

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MATCH-E-BE-NASH-SHE-WISH BAND OF :

4 POTTAWATOMI INDIANS, :

5 Petitioner : No. 11-246

6 v. :

7 DAVID PATCHAK, ET AL. :

8 - - - - -x

9 and

10 - - - - -x

11 KEN L. SALAZAR, SECRETARY OF THE :

12 INTERIOR, ET AL., :

13 Petitioners : No. 11-247

14 v. :

15 DAVID PATCHAK, ET AL. :

16 - - - - -x

17 Washington, D.C.

18 Tuesday, April 24, 2012

19

20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States

22 at 10:06 a.m.

23 APPEARANCES:

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4 MATTHEW T. NELSON, ESQ., Grand Rapids, Michigan; on

5 behalf of Respondents.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-246, Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER
ON BEHALF OF THE PETITIONERS IN NO. 11-247

MR. MILLER: Mr. Chief Justice, and may it please the Court:

The suit in this case suffers from two independent jurisdictional defects, either one of which provides a basis for reversing the judgment of the court of appeals.

The first is that the United States has not waived its sovereign immunity from suits challenging its title to Indian trust lands. And the second is that Patchak, the plaintiff, lacks prudential standing because the interests that he seeks to vindicate in the suit are not within the zone of interests protected or regulated by section 5 of the Indian Reorganization Act, the provision whose alleged violation forms the basis for his complaint.

JUSTICE SOTOMAYOR: Could you tell me who you think would have a valid and timely APA action to

1 challenge what the Secretary has allegedly done here,
2 which is to take lands into trust in violation of the
3 statute per our earlier -- I know that the U.S. is
4 challenging that assumption, but let's assume the -- the
5 reality of the allegation. Who would -- who would be
6 able to challenge it, and in what mechanism?

7 MR. MILLER: There are -- there are two parts
8 to that. And taking the timing question first, the
9 claim would have to be brought before the land was taken
10 into trust. And that's why the regulations set out a
11 30-day period after the announcement of the intent to
12 take the land into trust before title is actually
13 transferred. So somebody would have to file during that
14 period, as the MichGO plaintiffs did --

15 JUSTICE SOTOMAYOR: That, I understand.
16 That's why I said timely filed.

17 MR. MILLER: And the proper plaintiff for a
18 claim under section 5 -- and, of course, there can be
19 other claims under NEPA or the IGRA -- but under section
20 5 of the IRA, the proper plaintiff would be a State or
21 local government, because those are the entities that
22 are directly affected, directly regulated by the
23 transfer of jurisdiction to the tribe --

24 JUSTICE SOTOMAYOR: Let's assume a situation
25 where you first promise the land to one tribe, and then,

1 in the midst of negotiations, another tribe lays claim.
2 The United States says, I change my mind; I'm going to
3 give the land to the other tribe. Does the tribe that
4 you have denied the land to have any standing or any
5 rights with respect to challenging that determination?

6 MR. MILLER: Yes. As the beneficiaries of
7 section 5, the parties for whose benefit Congress acted
8 and the Secretary would be acting, I think in that
9 scenario a tribe would have standing to challenge it.

10 JUSTICE SCALIA: Mr. Miller, you -- you claim
11 on behalf of the government that the decision of whether
12 to take the land into trust has nothing to do with the
13 use to which the land will be put; wherefore, these
14 plaintiffs who were complaining about the use to which
15 it'll be put have no standing.

16 If that is so, why did the government delay
17 the taking into trust for 3 years while there was
18 pending a lawsuit which would have prevented the use
19 that the government intended the newly trusted land to
20 be used for?

21 You delayed for 3 years because there was a
22 challenge to whether you could use -- whether this land
23 could be used for what you call gaming and I call
24 gambling.

25 Why did you delay for 3 years if it's

1 irrelevant?

2 MR. MILLER: Well, the -- the challenge in
3 that case was -- was not just to the use. It was to the
4 decision to take title to land into trust. And the
5 Secretary's policy, as set out in --

6 JUSTICE SCALIA: Well, wait. On what basis?
7 On any basis other than --

8 MR. MILLER: There was a NEPA claim, for
9 example. And the -- the plaintiff in that case, the
10 MichGO organization, alleged that the Secretary had not
11 complied with NEPA, had not adequately considered the
12 environmental consequences of the action to take the
13 land into trust.

14 JUSTICE SCALIA: Well, what environmental
15 action consequences are there from the mere decision to
16 take it into trust? Unless you know what it's going to
17 be used for, you have no idea what the environmental
18 consequences are.

19 MR. MILLER: Well, that's -- that is true.
20 And it is also true that NEPA may in some circumstances
21 require consideration of the use for which the land is
22 to be put; but, it doesn't follow that section 5
23 requires or contemplates protecting the interests of
24 nearby landowners from the use.

25 JUSTICE SCALIA: But the challenge was

1 to -- was to the transfer, you say.

2 MR. MILLER: That -- I mean, that was -- the
3 allegation --

4 JUSTICE SCALIA: Based in part on the use to
5 which it was going to be put; right?

6 MR. MILLER: Right, but what -- what MichGO
7 was seeking, what the plaintiff was seeking in that
8 case, was an injunction barring the transfer.

9 And the Secretary's policy -- the whole point
10 of the 30-day regulation is to allow people who want to
11 challenge the transfer to have a full opportunity to
12 litigate those claims. And that is why the --

13 JUSTICE GINSBURG: And that wouldn't be true
14 of Mr. Patchak? Suppose he had filed in the 30-day
15 window. The Secretary gives notice to affected persons.
16 So he comes in and he says: I think that you don't have
17 authority to do it because this tribe wasn't under
18 Federal jurisdiction, and so I want you to call -- call
19 it off. Nothing -- nothing has been transferred within
20 30 days.

21 I thought both your brief and the tribe's
22 brief said that the judicial review would be available
23 to any affected person who used that procedure. Is
24 that -- is that true?

25 MR. MILLER: I mean, if they could establish

1 standing, but -- if he had filed within the 30-day
2 period, the Secretary would not take title to the land
3 until there was a full opportunity for judicial review.

4 Now, in this case, he filed outside the
5 30-day period. He was aware that --

6 JUSTICE GINSBURG: But you said -- you had it
7 was important if. So the argument is this tribe wasn't
8 under Federal jurisdiction. I could raise that because
9 I'm an affected person. Somebody's got to be able to
10 enforce against the Secretary the limitations that
11 Congress put on the Secretary. So would there be
12 standing in that situation?

13 Mr. Patchak comes in within the 30-day
14 period, so he's not trying to undo any done deal.

15 MR. MILLER: There would not be standing for
16 Patchak as a private individual, but there would be
17 standing for a State or local government or, in
18 the unusual situation that Justice Sotomayor suggested,
19 for another tribe --

20 JUSTICE GINSBURG: So then you disagree with
21 the tribe that said in no uncertain terms, in its reply
22 brief, that this case is not about the availability of
23 judicial review. Judicial review was available in the
24 30-day window.

25 MR. MILLER: I think we -- we don't disagree

1 with that in the context of the discussion of the
2 sovereign immunity issue. I don't understand that
3 statement in the tribe's brief to have been a concession
4 that there would have been standing.

5 JUSTICE KAGAN: Well, on the standing point,
6 I mean, the -- the distinction that you're setting up
7 between acquisition of land and use of land -- this goes
8 back to Justice Scalia's question -- that strikes
9 me as -- as artificial, that the question of when land
10 is acquired is all tied up with the question of what use
11 is going to be made of it.

12 The government doesn't acquire this land with
13 no object in mind. It thinks about how the land is
14 going to be used. So that in the end, this really is a
15 land use statute, isn't it?

