No. 16-498

In The
Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* FEDERAL COURTS AND FEDERAL INDIAN LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

Amici law professors (listed in the Appendix) are leading scholars and teachers of federal courts law and federal Indian law who submit this brief in their individual capacities, not on behalf of their institutions. They study and write extensively on federal jurisdiction, the separation of powers, and Congress's authority in Indian affairs. *Amici* are well-versed scholars of Congress's longstanding authority to enact Tribe-specific lands acts, which have been vital to restoring Indian Nations' land base. *Amici* submit this brief to demonstrate that the Gun Lake Act is a common exercise of Congress's constitutional authority over federal jurisdiction in the unique area of Indian affairs.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317 (2016), this Court was clear: "Congress, our decisions make clear, may amend the law and make

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. As required under S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* law professors received no compensation for offering the views reflected herein.

the change applicable to pending cases, even when the amendment is outcome determinative." Congress did just that with the Gun Lake Act. *See* Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014). In enacting that Tribe-specific lands act, Congress did not violate Article III or the separation of powers.

The Gun Lake Act is not the first time that Congress has enacted Tribe-specific legislation to settle an ongoing dispute about Indian lands. Beyond the nearly 400 treaties with Indian Nations, Congress has enacted countless Tribe-specific lands acts over the last 150 years to implement its government-to-government trust relationship with Indian Nations. Such Tribe-specific statutes often take land into trust for an Indian Nation, as the Gun Lake Act does, and limit federal jurisdiction, as the Gun Lake Act also does. This centuries-long history, absent from the briefing of the Petitioner and his *amici*, belies any argument that the Gun Lake Act is unprecedented.

The Gun Lake Act is not only an unremarkable exercise of Congress's Indian Affairs power, it is also a direct response to this Court's invitation to address disputes such as the Petitioner's ongoing dispute with the United States and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe"). In 2012, this Court held that the Petitioner could bring an Administrative Procedure Act ("APA") challenge to the Secretary of the Interior's decision to take the Bradley Property into trust for the Gun Lake Tribe. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi*

Indians v. Patchak ("*Patchak I*"), 567 U.S. 209 (2012). But this Court went on to recognize that Congress could, and "perhaps . . . should," withdraw federal jurisdiction by reinstating sovereign immunity. *Id.* at 224. And Congress did just that with Section 2(b) of the Gun Lake Act.

Congress's decision to withdraw federal jurisdiction was within constitutional bounds, and Petitioner's interpretation of *Klein* is untenable. Whatever else it stands for, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), does not support the Petitioner's argument that the Gun Lake Act must be unconstitutional because Congress directed a judicial outcome without modifying "generally applicable" laws. *See* Pet'r Br. 11. This Court decisively foreclosed that argument in *Bank Markazi*, when it recognized that "'[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.'" 136 S. Ct. at 1327 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)). And reading *Klein* to prohibit legislation that is tailored to resolve ongoing land disputes is irreconcilable with this Court's holdings that Congress may enact land-specific legislation to determine the outcome of pending litigation. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856).

Although *Klein* is not a model of clarity, *amici* agree that the Gun Lake Act does not violate any holding of *Klein*. Unlike the statute at issue in *Klein*,

the Gun Lake Act does not forbid the Court to "give the effect to evidence which, in its own judgment, such evidence should have." 80 U.S. at 147. Because the Gun Lake Act does not intrude on the judiciary's role to weigh the merits of a case, but simply makes new law for the federal courts to apply, the separation of powers is not disturbed. By taking the Bradley Property into trust for the Gun Lake Tribe, and withdrawing federal jurisdiction over *any* action challenging that decision, Congress made outcome-determinative law requiring the federal courts to dismiss the Petitioner's action. Such a statute is well within Congress's authority to circumscribe the limits of federal jurisdiction. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

Finally, the Gun Lake Act does not present the parade of horribles that the Petitioner and his *amici* suggest. The Act is not a wholesale jurisdiction-stripping statute. It does not withdraw jurisdiction to challenge the Act itself on constitutional grounds. The Gun Lake Act is narrowly-tailored and makes new law concerning statutory challenges to the trust status of the Bradley Property. This case involves such a claim—a third-party challenge to Congress's decision about whether tribal property deserves protection through federal trust status. The Petitioner claims no vested property right in the Bradley Property—nor could he.

Consistent with its historical practice, particularly in the unique area of Indian Affairs, Congress had authority to declare the permanent trust status of the

Bradley Property and to withdraw jurisdiction over any action concerning that status.

ARGUMENT

I. The Gun Lake Act Makes New Law Concerning Indian Affairs.

This Court has recently reaffirmed that Congress may make new law that is outcome determinative in a pending case. *See Bank Markazi*, 136 S. Ct. at 1317 ("Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative."). When doing so, Congress is not limited to generally applicable legislation, but may enact specific laws for the federal courts to apply. *See id.* at 1327 ("'While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action.'") (quoting *Plaut*, 514 U.S. at 239 n.9). In enacting such laws, Congress does not violate Article III or the separation of powers.

