Nos. 11-246 and 11-247

In The
Supreme Court of the United States

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

Petitioner,

v.

DAVID PATCHAK, *ET AL.*,

Respondents.

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

Petitioners,

v.

DAVID PATCHAK, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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Respondent seeks a declaratory judgment and injunction forcing the United States to relinquish title to and protective control over Indian trust lands. In seeking such unprecedented relief, respondent does not deny that, prior to enactment of the Quiet

Title Act ("QTA"), 28 U.S.C. § 2409a, his suit would have been completely barred by sovereign immunity. Moreover, after the QTA was enacted, his suit was triply barred because of (i) Congress's express protection of Indian trust lands from suit, 28 U.S.C. § 2409a(a), (ii) the statutory requirement that plaintiffs seeking "to try the Federal Government's title to land" could do so only if they possessed their own legal interest in the land, *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983); *see* 28 U.S.C. § 2409a(d), and (iii) the Act's explicit bar against injunctive relief forcing the United States to surrender title to land, 28 U.S.C. § 2409a(b) & (c).

Nonetheless, respondent argues that, precisely because of Congress's deliberate exclusion of his claim under the QTA, he can use the Administrative Procedure Act ("APA") to make the exact same challenge to United States title foreclosed by the QTA and to obtain the exact same relief forbidden by the QTA.

That stands sovereign immunity principles on their head. He does not cite a single case from this Court permitting such easy circumvention of explicit congressional limitations on suits against the United States, let alone the "special sovereignty interests" implicated when the sovereign's control of land is at stake, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997).

Respondent's position also turns logic upside down, because still missing from his argument is any coherent explanation of why Congress would have wanted to permit *only* those plaintiffs lacking any legal interest in the land to divest the United States

of title, while closing the courthouse doors to those who claim direct title to the land and thus are most grievously injured by the government's actions. Respondent's only answer (Br. 33) is that his interest is "*different*." It certainly is. So much so that it is dubious whether respondent's proposed reading of the QTA's and APA's intersection would survive even rational-basis scrutiny.

Respondent's claim to prudential standing fares no better. It is an open plea to recycle through litigation under one statute (the Indian Reorganization Act) a claim already litigated and lost—foreclosed by precedent—under another statute (the Indian Gaming Regulatory Act ("IGRA")). This Court has held time and again that prudential standing must be tied to interests protected by the statutory provision under which suit is brought. But the Reorganization Act provision under which respondent attempts to litigate his objections to gaming was enacted 45 years before organized gaming on tribal lands even started and more than a half century before enactment of the IGRA provisions that respondent claims should be imported into the Reorganization Act. It would vastly expand the prudential standing doctrine for this Court to hold that a plaintiff's asserted injuries can travel across time as well as statutes.

I. THE QUIET TITLE ACT BARS ADMINISTRATIVE PROCEDURE ACT SUITS DISPUTING THE UNITED STATES' TITLE TO INDIAN TRUST LANDS

A. The QTA's Text Fully Immunizes Indian Trust Lands

Congress expressly excised "trust or restricted Indian lands" from any suit "disput[ing] title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The fundamental flaw in respondent's argument is that he reads that deliberate shield of protection as silently agnostic about the susceptibility of those same Indian lands to APA suits "disputing [United States'] title."

The plain text forecloses such a cramped reading of a textually unqualified reservation of sovereign immunity. Congress said that "[t]his section"—*i.e.*, the QTA's entire waiver of sovereign immunity—"does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). The QTA thus provides a comprehensive carve-out of those Indian lands from any aspect of Congress's waiver of immunity for any litigation "disput[ing] title" held by the United States to "real property." *Id.* As to such lands, the waiver of immunity simply "does not apply," *id.*, and sovereign immunity is expressly preserved intact, *see United States v. Mottaz,* 476 U.S. 834, 843 (1986) ("[W]hen the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.").

Respondent argues (Br. 15-16) that, because the QTA's subsequent provisions appear to limit relief to

plaintiffs asserting their own "right, title, or interest" in land, 28 U.S.C. § 2409a(d), Congress's reservation of sovereign immunity must be similarly cabined since "an exception to a waiver cannot exceed the scope of the waiver itself" (Br. 22). But that argument confuses the scope of the QTA's waiver of immunity with the pleading requirements for a successful complaint. Provisions identifying what a qualifying plaintiff must do to prevail perform quite a different function from those that define the scope of lawsuits that are designedly closed out of litigation altogether. That is triply true here.