16 MR. MILLER: Well, it is a land use statute
17 in -- in this sense, in the sense that -- and you're
18 right that the regulations do refer to the purposes for
19 which the land is to be used, but that's because --

20 JUSTICE KAGAN: And the statute as well
21 thinks of this as a -- is a statute that's designed to
22 promote economic development, which is dependent on some
23 understanding of how the land is actually going to be
24 used by the tribes.

25 MR. MILLER: That -- that is exactly right.

1 And that's why, in determining whether -- the Secretary
2 has to take account of use in order to determine whether
3 it will, in fact, serve the interest of promoting tribal
4 economic development and self-governance, but it doesn't
5 follow that the effect of that use on bystanders, on
6 other property owners in the vicinity, is within the
7 interests that Congress had in mind --

8 JUSTICE SCALIA: Why not? Of course, it
9 doesn't have to be within the interest, it just has to
10 be arguably within the interest. That -- that adverb is
11 left out in much of the discussion.

12 But if, indeed, the use of the land is one of
13 the elements to be considered in taking title, why isn't
14 somebody who is affected by the proposed use within the
15 zone of interest?

16 MR. MILLER: Because -- I mean, just to take
17 the facts of this case as an example, you know,
18 Patchak's objection is not to the jurisdictional
19 transfer. It's not to the fact that this is now going
20 to be tribal land rather than land subject to the taxing
21 or regulatory authority of the State of Michigan or
22 Allegan County --

23 CHIEF JUSTICE ROBERTS: Just to interrupt, in
24 other words, it's not to the title.

25 MR. MILLER: Well, I mean -- that is -- the

1 relief he is trying to get is to undo that, but
2 the -- the injury doesn't come from that.

3 CHIEF JUSTICE ROBERTS: I'm sorry.

4 MR. MILLER: The injury comes from the fact
5 that the land is going to be used for gaming, but in
6 1934 --

7 JUSTICE SCALIA: You could put that it way,
8 or you could put it that the injury comes from the
9 government's taking title for gaming. Okay? You could
10 put it that way as well.

11 MR. MILLER: But --

12 JUSTICE SCALIA: Inasmuch as the government
13 always has a purpose in mind when it takes title.

14 MR. MILLER: But for the zone of interest
15 test, the question would be, are people who may be
16 adversely affected by gaming on Indian land within the
17 zone of interest -- is that interest arguably
18 something the tribe -- Congress was speaking to --

19 JUSTICE SOTOMAYOR: I'm a little confused.
20 The government --

21 JUSTICE KENNEDY: On what date was it -- on
22 what date was it clear that the use would be gaming?
23 There is some suggestion in the briefs that, oh, well,
24 it could be light industry and it was zoned for economic
25 use generally. At what point was it acknowledged by all

1 that this would be for gaming? At the very outset?

2 MR. MILLER: I believe that in applying to
3 have the land taken into trust, the tribe said what --

4 JUSTICE KENNEDY: At the very outset.

5 MR. MILLER: -- it wanted to happen.

6 JUSTICE ALITO: What would happen if someone
7 filed a challenge within the 30-day period and then the
8 government took title to the land while the litigation
9 was pending? Do the regulations preclude that from
10 happening while the litigation continues, or is it
11 necessary for the -- the challenger to obtain a stay
12 from a court?

13 MR. MILLER: The regulations do not address
14 that. The BIA manual provides that that action, of
15 taking the land into trust, should not be taken while
16 the litigation is pending.

17 JUSTICE ALITO: Well, is that enforceable?

18 MR. MILLER: I -- I think that it would not
19 be, but I think that -- I guess I would say two things
20 about that. The first is that the Secretary enacted
21 these regulations, the 30-day notice rule, precisely for
22 the purpose of ensuring that there would be an adequate
23 opportunity for judicial review, and thus removing the
24 constitutional doubt that the Eighth Circuit had found
25 associated with the IRA.

1 And I think -- so there is every reason to
2 think that the Secretary is going to conscientiously
3 carry out what those regulations provide for, which is
4 allowing judicial review. And if the Secretary were
5 ever to do that, I think he would find that going
6 forward in every case, courts would enter a stay.

7 CHIEF JUSTICE ROBERTS: Well, they didn't
8 here. I mean, when Patchak filed his suit, title had
9 not yet passed to the Secretary. And he sought a stay.

10 MR. MILLER: And -- and it was -- it was
11 denied, and he could have sought relief from the court
12 of appeals, and he didn't.

13 CHIEF JUSTICE ROBERTS: But nothing -- at
14 that point, you thought nothing prevented the Secretary
15 from moving forward, and in fact, the Secretary did move
16 forward even though he'd already filed the suit.

17 MR. MILLER: That -- yes.

18 JUSTICE BREYER: All right. Well, then why
19 isn't it just like your 30 days?

20 MR. MILLER: Well, because this was a suit
21 that was not filed within the 30-day period. The --

22 JUSTICE BREYER: So what?

23 MR. MILLER: They --

24 JUSTICE BREYER: Can I -- the -- this is
25 exactly the point that I don't understand. Forget

1 standing for a moment. I'm just thinking of your quiet
2 title action.

3 This wasn't an action to quiet title at all.
4 This was a -- I looked at the complaint, as I -- as I
5 gather from his questions, so did the Chief Justice.
6 And it is a complaint filed before the -- the property
7 was taken into trust, and it asks for an injunction
8 under the APA, if it wants review of that, before the
9 government has any title to it at all, or at least it
10 hasn't taken it into trust.

11 So why are we considering quiet title? What
12 has that to do with this? Why isn't it
13 exactly what -- now, that's the same as the Chief
14 Justice asked, and I have exactly the same question.

15 MR. MILLER: Right. Well -- and in that
16 period before the land is taken into trust, the APA,
17 everyone agrees, permits -- permits that litigation.

18 JUSTICE BREYER: All right. Well, why isn't
19 that -- that's the end of that argument, then, isn't it?
20 Because this suit was brought seeking an injunction
21 before the land was taken into trust; the district court
22 denies the request for the injunction. The court of
23 appeals reverses that. And so there we are. We're
24 reviewing that action by the court of appeals, reviewing
25 a judge who said you are not entitled to an injunction

1 sought before the land was taken into trust.

2 MR. MILLER: Because at this point, the
3 question of whether to enjoin the transfer from taking
4 place is moot. Because --

5 JUSTICE BREYER: Oh, I don't know about that.
6 Well --

7 MR. MILLER: The relief that's being sought
8 now -- and this is made clear in Patchak's brief in the
9 court of appeals -- is an order compelling the Secretary
10 to relinquish the title to the land. And so that --

11 JUSTICE BREYER: Well, I don't know how --
12 how we should treat that. There -- there was an order.
13 Suppose that order was wrong. Suppose they should have
14 granted the injunction. Then isn't what we should do,
15 send it back because that injunction should have been
16 granted, then have a hearing or trial or whatever you
17 want to have on whether the Act applies, and then figure
18 out how you do relief? Which I don't know.

19 MR. MILLER: No. The time to seek review of
20 whether to enjoin a not-yet-completed transfer is before
21 the transfer is completed.

22 JUSTICE BREYER: They did.

23 MR. MILLER: But -- and if he wanted to
24 appeal the district court's denial of that injunction,
25 he could have done so as of right under --

1 JUSTICE BREYER: He didn't appeal that. He
2 appealed it different --

3 MR. MILLER: He did not appeal it.

4 JUSTICE KENNEDY: Well, then your -- your
5 argument is just one of timing and not the fact that the
6 reliance is on the -- is on the QTA.

7 The tribe says, isn't it ironic that if you
8 really have a claim in the land as a property owner, you
9 can't sue under the QTA, and this person is much further
10 removed. Well, that's because he has a different ground
11 for relief. That's all we're talking about.

12 MR. MILLER: Well, the --

13 JUSTICE KENNEDY: So the fact that the QTA
14 suddenly, deus ex machina, pops onto the scene doesn't
15 mean that it -- that that changes his -- his ground for
16 relief that he's -- that he's relying upon. His ground
17 of relief has always been the same, APA.

