

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x

3   MATCH-E-BE-NASH-SHE-WISH BAND OF       :

4   POTTAWATOMI INDIANS,                   :

5                   Petitioner                   :   No. 11-246

6                   v.                         :

7   DAVID PATCHAK, ET AL.                   :

8   - - - - -x

9   and

10   - - - - -x

11   KEN L. SALAZAR, SECRETARY OF THE       :

12   INTERIOR, ET AL.,                     :

13                   Petitioners                   :   No. 11-247

14                   v.                         :

15   DAVID PATCHAK, ET AL.                   :

16   - - - - -x

17   Washington, D.C.

18   Tuesday, April 24, 2012

19

20                   The above-entitled matter came on for oral

21   argument before the Supreme Court of the United States

22   at 10:06 a.m.

23   APPEARANCES:

24   ERIC D. MILLER, ESQ., Assistant to the Solicitor

25       General, Department of Justice, Washington, D.C.; for

1       Petitioners in No. 11-247.

2       PATRICIA A. MILLETT, ESQ., Washington, D.C.; for

3       Petitioner in No. 11-246.

4       MATTHEW T. NELSON, ESQ., Grand Rapids, Michigan; on

5       behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 this morning in Case 11-246, Match-E-Be-Nash-She-Wish  
5 Band of Pottawatomi Indians v. Patchak.

6 Mr. Miller.

7 ORAL ARGUMENT OF ERIC D. MILLER

8 ON BEHALF OF THE PETITIONERS IN NO. 11-247

9 MR. MILLER: Mr. Chief Justice, and may it  
10 please the Court:

11 The suit in this case suffers from two  
12 independent jurisdictional defects, either one of which  
13 provides a basis for reversing the judgment of the court  
14 of appeals.

15 The first is that the United States has not  
16 waived its sovereign immunity from suits challenging its  
17 title to Indian trust lands. And the second is that  
18 Patchak, the plaintiff, lacks prudential standing  
19 because the interests that he seeks to vindicate in the  
20 suit are not within the zone of interests protected or  
21 regulated by section 5 of the Indian Reorganization Act,  
22 the provision whose alleged violation forms the basis  
23 for his complaint.

24 JUSTICE SOTOMAYOR: Could you tell me who you  
25 think would have a valid and timely APA action to

1 challenge what the Secretary has allegedly done here,  
2 which is to take lands into trust in violation of the  
3 statute per our earlier -- I know that the U.S. is  
4 challenging that assumption, but let's assume the -- the  
5 reality of the allegation. Who would -- who would be  
6 able to challenge it, and in what mechanism?

7 MR. MILLER: There are -- there are two parts  
8 to that. And taking the timing question first, the  
9 claim would have to be brought before the land was taken  
10 into trust. And that's why the regulations set out a  
11 30-day period after the announcement of the intent to  
12 take the land into trust before title is actually  
13 transferred. So somebody would have to file during that  
14 period, as the MichGO plaintiffs did --

15 JUSTICE SOTOMAYOR: That, I understand.  
16 That's why I said timely filed.

17 MR. MILLER: And the proper plaintiff for a  
18 claim under section 5 -- and, of course, there can be  
19 other claims under NEPA or the IGRA -- but under section  
20 5 of the IRA, the proper plaintiff would be a State or  
21 local government, because those are the entities that  
22 are directly affected, directly regulated by the  
23 transfer of jurisdiction to the tribe --

24 JUSTICE SOTOMAYOR: Let's assume a situation  
25 where you first promise the land to one tribe, and then,

1 in the midst of negotiations, another tribe lays claim.  
2 The United States says, I change my mind; I'm going to  
3 give the land to the other tribe. Does the tribe that  
4 you have denied the land to have any standing or any  
5 rights with respect to challenging that determination?

6 MR. MILLER: Yes. As the beneficiaries of  
7 section 5, the parties for whose benefit Congress acted  
8 and the Secretary would be acting, I think in that  
9 scenario a tribe would have standing to challenge it.

10 JUSTICE SCALIA: Mr. Miller, you -- you claim  
11 on behalf of the government that the decision of whether  
12 to take the land into trust has nothing to do with the  
13 use to which the land will be put; wherefore, these  
14 plaintiffs who were complaining about the use to which  
15 it'll be put have no standing.

16 If that is so, why did the government delay  
17 the taking into trust for 3 years while there was  
18 pending a lawsuit which would have prevented the use  
19 that the government intended the newly trusted land to  
20 be used for?

21 You delayed for 3 years because there was a  
22 challenge to whether you could use -- whether this land  
23 could be used for what you call gaming and I call  
24 gambling.

25 Why did you delay for 3 years if it's

1 irrelevant?

2 MR. MILLER: Well, the -- the challenge in  
3 that case was -- was not just to the use. It was to the  
4 decision to take title to land into trust. And the  
5 Secretary's policy, as set out in --

6 JUSTICE SCALIA: Well, wait. On what basis?  
7 On any basis other than --

8 MR. MILLER: There was a NEPA claim, for  
9 example. And the -- the plaintiff in that case, the  
10 MichGO organization, alleged that the Secretary had not  
11 complied with NEPA, had not adequately considered the  
12 environmental consequences of the action to take the  
13 land into trust.

14 JUSTICE SCALIA: Well, what environmental  
15 action consequences are there from the mere decision to  
16 take it into trust? Unless you know what it's going to  
17 be used for, you have no idea what the environmental  
18 consequences are.

19 MR. MILLER: Well, that's -- that is true.  
20 And it is also true that NEPA may in some circumstances  
21 require consideration of the use for which the land is  
22 to be put; but, it doesn't follow that section 5  
23 requires or contemplates protecting the interests of  
24 nearby landowners from the use.

25 JUSTICE SCALIA: But the challenge was

1 to -- was to the transfer, you say.

2 MR. MILLER: That -- I mean, that was -- the  
3 allegation --

4 JUSTICE SCALIA: Based in part on the use to  
5 which it was going to be put; right?

6 MR. MILLER: Right, but what -- what Michigan  
7 was seeking, what the plaintiff was seeking in that  
8 case, was an injunction barring the transfer.

9 And the Secretary's policy -- the whole point  
10 of the 30-day regulation is to allow people who want to  
11 challenge the transfer to have a full opportunity to  
12 litigate those claims. And that is why the --

13 JUSTICE GINSBURG: And that wouldn't be true  
14 of Mr. Patchak? Suppose he had filed in the 30-day  
15 window. The Secretary gives notice to affected persons.  
16 So he comes in and he says: I think that you don't have  
17 authority to do it because this tribe wasn't under  
18 Federal jurisdiction, and so I want you to call -- call  
19 it off. Nothing -- nothing has been transferred within  
20 30 days.

21 I thought both your brief and the tribe's  
22 brief said that the judicial review would be available  
23 to any affected person who used that procedure. Is  
24 that -- is that true?

25 MR. MILLER: I mean, if they could establish



1 standing, but -- if he had filed within the 30-day  
2 period, the Secretary would not take title to the land  
3 until there was a full opportunity for judicial review.

4 Now, in this case, he filed outside the  
5 30-day period. He was aware that --

6 JUSTICE GINSBURG: But you said -- you had it  
7 was important if. So the argument is this tribe wasn't  
8 under Federal jurisdiction. I could raise that because  
9 I'm an affected person. Somebody's got to be able to  
10 enforce against the Secretary the limitations that  
11 Congress put on the Secretary. So would there be  
12 standing in that situation?

13 Mr. Patchak comes in within the 30-day  
14 period, so he's not trying to undo any done deal.

15 MR. MILLER: There would not be standing for  
16 Patchak as a private individual, but there would be  
17 standing for a State or local government or, in  
18 the unusual situation that Justice Sotomayor suggested,  
19 for another tribe --

20 JUSTICE GINSBURG: So then you disagree with  
21 the tribe that said in no uncertain terms, in its reply  
22 brief, that this case is not about the availability of  
23 judicial review. Judicial review was available in the  
24 30-day window.

25 MR. MILLER: I think we -- we don't disagree

1 with that in the context of the discussion of the  
2 sovereign immunity issue. I don't understand that  
3 statement in the tribe's brief to have been a concession  
4 that there would have been standing.

