No. 11-247

In the Supreme Court of the United States

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

v.

DAVID PATCHAK, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The Quiet Title Act (QTA), 28 U.S.C. 2409a, expressly retains the United States' sovereign immunity from suits that challenge its title to "trust or restricted Indian lands." 28 U.S.C. 2409a(a). The court of appeals held, however, that a plaintiff may circumvent that retention of immunity simply by suing under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The court reached that conclusion even though the APA's waiver of sovereign immunity, 5 U.S.C. 702, states that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." That conclusion is erroneous, and it warrants this Court's review because it directly conflicts with the decisions of three other courts of appeals and, if allowed to stand, would seriously impair the economic development of Indian trust land.

The court of appeals compounded its error by holding that respondent Patchak has prudential standing to challenge the decision of the Secretary of the Interior to take title to land in trust simply because he objects to the use to which the land may later be put. That holding conflicts with this Court's decisions establishing that, to have prudential standing, a plaintiff must allege an injury that falls within the zone of interests protected by the specific statutory provision that forms the basis for the complaint. It therefore warrants review in conjunction with this Court's review of the court of appeals' APA holding.

In opposing review, Patchak attempts to defend the decision below on the merits and to suggest that the circuit conflict does not require resolution at this time. He also asserts that this case would be an inappropriate vehicle for resolving the questions presented. Those arguments lack merit.

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

1. As explained in the petition (at 8-14), the court's interpretation of the APA's waiver of sovereign immunity is contrary to the text and legislative history of Section 702. It is also inconsistent with this Court's decisions in *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983), and *United States* v. *Mottaz*, 476 U.S. 834 (1986), which recognized that "Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property." *Id.* at 841 (quoting *Block*) (emphasis added).

Patchak repeats the error of the court of appeals when he argues (Br. in Opp. 21-23) that, because he does not himself claim title to the land in question, his claim could not be

brought under the QTA, and therefore his action falls with the APA's general waiver of sovereign immunity. The flaw in that argument is that it focuses on the relief that Patchak is not seeking (a determination that he owns the land), rather than on the relief that he is seeking (an order compelling the United States to relinquish trust title to the land). Patchak does not dispute that his lawsuit necessarily challenges the United States' title to the property, requiring the United States to give up that title if he prevails. It is therefore an action "to adjudicate a disputed title to real property in which the United States claims an interest," and because it involves "trust or restricted Indian lands," it is barred by the QTA. 28 U.S.C. 2409a(a). For that reason, it is also forbidden by Section 702(2)'s proviso that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

Patchak's argument hinges on the proposition that when Congress enacted the QTA allowing suits against the United States but with its exception for trust and restricted Indian lands—prior to the 1976 amendments to the APA, when no relief was available against the United States under the APA at all—Congress sought to protect the United States' title to trust and restricted Indian lands only from disruption by persons claiming title in their own right. Patchak provides no support for that contention, and it is incorrect. In fact, Congress understood the background law to prevent anyone from challenging the United States' title to any land, and it sought to provide adverse claimants, and no others, with an action against the United States. Yet Congress determined that even adverse claimants were to be left without a lawsuit when their claim involved trust or restricted Indian lands. Nothing in Section 702 supports

the illogical result of the decision below, under which anyone in the world *except* an adverse claimant is free to challenge the United States' title to trust lands by suing an officer of the United States under the APA.

2. The court of appeals acknowledged that its interpretation of Section 702 directly conflicts with that of the other three circuits that have considered the question. Pet. App. 18a (citing *Neighbors for Rational Dev., Inc.* v. *Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist.* v. *United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court *sub nom. California* v. *United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation* v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)). In addition, as noted in the petition (at 15-16), the decision below is also in serious tension with the reasoning of the Seventh Circuit in *Shawnee Trail Conservancy* v. *United States Department of Agriculture*, 222 F.3d 383, 387-388 (2000), cert. denied, 531 U.S. 1074 (2001).

Patchak does not deny the existence of a circuit conflict. Instead, he argues (Br. in Opp. 26) that the Court "should allow more time for other circuits to address the issue and weigh the competing arguments." In the very next sentence, however, he argues that there is no need for the Court to resolve the conflict, because uniformity could be achieved by virtue of the ability of plaintiffs anywhere in the country to obtain venue in the District of Columbia. Those two arguments are mutually contradictory, and neither is correct. As to the first point, any plaintiff wishing to sue the Secretary may do so in the United States District Court for the District of Columbia. 28 U.S.C. 1391(e). Now that the D.C. Circuit has held that Section 702 permits challenges to decisions taking title to land in trust for Indian tribes, further development of the law in other circuits is

therefore unlikely. As to the second point, Patchak confuses the availability of forum shopping with the existence of genuine uniformity. Even if future litigation is centered in the D.C. Circuit, the courts of appeals will remain divided on an important question of statutory interpretation. This Court's review is therefore warranted.