When it legislates in the field of Indian Affairs, Congress has, for more than a century, regularly enacted Tribe-specific legislation pursuant to its constitutional authority to implement the government-to-government relationship between the United States and Indian Nations. *E.g.*, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902). Indian lands issues lie at the heart of Congress's Indian Affairs power. And

congressional decisions about the management of specific Indian lands are by necessity particularized—just as they are when Congress legislates with respect to specific non-Indian lands. Where controversies arise about Indian lands, Congress has routinely enacted Tribe-specific lands acts and settled disputes by making new law. The Gun Lake Act is but one example of commonplace congressional action.

A. Congress Regularly Enacts Tribe-Specific Lands Acts And Settles Disputes Involving Indians.

The United States has undertaken a duty of protection to federally-recognized Indian Nations. This trust relationship arose first in the context of treaty relationships between the United States and Indian Nations. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-56, 560-61 (1832). This general trust relationship between the federal government and Indian Tribal governments distinguishes the field of Indian Affairs. *See, e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

Congress regulates this government-to-government relationship through legislation. And when enacting statutes concerning Indian Affairs, Congress routinely invokes the general trust relationship. *See* Restatement of the Law of American Indians, § 4, Reporters' Notes (Am. Law Inst., Tent. Draft No. 1, Apr. 22, 2015) (surveying federal statutes stemming from the trust relationship). Congress also regulates relationships

between the United States and specific Indian Nations. In addition to the 400-odd Indian treaties,[2] Congress has enacted untold numbers of Tribe-specific statutes covering a wide variety of subjects. *See* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. Colo. L. Rev. 77, 126-28 (2015) (finding that from 1975 to 2012, Congress enacted 353 Tribe-specific bills). For example, there are statutes extending or reaffirming federal acknowledgment of a Tribe's sovereignty,[3] acquiring and administering assets in trust for specific Tribes,[4] resolving boundary disputes,[5] settling water

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[2] Allison M. Dussias, *Let No Native American Child Be Left Behind: Reenvisioning Native American Education for the Twenty-First Century*, 43 Ariz. L. Rev. 819, 826 (2001) (noting that United States entered into roughly 400 treaties with Indian Nations between 1778 and 1871).

[3] *See, e.g.*, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, §§ 4(a)(1), 6(c), 107 Stat. 1118, 1121 (1993); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, § 4, 108 Stat. 2156, 2157 (1994); Pokagon Band of Potawatomi Indians Restoration Act, Pub. L. No. 103-323, § 2, 108 Stat. 2152, 2153 (1994). For a full list of the 24 statutes extending, restoring, or reaffirming the federal acknowledgment of the sovereignty of 32 Indian Nations from 1977 to 2012, *see* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 Ind. L.J. 955, 1010-16 (2016).

[4] *See, e.g.*, Pascua Yaqui Tribe Trust Land Act, Pub. L. No. 113-134, § 3, 128 Stat. 1732, 1732 (2014); Michigan Indian Claims Settlement Act, Pub. L. No. 105-143, § 108(f), 111 Stat. 2652, 2661-62 (1997); Act of June 20, 1966, Pub. L. No. 89-459, 80 Stat. 211 (conveying federal land in trust for the benefit of the Minnesota Chippewa Tribe).

[5] *See, e.g.*, Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47, § 2, 119 Stat. 451, 452 (2005); Hoopa Valley Reservation South Boundary Adjustment Act, Pub.

rights disputes,[6] and providing for the management of the natural resources of specific Tribes.[7]

The United States has long had the authority to take land into trust for the benefit of an Indian Nation. This trust acquisition process is crucial to reconstituting a land base for many Indian Nations and is a centerpiece of Congress's policy of promoting Tribal self-determination and economic development. The Department of the Interior typically takes the lead in acquiring land into trust for Indian Nations. *See* 25 U.S.C. § 5108; 25 C.F.R. pts. 151 & 292. But Congress also regularly steps in with Tribe-specific legislation to settle disputes and provide needed repose.

This congressional practice is longstanding. Over the last 150 years, Congress has enacted dozens upon dozens of Tribe-specific statutes that resolve ongoing disputes between the United States, Indian Nations,

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L. No. 105-79, § 2, 111 Stat. 1527, 1527 (1997); Act of Nov. 23, 1988, Pub. L. No. 100-708, § 3, 102 Stat. 4717, 4718 (correcting boundaries of Goshute Reservation).

[6] *See, e.g.*, Fort McDowell Indian Community Water Rights Settlement Act of 2006, Pub. L. No. 109-373, § 3, 120 Stat. 2650, 2650-51 (2006); Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 104, 108 Stat. 4526, 4528 (1994); Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, § 1, 92 Stat. 409, 409 (1978).