18 MR. MILLER: With -- with respect, Your
19 Honor, once the land is taken into trust, the -- the
20 only effective relief would be an order taking the land
21 out of trust, and that's what brings this within the
22 scope of the QTA.

23 JUSTICE ALITO: Well, that depends on whether
24 sovereign immunity is judged as of the time of the
25 filing of the complaint or as of the time of the

1 litigation of the sovereign immunity claim, right? And
2 you claim -- you don't want us to address that issue.

3 MR. MILLER: We -- we think it's -- it's not
4 properly before the Court. But I mean, one thing I
5 would just say about that is it is not remarkable, or it
6 often happens that, as the nature of the claims or the
7 identity of the parties changes throughout the course of
8 litigation, sovereign immunity can bar a suit that
9 wouldn't have been barred before.

10 And one example of that is under the Westfall
11 Act. Somebody sues an officer of the United States for
12 a tort, that suit can go forward. But if the Attorney
13 General then certifies under the Westfall Act that the
14 employee was acting within the scope of his or her
15 duties, then it gets converted into an action against
16 the United States, which might, if it falls within one
17 of the FTCA exceptions, be brought --

18 JUSTICE SCALIA: But the Act provides for
19 that. The Act provides for that, right?

20 MR. MILLER: Well, but that -- that's just an
21 example of how, as -- as the parties, or the relief --
22 here, it's the relief -- changes, sovereign immunity can
23 bar an action.

24 If I could reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Millett.

2 ORAL ARGUMENT OF PATRICIA A. MILLETT

3 ON BEHALF OF THE PETITIONER IN NO. 11-246

4 MS. MILLETT: Mr. Chief Justice, and may it
5 please the Court:

6 When you strip title to land, which is a fact
7 in this case, you strip sovereignty. You wreak havoc on
8 ongoing governmental operations, you -- on criminal
9 jurisdiction, civil jurisdiction, the backdrop against
10 which contracts were negotiated, investment decisions
11 made and economic development undertaken.

12 That is why the Congress of the United States
13 and this Court in Coeur D'Alene have never allowed
14 injunctive relief to strip the United States of title
15 that it has. The essence of sovereign immunity is,
16 right or wrong, you cannot take title away that the
17 United States has.

18 JUSTICE SCALIA: Well, is -- is that in
19 the -- is that in the Administrative Procedure Act? I
20 thought the Administrative Procedure Act eliminates
21 the -- the old bugaboo of sovereign immunity, and says
22 when it -- when it will stand and when it won't.

23 MS. MILLETT: If you look --

24 JUSTICE SCALIA: And if you're relying on the
25 Quiet Title Act, that -- that clearly covers only suits

1 which seek to say, I own the land rather than the
2 government, and this is not such a suit. So I don't see
3 why the normal APA principles wouldn't govern.

4 MS. MILLETT: For two reasons, Justice
5 Scalia. Because the APA itself -- and this is on page
6 6a of the addendum to our brief -- says that it does not
7 waive sovereign immunity and does not grant relief if
8 another statute expressly or impliedly forecloses the
9 relief that is sought. And the Quiet Title Act says you
10 cannot have an injunction stripping the United States of
11 land, period, and you cannot have any litigation over
12 title --

13 JUSTICE SCALIA: No, but the relief to be
14 sought under the Quiet Title Act is title in the
15 plaintiff. That's the relief ultimately sought.

16 MS. MILLETT: No --

17 JUSTICE SCALIA: Now, on the way to that, you
18 may -- you may get some injunctive remedy, but the basis
19 for the lawsuit is -- is not: I own the land.

20 MS. MILLETT: With respect, Justice Scalia,
21 you can get no injunctive relief whatsoever even if you
22 are asserting title. But the Quiet Title Act itself is
23 brought -- it limits relief to monetary compensation,
24 unless the government agrees to a specific relief.

25 JUSTICE SCALIA: Relief in that kind of suit,

1 yes.

2 MS. MILLETT: Yes --

3 JUSTICE SCALIA: Relief in that kind of suit.
4 But this is not that kind of suit.

5 MS. MILLETT: But -- no. Justice Scalia,
6 with respect, on page -- this is 2a of the addendum to
7 our brief, 2409a(a), the type of suit that is addressed,
8 and to which the Indian lands exception applies, is a
9 suit -- and I'm reading here from the second line of
10 a(a): "A civil action -- "

11 JUSTICE SCALIA: Excuse me. I guess I've
12 lost you.

13 MS. MILLETT: I'm sorry. I'm on the addendum
14 to our -- the blue brief, 2a, and this is the Quiet
15 Title Act.

16 JUSTICE SCALIA: Okay.

17 MS. MILLETT: And right -- subsection (a),
18 the second line, all right: "The waiver of sovereign
19 immunity is for a civil action under this section to
20 adjudicate a disputed title." It does not say --

21 JUSTICE KAGAN: Ms. Millett, it also says:
22 "Under this section."

23 MS. MILLETT: Yes.

24 JUSTICE KAGAN: And the section describes the
25 complaint. It says: "The complainant shall set forth

1 with particularity the nature of the right, title, or
2 interest which the plaintiff claims."

3 So the type of suit that this section has in
4 mind is a suit in which the plaintiff claims a right,
5 title or interest. And the language that you read,
6 "under this section," well, that's what this section is
7 about, a suit in which a plaintiff claims the right,
8 title or interest.

9 MS. MILLETT: No, Justice Kagan, in this
10 respect. That tells you what you have to do if you are
11 allowed to proceed under the statute to win, the first
12 step of what you have to do. But what subsection (a)
13 says is what is carved out, what is a wholesale -- and
14 this Court said in *Mottaz*, a retention of immunity, even
15 in the face of arguments that the government has done
16 wrong administratively, as in *Mottaz*. What you
17 do -- have done is retain immunity.

18 When the -- the section here right under the
19 sentence I read, Justice Scalia, about this section does
20 not apply to trust or restricted Indian lands, what that
21 meant was that this -- that Congress, against a backdrop
22 of complete immunity, said: We've looked at lands,
23 we've studied what we're doing, and we are not doing two
24 things, and we're going to be explicit about it. We are
25 not letting you touch Indian lands. The United

1 States may not be named --

2 JUSTICE SCALIA: You can say that again and
3 again, counsel, but it does say "under this section."
4 And I don't -- I don't know how you get out from under
5 that. It says "under this section."

6 MS. MILLETT: This --

7 JUSTICE SCALIA: And if this section applies
8 only to suits seeking to assert title on the part of a
9 plaintiff, it's not under this section.

10 MS. MILLETT: They are -- this section is, I
11 think, defined by what Congress's waiver of sovereign
12 immunity. And it didn't say we're waiving sovereign
13 immunity for quiet title actions. It says for a civil
14 action in which the United States' title is disputed.
15 So quieting U.S. title --

16 JUSTICE BREYER: But that -- but you
17 don't -- you can't believe that totally because you
18 agree there is some APA review of an action brought
19 before the title shifts where, the claim is, you cannot
20 take title, Secretary. You agree with that. You can
21 bring some.

22 MS. MILLETT: Absolutely. Before title --

23 JUSTICE BREYER: Okay. Once you agree to
24 that, I stop at the words, not just "under this
25 section," but "to adjudicate a disputed title to real

1 property."

2 Then I read his complaint. His complaint, on
3 31 to 38, is asking for an injunction, and it's asking
4 for an injunction before they take any title to the
5 property. And maybe they went ahead and did it anyway,
6 but is there some other complaint that I didn't read?
7 Is there some amendment to the complaint in the record?
8 If so, where is it?

