No. 11-246

# In The
# Supreme Court of the United States

MATCH-E-BE-NASH-SHE-WISH
BAND OF POTTAWATOMI INDIANS,
*Petitioner*,

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*

## REPLY BRIEF FOR THE PETITIONER


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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES:**

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## REPLY BRIEF FOR THE PETITIONER

The court of appeals' Quiet Title Act holding squarely conflicts with the law of four other circuits. Respondent admits that. Opp. 24-28. And for good reason: the competing circuit decisions and their construction of the Quiet Title Act, 28 U.S.C. § 2409a, are irreconcilable. *See* Pet. 9-15; U.S. Pet. at 15-16, *Salazar v. Patchak*, No. 11-247 ("U.S. Pet."). Respondent's only answer is that, because future plaintiffs can all choose to take their cases into the D.C. Circuit, a de facto "uniformity on this issue" will eventually be forced on the United States government and other affected parties. Opp. 26.

The uniformity in federal law that this Court's certiorari jurisdiction enforces, however, is the genuine consistency in the substantive content of federal law that is accomplished by the adoption of a single, considered, and controlling rule of law. Respondent's prognostication (Opp. 26) that forum-shopping litigants will circumvent all contrary circuit law by filing suit in the D.C. Circuit is a prescription for jurisdictional overbearing by plaintiffs, not for obtaining "uniformity" in conflicting circuit law. The sovereign immunity of the United States Government from suit and the vital need for stability in the title of land on the part of local governments, tribes, and businesses deserve a genuinely settled construction of the law that is grounded in legal reasoning, not procedural traps. *See, e.g.*, Amicus Brief of Wayland Township, *et al.*, 7-8; Pet. 21.

Respondent's other efforts to fend off this Court's review fare no better. The contention that the United States' sovereign immunity is a second-class protection that does not immunize the federal government from suit or warrant interlocutory review is just wrong, defying on-point precedent from this Court holding the opposite and granting the same prompt review that is warranted here.

Respondent's invocation of the time-of-filing rule is no help either. Assuming that rule derived from diversity jurisdiction cases applies to federal question cases at all, it would do so only if consistent with the relevant statutory text. The argument thus involves a subsidiary statutory construction issue that would arise after, and only after, resolution of the threshold jurisdictional question presented here. Beyond that, the merits of the court of appeals' Quiet Title Act

holding, its impact on the sovereign immunity of the United States, and the funneling of future Quiet Title Act litigation into the D.C. Circuit (the same funneling that respondent applauds in trying to downplay the circuit conflict) is unaffected by and completely independent of that argument.

With respect to the question of prudential standing, respondent has no substantive answer to the conflict in the circuits' decisional law. He completely ignores the conflict between the court's decision here relying on a statute other than the one sued upon to supply the interest for prudential standing, and the Federal Circuit's opposite holding that only an interest protected by the statute that is the "gravamen" of the complaint suffices. *See* Pet. 32-33. He also makes no effort to defend—nor could he, Pet. 22-31—the court of appeals' holding that a plaintiff's interest in "polic[ing]" compliance with federal law (Pet. App. 6a) supports prudential standing.

Finally, respondent's attempt to brush off the contrary law of the Fifth, Sixth, Seventh, and Eighth Circuits backfires as he admits that those circuits deny prudential standing when the plaintiff's interests are "'at odds with the concerns of the provision in issue.'" Opp. 30 (quoting *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742 (6th Cir. 1997)). That is this case.

## I. THE CONFLICT IN THE CIRCUITS ON THE QUIET TITLE ACT'S SCOPE IS ADMITTED, RECURRING, AND CAN BE RESOLVED ONLY BY THIS COURT

Twice this Court has held that the Quiet Title Act is "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); *see Block v. North Dakota*, 461 U.S. 273, 286 (1983).

The D.C. Circuit disagrees. The court held here that the Quiet Title Act is just one option; the Administrative Procedure Act also allows plaintiffs to challenge the United States' title as long as those plaintiffs do not themselves claim title to the property. Pet. App. 20a-24a. In so holding, the D.C. Circuit openly acknowledged (Pet. App. 20a) that its decision squarely conflicts with the law of the Ninth, Tenth, and Eleventh Circuits. Each of those courts has specifically rejected the argument that the Quiet Title Act and its reservations of immunity apply only to those asserting their own title to land held by the United States. *See Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004); *Metropolitan Water Dist. v. United States*, 830 F.2d 139, 143-144 (9th Cir. 1987), *aff'd by 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 Interior*, 768 F.2d 1248, 1251, 1254 (11th Cir. 1985); *see also* Pet. 10-13; U.S. Pet. 15.

The decision also is irreconcilable with the Seventh Circuit's decision in *Shawnee Trail Conservancy v. United States Department of Agriculture*, 222 F.3d 383 (7th Cir. 2000), which held

that the Quiet Title Act continues to apply even "in the context of claims that do not seek to quiet title in the party bringing the action," *id.* at 388. *See also* Pet. 13-14; U.S. Pet. 15-16.

Respondent admits (Opp. 24) that the law of the other circuits squarely conflicts with the court of appeals' decision here, and all of his efforts to deflect the need for this Court's review collapse on themselves.

