

1 IN THE SUPREME COURT OF THE UNITED STATES

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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:

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1 Petitioners in No. 11-247.

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3 Petitioner in No. 11-246.

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

5 behalf of Respondents.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ERIC D. MILLER, ESQ.	
4	On behalf of the Petitioners in No. 11-247	4
5	ORAL ARGUMENT OF	
6	PATRICIA A. MILLETT, ESQ.	
7	On behalf of the Petitioner in No. 11-246	19
8	ORAL ARGUMENT OF	
9	MATTHEW T. NELSON, ESQ.	
10	On behalf of the Respondents	29
11	REBUTTAL ARGUMENT OF	
12	ERIC D. MILLER, ESQ.	
13	On behalf of the Petitioners in No. 11-247	53
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
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11
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P R O C E E D I N G S

(10:06 a.m.)

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

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER
ON BEHALF OF THE PETITIONERS IN NO. 11-247

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

The suit in this case suffers from two independent jurisdictional defects, either one of which provides a basis for reversing the judgment of the Court of Appeals.

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

JUSTICE SOTOMAYOR: Could you tell me who you 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 -- I know that the U.S. is challenging
4 that assumption, but let's assume the reality of the
5 allegation. Who would -- who would be able to challenge
6 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 are
22 directly affected, directly regulated by the transfer of
23 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 are 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 three 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 three years because there was
22 a challenge to whether you could use -- whether this
23 land could be used for what you call gaming and I call
24 gambling.

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

1 irrelevant.

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

1 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 MichGO
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 --

13 JUSTICE GINSBURG: And that would be true of
14 Mr. Patchak? Suppose he had filed in the 30-day window.
15 The Secretary gives notice to affected persons. So he
16 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 --

6 JUSTICE GINSBURG: But you said -- you said
7 it was important if. So the argument is this tribe
8 wasn't under Federal jurisdiction. I could raise that
9 because I'm an affected person. Somebody's got to be
10 able to enforce against the Secretary the limitations
11 that 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 don't disagree with

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

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

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

1 relief he is trying to get is to undo that, but the --
2 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 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 that -- Congress was speaking to --

19 JUSTICE SOTOMAYOR: I'm a little confused.

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

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

3 JUSTICE KENNEDY: At the very outset.

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

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

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

16 JUSTICE ALITO: Well, is that enforceable?

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

25 And I think -- so there is every reason to

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

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

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

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

16 MR. MILLER: That -- yes.

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

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

21 JUSTICE BREYER: So what?

22 MR. MILLER: They --

23 JUSTICE BREYER: Can I -- the -- this is
24 exactly the point that I don't understand. Forget
25 standing for a moment. I'm just thinking of your quiet

1 title action.

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

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

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

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

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

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

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

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

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

21 JUSTICE BREYER: They did.

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

25 JUSTICE BREYER: He didn't appeal that. He

1 appealed --

2 MR. MILLER: He did not appeal the denial of
3 the injunction.

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 one thing I would just
5 say about that is it is not remarkable, or it often
6 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: The --

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

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

21 MS. MILLETT: Absolutely. Before title --

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

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

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

11 JUSTICE BREYER: I don't know about a
12 constructive amendment is.

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

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

1 of a preliminary injunction. He didn't do that.

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

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

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

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

20 MS. MILLETT: No, it was --

21 JUSTICE SCALIA: Okay.

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

24 JUSTICE SCALIA: So even constructively, it
25 hasn't turned into that.

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

7 JUSTICE SOTOMAYOR: Counsel --

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

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

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

21 MS. MILLETT: To be clear, as Justice Scalia
22 himself then testified before Congress, the law was a
23 mess, and you could not discern anything from Larson,
24 Malone. And the one area where actually courts have
25 pretty consistently denied relief, as Justice Scalia

1 then said, was in the land area.

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

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

13 Now, that is a concerted judgment of Congress
14 that we will not --

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

21 And the tribe answers and says: No, we can
22 do this under the Indian Gaming Regulation Act. And
23 Patchak then says: Well, no, because you don't have
24 valid authority under that Act because the Secretary
25 shouldn't have taken the land into title.

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

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

9 CHIEF JUSTICE ROBERTS: Right, right.

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

19 CHIEF JUSTICE ROBERTS: Right. But there'd
20 be no --

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

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

24 MS. MILLETT: There is no question he could
25 bring -- assuming tribal sovereign immunity, that he

1 could bring a nuisance action; but, it's also important
2 to remember in that context, the other reason that
3 nuisance action would fail is that the courts have
4 already ruled on this claim about the legitimacy of
5 authorization of gambling, about the environmental
6 effects and esthetic effects in the MichGO litigation.
7 This is simply recycled through the IRA claims that have
8 already been adjudicated and lost.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MS. MILLETT: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Mr. Nelson.

19 ORAL ARGUMENT OF MATTHEW T. NELSON

20 ON BEHALF OF THE RESPONDENTS

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

23 This is a classic APA action. Mr. Patchak is
24 challenging unlawful agency action. Mr. Patchak is not
25 asserting a quiet title action where someone asserts an

1 interest in property owned by the government and is
2 trying to get that property back.

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

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

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

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

21 MR. NELSON: Justice Ginsburg, the 30-day
22 window is a notice period. Mr. Patchak did in fact file
23 his lawsuit within the 6-year statute of limitations
24 provided by Congress for APA claims. And the reason
25 that the Secretary adopted the 30-day notice provision

1 is the very argument that we believe is misplaced here,
2 namely that the Quiet Title Act springs up to bar
3 judicial review after the land is taken into trust.

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

9 JUSTICE SCALIA: You say the 30-day window
10 only applies to quiet title actions.

11 MR. NELSON: Your Honor, the 30-day window --
12 yes, if someone was asserting a quiet title action, the
13 30-day window would apply.

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

17 MR. NELSON: Your Honor, certainly it
18 provides for comments in that people can come and assert
19 their comments absolutely, but it doesn't prevent
20 someone from asserting a lawsuit.

21 JUSTICE SOTOMAYOR: Would you have been
22 entitled to file in that 30-day period? How is your
23 claim, the one that you ultimately made, any different
24 than what you would have done if you had filed within
25 the 30 days?

1 MR. NELSON: Justice Sotomayor --

2 JUSTICE SOTOMAYOR: Same claim, right.

3 MR. NELSON: It is the same claim, yes, Your
4 Honor.

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

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

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

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

21 That does not convert this, though, into a
22 quiet title action because Mr. Patchak is not asserting
23 an interest in the property itself. The relief of the
24 quiet title action provides -- has two parts. It both
25 provides for -- that title will be taken from the

1 government and that title will be quieted in the
2 plaintiff. The relief that Mr. Patchak is seeking does
3 not include quieting title in himself.

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

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

17 Is there any precedent that you have to
18 negate that?

19 MR. NELSON: Your Honor, I am not at this
20 time prepared to say that there is or is not. I do know
21 that we have cited in the footnote in our brief the -- I
22 believe it's the Grupo Dataflux case that indicates that
23 jurisdiction is decided at the time that the complaint
24 is filed. Because the D.C. Circuit specifically
25 reserved this issue, we did not believe this issue was

1 before the Court.

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

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

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

21 MR. NELSON: Exceptions.

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

24 JUSTICE SOTOMAYOR: Counsel, is there any
25 limit to who can bring an APA action under your theory?

1 It seems to me that what you're saying is that anyone
2 other than a landowner because of the Quiet Title Act
3 can within 6 years attempt to unravel any decision the
4 government has made to take land, because we're not
5 limited now to trust lands.

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

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

14 MR. NELSON: Justice Sotomayor, yes, there is
15 a limit on who may assert these actions, first with
16 regard to this Court's prudential standing analysis
17 would obviously provide a limitation, but second with
18 regard --

19 JUSTICE SOTOMAYOR: In which way? You're
20 saying anyone who is affected, your niece, your farm
21 owner's niece who comes to visit twice a year or visits
22 the land and walks through it, could presumably say:
23 I'm negatively affected by the government's taking of
24 this land, Indian or not, within the 6 years, and the
25 government improperly took the land; undo it.

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

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

17 MR. NELSON: We don't disagree.

18 JUSTICE SCALIA: You're supposed to say, yes,
19 sir, good.

20 (Laughter.)