9 MS. MILLETT: I think there's a constructive
10 amendment in this sense, because if it's only
11 thing with --

12 JUSTICE BREYER: I don't know what a
13 constructive amendment is.

14 MS. MILLETT: Well, let me see if I can
15 explain. If I can explain. To be sure, the complaint,
16 which was untimely filed for purposes of the protection
17 of the government's not taking it into -- into trust,
18 but the set -- it did seek to stop the decision from
19 happening.

20 After that happened, when he did not seek
21 appeal or emergency relief from the district court not
22 giving him the injunction he asked for -- he asked for a
23 preliminary injunction to stop the taking of title. The
24 district court didn't give it. It actually sat on it,
25 constructively denied it. And it's well recognized in

1 courts of appeals, you can appeal a constructive denial
2 of a preliminary injunction. He didn't do that.

3 This is the way litigation works. Title
4 shifted. Sovereign immunity shifted. The Quiet Title
5 Act didn't apply, then it did apply because title was in
6 the hand and in the name of the United States
7 Government.

8 JUSTICE SCALIA: I thought you were going to
9 answer how his -- his complaint constructively changed.

10 MS. MILLETT: And so after that, he had two
11 choices. He could have dismissed the action as moot.
12 But what happened is he continued to press -- and this is
13 on page 25 of his brief, his court of appeals brief, at
14 page 26 and 27 -- he wants an injunction now, not to stop
15 title, but to take title out. And that's when the Quiet
16 Title Act --

17 JUSTICE SCALIA: I thought you were going to
18 tell us how it constructively changed to be an action
19 seeking to have a decree that title was in him, which is
20 what the QTA covers.

21 MS. MILLETT: No, it was --

22 JUSTICE SCALIA: Okay.

23 MS. MILLETT: No, because the Quiet Title
24 Act --

25 JUSTICE SCALIA: So even constructively, it

1 hasn't turned into that.

2 MS. MILLETT: The Quiet Title Act, when it
3 says -- when it says the only way we'll give you a
4 relief is if you can establish that you have an interest
5 in the land, forecloses suits seeking to adjudicate --
6 adjudicate, excuse me -- disputed U.S. title by those
7 who don't even have an interest.

8 JUSTICE SOTOMAYOR: Counsel --

9 MS. MILLETT: And against the back -- I'm
10 sorry.

11 JUSTICE SOTOMAYOR: Counsel, you're assuming
12 that the statute was passed against a backdrop of
13 complete sovereign immunity, but if you look at Larson
14 and Malone, it appears as if prior to the enactment of
15 the QTA, people could bring suits to say that an officer
16 had acted beyond his or her statutory authority. So
17 what the Quiet Title Act did was encapsulate some of
18 that law.

19 From where do we draw the conclusion that the
20 intent was to eliminate every other claim that could be
21 brought under something like the APA, or an officer
22 suit?

23 MS. MILLETT: To be clear, as Justice Scalia
24 himself then testified before Congress, the law was a
25 mess, and you could not discern anything from Larson,

1 Malone. And the one area where actually courts have
2 pretty consistently denied relief, as Justice Scalia
3 then said, was in the land area.

4 And Congress responded to hardship, but in
5 doing so, it was making a critical balance. It knew how
6 disruptive to government it is to pull the rug out from
7 under the feet of the Federal Government's operations.

8 And -- and it said we're going to draw lines,
9 and there's three lines. It said: No suits involving
10 Indian lands, no injunctive relief or coercive
11 injunctive relief at all will be allowed. If -- if you
12 have a right, you will only get damages unless the
13 government agrees otherwise. And to prevail, you must
14 have an interest in land.

15 Now, that is a concerted judgment of Congress
16 that we will not --

17 CHIEF JUSTICE ROBERTS: Could I say, just for
18 a moment, let's suppose the tribe -- the -- Mr. Patchak
19 brings a nuisance action against the tribe for running a
20 casino and imposing all these difficulties on the
21 surrounding previously rural community. He says this is
22 a nuisance.

23 And the tribe answers and says: No, we can
24 do this under the Indian Gaming Regulation Act. And
25 Patchak then says: Well, no, because you don't have

1 valid authority under that Act because the Secretary
2 shouldn't have taken the land into title.

3 Now, that is not a quiet title action. That
4 is a nuisance action. Can he have that adjudicated in
5 that suit?

6 MS. MILLETT: He could -- he could bring a
7 nuisance action, assuming the tribe waives sovereign
8 immunity, which would be its own problem. Assuming --
9 I'm assuming this is a suit against the tribe and not
10 the Secretary.

11 CHIEF JUSTICE ROBERTS: Right, right.

12 MS. MILLETT: And so there'd be their own
13 either State law or sovereign immunity questions, if he
14 could bring it. And then if the government tried to
15 raise this as -- or, excuse me, the tribe raised it as a
16 preemption defense, then there would be a separate
17 question whether at that point a court could issue,
18 consistent with the Quiet Title Act, a declaratory
19 judgment which would pull the rug out from the
20 government's feet.

21 CHIEF JUSTICE ROBERTS: Right. But there'd
22 be no --

23 MS. MILLETT: Now, to be sure, in the --

24 CHIEF JUSTICE ROBERTS: -- question of his
25 ability to sue and put that question at issue.

1 MS. MILLETT: There's no question he could
2 bring a -- assuming tribal sovereign immunity, that he
3 could bring a nuisance action, but it's also important
4 to remember in that context, the other reason that
5 nuisance action would fail is that the courts have
6 already ruled on this claim about the legitimacy of
7 authorization of gambling, about the environmental
8 effects and the esthetic effects in the MichGO
9 litigation. This is simply recycled through the IRA
10 claims that have already been adjudicated and lost.

11 CHIEF JUSTICE ROBERTS: Well, but that's a
12 question that's not before us.

13 MS. MILLETT: So -- but with respect to the
14 question of judicial review that was mentioned earlier
15 and I think would be implicated, obviously, in a
16 nuisance action for -- this is sort of being
17 case-specific with respect to claim preclusion and
18 issues like that.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MS. MILLETT: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Mr. Nelson.

22 ORAL ARGUMENT OF MATTHEW T. NELSON

23 ON BEHALF OF THE RESPONDENTS

24 MR. NELSON: Thank you, Mr. Chief Justice,
25 and may it please the Court:

1 This is a classic APA action. Mr. Patchak is
2 challenging unlawful agency action. Mr. Patchak is not
3 asserting a quiet title action where someone asserts an
4 interest in property owned by the government and is
5 trying to get that property back.

6 And as this Court has already discussed, the
7 best evidence of that is the fact that Mr. Patchak filed
8 this suit before the land was taken into trust. The
9 fact that the government subsequently took the land did
10 not affect the nature of Mr. Patchak's lawsuit.

11 JUSTICE GINSBURG: But he didn't file it
12 within the 30-day window, so that -- that is -- there
13 was a clear track. He could have filed within 30 days,
14 and at least the government tells us that that would
15 have been subject to judicial review, the ruling made
16 within -- that nothing would go on until that action was
17 cleared.

18 So why -- if he could have sued early, before
19 any title transfer, why isn't that all the relief
20 someone in his position would be entitled to? Why
21 should he be allowed to wait?

22 I mean, the whole purpose of the 30-day
23 window is to get people to state their objections.

24 MR. NELSON: Justice Ginsburg, the 30-day
25 window is a notice period. Mr. Patchak did in fact file

1 his lawsuit within the 6-year statute of limitations
2 provided by Congress for APA claims. And the reason
3 that the Secretary adopted the 30-day notice provision
4 is the very argument that we believe is misplaced here,
5 namely that the Quiet Title Act springs up to bar
6 judicial review after the land is taken into trust.

7 We don't believe that's the case, because
8 Mr. Patchak is not asserting a Quiet Title Act action,
9 which is limited to those claims where someone says,
10 this is my property and I want it back or, with regard
11 to the government, at least pay me for it.

