11-247

No.

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

DAVID PATCHAK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. 702 waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian Tribe.

2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

PARTIES TO THE PROCEEDING

The petitioners are Ken L. Salazar, Secretary of the Interior, and Larry Echo Hawk, Assistant Secretary of the Interior, Indian Affairs, both of whom were defendants below.

The respondents are David Patchak, plaintiff below, and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, intervenor-defendant below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Ken L. Salazar, Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 632 F.3d 702. The opinion of the district court (App., *infra*, 27a-37a) is reported at 646 F. Supp. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2011. Petitions for rehearing were denied on March 28, 2011 (App., *infra*, 23a-24a, 25a-26a). On

June 16, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 26, 2011, and on July 18, 2011, the Chief Justice further extended the time to August 25, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. App., *infra*, 38a-43a.

STATEMENT

1. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Band), also called the Gun Lake Band, is a federally recognized Tribe in Allegan County, Michigan. See 63 Fed. Reg. 56,936 (1998). Under the terms of the 1821 Treaty of Chicago, signed by Chief Match-E-Be-Nash-She-Wish, the Band ceded much of its land to the United States but reserved a tract of land at present-day Kalamazoo. Treaty of Chicago, 7 Stat. 219. In 1827, the Band ceded that parcel to the United States in exchange for the enlargement of one of the reserves of the Pottawatomi bands. Treaty of Sept. 19, 1827, 7 Stat. 305. Under subsequent treaties to which the Band was not a signatory, all Pottawatomi land was ceded to the United States, leaving the Band landless. Treaty of Chicago, 7 Stat. 431 (1833); Ottawa Treaty, 7 Stat. 513 (1836).

After the Band obtained federal recognition in 1998, it submitted an application to the Department of the Interior in which it asked the United States to acquire about 147 acres of land in Wayland Township, Michigan (the Bradley Property), in trust for the Band. Its application was based on the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, which authorizes the Secre-

tary of the Interior to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. Under the IRA, title to such land is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Ibid.* In May 2005, after an extensive administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. 70 Fed. Reg. 25,596-25,597. The announcement stated that "acceptance of the land into trust" would not occur for 30 days, so that "interested parties [would have] the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." *Ibid.*; see 25 C.F.R. 151.12(b).

2. During that 30-day period, an organization known as Michigan Gambling Opposition (MichGO) sued the Secretary, alleging that her decision violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that 25 U.S.C. 465 is an unconstitutional delegation of legislative authority to the Executive. The district court rejected those claims. *Michigan Gambling Opposition (MichGO)* v. *Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007).

MichGO appealed, and after oral argument, it attempted to add a claim that the land acquisition was not authorized under Section 465 because, according to MichGO, the Gun Lake Band was not under federal jurisdiction in 1934. See *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1061 (2009) (holding that the IRA limits the Secretary's authority "to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in

June 1934"). The court of appeals denied MichGO's motion to supplement the issues on appeal, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (Mar. 19, 2008), and then affirmed the district court's decision, *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009).

3. Respondent Patchak lives in Wayland Township, Michigan, "in close proximity to" the Bradley Property. C.A. App. 12. In 2008, a week after the court of appeals denied rehearing en banc in *Michigan Gambling Opposition*, he brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, making the argument that MichGO had attempted to raise in its appeal—*i.e.*, that the acquisition was not authorized by the IRA because the Band was not under federal jurisdiction in 1934. At the time Patchak filed his suit, title to the land had not yet been transferred to the United States in trust for the Band. When the Secretary announced that he intended to accept the land once the court of appeals issued its mandate in *Michigan Gambling Opposition*, Patchak sought what he called an "administrative stay of proceedings," which the district court denied. C.A. App. 64, 6. Patchak subsequently moved for a temporary restraining order prohibiting the trust acquisition. *Id.* at 411. The district court denied that motion as well, *id.* at 8, and on January 30, 2009, the Secretary of the Interior accepted title to the Bradley Property in trust for the Band, *id.* at 435-436.

