

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID PATCHAK,)

4 Petitioner,)

5 v.) No. 16-498

6 RYAN ZINKE, SECRETARY OF THE)

7 INTERIOR, ET AL.,)

8 Respondents.)

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10

11 Washington, D.C.

12 Tuesday, November 7, 2017

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:03 a.m.

16

17 APPEARANCES:

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19 behalf of the Petitioner

20 ANN O'CONNELL, Assistant to the Solicitor General,
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23 PRATIK A. SHAH, Washington, D.C.; on
24 behalf of the Match-E-Be-Nash-She-Wish Band
25 of Pottawatomi Indians Respondent

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-498, Patchak versus Zinke.

Mr. Gant.

ORAL ARGUMENT OF SCOTT E. GANT
ON BEHALF OF THE PETITIONER

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

Section 2(b) of the Gun Lake Act is unconstitutional because it is incompatible with several well-established strands of this Court's separation-of-powers jurisprudence as well as with Article III itself. With Section 2(b), Congress directed the federal courts to dismiss a pending case otherwise properly before the courts.

As a consequence of that directive to dismiss with respect to Mr. Patchak's case, the courts were prevented from performing their constitutionally assigned responsibilities to decide cases before them and to say what the law is in the context of deciding those cases.

Section 2(b) is precisely the kind of

1 legislative review of judicial decisions that
2 the framers rejected when they designed the
3 Constitution. And all of --

4 JUSTICE KAGAN: Mr. Gant, when -- when
5 you say "directed that a case shall be
6 dismissed," are you referring only to the last
7 few words of this statute or are you referring
8 more broadly?

9 MR. GANT: I'm referring to the -- to
10 the last -- the words that refer to dismissal
11 itself.

12 JUSTICE KAGAN: Right. "And shall be
13 promptly dismissed."

14 MR. GANT: Yes. And then --

15 JUSTICE KAGAN: Are you suggesting
16 that if those five words were not in the
17 statute, that the case would come out
18 differently?

19 MR. GANT: I -- I am not suggesting
20 that. I think it would still have come out
21 differently; for example, if you dropped the
22 reference to dismissal but left "maintain," the
23 result would be the same. The same would be
24 true if there had been a removal of judicial
25 review.

1 JUSTICE KENNEDY: In other words, if
2 two -- if the -- if the statute had contained
3 just 2(a) but not 2(b), same result?

4 MR. GANT: No. That -- I understand
5 that to be a different question from Justice
6 Kagan's. If 2(a) were -- were the only part of
7 the statute, we had no 2(b) -- 2(c) is not at
8 issue here. So, if we had 2(a) only, we
9 wouldn't be here arguing that there was a
10 separation-of-powers violation.

11 Part of the problem here --

12 JUSTICE KAGAN: But -- but if you had
13 2(b), finished, just shall not be filed or
14 maintained in a federal court, full stop,
15 you're saying that would be the same statute as
16 the one we actually have?

17 MR. GANT: It -- it would still be
18 unconstitutional.

19 JUSTICE KAGAN: Yeah.

20 MR. GANT: Now, the -- the omission of
21 the "shall be dismissed" language is not
22 without significance. And if I may, I'd like
23 to explain.

24 The direction to dismiss is a
25 quintessential judicial function. It's not

1 surprising that Black's dictionary, in defining
2 dismissal, refers to it as especially a judge's
3 decision to stop the case.

4 That's --

5 JUSTICE GINSBURG: Well, what do you
6 do with the McCardle case?

7 MR. GANT: McCardle was -- the fact
8 that a statute strips jurisdiction from a court
9 doesn't mean that it's immunized from review
10 under separation of powers. So the -- the
11 touchstone has to be and the relevant strands
12 of the separation-of-powers jurisprudence at
13 issue here are really two parts.

14 One is, has Congress exercised the
15 judicial power and/or has Congress prevented
16 the courts from fulfilling its constitutionally
17 assigned responsibilities? I submit that both
18 have occurred here as a result of what is in
19 the actual 2(b), but the same result would
20 arise if you omitted just the words "shall be
21 dismissed."

22 JUSTICE GORSUCH: But, Mr. --

23 JUSTICE ALITO: If this is a -- just a
24 jurisdiction-stripping statute, could you just
25 say as succinctly as possible what the rule is

1 that you would like us to adopt? What is the
2 -- the separation-of-powers rule that you would
3 like us to adopt with respect to a purely
4 jurisdiction-stripping statute?

5 MR. GANT: Well, I -- I want to be
6 directly responsive to your question, but I
7 also want to say, and I've made this
8 observation in the briefs, I think the better
9 view is that it is not jurisdictional. I'm
10 happy to elaborate on that later. But if we
11 assume that it's a jurisdiction-stripping
12 statute --

13 JUSTICE ALITO: Well, on that,
14 suppose, following up on the initial questions,
15 if all that 2(b) said was that an action
16 relating to this land shall not be maintained
17 in a federal court, would you say that is not a
18 jurisdiction-stripping statute?

19 MR. GANT: That --- that certainly
20 looks more like a jurisdiction-stripping
21 statute. The reason that I say that the better
22 view is it's not jurisdictional is -- is at
23 least twofold.

24 One is -- and I -- I have been accused
25 by some colleagues of taking Arbaugh too

1 seriously, but this Court went out of its way
2 in Arbaugh to announce to the world and to
3 Congress in particular that it wanted a new
4 rule, that if a court wanted a statute to be
5 viewed as jurisdictional, you needed to clearly
6 say so.

7 This statute doesn't say anywhere in
8 its text, in its headings, that it's
9 jurisdictional. In fact, 2(b), the section
10 we're discussing that -- that arguably strips
11 jurisdiction from the courts, uses the phrase
12 "no claims."

13 My research may have been faulty, but
14 I couldn't find a single case using that
15 language in framing a jurisdictional statute.

16 JUSTICE ALITO: Well, if one of the
17 things that 2(b) does is to strip jurisdiction,
18 and if "shall not" -- "shall not be maintained"
19 is a jurisdiction-stripping provision, then I
20 don't see how you can win unless you have a
21 rule that applies to a jurisdiction-stripping
22 statute. Maybe there are other things in this
23 statute that are vulnerable, so they could be
24 severed.

25 So, to go back to the question I

1 asked, if this is a statute that takes away
2 federal court jurisdiction, what is your
3 separation-of-powers rule?

4 MR. GANT: The rule -- the rule, I
5 submit, the Court should adopt is if a statute
6 is deemed as properly -- is properly construed
7 as a jurisdiction-stripping statute, it is
8 still subject to separation-of-powers analysis.
9 That -- that much is clear from Klein.
10 However, whatever else about the case might be
11 puzzling, Klein clearly establishes that the
12 mere fact that Congress affixes the label
13 "jurisdiction" to a statute doesn't immunize
14 it.

15 So then we return to our touchstone
16 principles here. Has, through this
17 jurisdiction statute, Congress exercised the
18 judicial power and/or has it prevented the
19 courts from fulfilling their constitutionally
20 assigned responsibilities?

21 JUSTICE ALITO: Yeah, but when -- as
22 succinctly as you can, Congress violates the
23 separation of powers when it deprives the
24 federal courts of jurisdiction in this
25 circumstance. And what is the circumstance?

1 MR. GANT: The circumstance is when it
2 is directly, overtly deciding a case or
3 effectively deciding a case, rather than making
4 new law and leaving it to the courts to apply
5 the new law.

6 JUSTICE GINSBURG: Well, let's --
7 let's take -- which is not fictional, suppose
8 Congress enacts a statute that says a federal
9 court shall not have jurisdiction over cases
10 involving prayer in school. Constitutional?

11 MR. GANT: I think that raises serious
12 but -- but somewhat different questions. Part
13 of what's offensive here to the separation of
14 powers principles is that Congress is directing
15 the outcome in a case. It could be a set of
16 cases.

17 And I submit, by the way, that look --
18 looking to Bank Markazi, if there had been
19 1,000 cases just like Patchak's, I think the
20 outcome would be the same. So the fact that it
21 is one case is, I think, probative of assessing
22 whether or not the Congress is actually
23 deciding a case, rather than actually making
24 the law to be applied by the courts.

25 JUSTICE KAGAN: Well, if that's so, I

1 mean, I thought that you were suggesting a rule
2 that said, well, when you direct one case,
3 that's unconstitutional, but now you've just
4 said you're not saying that.

5 So, again, coming back to Justice
6 Alito's question, I mean, we know that Congress
7 can alter the jurisdiction of the federal
8 courts. And we know that Congress can alter
9 that jurisdiction and apply it to pending
10 cases. We've said that over and over again.

11 So what makes -- what would make this
12 unconstitutional if we assumed that this is a
13 jurisdiction-stripping statute?

14 MR. GANT: Because what Congress has
15 done is affect directly here, but it could be
16 indirectly, dictated the outcome of the case
17 without changing the law.

