

Nos. 11-246 & 11-247

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IN THE  
**Supreme Court of the United States**

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, *ET AL.*,  
*Petitioners,*

and

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

v.

DAVID PATCHAK, *ET AL.*  
*Respondent.*

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

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**BRIEF OF WAYLAND TOWNSHIP, ALLEGAN COUNTY,  
ALLEGAN AREA EDUCATIONAL SERVICE AGENCY,  
WAYLAND UNION SCHOOLS, CITY OF WAYLAND, CITY OF  
ALLEGAN, DORR TOWNSHIP, MARTIN TOWNSHIP, YANKEE  
SPRINGS TOWNSHIP, DEPUTY SHERIFF'S ASSOCIATION OF  
MICHIGAN, WAYLAND AREA CHAMBER OF COMMERCE,  
ALLEGAN AREA CHAMBER OF COMMERCE, DORR  
BUSINESS ASSOCIATION, WEST MICHIGAN HISPANIC  
CHAMBER OF COMMERCE, BARRY COUNTY CHAMBER OF  
COMMERCE, BARRY COUNTY ECONOMIC DEVELOPMENT  
ALLIANCE, GUN LAKE BUSINESS ASSOCIATION, ET AL. AS  
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICI CURIAE

The amici are local governments, business associations, and other entities in southwest Michigan, near the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians (“Band”) trust lands that are the subject of this action.<sup>1</sup> The 147-acre parcel at issue in this case is located within the boundaries of amicus curiae Wayland Township, a municipal corporation in Allegan County that is home to approximately 3,000 individuals.

Amici curiae Allegan County, Allegan Area Educational Service Agency, Wayland Union Schools, City of Wayland, Dorr Township, Martin Township, and Yankee Springs Township are local governments in southwest Michigan that, along with Wayland Township, are engaged in efforts to foster economic development in an area that includes the trust lands. The amici have entered into a revenue sharing agreement with the Band, pursuant to a compact between the Band and the State of Michigan, that has been approved by the Secretary of the Interior. Amicus curiae City of Allegan is a Michigan municipal corporation that has experienced economic growth as a result of the Band’s development of the trust lands. Amicus curiae Deputy Sheriff’s

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<sup>1</sup> Pursuant to Sup. Ct. Rule 37.6, the amici affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the amici or their counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Association of Michigan, represents the interests of road and corrections deputies who have benefited from the job growth and retention arising out of the development of the trust lands.

Amici curiae Wayland Area Chamber of Commerce, Allegan Area Chamber of Commerce, Kalamazoo Regional Chamber of Commerce, Dorr Business Association, West Michigan Hispanic Chamber of Commerce, Barry County Chamber of Commerce, Barry County Economic Development Alliance, and Gun Lake Business Association are business associations in southwest Michigan whose members have benefited from cooperative economic development efforts involving the Band and its use of the trust lands. The businesses represented by these associations would suffer devastating job losses and decreased revenue if the land were taken out of trust and all of the investment in the economic development of the area were destroyed. Amicus curiae Plummer Supply, Inc., is a local business located near the trust lands that has benefited from the Band's economic development initiatives.

Collectively, the amici curiae represent numerous individuals and businesses that support and have been positively affected by the Band's economic development activities on the trust land. They submit this brief to explain the substantial local benefits that arise from the cooperative and mutually reinforcing economic development efforts of the Band, the regional governments, and local businesses. The amici curiae urge this Court to grant the petitions for certiorari to resolve the debilitating uncertainty and economic instability created by the court of appeals' decision, which

threatens to stifle economic development in a State and region that has endured a disproportionate amount of economic suffering in recent years.