[7] *See, e.g.*, Act of Oct. 6, 1999, Pub. L. No. 106-67, 113 Stat. 979, 979 (providing for mineral leasing of specified Indian lands in Oklahoma); Act of July 7, 1998, Pub. L. No. 105-188, § 1, 112 Stat. 620, 620 (permitting mineral leasing of Indian land within Fort Berthold Indian Reservation when specified conditions are met); Salmon and Steelhead Conservation Act of 1980, Pub. L. No. 96-561, § 102, 94 Stat. 3275, 3275-76 (1980).

state and local governments, and private interests. *See generally* Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law § 5.06[1] (2012) ("Congress has resolved tribal claims involving individual tribes or tribes through legislation."); Carlson, *supra*, at 126 (finding that 36% of the Indian-related bills enacted by Congress from 1975 to 2012 were Tribe-specific bills). There are numerous federal land acts relating to Michigan Tribes alone.[8]

In settling Indian lands disputes, Congress necessarily regulates relationships among Indian Nations, states and localities, and non-Indians. For example, federal statutes often settle land disputes by delineating jurisdictional boundaries and providing for trust land acquisitions by the federal government.[9]

Settling such disputes often requires Congress to legislate with respect to the Article III courts. For example, Congress has imposed short limitations periods on challenges to the constitutionality of

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[8] *See, e.g.*, Michigan Indian Claims Settlement Act, 111 Stat. 265; Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (1988); Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. No. 99-346, 100 Stat. 674 (1986); An Act for the Restoration to Market of Certain Lands in Michigan, § 1, 17 Stat. 381 (concerning lands "in the reservation made for the Ottawa and Chippewa Indians of Michigan").

[9] *See, e.g.*, Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, § 9, 92 Stat. 813, 817 (1978); Puyallup Tribe of Indians Settlement Act, Pub. L. No. 101-41, §§ 4-5, 9, 103 Stat. 83, 88 (1989).

statutes that settle Tribal land claims.[10] It routinely has barred the potential claims of third parties (usually Tribal citizens) to ensure clarity and certainty in a land claims settlement.[11] On still other occasions, Congress has legislated to treat prior claims regarding Indian lands as if they never "existed."[12] Through these means and others, Congress has withdrawn judicial review of claims involving Indian lands.

When enacting Tribe-specific lands acts, Congress has assessed the complex interests concerned and made new law to ensure clarity and certainty regarding land ownership. *See, e.g.*, Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, §§ 2-3, 114 Stat. 1875, 1875-76 (2000). Such certainty, Congress has found, is necessary for Tribal economic development, including for gaming enterprises. *See, e.g.*, Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 2(a), 108 Stat. 3501, 3501 (1994). Special jurisdictional acts concerning individual Indian Nations are also nothing new. Congress has broad authority to confer or to withdraw federal

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[10] *See, e.g.*, Wampanoag Tribal Council of Gay Head, Inc. Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 10, 101 Stat. 704, 710; Seminole Indian Land Claims Settlement Act, Pub. L. No. 100-228, § 8(a), 101 Stat. 1556, 1561 (1987).

[11] *See, e.g.*, Act of Nov. 24, 1980, Pub. L. No. 96-484, § 4, 94 Stat. 2365; Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, § 12, 108 Stat. 4632, 4642 (1994); Catawba Indian Tribe of South Carolina Land Claims Settlement Act, §§ 4(a)(1), 6(c), 107 Stat. 1123.

[12] White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, § 6(a)-(b), 100 Stat. 61, 65 (1986).

jurisdiction, including by legislating with respect to federal sovereign immunity. *See, e.g.*, *Lynch v. United States*, 292 U.S. 571, 581-82 (1934). Before 1946, when it created the Indian Claims Commission, Congress enacted 142 special jurisdictional acts concerning Tribal claims. Cohen Handbook, *supra*, § 5.06[2]. These special jurisdictional acts addressed, among other things, federal sovereign immunity. *See id.* After 1946, Congress has continued to enact Tribe-specific jurisdictional acts. *See, e.g.*, Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944. In sum, the field of Indian affairs reveals a longstanding history of Congress exercising its broad authority over jurisdiction and federal sovereign immunity on a Tribe-specific basis.

Thus, the Gun Lake Act is far from unprecedented.

B. The Gun Lake Act Is A Tribe-Specific Lands Act That Makes New Law.

The Gun Lake Act is but one more example in this long lineage of Tribe-specific statutes that bring clarity and certainty to the ownership status of Indian lands. Building upon its trust relationship with the Gun Lake Tribe, Congress enacted new law designating the Bradley Property as trust property and withdrawing subject matter jurisdiction over challenges to that designation. In so doing, Congress responded to this Court's invitation to address disputes such as the ongoing dispute over the Property.