18 JUSTICE GORSUCH: So, Mr. Gant, it's
19 that last clause.

20 JUSTICE KAGAN: Well, the law is the
21 jurisdictional law. That's what Congress is
22 changing. Congress is changing jurisdiction.
23 In so doing, Congress is changing the law. We
24 haven't said Congress has to change, you know,
25 substantive law.

1 Here Congress is changing
2 jurisdictional law. It's saying, you know,
3 yesterday you had jurisdiction over a certain
4 category of cases. Today you don't.

5 Now, why is that unconstitutional or
6 when is that unconstitutional?

7 MR. GANT: That is unconstitutional
8 when in the -- under the guise of -- of
9 changing the rules with respect to
10 jurisdiction, the court is effectively deciding
11 the case and then not letting the courts apply
12 the new law either.

13 So both things have occurred here.
14 So, in Bank Markazi and in Robertson, the
15 reason why those survive separation of powers
16 scrutiny was because they changed the law and
17 they left it to the courts to apply to new
18 cases. You have the exact opposite here.

19 JUSTICE GORSUCH: So, Mr. Gant, if I
20 understand it, the answer to the question, I
21 think, is that last clause, the dismiss,
22 ordering the courts to dismiss the claim, that
23 up to that point, shall not be filed or
24 maintained, if that's jurisdictional, as I
25 understand, you and your amici are okay with

1 that. It's the directing the dismissal.

2 But if that's the only beef we have,
3 is that really a beef at all because that's a
4 natural consequence of a jurisdiction-stripping
5 statute as McCardle itself, as Justice Ginsburg
6 pointed out, right, so there's nothing left. I
7 think it's almost a virtual quote from
8 McCardle, right, there's nothing left to be
9 done but dismiss. So where is the real beef
10 here?

11 MR. GANT: Justice Gorsuch, I think
12 what the -- collectively, what the courts'
13 cases instruct us is that we shouldn't stop the
14 inquiry at the label.

15 We know that from Klein. We know that
16 from other cases. So this case isn't framed as
17 jurisdictional, but if -- if we assume that the
18 --

19 JUSTICE GORSUCH: Assuming it's
20 jurisdictional and all you're left with is this
21 complaint about the last clause, why should we
22 care?

23 MR. GANT: We should care because then
24 what Congress is doing is it's -- it's giving
25 carte blanche to dictate the outcome of cases

1 just by affixing the label jurisdictional.

2 JUSTICE GINSBURG: And I thought you,
3 in your response to Justice Kagan, you said it
4 wouldn't make any difference if those last
5 words were omitted, "shall be dismissed." You
6 would have the same objection.

7 MR. GANT: I would have the same
8 objection -- let me be clear there. With
9 respect to pending cases, so the two words that
10 are operative here with respect to pending
11 cases are "shall not be maintained" and "shall
12 be dismissed." I'm not talking about the
13 filed.

14 So, with respect to prospective cases,
15 we're not arguing that Section 2(b) would be
16 unconstitutional because it wouldn't implicate
17 the -- the strands of the separation of powers
18 jurisprudence that I was discussing.

19 So it's with respect to pending cases
20 where both the shall not be -- may not be
21 maintained and shall be dismissed are both --

22 JUSTICE KAGAN: I don't think that's
23 the question, Mr. Gant. I think the question
24 is, and this was what I started with, would you
25 be making the same constitutional argument if

1 the last five words were not there? And I took
2 you to say, yes, you would be making the same
3 constitutional argument, and in so doing, you
4 separated yourself from your amici because I
5 understand your amici, as Justice Gorsuch does,
6 as saying that everything hangs on that last
7 five words.

8 And you're suggesting that not
9 everything hangs on that last five words, that
10 you would have the exact same constitutional
11 objections if those five words weren't in the
12 picture. Do I have you right?

13 MR. GANT: Yes. I think the fact that
14 it includes the dismissal term is -- makes it
15 particularly pernicious, so I would say that's
16 additional, pushing it even further beyond.

17 JUSTICE KAGAN: It's like bad
18 atmospherics?

19 MR. GANT: Well, but it -- but it's
20 not just atmospherics. As I -- as I suggested
21 earlier, I think there's an argument to be made
22 that a direction from Congress to the courts to
23 dismiss a case is telling the courts how to
24 perform their duties in an impermissible way.

25 JUSTICE SOTOMAYOR: Counselor --

1 JUSTICE KAGAN: But then you do get,
2 again, and I think that this is the underlying
3 premise of Justice Gorsuch's question, so take
4 out the last five words, and you were trying to
5 explain why what then just seems a
6 jurisdiction-stripping statute is
7 unconstitutional, in that -- against the
8 backdrop of a very consistent precedent that we
9 have that says that Congress can take away the
10 jurisdiction of the federal courts and can do
11 so in a way that affects pending cases.

12 And -- and so why and when is that
13 unconstitutional?

14 MR. GANT: Because you have to pierce
15 the label of jurisdiction and return to the
16 basic principles, which are is Congress
17 exercising judicial functions or is it
18 preventing the judiciary from carrying out its
19 actions.

20 CHIEF JUSTICE ROBERTS: It seems that
21 we -- we've been replicating what among lawyers
22 anyway is a famous dialogue between Professors
23 Wechsler and Hart about whether Congress can
24 achieve unconstitutional objectives by
25 preventing federal courts from adjudicating

1 claims that those provisions are
2 unconstitutional.

3 You know, during the civil rights era,
4 there were a lot of proposals in Congress that
5 said the federal courts have no jurisdiction
6 over any case in which busing is sought as a
7 remedy. And those types of proposals are
8 consistently submitted whenever Congress
9 attempts to achieve an unconstitutional result
10 by depriving the federal courts of
11 jurisdiction.

12 So I would have thought your answer is
13 -- is -- I would have thought you would have
14 taken the position that I understand to be
15 ascribed to Professor Hart in the dialogue,
16 which is that that is an indirect way of
17 achieving an unconstitutional result and is
18 subject to the same objection.

19 MR. GANT: That is my position. And I
20 --

21 JUSTICE SOTOMAYOR: Counselor, can I
22 -- I want to switch from personal jurisdiction
23 to sovereign immunity, in part for the reasons
24 that the Chief is -- Chief Justice is talking
25 about. Okay?

1 MR. GANT: Yes.

2 JUSTICE SOTOMAYOR: In Patchak I, I
3 took the position that the court got sovereign
4 immunity wrong, and basically I argued -- the
5 majority disagreed -- that -- that the Quiet
6 Title Act really granted immunity. And the
7 majority disagreed and said this had to do with
8 APA waiver of immunity.

9 I look at statutory history and this
10 new act, the Reaffirmation Act, was in the
11 context of that dispute in that case. And what
12 Congress did was settled the question, which I
13 believe it's entitled to do and is not
14 unconstitutional, it ratified the acts of the
15 Secretary's taking of this land, and by that
16 act implicated the Quiet Title Act.

17 And so, if it did that, I see this --
18 and I don't understand why it's not, that
19 waiver of sovereign immunity that the court did
20 not recognize in Patchak I.

21 And I raise this for two reasons:
22 One, I do think there's a difference between
23 the Congress coming in between two private
24 parties and directing a result in favor of one
25 private party. I think that's a quintessential

1 separation of powers question and a very, very
2 serious one.

3 But I think there is something
4 fundamentally different about suits involving
5 the government because sovereign immunity or
6 any suit against the government is a matter
7 only of largesse and the government's voluntary
8 choice.

9 We have repeatedly through the
10 centuries said the government can at any moment
11 take away its sovereign immunity. It can take
12 away that niceness of giving you the immunity.

13 So I see the potential of less of a
14 problem with separation of powers if -- if the
15 government has withdrawn sovereign immunity
16 than it directing the outcome between private
17 parties. I would be really frightened if we
18 let the government do that.

19 MR. GANT: Well, I --

20 JUSTICE SOTOMAYOR: But -- so, given
21 that statutory history, the only issue that was
22 left alive or was at issue in Patchak I, given
23 that the waiver of sovereign immunity that was
24 taken away tracks the APA language, the APA's
25 language says that a suit can be maintained

1 against the government, why isn't this a
2 sovereign immunity case?

3 Why am I dealing with personal
4 jurisdiction at all or separation of powers
5 questions at all?

6 MR. GANT: Because, with respect to
7 both the text of the Gun Lake Act, as well as
8 the statutory history, I submit that sovereign
9 immunity, the restoration of sovereign immunity
10 did not exist. The text nowhere mentions
11 sovereign immunity. If you look at --

12 JUSTICE SOTOMAYOR: We've never said
13 it had to.

14 MR. GANT: Well, it doesn't have to,
15 but there -- there are no other indicia, I
16 submit, that suggest --

17 JUSTICE SOTOMAYOR: All of the
18 statutory history indicia.

19 MR. GANT: Well --

20 JUSTICE SOTOMAYOR: The whole fight in
21 Patchak I was over the existence or
22 non-existence of sovereign immunity.

23 MR. GANT: But given that, and of
24 course the statutory history is to some extent
25 in the eye of the beholder, I look at it and I

1 see, given the history that you've just
2 outlined, that if what Congress had intended to
3 do was to restore sovereign immunity, there
4 would have been more evidence of that.