## INTRODUCTION

Michigan's economic troubles in recent years have been the subject of national headlines.<sup>2</sup> Faced with skyrocketing unemployment and a decimated automotive industry, Michigan has been described as "ground zero in the national economic downturn."<sup>3</sup> Southwest Michigan has not escaped these economic hardships. Although local governments in the region have worked to stimulate job growth and attract revenue, recovery has been stagnant.<sup>4</sup>

In recent months, however, southwest Michigan's economy has received a much-needed boost. On February 10, 2011, the Band opened a \$165 million gaming facility known as Gun Lake Casino. The facility occupies part of a 147-acre parcel held by the United States in trust for the Band pursuant to the Indian Reorganization Act, 25

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<sup>2</sup> See, e.g., Susan Saulny & Monica Davey, *New Economic Fears Arise in Michigan*, N.Y. TIMES, Nov. 22, 2008, <http://www.nytimes.com/2008/11/23/us/23michigan.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *On Labor Day, High Unemployment in Michigan, but Hope for Better Things*, GRAND RAPIDS PRESS, Sept. 4, 2011, [http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/09/on\\_labor\\_day\\_high\\_unemployment.html](http://www.mlive.com/opinion/grand-rapids/index.ssf/2011/09/on_labor_day_high_unemployment.html); Julia Bauer, *Unemployment Rises Again in West Michigan; Regional Labor Pool Also Shrinks*, GRAND RAPIDS PRESS, Apr. 23, 2009, [http://www.mlive.com/business/west-michigan/index.ssf/2009/04/unemployment\\_rises\\_again\\_in\\_we.html](http://www.mlive.com/business/west-michigan/index.ssf/2009/04/unemployment_rises_again_in_we.html).



U.S.C. § 465. The Band's economic development efforts on the trust lands have directly created 900 new jobs and infused area hotels, restaurants, and other service providers with new business. Additionally, the Band has entered into a revenue sharing agreement with regional governments that will provide essential resources for schools, roads, sewer and water systems, public safety programs, and other critical needs. The Band's economic development efforts have also improved morale and promoted intergovernmental service-sharing agreements, which are critical to the region's recovery.

Now, a decision of the Court of Appeals for the District of Columbia Circuit threatens to unravel the tremendous economic benefits generated by the Band's development of the trust lands. In a decision that openly conflicts with decisions of other federal courts of appeals, the D.C. Circuit held that an individual, Respondent David Patchak, has prudential standing to challenge the Secretary of the Interior's authority to place the land into trust, and that the United States is not immune from Patchak's suit under the Quiet Title Act, 28 U.S.C. § 2409a. Patchak's suit seeking to divest the United States of title to the trust lands has created uncertainty and economic instability for local governments and businesses in Southwest Michigan, making it difficult to plan and execute strategies for economic development and business growth.

The amici curiae have relied on the Band's economic development efforts, and the trust status of the lands on which the Band has developed its gaming facility, to plan infrastructure improvements,

negotiate intergovernmental agreements, and begin rebuilding their local economies. The amici regional governments have entered into a revenue sharing agreement with the Band, and have relied on revenue projections for the trust lands in planning for the development and delivery of government services to individuals and businesses, including critical infrastructure improvements. In addition, local businesses have based their planning and investment on economic development of the trust lands. The court of appeals' decision eliminates the stability that is essential for local governments and businesses. In light of the wide-reaching and disruptive impact of the court of appeals' decision, immediate review by this Court is urgently needed.

## **ARGUMENT**

**The Court of Appeals' Decision Warrants Review by This Court Because Local Governments and Businesses Must Be Able to Rely on the Status of Federal Land to Engage in Economic Planning and Development.**

**I. The Court of Appeals' Decision Creates Uncertainty And Instability In Communities Surrounding The Trust Lands.**

In 2001, the Band submitted a fee-to-trust application to the Secretary of the Interior, requesting that a 147-acre tract, known as the "Bradley Tract," be taken into trust under the Indian Reorganization Act for future use as a gaming facility. *See* 25 U.S.C. §§ 467, 2719. The Bradley Tract, located in Wayland Township, is adjacent to

the freeway and was the site of an abandoned manufacturing facility. This site had not been used for several years.