The district court dismissed Patchak's complaint. App., *infra*, 27a-37a. The court held that Patchak lacked prudential standing because the injury he alleged—namely, that the gaming facility the Band proposed to operate "would detract from the quiet, family atmo-

sphere of the surrounding rural area," *id.* at 30a n.5—was not arguably within the zone of interests protected by the IRA, *id.* at 34a-36a. The court stated that its subject-matter jurisdiction was "seriously in doubt" for the additional reason that the United States has not waived its sovereign immunity to suits challenging its title to Indian trust lands. *Id.* at 37a n.12.

4. The court of appeals reversed and remanded. App., *infra*, 1a-22a. The court held that Patchak had prudential standing, reasoning that the IRA "limit[s] the Secretary's trust authority," and "[w]hen that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." *Id.* at 7a. The court explained that, in reaching that conclusion, it "ha[d] not * * * viewed the IRA provisions in isolation." *Id.* at 8a. Instead, because the court viewed those provisions as "linked" to the IGRA, it evaluated Patchak's interests in light of the Band's intended use of the property for gaming. *Ibid.* "Taken together," the court concluded, "the limitations in [the IRA and the IGRA] arguably protected Patchak from the negative effects of an Indian gambling facility." *Ibid.* (internal quotation marks omitted).

The court of appeals also held that Patchak was a "proper entity to police the Secretary's authority to take lands into trust under the IRA." App., *infra*, 9a. The court reasoned that if the interests of a State or municipality—which might lose regulatory authority or tax revenue as a result of a trust acquisition—are within the zone of interests protected by the IRA, "then so are Patchak's interests," because his alleged injuries "may be different, but they are just as cognizable." *Id.* at 10a.

The court stated that the injuries Patchak alleged, including loss of property value, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land surrounding the casino site," are the "sorts of injuries [that] have long been considered sufficient for purposes of standing." *Ibid.*

The court of appeals next held that 5 U.S.C. 702 waived the government's sovereign immunity from Patchak's suit. App., *infra*, 10a-21a. Section 702 waives sovereign immunity for any "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. The government contended that Patchak's suit was barred by the last sentence of Section 702, which provides that "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Ibid.* The government argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, is such a statute. The QTA provides that the United States may be sued "to adjudicate a disputed title to real property in which the United States claims an interest," but it goes on to say that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a).

The court of appeals rejected the government's argument. Observing that "a common feature of quiet title actions is missing from this case" because Patchak was not claiming title to the land at issue, App., *infra*, 14a, the court concluded that "the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit," *id.* at 16a. In so holding, the court acknowledged that its decision created a conflict with

decisions of three other circuits. *Id.* at 18a (citing *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).

5. The court of appeals denied petitions for rehearing en banc. App., *infra*, 23a-24a, 25a-26a.

REASONS FOR GRANTING THE PETITION

The Quiet Title Act expressly retains the United States' sovereign immunity from suits that challenge its title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a). The court of appeals has held, however, that a plaintiff may circumvent that retention of immunity through the simple expedient of suing under the Administrative Procedure Act. The court reached that conclusion even though the APA's waiver of sovereign immunity, 5 U.S.C. 702, states that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The court of appeals' decision rests on a misinterpretation of the text and history of Section 702, and it contravenes this Court's cases construing that provision and the QTA. As the court of appeals acknowledged, its decision also conflicts with the decisions of all three of the other courts of appeals to consider the question. See *Neighbors for Rational Development, Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United*

States, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The decision threatens significant disruption of the United States' exercise of its trust responsibility for Indian lands, and it warrants review and correction by this Court.

In addition, in holding that the plaintiff in this case satisfied prudential-standing requirements, the court of appeals misconstrued this Court's precedents in two significant ways. Rather than evaluating whether the injury complained of was within the zone of interests protected by the statutory provision underlying the complaint, the court instead considered the interests protected by a wholly separate statute enacted decades later. And in conducting that analysis, the court conflated Article III and prudential standing principles. The court's errors compound the harmful effects of its APA holding, and they too warrant this Court's review.