5 It wasn't mentioned anywhere in any of
6 the -- the hearings. It wasn't mentioned in
7 the House or Senate reports. It wasn't
8 mentioned --

9 JUSTICE GINSBURG: Well, why wouldn't
10 -- wouldn't -- Patchak turned on this Court's
11 holding sovereign immunity had been waived.
12 And now Congress -- using the APA words, and
13 the APA itself doesn't say sovereign immunity,
14 so the APA withdrew the immunity, and this,
15 using the same kind of language, restores it.

16 Why isn't that the appropriate way to
17 look at this case? What did Congress want to
18 do? They -- we said sovereign immunity is
19 waived. They said sovereign immunity is not
20 waived.

21 MR. GANT: I take Congress at its word
22 in what it intended to do, and the D.C. Circuit
23 said the same, which is to void the case, to
24 make it go away, to direct dismissal against
25 Patchak and for Zinke. That's what -- that's

1 what the statute says. That's how the D.C.
2 Circuit, I think, properly understood it.

3 JUSTICE KENNEDY: If this suit had
4 proceeded to a conclusion, would -- and Patchak
5 prevailed, would he be entitled to costs?

6 MR. GANT: He might be. And that's
7 certainly one of the things that would have --
8 there are a number of things that would be
9 addressed on remand. And for the -- the
10 statute, (a) and (b) are not severable. And --

11 JUSTICE KENNEDY: Well, I'm -- I'm
12 wondering if it helps your position to say that
13 the Congress is stripping him of certain rights
14 that he had because of the litigation.

15 MR. GANT: Well, there -- there's no
16 question. I mean, we'd have to go back on
17 remand in addressing the question of
18 entitlement to costs and others, the
19 entitlement to declaratory judgment, the
20 meaning of 2(a). What Congress --

21 JUSTICE BREYER: When -- when you say
22 2(a) --

23 MR. GANT: Yeah.

24 JUSTICE BREYER: -- imagine that was
25 the only statute. I thought your claim -- and

1 imagine, as well, that 2(a) is, in fact,
2 constitutional and Congress can say in 2017
3 that when we took this into federal trust
4 territory, Indian trust territory, that was
5 constitutional. That's what it does, right.

6 If that's constitutional to do that,
7 do you have any case left?

8 MR. GANT: We do. We do have a case.

9 JUSTICE BREYER: What's the case?

10 MR. GANT: Leaving aside the -- am I
11 assuming that it's separable?

12 JUSTICE BREYER: You forget -- suppose
13 (b) and (c) were never there. They just passed
14 (a).

15 MR. GANT: If they just passed (a), as
16 I -- I think I mentioned this earlier in
17 response to another question, we would not be
18 arguing.

19 JUSTICE BREYER: I realize that, but
20 my question is: Would your client have a
21 lawsuit? What would be the basis for it?
22 Because I thought his basis was that the taking
23 of the land into trust was not lawful under a
24 particular act because that just referred to
25 tribes that were tribes in the '30s. Right?

1 MR. GANT: Yeah.

2 JUSTICE BREYER: Now, this act says we
3 don't give a -- we don't care about that; we
4 say that the government had the power to take
5 it into trust anyway. And it had that power to
6 take it into trust when it did. All right?

7 So, if that's the law, what is your
8 client suing about?

9 MR. GANT: Well --

10 JUSTICE BREYER: How can he win?

11 MR. GANT: For purposes of your
12 question, I'm presupposing that that's the law.

13 JUSTICE BREYER: Yeah.

14 MR. GANT: But one thing that happened
15 here is no court could make that determination.

16 JUSTICE BREYER: No, no, but what's
17 your argument?

18 MR. GANT: The argument -- the
19 argument is that -- well, we would argue that
20 it's not retroactive. We would argue --

21 JUSTICE BREYER: It says -- it says
22 ratified.

23 MR. GANT: I -- I understand. But I
24 -- I -- we haven't briefed this, but I submit
25 that there is an argument, a colorable

1 argument, to be made that ratification is in a
2 sense an endorsement -- if you look at -- on
3 page 2 of the --

4 JUSTICE BREYER: All right. So your
5 argument is that (a) applies only to taking
6 into trust after the passage of the act -- the
7 (a), after the passage of (a)?

8 MR. GANT: Yes.

9 JUSTICE BREYER: In other words, it
10 doesn't ratify the prior taking into trust of
11 Indian land?

12 MR. GANT: That is an argument. There
13 was an argument made below about the meaning of
14 (a) before the district court when this was --

15 JUSTICE BREYER: Okay. That's your
16 best argument?

17 MR. GANT: No, no, it's not. It is
18 not. There was an argument made below that the
19 -- the ratification talks about taking the land
20 into trust. But that doesn't mean that it
21 authorizes all uses of the property. So
22 there's a distinction between the land being
23 into trust and --

24 JUSTICE BREYER: Okay. Okay, I've got
25 it. Got it, got it.

1 MR. GANT: -- there are other -- there
2 are others.

3 JUSTICE KAGAN: Mr. Gant, could I --
4 I'm sorry to drag you around like this, but the
5 Chief Justice asked you a question and you
6 indicated that you agreed with his
7 understanding of when a jurisdictional statute
8 violated the Constitution, and -- and then you
9 were interrupted.

10 I just want to hear a little bit more
11 about what you think of his question.

12 MR. GANT: Sure. I hope I have it
13 firmly in mind. And at the same time, I want
14 to try and answer your -- some of your prior
15 questions and the question --

16 JUSTICE BREYER: There's also the
17 parties' side.

18 JUSTICE KAGAN: Well, I'm interested
19 in that question, the Chief Justice's question,
20 because he gave you a theory; you said yes.

21 MR. GANT: Okay.

22 JUSTICE KAGAN: But what does that
23 mean, "yes"? Yes why?

24 MR. GANT: What Congress cannot do is
25 direct the outcomes of a case even under the

1 guise of jurisdiction. Let's go back to the
2 "Smith wins" hypothetical from Bank Markazi.

3 JUSTICE ALITO: But I -- I thought the
4 Chief Justice's examples were instances in
5 which a hypothetical statute deprived the
6 federal court of the opportunity to rule on
7 violations of -- on constitutional -- alleged
8 constitutional violations, the same as the
9 question that Justice Ginsburg gave to you,
10 taking away jurisdiction over cases involving
11 prayer in the schools or jurisdiction over
12 equal protection violations, but this is a
13 statutory case.

14 MR. GANT: It is, although it has --
15 because there were -- the Court in Patchak I
16 addressed standing and sovereign immunity,
17 which at least have constitutional dimensions,
18 but there's no doubt about the fact that the
19 underlying claims at issue in the pending
20 complaint that's still operative are statutory
21 in nature. The only thing I think --

22 JUSTICE BREYER: So why don't you
23 bring your case in state court? It doesn't say
24 the state court doesn't have a -- I mean, yeah,
25 bring it in state court.

1 MR. GANT: I would have to think about
2 whether we could do that.

3 JUSTICE BREYER: Why?

4 CHIEF JUSTICE ROBERTS: Well, can the
5 tribe be sued in state court?

6 JUSTICE BREYER: Yeah, general
7 jurisdiction.

8 CHIEF JUSTICE ROBERTS: Can the
9 federal government be sued in state court?

10 JUSTICE BREYER: You can. Yeah.

11 CHIEF JUSTICE ROBERTS: I'm asking
12 you.

13 (Laughter.)

14 MR. GANT: I don't want to get in the
15 way of a good discussion.

16 (Laughter.)

17 MR. GANT: I honestly don't know the
18 -- I don't know the answer.

19 CHIEF JUSTICE ROBERTS: But I suppose
20 -- I suppose the question is, I mean, just as
21 in a case of -- the antibusing cases, there's a
22 constitutional violation that Congress is
23 trying to insulate from review, and that's the
24 separation-of-powers claim.

25 MR. GANT: And I took your question to

1 be that these were -- not that these were
2 identical situations, this case and -- and the
3 situations that Mr. Chief Justice posited, but
4 that they were close cousins.

5 And to go back to a question to try
6 and more directly answer your question, Justice
7 Gorsuch -- and I want to do save a few moments
8 for rebuttal -- if a statute said we think
9 Smith should win and, therefore, we -- we
10 determine that the courts shall not have
11 jurisdiction, that can't -- the fact that it
12 says it's jurisdictional cannot possibly save
13 it from a separation-of-powers scrutiny and
14 analysis.

15 And this is substantially similar to
16 that situation.

17 JUSTICE KAGAN: So why -- why is it
18 substantially similar to that situation? That
19 makes it sound like it's because it's about a
20 single case, but you said that that wasn't your
21 theory. So what is your theory?