5 JUSTICE KAGAN: Well, on the standing point,  
6 I mean, the -- the distinction that you're setting up  
7 between acquisition of land and use of land -- this goes  
8 back to Justice Scalia's question -- that strikes  
9 me as -- as artificial, that the question of when land  
10 is acquired is all tied up with the question of what use  
11 is going to be made of it.

12 The government doesn't acquire this land with  
13 no object in mind. It thinks about how the land is  
14 going to be used. So that in the end, this really is a  
15 land use statute, isn't it?

16 MR. MILLER: Well, it is a land use statute  
17 in -- in this sense, in the sense that -- and you're  
18 right that the regulations do refer to the purposes for  
19 which the land is to be used, but that's because --

20 JUSTICE KAGAN: And the statute as well  
21 thinks of this as a -- is a statute that's designed to  
22 promote economic development, which is dependent on some  
23 understanding of how the land is actually going to be  
24 used by the tribes.

25 MR. MILLER: That -- that is exactly right.

1 And that's why, in determining whether -- the Secretary  
2 has to take account of use in order to determine whether  
3 it will, in fact, serve the interest of promoting tribal  
4 economic development and self-governance, but it doesn't  
5 follow that the effect of that use on bystanders, on  
6 other property owners in the vicinity, is within the  
7 interests that Congress had in mind --

8 JUSTICE SCALIA: Why not? Of course, it  
9 doesn't have to be within the interest, it just has to  
10 be arguably within the interest. That -- that adverb is  
11 left out in much of the discussion.

12 But if, indeed, the use of the land is one of  
13 the elements to be considered in taking title, why isn't  
14 somebody who is affected by the proposed use within the  
15 zone of interest?

16 MR. MILLER: Because -- I mean, just to take  
17 the facts of this case as an example, you know,  
18 Patchak's objection is not to the jurisdictional  
19 transfer. It's not to the fact that this is now going  
20 to be tribal land rather than land subject to the taxing  
21 or regulatory authority of the State of Michigan or  
22 Allegan County --

23 CHIEF JUSTICE ROBERTS: Just to interrupt, in  
24 other words, it's not to the title.

25 MR. MILLER: Well, I mean -- that is -- the

1 relief he is trying to get is to undo that, but  
2 the -- the injury doesn't come from that.

3 CHIEF JUSTICE ROBERTS: I'm sorry.

4 MR. MILLER: The injury comes from the fact  
5 that the land is going to be used for gaming, but in  
6 1934 --

7 JUSTICE SCALIA: You could put that it way,  
8 or you could put it that the injury comes from the  
9 government's taking title for gaming. Okay? You could  
10 put it that way as well.

11 MR. MILLER: But --

12 JUSTICE SCALIA: Inasmuch as the government  
13 always has a purpose in mind when it takes title.

14 MR. MILLER: But for the zone of interest  
15 test, the question would be, are people who may be  
16 adversely affected by gaming on Indian land within the  
17 zone of interest -- is that interest arguably  
18 something the tribe -- Congress was speaking to --

19 JUSTICE SOTOMAYOR: I'm a little confused.  
20 The government --

21 JUSTICE KENNEDY: On what date was it -- on  
22 what date was it clear that the use would be gaming?  
23 There is some suggestion in the briefs that, oh, well,  
24 it could be light industry and it was zoned for economic  
25 use generally. At what point was it acknowledged by all

1     that this would be for gaming? At the very outset?

2                 MR. MILLER: I believe that in applying to  
3     have the land taken into trust, the tribe said what --

4                 JUSTICE KENNEDY: At the very outset.

5                 MR. MILLER: -- it wanted to happen.

6                 JUSTICE ALITO: What would happen if someone  
7     filed a challenge within the 30-day period and then the  
8     government took title to the land while the litigation  
9     was pending? Do the regulations preclude that from  
10    happening while the litigation continues, or is it  
11    necessary for the -- the challenger to obtain a stay  
12    from a court?

13                MR. MILLER: The regulations do not address  
14    that. The BIA manual provides that that action, of  
15    taking the land into trust, should not be taken while  
16    the litigation is pending.

17                JUSTICE ALITO: Well, is that enforceable?

18                MR. MILLER: I -- I think that it would not  
19    be, but I think that -- I guess I would say two things  
20    about that. The first is that the Secretary enacted  
21    these regulations, the 30-day notice rule, precisely for  
22    the purpose of ensuring that there would be an adequate  
23    opportunity for judicial review, and thus removing the  
24    constitutional doubt that the Eighth Circuit had found  
25    associated with the IRA.

1           And I think -- so there is every reason to  
2   think that the Secretary is going to conscientiously  
3   carry out what those regulations provide for, which is  
4   allowing judicial review. And if the Secretary were  
5   ever to do that, I think he would find that going  
6   forward in every case, courts would enter a stay.

7           CHIEF JUSTICE ROBERTS: Well, they didn't  
8   here. I mean, when Patchak filed his suit, title had  
9   not yet passed to the Secretary. And he sought a stay.

10          MR. MILLER: And -- and it was -- it was  
11   denied, and he could have sought relief from the court  
12   of appeals, and he didn't.

13          CHIEF JUSTICE ROBERTS: But nothing -- at  
14   that point, you thought nothing prevented the Secretary  
15   from moving forward, and in fact, the Secretary did move  
16   forward even though he'd already filed the suit.

17          MR. MILLER: That -- yes.

18          JUSTICE BREYER: All right. Well, then why  
19   isn't it just like your 30 days?

20          MR. MILLER: Well, because this was a suit  
21   that was not filed within the 30-day period. The --

22          JUSTICE BREYER: So what?

23          MR. MILLER: They --

24          JUSTICE BREYER: Can I -- the -- this is  
25   exactly the point that I don't understand. Forget

1 standing for a moment. I'm just thinking of your quiet  
2 title action.

3 This wasn't an action to quiet title at all.  
4 This was a -- I looked at the complaint, as I -- as I  
5 gather from his questions, so did the Chief Justice.  
6 And it is a complaint filed before the -- the property  
7 was taken into trust, and it asks for an injunction  
8 under the APA, if it wants review of that, before the  
9 government has any title to it at all, or at least it  
10 hasn't taken it into trust.

11 So why are we considering quiet title? What  
12 has that to do with this? Why isn't it  
13 exactly what -- now, that's the same as the Chief  
14 Justice asked, and I have exactly the same question.

15 MR. MILLER: Right. Well -- and in that  
16 period before the land is taken into trust, the APA,  
17 everyone agrees, permits -- permits that litigation.

18 JUSTICE BREYER: All right. Well, why isn't  
19 that -- that's the end of that argument, then, isn't it?  
20 Because this suit was brought seeking an injunction  
21 before the land was taken into trust; the district court  
22 denies the request for the injunction. The court of  
23 appeals reverses that. And so there we are. We're  
24 reviewing that action by the court of appeals, reviewing  
25 a judge who said you are not entitled to an injunction

1 sought before the land was taken into trust.

2 MR. MILLER: Because at this point, the  
3 question of whether to enjoin the transfer from taking  
4 place is moot. Because --

5 JUSTICE BREYER: Oh, I don't know about that.  
6 Well --

7 MR. MILLER: The relief that's being sought  
8 now -- and this is made clear in Patchak's brief in the  
9 court of appeals -- is an order compelling the Secretary  
10 to relinquish the title to the land. And so that --

11 JUSTICE BREYER: Well, I don't know how --  
12 how we should treat that. There -- there was an order.  
13 Suppose that order was wrong. Suppose they should have  
14 granted the injunction. Then isn't what we should do,  
15 send it back because that injunction should have been  
16 granted, then have a hearing or trial or whatever you  
17 want to have on whether the Act applies, and then figure  
18 out how you do relief? Which I don't know.

19 MR. MILLER: No. The time to seek review of  
20 whether to enjoin a not-yet-completed transfer is before  
21 the transfer is completed.

22 JUSTICE BREYER: They did.

23 MR. MILLER: But -- and if he wanted to  
24 appeal the district court's denial of that injunction,  
25 he could have done so as of right under --



1 JUSTICE BREYER: He didn't appeal that. He  
2 appealed it different --

3 MR. MILLER: He did not appeal it.

4 JUSTICE KENNEDY: Well, then your -- your  
5 argument is just one of timing and not the fact that the  
6 reliance is on the -- is on the QTA.