*First*, he argues that this Court's review is not needed because "the D.C. Circuit is correct" (Opp. 26). Petitioner, the United States, and four other circuits beg to differ. But, in any event, whether right or wrong, there should be a single federal-law answer in all the federal circuits to the meaning of a federal statute. The United States' sovereign immunity from suit should not turn on and off as plaintiffs cross circuit boundaries.[1]

*Second*, respondent insists (Opp. 26) that there is no need for this Court to harmonize circuit law because the D.C. Circuit's virtually universal jurisdiction over suits against federal agencies ensures that plaintiffs will now all file suit in the D.C. Circuit and thus will impose their own "uniformity" on the law. But the fact that the law will not develop further and the inter-circuit

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[1] Respondent cites (Opp. 22) the Act's provision that the United States may retain possession of land even if it loses litigation by paying just compensation, 28 U.S.C. § 2409a(b), and argues that the provision supports limiting the trust or restricted lands exception to plaintiffs asserting direct title. Whether that provision helps or hurts respondent on the merits (because it underscores the unlikelihood that Congress intended less-interested plaintiffs to be able to accomplish the very ouster

disagreement cannot be repaired are the very reasons this Court exercises its certiorari jurisdiction, not reasons for avoiding it. And the relevant "uniformity" enforced by this Court's certiorari jurisdiction is the adoption of a single, consistent, substantive meaning for federal law, not a uniform pattern of forum shopping by plaintiffs. *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980) (adoption by this Court of a single rule was necessary to encourage "uniformity in the administration of state law" and to avoid "forum shopping").

Arguing against himself, respondent then contends that plaintiffs will "continue[] to bring suits elsewhere" because they did so for 35 years after one district court ruled that the immunity preserved by the Quiet Title Act applied only to plaintiffs enforcing their own title. Opp. 27-28 (citing *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978)). Of course, such perpetuation of inconsistent results—just as much as the D.C. Circuit's truncation of percolation or correction in the law—merits this Court's certiorari review.

In any event, the whole reason that this Court's certiorari decision focuses on inter-*circuit* conflicts and not contrary trial court decisions by a single judge is that the latter are non-precedential, and thus they are incapable of establishing the type of governing law that permanently alters the outcomes of cases or parties' forum choices. Only rulings from the States' highest courts or from federal circuit

courts—like the five conflicting courts of appeals' decisions here—can do that.[2]

*Third*, respondent argues (Opp. 11) that the United States' sovereign immunity is a mere shadow of the immunity accorded to States and foreign governments in that it "is merely a right not to pay damages," not a right to avoid suit that merits interlocutory protection. The short answer is that this Court has said otherwise—repeatedly. *See*, *e.g.*, *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484 (2006) ("'[S]overeign immunity shields the Federal Government and its agencies from suit.'") (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *Mottaz*, 476 U.S. at 841 (Quiet Title Act addresses "[w]hen the United States consents to be sued"); *Block*, 461 U.S. at 280 ("The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity."); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued.").

Indeed, it is precisely because the Quiet Title Act expressly preserves the United States' immunity from suit that this Court has twice granted review in Quiet Title Act cases in precisely the same procedural

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[2] The ineffectiveness of the *Andrus* decision is equally attributable to the fact that, for 26 of respondent's "35 years" (Opp. 27), the decision was backhanded by the courts of appeals that addressed it, *see Florida Dep't of Bus. Regulation*, 768 F.2d at 1255 n.9; *Neighbors for Rational Dev.,* 379 F.3d at 964, and it was ignored by the D.C. Circuit entirely.

posture. *See Mottaz*, 476 U.S. at 840-841; *Malone v. Bowdoin*, 369 U.S. 643, 644-645 (1962). That review reflects, moreover, the critical need for stability embodied in the Quiet Title Act's trust or restricted lands exception, given the extensive reliance of local governments, tribes, and businesses on the reliability of the United States' title. *See, e.g.*, Amicus Brief of Wayland Township, *et al.* at 7-8 ("The court of appeals' decision is causing great disruption to the amici regional governments' ability to develop and implement infrastructure improvements and other initiatives.").

*Fourth*, and finally, respondent argues (Opp. 14-20) that the time-of-filing rule would preserve his claim even if the Quiet Title Act's bar to suit applied. To begin with, there is a substantial question whether the time-of-filing rule applies outside of the diversity-jurisdiction context at all. *See Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 571 (2004) (time-of-filing rule "measures all challenges to subject-matter jurisdiction *premised upon diversity of citizenship* against the state of facts that existed at the time of filing") (emphasis added); *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) ("The letter and spirit of the [time-of-filing] rule apply most obviously in diversity cases, where the rule originated * * * and where heightened concerns about forum-shopping and strategic behavior offer special justifications for it.").