21 JUSTICE SOTOMAYOR: No, but my question --
22 counsel, my question was different. Under your theory,
23 you could bring this suit after the land has been taken.
24 NEPA assumes before the land was taken. I'm talking
25 about under your theory of law, once land has been taken

1 by the U.S., if anyone has a viable legal claim that the
2 land was taken improperly, whether it's Indian trust
3 land or anyone else's land for any other purpose, that
4 person within 6 years can still bring a suit under the
5 APA.

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

8 JUSTICE BREYER: No, no, no. You can't -- I
9 mean --

10 JUSTICE SOTOMAYOR: Government land is always
11 taken by administrative action.

12 MR. NELSON: I'm sorry.

13 JUSTICE BREYER: I thought -- I mean --
14 sorry. You answer it as you want according to your
15 argument.

16 There is a difficult question here. The
17 difficult question is what happens if one brings an
18 ordinary APA suit before land is taken, before that suit
19 can be decided, before that suit can be decided, the
20 government takes the land. Does that transform it into
21 a quiet title action?

22 The obvious answer, which isn't obvious at
23 all, is that the answer is that it's a proper APA suit
24 if you bring it before they take it. And if you bring
25 it after they take it, it's a quiet title action.

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

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

11 (Laughter.)

12 JUSTICE BREYER: And I want to hear what you
13 say.

14 MR. NELSON: Thank you, Justice Breyer. The
15 fact that this -- the fact -- the fact that the land is
16 taken into trust does not transform the action into a
17 quiet title action simply because the government --

18 JUSTICE SOTOMAYOR: Forget about the trust.

19 MR. NELSON: Okay.

20 JUSTICE SOTOMAYOR: Because under your theory
21 of what -- what the APA permits you to do, anytime the
22 government takes land, whether into trust or for any
23 other purpose, the APA permits someone within six years,
24 with whatever definition of prudential standing you want
25 to give it, to come in after the taking and challenge

1 that it was ultra vires, that it was done improperly.
2 That's your theory.

3 So going back to Justice Breyer's question,
4 why isn't that within the quiet title action
5 prohibition --

6 MR. NELSON: Your Honor --

7 JUSTICE SOTOMAYOR: -- once it's in the
8 government's hands.

9 MR. NELSON: Once it's in the government's
10 hands, it is -- it does not -- once the government
11 acquires the title, it does not change the nature of the
12 APA action because the Quiet Title Act is limited to --

13 JUSTICE SCALIA: You're not -- you're
14 answering the question with regard to an argument I
15 don't think you've made and I don't think you would want
16 to make. You're not asserting that the action can be
17 brought anytime within six years after the government
18 has already taken the land. You're just asserting that
19 an action brought before the government takes the land
20 does not change its character and become a quiet title
21 action afterwards; right.

22 MR. NELSON: Yes, Your Honor.

23 JUSTICE SCALIA: You're not saying that
24 anybody can bring within six years after the
25 government's taking a suit, are you? I hope you're not

1 arguing that.

2 MR. NELSON: Absolutely not, Your Honor.

3 JUSTICE SCALIA: Thank you.

4 (Laughter.)

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

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

12 JUSTICE GINSBURG: But I think the government
13 told us that the land didn't belong to the tribe in the
14 first place.

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

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

21 MR. NELSON: Your Honor, the -- it depends in
22 part, I believe, at this -- at that point, based on
23 state law, what the effect of the Court's decision would
24 be. Would it render the trust status void? If so,
25 under Michigan law, the land would vest in the intended

1 beneficiary, which is the tribe.

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

8 JUSTICE SOTOMAYOR: Was that the -- I thought
9 part of it was agricultural land, and that another part
10 was a business. I mean, I think -- I thought -- well,
11 the government can correct me.

12 MR. NELSON: Your Honor, the land itself was
13 partially agricultural and partially light
14 manufacturing. That was how it was zoned.

15 JUSTICE SOTOMAYOR: Right.

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

19 JUSTICE BREYER: But your injury, your
20 injury is that it's being used for gambling. So is
21 there room for relief that could say the government can
22 do what it wants to the land, it just can't let it be
23 used for gambling, if you want.

24 And that would cure your injury, and it
25 wouldn't require the government to give back the land,

1 and it wouldn't require any unscrambling, and title
2 could rest in the government. I don't know if that's
3 possible or not possible.

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

9 JUSTICE KENNEDY: What were the provisions,
10 if any, in the Indian Reorganization Act itself that
11 show a concern for the kind of standing that you're
12 alleging here?

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

20 MR. NELSON: Your Honor, land --

21 JUSTICE KENNEDY: The Indian Reorganization
22 Act, just to help pursue the question a little bit
23 further, has a provision about the public interest, but
24 not in the section which you're relying on. It doesn't
25 say anything about the public interest.

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

3 JUSTICE KENNEDY: 463 does, but you're going
4 under 465.

5 MR. NELSON: Correct, we're under 465,
6 Your Honor.

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

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

19 MR. NELSON: Your Honor, I agree that section
20 465 does not specifically reference the public interest.
21 It does, however -- the intent in 465 is to have land
22 taken into trust. And I don't believe that you can
23 separate the fact that the land is being taken into
24 trust from the specific use to which it is being put.

25 Congress authorized the land to be taken into

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

10 Consequently, those -- and we believe
11 those -- those regulations are subject to Chevron
12 deference because they fall within the scope of the
13 authority delegated to the Secretary, and they don't
14 conflict with the broad delegation there in the -- in
15 section 465. So --

16 JUSTICE KENNEDY: That's helpful. Just a
17 different question, going back to what -- Justice
18 Alito's question. It does seem that we may be wasting
19 our time. I'm not suggesting that the state -- that the
20 case is moot, but you did wait for some three years
21 before you brought this suit. The building was built.
22 It seems to me there's a considerable laches problem. I
23 suppose that's just not before us.

24 MR. NELSON: Your Honor, in fact, the APA
25 reserves the laches defense, and the laches defense has

1 been asserted here. But I would point out that the
2 casino hadn't -- the casino did not open and they did
3 not move forward with this until after the land was
4 taken into trust, which was six months after this
5 lawsuit was filed.

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

12 JUSTICE KAGAN: But, Mr. Nelson --

13 JUSTICE KENNEDY: But that was under the
14 MichGO suit, not yours.

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

17 JUSTICE KENNEDY: Oh, your suit had been
18 filed at that point.

19 MR. NELSON: Correct.

20 JUSTICE KAGAN: Mr. Nelson, could I
21 understand the scope of your argument? Because I had
22 understood -- let's take the timing question aside for a
23 minute. Let's -- let's assume that you had filed this
24 suit after title had transferred. I had understood that
25 your argument was, yes, you should be allowed to do that

1 because, even though this was filed after title had
2 transferred, yours is just not a quiet title action, and
3 it's not a quiet title action because you're not seeking
4 title yourself. Isn't that the question? Isn't that
5 your argument?

6 MR. NELSON: Yes, Your Honor.

7 JUSTICE KAGAN: So your argument really has
8 nothing to do with the question of timing. Your
9 argument would be the same even if title had transferred
10 prior to your filing your lawsuit.

11 MR. NELSON: Your Honor, we believe that that
12 is a logical result; but, we do not believe that the
13 Court needs to address that issue in this case because
14 our argument is much stronger than that because we did,
15 in fact, file suit before the land was taken into trust.

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

19 In other words, all of your brief is
20 basically saying: Ours is just not a quiet title
21 action, and so we should be allowed to proceed
22 irrespective of when the government acquires title. And
23 then you have this little additional argument which
24 says: By the way, we started this lawsuit before the
25 government had title anyway.

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

3 MR. NELSON: Your Honor, I would disagree
4 that it is our weakest point, but I do agree that the --
5 that the logic here of the position that this is not a
6 Quiet Title Act action means that even if the government
7 acquires title to the land while the suit is pending,
8 that, logically, it would then follow that the action
9 remains an APA action, and it is not converted into a
10 quiet title action.

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

13 CHIEF JUSTICE ROBERTS: And the proposition
14 would be simply that the government can't go in and --
15 and moot out a suit that was -- by its unilateral
16 action, right?

17 MR. NELSON: Yes, Your Honor.

18 CHIEF JUSTICE ROBERTS: I mean, they seem to
19 recognize that it would be a bad thing, since it's only
20 by their grace, they've told us, that they don't do it
21 right away anyway. They give people 30 days.