With Section 2(a) of the Gun Lake Act, Congress made new law by taking the Bradley Property into

trust by statute. Section 2(a) "reaffirm[s]" the status of the Property "as trust land," thus "ratif[ying] and confirm[ing]" the Secretary's administrative decision. Gun Lake Act § 2(a), 128 Stat. 1913. The Secretary of the Interior takes land into trust based upon a variety of well-defined statutory criteria in the Indian Reorganization Act. In 2005, the Secretary took the Bradley Property into trust based upon those criteria, including a determination that the Gun Lake Tribe was "under federal jurisdiction" within the meaning of 25 U.S.C. §§ 5108 & 5129 (formerly 25 U.S.C. §§ 465 & 479). Four years later, this Court interpreted the meaning of those statutory provisions in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Citing *Carcieri*, the Petitioner has argued the Secretary lacked authority to take the Property into trust. *See Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 & n.6 (D.D.C. 2009), *rev'd on other grounds*, *Patchak I*, 567 U.S. 209. With the Gun Lake Act, Congress mooted that argument by confirming the trust status of the Bradley Property, consistent with its authority to take land into trust directly for Indian Nations and much as it has done with countless other Indian lands over the past 150 years. Section 2(a) of the Act thus made new law designating the Bradley Property as trust land without regard to the extent of the Secretary's delegated authority under 25 U.S.C. § 5108.

Section 2(b) of the Gun Lake Act likewise makes new law by withdrawing federal jurisdiction over challenges to the trust designation. It provides that "an action . . . relating to" the Property "shall not be filed

or maintained in a Federal court and shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913. Much as it has done in myriad Indian lands settlement acts, Congress chose to conclude the Gun Lake Tribe's decade-long fight to protect its reservation. It did so by making new law.

In 2012, this Court held that the Petitioner's challenge to the Secretary's decision could proceed under the Administrative Procedure Act, 5 U.S.C. § 706, notwithstanding the Quiet Title Act, 28 U.S.C. § 2409a(a), which various lower courts had concluded barred such a challenge. *See Patchak I*, 567 U.S. at 228; *id.* at 228-29 (Sotomayor, J., dissenting) (explaining that decision "expose[d] the Government's ownership of land to costly and prolonged challenges"); Cohen Handbook, *supra*, § 15.07[1][a] n.16 (noting that "[a] number of circuit courts had previously held that such suits were barred"). The Court invited Congress to address disputes such as the Petitioner's, explaining "that [it] is for Congress to tell us, not for us to tell Congress" whether the Petitioner's challenge may proceed. *Patchak I*, 567 U.S. at 224. Following the Court's invitation, the Gun Lake Tribe "addressed [its concerns] to Congress." *Id.* at 223. Congress responded by taking the Bradley Property into trust itself and by withdrawing federal jurisdiction over challenges to the Property's status as Indian trust land.[13]

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[13] Petitioner argues that the Gun Lake Act could not have made new law because the legislative history noted that the Act would not require any textual changes to existing statutes. Both the House and the Senate Reports stated that the Act makes

Section 2(b)'s withdrawal of jurisdiction is best read as a reinstatement of federal sovereign immunity. In *Patchak I*, this Court held that the APA waived sovereign immunity for the Petitioner's claim. 567 U.S. at 221. This Court went on, however, to recognize that Congress could, and "perhaps . . . should," reinstate sovereign immunity. *Id.* at 224. Congress did so in Section 2(b), providing that *any* action relating to the Bradley Property—including but not limited to the Petitioner's suit—"shall not be filed or maintained" in federal court. Gun Lake Act § 2(b), 128 Stat. 1913. To vindicate this restored sovereign immunity, Section 2(b) directs that any action challenging the federal trust property "shall be promptly dismissed," *id.*, notwithstanding the APA's provision that suits against the United States "shall not be dismissed," 5 U.S.C. § 702. Section 2(b) is thus best read to restore the sovereign immunity that the APA had waived. *See* H.R. Rep. No. 113-590, at 2 (explaining that the Gun Lake Act provides a "broad grant of immunity").

The Gun Lake Act thus represents an exercise of Congress's authority to enact Tribe-specific lands acts that take land into trust and settle ongoing disputes by limiting the jurisdiction of the Article III courts. In

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"no changes in existing law." H.R. Rep. No. 113-590, at 5 (2014); S. Rep. No. 113-194, at 4 (2014). Read in context, this statement means only that—no textual changes to existing statutes were required—as it refers to "subsection 12 of rule XXVI of the Standing Rules of the Senate," which requires a committee report to identify any textual changes to existing statutes that a bill might require. S.R. Rep. No. 113-194, at 4. But Congress may—and did—change the law without amending an existing statute.

the context of the federal government's relationship with Indian Nations, the Gun Lake Act is not unusual.

II. The Gun Lake Act Does Not Usurp Article III Judicial Power Or Violate The Separation Of Powers.

The Gun Lake Act is not constitutionally suspect simply because it addresses an ongoing dispute about a particular parcel of land. The Act violates neither Article III nor the separation of powers.

Amici recognize that Congress's authority to legislate with respect to pending cases, including by withdrawing jurisdiction, is not unlimited. For example, *Klein*, 80 U.S. at 128, held that Congress violated Article III and the separation of powers when it directed the Supreme Court to apply settled law in an outcome-determinative way. The Petitioner and his *amici* argue that the Gun Lake Act violates *Klein*. Each of their arguments fails, and for the same reason: The Gun Lake Act does not tell the courts how they must apply settled law, but rather makes new law for the federal courts to apply, which Congress undoubtedly can do.

A. Nothing In Article III Prevents Congress From Making New Law To Resolve Land Disputes Through Tribe-Specific Lands Acts.