7 The tribe says, isn't it ironic that if you  
8 really have a claim in the land as a property owner, you  
9 can't sue under the QTA, and this person is much further  
10 removed. Well, that's because he has a different ground  
11 for relief. That's all we're talking about.

12 MR. MILLER: Well, the --

13 JUSTICE KENNEDY: So the fact that the QTA  
14 suddenly, deus ex machina, pops onto the scene doesn't  
15 mean that it -- that that changes his -- his ground for  
16 relief that he's -- that he's relying upon. His ground  
17 of relief has always been the same, APA.

18 MR. MILLER: With -- with respect, Your  
19 Honor, once the land is taken into trust, the -- the  
20 only effective relief would be an order taking the land  
21 out of trust, and that's what brings this within the  
22 scope of the QTA.

23 JUSTICE ALITO: Well, that depends on whether  
24 sovereign immunity is judged as of the time of the  
25 filing of the complaint or as of the time of the

1 litigation of the sovereign immunity claim, right? And  
2 you claim -- you don't want us to address that issue.

3 MR. MILLER: We -- we think it's -- it's not  
4 properly before the Court. But I mean, one thing I  
5 would just say about that is it is not remarkable, or it  
6 often happens that, as the nature of the claims or the  
7 identity of the parties changes throughout the course of  
8 litigation, sovereign immunity can bar a suit that  
9 wouldn't have been barred before.

10 And one example of that is under the Westfall  
11 Act. Somebody sues an officer of the United States for  
12 a tort, that suit can go forward. But if the Attorney  
13 General then certifies under the Westfall Act that the  
14 employee was acting within the scope of his or her  
15 duties, then it gets converted into an action against  
16 the United States, which might, if it falls within one  
17 of the FTCA exceptions, be brought --

18 JUSTICE SCALIA: But the Act provides for  
19 that. The Act provides for that, right?

20 MR. MILLER: Well, but that -- that's just an  
21 example of how, as -- as the parties, or the relief --  
22 here, it's the relief -- changes, sovereign immunity can  
23 bar an action.

24 If I could reserve the remainder of my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Millett.

2 ORAL ARGUMENT OF PATRICIA A. MILLETT

3 ON BEHALF OF THE PETITIONER IN NO. 11-246

4 MS. MILLETT: Mr. Chief Justice, and may it  
5 please the Court:

6 When you strip title to land, which is a fact  
7 in this case, you strip sovereignty. You wreak havoc on  
8 ongoing governmental operations, you -- on criminal  
9 jurisdiction, civil jurisdiction, the backdrop against  
10 which contracts were negotiated, investment decisions  
11 made and economic development undertaken.

12 That is why the Congress of the United States  
13 and this Court in Coeur D'Alene have never allowed  
14 injunctive relief to strip the United States of title  
15 that it has. The essence of sovereign immunity is,  
16 right or wrong, you cannot take title away that the  
17 United States has.

18 JUSTICE SCALIA: Well, is -- is that in  
19 the -- is that in the Administrative Procedure Act? I  
20 thought the Administrative Procedure Act eliminates  
21 the -- the old bugaboo of sovereign immunity, and says  
22 when it -- when it will stand and when it won't.

23 MS. MILLETT: If you look --

24 JUSTICE SCALIA: And if you're relying on the  
25 Quiet Title Act, that -- that clearly covers only suits

1    which seek to say, I own the land rather than the  
2    government, and this is not such a suit.  So I don't see  
3    why the normal APA principles wouldn't govern.

4                   MS. MILLETT:  For two reasons, Justice  
5    Scalia.  Because the APA itself -- and this is on page  
6    6a of the addendum to our brief -- says that it does not  
7    waive sovereign immunity and does not grant relief if  
8    another statute expressly or impliedly forecloses the  
9    relief that is sought.  And the Quiet Title Act says you  
10   cannot have an injunction stripping the United States of  
11   land, period, and you cannot have any litigation over  
12   title --

13                  JUSTICE SCALIA:  No, but the relief to be  
14   sought under the Quiet Title Act is title in the  
15   plaintiff.  That's the relief ultimately sought.

16                  MS. MILLETT:  No --

17                  JUSTICE SCALIA:  Now, on the way to that, you  
18   may -- you may get some injunctive remedy, but the basis  
19   for the lawsuit is -- is not:  I own the land.

20                  MS. MILLETT:  With respect, Justice Scalia,  
21   you can get no injunctive relief whatsoever even if you  
22   are asserting title.  But the Quiet Title Act itself is  
23   brought -- it limits relief to monetary compensation,  
24   unless the government agrees to a specific relief.

25                  JUSTICE SCALIA:  Relief in that kind of suit,

1 yes.

2 MS. MILLETT: Yes --

3 JUSTICE SCALIA: Relief in that kind of suit.

4 But this is not that kind of suit.

5 MS. MILLETT: But -- no. Justice Scalia,  
6 with respect, on page -- this is 2a of the addendum to  
7 our brief, 2409a(a), the type of suit that is addressed,  
8 and to which the Indian lands exception applies, is a  
9 suit -- and I'm reading here from the second line of  
10 a(a): "A civil action -- "

11 JUSTICE SCALIA: Excuse me. I guess I've  
12 lost you.

13 MS. MILLETT: I'm sorry. I'm on the addendum  
14 to our -- the blue brief, 2a, and this is the Quiet  
15 Title Act.

16 JUSTICE SCALIA: Okay.

17 MS. MILLETT: And right -- subsection (a),  
18 the second line, all right: "The waiver of sovereign  
19 immunity is for a civil action under this section to  
20 adjudicate a disputed title." It does not say --

21 JUSTICE KAGAN: Ms. Millett, it also says:  
22 "Under this section."

23 MS. MILLETT: Yes.

24 JUSTICE KAGAN: And the section describes the  
25 complaint. It says: "The complainant shall set forth

1 with particularity the nature of the right, title, or  
2 interest which the plaintiff claims."

3           So the type of suit that this section has in  
4 mind is a suit in which the plaintiff claims a right,  
5 title or interest. And the language that you read,  
6 "under this section," well, that's what this section is  
7 about, a suit in which a plaintiff claims the right,  
8 title or interest.

9           MS. MILLETT: No, Justice Kagan, in this  
10 respect. That tells you what you have to do if you are  
11 allowed to proceed under the statute to win, the first  
12 step of what you have to do. But what subsection (a)  
13 says is what is carved out, what is a wholesale -- and  
14 this Court said in *Mottaz*, a retention of immunity, even  
15 in the face of arguments that the government has done  
16 wrong administratively, as in *Mottaz*. What you  
17 do -- have done is retain immunity.

18           When the -- the section here right under the  
19 sentence I read, Justice Scalia, about this section does  
20 not apply to trust or restricted Indian lands, what that  
21 meant was that this -- that Congress, against a backdrop  
22 of complete immunity, said: We've looked at lands,  
23 we've studied what we're doing, and we are not doing two  
24 things, and we're going to be explicit about it. We are  
25 not letting you touch Indian lands. The United

1 States may not be named --

2 JUSTICE SCALIA: You can say that again and  
3 again, counsel, but it does say "under this section."  
4 And I don't -- I don't know how you get out from under  
5 that. It says "under this section."

6 MS. MILLETT: This --

7 JUSTICE SCALIA: And if this section applies  
8 only to suits seeking to assert title on the part of a  
9 plaintiff, it's not under this section.

10 MS. MILLETT: They are -- this section is, I  
11 think, defined by what Congress's waiver of sovereign  
12 immunity. And it didn't say we're waiving sovereign  
13 immunity for quiet title actions. It says for a civil  
14 action in which the United States' title is disputed.  
15 So quieting U.S. title --

16 JUSTICE BREYER: But that -- but you  
17 don't -- you can't believe that totally because you  
18 agree there is some APA review of an action brought  
19 before the title shifts where, the claim is, you cannot  
20 take title, Secretary. You agree with that. You can  
21 bring some.

22 MS. MILLETT: Absolutely. Before title --

23 JUSTICE BREYER: Okay. Once you agree to  
24 that, I stop at the words, not just "under this  
25 section," but "to adjudicate a disputed title to real

1 property."