12 JUSTICE SCALIA: You -- you say the 30-day
13 window only applies to quiet title actions.

14 MR. NELSON: Your Honor, the 30-day
15 window -- yes, if someone was asserting a quiet title
16 action, the 30-day window would apply.

17 JUSTICE SCALIA: Surely -- surely the 30-day
18 envisions comments by anybody, not just people who claim
19 to own the property, doesn't it?

20 MR. NELSON: Your Honor, certainly it
21 provides for comments, in that people can come and
22 assert their comments. Absolutely. But it doesn't
23 prevent someone from asserting a lawsuit.

24 JUSTICE SOTOMAYOR: Would you have been
25 entitled to file in that 30-day period? How is your

1 claim, the one that you ultimately made, any different
2 than what you would have done if you had filed within
3 the 30 days?

4 MR. NELSON: Justice Sotomayor --

5 JUSTICE SOTOMAYOR: Same claim; right?

6 MR. NELSON: It is the same claim, yes, Your
7 Honor.

8 JUSTICE SOTOMAYOR: All right. Tell me what
9 relief you're seeking that's different than -- are
10 you -- what relief are you seeking? Aren't you seeking
11 to shed the United States of its title?

12 MR. NELSON: Your Honor, the relief that --

13 JUSTICE SOTOMAYOR: Just the -- what's
14 the -- don't tell me what your cause of action is. What
15 relief at the end of the day do you want?

16 MR. NELSON: Justice Sotomayor, Mr. Patchak
17 is seeking a declaratory judgment that the decision of
18 the Secretary that it can take land into trust for this
19 particular band of Indians is incorrect, and that
20 therefore, the decision to do so is ultra vires; and as
21 an incident to that relief, now that the government has
22 taken the land into trust, that the land now be taken
23 out of trust.

24 That does not convert this, though, into a
25 quiet title action, because Mr. Patchak is not asserting

1 an interest in the property itself.

2 The relief of the quiet title action
3 provides -- has two parts. It both provides for -- that
4 title will be taken from the government, and that title
5 will be quieted in the plaintiff. The relief that
6 Mr. Patchak is seeking does not include quieting title
7 in himself.

8 JUSTICE KAGAN: Mr. Nelson, putting that
9 question aside of whether this is or isn't a quiet title
10 action, there's another question, which is whether
11 sovereign immunity can come into effect after a suit has
12 been filed. It seems to me a hard question, and one
13 that has not been briefed by either party particularly.

14 So I just ask you, is there case -- are there
15 any cases that you can point to that suggest that
16 sovereign immunity cannot come into effect after a suit
17 has been filed? Because what the government says is,
18 you know, circumstances change, conditions change on the
19 ground, sovereign immunity can pop up where it didn't
20 exist before.

21 Is there any precedent that you have to
22 negate that?

23 MR. NELSON: Your Honor, I am not at this
24 time prepared to say that there is or is not. I do know
25 that we have cited in the footnote in our brief the -- I

1 believe it's the Grupo Dataflux case that indicates that
2 jurisdiction is decided at the time that the complaint
3 is filed. Because the D.C. Circuit specifically
4 reserved this issue, we did not believe this issue was
5 before the Court.

6 JUSTICE GINSBURG: The government answers to
7 that, that's in diversity. You know, you determine
8 citizenship as of the date the complaint is filed. If
9 the citizenship of a party changes, so it coincides with
10 someone on the other side of -- of the line, it doesn't
11 matter. But do you have cases other than diversity
12 cases where the filing of the complaint -- nothing
13 happens, nothing that can happen after affects the
14 jurisdiction as set as of the time the complaint is
15 filed? I don't know, outside diversity, where this
16 principle has applied.

17 MR. NELSON: Your Honor, I am not at this
18 time aware of any cases. I'm not, unfortunately, in a
19 position to say that the cases do not exist or do exist.
20 I believe the issue was addressed in the -- the D.C.
21 Circuit briefing, but I'm not aware at this time of any
22 cases that would -- that address this specific issue.

23 CHIEF JUSTICE ROBERTS: The Solicitor General
24 in footnote 1 of his reply brief says that's the general
25 rule, which I take it there might be exceptions to it.

1 MR. NELSON: Exceptions.

2 CHIEF JUSTICE ROBERTS: But I'm sure he'll
3 tell us what those are.

4 JUSTICE SOTOMAYOR: Counsel, is there any
5 limit to who can bring an APA action under your theory?
6 It seems to me that what you're saying is that anyone
7 other than a landowner because of the Quiet Title Act
8 can within 6 years attempt to unravel any decision the
9 government has made to take land, because we're not
10 limited now to trust lands.

11 We're limited -- under your theory, whenever
12 the government takes any kind of land, anyone's entitled
13 to come in and challenge that action under the APA for 6
14 years, and to seek an injunction because it isn't a
15 quiet title action. It's merely a challenge to the
16 decision to take land.

17 Is there any limit to your theory as to who
18 can bring that kind of action and --

19 MR. NELSON: Justice Sotomayor, yes, there is
20 a limit on who may assert these actions. First, with
21 regard to this Court's prudential standing analysis
22 would obviously provide a limitation, but second, with
23 regard --

24 JUSTICE SOTOMAYOR: In which way? You're
25 saying anyone who's affected, your niece, your farm

1 owner's niece who comes to visit twice a year or visits
2 the land and walks through it, could presumably say:
3 I'm negatively affected by the government's taking of
4 this land, Indian or not, within the 6 years, and the
5 government improperly took the land. Undo it.

6 MR. NELSON: No, Your Honor, I don't believe
7 that my -- that my client's niece would have prudential
8 standing because I don't think that you could -- that
9 that person would arguably be within the zone of
10 interests to assert that claim. I think that the zone
11 of interest test does exclude people who might have
12 Article III standing from asserting these types of
13 claims.

14 JUSTICE SCALIA: I thought that -- maybe I'm
15 wrong, but the government will correct me if I am. I
16 thought the government concedes that a NEPA action
17 could -- could be brought when the government is taking
18 land to use for a particular use. Let's say
19 it's -- it's taking land for a nuclear waste repository.
20 Certainly, a NEPA action would -- would lie. You don't
21 disagree with that, do you?

22 MR. NELSON: We don't disagree.

23 JUSTICE SCALIA: You're supposed to say "yes,
24 sir, good."

25 (Laughter.)

1 JUSTICE SOTOMAYOR: No, but my
2 question -- counsel, my question was different. Under
3 your theory, you could bring this suit after the land
4 has been taken. NEPA assumes before the land was taken.
5 I'm talking about under your theory of law, once land
6 has been taken by the U.S., if anyone has a viable legal
7 claim that the land was taken improperly, whether it's
8 Indian trust land or anyone else's land for any other
9 purpose, that person within 6 years can still bring a
10 suit under the APA.

11 MR. NELSON: Only to the extent that the land
12 is taken as a result of administrative action.

13 JUSTICE BREYER: No, no, no. You can't -- I
14 mean --

15 JUSTICE SOTOMAYOR: Government land is always
16 taken by administrative action.

17 MR. NELSON: I'm sorry.

18 JUSTICE BREYER: I thought -- I
19 mean -- sorry. You answer it as you want according to
20 your argument.

21 There is a difficult question here. The
22 difficult question is what happens if one brings an
23 ordinary APA suit before land is taken, before that suit
24 can be decided -- before that suit can be decided, the
25 government takes the land. Does that transform it into

1 a quiet title action?

2 The obvious answer, which isn't obvious at
3 all, is that the answer is that it's a proper APA suit
4 if you bring it before they take it. And if you bring
5 it after they take it, it's a quiet title action.