22 MR. GANT: Right. We could change it
23 to -- to 10 Smiths win or in every case of
24 Smith v. Jones. It's not the number. It's the
25 fact that Congress is directing the outcome and

1 it's saying that you win not because we've
2 changed the law, and notwithstanding old law
3 because we know two things about the old law --

4 JUSTICE KAGAN: But doesn't Congress
5 always do that when it strips the federal
6 courts of jurisdiction over a category of
7 cases?

8 MR. GANT: No.

9 JUSTICE KAGAN: Because we have said
10 that that applies to pending suits. So I guess
11 the question is: Why aren't you saying that
12 every time we said that, we were wrong; that
13 any time Congress changes the jurisdiction of
14 the federal court and then applies to pending
15 cases, that that's a separation-of-powers
16 issue?

17 MR. GANT: Because Shore and the other
18 separation-of-powers cases of this Court
19 counsel that we should take a functional,
20 practical look at the particulars of the case.
21 And in this case, unlike these hypothetical
22 statutes, you have Congress clearly directing
23 the outcome of the case where, under old law,
24 this Court held that this case may proceed.
25 The House report at page 2 said, under existing

1 law, the -- putting the land into trust was
2 likely unlawful.

3 And the only thing that changed was
4 Congress said this case goes away, period.

5 JUSTICE ALITO: I mean, sounds like
6 this is just based on your -- your analysis of
7 Congress's intent.

8 MR. GANT: No, I -- it's not.

9 JUSTICE ALITO: Let's take a case that
10 we -- we had earlier this term under the Alien
11 Tort Statute. I don't know whether you're
12 familiar with it. But it provides jurisdiction
13 in the federal courts for a suit by an alien
14 concerning certain torts. And we have the
15 question whether a corporation can be sued.

16 Suppose Congress were to pass a
17 statute that says that no federal court shall
18 have jurisdiction of an Alien Tort Statute suit
19 where the defendant is a corporation. There
20 are a limited number of cases involving that,
21 pending cases. Would that be unconstitutional?

22 MR. GANT: We'd have to look at the
23 particulars of the case and make a judgment
24 based on the case whether Congress was
25 directing the outcome of particular cases or

1 was it functioning more in a legislative role.

2 JUSTICE KAGAN: Well, it's certain --
3 I'm sorry. Your light's on.

4 MR. GANT: Well, I'm here for you, but
5 I would like to reserve --

6 (Laughter.)

7 MR. GANT: I would like to reserve a
8 few moments for rebuttal, but I -- but --

9 CHIEF JUSTICE ROBERTS: Well, why
10 don't you answer the -- ask and then answer the
11 question, and we'll afford you time for
12 rebuttal.

13 MR. GANT: Thank you, Mr. Chief
14 Justice.

15 JUSTICE KAGAN: I was just following
16 up on Justice Alito's because you -- you say
17 directing the outcome of these cases, but any
18 time Congress jurisdiction strips, and that
19 applies to pending cases, it does direct the
20 outcome of those cases. Once upon a time those
21 cases could proceed. Now they can't.

22 So Congress is directing the outcome
23 of those cases in some sense that we've
24 consistently held to be perfectly fine. We
25 might have been wrong in saying that's

1 perfectly fine, but we've said it a lot of
2 times.

3 MR. GANT: Right. And this may be an
4 example of what the Court has talked about in
5 other contexts where line-drawing can be hard.
6 Again, I'd step back and look at -- ask the
7 fundamental questions.

8 Has the legislature overstepped its
9 bounds, traversed the boundary between the
10 legislative function and the judicial function
11 in deciding how cases should be determined?
12 Congress is entitled to try and affect the
13 outcomes, but the process of how it does it
14 very much matters.

15 And this is about as an egregious
16 circumstance as I can imagine of Congress
17 actually dictating the outcome of a case by
18 saying you shall -- must dismiss without
19 changing the underlying law and leaving it to
20 the courts to apply in future circumstances.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. O'Connell.

25

1 ORAL ARGUMENT OF ANN O'CONNELL
2 ON BEHALF OF THE FEDERAL RESPONDENTS

3 MS. O'CONNELL: Mr. Chief Justice, and
4 may it please the Court:

5 The United States took title to the
6 Bradley Property in 2009, but the tribe's
7 operations on that land have been subject to
8 great uncertainty ever since then nevertheless.

9 Part of that uncertainty stems from
10 this Court's decision in Patchak I, which
11 interpreted the laws enacted by Congress up to
12 that point and concluded that the Quiet Title
13 Act did not bar Petitioner's challenge to the
14 trust status of this land.

15 The Court acknowledged in Patchak I
16 that barring claims like Petitioner's is within
17 Congress's legislative power. Through the Gun
18 Lake Act, Congress did a couple of things. It
19 eliminated any doubt about the trust status of
20 this land by ratifying and confirming the
21 Secretary's action in 2005.

22 And Congress also eliminated federal
23 court jurisdiction over challenges to the trust
24 status of this property, thereby revoking the
25 waiver of sovereign immunity in the APA.

1 JUSTICE KENNEDY: Suppose that Patchak
2 relied on his interpretation of the law and had
3 built a facility on a neighboring property that
4 was just completely inconsistent with a casino,
5 so that he's -- has some serious reliance
6 interests.

7 Would -- would this case be any
8 different?

9 MS. O'CONNELL: Well, there -- there
10 could be other constitutional concerns that may
11 be implicated by Congress -- by an act of
12 Congress that takes away vested property rights
13 or something like that, but they're -- they're
14 not Article III interests.

15 I don't think that it would violate
16 the separation of powers for Congress to enact
17 a law that --

18 JUSTICE KENNEDY: Well, they're taking
19 away his expectations when he built on the
20 property.

21 MS. O'CONNELL: Well, then maybe --

22 JUSTICE KENNEDY: In the hypothetical
23 case, hypothetical.

24 MS. O'CONNELL: He may be able to
25 bring some other sort of a challenge like a

1 takings challenge or something like that. I
2 mean, this Court in Bank Markazi --

3 JUSTICE KENNEDY: But Congress could
4 still pass this statute?

5 MS. O'CONNELL: Yes. And, you know,
6 the Court explained in Bank Markazi there are
7 other limits imposed in the Constitution on
8 retroactive application of laws. And so
9 perhaps if there was some kind of a takings
10 claim, then regardless of Section 2(b), the --
11 the Petitioner could bring some sort of a suit
12 to --

13 JUSTICE BREYER: Then maybe he has --
14 this might be his best argument, that this
15 ratification business is not in certain
16 respects retroactive.

17 Can he bring this case in state court
18 against the Secretary?

19 MS. O'CONNELL: No. The Secretary --

20 JUSTICE BREYER: No. Okay. The
21 answer is no.

22 MS. O'CONNELL: Well, he could bring
23 it, but the Secretary would still have immunity
24 in state court as for the trial.

25 JUSTICE BREYER: Okay. Has immunity

1 in state court, so you can't bring it. So he
2 has let's imagine under state law a right to
3 the peaceful enjoyment of his property. That's
4 what he's worried about.

5 Now, this (b) means -- his best claim,
6 he thinks, is not a constitutional claim that
7 they've taken it away, but he sees that in the
8 background.

9 His best claim, he thinks, is to say
10 that this law is not retroactive, and that in
11 the 1930s this tribe did not get -- was not one
12 of the ones that that Act protected.

13 That's his argument. With (b), he
14 cannot bring his claim in a state court. He
15 cannot bring his claim in federal court. And
16 there's no other person anywhere who even is
17 dreaming of such a claim.

18 And, therefore, what (b), he says,
19 does, as I understand it, is whatever general
20 language they dress it up in, it is taking the
21 only case that is likely to be brought,
22 challenging the taking of this land into trust
23 and challenging this later statute as well as
24 being interpreted, you know, such and such, and
25 throwing it out of court.

1 So there we have, though they have
2 excellent language and have tried to make it
3 general, in reality an act of Congress that
4 does nothing other than take his case and throw
5 it out of court. And that, he says, is for the
6 Congress, the legislative branch, to enter into
7 the judicial process and say: Mr. Plaintiff,
8 in this case you lose.

9 Now, what is your answer to that?

10 MS. O'CONNELL: I've got a couple of
11 answers to -- specifically to the second part.
12 On the first part, I don't know if in this case
13 you're talking about some sort of a
14 hypothetical relief that he's asking for.
15 Regardless of whether this is a statute that's
16 retroactive or not in terms of taking the land
17 into trust --

18 JUSTICE BREYER: It's not retroactive.
19 That's why I asked him the question.

20 MS. O'CONNELL: He -- he's --

21 JUSTICE BREYER: I take -- I take his
22 answer to my question was he retains certain
23 arguments that (a) is not sufficient to deprive
24 him of the right to use his property because
25 (a) does not move this tribe's land into trust

1 as of -- prior to its enactment.