22 MR. NELSON: Correct, Your Honor.

23 JUSTICE GINSBURG: Didn't they -- wasn't --
24 didn't they have some encouragement from a court of
25 appeals suggesting there might be a due process problem

1 if they didn't have that notice?

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

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

21 That can't be right, it seems to me, first
22 blush. So, therefore, I thought you -- yours was
23 different because you filed before they took title.
24 But, as I say, I'm uncertain of that distinction.

25 Now, your answer suggests you've been going

1 both ways. Sometimes you think, well, it matters that
2 we filed before, and other times you think, no, it
3 doesn't matter.

4 JUSTICE SOTOMAYOR: Is that because you don't
5 have a theory as to why once the government takes it
6 it's not a quiet title action?

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

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

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

21 JUSTICE SOTOMAYOR: Absent laches. You say
22 the only defense is laches.

23 MR. NELSON: No, Your Honor. The defenses
24 would be laches, the zone of interest would apply,
25 other -- any other defense --

1 JUSTICE SOTOMAYOR: But the bottom line is,
2 under your theory, as long as no landowner, the person
3 most directly affected by the taking, as long as that
4 person can't sue, but anybody who is an indirect person
5 can sue within 6 years, anybody who says, I don't want
6 the land, I just don't want the U.S. to have the land.

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

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

17 MR. NELSON: Under the Quiet Title Act they
18 can only -- for the 12-year period they can only undo --
19 they can -- excuse me. The government, if they prevail,
20 the government, correct, has the option of deciding
21 whether to pay for the land or to -- to give it up.

22 JUSTICE KAGAN: I think --

23 JUSTICE SCALIA: Of course the government can
24 fix that. I mean, if this is indeed an inconvenient
25 situation, that we think the government should not be in

1 doubt for 6 years afterwards, I guess Congress can
2 simply change it, right?

3 MR. NELSON: Yes, Your Honor.

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

7 MR. NELSON: I agree, Your Honor.

8 JUSTICE SCALIA: Yes.

9 JUSTICE KAGAN: I suppose the question,
10 Mr. Nelson, though, is whether you can provide us with a
11 reason why Congress would have wanted what you call
12 quiet title suits -- and I agree that your definition is
13 the traditional definition; when somebody -- when the
14 plaintiff is a -- is himself asserting a right or
15 interest -- why those suits should be barred, but your
16 suit involving a third party should not be barred.

17 What could possibly be the reason to
18 distinguish between those two sets of cases?

19 Now, you might just say, I don't have to give
20 you a reason, this is what the result of the statute
21 says. But if I say, just try to provide me with a
22 reason why Congress would have wanted that distinction,
23 what would you say?

24 MR. NELSON: Your Honor, I guess I would
25 first say that because relief under the APA is different

1 than relief under the Quiet Title Act, someone with a
2 right, title or interest in the property can assert the
3 same claim that Mr. Patchak can, in spite of the fact
4 that they have that right, title or interest, under the
5 APA, as long as they do not seek under the APA to quiet
6 title in themselves.

7 Second, with regard to why this provision
8 would -- this provision is there -- I'm sorry, Your
9 Honor, I have to acknowledge I've lost track of your
10 question. Have I responded or can you restate it?

11 JUSTICE SCALIA: What -- what about this as a
12 reason? When you prevail in a quiet title action, the
13 only way the government can get off the hook is to give
14 you the land, if it's -- if it's within, what, the 6
15 years, or pay you money, if it's after 6 years, but
16 within 12. Whereas in your case, I suppose the
17 government could moot the suit, moot the suit, by simply
18 disallowing gambling. Can the government do that.

19 MR. NELSON: Your Honor --

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

25 MR. NELSON: That is the gravamen of the

1 injury, yes, Your Honor.

2 JUSTICE SCALIA: So I guess you -- you could
3 be a happy fellow if -- so long as the tribe doesn't
4 build a casino, whereas in -- in quiet title cases, the
5 only way you can make a happy fellow out of the
6 plaintiff is to give him the land.

7 MR. NELSON: Or to pay him for it, yes, Your
8 Honor.

9 Unless the Court has any further questions, I
10 cede the remainder of my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Miller, you have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF ERIC D. MILLER

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

15 JUSTICE KENNEDY: Mr. Miller, one -- one
16 question, if -- if I may. The government takes the
17 position -- at least this was the way the Respondent
18 puts it -- that it can basically moot their action by
19 turning this into a quiet title action just by taking
20 title. And let's assume that that's one
21 characterization of your position. And the Respondent
22 on the other hand says, oh, well, this is an APA action,
23 we can -- we can wait forever, at least for 6 years.

24 Is there some midway position that the
25 government can't moot the case too soon, that it must

1 wait a reasonable time? Or is there no basis in the
2 statute or in the cases for that position to hold?

3 MR. MILLER: If I understand correctly,
4 you're asking about the case where the -- the lawsuit is
5 filed before the land has been transferred.

6 JUSTICE KENNEDY: Yes, yes.

7 MR. MILLER: I don't know of any basis for
8 restricting the government's ability to do that, I mean,
9 short of the plaintiffs obtaining an injunction from the
10 court. I guess the broader point I would make about
11 that timing question is that the -- the court of
12 appeals --

13 JUSTICE KENNEDY: Well, in other words you're
14 -- you're sticking with your position. You say you
15 can basically moot a suit at any point you want just by
16 taking title, so you're -- you're not accepting any
17 qualification to that proposition.

18 MR. MILLER: That -- that is our position. I
19 would just emphasize that that was not the basis of the
20 -- the ruling of the court of appeals. The court of
21 appeals held that it doesn't matter when the suit is
22 filed, and under the court's analysis --

23 JUSTICE KENNEDY: All or nothing, okay.

24 MR. MILLER: -- it would be exactly the same,
25 even if it was filed later. And I think the -- the

1 error in that analysis is -- is that the question here
2 is not whether Patchak's suit is a Quiet Title Act
3 action. The question is whether the Quiet Title Act
4 expressly or impliedly precludes relief under section
5 702, and the answer to that question is yes.

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

17 JUSTICE KAGAN: Well, but -- but in saying
18 that you have just broadened, or arguably you have. If
19 -- if you think that the quiet title action is really
20 about the narrower set of cases, which is when a person
21 himself claims title, how can you get from that to say
22 that there is an express or an implied refusal of -- of
23 this kind of claim?

24 MR. MILLER: I think for two reasons. And
25 the first is, just that -- that first sentence of

1 2409a(a), which is, you know, to adjudicate a disputed
2 title to land on which the United States claims an
3 interest. That's a perfect description of what this
4 case is.

5 And the second is that the last sentence of
6 section 702 directs our attention to whether the relief
7 is expressly or impliedly forbidden by another statute.
8 And the relief that is sought here is an order
9 compelling the Secretary to relinquish title on behalf
10 of the United States to this land. And --

11 CHIEF JUSTICE ROBERTS: Do other consequences
12 other than the ability of the Secretary to take land in
13 trust flow from whether or not a tribe is recognized in
14 1934?

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

17 JUSTICE SCALIA: All right. Do you have any
18 concern that the government will get hoist by its own
19 petard?

20 What your argument -- the conclusion to which
21 your argument leads is that this individual or any
22 individual claiming that the government took title
23 incorrectly can sue under the Quiet Title Act, even if
24 they don't claim that title was taken from them. Are
25 you sure that's good for the government?

1 MR. MILLER: Well, this action would be
2 barred under the Quiet Title Act because the Quiet Title
3 Act expressly precludes this relief, where -- where
4 Indian trust land is at issue, where the relief that's
5 sought is an injunction compelling relinquishment of
6 title without the option of paying damages --

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

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

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

16 Are there -- you cite one case. Are there
17 others going the other way?

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

19 CHIEF JUSTICE ROBERTS: What --

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

22 One point I would make on that is just refer
23 you to the Florida Prepaid case from 1998, which was
24 about state sovereign immunity and which explained that
25 a state may condition its waiver of sovereign immunity

1 and may change that in the course of the litigation.
2 And I think that's another analogy that might be
3 instructive here.