6 And -- and that would seem to me a first-blush answer.

7 But I haven't found -- I mean, that's a
8 question we don't -- I don't know if we have to answer
9 that question. It seems to me quite difficult. And I
10 don't know what authority there is. And is it fully
11 argued in the briefs? So what -- isn't that
12 what -- you're thinking -- I think Justice Sotomayor is
13 thinking, well, and you just said you can bring it
14 after. I don't know if you can bring it after.

15 So go answer now --

16 (Laughter.)

17 JUSTICE BREYER: And I want to hear what you
18 say.

19 MR. NELSON: Thank you, Justice Breyer.

20 The fact that this -- the fact -- the fact
21 that the land is taken into trust does not transform the
22 action into a quiet title action simply because the
23 government --

24 JUSTICE SOTOMAYOR: Forget about the trust.

25 MR. NELSON: Okay.

1 JUSTICE SOTOMAYOR: Because under your theory
2 of what -- what the APA permits you to do, anytime the
3 government takes land, whether into trust or for any
4 other purpose, the APA permits someone within 6 years,
5 with whatever definition of prudential standing you want
6 to give it, to come in after the taking and challenge
7 that it was ultra vires, that it was done improperly.
8 That's your theory.

9 So going back to Justice Breyer's question,
10 why isn't that within the quiet title action
11 prohibition --

12 MR. NELSON: Your Honor --

13 JUSTICE SOTOMAYOR: -- once it's in the
14 government's hands?

15 MR. NELSON: Once it's in the government's
16 hands, it is -- it does not -- once the government
17 acquires the title, it does not change the nature of the
18 APA action, because the Quiet Title Act is limited to --

19 JUSTICE SCALIA: You're not -- you're
20 answering the question with regard to an argument I
21 don't think you've made and I don't think you would want
22 to make. You're not asserting that the action can be
23 brought anytime within 6 years after the government has
24 already taken the land. You're just asserting that an
25 action brought before the government takes the land does

1 not change its character and become a quiet title action
2 afterwards; right?

3 MR. NELSON: Yes, Your Honor.

4 JUSTICE SCALIA: You're not saying that
5 anybody can bring within 6 years after the government's
6 taking a suit, are you? I hope you're not arguing that.

7 MR. NELSON: Absolutely not, Your Honor.

8 JUSTICE SCALIA: Thank you.

9 (Laughter.)

10 JUSTICE ALITO: What would happen now, as a
11 practical matter, if Mr. Patchak were to -- were to
12 prevail? I take -- I understand the casino's built and
13 running. So what would happen?

14 MR. NELSON: Your Honor, what would happen
15 here, to our understanding, is the land would be taken
16 out of trust and would revert to the tribe.

17 JUSTICE GINSBURG: But I think the government
18 told us that the land didn't belong to the tribe in the
19 first place.

20 MR. NELSON: Your Honor, I'm not entirely
21 sure as to what the status of the title was. Our
22 understanding is that --

23 JUSTICE GINSBURG: Well, the government did
24 say that the Band was not the prior owner of the tract.
25 So where would it go?

1 MR. NELSON: Your Honor, the -- it depends in
2 part, I believe, at this -- at that point, based on
3 State law, what the effect of the Court's decision would
4 be. Would it render the trust status void? If so,
5 under Michigan law, the land would vest in the intended
6 beneficiary, which is the tribe.

7 If it -- if it does not, if the entire action
8 would be undone, the land would revert back to the prior
9 owner, which, to the best of my understanding, is a
10 company that involves ownership both by a group of Las
11 Vegas investors and also, to my understanding, the Band
12 itself; although I could be corrected on that.

13 JUSTICE SOTOMAYOR: Was that the -- I thought
14 part of it was agricultural land, and that another part
15 was a business. I mean, I think -- I thought -- well,
16 the government can correct me.

17 MR. NELSON: Your Honor, the land itself was
18 partially agricultural and partially light
19 manufacturing. That was how it was zoned.

20 JUSTICE SOTOMAYOR: Right.

21 MR. NELSON: But it was all owned as a single
22 parcel. The Bradley tract was, I believe, a single
23 parcel for the purpose of --

24 JUSTICE BREYER: But your injury, your
25 injury is that it's being used for gambling. So is

1 there room for relief that could say the government can
2 do what it wants to the land, it just can't let it be
3 used for gambling, if you want.

4 And that would cure your injury, and it
5 wouldn't require the government to give back the land,
6 and it wouldn't require any unscrambling, and title
7 could rest in the government. I don't know if that's
8 possible or not possible.

9 MR. NELSON: Your Honor, we -- we looked into
10 and wanted to make an argument that somehow you could
11 separate the trust title status and the Federal
12 Government's fee simple interest. And in looking at the
13 deed itself, it doesn't look like that can be done.

14 JUSTICE KENNEDY: What were the provisions,
15 if any, in the Indian Reorganization Act itself that
16 show a concern for the kind of standing that you're
17 alleging here?

18 It seems to me you're talking about
19 environmental effects and so forth under the
20 Indian Gaming Act, but yet your primary suit is under
21 the Indian Reorganization Act. So I don't see -- I
22 understand how that might give you standing, but how
23 does it give you a cause of action for relief under the
24 Indian Reorganization Act?

25 MR. NELSON: Your Honor, land --

1 JUSTICE KENNEDY: The Indian Reorganization
2 Act, just to help pursue the question a little bit
3 further, has a provision about the public interest, but
4 not in the section that you're relying on. It doesn't
5 say anything about the public interest.

6 MR. NELSON: Yes, Your Honor, section 463 of
7 the Indian Gaming Act --

8 JUSTICE KENNEDY: 463 does, but you're going
9 under 465.

10 MR. NELSON: Correct, we're under 465,
11 Your Honor.

12 Justice Kennedy, I would point to the fact
13 that the land is authorized to be taken into trust for
14 Indians, and when land is taken into trust, it
15 necessarily implicates the use. And as soon as the use
16 is implicated, anyone who is affected by that
17 use -- people who live in close proximity to that
18 land -- are within -- are arguably within the scope of
19 those people who Congress would expect to enforce --

20 JUSTICE KENNEDY: What is the specific
21 provision of the IRA that you rely on? You -- do you go
22 back to 463? Because there's nothing in 465 that
23 answers your -- this question, I don't think.

24 MR. NELSON: Your Honor, I agree that section
25 465 does not specifically reference the public interest.

1 It does, however -- the intent in 465 is to have land
2 taken into trust. And I don't believe that you can
3 separate the fact that the land is being taken into
4 trust from the specific use to which it is being put.

5 Congress authorized the land to be taken into
6 trust for a specific use. And you can see, in fact,
7 that the government has reached the same conclusion.
8 When you look at the regulations that the Secretary has
9 adopted in consideration of section 465, they not only
10 address land use, the tribe has to identify the use to
11 which the land will be put, but they also require the
12 tribe to identify any conflicts of land use, which
13 clearly addresses the fact that other people are going
14 to be affected by the land use.

15 Consequently, those -- and we believe
16 those -- those regulations are subject to Chevron
17 deference because they fall within the scope of the
18 authority delegated to the Secretary, and they don't
19 conflict with the broad delegation there in the -- in
20 section 465. So --

21 JUSTICE KENNEDY: That's helpful. Just a
22 different question, going back to what -- Justice
23 Alito's question. It does seem that we may be wasting
24 our time. I'm not suggesting that the State -- that the
25 case is moot, but you did wait for some 3 years before

1 you brought this suit. The building was built. It
2 seems to me there's a considerable laches problem. I
3 suppose that's just not before us.

4 MR. NELSON: Your Honor, in fact, the APA
5 reserves the laches defense, and the laches defense has
6 been asserted here. But I would point out that the
7 casino hadn't -- the casino did not open, and they did
8 not move forward with this until after the land was
9 taken into trust, which was 6 months after this lawsuit
10 was filed.