2                   Then I read his complaint. His complaint, on  
3 31 to 38, is asking for an injunction, and it's asking  
4 for an injunction before they take any title to the  
5 property. And maybe they went ahead and did it anyway,  
6 but is there some other complaint that I didn't read?  
7 Is there some amendment to the complaint in the record?  
8 If so, where is it?

9                   MS. MILLETT: I think there's a constructive  
10 amendment in this sense, because if it's only  
11 thing with --

12                  JUSTICE BREYER: I don't know what a  
13 constructive amendment is.

14                  MS. MILLETT: Well, let me see if I can  
15 explain. If I can explain. To be sure, the complaint,  
16 which was untimely filed for purposes of the protection  
17 of the government's not taking it into -- into trust,  
18 but the set -- it did seek to stop the decision from  
19 happening.

20                  After that happened, when he did not seek  
21 appeal or emergency relief from the district court not  
22 giving him the injunction he asked for -- he asked for a  
23 preliminary injunction to stop the taking of title. The  
24 district court didn't give it. It actually sat on it,  
25 constructively denied it. And it's well recognized in



1 courts of appeals, you can appeal a constructive denial  
2 of a preliminary injunction. He didn't do that.

3 This is the way litigation works. Title  
4 shifted. Sovereign immunity shifted. The Quiet Title  
5 Act didn't apply, then it did apply because title was in  
6 the hand and in the name of the United States  
7 Government.

8 JUSTICE SCALIA: I thought you were going to  
9 answer how his -- his complaint constructively changed.

10 MS. MILLETT: And so after that, he had two  
11 choices. He could have dismissed the action as moot.  
12 But what happened is he continued to press -- and this is  
13 on page 25 of his brief, his court of appeals brief, at  
14 page 26 and 27 -- he wants an injunction now, not to stop  
15 title, but to take title out. And that's when the Quiet  
16 Title Act --

17 JUSTICE SCALIA: I thought you were going to  
18 tell us how it constructively changed to be an action  
19 seeking to have a decree that title was in him, which is  
20 what the QTA covers.

21 MS. MILLETT: No, it was --

22 JUSTICE SCALIA: Okay.

23 MS. MILLETT: No, because the Quiet Title  
24 Act --

25 JUSTICE SCALIA: So even constructively, it

1 hasn't turned into that.

2 MS. MILLETT: The Quiet Title Act, when it  
3 says -- when it says the only way we'll give you a  
4 relief is if you can establish that you have an interest  
5 in the land, forecloses suits seeking to adjudicate --  
6 adjudicate, excuse me -- disputed U.S. title by those  
7 who don't even have an interest.

8 JUSTICE SOTOMAYOR: Counsel --

9 MS. MILLETT: And against the back -- I'm  
10 sorry.

11 JUSTICE SOTOMAYOR: Counsel, you're assuming  
12 that the statute was passed against a backdrop of  
13 complete sovereign immunity, but if you look at Larson  
14 and Malone, it appears as if prior to the enactment of  
15 the QTA, people could bring suits to say that an officer  
16 had acted beyond his or her statutory authority. So  
17 what the Quiet Title Act did was encapsulate some of  
18 that law.

19 From where do we draw the conclusion that the  
20 intent was to eliminate every other claim that could be  
21 brought under something like the APA, or an officer  
22 suit?

23 MS. MILLETT: To be clear, as Justice Scalia  
24 himself then testified before Congress, the law was a  
25 mess, and you could not discern anything from Larson,

1 Malone. And the one area where actually courts have  
2 pretty consistently denied relief, as Justice Scalia  
3 then said, was in the land area.

4 And Congress responded to hardship, but in  
5 doing so, it was making a critical balance. It knew how  
6 disruptive to government it is to pull the rug out from  
7 under the feet of the Federal Government's operations.

8 And -- and it said we're going to draw lines,  
9 and there's three lines. It said: No suits involving  
10 Indian lands, no injunctive relief or coercive  
11 injunctive relief at all will be allowed. If -- if you  
12 have a right, you will only get damages unless the  
13 government agrees otherwise. And to prevail, you must  
14 have an interest in land.

15 Now, that is a concerted judgment of Congress  
16 that we will not --

17 CHIEF JUSTICE ROBERTS: Could I say, just for  
18 a moment, let's suppose the tribe -- the -- Mr. Patchak  
19 brings a nuisance action against the tribe for running a  
20 casino and imposing all these difficulties on the  
21 surrounding previously rural community. He says this is  
22 a nuisance.

23 And the tribe answers and says: No, we can  
24 do this under the Indian Gaming Regulation Act. And  
25 Patchak then says: Well, no, because you don't have

1 valid authority under that Act because the Secretary  
2 shouldn't have taken the land into title.

3 Now, that is not a quiet title action. That  
4 is a nuisance action. Can he have that adjudicated in  
5 that suit?

6 MS. MILLETT: He could -- he could bring a  
7 nuisance action, assuming the tribe waives sovereign  
8 immunity, which would be its own problem. Assuming --  
9 I'm assuming this is a suit against the tribe and not  
10 the Secretary.

11 CHIEF JUSTICE ROBERTS: Right, right.

12 MS. MILLETT: And so there'd be their own  
13 either State law or sovereign immunity questions, if he  
14 could bring it. And then if the government tried to  
15 raise this as -- or, excuse me, the tribe raised it as a  
16 preemption defense, then there would be a separate  
17 question whether at that point a court could issue,  
18 consistent with the Quiet Title Act, a declaratory  
19 judgment which would pull the rug out from the  
20 government's feet.

21 CHIEF JUSTICE ROBERTS: Right. But there'd  
22 be no --

23 MS. MILLETT: Now, to be sure, in the --

24 CHIEF JUSTICE ROBERTS: -- question of his  
25 ability to sue and put that question at issue.

1           MS. MILLETT: There's no question he could  
2 bring a -- assuming tribal sovereign immunity, that he  
3 could bring a nuisance action, but it's also important  
4 to remember in that context, the other reason that  
5 nuisance action would fail is that the courts have  
6 already ruled on this claim about the legitimacy of  
7 authorization of gambling, about the environmental  
8 effects and the esthetic effects in the MichGO  
9 litigation. This is simply recycled through the IRA  
10 claims that have already been adjudicated and lost.

11           CHIEF JUSTICE ROBERTS: Well, but that's a  
12 question that's not before us.

13           MS. MILLETT: So -- but with respect to the  
14 question of judicial review that was mentioned earlier  
15 and I think would be implicated, obviously, in a  
16 nuisance action for -- this is sort of being  
17 case-specific with respect to claim preclusion and  
18 issues like that.

19           CHIEF JUSTICE ROBERTS: Thank you, counsel.

20           MS. MILLETT: Thank you, Your Honor.

21           CHIEF JUSTICE ROBERTS: Mr. Nelson.

22           ORAL ARGUMENT OF MATTHEW T. NELSON

23           ON BEHALF OF THE RESPONDENTS

24           MR. NELSON: Thank you, Mr. Chief Justice,  
25 and may it please the Court:

1           This is a classic APA action. Mr. Patchak is  
2   challenging unlawful agency action. Mr. Patchak is not  
3   asserting a quiet title action where someone asserts an  
4   interest in property owned by the government and is  
5   trying to get that property back.

6           And as this Court has already discussed, the  
7   best evidence of that is the fact that Mr. Patchak filed  
8   this suit before the land was taken into trust. The  
9   fact that the government subsequently took the land did  
10  not affect the nature of Mr. Patchak's lawsuit.

11           JUSTICE GINSBURG: But he didn't file it  
12  within the 30-day window, so that -- that is -- there  
13  was a clear track. He could have filed within 30 days,  
14  and at least the government tells us that that would  
15  have been subject to judicial review, the ruling made  
16  within -- that nothing would go on until that action was  
17  cleared.

18           So why -- if he could have sued early, before  
19  any title transfer, why isn't that all the relief  
20  someone in his position would be entitled to? Why  
21  should he be allowed to wait?

22           I mean, the whole purpose of the 30-day  
23  window is to get people to state their objections.

24           MR. NELSON: Justice Ginsburg, the 30-day  
25  window is a notice period. Mr. Patchak did in fact file

1 his lawsuit within the 6-year statute of limitations  
2 provided by Congress for APA claims. And the reason  
3 that the Secretary adopted the 30-day notice provision  
4 is the very argument that we believe is misplaced here,  
5 namely that the Quiet Title Act springs up to bar  
6 judicial review after the land is taken into trust.