After an administrative review process that included an extensive environmental assessment, the Secretary published notice that the Bradley Tract would be taken into trust for the Band. *See* 70 Fed. Reg. 25,596-97. The notice announced a thirty-day waiting period, the purpose of which was “to afford interested parties 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.” *Id.* The notice clearly stated that the Bradley Tract would be “used for the purpose of construction and operation of a gaming facility.” *Id.*

During the thirty-day waiting period, an anti-gambling organization known as Michigan Gambling Opposition (“MichGO”) filed suit to challenge the Secretary’s decision to take the Bradley Tract into trust. Both the district court and the court of appeals rejected MichGO’s claims on the merits. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008). The Secretary then placed the land into trust, and the Band proceeded with its plans to develop the trust lands. On February 10, 2011, the Band opened a \$165 million gaming facility, Gun Lake Casino, on the trust lands.

Respondent David Patchak did not file suit during the thirty-day waiting period. After MichGO’s suit was rejected, however, Patchak filed suit against the Secretary of the Interior and the Assistant Secretary for the Bureau of Indian Affairs (collectively, “Secretary”), challenging the Secretary’s

decision to take the Bradley Tract into trust. Patchak alleged that because he lived near the Bradley Tract, he would be injured by the noise, pollution, and crime that assertedly will be generated by the gaming facility. *Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011). Patchak's suit seeks an injunction reversing the Secretary's decision to take the Bradley Tract into trust. If successful, the suit could require Gun Lake Casino to close its doors. As a result, 900 employees would lose their jobs, and local governments and businesses would lose millions of dollars in annual revenues and economic development opportunities.

The United States District Court for the District of Columbia rejected Patchak's suit, holding that Patchak lacks standing and that this litigation is barred by sovereign immunity. *Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009). The Court of Appeals for the District of Columbia Circuit reversed, concluding that Patchak has prudential standing to enforce the Indian Reorganization Act and that the Indian lands exception to the Quiet Title Act's waiver of sovereign immunity is inapplicable. *Patchak*, 632 F.3d at 705, 710. Both the Secretary and the Band now seek review by this Court.

The court of appeals' decision casts a shadow of uncertainty over local governments and businesses near the trust lands. The amici regional governments have planned infrastructure improvements, public safety projects, and community initiatives in reliance on the trust status of the land and its resulting economic development. The court of appeals' decision is causing great disruption to the

amici regional governments' ability to develop and implement infrastructure improvements and other initiatives. Similarly, possible divestiture of the federal government's title to the Bradley Tract at this late juncture threatens to unravel the many benefits that the economic development of that Tract has conferred on the region, and makes it difficult for businesses to plan and execute investments that will contribute to the region's economic recovery.

## **II. The Band's Development Of The Trust Lands Benefits Southwest Michigan's Economy And Provides Local Governments With Critical Resources.**

The Band's development of the trust lands provides very significant and wide-reaching benefits to area communities. Most directly, the Band's opening of the gaming facility created 900 new jobs in early 2011. This job creation was particularly welcome because Allegan County, in which the trust lands are located, reported an 11.9% unemployment rate during 2010, more than two percent points higher than the national unemployment rate.<sup>5</sup> In addition to these 900 jobs, some 750 skilled trades workers, including plumbers, electricians, carpenters, and sheet metal workers,<sup>6</sup> were

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<sup>5</sup> *County-Level Unemployment and Median Household Income for Michigan*, USDA ECONOMIC RESEARCH SERVICE, Aug. 23, 2011, <http://www.ers.usda.gov/data/unemployment/RDList2.asp?ST=MI>.