2 MS. O'CONNELL: His --

3 JUSTICE BREYER: I think it's
4 something like that.

5 MS. O'CONNELL: The -- just to
6 clarify, he's filed an APA claim. So the
7 relief he is asking for is prospective
8 injunctive relief. There doesn't -- it doesn't
9 actually matter if the statute is retroactive
10 or not.

11 But to answer the question about
12 whether the Congress is targeting one
13 particular lawsuit in this case, a couple of
14 responses: First is that this statute,
15 although that seems to the Petitioner, and it
16 may be the practical effect, that because his
17 is the only case that's pending, it's the only
18 one that is dismissed, this is not a statute
19 that is directed toward just Smith v. Jones,
20 Smith wins. This is a case that applies to any
21 suit related to --

22 JUSTICE KAGAN: Well, what if it were?
23 What -- what if they -- the Congress had said
24 the Secretary's decision to make the Bradley
25 Property is confirmed, and David Patchak's suit

1 shall not be maintained and shall be dismissed.

2 MS. O'CONNELL: I -- I don't think
3 there is an Article III problem with a case
4 that takes away jurisdiction over even just one
5 case. It may have other constitutional
6 concerns. Footnote 27 of Bank Markazi said
7 maybe you could look to the equal protection
8 clause, if it's just a statute that targets one
9 person and it's irrational, there's no rational
10 basis for it, but we don't see any separation
11 of powers problem with taking jurisdiction over
12 -- away over only just one case.

13 JUSTICE SOTOMAYOR: I'm sorry.

14 CHIEF JUSTICE ROBERTS: Well, in that
15 -- in that case, is -- does the government
16 recognize any limit on Congress's power to
17 decide the result in a pending case?

18 MS. O'CONNELL: To decide the result
19 in a pending case, yes.

20 CHIEF JUSTICE ROBERTS: What is it?
21 If saying Smith wins, isn't that -- what would
22 an unconstitutional statute under the
23 separation of powers look like from your
24 viewpoint?

25 MS. O'CONNELL: Well, certainly Smith

1 wins would be an unconstitutional statute
2 because in that case Congress is just directing
3 the results of a case without changing the
4 underlying law.

5 JUSTICE KAGAN: But what's the
6 difference between --

7 CHIEF JUSTICE ROBERTS: And -- and so
8 we should -- so we should look at this and
9 decide whether we think this is in substance
10 different from Smith wins?

11 MS. O'CONNELL: I think that would be
12 a perfectly fine way to do it. And I think
13 this case is different from Smith wins in a
14 variety of different ways.

15 JUSTICE KAGAN: Is there a difference
16 between Smith wins and there's no jurisdiction
17 over Jones's suit?

18 MS. O'CONNELL: Yes.

19 JUSTICE KAGAN: And, therefore, Smith
20 wins?

21 MS. O'CONNELL: Yes. I think that
22 that is one of the differences between Smith
23 wins and the -- and the statute that's going on
24 here, even if you think -- even if you imagine
25 a hypothetical statute that's just limited to

1 Smith v. Jones, and, again, this Court -- the
2 statute is broader than that.

3 CHIEF JUSTICE ROBERTS: So Congress
4 has plenary authority to insulate itself from
5 separation of powers arguments. They -- a
6 statute that says in any case in which a
7 statute is alleged to violate the separation of
8 powers, federal courts have no jurisdiction.
9 You think that's okay?

10 MS. O'CONNELL: No. I --

11 CHIEF JUSTICE ROBERTS: Why not?

12 MS. O'CONNELL: And we haven't
13 contested in this case that the Court can
14 analyze 2(b) to determine whether it violates
15 the separation of powers. That's what the
16 whole case is about. Congress has not
17 insulated 2(b) from that review and Petitioner
18 is bringing a constitutional challenge to
19 Section 2(b).

20 I think one of the -- another one of
21 the key --

22 JUSTICE GORSUCH: Well, Ms. O'Connell,
23 it seems to me like a lot hinges on whether
24 this is jurisdictional or not in response to
25 all of these questions.

1 And this Court in recent years has
2 instructed that we're not going to lightly
3 assume Congress is stripping jurisdiction. We
4 need a clear statement, Arbaugh, Sebelius, and
5 whatever might have been permissible before,
6 Congress is now on notice that it needs to
7 provide a clear rule. And this statute comes
8 after those warnings from this Court.

9 And help me understand why this
10 statute is, in fact, jurisdiction stripping
11 without reference to old past laws but after
12 Sebelius, after Arbaugh?

13 MS. O'CONNELL: Well, I think --
14 there's two cases we've cited that show that
15 this is jurisdictional language. One of them I
16 won't use to answer your question --

17 JUSTICE GORSUCH: Right. You can't.
18 Right.

19 MS. O'CONNELL: -- because it's
20 older.

21 JUSTICE GORSUCH: Keene. Right.

22 MS. O'CONNELL: But I think Gonzalez
23 versus Thaler is another -- another opinion
24 where this Court took some language that's
25 similar. We think it's like the appellate

1 court equivalent.

2 JUSTICE GORSUCH: But you've also got
3 Reed Elsevier, which has similar language to
4 this. No -- basically no claim shall be
5 maintained or something like that that we held
6 wasn't jurisdictional, in the copyright
7 statute.

8 MS. O'CONNELL: In this statute, we
9 think there's -- there's a lot of different
10 things at play that make it a jurisdictional
11 statute, one being that it says a case can't be
12 filed or maintained in federal court. If it
13 just says it can't be maintained, maybe that
14 could be something different, but if it's it
15 can't be filed even in the first place, that
16 speaks to jurisdictional terms.

17 JUSTICE GORSUCH: Parties file things.
18 That could be a claims processing rule too.
19 Right? You don't file it.

20 MS. O'CONNELL: Well, although this --
21 I mean, so those are the two cases that
22 Petitioner cites in his opening brief. One is
23 Sebelius, which is the claims processing rule,
24 and then Arbaugh, which is the -- the elements
25 of a cause of action.

1 JUSTICE GORSUCH: Let's say -- let's
2 say it isn't jurisdictional. Let's say --
3 let's say we're going to stick with our clear
4 statement rule and that we find this
5 non-jurisdictional. Don't we then have a real
6 problem because a dismissal would be not
7 12(b)(1) but 12(b)(6), it would be on the
8 merits and have collateral consequences?

9 And wouldn't that be a real problem
10 for Article III?

11 MS. O'CONNELL: A couple of responses.
12 I think the -- requiring the jurisdictional
13 clear statement rule in this case flips the
14 constitutional --

15 JUSTICE GORSUCH: I'm -- I'm asking
16 you to put that aside in this question.

17 MS. O'CONNELL: Well, I think the
18 Court would -- would want to invoke the
19 constitutional avoidance principle to --

20 JUSTICE GORSUCH: I'm asking you to --
21 again, assuming this isn't jurisdictional, for
22 purposes of this question, wouldn't we have a
23 real problem because you are directing
24 dismissal and dismissal wouldn't be 12(b)(1),
25 it would be 12(b)(6), and that has collateral

1 consequences potentially.

2 MS. O'CONNELL: If -- if the Court
3 concluded that -- that Congress was just
4 telling the Court that it had to dismiss this
5 case on the merits, then -- then, yes, I think
6 that may be a problem, but even if the Court
7 doesn't think that -- I mean, even if you don't
8 use jurisdictional language or you think that
9 the statute may not be taking away jurisdiction
10 over a category of cases, which we think it is,
11 I'd like to come back to the sovereign immunity
12 point, which is that, you know, the APA
13 provides the waiver of sovereign immunity, and
14 that's the statute that the Petitioner has sued
15 under.

16 The APA doesn't apply if another
17 statute precludes judicial review.

18 CHIEF JUSTICE ROBERTS: Sovereign
19 immunity is --

20 JUSTICE GINSBURG: Can I ask you a
21 question about the -- the APA? The argument
22 that has been raised on the other side is it
23 doesn't -- you don't need sovereign immunity
24 waiver because sovereign immunity doesn't
25 protect a federal employee from a suit alleging

1 that that employee acted in excess of statutory
2 authority.

3 So, I mean, what -- what I suggested
4 in the first part of this argument was we held
5 there is sovereign -- there -- sovereign
6 immunity is not a bar. Congress says sovereign
7 immunity is a bar. But the answer to that is,
8 so what? We can sue a federal officer and
9 sovereign immunity wouldn't bar that.

10 MS. O'CONNELL: Justice Ginsburg, I
11 think this Court's decision in Block versus
12 North Dakota goes a long way to answering that
13 question. In Block, the state was suing --
14 bringing an officer suit because it was outside
15 of the statute of limitations in the Quiet
16 Title Act. What the Court said was you can't
17 just use an officer suit to get around the
18 Quiet Title Act; now that we have Congress's
19 waiver of sovereign immunity in the Quiet Title
20 Act, you have to comply with those statutory
21 provisions. The same should be true of the
22 APA.