A. The Court Of Appeals' Erroneous Construction Of The APA's Waiver Of Sovereign Immunity Warrants This Court's Review

1. The decision below is contrary to the text and history of Section 702 and to this Court's precedents interpreting it

a. In the 1976 amendments to the APA, Congress enacted a waiver of the federal government's sovereign immunity from suits seeking judicial review of agency action and requesting relief other than money damages. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). As amended, Section 702 provides that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim

that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. 702. At the same time, however, Congress was careful to preserve the limitations prescribed in other statutes in which it had waived sovereign immunity for particular classes of cases. To that end, the last sentence of 5 U.S.C. 702(2) provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The QTA, which was enacted only four years before the 1976 amendments to Section 702, is precisely the sort of "other statute" to which Congress referred when it limited the scope of the APA's waiver. Act of Oct. 25, 1972, Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (28 U.S.C. 2409a). The QTA permits the United States to be sued "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). It goes on to say, however, that "[t]his section does not apply to trust or restricted Indian lands." *Ibid.* Even in the absence of the limitation set out in the last sentence of Section 702, general principles of statutory interpretation would suggest that a plaintiff may not rely on the APA to circumvent the QTA's specific limitations. See *EC Term of Years Trust* v. *United States*, 550 U.S. 429, 433 (2007) ("[A] precisely drawn, detailed statute pre-empts more general remedies.") (internal quotation marks and citation omitted). But the text of Section 702 removes any doubt: the QTA is an "other statute that grants consent to suit" but "expressly or impliedly

forbids the relief which is sought" in a case, such as this one, challenging the United States' title to Indian trust lands. This suit is therefore barred by Section 702 and sovereign immunity.

b. The legislative history of Section 702 confirms what is apparent from its text. In amending that provision in 1976, Congress adopted a proposal of the Administrative Conference of the United States. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, 12, 23-24, 26-28 (1976) (*House Report*); S. Rep. No. 996, 94th Cong., 2d Sess. 3, 12, 22-23, 25-27 (1976) (*Senate Report*). In a memorandum supporting its proposal, the Administrative Conference had pointed out that its "recommendation [was] phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes * * * in which Congress has conditionally consented to suit." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 138-139 (1970) (*1970 APA Hearing*). The Committee observed that "this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal," *id.* at 139, in Section 702(1), which states that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702(1). But the Committee explained that "clause (2) of the final sentence of part (1) of the recommendation," that is, the clause that became Section 702(2), "is intended to prevent any question on this matter from arising." *1970 APA Hearing* 139.

As originally introduced in the Senate, the APA bill varied from the Administrative Conference's proposal in a significant respect: its version of Section 702(2) would have withheld authority to grant relief only if another statute "forbids the relief which is sought," rather than if it "*expressly or impliedly* forbids the relief which is sought," as the Administrative Conference had suggested. *Senate Report* 12, 26. On behalf of the Department of Justice, then Assistant Attorney General Scalia urged Congress to restore the phrase "expressly or impliedly." As he explained, waiver statutes enacted before 1976 were passed against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular waiver statute. *Id.* at 27. Assistant Attorney General Scalia observed that "this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *Ibid.* That result, he concluded, is "simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." *Ibid.*

In response to Assistant Attorney General Scalia's letter, the Senate Committee amended the provision to conform to the Administrative Conference's proposal, *Senate Report* 12, and the provision passed the House and Senate in that form. That history confirms that, under Section 702(2), "where statutory remedies already exist, these remedies will be exclusive." *Id.* at 27.

c. This Court has twice held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *United States* v. *Mottaz*, 476

U.S. 834, 841 (1986) (quoting *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983)). The Court in *Block* accordingly rejected the suggestion that a plaintiff may invoke the waiver of sovereign immunity in Section 702 to avoid the limitations on the waiver of sovereign immunity under the QTA. 461 U.S. at 286 n.22. The Court reasoned that the QTA is an "other statute" granting consent to suit within the meaning of 5 U.S.C. 702(2), so that if a suit is untimely under the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(f), then "the QTA expressly 'forbids the relief' which would be sought under [Section] 702," 461 U.S. at 286 n.22. See *ibid.* (Section 702 "provides no authority to grant relief 'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy.'") (quoting *House Report* 13).