First, the Indian lands provision is more than an "exception" to waived immunity. It is a comprehensive and categorical walling off of any and all challenges to United States' title to or legal interest in Indian trust lands. *See Block*, 461 U.S. at 283 (Indian-lands provision "limit[s] the waiver of sovereign immunity"). To put it another way, in enacting the QTA, Congress surveyed the government's interests in land and not only specified the terms on which suits could go forward, but also took certain categories of federal land interests—trust or restricted Indian lands—completely off the litigation table. That was a land-focused, not plaintiff-specific, judgment.

Second, respondent's argument reads the statute backwards. The Indian lands provision appears at the very beginning of the QTA and follows immediately after and corresponds to the Act's waiver of immunity for "a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). The two sentences must be read together and the reservation of

immunity given *at least* corresponding breadth. *See Mottaz*, 476 U.S. at 842 (QTA "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians").

The reservation of immunity for Indian lands, moreover, is simply the first clause of a sentence. The second clause adds that the waiver of immunity "does [not] apply to or affect actions which may be or could have been brought under" a variety of alternative statutory schemes, such as the Tucker Acts, the Federal Tort Claims Act, and tax laws. 28 U.S.C. § 2409a(a). Because many of those schemes will only infrequently implicate plaintiffs who are themselves asserting a "right, title, or interest" in land under subsection (d), the QTA's statutory limitations on the waiver of immunity in Section 2409a(a) were necessarily meant to be broader and more comprehensive than just the pleading contours imposed on those who have navigated past the QTA's exclusions.

In other words, in waiving immunity, Section 2409a(a) quite naturally focuses on the nature of the *United States'* legal interests because that is what waivers of immunity do. The reservation of full immunity for trust or restricted Indian lands likewise makes the *United States*' legal interest and the status of its lands dispositive. The provision governing complaints naturally focuses, by contrast, on the *plaintiffs'* legal interests and what requirements Congress has interposed as a precondition for relief under the QTA, which is something quite different.

Third, and in any event, the QTA's waiver of immunity and the preservation of immunity for

Indian lands are (at least) fully symmetrical. Congress waived sovereign immunity for "a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). *Every* challenge to the United States' legal interest in Indian "trust" lands necessarily involves "a disputed title" because all Indian trust lands entail a transfer of legal title to the federal government. *See* 25 U.S.C. § 465.

B. The QTA Deliberately Excludes Challenges To United States' Title Unconnected To Any Legal Interest In The Land

Respondent's basic premise about how statutes like the QTA and the APA intersect is also wrong. His argument assumes that plaintiffs whose claims are deliberately excluded by Congress from suit under a "precisely drawn, detailed statute" waiving immunity like the QTA, *Block*, 461 U.S. at 285, remain free to resort to general remedial schemes like the APA to obtain the relief denied them under the more particularized scheme. That is incorrect.

In *United States v. Fausto*, 484 U.S. 439 (1988), for example, this Court addressed the availability of judicial review under the Civil Service Reform Act, which permitted competitive service employees to obtain judicial review of personnel actions, but provided no judicial review for nonpreference excepted service employees, 484 U.S. at 446-447. Respondent's argument mirrors the lower court in *Fausto*, which "viewed the exclusion of nonpreference members of the excepted service *** as congressional silence on the issue of what review these employees should receive," *id.* at 447, and thus permitted them

to seek relief under the general remedial provisions of the Backpay Act. This Court disagreed and held, instead, that such a "deliberate exclusion" of a category of employees from a statute's judicial review provisions, *id*. at 455, reflected a "congressional judgment that those employees should not be able to demand judicial review" for their personnel actions, *id*. at 448.

So too here, the QTA does not simply overlook or leave unaddressed the availability of judicial review for plaintiffs seeking to challenge the United States' title to trust or restricted Indian lands. Quite the opposite, the statutory text addresses such claims twice, by both walling them off from judicial review and expressly proscribing the very type of specific or injunctive relief provided by the APA, *see* 28 U.S.C. 2409a(b) & (c). That "deliberate exclusion *** prevents respondent from seeking review" and injunctive relief under the more general provisions of the APA. *Fausto*, 484 U.S. at 455*; see Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("Where a statute provides that particular agency action is reviewable at the instance of one party" under specified conditions, "the inference that it is not reviewable at the instance of other parties *** is strong."); *Mottaz*, 476 U.S. at 847 (QTA barred suit under the General Allotment Act that would "require the Government to relinquish its possession of the disputed lands," because the QTA "expressly gives that choice to the Government, not the claimant").