<sup>6</sup> *Gun Lake Casino Opening Weekend Draws a Full House*, SW. MICH.'S SECOND WAVE, Feb. 17, 2011, <http://swmichigan.secondwavemedia.com/devnews/casino0217.aspx>.

employed during the construction of the \$165 million facility.<sup>7</sup> Development of the trust lands has also indirectly created an estimated 1,000 outside vendor jobs.<sup>8</sup> The new jobs translate into significant and wide-reaching benefits for area communities because the employees pay local taxes and spend money at local businesses.<sup>9</sup>

The Band estimates that, as a result of its efforts to develop the trust lands, it will spend \$30 million annually on vendor goods and services.<sup>10</sup> Most of those goods and services will be purchased in southwest Michigan.<sup>11</sup>

The Band's development of the trust lands facility has resulted in significant collateral benefits to the area economy. The Band estimates that the facility will create 60,000 annual new guest stays at area hotels and \$4.4 million in additional revenues

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<sup>7</sup> Herb Woerpel, *Tribe Secures \$165 Million Loan for Gun Lake Casino*, PENASEE GLOBE, July 20, 2010, [http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe\\_secures\\_165\\_million\\_loan.html](http://www.mlive.com/penaseeglobe/index.ssf/2010/07/tribe_secures_165_million_loan.html).

<sup>8</sup> *Gun Lake Casino Opening Weekend*, *supra* note 6.

<sup>9</sup> Ryan Lewis, *Wayland School, Township Win Big Checks*, ALLEGAN CNTY. NEWS, July 27, 2011, [http://www.allegannews.com/articles/2011/07/28/local\\_news/2.txt](http://www.allegannews.com/articles/2011/07/28/local_news/2.txt).

<sup>10</sup> Pete Daly, *Gun Lake Casino to Break Ground Sept. 17*, GRAND RAPIDS BUS. J., Aug. 31, 2009, <http://www.grbj.com/GRBJ/ArticleArchive/2009/August/August+31/BREAKING+NEWS.htm>.

<sup>11</sup> *Gun Lake Casino Opening Weekend*, *supra* note 6.

for area hotels.<sup>12</sup> The casino's opening has also contributed to increased business for area restaurants, gas stations, drycleaners, landscapers, and other businesses. The facility has room to expand, which means that the economic benefits to the region can grow over time.<sup>13</sup> But expansion can occur only if the status of the land is stable, and local governments and businesses can rely on it as a basis for economic planning.

Notably, the Band has agreed to share a portion of the net revenues generated by the gaming facility with surrounding local governments. On May 9, 2007, the Band and the State of Michigan entered into a Class III Gaming Compact, which was approved by the Secretary of the Interior by operation of law. Under the compact, Gun Lake Casino is obligated to pay two percent of its net slot machine revenue to local units of government within the immediate vicinity of Gun Lake Casino. The revenue is allocated by a local revenue sharing board created under Michigan's Urban Cooperation Agreement of 1967, Mich. Comp. Laws § 124.501 *et seq.*

Pursuant to the compact, an interlocal agreement was executed between the Gun Lake Tribe and ten public agencies: the County of Allegan; the Township of Wayland; Wayland Union School District; Allegan Area Educational Service

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<sup>12</sup> *Wayland Casino to Break Ground Sept. 17*, WOOD TV 8, Sept. 3, 2009, [http://www.woodtv.com/dpp/news/local/gun\\_lake\\_region/Wayland\\_casino\\_to\\_break\\_ground\\_September\\_17](http://www.woodtv.com/dpp/news/local/gun_lake_region/Wayland_casino_to_break_ground_September_17).

<sup>13</sup> *Gun Lake Casino Opening Weekend*, *supra* note 6.

Agency; the City of Wayland; the Township of Dorr; the Township of Leighton; the Township of Martin; the Township of Hopkins; and the Township of Yankee Springs. The interlocal agreement creates the Match-E-Be-Nash-She-Wish Wayland Township Area Local Revenue Sharing Board (the “Board”), a separate legal entity charged with establishing criteria or formulas for distributing and disbursing revenues to the local governments. The Board comprises three members of the Band and three representatives from the local governments.