7 We don't believe that's the case, because  
8 Mr. Patchak is not asserting a Quiet Title Act action,  
9 which is limited to those claims where someone says,  
10 this is my property and I want it back or, with regard  
11 to the government, at least pay me for it.

12 JUSTICE SCALIA: You -- you say the 30-day  
13 window only applies to quiet title actions.

14 MR. NELSON: Your Honor, the 30-day  
15 window -- yes, if someone was asserting a quiet title  
16 action, the 30-day window would apply.

17 JUSTICE SCALIA: Surely -- surely the 30-day  
18 envisions comments by anybody, not just people who claim  
19 to own the property, doesn't it?

20 MR. NELSON: Your Honor, certainly it  
21 provides for comments, in that people can come and  
22 assert their comments. Absolutely. But it doesn't  
23 prevent someone from asserting a lawsuit.

24 JUSTICE SOTOMAYOR: Would you have been  
25 entitled to file in that 30-day period? How is your

1 claim, the one that you ultimately made, any different  
2 than what you would have done if you had filed within  
3 the 30 days?

4 MR. NELSON: Justice Sotomayor --

5 JUSTICE SOTOMAYOR: Same claim; right?

6 MR. NELSON: It is the same claim, yes, Your  
7 Honor.

8 JUSTICE SOTOMAYOR: All right. Tell me what  
9 relief you're seeking that's different than -- are  
10 you -- what relief are you seeking? Aren't you seeking  
11 to shed the United States of its title?

12 MR. NELSON: Your Honor, the relief that --

13 JUSTICE SOTOMAYOR: Just the -- what's  
14 the -- don't tell me what your cause of action is. What  
15 relief at the end of the day do you want?

16 MR. NELSON: Justice Sotomayor, Mr. Patchak  
17 is seeking a declaratory judgment that the decision of  
18 the Secretary that it can take land into trust for this  
19 particular band of Indians is incorrect, and that  
20 therefore, the decision to do so is ultra vires; and as  
21 an incident to that relief, now that the government has  
22 taken the land into trust, that the land now be taken  
23 out of trust.

24 That does not convert this, though, into a  
25 quiet title action, because Mr. Patchak is not asserting



1 an interest in the property itself.

2 The relief of the quiet title action  
3 provides -- has two parts. It both provides for -- that  
4 title will be taken from the government, and that title  
5 will be quieted in the plaintiff. The relief that  
6 Mr. Patchak is seeking does not include quieting title  
7 in himself.

8 JUSTICE KAGAN: Mr. Nelson, putting that  
9 question aside of whether this is or isn't a quiet title  
10 action, there's another question, which is whether  
11 sovereign immunity can come into effect after a suit has  
12 been filed. It seems to me a hard question, and one  
13 that has not been briefed by either party particularly.

14 So I just ask you, is there case -- are there  
15 any cases that you can point to that suggest that  
16 sovereign immunity cannot come into effect after a suit  
17 has been filed? Because what the government says is,  
18 you know, circumstances change, conditions change on the  
19 ground, sovereign immunity can pop up where it didn't  
20 exist before.

21 Is there any precedent that you have to  
22 negate that?

23 MR. NELSON: Your Honor, I am not at this  
24 time prepared to say that there is or is not. I do know  
25 that we have cited in the footnote in our brief the -- I

1 believe it's the Grupo Dataflux case that indicates that  
2 jurisdiction is decided at the time that the complaint  
3 is filed. Because the D.C. Circuit specifically  
4 reserved this issue, we did not believe this issue was  
5 before the Court.

6 JUSTICE GINSBURG: The government answers to  
7 that, that's in diversity. You know, you determine  
8 citizenship as of the date the complaint is filed. If  
9 the citizenship of a party changes, so it coincides with  
10 someone on the other side of -- of the line, it doesn't  
11 matter. But do you have cases other than diversity  
12 cases where the filing of the complaint -- nothing  
13 happens, nothing that can happen after affects the  
14 jurisdiction as set as of the time the complaint is  
15 filed? I don't know, outside diversity, where this  
16 principle has applied.

17 MR. NELSON: Your Honor, I am not at this  
18 time aware of any cases. I'm not, unfortunately, in a  
19 position to say that the cases do not exist or do exist.  
20 I believe the issue was addressed in the -- the D.C.  
21 Circuit briefing, but I'm not aware at this time of any  
22 cases that would -- that address this specific issue.

23 CHIEF JUSTICE ROBERTS: The Solicitor General  
24 in footnote 1 of his reply brief says that's the general  
25 rule, which I take it there might be exceptions to it.

1 MR. NELSON: Exceptions.

2 CHIEF JUSTICE ROBERTS: But I'm sure he'll  
3 tell us what those are.

4 JUSTICE SOTOMAYOR: Counsel, is there any  
5 limit to who can bring an APA action under your theory?  
6 It seems to me that what you're saying is that anyone  
7 other than a landowner because of the Quiet Title Act  
8 can within 6 years attempt to unravel any decision the  
9 government has made to take land, because we're not  
10 limited now to trust lands.

11 We're limited -- under your theory, whenever  
12 the government takes any kind of land, anyone's entitled  
13 to come in and challenge that action under the APA for 6  
14 years, and to seek an injunction because it isn't a  
15 quiet title action. It's merely a challenge to the  
16 decision to take land.

17 Is there any limit to your theory as to who  
18 can bring that kind of action and --

19 MR. NELSON: Justice Sotomayor, yes, there is  
20 a limit on who may assert these actions. First, with  
21 regard to this Court's prudential standing analysis  
22 would obviously provide a limitation, but second, with  
23 regard --

24 JUSTICE SOTOMAYOR: In which way? You're  
25 saying anyone who's affected, your niece, your farm

1 owner's niece who comes to visit twice a year or visits  
2 the land and walks through it, could presumably say:  
3 I'm negatively affected by the government's taking of  
4 this land, Indian or not, within the 6 years, and the  
5 government improperly took the land. Undo it.

6 MR. NELSON: No, Your Honor, I don't believe  
7 that my -- that my client's niece would have prudential  
8 standing because I don't think that you could -- that  
9 that person would arguably be within the zone of  
10 interests to assert that claim. I think that the zone  
11 of interest test does exclude people who might have  
12 Article III standing from asserting these types of  
13 claims.

14 JUSTICE SCALIA: I thought that -- maybe I'm  
15 wrong, but the government will correct me if I am. I  
16 thought the government concedes that a NEPA action  
17 could -- could be brought when the government is taking  
18 land to use for a particular use. Let's say  
19 it's -- it's taking land for a nuclear waste repository.  
20 Certainly, a NEPA action would -- would lie. You don't  
21 disagree with that, do you?

22 MR. NELSON: We don't disagree.

23 JUSTICE SCALIA: You're supposed to say "yes,  
24 sir, good."

25 (Laughter.)

1 JUSTICE SOTOMAYOR: No, but my  
2 question -- counsel, my question was different. Under  
3 your theory, you could bring this suit after the land  
4 has been taken. NEPA assumes before the land was taken.  
5 I'm talking about under your theory of law, once land  
6 has been taken by the U.S., if anyone has a viable legal  
7 claim that the land was taken improperly, whether it's  
8 Indian trust land or anyone else's land for any other  
9 purpose, that person within 6 years can still bring a  
10 suit under the APA.

11 MR. NELSON: Only to the extent that the land  
12 is taken as a result of administrative action.

13 JUSTICE BREYER: No, no, no. You can't -- I  
14 mean --

15 JUSTICE SOTOMAYOR: Government land is always  
16 taken by administrative action.

17 MR. NELSON: I'm sorry.

18 JUSTICE BREYER: I thought -- I  
19 mean -- sorry. You answer it as you want according to  
20 your argument.

21 There is a difficult question here. The  
22 difficult question is what happens if one brings an  
23 ordinary APA suit before land is taken, before that suit  
24 can be decided -- before that suit can be decided, the  
25 government takes the land. Does that transform it into

1 a quiet title action?