Block v. Community Nutrition Institute, 467 U.S. 340 (1984), says the same thing. There, the relevant statute permitted only milk producers and handlers to seek review of the Secretary of Agriculture's milk

pricing orders. When consumers tried to challenge a pricing order under the APA, this Court said "no." "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 349.

The test for whether a particularized scheme's exclusion was deliberate or (as respondent argues) simply left plaintiffs to other procedural devices is whether "congressional intent to preclude judicial review is 'fairly discernible,'" *Community Nutrition*, 467 U.S. at 351, considering the statute's text, structure, objectives, and history, and the nature of the administrative action involved, *id.* at 345. Because, in *Community Nutrition*, permitting consumers to vindicate their interests under the APA would have circumvented the limitations on suits prescribed in the statute and would have permitted injunctive relief "even though such injunctions are expressly prohibited in proceedings" under the statute, *id.* at 348, this Court held that the suit was foreclosed, *id.* at 345-351.

This case is the same. Congress's intent to permit only certain plaintiffs to challenge governmental activity—those claiming title to or legal interest in non-Indian land—and to exclude those plaintiffs lacking such a legal interest is "fairly discernible" in the QTA. The unqualified scope of the QTA's textual retention of immunity for all trust or restricted Indian lands from all claims disputing United States' title and the express preclusion of coercive injunctive relief underscore the deliberateness with which Congress confined judicial

review to that particular class of plaintiffs claiming a legal interest in non-Indian land. Those plaintiffs, after all, are the ones that are most harmed by any governmental error. *See* S. Rep. No. 575, 92d Cong., 1st Sess. 1 (1971); *see also* S. Rep. No. 996, 94th Cong., 2d Sess. 7-8 (1976).

Furthermore, allowing APA suits would empower the very plaintiffs that Congress foreclosed from relief under the QTA to obtain injunctive relief "even though such injunctions are expressly prohibited in proceedings" under the QTA, *Community Nutrition*, 467 U.S. at 348, whenever the United States wishes to retain its legal interest, 28 U.S.C. § 2409a(b) & (c).

Still worse, opening the APA door would arm even those individuals permitted to go forward under the QTA "with a convenient device for evading the [QTA's] statutory requirement[s]," *Community Nutrition*, 467 U.S. at 348, simply by repackaging their litigation as one that seeks to redress harms to their aesthetic, environmental, or personal interests.

Permitting APA actions would also confound the QTA's flat 12-year statute of limitations, 28 U.S.C. § 2409a(g), by creating serial opportunities for APA injunctive relief stripping the United States of title any time an intervening agency action occurs on the land. *See Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122-123 (2005) (specialized statutory scheme precluded resort to suit under 42 U.S.C. § 1983, in part because the specific statute "limits relief in ways that § 1983 does not"); *Brown v. GSA*, 425 U.S. 820, 826-828 (1976) (specialized statutory scheme under Title VII for federal employees precluded resort to Title VII's general remedies).

In short, in the QTA, Congress determined that those asserting legal claims to or interest in the land itself could best "be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *Block*, 467 U.S. at 352. And if any question remains, this Court must err on the side of preserving sovereign immunity. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012).

C. The QTA's History And Purpose Require The Categorical Protection Of Trust Lands From Suit

Principles of repose and stability of title are critical for land to be put to productive use, and those concerns are at their apex in the context of tribal lands. The Indian Reorganization Act empowered the United States to take land into trust as a means of combating rampant poverty and unemployment plaguing tribal members, and promoting economic development. *See* Pet. Br. 41-42.[1] None of that can occur in an environment where the stability of title and jurisdictional status of land is subject to perpetual revision via declaratory and injunctive litigation. Only by putting Indian trust lands off limits under the QTA could Congress ensure a stable and sound foundation for economic and cultural development both on Indian lands and in the surrounding communities. *See* Wayland Township Br. 14-17; NCAI Br. 8-14.

The QTA's categorical retention of sovereign immunity over tribal lands also reinforces the

[1] "Pet. Br." refers to the opening brief filed by petitioner in No. 11-246.

principle that "Indian title is a matter of federal law and can be extinguished only with federal consent," *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). *See* Pet. Br. 18-20.