In June of 2011, Gun Lake Casino made its first distribution under the revenue sharing agreement, based on just two months of operations. Gun Lake Casino distributed a total of \$514,871.00 to local governments, plus more than \$2 million to the State of Michigan. Of the distributions to local governments, Wayland Union Schools received \$194,628.31 and the Allegan Area Educational Service Agency received \$32,163.63.<sup>14</sup> Future distributions will be made in six-month increments.

Based on the revenue sharing agreement, local governments have begun planning critical infrastructure projects and other initiatives that would not be feasible without the Band’s cooperative economic development efforts. Wayland Township, for example, is planning the construction of a water and sewer treatment system that would eliminate reliance on aging septic systems and provide

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<sup>14</sup> Lewis, *supra* note 9.



important environmental protections.<sup>15</sup> With its first share of the revenue, Wayland Township has undertaken a feasibility study in connection with the proposed water and sewer system, entered into an option contract for purchase of property upon which to locate the sewer and water systems, and is making plans for road improvements that would otherwise have been deferred.<sup>16</sup>

Wayland Union School District is using the shared revenue to cut preschool tuition rates by one-third, which will allow more children the opportunity to receive a preschool education.<sup>17</sup> To further help families, Wayland Union School District is also using part of its revenue disbursement to subsidize “pay to play” athletic fees for students.<sup>18</sup> Typically, each high school student must pay \$100.00 per sport to participate in school athletics, in addition to any costs for equipment and camps. The Band’s shared revenue will eliminate this fee and thus alleviate the financial burden on families of high school athletes.

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<sup>15</sup> *Wayland Twp Board Talks Casino Plans*, WOOD TV 8, Feb. 2, 2009, [http://www.woodtv.com/dpp/news/Wayland\\_Twp\\_board\\_talks\\_casino\\_plans](http://www.woodtv.com/dpp/news/Wayland_Twp_board_talks_casino_plans).

<sup>16</sup> Lewis, *supra* note 9.

<sup>17</sup> Julie Makarewicz, *Wayland Union School District Finds Uses for Gun Lake Casino Payment*, GRAND RAPIDS PRESS, Aug. 23, 2011, [http://www.mlive.com/wayland/2011/08/wayland\\_union\\_school\\_district.html](http://www.mlive.com/wayland/2011/08/wayland_union_school_district.html).

<sup>18</sup> Lisa LaPlante, *No More Pay-to-Play for Wayland Wildcats, Thanks to Casino*, FOX 17 NEWS, Aug. 24, 2011, <http://www.fox17online.com/news/fox17-wayland-schools-no-more-paytoplay-for-wayland-wildcats-thanks-to-casino-20110824,0,4518511.story>; *see also* Makarewicz, *supra* note 17.

Additionally, Wayland Union School District intends to establish a scholarship fund for graduating seniors to encourage families to stay in the Wayland area.<sup>19</sup> The school district will also use shared revenue to fund maintenance and capital projects.<sup>20</sup> This will permit more of the district's general funds to be used in the classroom, rather than on building improvements.

The revenue sharing agreement also allows local communities to bolster their public safety programs and engage in collaborative intergovernmental agreements. Wayland Township is using a portion of the shared revenue to fund a contract with the Allegan County Sheriff's Department, under which Allegan County will provide two deputies dedicated to patrolling Wayland Township.<sup>21</sup> Along with increased public safety, this cooperation between municipalities yields intangible benefits for the morale of the community.

In addition to the benefits from the revenue sharing agreement, the Band's economic development efforts on the trust lands have also contributed directly to area communities. Most recently, the Band and Gun Lake Casino donated \$12,000.00 to the Allegan County Sheriff's

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<sup>19</sup> Lindsey Smith, *Gun Lake Casino's First Payout to State, Local Governments Top Expectations*, MICH. RADIO, June 2, 2011, <http://michiganradio.org/post/gun-lake-casino%E2%80%99s-first-payout-state-local-governments-top-expectations>.

<sup>20</sup> Makarewicz, *supra* note 17.

<sup>21</sup> Lewis, *supra* note 9.