2 The obvious answer, which isn't obvious at  
3 all, is that the answer is that it's a proper APA suit  
4 if you bring it before they take it. And if you bring  
5 it after they take it, it's a quiet title action.

6 And -- and that would seem to me a first-blush answer.

7 But I haven't found -- I mean, that's a  
8 question we don't -- I don't know if we have to answer  
9 that question. It seems to me quite difficult. And I  
10 don't know what authority there is. And is it fully  
11 argued in the briefs? So what -- isn't that  
12 what -- you're thinking -- I think Justice Sotomayor is  
13 thinking, well, and you just said you can bring it  
14 after. I don't know if you can bring it after.

15 So go answer now --

16 (Laughter.)

17 JUSTICE BREYER: And I want to hear what you  
18 say.

19 MR. NELSON: Thank you, Justice Breyer.

20 The fact that this -- the fact -- the fact  
21 that the land is taken into trust does not transform the  
22 action into a quiet title action simply because the  
23 government --

24 JUSTICE SOTOMAYOR: Forget about the trust.

25 MR. NELSON: Okay.

1 JUSTICE SOTOMAYOR: Because under your theory  
2 of what -- what the APA permits you to do, anytime the  
3 government takes land, whether into trust or for any  
4 other purpose, the APA permits someone within 6 years,  
5 with whatever definition of prudential standing you want  
6 to give it, to come in after the taking and challenge  
7 that it was ultra vires, that it was done improperly.  
8 That's your theory.

9 So going back to Justice Breyer's question,  
10 why isn't that within the quiet title action  
11 prohibition --

12 MR. NELSON: Your Honor --

13 JUSTICE SOTOMAYOR: -- once it's in the  
14 government's hands?

15 MR. NELSON: Once it's in the government's  
16 hands, it is -- it does not -- once the government  
17 acquires the title, it does not change the nature of the  
18 APA action, because the Quiet Title Act is limited to --

19 JUSTICE SCALIA: You're not -- you're  
20 answering the question with regard to an argument I  
21 don't think you've made and I don't think you would want  
22 to make. You're not asserting that the action can be  
23 brought anytime within 6 years after the government has  
24 already taken the land. You're just asserting that an  
25 action brought before the government takes the land does

1 not change its character and become a quiet title action  
2 afterwards; right?

3 MR. NELSON: Yes, Your Honor.

4 JUSTICE SCALIA: You're not saying that  
5 anybody can bring within 6 years after the government's  
6 taking a suit, are you? I hope you're not arguing that.

7 MR. NELSON: Absolutely not, Your Honor.

8 JUSTICE SCALIA: Thank you.

9 (Laughter.)

10 JUSTICE ALITO: What would happen now, as a  
11 practical matter, if Mr. Patchak were to -- were to  
12 prevail? I take -- I understand the casino's built and  
13 running. So what would happen?

14 MR. NELSON: Your Honor, what would happen  
15 here, to our understanding, is the land would be taken  
16 out of trust and would revert to the tribe.

17 JUSTICE GINSBURG: But I think the government  
18 told us that the land didn't belong to the tribe in the  
19 first place.

20 MR. NELSON: Your Honor, I'm not entirely  
21 sure as to what the status of the title was. Our  
22 understanding is that --

23 JUSTICE GINSBURG: Well, the government did  
24 say that the Band was not the prior owner of the tract.  
25 So where would it go?



1           MR. NELSON: Your Honor, the -- it depends in  
2 part, I believe, at this -- at that point, based on  
3 State law, what the effect of the Court's decision would  
4 be. Would it render the trust status void? If so,  
5 under Michigan law, the land would vest in the intended  
6 beneficiary, which is the tribe.

7           If it -- if it does not, if the entire action  
8 would be undone, the land would revert back to the prior  
9 owner, which, to the best of my understanding, is a  
10 company that involves ownership both by a group of Las  
11 Vegas investors and also, to my understanding, the Band  
12 itself; although I could be corrected on that.

13           JUSTICE SOTOMAYOR: Was that the -- I thought  
14 part of it was agricultural land, and that another part  
15 was a business. I mean, I think -- I thought -- well,  
16 the government can correct me.

17           MR. NELSON: Your Honor, the land itself was  
18 partially agricultural and partially light  
19 manufacturing. That was how it was zoned.

20           JUSTICE SOTOMAYOR: Right.

21           MR. NELSON: But it was all owned as a single  
22 parcel. The Bradley tract was, I believe, a single  
23 parcel for the purpose of --

24           JUSTICE BREYER: But your injury, your  
25 injury is that it's being used for gambling. So is

1     there room for relief that could say the government can  
2     do what it wants to the land, it just can't let it be  
3     used for gambling, if you want.

4                     And that would cure your injury, and it  
5     wouldn't require the government to give back the land,  
6     and it wouldn't require any unscrambling, and title  
7     could rest in the government. I don't know if that's  
8     possible or not possible.

9                     MR. NELSON: Your Honor, we -- we looked into  
10    and wanted to make an argument that somehow you could  
11    separate the trust title status and the Federal  
12    Government's fee simple interest. And in looking at the  
13    deed itself, it doesn't look like that can be done.

14                    JUSTICE KENNEDY: What were the provisions,  
15    if any, in the Indian Reorganization Act itself that  
16    show a concern for the kind of standing that you're  
17    alleging here?

18                    It seems to me you're talking about  
19    environmental effects and so forth under the  
20    Indian Gaming Act, but yet your primary suit is under  
21    the Indian Reorganization Act. So I don't see -- I  
22    understand how that might give you standing, but how  
23    does it give you a cause of action for relief under the  
24    Indian Reorganization Act?

25                    MR. NELSON: Your Honor, land --

1 JUSTICE KENNEDY: The Indian Reorganization  
2 Act, just to help pursue the question a little bit  
3 further, has a provision about the public interest, but  
4 not in the section that you're relying on. It doesn't  
5 say anything about the public interest.

6 MR. NELSON: Yes, Your Honor, section 463 of  
7 the Indian Gaming Act --

8 JUSTICE KENNEDY: 463 does, but you're going  
9 under 465.

10 MR. NELSON: Correct, we're under 465,  
11 Your Honor.

12 Justice Kennedy, I would point to the fact  
13 that the land is authorized to be taken into trust for  
14 Indians, and when land is taken into trust, it  
15 necessarily implicates the use. And as soon as the use  
16 is implicated, anyone who is affected by that  
17 use -- people who live in close proximity to that  
18 land -- are within -- are arguably within the scope of  
19 those people who Congress would expect to enforce --

20 JUSTICE KENNEDY: What is the specific  
21 provision of the IRA that you rely on? You -- do you go  
22 back to 463? Because there's nothing in 465 that  
23 answers your -- this question, I don't think.

24 MR. NELSON: Your Honor, I agree that section  
25 465 does not specifically reference the public interest.

1 It does, however -- the intent in 465 is to have land  
2 taken into trust. And I don't believe that you can  
3 separate the fact that the land is being taken into  
4 trust from the specific use to which it is being put.

5 Congress authorized the land to be taken into  
6 trust for a specific use. And you can see, in fact,  
7 that the government has reached the same conclusion.  
8 When you look at the regulations that the Secretary has  
9 adopted in consideration of section 465, they not only  
10 address land use, the tribe has to identify the use to  
11 which the land will be put, but they also require the  
12 tribe to identify any conflicts of land use, which  
13 clearly addresses the fact that other people are going  
14 to be affected by the land use.

15 Consequently, those -- and we believe  
16 those -- those regulations are subject to Chevron  
17 deference because they fall within the scope of the  
18 authority delegated to the Secretary, and they don't  
19 conflict with the broad delegation there in the -- in  
20 section 465. So --

21 JUSTICE KENNEDY: That's helpful. Just a  
22 different question, going back to what -- Justice  
23 Alito's question. It does seem that we may be wasting  
24 our time. I'm not suggesting that the State -- that the  
25 case is moot, but you did wait for some 3 years before

1     you brought this suit. The building was built. It  
2     seems to me there's a considerable laches problem. I  
3     suppose that's just not before us.

4                 MR. NELSON: Your Honor, in fact, the APA  
5     reserves the laches defense, and the laches defense has  
6     been asserted here. But I would point out that the  
7     casino hadn't -- the casino did not open, and they did  
8     not move forward with this until after the land was  
9     taken into trust, which was 6 months after this lawsuit  
10    was filed.