But even if it is conceptually capable of extension to federal question jurisdiction cases, its applicability to any given jurisdictional statute is a question of statutory construction. *See United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1730 (2011) (courts

are "wrong" to apply time-of-filing rule "to suppress the statute's aims"); *ConnectU*, 522 F.3d at 92 ("[C]ourts have been careful not to import the time-of-filing rule indiscriminately into the federal question realm.") (footnote omitted). Whether the Quiet Title Act admits of a time-of-filing exception thus is a statutory construction question that will not arise unless and until this Court resolves the inter-circuit conflict on the Quiet Title Act's applicability.

And when it does, respondent will lose. The only court of appeals to have addressed whether a time-of-filing rule applies to the Quiet Title Act's trust or restricted lands provision has rejected it. *See Iowa Tribe of Kan. & Neb. v. Sac & Fox Nation*, 607 F.3d 1225, 1232-1237 (10th Cir. 2010) (waiver of immunity existed when plaintiff filed suit to enjoin Secretary from placing Indian lands into trust, but was revoked after placement into trust occurred). That decision, moreover, was rooted in over 150 years of this Court's precedent recognizing that the sovereign—federal or state—can revoke a waiver of immunity after suit is filed. *See*, *e.g.*, *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (sovereign has the right to "withdraw its consent whenever it may suppose that justice to the public requires it"); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] State may * * * alter the conditions of its waiver and apply those changes to a pending suit."); *Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357, 362 (1943) ("Such consent, though previously granted, has now been withdrawn. And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."); *Lynch v. United States*, 292 U.S. 571,

581 (1934) (Brandeis, J.) (government could refuse to honor contractual consent to suit because "[t]he consent may be withdrawn, although given after much deliberation and for a pecuniary consideration"); *see also Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 61 n.3 (1944) (Frankfurter, J., dissenting) ("Of course the State can at any time withdraw its consent to be sued.").

In any event, the mere potential of prevailing later on a statutory construction question does nothing to diminish the importance at this juncture of resolving the entrenched five-circuit split on whether the United States' sovereign immunity bars the suit altogether, particularly because the enduring legal and practical impact of the D.C. Circuit's decision is entirely unaffected by that statutory construction question.

## II. THE CIRCUITS' LEGAL TESTS FOR PRUDENTIAL STANDING ARE IRRECONCILABLE

Respondent tries to amend rather than defend the D.C. Circuit's prudential standing holding. That court held that respondent's interests under *a different* statute—the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721—positioned him to "police" the Secretary's compliance with the Indian Reorganization Act, 25 U.S.C. § 465. Pet. App. 6a; *see id.* at 8a-9a. That rule for prudential standing cannot be reconciled with the law in the Fifth, Sixth, Seventh, and Eighth Circuits. *See* Pet. 26-30. The Eighth Circuit has specifically held that a plaintiff's "considerable" legal interests do not support prudential standing to nullify the Secretary of Interior's leasing decision on Indian lands where

those interests "conflict with the tribes' interests." *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1037 (8th Cir. 2002); *see also Bonds v. Tandy*, 457 F.3d 409, 414-415 (5th Cir. 2006) (conflicting interest precludes prudential standing).

Similarly, the Sixth and Seventh Circuits have flatly rejected the "policing" approach to prudential standing adopted by the D.C. Circuit here. *See Courtney v. Smith*, 297 F.3d 455, 461, 463-464 (6th Cir. 2002); *American Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 470 (7th Cir. 1999) (substantial employment interest "in a realistic and fair contracting process" insufficient to confer prudential standing).

The D.C. Circuit's decision is also flatly inconsistent with this Court's precedent holding that, to establish prudential standing, the plaintiff must demonstrate that his injury falls within the zone of interests protected by "the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *accord Bennett v. Spear*, 520 U.S. 154, 175-176 (1997) (same). Indeed, in *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1988), this Court held that reliance on even a different provision of the *same law* at issue would be permitted only if there was an "unmistakable link" between the two provisions, *id.* at 494 n.7.

Likewise, respondent has no answer to the irreconcilability of the D.C. Circuit's decision here and the Federal Circuit's decision in *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991), which specifically held that prudential standing

requires that the plaintiff's interest fall within the zone of interests of the statute that is the "gravamen" of the complaint, not another statute, *id.* at 937 (quoting *Lujan*, 497 U.S. at 886).

Understandably, respondent does not even mention the D.C. Circuit's "polic[ing]" rule, let alone try to defend it. Indeed, this Court just last term reaffirmed that standing cannot be predicated on either interests that are "inconsistent with the purposes implicit in the statute," *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 870 (2011) (quotation marks omitted), or a desire to police governmental compliance with the law, *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1441-1442 (2011).

Instead, respondent argues (Opp. 29) that this Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), somehow rendered his interests consistent with the purposes of the Indian Reorganization Act. Respondent, however, never explains how a decision *narrowing* the number of a statute's beneficiaries can counterintuitively *expand* the class of people entitled to sue under it.

In any event, that argument simply commits the same legal error under a different label: it collapses the merits and prudential standing inquiries, and arrogates to every private individual eager to file suit the right to enforce a sovereign immunity interest in trust or restricted land that (unlike his gambling opposition) is rooted in the Indian Reorganization Act. Whether that is the right or wrong mode of determining whether prudential standing exists is precisely the question on which the courts of appeals

have adopted conflicting rules, and precisely why this Court's review is needed.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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