4 CHIEF JUSTICE ROBERTS: So this suit would
5 come out the other way if the person objecting was just
6 over the border in -- in Indiana, instead of in
7 Michigan? Because there would be -- it could be brought
8 as a diversity suit.

9 MR. MILLER: Well, it would --

10 CHIEF JUSTICE ROBERTS: I'm assuming --

11 MR. MILLER: It would be still be --
12 sovereign immunity would still apply. Sovereign
13 immunity would bar relief, even if the basis for
14 jurisdiction were diversity rather than --

15 CHIEF JUSTICE ROBERTS: Even if it were a
16 suit against the tribe, it would still be not a
17 diversity action but a Federal cause of action?

18 MR. MILLER: Our point is that the reason
19 it's barred is because of sovereign immunity. When --
20 the time of filing in diversity cases refers to if the
21 citizenship of the parties changes during the course of
22 the litigation. That doesn't -- my understanding is
23 that doesn't defeat diversity. That's the nature of
24 that exception.

25 CHIEF JUSTICE ROBERTS: Okay. Thank you,

1 counsel.

2 The case is submitted.

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

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<p>A</p> <p>ability 28:23 54:8 56:12</p> <p>able 5:5 9:10 45:10</p> <p>above-entitled 1:20 59:4</p> <p>absent 49:21 50:10</p> <p>absolutely 23:21 31:19 40:2</p> <p>accepting 54:16</p> <p>account 11:2</p> <p>acknowledge 52:9</p> <p>acknowledged 12:24</p> <p>acquire 10:12</p> <p>acquired 10:10</p> <p>acquires 39:11 46:22 47:7</p> <p>acquisition 10:7</p> <p>Act 4:21 16:16 18:11,13,18,19 19:19,20,25 20:9,14,22 21:15 25:4,15 25:23 26:1,16 27:22,24 28:16 31:2,5 35:2 39:12 42:10,15 42:16,19,22 43:2 47:6 48:7 49:7 50:12,17 52:1 55:2,3,12 56:23 57:2,3,9 57:10</p> <p>acted 6:7 26:15</p> <p>acting 6:8 18:14</p> <p>action 4:25 7:12 7:15 13:13 15:1 15:2,23 18:15 18:23 21:10,19 23:13,18 25:10 25:17 27:17</p>	<p>28:1,2,5 29:1,3 29:14,23,24,25 30:13 31:5,12 32:11,22,24 33:6 34:25 35:8 35:10,13 36:11 36:15 37:7,11 37:21,25 38:16 38:17 39:4,12 39:16,19,21 41:2 42:18 46:2 46:3,21 47:6,8 47:9,10,16 48:16 49:6,9,16 49:16 52:12 53:18,19,22 55:3,19 57:1 58:17,17</p> <p>actions 23:13 31:10 35:15</p> <p>addendum 20:6 21:6,13</p> <p>additional 46:23</p> <p>address 13:12 18:2 34:17 44:5 46:13</p> <p>addressed 21:7 34:15</p> <p>addresses 44:8</p> <p>adequate 13:21</p> <p>adequately 7:11</p> <p>adjudicate 21:20 23:24 26:4,5 56:1</p> <p>adjudicated 28:2 29:8</p> <p>adjudicating 55:13</p> <p>administrative 19:19,20 37:7 37:11</p> <p>administratively 22:16</p> <p>adopted 30:25 44:4 48:10</p>	<p>adverb 11:10</p> <p>adversely 12:16</p> <p>affect 30:7</p> <p>agency 29:24</p> <p>agree 23:17,20 23:22 43:19 47:4 51:7,12</p> <p>agrees 15:16 20:24 27:11</p> <p>agricultural 41:9 41:13</p> <p>ahead 24:4</p> <p>AL 1:7,12,15</p> <p>ALITO 13:5,16 17:23 40:5</p> <p>Alito's 44:18</p> <p>Allegan 11:22</p> <p>allegation 5:5 8:3</p> <p>alleged 4:22 7:10</p> <p>allegedly 5:1</p> <p>alleging 42:12</p> <p>allow 8:10</p> <p>allowed 19:13 22:11 27:9 30:18 45:25 46:21</p> <p>allowing 14:3</p> <p>amendment 24:6 24:9,12</p> <p>analogy 58:2</p> <p>analysis 35:16 54:22 55:1</p> <p>announcement 5:11</p> <p>answer 25:8 37:14,22,23 38:1,3,10 48:25 49:10 55:5</p> <p>answering 39:14</p> <p>answers 27:21 34:2 43:18</p> <p>anybody 31:15 39:24 50:4,5</p> <p>anyone's 35:7</p> <p>anytime 38:21</p>	<p>39:17</p> <p>anyway 24:4 46:25 47:21</p> <p>APA 4:25 15:7 15:15 17:17 20:3,5 23:18 26:20 29:23 30:24 34:25 35:8 37:5,18,23 38:21,23 39:12 44:24 47:9 48:15 50:12 51:25 52:5,5 53:22</p> <p>appeal 16:23,25 17:2 24:20,25</p> <p>appealed 17:1</p> <p>appeals 4:14 14:11 15:22,23 16:8 24:25 25:12 47:25 54:12,20,21</p> <p>APPEARANC... 1:23</p> <p>appears 26:13</p> <p>applied 34:11</p> <p>applies 16:16 21:8 23:7 31:10</p> <p>apply 22:20 25:4 25:4 31:13 49:24 58:12</p> <p>applying 13:1</p> <p>April 1:18</p> <p>area 26:24 27:1</p> <p>arguably 11:10 12:17 36:4 43:13 55:18</p> <p>argued 38:6</p> <p>arguing 40:1</p> <p>argument 1:21 3:2,5,8,11 4:3,7 9:7 15:18 17:5 19:2 29:19 31:1 37:15 39:14 42:5 45:21,25</p>	<p>46:5,7,9,14,23 48:13,13,14 53:13 56:20,21</p> <p>arguments 22:15</p> <p>Article 36:7</p> <p>artificial 10:9</p> <p>aside 33:5 45:22</p> <p>asked 15:12 24:21,21</p> <p>asking 24:2,2 54:4</p> <p>asks 15:6</p> <p>assert 23:8 31:18 35:15 36:5 52:2</p> <p>asserted 45:1</p> <p>asserting 20:22 29:25 31:5,12 31:20 32:22 36:7 39:16,18 49:8 51:14</p> <p>asserts 29:25</p> <p>Assistant 1:24</p> <p>associated 13:24</p> <p>assume 5:4,24 45:23 53:20</p> <p>assumes 36:24</p> <p>assuming 26:10 28:5,6,7,25 58:10</p> <p>assumption 5:4</p> <p>attempt 35:3</p> <p>attention 56:6</p> <p>Attorney 18:12</p> <p>authority 8:17 11:21 26:15 27:24 38:5 44:13 48:8</p> <p>authorization 29:5</p> <p>authorized 43:8 43:25</p> <p>availability 9:22</p> <p>available 8:22 9:23</p> <p>aware 9:5 34:13</p>
---	--	--	---	--