Indeed, unlike most federal lands, litigation over the United States' title to Indian lands directly implicates the legal interests of a third party not before the court and whose sovereign immunity Congress did not waive—the relevant tribe. Preserving full immunity thus was necessary to avoid creating a legal regime in which "[a] unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Mottaz*, 476 U.S. at 843 n.6.

Those concerns do not lessen just because the plaintiff lacks a legal interest in the land at issue. That is why Congress tied Indian-lands immunity not to the content of plaintiff's complaint, but to the land itself and to the United States' distinct interests "based on that property's status as trust or restricted Indian lands." *Mottaz*, 476 U.S. at 843.[2]

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[2] Respondent argues (Br. 18) that the plaintiff's interest in the land was critical in *Mottaz*. But in applying Section 2409a(a)'s Indian-lands' barrier to suit, it was the nature of the *United States'* interest that controlled the outcome. 476 U.S. at 843 (sovereign immunity would have attached if "the United States [had] claim[ed] an interest in [the] real property based on that property's status as trust or restricted Indian lands"). The opinion later discussed Mottaz's interest in acquiring title, but only to hold that Mottaz could not circumvent the QTA by invoking more general remedial schemes. *Id*. at 846-851. That same anti-circumvention rule is why respondent loses as well.

Finally, respondent never comes to grips with the irrationality of the "inverted preference" scheme his position would create, *Fausto*, 484 U.S. at 450, by allowing those plaintiffs who lack any legal interest in the land to file suit with a far more elastic statute of limitations and to obtain the very specific injunctive relief prohibited by the QTA, while excluding those who actually claim title to the land. Indeed, his reading would transmute a QTA provision meant to *limit* consent to suit into one that *expands* consent to suit and *expands* the remedies available by opening the APA door. Congress surely did not mean to do that.

Respondent protests that his interests are just "*different*" (Br. 33), not lesser, than plaintiffs who claim a legal interest in the land. That is hard to understand. Plaintiffs with interests in land would also share respondent's aesthetic objections to the (alleged) improper usages of the land, desire to "hold[] a federal agency accountable," and zeal to correct "unlawful action." Resp. Br. 8, 34, 39.

But whatever the adjectival label, it does not explain why Congress would have deputized respondent to "police" agency action (Pet. App. 6a; *see* Resp. Br. 46) and to have *greater* remedial options—including injunctive relief ousting the United States of title and control over land—than those with a direct stake in the land. If Congress had passed a law that, in terms, codified such a stark disparity in the enforceability of legal rights, one would be hard-pressed to articulate a rational basis for it.

D. Section 702 Of The APA Equally Forecloses Relief

Section 702 of the APA is explicit that it does not "affect[] other limitations on judicial review *** [or] confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. This Court has already held, moreover, that "[t]he QTA is such an 'other statute'" within the meaning of Section 702. *Block*, 461 U.S. at 286 n.22.

Respondent nevertheless argues (Br. 14) that Section 702 has no application because the QTA does not "grant[] consent to suit" on his particular claim, 5 U.S.C. § 702, since he lacks a legal interest in non-Indian land. But respondent's claim-specific approach is in the teeth of *Community Nutrition*. There, as in the QTA, the comprehensive statutory scheme granted only certain categories of plaintiffs (milk producers and handlers) the right to challenge governmental action. 467 U.S. at 349. Just like respondent's statutory exclusion from relief under the QTA, claims by consumers were left out of the review provisions in *Community Nutrition*. Accordingly, because the QTA "provides a detailed mechanism for judicial consideration" of challenges to United States' title "at the behest of particular persons," then "judicial review of those issues at the behest of other persons" like respondent is at least "impliedly precluded." *Id.*

Furthermore, nothing in APA Section 702 says that the "other statute" must grant the *plaintiff* consent to sue. It says APA litigation is barred simply if the statute "grants consent to suit" over a specified subject matter, which the QTA does for

disputes targeting United States' title. 5 U.S.C. § 702.[3] The only relevant question then is whether the QTA also "expressly or impliedly forbids the relief which is sought," *id.*, which the QTA's provisions flatly banning coercive injunctive relief dispossessing the United States of title specifically do. 28 U.S.C. § 2409a(b) & (c).