The long history of case-specific legislation in the Indian Affairs arena proves that *Klein* does not stand for the broad proposition that the Petitioner advances. The Petitioner argues that *Klein* forbids Congress from making new law that directs a federal court promptly to dismiss a pending case without modifying "generally applicable substantive or procedural laws." Pet'r Br. 11. That is not what *Klein* held. Instead, *Klein* rested upon two holdings, neither of which is implicated by the Gun Lake Act.

Klein arose out of Civil War and Reconstruction era legislation concerning property seized by the Union forces during the War. Klein was the executor of the estate of Wilson, who had shipped cotton for confederates during the War, and received a full presidential pardon after taking a loyalty oath. Klein sought to recover the proceeds of the sale of Wilson's cotton.

While Klein's case was pending on appeal, the Supreme Court decided in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), that an individual who, like Wilson, had taken a loyalty oath and received a presidential pardon, would be entitled to the proceeds of sale under an 1863 Act. In 1870, Congress responded to *Padelford* by enacting a statute that withdrew jurisdiction over claims to recover seized property

where the claimant relied upon a presidential pardon. The statute directed courts to construe a presidential pardon as proof that an individual had given aid and comfort to the Confederacy. *See* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235. And it withdrew jurisdiction once the courts had reached that determination on the merits: "on proof of such pardon and acceptance, . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." *Id.* As for appellate jurisdiction, the Act provided that "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Id.*

The *Klein* Court held that the 1870 Act violated Article III and the separation of powers in two ways. First, by stripping jurisdiction over claims concerning seized property *only* when a court had found on the merits that those claims rested upon a presidential pardon, Congress forbade the Court to "give the effect to evidence which, in its own judgment, such evidence should have." 80 U.S. at 147. This "passed the limit which separates the legislative from the judicial power." *Id.* Second, Congress had transgressed the separation of powers by "impairing the effect of a [presidential] pardon." *Id.*; *see also United States v. Sioux Nation*, 448 U.S. 371, 405 (1980) (discussing *Klein*'s reasons for holding 1870 Act unconstitutional).

The Article III line drawn by *Klein* thus is not crossed by particularized legislative action withdrawing jurisdiction. And this Court recognized as much in *Bank Markazi*, 136 S. Ct. at 1327. Congress

may, for example, enact particularized legislation that applies to ongoing litigation concerning specific forests, a single bridge, or a single memorial site. *See id.* at 1326, 1328 (citing *Robertson*, 503 U.S. at 434-35, 438-39, *Wheeling Bridge*, 59 U.S. at 430-32, and *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001)). With reason. Statutes that govern the management of specific properties are commonplace—and by necessity particularized. *See id.* at 1327 (explaining that petitioner's argument rested on "flawed . . . assumption that legislation must be generally applicable").

Thus, *Bank Markazi* upheld Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012 because the Act "direct[ed] courts to apply a new legal standard to undisputed fact" by rendering specific property of the Central Bank of Iran available to satisfy judgments. *Bank Markazi*, 136 S. Ct. at 1325 (upholding 22 U.S.C. § 8772). In so doing, the Court recognized that "laws that govern[] one or a very small number of specific subjects" are not necessarily unconstitutional. *Id.* at 1328. That is particularly true, this Court reasoned, when those laws address government-to-government relationships. Section 8772 was an "exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Id.*

The Gun Lake Act is similarly constitutional. Section 2(a) is Congress's new mandate that the Bradley Property be held in trust, regardless of the

scope of the Secretary of Interior's authority under the Indian Reorganization Act, 25 U.S.C. § 5108, or any other statute. Gun Lake Act § 2(a), 128 Stat. 1913. Section 2(b) also changes the law by withdrawing jurisdiction over challenges to that trust designation. *Id.* § 2(b). Like Section 8772 of the Iran Threat Reduction and Syria Human Rights Act, the Gun Lake Acts governs a specific subject—in this case, a specific parcel of property—but is not unconstitutional on that basis alone. And like Section 8772, the Gun Lake Act addresses government-to-government relationships in a sphere, Indian Affairs, where the "controlling role of the political branches is both necessary and proper."[14] *Bank Markazi*, 136 S. Ct. at 1328. Congress has long had authority to enact rational measures to implement its trust responsibility to Indian Nations. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Nor does the withdrawal of jurisdiction offend the separation of powers. Even beyond being a straightforward exercise of its Indian Affairs power, the Gun Lake Act is far from the first instance where Congress has required the federal courts to withdraw jurisdiction over a pending case. Congress has "on

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[14] Congress may choose to implement the United States' responsibilities under international law through Tribe-specific lands acts. *See generally* U.N. Decl. on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 art. 28(1) (2007) ("Indigenous peoples have the right to redress, by means that can include restitution . . . for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.").

occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court." *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962). In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), this Court held that Congress had validly withdrawn federal jurisdiction over an appeal from the Court of Claims by repealing the law upon which the Court of Claims had based its judgment and providing that " 'no judgment heretofore rendered in pursuance of said act shall be paid.' " *Id.* at 64-65 (emphasis omitted). And in *Ex parte McCardle*, 74 U.S. at 514, this Court dismissed a case pending on appeal after Congress amended the law to withdraw jurisdiction over a class of cases, including McCardle's. Simple withdrawal of jurisdiction over a pending case does not pose the *Klein* separation of powers problem, because it does not intrude upon an Article III court's weighing of the merits.