As noted in the petition (at 16), this Court granted certiorari in *California* v. *United States*, 490 U.S. 920 (1989) (No. 87-1165), to consider the relationship between Section 702 and the Indian trust-lands exception to the QTA. The Court was equally divided in that case and accordingly was unable to resolve the issue. Now that the issue is the subject of a circuit conflict, review by this Court is even more appropriate.

3. By making it possible for plaintiffs to challenge trust acquisitions after they have already taken place, the decision below, if allowed to stand, would severely hamper efforts to develop trust land. See Wayland Township *Amicus* Br. 14-17. Although Patchak attempts to minimize the adverse consequences that would be likely to result, even he acknowledges (Br. in Opp. 26) that, under the decision, the Secretary's actions taking land into trust would be open to attack for at least six years—the limitations period applicable to APA actions. See 28 U.S.C. 2401(a). That prolonged uncertainty would create significant disincentives to investment, frustrating the purpose of trust acquisitions, which is to "encourag[e] tribal self-sufficiency and economic development." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal quotation marks and citation omitted).

Patchak suggests (Br. in Opp. 26-27) that because no new cases have been filed challenging trust acquisitions in the ten months since the decision below was issued, the decision is unlikely to disrupt future land acquisitions. But

that ten-month period—during much of which there has been a pending rehearing petition or petition for a writ of certiorari—is hardly indicative of the decision's likely prospective consequences. Potential litigants may be waiting to see how this case is resolved; if the decision is allowed to stand, more litigation can be expected.

Similarly unpersuasive is Patchak's assertion (Br. in Opp. 27-28) that plaintiffs have had the same incentive to bring suit for the past 35 years. That argument is premised on a district court decision, *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465 (D.D.C. 1978), which held that the QTA did not bar APA actions challenging actions taking land into trust for an Indian tribe. But when every other circuit to have addressed the issue has rejected that view, it is implausible to suggest that litigants should have been proceeding for the last 35 years under a regime established by a single, non-binding district court decision. That is especially so because *Andrus* was decided before this Court's decisions in *Block* and *Mottaz*, which fatally undermine that decision by emphasizing the exclusivity of the QTA.

B. The Court Of Appeals' Prudential-Standing Holding Also Warrants Review

1. The doctrine of prudential standing requires a plaintiff to show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In this case, the statutory provision underlying the complaint is Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, which authorizes the Secretary to acquire an interest in land "for the purpose of providing land for Indians." That provision has nothing to do with the interests asserted in Patchak's suit—avoiding allegedly diminished property values, loss of "the rural char-

acter of the area," and loss of "the enjoyment of the agricultural land" near the site on which the Band has built a gaming facility. Pet. App. 10a. In holding that Patchak nevertheless has prudential standing to maintain his suit, the court of appeals erred in two different ways. First, instead of focusing on the interests protected by Section 5 of the IRA, it examined the interests protected by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, a separate statute enacted decades later. Pet. App. 8a. Second, it conflated the requirements of Article III standing and prudential standing, reasoning that Patchak had demonstrated prudential standing because he had articulated a "cognizable" injury. *Id.* at 10a. As explained in the petition (at 19-23), the court's analysis on both points is not only erroneous but also in conflict with decisions of this Court.

Patchak makes no effort to defend the sweeping reasoning of the court of appeals. Instead, he notes (Br. in Opp. 29) that this Court's decision in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), limits the Secretary's authority under Section 5 of the IRA, and that the Secretary's regulations make land use relevant to the trust-acquisition decision. Neither point supports the court of appeals' ruling on prudential standing.[*]

As to *Carcieri*, there is no dispute that Section 5 of the IRA limits the Secretary's discretion. But that is only the start of the analysis, and it does not answer the relevant question, which is whether Patchak's alleged injury falls within the zone of interests sought to be protected by Sec-

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[*] Although it is not directly relevant to the analysis here, Patchak's discussion of *Carcieri* appears to conflate the status of being "under Federal jurisdiction" in 1934, which is required for the Secretary to take title to land into trust for a tribe, 555 U.S. at 382, with the status of being "federally recognized" in 1934, which is not, see *id.* at 397-399 (Breyer, J., concurring).

tion 5. Patchak fails to explain how Congress's decision to limit the Secretary's authority to take land into trust for tribes that were under federal jurisdiction in 1934 evidences any intent to protect the interests that he identified for his suit. Although he asserts (Br. in Opp. 29) that the limitations of Section 5 "at least arguably exist[] to protect the interests of the community that would be affected if the land were taken into trust," his alleged injuries have nothing to do with the trust status of the land under the IRA, but only with its use for gaming under IGRA.