11 At that point, in spite of the knowledge of
12 this Court's decision in *Carcieri*, they made a
13 reasonable business decision to move forward with this,
14 knowing the risk that they were taking, that the entire
15 basis of them being able to operate a casino and engage
16 in class 3 gambling could be overturned.

17 JUSTICE KAGAN: But, Mr. Nelson --

18 JUSTICE KENNEDY: But that was under the
19 *MichGO* suit, not yours.

20 MR. NELSON: No, Your Honor. They knew that
21 our suit had been filed --

22 JUSTICE KENNEDY: Oh, your suit had been
23 filed at that point.

24 MR. NELSON: Correct.

25 JUSTICE KAGAN: Mr. Nelson, could I

1 understand the scope of your argument? Because I had
2 understood -- let's take the timing question aside for a
3 minute. Let's -- let's assume that you had filed this
4 suit after title had transferred. I had understood that
5 your argument was, yes, you should be allowed to do that
6 because, even though this was filed after title had
7 transferred, yours is just not a quiet title action.
8 And it's not a quiet title action because you're not
9 seeking title yourself.

10 Isn't that the question? Isn't that your
11 argument?

12 MR. NELSON: Yes, Your Honor.

13 JUSTICE KAGAN: So your argument really has
14 nothing to do with the question of timing. Your
15 argument would be the same even if title had transferred
16 prior to your filing your lawsuit.

17 MR. NELSON: Your Honor, we believe that that
18 is a logical result, but we do not believe that the
19 Court needs to address that issue in this case because
20 our argument is much stronger than that because we did,
21 in fact, file suit before the land was taken into trust.

22 JUSTICE KAGAN: Well, as I understood your
23 brief, 49 pages of it were about one thing, and there's
24 one footnote that's about something else.

25 In other words, all of your brief is

1 basically saying: Ours is just not a quiet title
2 action, and so we should be allowed to proceed
3 irrespective of when the government acquires title. And
4 then you have this little additional argument which
5 says: By the way, we started this lawsuit before the
6 government had title anyway.

7 So, I mean, the briefing in this case is all
8 about what you now say is your weakest point.

9 MR. NELSON: Your Honor, I would disagree
10 that it's our weakest point, but I do agree that
11 the -- that the logic here of the position that this is
12 not a Quiet Title Act action means that even if the
13 government acquires title to the land while the suit is
14 pending, that logically, it would then follow that the
15 action remains an APA action, and it is not converted
16 into a quiet title action.

17 JUSTICE SCALIA: I think you're right. I
18 pushed you into it. It's my fault. You're right.

19 CHIEF JUSTICE ROBERTS: And the proposition
20 would be simply that the government can't go in
21 and -- and moot out a suit that was -- by its unilateral
22 action, right?

23 MR. NELSON: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: I mean, they seem to
25 recognize that it would be a bad thing, since it's only

1 by their grace, they've told us, that they don't do it
2 right away anyway. They give people 30 days.

3 MR. NELSON: Correct, Your Honor.

4 JUSTICE GINSBURG: But didn't they --
5 wasn't -- didn't they have some encouragement from a
6 court of appeals suggesting there might be a due process
7 problem if they didn't have that notice?

8 MR. NELSON: Your Honor, there was the Eighth
9 Circuit decision -- I believe it was United States v.
10 South Dakota or South Dakota v. United States -- in
11 which the Court there found that the lack of judicial
12 review pushed towards the conclusion that the
13 Reorganization Act is an unconstitutional delegation of
14 the legislative authority. And that was one of the
15 reasons, or that was the reason cited in the Federal
16 Register, for why the Department of Interior adopted the
17 30-day notice provision.

18 JUSTICE BREYER: I don't think Justice
19 Scalia's argument was a bad argument. I thought it was
20 a rather good argument. If in fact you go back and you
21 take the view that any suit filed to review APA is not a
22 quiet title action, people could go upset government
23 title to property years and years later. And they would
24 say: Oh, well, we're not challenging the title; we're
25 just challenging what happened when it was taken, the

1 title was taken.

2 That can't be right, it seems to me, first
3 blush. So therefore, I thought you -- yours is different
4 because you filed before they took title. But as I say,
5 I'm uncertain of that distinction.

6 Now, your answer suggests you've been going
7 both ways. Sometimes you think, well, it matters that
8 we filed before. And other times, you think, no, it
9 doesn't matter.

10 JUSTICE SOTOMAYOR: Is that because you don't
11 have a theory as to why once the government takes it,
12 it's not a quiet title action?

13 MR. NELSON: Your Honor, the Quiet Title Act
14 by its terms requires that the person who is asserting
15 the action had an interest in the property.

16 JUSTICE SOTOMAYOR: So answer my question, or
17 the one that Justice Breyer has said. Then it
18 doesn't -- and the one Justice Kagan repeated yet
19 again -- okay? What difference does it make that the
20 government has taken title? Whether the government has
21 title or doesn't, under your theory, since this is not a
22 quiet action -- title action, anyone who is unhappy with
23 the way the government took title could challenge it
24 within 6 years. Isn't that the bottom line of your
25 theory?

1 MR. NELSON: Yes, Your Honor. Anyone --

2 JUSTICE SOTOMAYOR: Absent laches. You say
3 the only defense is laches.

4 MR. NELSON: No, Your Honor. The defenses
5 would be laches. The zone of interest would apply.
6 Other -- any other defense --

7 JUSTICE SOTOMAYOR: But the bottom line is,
8 under your theory, as long as no landowner, the person
9 most directly affected by the taking, as long -- that
10 person can't sue, but anybody who is an indirect person
11 can sue within 6 years, anybody who says, I don't want
12 the land, I just don't want the U.S. to have the land.

13 MR. NELSON: No, Your Honor. There's a
14 distinction I think has to be made there.
15 The -- someone who has a right, title, or interest in
16 the property, absent there being trust land, can sue to
17 upset the government's title for 12 years under the
18 Quiet Title Act. They could bring a claim under the APA
19 for up to 6 years to govern the -- or to challenge the
20 government's decision to take the land --

21 JUSTICE SOTOMAYOR: But they can't undo the
22 transfer. They can only get money.

23 MR. NELSON: Under the Quiet Title Act, they
24 can only -- for the 12-year period, they can only
25 undo -- they can -- excuse me. The government, if they

1 prevail, the government, correct, has the option of
2 deciding whether to pay for the land or to -- to give it
3 up.

4 JUSTICE KAGAN: I think --

5 JUSTICE SCALIA: Of course, the government
6 can fix that. I mean, if this is indeed an inconvenient
7 situation, that we think the government should not be in
8 doubt for 6 years afterwards, I guess Congress can
9 simply change it; right?

10 MR. NELSON: Yes, Your Honor.

11 JUSTICE SCALIA: Totally within the control
12 of Congress. We -- we -- we don't have to make up some
13 limitation to protect -- to protect the United States.

14 MR. NELSON: I agree, Your Honor.

15 JUSTICE SCALIA: Yes.

16 JUSTICE KAGAN: I suppose the question,
17 Mr. Nelson, though, is whether you can provide us with a
18 reason why Congress would have wanted what you call
19 quiet title suits -- and I agree that your definition is
20 the traditional definition. When somebody -- when the
21 plaintiff is a -- is himself asserting a right or
22 interest -- why those suits should be barred, but your
23 suit involving a third party should not be barred.

24 What could possibly be the reason to
25 distinguish between those two sets of cases?

1 Now, you might just say, I don't have to give
2 you a reason, this is what the result of the statute
3 says. But if I say, just try to provide me with a
4 reason why Congress would have wanted that distinction,
5 what would you say?

6 MR. NELSON: Your Honor, I guess I would
7 first say that because relief under the APA is different
8 than relief under the Quiet Title Act, someone with a
9 right, title or interest in the property can assert the
10 same claim that Mr. Patchak can, in spite of the fact
11 that they have that right, title or interest, under the
12 APA, as long as they do not seek under the APA to quiet
13 title in themselves.