B. The Gun Lake Act Does Not Violate *Klein*'s Prohibition Of Congressional Direction Of The Result In A Pending Case

1. The Petitioner's *amici* do not quarrel with *Bank Markazi*'s holding that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases" without violating Article III or the separation of powers. 136 S. Ct. at 1325; *see Amicus* Br. 5. Nor do the *amici* dispute that Congress may achieve specific results in pending cases

concerning particular parcels of land, including by precluding judicial review. *See Amicus* Br. 11, 21 n.9. Finally, the *amici* do not argue that Congress lacks broad authority over federal jurisdiction. *See Amicus* Br. 10.

Instead, the Petitioner's *amici* argue that the Gun Lake Act, to the extent it makes new law, does not make it in the right way. The rule they propose, in other words, is not simply that *Klein* prohibits Congress from directing results without changing the law. *See Amicus* Br. 11. They argue that Congress violates the separation of powers if it makes new law withdrawing jurisdiction while also specifying that federal courts should "promptly" "dismiss[]" suits that fall within the new jurisdictional rule. *Id.* at 21. The core of their argument is that the Gun Lake Act violates this prohibition because it required the dismissal of the Petitioner's action. But the Gun Lake Act applies to any action concerning the Bradley Property. And *Klein* does not prohibit Congress from making new law that requires prompt dismissal of pending actions.

2. *Klein* does not prohibit Congress from altering the ownership status of a parcel of land in a way that moots a judicial decree. On the contrary, *Klein* took pains to distinguish *Wheeling Bridge*, 59 U.S. 421, in which Congress had declared that two bridges were federal postal roads and lawful, notwithstanding the Court's earlier holding that the Wheeling Bridge was an unlawful impediment to navigation, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54

U.S. (13 How.) 518 (1852). After Congress passed this property-specific legislation, the Court applied the new statute, which precluded enforcement of its earlier judgment. *Klein* reconciled its holding with *Wheeling Bridge*, explaining that "the court [in *Wheeling Bridge*] was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. at 146-47. The new law made no intrusion into judicial law-determination or fact-finding. As the Petitioner's *amici* note, the "critical aspect" of *Wheeling Bridge* was that Congress "had permanently, and for all legal purposes, altered the underlying legal status of the bridge." *Amicus* Br. 9 n.6.

The Gun Lake Act accomplishes the same end. Section 2(a) permanently alters the ownership status of the Bradley Property. Quite apart from any otherwise applicable statutory constraints on the Secretary's decision to take land into trust, the Gun Lake Act declares the Property to be Indian trust land. And this congressional determination and affirmation of the Property's trust status is new law.

3. Nor does *Klein* prohibit Congress from eliminating the legal basis for the Petitioner's suit. Congress similarly eliminated the legal basis for pending lawsuits when it enacted the Northwest Timber Compromise, which resolved a dispute concerning the adequacy of the Bureau of Land Management's ("BLM") consideration of the environmental impacts of permitting timber harvesting in thirteen national forests in Oregon and Washington. *See Robertson*, 503 U.S. at 432-36 (1992) (reviewing Northwest Timber

Compromise, § 318, Pub. L. No. 101-121, 103 Stat. 701, 745 (1989)). Identifying the three pending lawsuits by name and docket number, Congress provided that its own consideration of the environmental impacts satisfied the statutory requirements that applied to the BLM. *Id.* at 434-35. In *Robertson*, this Court upheld that statutory compromise. *Id.* at 438. Congress had "directed . . . a change in law, not specific results under old law," and thus had not violated *Klein*. *Id.* at 439. By "effectively modifying the provisions at issue" in the pending cases, Congress had eliminated the basis for the plaintiffs' administrative law challenge. *Id.* at 440.

The Gun Lake Act similarly eliminates the basis for the Petitioner's complaint about the Secretary of Interior's compliance with federal statutory law. And the Act changes the law not only for the Petitioner's suit, but also for *any* "action . . . relating" to the Bradley Property. Gun Lake Act § 2(b), 128 Stat. 1913. That is constitutional even under *amici*'s reading of *Robertson*. *See Amicus* Br. 11 ("[A]lthough the compromise had the effect of eliminating the legal basis for the plaintiffs' suit [in *Robertson*], the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise.").

Like the Northwest Timber Compromise, the Gun Lake Act explicitly withdraws federal jurisdiction while also eliminating the legal basis for an administrative law challenge. *See Robertson*, 503 U.S. at 435 n.2 (noting that Section 318(b)(6)(A) of the Northwest Timber

Compromise withdrew jurisdiction with respect to standards adopted in subsections (b)(3) and (b)(5)). And there are other examples where Congress has eliminated the legal basis for suit while withdrawing federal jurisdiction.