34:16 56:15 57:18 a(a) 21:10 a.m 1:22 4:2 59:3	best 30:4 41:4 beyond 26:15 BIA 13:13 bit 42:22 blue 21:14 blush 38:1 48:22 border 58:6 bottom 49:18 50:1 Bradley 41:17 Breyer 14:17,21	58:7 Brown 55:8 bugaboo 19:21 build 53:4 building 44:21 built 40:7 44:21 business 41:10 45:8 bystanders 11:5	49:17 50:13 challenger 13:10 challenging 4:16 5:3 6:5 29:24 48:18,19 change 6:2 33:14 33:14 39:11,20 51:2 58:1 changed 25:8,17 changes 17:15 18:7,22 34:5 58:21 character 39:20 characterization 53:21 Chevron 44:11 Chief 4:3,9 11:23	56:24 claiming 56:22 claims 5:19 8:12 18:6 22:2,4,7 29:7 30:24 31:6 36:8 55:14,21 56:2 class 45:11 classic 29:23 clear 12:21 16:7 26:21 30:10 cleared 30:14 clearly 19:25 44:8 client's 36:2 close 43:12 coercive 27:8 Coeur 19:13 coincides 34:5 come 12:2 31:18 33:7,12 35:8 38:25 58:5 comes 8:16 9:13 12:4,8 35:21 comments 31:15 31:18,19 community 27:19 company 41:5 compelling 16:8 56:9 57:5 compensation 20:23 complainant 21:25 complaining 6:14 complaint 4:23 15:3,5 17:25 21:25 24:1,1,5 24:6,14 25:8 33:23 34:4,8,10 52:24 complete 22:22 26:12 completed 16:20 complied 7:11
<hr/> B <hr/>	<hr/> C <hr/>	<hr/> C <hr/>	<hr/> C <hr/>	
back 10:8 16:14 26:8 30:2 31:7 39:3 41:3,25 43:17 44:17 48:14 backdrop 19:9 22:21 26:11 bad 47:19 48:13 balance 27:3 band 1:3 4:5 32:16 40:19 41:6 bar 18:8,23 31:2 58:13 barred 18:9 51:15,16 57:2 58:19 barring 8:8 based 8:4 40:22 basically 46:20 53:18 54:15 basis 4:13,22 7:6 7:7 20:18 45:10 54:1,7,19 58:13 behalf 2:5 3:4,7 3:10,13 4:8 6:11 19:3 29:20 53:14 56:9 believe 13:1 23:17 31:1,4 33:22,25 34:15 36:1 40:22 41:17 43:22 44:10 46:11,12 48:3 belong 40:13 beneficiaries 6:6 beneficiary 41:1 benefit 6:7	case 4:4,11 7:2,9 8:8 9:4,22 11:17 14:5 19:7 29:14 31:4 33:10,22 44:20 46:13 47:1 52:16 53:25 54:4 56:4 57:16 57:23 59:2,3 cases 33:11 34:7 34:7,13,14,16 51:18 53:4 54:2 55:9,20 57:15 58:20 casino 27:18 45:2,2,10 52:23 53:4 casino's 40:7 cause 32:11 42:18 58:17 cede 53:10 certainly 31:17 36:15 certifies 18:13 challenge 5:1,5 6:9,22 7:2,25 8:11 13:6 35:8 35:10 38:25	call 6:23,23 8:18 8:18 51:11 Carcieri 45:7 carry 14:2 carved 22:13 case 4:4,11 7:2,9 8:8 9:4,22 11:17 14:5 19:7 29:14 31:4 33:10,22 44:20 46:13 47:1 52:16 53:25 54:4 56:4 57:16 57:23 59:2,3 cases 33:11 34:7 34:7,13,14,16 51:18 53:4 54:2 55:9,20 57:15 58:20 casino 27:18 45:2,2,10 52:23 53:4 casino's 40:7 cause 32:11 42:18 58:17 cede 53:10 certainly 31:17 36:15 certifies 18:13 challenge 5:1,5 6:9,22 7:2,25 8:11 13:6 35:8 35:10 38:25	call 6:23,23 8:18 8:18 51:11 Carcieri 45:7 carry 14:2 carved 22:13 case 4:4,11 7:2,9 8:8 9:4,22 11:17 14:5 19:7 29:14 31:4 33:10,22 44:20 46:13 47:1 52:16 53:25 54:4 56:4 57:16 57:23 59:2,3 cases 33:11 34:7 34:7,13,14,16 51:18 53:4 54:2 55:9,20 57:15 58:20 casino 27:18 45:2,2,10 52:23 53:4 casino's 40:7 cause 32:11 42:18 58:17 cede 53:10 certainly 31:17 36:15 certifies 18:13 challenge 5:1,5 6:9,22 7:2,25 8:11 13:6 35:8 35:10 38:25	Chief 4:3,9 11:23 12:3 14:6,12 15:4,12 18:25 19:4 27:15 28:9 28:19,22 29:9 29:16,18,21 34:18,22 47:13 47:18 53:11 56:11 57:12,19 58:4,10,15,25 choices 25:10 Circuit 13:23 33:24 34:15 48:3 circumstances 7:20 33:14 cite 57:16 cited 33:21 48:9 citizenship 34:4 34:5 58:21 civil 19:9 21:10 21:19 23:13 claim 5:9,18 6:1 6:10 7:8 17:8 18:1,2 23:19 26:19 29:4,15 31:15,23 32:2,3 36:5 37:1 50:12 52:3 55:23

concedes 36:11	25:24	critical 27:3	delegation 44:14	23:14,24 26:5
concern 42:11	contemplates	cure 41:24	48:7	55:13 56:1
56:18	7:23		denial 16:23 17:2	disruptive 27:4
concerted 27:13	context 10:1 29:2	D	24:25	distinction 10:6
concession 10:3	continued 25:11	d 1:24 3:3,12 4:1	denied 6:4 14:10	48:24 50:8
conclusion 26:18	continues 13:9	4:7 53:13 57:10	24:24 26:25	51:22
44:2 48:6 56:20	contracts 19:10	Dakota 48:4,4	denies 15:21	distinguish 51:18
condition 57:25	control 51:4	damages 27:10	Department 1:25	district 15:20
conditions 33:14	convert 32:21	57:6	48:10	16:23 24:20,23
confidence 57:20	converted 18:15	Dataflux 33:22	dependent 10:22	diversity 34:3,7
conflict 44:14	47:9	date 12:20,21	depends 17:23	34:11 57:15
conflicts 44:7	correct 36:10	34:4	40:21	58:8,14,17,20
confused 12:19	41:11 43:5	DAVID 1:7,15	describes 21:24	58:23
Congress 6:7	45:19 47:22	day 31:14 32:12	description 56:3	doing 22:23,23
9:11 11:7 12:18	50:20	days 8:20 14:18	designed 10:21	27:3
19:12 22:21	corrected 41:7	30:10 31:25	determination	doubt 13:23 51:1
26:22 27:2,13	correctly 54:3	47:21	6:5	draw 26:18 27:6
30:24 43:14,25	counsel 18:25	deal 9:14	determine 11:2	drawn 55:9
51:1,5,11,22	23:3 26:7,10	decided 33:23	34:3	due 47:25
Congress's	29:16 34:24	37:19,19	determining 11:1	duties 18:15
23:11	36:22 53:11	deciding 50:20	deus 17:14	D'Alene 19:13
conscientiously	59:1	decision 6:11 7:3	development	D.C 1:17,25 2:2
14:1	County 11:22	7:15 24:17	10:22 11:4	33:24 34:15
consequences	course 5:18 11:8	32:14,17 35:3	19:11	E
7:12,15,18	18:7 50:23 57:7	35:10 40:23	difference 49:13	E 3:1 4:1,1
56:11	58:1,21	45:7,8 48:3	different 17:10	earlier 29:12
Consequently	court 1:1,21 4:10	50:14	31:23 32:6	57:13
44:10	4:13 13:11	decisions 19:10	36:22 44:17	early 30:15
considerable	14:10 15:20,21	declaratory	48:23 51:25	economic 10:22
44:22	15:23 16:8 18:4	28:16 32:14	difficult 37:16,17	11:4 12:23
consideration	19:5,13 22:14	decree 25:18	38:4	19:11
7:21 44:4	24:20,23 25:12	deed 42:8	difficulties 27:18	effect 11:5 33:7
considered 7:11	28:15 29:22	defeat 58:23	directly 5:22,22	33:12 40:23
11:13	30:3 34:1 46:13	defects 4:12	50:3	effective 17:20
considering	47:24 48:5 53:9	defense 28:14	directs 56:6	effects 29:6,6
15:10	54:10,11,20,20	44:25,25 49:22	disagree 9:20,25	42:14
consistent 28:16	55:8	49:25	36:16,17 47:3	Eighth 13:23
consistently	courts 14:5 24:25	defenses 49:23	disallowing	48:2
26:25	26:24 29:3	deference 44:12	52:18	either 4:12 28:11
constitutional	court's 16:23	defined 23:11	discern 26:23	33:9
13:23	35:16 40:23	definition 38:24	discussed 30:3	elements 11:13
constructive	45:7 54:22	51:12,13	discussion 10:1	eliminate 26:19
24:8,12,25	covers 19:25	delay 6:16,25	11:11	eliminates 19:20
constructively	25:19	delayed 6:21	dismiss 25:10	else's 37:3
24:24 25:8,17	criminal 19:8	delegated 44:13	disputed 21:20	