Indeed, just like the plaintiff in *Mottaz*, respondent seeks injunctive relief that would "require the Government to relinquish its possession of the disputed lands," even though the QTA "gives that choice to the Government, not the claimant." 476 U.S. at 847. *Cf. Couer d'Alene*, 521 U.S. at 281 (suit for injunctive relief against state officials concerning State's title to land is barred as "the functional equivalent of a quiet title action"). Because the relief respondent seeks is forbidden even for plaintiffs to whom the QTA grants consent to sue, that same relief is doubly forbidden as to those for whom Congress barred suit altogether. And that sovereign-immunity judgment is what APA Section 702 enforces.

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[3] *See* H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976) ("If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive."); S. Rep. No. 996, 94th Cong., 2d Sess. 11 (1976) (same).

II. RESPONDENT LACKS PRUDENTIAL STANDING

A. Respondent Falls Outside Section 465's Zone Of Interests

For forty years, this Court's prudential standing doctrine has required plaintiffs suing under the APA to establish that they fall within the zone of interests of the statute they seek to enforce. *See, e.g., Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-157 (1970). That means that respondent must show that the legal injuries of which he complains— his concerns over the impact of gaming on the community's environment and aesthetics—are the type of interests that the Indian Reorganization Act's land-into-trust provision, 25 U.S.C. § 465, "protect[s] or regulate[s]." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987).

Respondent cannot do that. He does not claim to be protected by or a beneficiary of Section 465 of the Reorganization Act. He argues (Br. 38), instead, that he is "regulated" by that provision. Not so. Nothing in the Reorganization Act commands, directs, limits, or even cajoles respondent's own activities on or off of his own land. And whatever respondent's personal preference for a "rural" lifestyle at his home three miles away from the casino, Br. 5; J.A. 28, 30-31, C.A. App. 549, the decision to zone the area where the casino sits between a highway and railroad line for "'light industrial and commercial uses'" is a product of local law, not of Section 465. *See Michigan*

Gambling Opposition v. Norton, 477 F. Supp. 2d 1, 10 n.13 (D.D.C. 2007).[4]

What respondent really means (Br. 38-39) is that he has been affected by the Secretary's actions because his aesthetic enjoyment of the "area" (*id.* at 5) will be diminished. But if simply alleging an impact or effect sufficed, then the prudential-standing and Article III-standing inquiries would collapse together. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (Article III standing requires, *inter alia*, that plaintiff have "suffered an 'injury in fact' *** [that is] 'fairly *** trace[able] to the challenged action of the defendant'").

In any event, respondent has not identified anything in the Secretary's land-into-trust decision itself that has affected his land or caused him or his "area" any harm. The trust status of a piece of private property has no adverse effect on him, and even less so does the question of the interrelationship between Gun Lake and the federal government in 1934.[5]

Instead, respondent's alleged injuries are tied exclusively to Gun Lake's post-trust decision to operate a casino on just a portion of the land. That

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[4] Respondent's land is roughly the same distance from the casino as Arlington Cemetery is from this Court. *See* J.A. 28; C.A. App. 549.

[5] While not presented here, respondent's argument that Gun Lake was not "under Federal jurisdiction" in 1934, 25 U.S.C. § 479, is without basis. The Tribe was a party to several treaties, received federal Indian services, and was under the administrative jurisdiction and supervision of the Office of Indian Affairs throughout the relevant time.

outcome, however, is the product of combined decisions by (i) Gun Lake to undertake gaming, (ii) the State of Michigan to approve a gaming compact, (iii) the Secretary's determination under IGRA, 25 U.S.C. § 2719, that the land was eligible for gaming; and (iv) the discretionary decisions of the National Indian Gaming Commission to approve a gaming ordinance and facility license, *id.* § 2710; 25 C.F.R. §§ 559.1, 559.2. Respondent does not challenge any of those decisions.

Respondent argues (Br. 41) that the Secretary's land-into-trust trust determination "cannot be separated" from Gun Lake's decisions concerning how its land will be used because "economic benefit arises only when that land is used." That is not right either.

First, the trust decision is only for "the purpose of providing land for Indians." 25 U.S.C. § 465. Economic development is one option; oftentimes, however, the trust land is acquired to restore historic lands, to build housing, to preserve natural resources, or for hunting and gaming rights. *See, e.g.,* NCAI Br. 17-27. Whether to use the land for economic development or another purpose is up to the tribe; no particular use is dictated by or follows from the trust decision. And even if the tribe decides to undertake economic development, the vast majority of economic uses of trust land are non-gaming. *Id.* at 17 n.12.