In 2001, for instance, Congress enacted Public Law No. 107-11, 115 Stat. 19 (2001), which mirrors the Gun Lake Act. In a case cited with approval by this Court, the D.C. Circuit upheld this statute. *See Bank Markazi*, 136 S. Ct. at 1328 (citing *Save Our Mall*, 269 F.3d at 1097, *cert. denied*, 537 U.S. 813 (2002)). Public Law No. 107-11 first provided that construction of a World War II memorial on the National Mall would be approved, *see Save Our Mall*, 269 F.3d at 1094, just as Section 2(a) of the Gun Lake Act approves the trust designation of the Bradley Property. And the statute then withdrew jurisdiction over a pending administrative law challenge to the memorial designation, stating that the designation "shall not be subject to judicial review." *Id.* Similarly, Sections 2(a) and 2(b) of the Gun Lake Act apply this belt-and-suspenders approach, declaring the substantive law, and then avoiding litigation over the decision with respect to the property by withdrawing jurisdiction over all pending and future cases relating to that property. Just as Public Law No. 107-11 passed constitutional muster, *see id.* at 1097, so too does the Gun Lake Act.

4. The Petitioner's *amici* do not dispute that Congress can make new law withdrawing federal jurisdiction over a pending case. *Amicus* Br. 20-21.

But, they argue, a constitutional problem is created when Congress includes the phrase "shall be promptly dismissed" as part of the jurisdictional provision. *See id.* at 20.

Section 2(b) of the Gun Lake Act states that any action "relating to the [Bradley] Property shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Act § 2(b), 128 Stat. 1913. *Amici* seem to suggest that the first half of this statutory phrase—"shall not be filed or maintained in a Federal court"—poses no constitutional problem. *See Amicus Br.* 20-21. Nor, they imply, would it violate *Klein* for Congress to withdraw jurisdiction by providing that a pending action "shall not be subject to judicial review," as Congress did when it approved the World War II memorial on the National Mall. *See id.* at 21 n.9 (attempting to distinguish *Save Our Mall*, 269 F.3d at 1092, from this case). Thus, their argument against Section 2(b) of the Gun Lake Act—as well as the Petitioner's argument—depends entirely upon isolating the phrase "shall be promptly dismissed" from the rest of the statute. *See id.* at 21; Pet'r Br. 11-12.

But Section 2(b) is not unconstitutional simply because Congress included a phrase specifying the necessary consequences of a withdrawal of jurisdiction. The Petitioner and his *amici* would read the phrase "shall not be filed or maintained in a Federal court" out of Section 2(b), as if Section 2(b) contained a naked command that the federal courts shall dismiss any action. Which it does not. Rather, read as a whole,

Section 2(b) provides that if a court finds that an action before it brings a challenge to the trust status of the Bradley Property, then it must withhold federal jurisdiction and therefore promptly dismiss the action. Thus, Section 2(b) does not purport to declare the law in place of the courts; rather—like any jurisdiction-removing provision—it simply withdraws the authority of the courts to declare the law. *See Ex parte McCardle*, 74 U.S. at 514 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").[15]

In short, Section 2(b) of the Gun Lake Act is a far cry from the statutory provisions struck down in *Klein*. The *Klein* statute provided that "on proof of [a presidential] pardon and acceptance, . . . the jurisdiction of the court shall cease, and the court shall forthwith dismiss the suit of such claimant." Act of July 12, 1870, ch. 251, 16 Stat. at 235. This statute directed the federal courts to make a determination on the merits and weigh the facts to determine "proof"—that a claimant had accepted a presidential pardon—

[15] The Petitioner is correct that "the Court has repeatedly confirmed that the judicial power cannot be shared with another branch of government." Pet'r Br. 13. As much as that is true, it is beside the point. The Court has repeatedly confirmed that the Judiciary can act only in cases and controversies over which it has jurisdiction. This basic rule was stated in *Ex parte McCardle*: "The first question necessarily is that of jurisdiction," and if a statute validly "takes away [the Court's] jurisdiction . . . , it is useless, if not improper, to enter into any discussion of other questions." 74 U.S. at 512.

rather than a threshold jurisdictional determination that a particular action related to a particular parcel of land. And the *Klein* statute further directed that a federal court must give its merits determination precisely the opposite effect than it would have had under already-existing law. *See generally Padelford*, 76 U.S. at 543. By contrast, the Gun Lake Act accepts this Court's invitation to reinstate sovereign immunity. *See* Resp. Br. 19.

Thus, in *Klein*, the jurisdictional withdrawal depended upon the merits finding, and directly undermined this Court's earlier ruling on the consequences of such a merits determination. The Gun Lake Act, by contrast, does not direct the federal courts to withdraw jurisdiction based on a merits determination, nor does it direct the opposite result from what would apply under settled law. To the contrary, wholly apart from the merits of any particular lawsuit, Section 2(b) provides that any action "relating to the [Bradley] Property shall not be filed or maintained and shall be promptly dismissed."