23 So if -- if Petitioner could -- could
24 just bring an officer suit against Secretary
25 Zinke for prospective injunctive relief, that

1 would vitiate the final agency action
2 requirement of the APA, the statute of
3 limitations of the APA. Congress has given us
4 its waiver of sovereign immunity in the APA,
5 and when it enacts a statute like this, it has
6 revoked it.

7 CHIEF JUSTICE ROBERTS: It --

8 JUSTICE SOTOMAYOR: Can you tell me
9 what other actions in your judgment, besides
10 this one, could be or would be filed relating
11 to the land? Would a slip-and-fall no longer
12 be permissible?

13 MS. O'CONNELL: So I think there are
14 some questions about just how broad this
15 statute is. We think it -- it at least covers
16 suits that relate to the trust status of the
17 Bradley Property or the -- the Secretary's
18 decision and Congress's decision to take it
19 into trust. But --

20 JUSTICE SOTOMAYOR: But any suit like
21 that would be way past the statute of
22 limitations. Who -- who could even bring it?

23 MS. O'CONNELL: Well, I -- it may be
24 outside the statute of limitations now. I
25 believe there was a -- a regulation passed

1 later in time that made the -- the land a part
2 of the tribe's reservation, which I guess
3 there's questions about whether that could
4 restart the statute of limitations, but, you
5 know, now -- and also Congress has enacted 2(a)
6 now.

7 And so, if somebody wanted to bring a
8 challenge to that, then that would also be
9 barred by 2(b) and it would --

10 CHIEF JUSTICE ROBERTS: Yeah, but
11 there wouldn't be any challenge to that. It
12 does seem -- I mean, you say, well, "relating
13 to" could mean different things. And it could,
14 but that would be for a court to decide.

15 And it's not clear how they get to
16 decide what "relating" means in light of 2(b),
17 which says if it does relate, it's dismissed
18 automatically. And I guess I just don't
19 understand how -- well, you're saying it's an
20 open issue how broad Congress's determination
21 that these cases shouldn't be in federal court
22 is?

23 MS. O'CONNELL: That's -- it's -- it's
24 an open issue how broad 2(a) is. The -- that
25 any action -- well, yes, that any action

1 relating to the Bradley Property can't be filed
2 or maintained in federal court.

3 JUSTICE BREYER: On 2(a) --

4 CHIEF JUSTICE ROBERTS: On the
5 sovereign immunity question, you know, that is
6 the federal government sort of going nuclear.
7 You know, they're -- they're -- I'm like the
8 king; you can't sue me because I can do no
9 wrong. And it seems to me there's a real
10 political accountability problem there because
11 this statute doesn't say anything about
12 sovereign immunity.

13 MS. O'CONNELL: Even if the statute --

14 CHIEF JUSTICE ROBERTS: And you didn't
15 argue it even in the -- the brief in
16 opposition, if I'm remembering right.

17 MS. O'CONNELL: Well, this is an
18 argument that we -- we presented to the court
19 of appeals. The court of appeals said they
20 didn't need to reach it because they decided
21 that this was a jurisdiction-stripping statute.

22 But -- but even so, it's -- it's
23 really just another way of getting you to the
24 point that the court lacks jurisdiction over
25 the case, that Congress has changed the law,

1 and it takes you outside the scope of Klein,
2 but --

3 JUSTICE ALITO: Can you point to any
4 case in which we've held there was sovereign
5 immunity where the statute said nothing --
6 never mentioned either immunity or the United
7 States as a party?

8 MS. O'CONNELL: Well, I -- again, I
9 think that in this context it doesn't matter if
10 the statute is broader than just precluding
11 claims against the United States because under
12 the APA, what you're looking for in order to
13 say that the APA doesn't apply is a statute
14 that precludes judicial review.

15 JUSTICE ALITO: Well, how much broader
16 is it? It's somewhat difficult to decide this
17 case without having some idea what "relating
18 to" here means.

19 MS. O'CONNELL: Well --

20 JUSTICE ALITO: It's hard to believe
21 that this statute means what it literally says,
22 that no -- no action relating to the land --
23 suppose that -- that the tribe said anybody who
24 has toxic waste any place in the country can
25 bring it here and just dump it in a big pit.

1 Would you say, well, the federal government
2 couldn't bring a lawsuit about that?

3 MS. O'CONNELL: No. I think we would
4 --

5 JUSTICE ALITO: Okay. So what does
6 "relating to" mean?

7 MS. O'CONNELL: In -- we -- it at
8 least means that you can't -- that nobody can
9 bring a statute that challenges the trust
10 status of the land and the Secretary's decision
11 to take the land into trust. So I think --

12 JUSTICE BREYER: Here in the trust --
13 I'm on my own track here, but I -- I know this
14 question is fascinating, what we've been
15 discussing, and it's right there in (b), but
16 I'm still stuck on (a) and why we really have
17 to get to (b).

18 You said that all they've asked for is
19 prospective relief.

20 MS. O'CONNELL: Correct.

21 JUSTICE BREYER: And as far as
22 prospective relief, when this was passed in
23 2014, it certainly, in (a), took the Indian
24 land into trust.

25 MS. O'CONNELL: Yes.

1 JUSTICE BREYER: All right. That's
2 what they're challenging, prospectively.
3 What's the argument?

4 MS. O'CONNELL: Well, I don't --
5 Petitioner hasn't brought challenges to Section
6 2(a). It certainly hasn't brought any
7 constitutional challenges to what Congress has
8 done in Section 2(a).

9 JUSTICE BREYER: So we should get into
10 the most fascinating and difficult questions in
11 what one of my -- I heard once described as the
12 course federal courts call "darkness at noon,"
13 and -- and the -- the -- but perhaps we don't
14 have to in this case, fascinating though it is,
15 because there is no claim under (a) that
16 prospectively this land is not Indian trust
17 land.

18 MS. O'CONNELL: That's -- I think
19 that's correct.

20 JUSTICE BREYER: Is that your view?

21 MS. O'CONNELL: Yes.

22 JUSTICE BREYER: You think that's
23 correct?

24 MS. O'CONNELL: I think under 2(a),
25 Congress has really --

1 JUSTICE BREYER: Well, then maybe
2 we'll get a minute on the other side.

3 MS. O'CONNELL: -- exercised its own
4 --

5 JUSTICE KENNEDY: Suppose -- suppose
6 in this case that about 80 percent of the
7 litigation had -- had been completed, no
8 judgment yet, and suppose, assume, that had
9 Patchak prevailed, he would be entitled to
10 costs.

11 Could the case be ordered dismissed so
12 that he could no longer get those costs?

13 MS. O'CONNELL: If there's no -- it
14 depends on what basis the Congress is
15 ordering --

16 JUSTICE KENNEDY: Under this statute.
17 Under (a) --

18 MS. O'CONNELL: Under -- if Congress
19 is taking away --

20 JUSTICE KENNEDY: Under both (a) and
21 (b) of this statute.

22 MS. O'CONNELL: If Congress is taking
23 away jurisdiction, then, no, I don't think the
24 court would have the authority to order costs.
25 And he also wouldn't be a prevailing party if

1 no judgment had been entered.

2 JUSTICE KENNEDY: Well, I'm -- I'm
3 assuming -- I'm assuming that he would have
4 been a prevailing party, there was a
5 substantial chance of it, and he would have
6 been entitled to costs. But even though
7 80 percent of the costs had been expended, he
8 -- the Congress could suddenly say he can't get
9 them?

10 MS. O'CONNELL: The -- the rule that
11 this Court has laid out is that once a final
12 judgment has been entered, that Congress can't
13 undo that.

14 And so any time up to -- I mean, the
15 Court's cases have said again and again that
16 the Congress can enact jurisdictional rules and
17 apply them to pending cases, so, no, I don't
18 think there is any separation of powers problem
19 with such a -- with such a rule.

20 One other final point I'd like to
21 make, the -- the Petitioner argues that by
22 enacting Section 2(b), that Congress is taking
23 away the Court's ability to interpret the law,
24 but when it's a jurisdictional statute that
25 Congress is enacting, a jurisdiction-stripping

1 statute, there's not going to be much left for
2 the Court to do.

3 There's cases from this Court that
4 talk about whether there is something left for
5 the Court to do and whether that's enough to --
6 to give the Court a role in exercising its
7 judicial role. Those cases are all trying to
8 decide whether Congress has changed the law
9 such that the case is taken outside the scope
10 of Klein.

11 When you have a statute like this one
12 that takes away subject matter jurisdiction of
13 the federal courts and gets a category of cases
14 off of the judicial agenda, the court just has
15 to determine whether this case falls within
16 that category and then it -- it should dismiss.

17 If there are no further questions, we
18 ask that the Court affirm.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Shah.