Second, even when gaming is undertaken, the trust and gaming decisions are not only capable of separation, they have been legislatively and administratively separated. Congress housed the regulation of gaming in an entirely different statute (IGRA) and created an entirely new entity—the National Indian Gaming Commission—to administer

that statute and to make gaming ordinance decisions, 25 U.S.C. § 2702.

Thus the ineluctable Restoration Act/IGRA linkage on which respondent tries to ground prudential standing simply does not exist in law or fact. Instead, whether or not gaming ever occurs on trust land requires the intervention of multiple different decisions by multiple separate entities. By the same token, taking the land out of trust would not itself stop gaming. Michigan and its residents would remain free under state law to authorize gaming by either a private entity or by Gun Lake's own gaming corporation. *See* Mich. Const. Art. IV, § 41 (eff. 2004). Because the cause of injuries and their remediation depend on the intervening judgments of independent actors and not the operation of Section 465, prudential standing fails. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

B. Respondent's Interests Are Not Like Those Of State And Local Governments

Respondent echoes (Br. 38) the court of appeals' reasoning (Pet. App. 11a) that, because state and local governments have prudential standing to enforce the Reorganization Act's limitations on land-into-trust decisions, so too should every individual in the community.

But if prudential standing means anything, it means that the nature of interests and injuries matter dispositively. The reason that States and local governments have prudential standing to challenge land-into-trust decisions is that such

decisions themselves directly restrain and contract their sovereign power, taxing authority, and jurisdictional control over land. *See Nevada v. Hicks*, 533 U.S. 353, 361-362 (2001) (discussing limits on state regulatory authority over Indian lands). Indeed, the loss of "State and local taxation" authority appears on the face of the statute. 25 U.S.C. § 465.

Respondent (Br. 40-41) and his amici California Groups (Br. 12) argue that, unless he is afforded standing, sometimes no one will sue, which they argue violates the presumption of judicial review for administrative action. They worry, in particular, that state and local governments might adopt zoning decisions and economic development plans that are compatible with trust lands, but with which they disagree, Resp. Br. 40-41; California Groups Br. 12.

Even if one assumes that, for every government action, there must be an equal and opposing plaintiff available to sue, that argument fails. This case has nothing to do with the availability of judicial review. Respondent and anyone else opposed to gaming had plenty of opportunity to file suit and seek review under IGRA, the QTA, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, or any other applicable statute of the same concerns respondent raises. Indeed, an anti-gaming lawsuit was filed and litigated challenging this very trust decision. *See Michigan Gambling*, *supra*. The Secretary publicly announced the decision to place this land into trust in advance and afforded respondent and any other "interested parties" the opportunity to seek judicial review of the decision within 30 days. 70 Fed. Reg. 25,596 (May 12, 2005). The Secretary then further

delayed the trust placement for three years until the litigation brought by respondent's interest group raising the very anti-casino concerns that respondent reiterates here was concluded by this Court's denial of certiorari, *Michigan Gambling Opposition v. Kempthorne*, 555 U.S. 1137 (2009). *See* Pet. App. 31a n.10; Pet. Br. 8.

So what respondent and his amici actually want is a judicial presumption enforcing an even longer period of time in which to seek still more review, and re-review of gaming objections. There is no such presumption. And their distrust of the judgments of state and local governments (Resp. Br. 40-41; California Groups Br. 12) simply ignores the extensive litigation that has arisen challenging land-into-trust decisions under a variety of federal laws by governments, not to mention the federalism-based respect for the historic primacy of state and local governments in making land-use and zoning decisions.

Finally, respondent tries to squeeze himself into the prudential standing mold by arguing (Br. 38-39) that Congress "could reasonably have expected [him] to enforce §465." But, as respondent admits (Br. 38), the test for prudential standing is whether Congress "'*intended*'" an individual "'to be relied upon to challenge agency disregard of the law,'" *Clarke*, 479 U.S. at 403 (emphasis added), not whether a reasonable Congress should have "expected" attempted litigation. And when it comes to evidencing such congressional intent, respondent once again comes up short.

First, it is inconceivable that Congress ever intended the Reorganization Act to become a vehicle

for vindicating anti-gaming interests because tribal gaming did not even come into existence until more than four decades *after* the Reorganization Act's passage. *See* Felix S. Cohen, *Handbook of Federal Indian Law* § 12.01 (2005 ed.); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). Nor were community-aesthetic injuries recognized by this Court as a basis for standing to challenge governmental actions until the 1970s. *See Association of Data Processing*, 397 U.S. at 154.