5. Even if the text alone does not, the canon of constitutional avoidance compels reading Section 2(b) as withdrawing federal jurisdiction without directing a result under settled law. Even if Section 2(b) were ambiguous, it would be "possible" to interpret it as "amend[ing] applicable law" and thus to avoid any question of its constitutionality under *Klein*. *See Robertson*, 503 U.S. at 441 (internal quotation marks omitted).

The Petitioner's *amici* imply that separation-of-powers values would be sacrificed if this Court were to hold the Gun Lake Act constitutional. Yet none of the important values that they advance are implicated here. The separation of powers does protect an individual litigant from a legislative majority that would seek to decide his case alone. *See Amicus* Br. 12-13. But that is not this case. Section 2(a) of the Act takes land into trust, thus altering its legal status with respect to all non-owners, not just the Petitioner. And Section 2(b) directs that *any* action concerning the Bradley Property—not just the Petitioner's—"shall not be filed or maintained."[16] Gun Lake Act § 2(b), 128 Stat. 1913.

Moreover, the separation of powers also protects Congress's authority to take land into trust and to settle ongoing Indian lands disputes, a function vital to restoring Indian Nations' land base from the losses suffered due to generations of adverse federal policies.

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[16] The Petitioner argues that Section 2(b) violates Article III because it precludes the federal courts from addressing unresolved merits questions arising from Section 2(a). Pet'r Br. 20. It is telling, however, that the Petitioner's *amici* do not press an Article III objection on this basis—likely because Article III does not so limit Congress's authority to withdraw jurisdiction. In all events, federal courts always have jurisdiction to address their own jurisdiction to review agency action where, as here, Congress has withdrawn it. *Cf. Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 673-74 (1986). Against this backdrop, Section 2(b) leaves standing the federal courts' jurisdiction to address their own jurisdiction by deciding whether an action falls within the scope of Section 2(b)'s withdrawal of judicial review. And that is all Article III requires.

For more than 150 years, Congress has enacted Tribe-specific lands acts to settle disputes, and this Court has recognized the political branches' authority to negotiate the resolution of government-to-government Indian Affairs questions. Contrary to the suggestion of the Petitioner's *amici*, *see* Br. 15, Congress was not evading responsibility by enacting the Gun Lake Act. Instead, it was fulfilling its trust responsibility to Indian Nations using a statutory tool that it has used countless times before.

C. The Gun Lake Act Does Not Prescribe An Unconstitutional Rule Of Decision Or Deprive The Petitioner Of Vested Rights.

The Gun Lake Act does not pose the threat to individual constitutional rights that the Petitioner suggests. Though the Petitioner implies his individual rights have been violated, Pet'r Br. 26, this is not a case in which Congress has ordered the federal courts to apply an unconstitutional rule of decision or to deprive an individual of vested rights. *Klein* held that Congress could not order a federal court to deny the constitutional effect of a presidential pardon. *See* 80 U.S. at 147 ("The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."). In this way, "the *Klein* judgment is adequately supported by . . . the entirely plausible understanding that the rule of decision whose application Congress directed would have required the courts to abridge the President's pardon power." Richard H. Fallon, Jr. et al.,

Hart & Wechsler's The Federal Courts and the Federal System 425 (7th ed. 2015). The Gun Lake Act, by contrast, does not interfere with any constitutional power reserved to the President, but rather moots the Petitioner's APA challenge to the Secretary's decision to take the Bradley Property into trust. In this case, Congress has not required the federal courts to apply a rule of decision that directly encroaches upon another constitutionally-protected power, like the pardon power, or the judicial power to declare the law.

Nor is this a case in which Congress has decided among competing claims of vested property rights. It may be that Article III limits Congress's authority to target a pending case involving competing claims of ownership by directing the federal courts to favor one party's evidence of title over another's. *See Bank Markazi*, 136 S. Ct. at 1329 (Roberts, C.J., dissenting). When *Klein* was decided, the concept of vested rights "was a dominant feature of general constitutional law," though it "has largely fallen from our federal constitutional discourse" today. Edward A. Hartnett, *Congress Clears its Throat*, 22 Const. Comment. 553, 575 (2005). In *Klein*, this Court suggested that Wilson's property rights vested when he took the oath of loyalty. *See* 80 U.S. at 142 (explaining that "restoration of the proceeds became the absolute right of the persons pardoned"); Hartnett, *supra*, at 574.

Whatever *Klein*'s relevance for vested property rights, however, this case does not present that question. The Petitioner does not claim to be the rightful owner of the Bradley Property. *See Patchak I*,

567 U.S. at 220 (explaining that Petitioner "wants a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it"). This is not a case in which Congress has stripped an individual of vested property rights by directing the federal courts to apply settled law in an outcome-determinative way. Rather, through the Gun Lake Act, Congress responded to an invitation from this Court to decide whether, in the interests of finality, suits related to the Bradley Property should proceed. The Gun Lake Act neither undermines judicial independence nor encroaches upon constitutional rights. Instead, it is a standard exercise of Congress's plenary authority over Indian Affairs, and reflects a constructive dialogue between Congress and this Court.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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