<p>emergency 24:20 emphasize 54:19 employee 18:14 enacted 13:19 enactment 26:13 encapsulate 26:16 encouragement 47:24 enforce 9:10 43:14 enforceable 13:16 engage 45:10 enjoin 16:2,19 ensuring 13:21 enter 14:5 entire 41:2 45:9 entirely 40:15 entities 5:21 entitled 15:24 30:17 31:22 35:7 environmental 7:12,14,17 29:5 42:14 envisions 31:15 ERIC 1:24 3:3 3:12 4:7 53:13 error 55:1 ESQ 1:24 2:2,4 3:3,6,9,12 essence 19:15 establish 8:25 26:3 esthetic 29:6 ET 1:7,12,15 evidence 30:4 ex 17:14 exactly 10:25 14:24 15:11,13 54:24 55:12 example 7:9 11:17 18:10,21</p>	<p>exception 21:8 58:24 exceptions 18:17 34:20,21 exclude 36:6 excuse 21:11 26:5 28:13 50:19 exist 33:16 34:14 34:14 expect 43:14 explain 24:14,14 explained 57:24 explicit 22:24 express 55:22 expressly 20:8 55:4 56:7 57:3 extent 37:6</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 22:15 fact 11:3,19 12:4 14:14 17:5,13 19:6 30:4,6,22 38:15,15,15 43:7,23 44:1,8 44:24 46:15 48:14 52:3 facts 11:17 fail 29:3 fall 44:12 falls 18:16 farm 35:20 fault 47:12 Federal 8:18 9:8 27:5 42:6 48:9 58:17 fee 42:7 feet 27:5 28:18 fellow 53:3,5 figure 16:16 file 5:13 30:8,22 31:22 46:15 filed 5:16 8:14 9:1,4 13:6 14:7</p>	<p>14:15,20 15:5 24:15 30:4,10 31:24 33:8,13 33:24 34:4,10 45:5,16,18,23 46:1 48:15,23 49:2 54:5,22,25 filing 17:25 34:8 46:10 57:14 58:20 find 14:4 first 4:15 5:8,25 13:19 22:11 35:15 38:1 40:14 48:21 51:25 55:7,25 55:25 fix 50:24 Florida 57:23 flow 56:13 follow 7:22 11:5 47:8 footnote 33:21 34:19 46:18 57:13 forbidden 56:7 forecloses 20:8 26:4 forever 53:23 Forget 14:24 38:18 forms 4:22 forth 21:25 42:14 forward 14:5,14 14:15 18:12 45:3,8 found 13:23 38:2 48:5 FTCA 18:17 full 8:11 9:3 fully 38:5 further 17:9 42:23 53:9</p> <hr/> <p style="text-align: center;">G</p> <hr/>	<p>G 4:1 gambling 6:24 29:5 41:20,23 45:11 52:18 gaming 6:23 12:5 12:9,16,21,25 27:22 42:15 43:2 gather 15:4 general 1:25 18:13 34:18,19 55:7,11 generally 12:24 Ginsburg 8:13 9:6,20 30:8,21 34:2 40:12,18 47:23 give 6:3 24:23 26:2 38:25 41:25 42:17,18 47:21 50:21 51:19 52:13 53:6 gives 8:15 giving 24:21 go 18:12 30:13 38:9 40:20 43:16 47:14 48:14,16 52:22 goes 10:8 going 6:2 7:16 8:5 10:11,14,23 11:19 12:5 14:1 14:4 22:24 25:7 25:16 27:6 39:3 43:3 44:8,17 48:25 57:17 good 36:19 48:14 56:25 govern 20:3 50:13 government 5:21 6:11,16,19 9:17 10:12 12:12 13:7 15:8 20:2</p>	<p>20:24 22:15 25:6 27:4,10 28:12 30:1,6,11 31:8 32:18 33:1 33:13 34:2 35:4 35:7,25 36:10 36:11,12 37:10 37:20 38:17,22 39:10,17,19 40:12,18 41:11 41:21,25 42:2 44:2 46:22,25 47:6,14 48:16 49:5,14,14,17 50:19,20,23,25 52:13,17,18 53:16,25 56:18 56:22,25 57:8 governmental 19:8 government's 12:9 24:16 27:5 28:18 35:23 39:8,9,25 42:7 50:11,14 54:8 grace 47:20 Grand 2:4 grant 20:7 granted 16:12,14 gravamen 52:24 52:25 ground 17:10,15 17:16 33:15 group 41:5 Grupo 33:22 GSA 55:8 guess 13:18 21:11 51:1,24 53:2 54:10</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hand 25:5 53:22 hands 39:8,10 happen 13:4,5 34:9 40:5,8,9</p>
---	--	--	---	--

<p>happened 24:19 25:11 48:19</p> <p>happening 13:9 24:18</p> <p>happens 18:6 34:8 37:17</p> <p>happy 53:3,5</p> <p>hard 33:8</p> <p>hardship 27:2</p> <p>havoc 19:7</p> <p>hear 4:3 14:7 38:12</p> <p>hearing 16:15</p> <p>held 54:21</p> <p>help 42:22</p> <p>helpful 44:16</p> <p>he'll 34:22</p> <p>hoist 56:18</p> <p>hold 54:2</p> <p>Honor 17:19 29:17 31:11,17 32:4,9 33:19 34:12 36:1 39:6 39:22 40:2,9,15 40:21 41:12 42:4,20 43:1,6 43:19 44:24 45:15 46:6,11 47:3,17,22 48:2 49:7,20,23 50:7 51:3,7,24 52:9 52:19 53:1,8</p> <p>hook 52:13</p> <p>hope 39:25</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 7:17</p> <p>identify 44:5,7 57:11</p> <p>identity 18:7</p> <p>IGRA 5:19</p> <p>III 36:7</p> <p>immunity 4:16 10:2 17:24 18:1 18:8,22 19:15</p>	<p>19:21 20:7 21:19 22:14,17 22:22 23:11,12 25:3 26:12 28:6 28:11,25 33:7 33:12,15 57:15 57:24,25 58:12 58:13,19</p> <p>implicated 29:13 43:11</p> <p>implicates 43:10</p> <p>implied 55:22</p> <p>impliedly 20:8 55:4 56:7</p> <p>important 9:7 29:1</p> <p>imposing 27:18</p> <p>improperly 35:25 37:2 39:1</p> <p>Inasmuch 12:12</p> <p>incident 32:18</p> <p>include 33:3</p> <p>inconvenient 50:24</p> <p>incorrect 32:16</p> <p>incorrectly 56:23</p> <p>independent 4:12</p> <p>Indian 4:17,21 12:16 21:8 22:20,25 27:8 27:22 35:24 37:2 42:10,15 42:16,19,21 43:2 57:4</p> <p>Indiana 58:6</p> <p>Indians 1:4 4:5 32:16 43:9</p> <p>indicates 33:22</p> <p>indirect 50:4</p> <p>individual 9:16 56:21,22</p> <p>industry 12:23</p> <p>injunction 8:8 15:6,19,21,24</p>	<p>16:13,14,23 17:3 20:10 24:2 24:3,21,22 25:1 25:13 35:9 54:9 57:5</p> <p>injunctive 19:14 20:18,21 27:8,9</p> <p>injury 12:2,4,8 41:19,20,24 53:1</p> <p>instructive 58:3</p> <p>intended 6:19 40:25</p> <p>intent 5:11 26:19 43:21</p> <p>interest 11:3,9 11:10,15 12:14 12:17,17 22:2,5 22:8 26:3,6 27:12 30:1 32:23 36:6 42:7 42:23,25 43:20 49:9,24 50:9 51:15 52:2,4 55:14 56:3 57:11</p> <p>interests 4:19,20 7:23 11:7 36:5</p> <p>Interior 1:12 48:10</p> <p>interrupt 11:23</p> <p>investment 19:10</p> <p>investors 41:6</p> <p>involves 41:5</p> <p>involving 27:7 51:16</p> <p>IRA 5:20 13:24 29:7 43:16</p> <p>ironic 17:7</p> <p>irrelevant 7:1</p> <p>irrespective 46:22</p> <p>issue 10:2 18:2 28:15,23 33:25</p>	<p>33:25 34:15,17 46:13 57:4</p> <p>issues 29:15</p> <p>it'll 6:15</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>judge 15:24</p> <p>judged 17:24</p> <p>judgment 4:13 27:13 28:17 32:14</p> <p>judicial 8:22 9:3 9:23,23 13:22 14:3 29:12 30:12 31:3 48:5</p> <p>jurisdiction 5:23 8:18 9:8 19:9,9 33:23 34:9 58:14</p> <p>jurisdictional 4:12 11:18</p> <p>Justice 1:25 4:3 4:9,24 5:15,24 6:10 7:6,14,25 8:4,13 9:6,18 9:20 10:5,8,20 11:8,23 12:3,7 12:12,19,20 13:3,5,16 14:6 14:12,17,21,23 15:4,12,17 16:4 16:10,21,25 17:4,13,23 18:18,25 19:4 19:18,24 20:4 20:13,17,20,25 21:3,5,11,16 21:21,24 22:9 22:19 23:2,7,16 23:22 24:11 25:7,16,21,24 26:7,10,21,25 27:15 28:9,19 28:22 29:9,16 29:18,21 30:8</p>	<p>30:21 31:9,14 31:21 32:1,2,5 32:10,13 33:4 34:2,18,22,24 35:14,19 36:9 36:18,21 37:8 37:10,13 38:7 38:12,14,18,20 39:3,7,13,23 40:3,5,12,18 41:8,15,19 42:9 42:21 43:3,7,15 44:16,17 45:12 45:13,17,20 46:7,16 47:11 47:13,18,23 48:12,12 49:4 49:10,11,12,21 50:1,15,22,23 51:4,8,9 52:11 52:20 53:2,11 53:15 54:6,13 54:23 55:17 56:11,17 57:7 57:12,19 58:4 58:10,15,25</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 10:5,20 21:21,24 22:9 33:4 45:12,20 46:7,16 49:12 50:22 51:9 55:17</p> <p>KEN 1:11</p> <p>Kennedy 12:20 13:3 17:4,13 42:9,21 43:3,7 43:15 44:16 45:13,17 53:15 54:6,13,23</p> <p>kind 20:25 21:3,4 35:7,13 42:11 55:23</p> <p>knew 27:3 45:15</p>
---	--	---	---	---