11                At that point, in spite of the knowledge of  
12    this Court's decision in Carcieri, they made a  
13    reasonable business decision to move forward with this,  
14    knowing the risk that they were taking, that the entire  
15    basis of them being able to operate a casino and engage  
16    in class 3 gambling could be overturned.

17                JUSTICE KAGAN: But, Mr. Nelson --

18                JUSTICE KENNEDY: But that was under the  
19    MichGO suit, not yours.

20                MR. NELSON: No, Your Honor. They knew that  
21    our suit had been filed --

22                JUSTICE KENNEDY: Oh, your suit had been  
23    filed at that point.

24                MR. NELSON: Correct.

25                JUSTICE KAGAN: Mr. Nelson, could I

1 understand the scope of your argument? Because I had  
2 understood -- let's take the timing question aside for a  
3 minute. Let's -- let's assume that you had filed this  
4 suit after title had transferred. I had understood that  
5 your argument was, yes, you should be allowed to do that  
6 because, even though this was filed after title had  
7 transferred, yours is just not a quiet title action.  
8 And it's not a quiet title action because you're not  
9 seeking title yourself.

10                   Isn't that the question? Isn't that your  
11 argument?

12                   MR. NELSON: Yes, Your Honor.

13                   JUSTICE KAGAN: So your argument really has  
14 nothing to do with the question of timing. Your  
15 argument would be the same even if title had transferred  
16 prior to your filing your lawsuit.

17                   MR. NELSON: Your Honor, we believe that that  
18 is a logical result, but we do not believe that the  
19 Court needs to address that issue in this case because  
20 our argument is much stronger than that because we did,  
21 in fact, file suit before the land was taken into trust.

22                   JUSTICE KAGAN: Well, as I understood your  
23 brief, 49 pages of it were about one thing, and there's  
24 one footnote that's about something else.

25                   In other words, all of your brief is

1 basically saying: Ours is just not a quiet title  
2 action, and so we should be allowed to proceed  
3 irrespective of when the government acquires title. And  
4 then you have this little additional argument which  
5 says: By the way, we started this lawsuit before the  
6 government had title anyway.

7 So, I mean, the briefing in this case is all  
8 about what you now say is your weakest point.

9 MR. NELSON: Your Honor, I would disagree  
10 that it's our weakest point, but I do agree that  
11 the -- that the logic here of the position that this is  
12 not a Quiet Title Act action means that even if the  
13 government acquires title to the land while the suit is  
14 pending, that logically, it would then follow that the  
15 action remains an APA action, and it is not converted  
16 into a quiet title action.

17 JUSTICE SCALIA: I think you're right. I  
18 pushed you into it. It's my fault. You're right.

19 CHIEF JUSTICE ROBERTS: And the proposition  
20 would be simply that the government can't go in  
21 and -- and moot out a suit that was -- by its unilateral  
22 action, right?

23 MR. NELSON: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: I mean, they seem to  
25 recognize that it would be a bad thing, since it's only

1 by their grace, they've told us, that they don't do it  
2 right away anyway. They give people 30 days.

3 MR. NELSON: Correct, Your Honor.

4 JUSTICE GINSBURG: But didn't they --  
5 wasn't -- didn't they have some encouragement from a  
6 court of appeals suggesting there might be a due process  
7 problem if they didn't have that notice?

8 MR. NELSON: Your Honor, there was the Eighth  
9 Circuit decision -- I believe it was United States v.  
10 South Dakota or South Dakota v. United States -- in  
11 which the Court there found that the lack of judicial  
12 review pushed towards the conclusion that the  
13 Reorganization Act is an unconstitutional delegation of  
14 the legislative authority. And that was one of the  
15 reasons, or that was the reason cited in the Federal  
16 Register, for why the Department of Interior adopted the  
17 30-day notice provision.

18 JUSTICE BREYER: I don't think Justice  
19 Scalia's argument was a bad argument. I thought it was  
20 a rather good argument. If in fact you go back and you  
21 take the view that any suit filed to review APA is not a  
22 quiet title action, people could go upset government  
23 title to property years and years later. And they would  
24 say: Oh, well, we're not challenging the title; we're  
25 just challenging what happened when it was taken, the



1 title was taken.

2 That can't be right, it seems to me, first  
3 blush. So therefore, I thought you -- yours is different  
4 because you filed before they took title. But as I say,  
5 I'm uncertain of that distinction.

6 Now, your answer suggests you've been going  
7 both ways. Sometimes you think, well, it matters that  
8 we filed before. And other times, you think, no, it  
9 doesn't matter.

10 JUSTICE SOTOMAYOR: Is that because you don't  
11 have a theory as to why once the government takes it,  
12 it's not a quiet title action?

13 MR. NELSON: Your Honor, the Quiet Title Act  
14 by its terms requires that the person who is asserting  
15 the action had an interest in the property.

16 JUSTICE SOTOMAYOR: So answer my question, or  
17 the one that Justice Breyer has said. Then it  
18 doesn't -- and the one Justice Kagan repeated yet  
19 again -- okay? What difference does it make that the  
20 government has taken title? Whether the government has  
21 title or doesn't, under your theory, since this is not a  
22 quiet action -- title action, anyone who is unhappy with  
23 the way the government took title could challenge it  
24 within 6 years. Isn't that the bottom line of your  
25 theory?

1 MR. NELSON: Yes, Your Honor. Anyone --

2 JUSTICE SOTOMAYOR: Absent laches. You say  
3 the only defense is laches.

4 MR. NELSON: No, Your Honor. The defenses  
5 would be laches. The zone of interest would apply.  
6 Other -- any other defense --

7 JUSTICE SOTOMAYOR: But the bottom line is,  
8 under your theory, as long as no landowner, the person  
9 most directly affected by the taking, as long -- that  
10 person can't sue, but anybody who is an indirect person  
11 can sue within 6 years, anybody who says, I don't want  
12 the land, I just don't want the U.S. to have the land.

13 MR. NELSON: No, Your Honor. There's a  
14 distinction I think has to be made there.  
15 The -- someone who has a right, title, or interest in  
16 the property, absent there being trust land, can sue to  
17 upset the government's title for 12 years under the  
18 Quiet Title Act. They could bring a claim under the APA  
19 for up to 6 years to govern the -- or to challenge the  
20 government's decision to take the land --

21 JUSTICE SOTOMAYOR: But they can't undo the  
22 transfer. They can only get money.

23 MR. NELSON: Under the Quiet Title Act, they  
24 can only -- for the 12-year period, they can only  
25 undo -- they can -- excuse me. The government, if they

1 prevail, the government, correct, has the option of  
2 deciding whether to pay for the land or to -- to give it  
3 up.

4 JUSTICE KAGAN: I think --

5 JUSTICE SCALIA: Of course, the government  
6 can fix that. I mean, if this is indeed an inconvenient  
7 situation, that we think the government should not be in  
8 doubt for 6 years afterwards, I guess Congress can  
9 simply change it; right?

10 MR. NELSON: Yes, Your Honor.

11 JUSTICE SCALIA: Totally within the control  
12 of Congress. We -- we -- we don't have to make up some  
13 limitation to protect -- to protect the United States.

14 MR. NELSON: I agree, Your Honor.

15 JUSTICE SCALIA: Yes.

16 JUSTICE KAGAN: I suppose the question,  
17 Mr. Nelson, though, is whether you can provide us with a  
18 reason why Congress would have wanted what you call  
19 quiet title suits -- and I agree that your definition is  
20 the traditional definition. When somebody -- when the  
21 plaintiff is a -- is himself asserting a right or  
22 interest -- why those suits should be barred, but your  
23 suit involving a third party should not be barred.

24 What could possibly be the reason to  
25 distinguish between those two sets of cases?

1                   Now, you might just say, I don't have to give  
2   you a reason, this is what the result of the statute  
3   says. But if I say, just try to provide me with a  
4   reason why Congress would have wanted that distinction,  
5   what would you say?

