the "suit may proceed"), without amending underlying substantive or procedural laws, it violated the separation of powers by both impairing the judiciary "in the performance of its constitutional duties" and "intrud[ing] upon the central prerogatives" of the judicial branch. *Loving*, 517 U.S. at 757.

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

Section 2(a) of the Gun Lake Act provided that the Bradley Property "is reaffirmed as trust land," and "the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed." The meaning and effect of this language is hardly self-evident. The Court of Appeals viewed Section 2(a) as having "changed the law" (Appx. A at 11a)—although it did not explain how.[7]

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[7] The D.C. Circuit also mistakenly viewed the Gun Lake Act as "removing *jurisdiction* from the federal courts over any actions relating to [the Bradley Property]." Appx. A at 2a. (emphasis added). This was an error for several reasons. First, the statute does not address jurisdiction—in fact, the word "jurisdiction" does not appear anywhere in its title, headings or text. Second, this Court has adopted a "bright line" test for determining whether a statutory limitation is jurisdictional, treating restrictions as nonjuridictional unless Congress has "clearly stated" otherwise. *Sebelius v. Auburn Regional Medical Center*, 135 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006)). This "bright line" test was adopted before the Gun Lake Act, and the Court generally "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Underscoring the absence of a clear statement is the Gun Lake Act's use of the term "maintain," which this Court has recognized is "ambiguous," and "enjoys a breadth of meaning." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003). Third, the legislative history corroborates the statute is not jurisdictional—neither the House nor Senate Reports describe the law as altering federal court jurisdiction; to the contrary, each Report states the statute would not make any "changes in

Petitioner believes Section 2(a) did not put the Bradley Property into trust. As the statute itself clearly states, it was enacted to "[t]o reaffirm that certain land *has been* taken into trust"—this is, it conveyed Congress's post-hoc endorsement of the Interior Secretary's decision (which the House Report described as "likely unlawful"[8]), seemingly without *itself* changing the legal status of the property. For that reason, both the House and Senate Reports concerning the Gun Lake Act stated the statute would make no "changes in existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014); *see also* (Appx. A at 11a) (D.C. Circuit noting Section 2(a) ratified and confirmed "*the Department of the Interior's* decision to take the Bradley Property into trust.") (emphasis added).

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existing law." *See* H. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). But Section 2(b) of the Gun Lake Act would violate the separation of powers even if the statute was ostensibly "jurisdictional." When enacting the Gun Lake Act "Congress's sole concern was deciding this particular case." *Bank Markazi*, 136 S.Ct. at 1333 (Roberts, C.J., dissenting). Whatever latitude Congress ordinarily enjoys when legislating about federal court jurisdiction would not permit it to exercise the judicial power while impeding the judiciary from carrying out its own constitutionally-assigned responsibilities. *Cf. City of Boerne*, 521 U.S. at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."). And, in any event, the importance of the Questions Presented by this Petition would not be diminished were the Gun Lake Act labeled as a jurisdictional statute.

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

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

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

Yet the lower courts *could not* address any unresolved legal questions arising from Section 2(a) —including the meaning and effect of that provision, and its potential retroactive application—because Congress precluded the Courts from deciding any of these when, in Section 2(b), it directed that Petitioner's pending case "shall be promptly dismissed." The D.C. Circuit—while mistaken about the constitutionality of the Gun Lake Act—made

clear Section 2(b) was dictating the outcome of Petitioner's appeal, explaining: "if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action." Appx. A at 11a-12a.

Thus, the presence of Section 2(a) in the Gun Lake Act does not cure the profound separation of powers concerns raised by Section 2(b). To the contrary, Section 2(a) produced a host of *new*, unsettled legal issues pertinent to Petitioner's APA case. However, with Section 2(b) of the Act, Congress itself disposed of these new issues, as well as all pre-existing ones—rather than let the courts already adjudicating the case address and apply them to the facts of the case.