14 Second, with regard to why this provision
15 would -- this provision is there -- I'm sorry, Your
16 Honor, I have to acknowledge I've lost the track of your
17 question.

18 Have I responded or can you restate it?

19 JUSTICE SCALIA: What -- what about this as a
20 reason? When you prevail in a quiet title action, the
21 only way the government can get off the hook is to give
22 you the land, if it's -- if it's within, what, the 6
23 years, or pay you money if it's after 6 years, but
24 within 12. Whereas in your case, I suppose the
25 government could moot the suit -- moot the suit, by

1 simply disallowing gambling.

2 Can the government do that?

3 MR. NELSON: Your Honor --

4 JUSTICE SCALIA: Once it has told the tribe
5 that they can have -- I mean, this suit could
6 be -- could go away so long as the tribe does not run a
7 casino; isn't that right? That's your -- that's the
8 gravamen of your complaint.

9 MR. NELSON: That is the gravamen of the
10 injury. Yes, Your Honor.

11 JUSTICE SCALIA: So I guess you -- you could
12 be a happy fellow if -- so long as the tribe doesn't
13 build a casino. Whereas in -- in quiet title cases, the
14 only way you can make a happy fellow out of the
15 plaintiff is to give him the land.

16 MR. NELSON: Or to pay him for it, yes, Your
17 Honor.

18 Unless the Court has any further questions, I
19 cede the remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Miller, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF ERIC D. MILLER

23 ON BEHALF OF THE PETITIONERS IN NO. 11-247

24 JUSTICE KENNEDY: Mr. Miller, one -- one
25 question, if -- if I may. The government takes the

1 position -- at least this was the way the Respondent
2 puts it -- that it can basically moot their action by
3 turning this into a quiet title action just by taking
4 title. And let's assume that that's one
5 characterization of your position. And the Respondent
6 on the other hand says, oh, well, this is an APA action,
7 we can -- we can wait forever, at least for 6 years.

8 Is there some midway position that the
9 government can't moot the case too soon, that it must
10 wait a reasonable time? Or is there no basis in the
11 statute or in the cases for that position to hold?

12 MR. MILLER: If I understand correctly,
13 you're asking about a case where the -- the lawsuit is
14 filed before the land has been transferred.

15 JUSTICE KENNEDY: Yes, yes.

16 MR. MILLER: I don't know of any basis for
17 restricting the government's ability to do that. I
18 mean, short of the plaintiffs obtaining an injunction
19 from the Court. I guess the broader point I would make
20 about that timing question is that the -- the court of
21 appeals --

22 JUSTICE KENNEDY: Well, in other words,
23 you're -- you're sticking with your position. You say
24 you can basically moot a suit at any point you want just
25 by taking title, so you're -- you're not accepting any

1 qualification to that proposition.

2 MR. MILLER: That -- that is our position. I
3 would just emphasize that that was not the basis of
4 the -- the ruling of the court of appeals. The court of
5 appeals held that it doesn't matter when the suit is
6 filed, and under the Court's analysis --

7 JUSTICE KENNEDY: All or nothing? Okay.

8 MR. MILLER: -- it would be exactly the same,
9 even if it was filed later. And I think the -- the
10 error in that analysis is -- is that the question here
11 is not whether Patchak's suit is a Quiet Title Act
12 action. The question is whether the Quiet Title Act
13 expressly or impliedly precludes relief under section
14 702, and the answer to that question is yes.

15 And I'd just like to make two points about
16 that. The first is that the general principle
17 recognized by this Court in *Brown v. GSA* and a number of
18 other cases is that when you have a narrowly drawn
19 remedial scheme for a particular subject, that that
20 precludes resort to more general remedies. And here,
21 the Quiet Title Act is exactly such a scheme. It's the
22 mechanism for adjudicating a disputed title to real
23 property in which the United States claims an interest,
24 and it has its own procedures, its own statute of
25 limitations --

1 JUSTICE KAGAN: Well, but -- but in saying
2 that you've just broadened it, or arguably, you have.
3 If -- if you think that the quiet title action is really
4 about the narrower set of cases, which is when a person
5 himself claims title, how can you get from that to say
6 that there is an express or an implied refusal of -- of
7 this kind of claim?

8 MR. MILLER: I think -- for two reasons. And
9 the first is, just that -- that first sentence of
10 2409a(a), which is, you know, to adjudicate a disputed
11 title to land on which the United States claims an
12 interest. That's a perfect description of what this
13 case is.

14 And the second is that the last sentence of
15 section 702 directs our attention to whether the relief
16 is expressly or impliedly forbidden by another statute.
17 And the relief that is sought here is an order
18 compelling the Secretary to relinquish title on behalf
19 of the United States to this land. And --

20 CHIEF JUSTICE ROBERTS: What specific -- do
21 other consequences other than the ability of the
22 Secretary to take land in trust flow from whether or not
23 a tribe is recognized in 1934?

24 MR. MILLER: I -- I'm not aware of any. I'm
25 not sure that there aren't any others, but --

1 JUSTICE SCALIA: All right. Do you have any
2 concern that the government will get hoist by its own
3 petard?

4 What your argument -- the conclusion to which
5 your argument leads is that this individual, or any
6 individual claiming that the government took title
7 incorrectly, can sue under the Quiet Title Act, even if
8 they don't claim that title was taken from them.

9 Are you sure that's good for the government?

10 MR. MILLER: Well, this action would be
11 barred under the Quiet Title Act because the Quiet Title
12 Act expressly precludes this relief, where -- where
13 Indian trust land is at issue, where the relief that's
14 sought is an injunction compelling relinquishment of
15 title without the option of paying damages --

16 JUSTICE SCALIA: Of course, that's not the
17 only time the government takes land, right?

18 MR. MILLER: Well, and the Quiet Title Act,
19 section (d), requires in a suit under the Quiet Title
20 Act the plaintiff to identify his interest in the land.

21 CHIEF JUSTICE ROBERTS: Mr. Miller, I
22 mentioned earlier your footnote 1 in your reply brief
23 about whether the time of filing question for sovereign
24 immunity purposes is limited to diversity cases.

25 Are there -- you cite one case. Are there

1 others going the other way?

2 MR. MILLER: I'm not aware of others, but --

3 CHIEF JUSTICE ROBERTS: What --

4 MR. MILLER: -- I can't say with confidence
5 that there aren't any others.

6 One point I would make on that is just refer
7 you to the Florida Prepaid case from 1998, which was
8 about State sovereign immunity, and which explained that
9 a State may condition its waiver of sovereign immunity
10 and may change that in the course of the litigation.
11 And I think that's another analogy that might be
12 instructive here.

13 CHIEF JUSTICE ROBERTS: So this suit would
14 come out the other way if the person objecting was just
15 over the border in -- in Indiana, instead of in
16 Michigan? Because there would be -- it could be brought
17 as a diversity suit.

18 MR. MILLER: Well, it would --

19 CHIEF JUSTICE ROBERTS: I'm assuming --

20 MR. MILLER: It would be still
21 be -- sovereign immunity would still apply. Sovereign
22 immunity would bar relief, even if the basis for
23 jurisdiction were diversity rather than --

24 CHIEF JUSTICE ROBERTS: Even if it were a
25 suit against the tribe, it would still be not a

1 diversity action but a Federal cause of action?

2 MR. MILLER: Our -- our point is that the
3 reason it's barred is because of sovereign immunity.
4 When -- the time of filing in diversity cases refers to
5 if the citizenship of the parties changes during the
6 course of the litigation. That doesn't -- my
7 understanding is that doesn't defeat diversity. That's
8 the nature of that exception.

9 CHIEF JUSTICE ROBERTS: Okay. Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:08 a.m., the case in the
13 above-entitled matter was submitted.)

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