6                   MR. NELSON: Your Honor, I guess I would  
7   first say that because relief under the APA is different  
8   than relief under the Quiet Title Act, someone with a  
9   right, title or interest in the property can assert the  
10  same claim that Mr. Patchak can, in spite of the fact  
11  that they have that right, title or interest, under the  
12  APA, as long as they do not seek under the APA to quiet  
13  title in themselves.

14                  Second, with regard to why this provision  
15  would -- this provision is there -- I'm sorry, Your  
16  Honor, I have to acknowledge I've lost the track of your  
17  question.

18                  Have I responded or can you restate it?

19                  JUSTICE SCALIA: What -- what about this as a  
20  reason? When you prevail in a quiet title action, the  
21  only way the government can get off the hook is to give  
22  you the land, if it's -- if it's within, what, the 6  
23  years, or pay you money if it's after 6 years, but  
24  within 12. Whereas in your case, I suppose the  
25  government could moot the suit -- moot the suit, by

1 simply disallowing gambling.

2 Can the government do that?

3 MR. NELSON: Your Honor --

4 JUSTICE SCALIA: Once it has told the tribe  
5 that they can have -- I mean, this suit could  
6 be -- could go away so long as the tribe does not run a  
7 casino; isn't that right? That's your -- that's the  
8 gravamen of your complaint.

9 MR. NELSON: That is the gravamen of the  
10 injury. Yes, Your Honor.

11 JUSTICE SCALIA: So I guess you -- you could  
12 be a happy fellow if -- so long as the tribe doesn't  
13 build a casino. Whereas in -- in quiet title cases, the  
14 only way you can make a happy fellow out of the  
15 plaintiff is to give him the land.

16 MR. NELSON: Or to pay him for it, yes, Your  
17 Honor.

18 Unless the Court has any further questions, I  
19 cede the remainder of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Miller, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF ERIC D. MILLER

23 ON BEHALF OF THE PETITIONERS IN NO. 11-247

24 JUSTICE KENNEDY: Mr. Miller, one -- one  
25 question, if -- if I may. The government takes the

1 position -- at least this was the way the Respondent  
2 puts it -- that it can basically moot their action by  
3 turning this into a quiet title action just by taking  
4 title. And let's assume that that's one  
5 characterization of your position. And the Respondent  
6 on the other hand says, oh, well, this is an APA action,  
7 we can -- we can wait forever, at least for 6 years.

8 Is there some midway position that the  
9 government can't moot the case too soon, that it must  
10 wait a reasonable time? Or is there no basis in the  
11 statute or in the cases for that position to hold?

12 MR. MILLER: If I understand correctly,  
13 you're asking about a case where the -- the lawsuit is  
14 filed before the land has been transferred.

15 JUSTICE KENNEDY: Yes, yes.

16 MR. MILLER: I don't know of any basis for  
17 restricting the government's ability to do that. I  
18 mean, short of the plaintiffs obtaining an injunction  
19 from the Court. I guess the broader point I would make  
20 about that timing question is that the -- the court of  
21 appeals --

22 JUSTICE KENNEDY: Well, in other words,  
23 you're -- you're sticking with your position. You say  
24 you can basically moot a suit at any point you want just  
25 by taking title, so you're -- you're not accepting any

1 qualification to that proposition.

2 MR. MILLER: That -- that is our position. I  
3 would just emphasize that that was not the basis of  
4 the -- the ruling of the court of appeals. The court of  
5 appeals held that it doesn't matter when the suit is  
6 filed, and under the Court's analysis --

7 JUSTICE KENNEDY: All or nothing? Okay.

8 MR. MILLER: -- it would be exactly the same,  
9 even if it was filed later. And I think the -- the  
10 error in that analysis is -- is that the question here  
11 is not whether Patchak's suit is a Quiet Title Act  
12 action. The question is whether the Quiet Title Act  
13 expressly or impliedly precludes relief under section  
14 702, and the answer to that question is yes.

15 And I'd just like to make two points about  
16 that. The first is that the general principle  
17 recognized by this Court in *Brown v. GSA* and a number of  
18 other cases is that when you have a narrowly drawn  
19 remedial scheme for a particular subject, that that  
20 precludes resort to more general remedies. And here,  
21 the Quiet Title Act is exactly such a scheme. It's the  
22 mechanism for adjudicating a disputed title to real  
23 property in which the United States claims an interest,  
24 and it has its own procedures, its own statute of  
25 limitations --

1 JUSTICE KAGAN: Well, but -- but in saying  
2 that you've just broadened it, or arguably, you have.  
3 If -- if you think that the quiet title action is really  
4 about the narrower set of cases, which is when a person  
5 himself claims title, how can you get from that to say  
6 that there is an express or an implied refusal of -- of  
7 this kind of claim?

8 MR. MILLER: I think -- for two reasons. And  
9 the first is, just that -- that first sentence of  
10 2409a(a), which is, you know, to adjudicate a disputed  
11 title to land on which the United States claims an  
12 interest. That's a perfect description of what this  
13 case is.

14 And the second is that the last sentence of  
15 section 702 directs our attention to whether the relief  
16 is expressly or impliedly forbidden by another statute.  
17 And the relief that is sought here is an order  
18 compelling the Secretary to relinquish title on behalf  
19 of the United States to this land. And --

20 CHIEF JUSTICE ROBERTS: What specific -- do  
21 other consequences other than the ability of the  
22 Secretary to take land in trust flow from whether or not  
23 a tribe is recognized in 1934?

24 MR. MILLER: I -- I'm not aware of any. I'm  
25 not sure that there aren't any others, but --



1 JUSTICE SCALIA: All right. Do you have any  
2 concern that the government will get hoist by its own  
3 petard?

4 What your argument -- the conclusion to which  
5 your argument leads is that this individual, or any  
6 individual claiming that the government took title  
7 incorrectly, can sue under the Quiet Title Act, even if  
8 they don't claim that title was taken from them.

9 Are you sure that's good for the government?

10 MR. MILLER: Well, this action would be  
11 barred under the Quiet Title Act because the Quiet Title  
12 Act expressly precludes this relief, where -- where  
13 Indian trust land is at issue, where the relief that's  
14 sought is an injunction compelling relinquishment of  
15 title without the option of paying damages --

16 JUSTICE SCALIA: Of course, that's not the  
17 only time the government takes land, right?

18 MR. MILLER: Well, and the Quiet Title Act,  
19 section (d), requires in a suit under the Quiet Title  
20 Act the plaintiff to identify his interest in the land.

21 CHIEF JUSTICE ROBERTS: Mr. Miller, I  
22 mentioned earlier your footnote 1 in your reply brief  
23 about whether the time of filing question for sovereign  
24 immunity purposes is limited to diversity cases.

25 Are there -- you cite one case. Are there

1 others going the other way?

2 MR. MILLER: I'm not aware of others, but --

3 CHIEF JUSTICE ROBERTS: What --

4 MR. MILLER: -- I can't say with confidence  
5 that there aren't any others.

6 One point I would make on that is just refer  
7 you to the Florida Prepaid case from 1998, which was  
8 about State sovereign immunity, and which explained that  
9 a State may condition its waiver of sovereign immunity  
10 and may change that in the course of the litigation.  
11 And I think that's another analogy that might be  
12 instructive here.

13 CHIEF JUSTICE ROBERTS: So this suit would  
14 come out the other way if the person objecting was just  
15 over the border in -- in Indiana, instead of in  
16 Michigan? Because there would be -- it could be brought  
17 as a diversity suit.

18 MR. MILLER: Well, it would --

19 CHIEF JUSTICE ROBERTS: I'm assuming --

20 MR. MILLER: It would be still  
21 be -- sovereign immunity would still apply. Sovereign  
22 immunity would bar relief, even if the basis for  
23 jurisdiction were diversity rather than --

24 CHIEF JUSTICE ROBERTS: Even if it were a  
25 suit against the tribe, it would still be not a

1 diversity action but a Federal cause of action?

2 MR. MILLER: Our -- our point is that the  
3 reason it's barred is because of sovereign immunity.  
4 When -- the time of filing in diversity cases refers to  
5 if the citizenship of the parties changes during the  
6 course of the litigation. That doesn't -- my  
7 understanding is that doesn't defeat diversity. That's  
8 the nature of that exception.

9 CHIEF JUSTICE ROBERTS: Okay. Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:08 a.m., the case in the  
13 above-entitled matter was submitted.)

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