Second, respondent argues (Br. 44) that Section 463 of the Reorganization Act "directs the Secretary to consider 'the public interest' when deciding whether to restore surplus lands to Indian tribes." Even assuming that respondent is a better arbiter of the "public interest" than the nine governmental entities and eight private business and community groups that support the Secretary's trust decision in this case, *see* Wayland Township Br., that statutory argument proves Gun Lake's point because Congress omitted that same "public interest" factor from Section 465's land-into-trust provision. And unsurprisingly so because Section 465 governs the treatment of *private* land, not surplus *public* lands. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States* 464 U.S. 16, 23 (1983).

Contrary to respondent's argument (Br. 45), neither *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011), nor *FEC v. Akins*, 524 U.S. 11

(1998), invoked the purpose of statutes as a whole to create prudential standing that would not otherwise exist under an individual provision. Anyhow, *Russello* would dictate a different answer to that holistic inquiry than the one respondent wants.

Third, Interior Department regulations outlining factors for the Secretary's land-into-trust decisions do not help respondent. Those regulations address only the interests of "the state and local governments having regulatory jurisdiction over the land to be acquired," and afford an opportunity for *those governments* to submit "comments as to the acquisition's potential impacts on regulatory jurisdiction" and land use. 25 C.F.R. §§ 151.10, 151.11. What is far more telling—and irreconcilable with respondent's position—is that the regulations do not provide any notice to or opportunity for input from individuals like respondent until *after* the final trust decision has been made. 25 C.F.R. § 151.12(b).

Finally, this Court's "competitor prudential standing" cases do not show that *any* plaintiff "who police[s] a statute's limitation fall[s] within that statue's zone of interests" (Resp. Br. 46). They hold only that, when a plaintiff's interest in limiting the activities of the companies against which it competes enforces key limitations of a statute, prudential standing may attach if Congress designed those limitations to protect competitors. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 496-499 (1998); *Clarke*, 479 U.S. at 397 (plaintiffs "not only suffered actual injury, but *** suffered injury from the competition that Congress had arguably legislated against by limiting the activities available to [competitors]").

There is no such link here. While state and local governments compete directly with the tribes and federal government for the jurisdictional and taxing authority that the Reorganization Act allocates, respondent does not.

C. Borrowing Interests From The Indian Gaming Regulatory Act Does Not Support Prudential Standing Under The Reorganization Act

This Court has held, time and again, that only "the statute whose violation is the gravamen" of respondent's suit can be the "'relevant statute'" for purposes of the zone-of-interests test. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886 (1990).

Respondent nevertheless insists (Br. 48) that he can borrow interests to support standing from IGRA, because he deems that law "integrally related" to Section 465. But *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), precludes precisely such inter-statutory "leapfrog[ging]" to satisfy the zone-of-interests test, *id*. at 530. *See* Pet. Br. 49.

Respondent argues (Br. 48) that *Clarke* supports hybridizing statutory interests because this Court looked to the McFadden Act in assessing the National Bank Act's zone of interests. But that was just because the McFadden Act amended the relevant provision of the Bank Act. *See Clarke*, 479 U.S. at 391; *see also Air Courier Conference*, 498 U.S. at 530 (describing *Clarke*'s analysis of "two sections of the National Bank Act"). Thus, the relevant provisions of the McFadden Act and the National Bank Act were

one and the same. The Reorganization Act and IGRA are not.

Confining prudential standing to the statute sued under makes particular sense because the text of the APA requires that respondent's interests arise from the "relevant statute" upon which his claim rests, 5 U.S.C. § 702, not some statute akin to the one under which he is suing. Otherwise plaintiffs could reincarnate under a new statute claims already litigated and lost by others under the original statute—which is precisely what respondent is attempting here.[6]

[6] Respondent stresses (Br. 36) "the APA's 'generous review provisions.'" But respondent was afforded ample opportunity to file suit under IGRA, NEPA, or any statute for which he had standing. "[G]enerous review" is not limitless review "by every person suffering injury in fact," *Clarke*, 479 U.S. at 395, 396 n.9, and certainly does not extend to either recycling tried-and-failed claims under different statutory headings or a do-over of litigation strategy decisions from others' earlier rounds of unsuccessful judicial review.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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