Like *Block*, this case involves a suit that is within the general subject matter addressed by the QTA but is foreclosed by a specific limitation under the QTA, namely, the express exception for suits involving "Indian lands." Under *Block*, Patchak cannot avoid the limitations in the QTA by invoking the APA.

d. The court of appeals erroneously believed that sovereign immunity does not bar Patchak's lawsuit because Patchak does not himself claim an interest in the Bradley Property, and he therefore did not "bring a Quiet Title Act case." App., *infra*, 13a. The court's analysis was flawed because it focused on the relief that Patchak does *not* seek, rather than the relief that he *does* seek, which is to reverse the Secretary's acquisition of the Bradley Property as trust land for the Band, thus necessarily challenging the United States' title to the property and requiring the United States to relinquish that title. See Patchak C.A. Br. 26 (describing the relief

sought as including a direction to the district court "to order the Bradley [Property] taken out of trust"). That is precisely the consequence Congress sought to prevent by including in the QTA the bar to suits challenging the United States' title to land it holds in trust for Indians. It is therefore a consequence forbidden by Section 702(2)'s directive that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The court of appeals was of course correct that Patchak could not bring an action under the QTA because he does not assert his own interest in the property. App., *infra*, 13a-16a; see 28 U.S.C. 2409a(d). But the court drew the wrong lesson from that observation. One purpose of the QTA is to subject the United States' claim of title to adjudication by a court only where there is a party who has an adverse claim to the same property and who would otherwise suffer the "obviously unjust" hardship of being unable to remove a cloud on his title to that property. *Senate Report* 7. Without such a limitation, the United States would be exposed to numerous actions by various third parties who might wish to resolve a controversy concerning the United States' claim of title but who lack any competing claim to the same property. Such actions do not present the potential for hardship or concrete adversity regarding a particular parcel that would warrant subjecting the government to the burdens of suit concerning its title. Yet the court of appeals' holding leads to the perverse result that a party who claims no interest in the land at issue may challenge the United States' title to lands that are held in trust, even though the same challenge would be barred if brought by a party who claimed an interest in

the land. See *Neighbors for Rational Development*, 379 F.3d at 962 ("If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land, we think it highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land."); *Florida Dep't of Bus. Regulation*, 768 F.2d at 1254-1255 ("It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands.").

The court of appeals was undeterred by that anomaly, suggesting that it is "far-fetched to attribute an intention to the 1972 Congress [which passed the QTA] about a subject"—claims by individuals not seeking to quiet title in themselves—"not within the terms of the statutory language." App., *infra*, 19a. In fact, Patchak's claim falls squarely within "the terms of the statutory language": he "dispute[s]" the United States' trust "title to real property in which the United States claims an interest." See 28 U.S.C. 2409a(a). Moreover, the court's reasoning overlooks that the QTA was enacted against the background of a general rule of sovereign immunity. As Assistant Attorney General Scalia explained, Congress would have had no reason expressly to forbid relief to individuals who were not seeking to quiet title in themselves; the general rule of sovereign immunity already prevented those individuals from obtaining relief. *Senate Report* 27. The Congress that enacted the QTA imposed carefully considered limitations on its waiver of sovereign immunity with respect to suits challenging the United States' title to real property. Section 702 may not be used to circumvent those limitations.