know 5:3 7:16 11:17 16:4,10 16:17 23:4 24:11 33:14,20 34:3,10 38:3,5 38:9 42:2 54:7 56:1	56:2,10,12 57:4 57:8,11	litigate 8:12	means 47:6	mind 6:2 10:13 11:7 12:13 22:4
knowing 45:9	landowner 35:2 50:2	litigation 13:7,9 13:15 15:16 18:1,8 20:11 25:2 29:6 58:1 58:22	meant 22:21	minute 45:23
knowledge 45:6	landowners 7:24	lands 4:17 5:2 21:8 22:20,22 22:25 27:8 35:5	mechanism 5:6 55:13	minutes 53:12
L	lands 4:17 5:2 21:8 22:20,22 22:25 27:8 35:5	little 12:19 42:22 46:23	mentioned 29:12 57:13	misplaced 31:1
L 1:11	language 22:5	live 43:12	mere 7:15	moment 14:25 27:16
laches 44:22,25 44:25 49:21,22 49:24	Larson 26:12,23	local 5:21 9:17	merely 35:10	monetary 20:23
lack 48:5	Las 41:5	logic 47:5	mess 26:23	money 50:16 52:15
lacks 4:18	Laughter 36:20 38:11 40:4	logical 46:12	MichGO 5:14 7:9 8:6 29:6 45:14	months 45:4
land 5:9,12,25 6:3,4,12,13,19 6:23 7:4,13,21 9:2 10:7,7,9,12 10:13,15,16,19 10:23 11:12,20 11:20 12:5,16 13:2,7,14 15:15 15:20,25 16:9 17:8,19,20 19:6 20:1,11,19 26:4 27:1,12,25 30:5 30:6 31:3 32:15 32:19,19 35:4,7 35:11,22,24,25 36:13,14,23,24 36:25 37:2,3,3 37:6,10,18,20 38:15,22 39:18 39:19 40:10,13 40:25 41:3,9,12 41:22,25 42:20 43:8,9,12,21 43:23,25 44:5,6 44:7,9 45:3 46:15 47:7 50:6 50:6,10,14,21 52:14 53:6 54:5	law 26:17,22 28:11 36:25 40:23,25	logically 47:8	Michigan 2:4 11:21 40:25 58:7	moot 16:3 25:10 44:20 47:15 52:17,17 53:18 53:25 54:15
	lawsuit 6:18 20:19 30:7,23 31:20 45:5 46:10,24 54:4	long 50:2,3 52:5 52:22 53:3	midst 6:1	morning 4:4
	lays 6:1	look 26:12 42:8 44:3	midway 53:24	Mottaz 22:14,16
	leads 56:21	looked 15:3 22:22 42:4	Miller 1:24 3:3 3:12 4:6,7,9 5:7 5:17 6:6,10 7:2 7:8,19 8:2,6,25 9:15,25 10:16 10:25 11:16,25 12:4,11,14 13:1 13:4,12,17 14:9 14:16,19,22 15:14 16:1,6,18 16:22 17:2,12 17:18 18:3,20 53:12,13,15 54:3,7,18,24 55:24 56:15 57:1,9,12,18 57:20 58:9,11 58:18	move 14:14 45:3 45:8
	left 11:11	looking 42:7	moving 14:14	N
	legal 37:1	lost 21:12 29:8 52:9		N 3:1,1 4:1
	legislative 48:7	M		name 25:5
	legitimacy 29:4	machina 17:14		named 23:1
	letting 22:25	making 27:3		narrower 55:20
	let's 5:4,24 27:16 36:13 45:22,23 45:23 53:20	Malone 26:13,24		narrowly 55:9
	lie 36:15	manual 13:13		nature 18:6 22:1 30:7 39:11 58:23
	light 12:23 41:13	manufacturing 41:14		nearby 7:24
	limit 34:25 35:12 35:15	Match-E-Be-... 1:3 4:4		necessarily 43:10
	limitation 35:17 51:6	matter 1:20 34:6 40:6 49:3 54:21 59:4		necessary 13:10
	limitations 9:10 30:23 55:16	matters 49:1		needs 46:13
	limited 31:6 35:5 35:6 39:12 57:15	MATTHEW 2:4 3:9 29:19		negate 33:18
	limits 20:23	mean 8:2,25 10:6 11:16,25 14:7 17:15 30:19 37:9,13 38:2 41:10 47:1,18 50:24 52:21 54:8		negatively 35:23
	line 21:9,18 34:6 49:18 50:1			negotiated 19:10
	lines 27:6,7			negotiations 6:1
				Nelson 2:4 3:9 29:18,19,21 30:21 31:11,17 32:1,3,9,13 33:4,19 34:12 34:21 35:14