Department to purchase a police K-9 dog that can be used for “search and rescue tactics, locating a lost child, and identifying illegal substances.”<sup>22</sup> The donation illustrates a newly forged partnership between the Band and local law enforcement, which ultimately benefits all of the area’s residents.

Although Gun Lake Casino has been open for just nine months, it has already bolstered the region’s economy and promoted positive, cooperative relationships between municipalities and between the Band and the general community. Until the court of appeals issued its decision, these economic and community benefits were expected to increase over time, particularly as the local governments commence infrastructure improvements using shared revenue from the casino. All of these positive developments are threatened by the court of appeals’ decision, which has created instability and uncertainty that is highly disruptive to government and business planning and investment.

### **III. Allowing Third Party Litigation To Divest The Federal Government Of Land Will Adversely Affect Local Governments’ Ability To Undertake Essential Improvements.**

Given the beneficial impact of the Band’s development of the trust lands in southwest

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<sup>22</sup> Press Release, Gun Lake Casino, Gun Lake Tribe and Gun Lake Casino Donate Police K-9 to Allegan County Sheriff’s Department (Aug. 25, 2011), [http://www.mbpi.org/PDF/News/Press%20Releases/PR\\_K-9\\_Donation\\_8-25-11.pdf](http://www.mbpi.org/PDF/News/Press%20Releases/PR_K-9_Donation_8-25-11.pdf).

Michigan, the consequences of allowing an individual litigant to destabilize economic and business planning in the region are clear. As a result of the court of appeals' decision, the Band and regional governments and businesses can no longer plan and implement economic development and investment plans based on an assurance that the United States holds title to the Bradley Tract in trust for the tribe. The region could lose jobs—both at Gun Lake Casino and at the businesses that have boomed as a result of Gun Lake Casino's operation—during a period of already high unemployment. In addition, governments and businesses are faced with the possible loss of \$30 million of revenue from Gun Lake Casino's purchase of supplies and services. Local governments also face the possible loss of taxes and shared revenues generated by the gaming facility. This uncertainty is disruptive to economic development plans, which require a high degree of certainty and stability.

Local governments and businesses near the Band's gaming facility must be able to rely on the federal government's decision to take the Bradley Tract into trust, in order to commence infrastructure improvements, implement public safety programs, and otherwise engage in responsible planning. Local governments cannot budget for such improvements if they do not know whether Gun Lake Casino will continue to operate. For example, Wayland Township intends to construct a \$17 million water and sewer treatment system, which would not be feasible without the ongoing operation of Gun Lake Casino. Wayland Township cannot effectively implement such a sizeable infrastructure project

without substantial certainty about the trust status of the land. Thus, the court of appeals' decision has left an entire region in limbo: can communities begin improving their roads, sewer systems, and water systems, or must they refrain from making these improvements because the federal government might, in the future, be divested of title to the land?

The court of appeals' decision will have an impact that extends far beyond southwest Michigan. Local governments across the country must be able to rely on the federal government's decision to take land into trust, and the stability of the federal government's title, so that they can enter into contracts to construct improvements and undertake other important public projects. Allowing challenges to the status of trust lands after title has been transferred to the United States (and after a business is operating on the land) will result in crippling instability and uncertainty that will frustrate cooperative economic development efforts, such as the beneficial efforts engaged in by the Band and the Local Governments and Associations. Such instability and uncertainty will stifle economic development during at a time when it is sorely needed.

This Court has long held that a basic purpose of the law is to provide predictability. *See, e.g., Regan v. New York*, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs . . ."). The court of appeals' decision eliminates predictability and places local governments in a precarious position: they are handed resources to improve their communities and grow their economies, but they do not know whether

the resources will suddenly be taken away. Local governments need stability to climb out of the recession and build stronger communities, and the court of appeals' decision takes away that critical stability. Accordingly, this Court's immediate review of the court of appeals' decision is warranted.

### CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Petitions for Certiorari filed by the Solicitor General and the Band, the amici curiae respectfully request that this Court grant the petitions for certiorari.

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