2. *The decision below conflicts with the decisions of three other courts of appeals*

The court of appeals acknowledged that its interpretation of Section 702 directly conflicts with that of the other three circuits that have considered the question. App., *infra*, 18a (citing *Neighbors for Rational Development*, *Metropolitan Water Dist.*, and *Florida Dep't of Bus. Regulation*). Each of those circuits has held, contrary to the court here, that a plaintiff may not invoke the APA's waiver of sovereign immunity to circumvent the QTA's retention of the United States' sovereign immunity from suits seeking to adjudicate the United States' title to Indian trust lands, even if the plaintiff does not seek to quiet title in favor of himself. *Neighbors for Rational Development*, 379 F.3d at 962; *Metropolitan Water Dist.*, 830 F.2d at 143; *Florida Dep't of Bus. Regulation*, 768 F.2d at 1254-1255.

The court of appeals' decision is also in serious tension, if not direct conflict, with the Seventh Circuit's decision in *Shawnee Trail Conservancy* v. *United States Department of Agriculture*, 222 F.3d 383, 387-388 (2000), cert. denied, 531 U.S. 1074 (2001). In that case, the plaintiffs alleged that the Forest Service lacked authority to restrict the use of certain roads in a national forest because, they said, the roads were subject to various easements and rights-of-way, and therefore the Forest Service did not "own the property rights necessary to make decisions concerning their incidents of use." *Id.* at 386. Even though the plaintiffs did not themselves claim any interest in those easements or rights of way, the Seventh Circuit held that the QTA barred their suit. In reaching that conclusion, it stated that "the majority of courts that have considered the QTA in the context of claims that do not seek to quiet title in the party bring-

ing the action have nonetheless found the Act applicable, and we find the reasoning of these cases persuasive." *Id.* at 388; see *id.* at 387 (discussing *Metropolitan Water Dist.*). That reasoning cannot be reconciled with the decision of the court of appeals in this case.

3. If not corrected by this Court, the decision below will have significant adverse consequences

In *California* v. *United States*, 490 U.S. 920 (1989) (No. 87-1165), this Court granted certiorari to consider the relationship between Section 702 and the Indian trust-lands exception to the QTA, but the Court was equally divided and therefore did not resolve the issue. Review is even more appropriate now because the decision below creates a circuit conflict and because the court of appeals' erroneous decision makes it highly unlikely that further development of the law will occur in other circuits. Any plaintiff seeking to sue the Secretary can obtain venue in the United States District Court for the District of Columbia, 28 U.S.C. 1391(e), and in light of the decision below, there is little reason for a plaintiff to bring a case anywhere else.

If allowed to stand, the court of appeals' decision will severely disrupt the Secretary's acquisition of trust lands for Indians. The Secretary's regulations provide for a 30-day window for the initiation of litigation after the announcement of his intention to take land into trust. 20 C.F.R. 151.12(b). The decision in this case makes that time limit meaningless. Instead, any plaintiff who can establish standing can now bring an APA challenge to any trust acquisition within the preceding six years. 28 U.S.C. 2401(a). That is true whether the land was taken into trust pursuant to the Secretary's general authority under the Indian Reorganization Act,

25 U.S.C. 465, or pursuant to specific legislation enacted to provide a land base for a specified group of Indians. See, *e.g.*, Graton Rancheria Restoration Act, Pub. L. No. 106-568, Tit. XIV, 114 Stat. 2939 (25 U.S.C. 1300n to 1300n-6); Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798. That six-year period of uncertainty as to whether a trust acquisition will be subject to judicial challenge—and hence whether the land will securely be held in trust for the Tribe—will pose significant barriers to Tribes that are seeking the economic development of trust land. If left unreviewed, the circumvention of the QTA countenanced by the court of appeals will therefore frustrate the purpose of trust acquisitions, which is to provide a land base for Indians in order to "encourag[e] tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal quotation marks and citation omitted); see *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 220-221 (2005).