22 ORAL ARGUMENT OF PRATIK A. SHAH ON BEHALF OF
23 THE MATCH-E-BE-NASH-SHE-WISH BAND OF
24 POTTAWATOMI INDIANS RESPONDENT

25 MR. SHAH: Mr. Chief Justice, and may

1 it please the Court:

2 I guess I'd like to start with Justice
3 Alito's question because I think it cuts to the
4 matter, what would be an administrable line in
5 a separation of powers case.

6 And the line that we would embrace is
7 the line that the other side has offered in the
8 federal court scholars amicus brief supporting
9 the other side, and this is at page 15 of that
10 amicus brief. It says -- and this is relying
11 on Professor Hart, it says, "It is one thing to
12 exclude completely the federal courts from
13 adjudication. It is quite another to vest the
14 federal courts with jurisdiction to adjudicate
15 but simultaneously restrict the power of those
16 courts to perform the adjudicatory function in
17 the manner they deem appropriate."

18 Now, the scholars then explain why
19 that first category, which this case clearly
20 falls within when you're taking federal courts
21 out of the business entirely raises no
22 separation of powers problems.

23 They say, "By wholly excluding the
24 federal court, Congress loses its ability to
25 draw upon the integrity possessed by the

1 Article III judiciary in the public's eyes."

2 And so we think that gets to the core
3 separation of powers concerns that are
4 underlying the lines that this Court has drawn.
5 It avoids any puppeteering concern that
6 Congress is using the Article III, the judicial
7 imprimatur to give a merits judgment. It
8 avoids any public misperception concern that
9 this is an Article III resolution on the merits
10 of the controversy.

11 CHIEF JUSTICE ROBERTS: I don't see --

12 JUSTICE KAGAN: I guess I don't
13 understand, Mr. Shah, how that helps you. I
14 mean, doesn't this just exclude the power of
15 the federal courts?

16 MR. SHAH: Yes. And so that -- that's
17 the permissible side of the line, that the
18 professors lay out. They say if you are
19 excluding completely the federal courts from
20 adjudication, that does not raise a separation
21 of powers problem.

22 JUSTICE KAGAN: I -- I see.

23 MR. SHAH: They rely on Professor
24 Hart's dialectic for that proposition. They
25 say the harder cases --

1 JUSTICE KAGAN: Got it.

2 MR. SHAH: -- are like -- oh, sorry.

3 JUSTICE KAGAN: Could I ask you to --
4 Ms. O'Connell said when you were looking at
5 that, if you had a piece of legislation that
6 said in Jones v. Smith, Smith loses, that that
7 would be unconstitutional.

8 MR. SHAH: Right.

9 JUSTICE KAGAN: And she has to say
10 that because nine of us said it.

11 MR. SHAH: Yes.

12 (Laughter.)

13 JUSTICE KAGAN: So then the question
14 is why is it different --

15 MR. SHAH: Sure.

16 JUSTICE KAGAN: -- if Congress instead
17 says in Jones v. Smith, there shall be no
18 jurisdiction, and Smith loses. Why -- why is
19 that different?

20 MR. SHAH: So, Your Honor, if, in
21 fact, what they're doing is taking away
22 jurisdiction, they just say there is no -- so
23 in your hypothetical, there is no --

24 JUSTICE KAGAN: In Jones v. Smith,
25 there shall be no jurisdiction --

1 MR. SHAH: Right.

2 JUSTICE KAGAN: -- ergo, Smith loses.

3 MR. SHAH: Right. Well, the reason
4 why we think that statute is different is
5 because of the first part of it. It's saying
6 there is no jurisdiction.

7 So, when it says Smith loses, it's not
8 in the same way that was in the hypothetical in
9 Bank Markazi where all nine Justices said that
10 that would be problematic.

11 And three reasons why it's different.
12 First, in the Bank Markazi hypothetical of
13 Smith wins in a civil suit between Smith and
14 Jones, that is a merits judgment that the Court
15 had in mind. Presumably, in Smith wins, there
16 is a merits judgment that the Court --

17 JUSTICE KENNEDY: Suppose -- suppose
18 the statute said in order to ensure that Smith
19 wins, there shall be no jurisdiction.

20 MR. SHAH: Well, again, Your Honor, I
21 guess I still -- if what it's doing is -- is
22 asking the Court or taking away the --

23 JUSTICE KENNEDY: It's doing -- what
24 it's doing is clear to everybody.

25 MR. SHAH: It's taking away --

1 JUSTICE KENNEDY: In fact, it says
2 that it's clear. What's the result?

3 MR. SHAH: Sure. So I still think
4 that is distinguishable from the hypothetical
5 statute in Bank Markazi. And the reason is
6 because of the -- because it's taking away
7 jurisdiction. So there are a couple reasons
8 why it's different.

9 One is a functional matter. The
10 judgment is quite different. It's not a merits
11 judgment. Smith is presumably not in the Bank
12 Markazi hypothetical.

13 JUSTICE KENNEDY: But you're taking
14 away jurisdiction --

15 MR. SHAH: Yes.

16 JUSTICE KENNEDY: -- in order to have
17 a particular result in litigation.

18 MR. SHAH: Right, Your Honor, but the
19 result that you're getting is different than in
20 Smith v. wins -- Smith wins, because --

21 JUSTICE KAGAN: I don't think Smith
22 much cares. Why would Smith care?

23 MR. SHAH: Well, Your Honor, in -- in
24 Bank Markazi, Smith was the plaintiff. He
25 cares a lot, because if he wins, he gets an

1 award of relief, and that relief has res
2 judicata effect.

3 That's very different from a dismissal
4 for lack of jurisdiction in which there's no
5 merits judgment, there's no award of relief,
6 and there's no res judicata effect.

7 CHIEF JUSTICE ROBERTS: It doesn't say
8 anything about jurisdiction. And you are
9 enlisting the courts. You're telling the court
10 you have to -- you take this stamp and you
11 stamp dismissed on it.

12 And it doesn't say dismissed for want
13 of jurisdiction. I suppose we'd have to figure
14 out what the collateral consequences are, since
15 the statute doesn't say.

16 MR. SHAH: Well, your --

17 CHIEF JUSTICE ROBERTS: You aren't
18 dragooning the court into doing something the
19 court doesn't want to do. You're making them
20 dismiss a case that's pending before them.

21 MR. SHAH: Well, Your Honor, it --
22 we're assuming -- if we're assuming this is a
23 jurisdiction-stripping statute; that is, it is
24 withdrawing jurisdiction, then the only thing
25 the court can do is dismiss for lack of

1 jurisdiction.

2 And if that, enlisting the courts in
3 that limited matter is a problem, then that's
4 true for 150 years of this Court's precedent.

5 CHIEF JUSTICE ROBERTS: Well, that
6 begs the answer -- that begs the answer to the
7 -- the -- the Hart & Wechsler dialogue that
8 when the court -- when Congress strips
9 jurisdiction to achieve an otherwise
10 unconstitutional result, that that's perfectly
11 fine.

12 MR. SHAH: Well, Your Honor --

13 CHIEF JUSTICE ROBERTS: And I think
14 that's a very difficult question.

15 MR. SHAH: Well, Your Honor, I think
16 that question implicates different interests.
17 It's not a separation of powers problem, I
18 don't think, for Congress to say a certain set
19 of cases can't be within the federal courts.

20 If they're talking about equal
21 protection cases and singling those out, that
22 runs afoul of the equal protection clause.

23 CHIEF JUSTICE ROBERTS: Well, is it --
24 I understand your answer, but is it a
25 separation of powers question if they say, if

1 the claim is separation of powers, the case --
2 there -- there is no jurisdiction?

3 MR. SHAH: Yes, Your Honor, there --
4 there I grant you we're not arguing that
5 Congress can take away the court's jurisdiction
6 to adjudicate whether there is a separation of
7 powers problem itself, the constitutional vow
8 itself, and that's why we're here, on here.

9 We are not arguing that Congress has
10 done or could -- could do that. It can't
11 prevent the court from adjudicating whether the
12 statute it has passed is constitutional, but
13 that's not what's going on here, we're having a
14 full airing of the claim.

15 The question is can they withdraw
16 jurisdiction. And if, in fact, enlisting the
17 courts, as you say, in that limited manner
18 violates separation of powers, well, that's
19 true in the seminal withdrawal of jurisdiction
20 case in *McCardle* and 150 years of cases after
21 that. In fact, in *McCardle*, the petitioner
22 made --

23 JUSTICE GINSBURG: What about the
24 answer to *McCardle* is it was just a question of
25 how you get habeas. There was another route.

1 Congress had closed off one route, but it left
2 open another.

3 MR. SHAH: Well, Your Honor, I guess a
4 couple responses.

5 One is the petitioner in McCardle
6 actually made the very same argument that
7 Petitioner makes here, is that Congress was
8 targeting my suit when it passed that statute.
9 And the court expressly addressed that argument
10 and said, no, we're not going to look behind
11 Congress's act.

12 It describes a category of suits. And
13 we're not going to ask whether Congress had
14 some illicit motive of targeting your suit.
15 That's my first response, Justice Ginsburg.