Perhaps Section 2(a) would have aided the Secretary in defending against Petitioner's APA claim on the merits. But Congress decided Petitioner's case by itself when mandating that it be "promptly dismissed"—and in so doing exercised the judicial power reserved for the federal courts by Article III. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("the judicial function [is] deciding cases"); *Ex Parte Slater*, 246 U.S. 128, 133 (1918) ("[E]xercise of the judicial function" is "applying recognized legal and equitable principles to the facts in hand").

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

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011); *see*

also Noel Canning, 134 S.Ct. at 2593 (It is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'") (Scalia, J., concurring) (quoting *Bond*, 564 U.S. at 223). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

The threat to individual rights is particularly acute when the political braches intrude upon the judicial power. Separation of the judiciary was "to guarantee that the process of adjudication itself remained impartial," *Northern Pipeline*, 458 U.S. at 58, and Article III safeguards litigants' "rights to have claims decided before judges who are free from potential domination by other branches of government." *United States v. Will*, 449 U.S. 200, 218 (1980).

Having experienced and rejected a system of intermingled legislative and judicial powers, *Plaut*, 514 U.S. at 219, the Framers recognized—as has this Court—that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'" The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton, quoting 1 Montesquieu, Spirit of Laws 181); *see also Stern*, 564 U.S. at 483.

Here, with Section 2(b)'s mandate that Petitioner's pending case be "promptly dismissed," Congress arrogated to itself the judicial role of deciding Petitioner's APA claim—and did so after this Court had already determined that his "suit

may proceed." In so doing, Congress stripped Petitioner of his individual right to have his claim adjudicated by a neutral judge, free of political interference.

Section 2(b) also deprived Petitioner of his right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Gun Lake Act concerns only the Bradley Property and—as the D.C. Circuit acknowledged—"only affected [Petitioner's] lawsuit." Appx. A at 12a. The statute did not change any generally applicable substantive or procedural laws—including the APA and the IRA. Instead, as the text and legislative history make clear, its purpose and effect was to "void" Petitioner's lawsuit, H. Rep. No. 113-590, at 2, stripping him of the right to continue pursuing what this Court described as a "garden variety APA claim" alleging that "the Secretary's decision to take land into trust violates a federal statute." *Patchak I*, 132 S.Ct. at 2208.[9]

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[9] Even if Section 2(a) had the effect of taking the Bradley Property into trust at the time the Gun Law Act was enacted, the statute does not state it would have retroactive effect, and in any event Section 2(a) has no bearing on the core of Petitioner's APA claim: a challenge to *the Interior Secretary's authority under the IRA* to take the land into trust. With Section 2(b), Congress left the APA's substantive and procedural provisions available to everyone but Petitioner (there were no other pending suits concerning the Bradley Property). As a result, Petitioner lost his right to seek a declaration that the IRA did not authorize the taking of the Bradley Property into trust, and the award of costs and reasonable attorneys' fees.

Section 2(b) violates Petitioner's right to equal protection, regardless of what level of scrutiny is applied. Even under rational basis scrutiny, a classification must bear "a rational relationship to a legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, the only objective evident from Section 2(b)'s text and the legislative history is overcoming this Court's decision in *Patchak I*, and extinguishing Petitioner's lawsuit after this Court held that his "suit may proceed." *Patchak I*, 132 S.Ct. at 2203. That is not a "legitimate end" capable of sustaining disparate treatment.[10]

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[10] That the Gun Lake Act concerns only the Bradley Property, and was specifically intended to dispose of Petitioner's lawsuit, suggests Congress sought to impermissibly *apply* the law, rather than make it. *See Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (discussing relevance of statute's "application to a limited number of individuals"); *see also United States v. Brown*, 381 U.S. 437, 442 (1965) (Bill of Attainder Clause intended to supplement separation of powers, acting as "a general safeguard against legislative exercise of the judicial function").

CONCLUSION

Congress has "passed the limit which separates the legislative from the judicial power," but "[i]t is of vital importance that these powers be kept distinct." *Klein*, 13 Wall. at 147.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

October 2016

Respectfully submitted,

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