Indeed, the uncertainty surrounding the status of trust land may not even end six years after the land is taken into trust. The implication of the decision below could be that, whenever the Secretary takes final agency action with respect to Indian trust land, plaintiffs could bring an APA suit contending that his action was contrary to law because the land is not properly held in trust for Indians. That might even be so when the United States has held the land in trust for years and the Tribe has made substantial investments in it. Allowing such never-ending attacks on the trust status of lands would severely undermine the United States' long-standing recognition of tribal sovereignty, self-gover-

nance, and economic self-determination. That result warrants this Court's review.

B. The Court Of Appeals' Prudential-Standing Holding Conflicts With Decisions Of This Court And Also Warrants Review

1. To establish standing to invoke the jurisdiction of a federal court, a plaintiff must satisfy the "irreducible constitutional minimum of standing" by showing that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets and citation omitted). In addition, this Court has recognized "judicially self-imposed limits on the exercise of federal jurisdiction," including the requirement that the plaintiff establish prudential standing. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). As relevant here, the doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed.*, 497 U.S. 871, 883 (1990); *Bennett* v. *Spear*, 520 U.S. 154, 175-176 (1997). The zone-of-interests test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

In this case, "the statutory provision whose [alleged] violation forms the legal basis for [Patchak's] complaint," *National Wildlife Fed.*, 497 U.S. at 883, is Section 5 of the IRA, which authorizes the Secretary to ac-

quire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. But that provision has nothing to do with the interests asserted in Patchak's suit—avoiding diminished property values, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. App., *infra*, 10a. Patchak therefore lacks prudential standing to maintain his suit, and the court of appeals' decision to the contrary conflicts with this Court's precedents in two different ways.

a. First, the court of appeals disregarded this Court's decision in *National Wildlife Federation* by failing to limit its zone-of-interests analysis to "the statutory provision whose violation forms the legal basis for [Patchak's] complaint." 497 U.S. at 883. Here, that provision is 25 U.S.C. 465, so the court should have focused its inquiry on Section 465. It would have been inappropriate for the court to consider the interests protected even by other provisions of the IRA itself, outside of Section 465. As this Court explained in *Bennett*, "[w]hether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. But what the court of appeals actually did in this case was even less justified than that: the court evaluated the interests protected by the Indian Gaming Regulatory Act (IGRA), an entirely different statute enacted in 1988, some 54 years after the IRA.

The court of appeals attempted to justify its reliance on IGRA by asserting that the IRA's provisions are "linked" to those of IGRA, but that reasoning cannot

withstand scrutiny. App., *infra*, 8a. It is true that the IRA and IGRA are "linked" in the superficial sense that one way for a Tribe to operate a gaming facility (permitted by IGRA) is if the facility is located on land held in trust by the United States for the Tribe (and acquired under the IRA). But the presence of trust land is neither a necessary nor a sufficient condition for gaming to occur, both because there are additional provisions of IGRA that must be satisfied before a Tribe can operate a gaming facility, and also because a Tribe may conduct gaming on other lands, such as lands within an Indian reservation and restricted fee land, 25 U.S.C. 2703(4). More to the point, whatever role the IRA's limitations may happen to play today in protecting "the interests of those * * * who would suffer from living near a gambling operation," App., *infra*, 7a, there is no reason to suppose that Congress could even have imagined those interests, let alone actually sought to protect them, when it enacted the IRA in 1934. There is accordingly no basis for concluding that those interests are even arguably "within the 'zone of interests' sought to be protected" by 25 U.S.C. 465. *National Wildlife Fed.*, 497 U.S. at 883.

Of course, where the Secretary has determined that land is eligible for gaming, an entity with standing to challenge gaming on that land may bring a claim alleging that the determination violates IGRA. Indeed, MichGO brought just such a challenge to the Band's gaming operation, but it chose to abandon its claim on appeal. *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009). And should Patchak be able to identify some final agency action that he believes violates IGRA, he too could bring a claim alleging that IGRA was vio-

lated, if he establishes standing. His current suit, however, does not challenge the Bradley Property's eligibility for gaming under IGRA—he instead alleges that the Secretary could not acquire the Bradley Property in trust for the Band for *any* purpose.