Nor can Patchak resort to regulations—regulations he does not even seek to enforce—to establish his prudential standing. That the Secretary has made a discretionary decision to take land-use patterns into account does not mean that Congress intended to protect the interests of landowners in the vicinity when it enacted Section 5 itself.

2. The court of appeals' flawed analysis of prudential standing exacerbates the consequences of its holding that review is available under Section 702 notwithstanding that the relief sought is precluded by the QTA. By expanding the class of potential plaintiffs, that aspect of the court's decision increases the uncertainty that will surround all trust acquisitions. It therefore warrants review in conjunction with review of the court's interpretation of Section 702.

Patchak does not address that argument, but instead asserts (Br. in Opp. 29) that the decision below is consistent with the decisions of this Court and other courts of appeals. As explained above, however, the decision cannot be reconciled with this Court's prudential-standing cases. And while there is no direct conflict on the specific issue of prudential standing under Section 5 of the IRA, the decision below is also contrary to the principles of prudential standing applied by other courts of appeals. See 11-246 Pet. 26-30, 32-33.

C. This Case Is An Appropriate Vehicle For Considering The Questions Presented

Patchak argues that this case is a poor vehicle for considering the questions presented because the decision below is interlocutory (Br. in Opp. 10-14) and because the judgment of the court of appeals could be affirmed on an alternative ground (*id.* at 14-20). Neither argument provides a basis for denying review.

1. Patchak points out (Br. in Opp. 10) that the decision below is interlocutory because the court of appeals reversed the district court's order dismissing the case and remanded for further proceedings. He then devotes considerable effort to demonstrating (*id.* at 11-14) that federal sovereign immunity is different from state sovereign immunity because it does not involve a right not to be sued. But see *Dolan* v. *USPS*, 546 U.S. 481, 484 (2006) ("[S]overeign immunity shields the Federal Government and its agencies from suit.") (internal quotation marks omitted). Whether or not that proposition is correct, it has no relevance here. Although this Court generally does not review cases in an interlocutory posture, it does review such cases when a court of appeals has finally decided an important legal issue that otherwise warrants examination by the Court. See, *e.g.*, *Shinseki* v. *Sanders*, 556 U.S. 396 (2009); *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527 (2008); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004). In particular, the Court often reviews jurisdictional rulings even when they come before the Court in an interlocutory posture. Just last Term, for example, the Court granted the petition in *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), to review the Federal Circuit's reversal of a dismissal for lack of jurisdiction under 28 U.S.C. 1500. The issues in this case similarly warrant review.

2. Patchak next observes (Br. in Opp. 14) that the court of appeals did not address what he refers to as "a second sovereign-immunity issue—the 'time-of-filing issue.'" That is, the court did not consider whether the availability of suit under the APA at the time Patchak filed suit (before the land was taken into trust) survived the Secretary's action taking title to the land. Pet. App. 21a n.10. According to Patchak, depending on how that issue is resolved, it could provide an alternative ground for affirming the judgment below. As Patchak concedes (Br. in Opp. 17-18), however, that issue is itself the subject of a circuit conflict, and the D.C. Circuit does not appear to have taken a position on it. It is therefore far from clear that the time-of-filing issue would be resolved in Patchak's favor. More importantly, even if the sovereign-immunity analysis were conducted at the time of the filing of the complaint and were unaffected by the Secretary's subsequent action taking title to the land in trust, that would do nothing to establish Patchak's prudential standing. Thus, the supposed alternative ground for affirmance would only be an alternative ground if this Court were to resolve the second question presented in Patchak's favor.

In any event, whatever the ultimate outcome of the litigation over the particular land acquisition at issue here, Patchak does not deny that this case would provide a vehicle for the Court to consider important questions concerning the interpretation of the APA and the QTA as well as prudential standing. The possibility that Patchak might ultimately be able to identify another waiver of sovereign immunity would not prevent the Court from addressing the questions presented in the petition. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary. See, *e.g.*, *Skinner* v. *Switzer*,

131 S. Ct. 1289, 1300 (2011); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010). The same course is appropriate here.

* * * * *

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

Respectfully submitted.

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