16 The second response is if, in fact,
17 there's a claim that there is no other forum to
18 bring this case, then maybe there is, as this
19 Court said in Bank Markazi, there are other
20 constitutional limitations. Maybe that's a due
21 process problem.

22 In fact, Petitioner raised a due
23 process claim in the lower courts. And in its
24 cert petition, this Court denied cert on the
25 due process claim. So that is out of the case.

1 We're strictly on separation of powers
2 grounds, and there is no separation of powers
3 problem in this Court withdrawing jurisdiction,
4 including with respect to pending cases.
5 That's what it did in *McCardle*. That's what it
6 did in *Assessors v. Osborne*. That's what it
7 did in *Hallowell*. That's what --

8 JUSTICE KAGAN: I guess I'm -- I'm not
9 quite sure what you're reserving there, Mr.
10 Shah, so here is a hypothetical.

11 MR. SHAH: Okay.

12 JUSTICE KAGAN: There's a very large
13 corporation, commits a lot of employment
14 discrimination. Because it does, it has a lot
15 of employment discrimination suits filed
16 against it.

17 And so the CEO of this big corporation
18 goes to Congress and says: These suits are
19 getting to be a real hassle, and so I'd like a
20 piece of legislation. And Congress says: Good
21 enough, and it says there shall be no
22 jurisdiction over any employment discrimination
23 suits filed against that corporation.

24 MR. SHAH: Right.

25 JUSTICE KAGAN: All right? And -- and

1 -- and -- and -- and -- and in so doing, it
2 knocks out all these employment litigation --
3 all these employment discrimination suits that
4 have been filed against that corporation.

5 Is that constitutional?

6 MR. SHAH: It may be unconstitutional,
7 but not for failure of separation of powers,
8 not a separation of powers violation. Maybe
9 that is the type of class-of-one problem that
10 this Court noted in -- in the Court's opinion
11 in Bank Markazi.

12 In Footnote 27, it said: Look, if
13 you're singling out a particular litigant for
14 special disfavored or favored treatment, that's
15 the class -- maybe that's a class-of-one claim.
16 So it's not a separation --

17 JUSTICE KAGAN: So, if this had said
18 just David Patchak's suit, different case?

19 MR. SHAH: Well, Your Honor, if
20 Congress had singled out just Mr. Patchak's
21 suit in the text of the statute, maybe they
22 could have brought that sort of claim. I still
23 think based on this Court's decision in Bank
24 Markazi that talked about Congress is free to
25 legislate with -- in a particularized manner

1 even with respect to particular cases, it's
2 probably okay, but it would raise at least a
3 harder question. But make no mistake, the
4 statute here is about a class of cases.

5 Now, I will grant you it is a
6 relatively narrow class of cases, suits that
7 were relating to the Bradley Property. And as
8 it turned out --

9 JUSTICE KENNEDY: I -- I don't know
10 why the hypothetical that Justice Kagan just
11 put doesn't severely compromise the integrity
12 of the courts. The courts are hearing cases
13 against one class or -- or against a large
14 class of defendants but not another class.

15 And this, it seems to me, severely --

16 MR. SHAH: Your Honor --

17 JUSTICE KENNEDY: -- calls into
18 question the integrity of the courts. And
19 that's a separation of powers problem.

20 MR. SHAH: Well, Your Honor, I agree
21 with you, everything up until that last part.
22 I agree if -- if the court was drawing lines
23 that you could only sue these type of
24 defendants and not other types of defendants or
25 singling out one company --

1 JUSTICE KENNEDY: Well, that's the
2 hypothetical.

3 MR. SHAH: Yes. Well, I think that's
4 an --

5 JUSTICE KENNEDY: And you said
6 separation of powers is not involved.

7 MR. SHAH: Right. I think that's an
8 equal --

9 JUSTICE KENNEDY: It seems to me that
10 this is intrinsically separation of powers.

11 MR. SHAH: Well, Your Honor, I think
12 that's an equal protection problem. And -- and
13 as this Court recognized in Footnote 27, there
14 are claims to deal with that.

15 CHIEF JUSTICE ROBERTS: You can take
16 an extra minute because we're going to give
17 your friend some rebuttal time.

18 MR. SHAH: Sure, Your Honor.

19 I guess what I was starting to finish
20 up on was on the -- on the class of claims, it
21 may be a narrow category, but just because it
22 turned out that the only suit happened to be
23 Patchak's, it would be an odd constitutional
24 rule if on the day before they -- if they've
25 passed the statute on the day before Patchak's

1 suit, it's fine. On the day after Patchak's
2 suit, it's not fine. And then, if three other
3 people happen to file suit, suddenly it's fine
4 again.

5 That -- that is not a right sort of --
6 that does not strike us as a sensible
7 constitutional rule. Instead, you should look
8 at the words that Congress enacted which was
9 trying to insulate a category of cases from --
10 from this Court exer -- from any federal court
11 exercising jurisdiction. That's precisely what
12 Congress has done for over 150 years dating
13 back to *McCordle* and in a line of cases since
14 then.

15 If there are no further questions.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. SHAH: Thank you.

19 CHIEF JUSTICE ROBERTS: Three minutes,
20 Mr. Gant.

21 REBUTTAL ARGUMENT OF SCOTT E. GANT

22 ON BEHALF OF THE PETITIONER

23 MR. GANT: Thank you, Mr. Chief
24 Justice. A few quick points. I'll try and run
25 through them quickly.

1 Justice Kennedy, I completely agree
2 with you that there is a separation of powers
3 problem posed by the circumstance -- the
4 hypotheticals that were posed. We shouldn't
5 lose sight of the fact that separation of
6 powers were designed in substantial part to
7 protect an individual's rights and to protect
8 an independent judiciary.

9 What we would have here is, if you
10 affirm and uphold the Gun Lake Act, you will
11 have judges looking over their shoulders
12 wondering if they're going to be next in a case
13 like this Court was in Patchak I, where
14 Congress says we don't like the results. We're
15 going to take the case away from the courts.
16 We can dress it up using the language of
17 jurisdiction, but it's still taking the case
18 away from the courts and directing the outcome.

19 Now, on the point, the distinction
20 that counsel for the Respondents were trying to
21 drive home, that somehow a direction to dismiss
22 in 2(b) is different because it's not merits.
23 I would refer to the Court to a unanimous
24 decision from last year, CRST versus EEOC,
25 where the Court found the -- the party that was

1 not prevailing in -- that -- that did not win
2 on the merits in the EEOC case was nevertheless
3 the prevailing party.

4 The Court, unanimous Court observed
5 the defendant, however, has fulfilled its
6 primary objective whenever plaintiff's
7 challenge is rebuffed, irrespective of the
8 precise reason.

9 As anyone who has ever been a
10 plaintiff or represented a plaintiff knows,
11 when the plaintiff's case is dismissed, the
12 plaintiff has lost and the defendant has won.
13 It could have different collateral
14 consequences, res judicata and so on, but
15 fundamentally, when the plaintiff gets kicked
16 out of court, they have lost.

17 Mr. Patchak had that result as -- from
18 2(b).

19 With respect to the relationship
20 between 2(a) and 2(b), 2(a) does one of two
21 things here. It's either meaningless because
22 all the work is done by 2(b). If the suit
23 relates to the Gun Lake -- to the Bradley
24 Property, it shall be dismissed.

25 Or, as the House of Representatives

1 argued on pages 3 and 20 of its brief, what
2 2(a) -- 2(b) does is it implements 2(a). This
3 was an extraordinary assertion by the House of
4 Representatives, which came and filed an amicus
5 brief, and they said what they were really
6 telling you is that what the Congress did in
7 2(b) was it decided what 2(a) means and then
8 kicked the case out of court based on its own
9 understanding while depriving this Court or any
10 other court of the opportunity to say what 2(a)
11 means.

12 Respondents -- Federal Respondents
13 said they didn't know quite what some of the
14 provisions in the Gun Lake Act means except
15 they do know that it prevents Mr. Patchak's
16 case from going forward.

17 This seems to me that their uncertain
18 about the meaning, except when it comes to its
19 application to Mr. Patchak, only highlights the
20 fact that Congress was trying to direct the
21 outcome in Mr. Patchak's case.

22 With respect to the hypotheticals that
23 were posed to Mr. Shah by Justices Kagan and
24 Kennedy, this case is no different, I think,
25 than the hypotheticals you were posing. This

1 is substantially like Smith wins. You can play
2 around with the words. You can say we want
3 Smith to win; therefore, there's no
4 jurisdiction.

5 I don't think anyone here believes
6 that Congress should be able to do that. So
7 this is effectively the same thing.

8 And finally, Justice Gorsuch, with
9 respect to the Gonzalez case that you were
10 discussing with counsel for the Federal
11 Respondents, in that case, both of the parties
12 acknowledged that there was no dispute about
13 jurisdiction.

14 Thank you for the extra time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:06 a.m., the case
18 was submitted.)

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Official - Subject to Final Review

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