The court of appeals relied on *Air Courier Conference* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), but the court of appeals' analysis cannot be reconciled with this Court's decision in that case. App., *infra*, 8a. In *Air Courier Conference*, postal-employee unions sought to challenge a regulation suspending restrictions in private-express statutes, which regulate the conduct of the Postal Service's competitors. 498 U.S. at 519-520. The unions argued that the suspension would harm their members' employment opportunities, and they suggested that, in identifying the relevant zone of interests, the Court should look beyond the private-express statutes themselves to consider the broader Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, which codified those statutes. 498 U.S. at 528.

This Court rejected that suggestion. In so doing, the Court acknowledged that it had sometimes looked beyond the particular statutory provision invoked by a plaintiff to related provisions within the same statute. *Air Courier Conf.*, 498 U.S. at 529. But the Court explained that "the only relationship between the [private-express statutes], upon which the Unions rel[ied] for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rel[ied] for their standing, [was] that both were included in the general codification of postal statutes embraced in the PRA." *Ibid.* To accept the unions' argument, the Court observed, would require holding that the PRA was the

relevant statute for prudential standing, "with all of its various provisions united only by the fact that they dealt with the Postal Service." *Ibid.* The Court refused to apply that "level of generality" in conducting its prudential-standing analysis; to do so, it concluded, would "deprive the zone-of-interests test of virtually all meaning." *Id.* at 529-530. Thus, far from supporting the decision below, *Air Courier Conference* confirms that, under this Court's precedents, there is no basis for the court of appeals' conclusion that the zone of interests arguably sought to be protected by the Congress that passed the IRA in 1934 encompasses interests reflected in a statute passed more than a half-century later.

b. Second, the court of appeals erred in conflating Article III and prudential-standing principles. The court emphasized that a State has prudential standing to bring a suit alleging a violation of 25 U.S.C. 465 because the limitations prescribed in the IRA serve to protect a State's interest in its regulatory authority and tax revenue. App., *infra*, 9a-10a. According to the court, while "the nature" of a State's and Patchak's alleged injuries "may be different," Patchak's injuries "are just as cognizable." *Id.* at 10a. But alleging a cognizable injury is a requirement of *Article III* standing. That an injury is cognizable in that respect does not establish that it falls within the zone of interests intended to be protected by the statutory provision giving rise to the claim. See *Clarke*, 479 U.S. at 395-396 (explaining that the prudential-standing requirement under the zone-of-interests test "add[s] to the requirement" that a plaintiff suffer an injury in fact).

For similar reasons, the court erred in relying on *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), for the proposition that the "sorts of injuries [Patchak asserts] have

long been considered sufficient for purposes of standing." App., *infra*, 10a. In *Sierra Club*, the Court considered whether the plaintiffs had satisfied the injury-in-fact requirement of Article III, and it ultimately concluded that they had not. 405 U.S. at 734-740. Nothing in the Court's opinion addressed prudential standing.

2. The court of appeals' departure from the prudential-standing principles articulated by this Court warrants review in conjunction with review of the court's holding that relief is available under the APA, 5 U.S.C. 702, notwithstanding that the relief sought is precluded by the QTA. As explained above, the court's holding under Section 702 creates a cloud of uncertainty over any trust acquisition under the IRA. And the court of appeals' refusal to follow this Court's prudential-standing jurisprudence has greatly expanded the class of potential plaintiffs, essentially to anyone who asserts he will be injured by the uses to which the land held in trust by the United States for a Tribe might be put. In so holding, the court has permitted a party that Congress did not intend to be able to bring suit to obtain relief that Congress did not intend anyone to obtain. That result warrants correction by this Court.

If this Court were to reverse the court of appeals' APA holding, it would have no need to consider prudential standing. But because both issues are jurisdictional, the Court has discretion to determine the order in which it will consider them. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999). In order to ensure that the Court has the benefit of full briefing on all of the issues in this case, the petition for a writ of certiorari should be granted with respect to both questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011