36:1,17 37:6,12 38:14,19 39:6,9 39:22 40:2,9,15 40:21 41:12,16 42:4,20 43:1,5 43:19 44:24 45:12,15,19,20 46:6,11 47:3,17 47:22 48:2 49:7 49:20,23 50:7 50:17 51:3,7,10 51:24 52:19,25 53:7 NEPA 5:19 7:8 7:11,20 36:11 36:15,24 never 19:13 newly 6:19 niece 35:20,21 36:2 normal 20:3 notice 8:15 13:20 30:22,25 48:1 48:10 not-yet-compl... 16:19 nuclear 36:14 nuisance 27:17 27:20 28:2,5 29:1,3,14 number 55:8	oh 12:22 16:4 45:17 48:18 53:22 okay 12:9 21:16 23:22 25:21 38:19 49:13 54:23 58:25 old 19:21 once 17:19 23:22 36:25 39:7,9,10 49:5 52:20 ongoing 19:8 open 45:2 operate 45:10 operations 19:8 27:5 opportunity 8:11 9:3 13:22 option 50:20 57:6 oral 1:20 3:2,5,8 4:7 19:2 29:19 order 11:2 16:8 16:11,12 17:20 56:8 ordinary 37:18 organization 7:10 outset 12:25 13:3 outside 9:4 34:11 overturned 45:11 owned 30:1 41:16 owner 17:8 40:19 41:4 owners 11:6 ownership 41:5 owner's 35:21	part 8:4 23:8 40:22 41:9,9 partially 41:13 41:13 particular 32:16 36:13 55:10 particularity 22:1 particularly 33:9 parties 6:7 18:7 18:21 58:21 parts 5:7 32:24 party 33:9 34:5 51:16 passed 14:8 26:11 Patchak 1:7,15 4:5,18 8:14 9:13,16 14:7 27:16,23 29:23 29:24 30:4,22 31:5 32:13,22 33:2 40:6 52:3 Patchak's 11:18 16:7 30:7 55:2 PATRICIA 2:2 3:6 19:2 pay 31:8 50:21 52:15 53:7 paying 57:6 pending 6:18 13:8,15 47:7 people 8:10 12:15 26:14 30:20 31:15,18 36:6 43:12,13 44:8 47:21 48:16 perfect 56:3 period 5:11,14 9:2,5,14 13:6 14:20 15:15 20:11 30:22 31:22 50:18 permits 15:16,16	38:21,23 person 8:23 9:9 17:9 36:4 37:4 49:8 50:2,4,4 55:20 58:5 persons 8:15 petard 56:19 Petitioner 1:5 2:3 3:7 19:3 Petitioners 1:13 2:1 3:4,13 4:8 53:14 place 16:3 40:14 plaintiff 4:18 5:17,20 7:9 8:7 20:15 22:2,4,7 23:9 33:2 51:14 53:6 57:11 plaintiffs 5:14 6:14 54:9 please 4:10 19:5 29:22 point 8:9 10:5 12:24 14:13,24 16:1 28:15 33:11 40:22 43:7 45:1,6,18 47:2,4 54:10,15 57:22 58:18 points 55:6 policy 7:5 8:9 pop 33:15 pops 17:14 position 30:17 34:14 47:5 53:17,21,24 54:2,14,18 possible 42:3,3 possibly 51:17 Pottawatomie 1:4 4:5 practical 40:6 precedent 33:17 precisely 13:20 preclude 13:8	precludes 55:4 55:11 57:3 preclusion 29:15 preemption 28:14 preliminary 24:22 25:1 Prepaid 57:23 prepared 33:20 press 25:11 presumably 35:22 pretty 26:25 prevail 27:11 40:7 50:19 52:12 prevent 31:19 prevented 6:18 14:13 previously 27:19 primary 42:15 principle 34:11 55:7 principles 20:3 prior 26:13 40:19 41:3 46:10 private 9:16 problem 28:6 44:22 47:25 procedure 8:23 19:19,20 procedures 55:15 proceed 22:11 46:21 process 47:25 prohibition 39:5 promise 5:25 promote 10:22 promoting 11:3 proper 5:17,20 37:23 properly 18:4 property 11:6 15:5 17:8 23:25
O				
O 3:1 4:1 object 10:13 objecting 58:5 objection 11:18 objections 30:20 obtain 13:10 obtaining 54:9 obvious 37:22,22 obviously 29:13 35:17 officer 18:11 26:14,20				
	P			
	P 4:1 page 3:2 20:5 21:6 25:11,12 pages 46:17 parcel 41:17,18			

<p>24:4 30:1,2 31:7,16 32:23 48:17 49:9 50:10 52:2 55:14 proposed 11:14 proposition 47:13 54:17 protect 51:6,6 protected 4:20 protecting 7:23 protection 24:15 provide 14:2 35:17 51:10,21 provided 30:24 provides 4:13 13:13 18:18,19 31:18 32:24,25 provision 4:22 30:25 42:23 43:16 48:11 52:7,8 provisions 42:9 proximity 43:12 prudential 4:18 35:16 36:2 38:24 public 42:23,25 43:20 pull 27:4 28:17 purpose 12:13 13:21 30:19 37:3 38:23 41:18 purposes 10:18 24:15 57:15 pursue 42:22 pushed 47:12 48:6 put 6:13,15 7:22 8:5 9:11 12:7,8 12:10 28:23 43:24 44:6 puts 53:18 putting 33:4</p>	<p>Q</p> <p>QTA 17:6,9,13 17:22 25:19 26:14 qualification 54:17 question 5:8 10:8 10:9,10 12:15 15:13 16:2 28:15,22,23,24 29:10,12 33:5,6 33:8 36:21,22 37:16,17 38:3,4 39:3,14 42:22 43:18 44:17,18 45:22 46:4,8 49:10 51:9 52:10 53:16 54:11 55:1,3,5 57:14 questions 15:4 28:11 53:9 quiet 14:25 15:2 15:10 19:25 20:9,14,22 21:14 23:13 25:3,14,22 26:1 26:16 28:1,16 29:25 31:2,5,10 31:12 32:22,24 33:5 35:2,9 37:21,25 38:17 39:4,12,20 46:2 46:3,20 47:6,10 48:16 49:6,7,16 50:12,17 51:12 52:1,5,12 53:4 53:19 55:2,3,12 55:19 56:23 57:2,2,9,10 quieted 33:1 quieting 23:14 33:3 quite 38:4</p>	<p>R</p> <p>R 4:1 raise 9:8 28:13 raised 28:13 Rapids 2:4 reached 44:2 read 22:5,19 24:1,5 reading 21:9 real 23:24 55:13 reality 5:4 really 10:14 17:8 46:7 55:19 reason 13:25 29:2 30:24 48:9 51:11,17,20,22 52:12 58:18 reasonable 45:8 54:1 reasons 20:4 48:8 55:24 REBUTTAL 3:11 53:13 recognize 47:19 recognized 24:24 55:8 56:13 record 24:6 recycled 29:7 refer 10:18 57:22 reference 43:20 refers 58:20 refusal 55:22 regard 31:7 35:16,18 39:14 52:7 Register 48:9 regulated 4:21 5:22 regulation 8:10 27:22 regulations 5:10 10:18 13:8,12 13:20 14:2 44:3 44:11 regulatory 11:21</p>	<p>reliance 17:6 relief 12:1 14:10 16:6,17 17:11 17:16,17,20 18:21,22 19:14 20:7,9,13,15 20:21,23,24,25 21:3 24:20 26:3 26:25 27:8,9 30:16 32:6,7,9 32:11,18,23 33:2 41:21 42:18 51:25 52:1 55:4 56:6 56:8 57:3,4 58:13 relinquish 16:9 56:9 relinquishment 57:5 rely 43:16 relying 17:16 19:24 42:24 remainder 18:24 53:10 remaining 53:12 remains 47:9 remarkable 18:5 remedial 55:10 remedies 55:11 remedy 20:18 remember 29:2 removed 17:10 removing 13:22 render 40:24 Reorganization 4:21 42:10,16 42:19,21 48:6 repeated 49:12 reply 9:21 34:19 57:13 repository 36:14 request 15:21 require 7:21 41:25 42:1 44:6</p>	<p>requires 7:23 49:8 57:10 reserve 18:24 reserved 33:25 reserves 44:25 resort 55:11 respect 6:5 17:18 20:20 21:6 22:10 29:11,15 responded 27:2 52:10 Respondent 53:17,21 Respondents 2:5 3:10 29:20 rest 42:2 restate 52:10 restricted 22:20 restricting 54:8 result 37:7 46:12 51:20 retain 22:17 retention 22:14 reverses 15:22 reversing 4:13 revert 40:11 41:3 review 8:22 9:3 9:23,23 13:22 14:3 15:7 16:18 23:18 29:12 30:12 31:3 48:5 48:15 reviewing 15:23 15:23 right 8:5,6 10:18 10:25 14:17 15:14,17 16:24 18:1,19 19:16 21:17,18 22:1,4 22:7,18 27:10 28:9,9,19 32:2 32:5 39:21 41:15 47:11,12 47:16,21 48:21 50:9 51:2,14</p>
---	--	--	---	---

<p>52:2,4,23 56:17 57:8 rights 6:5 risk 45:9 ROBERTS 4:3 11:23 12:3 14:6 14:12 18:25 27:15 28:9,19 28:22 29:9,16 29:18 34:18,22 47:13,18 53:11 56:11 57:12,19 58:4,10,15,25 room 41:21 rug 27:4 28:17 rule 13:20 34:20 ruled 29:4 ruling 30:12 54:20 run 52:22 running 27:17 40:8 rural 27:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 3:1 4:1 SALAZAR 1:11 sat 24:23 saying 35:1,20 39:23 46:20 55:17 says 6:2 8:16 17:7 19:21 20:6 20:9 21:21,25 22:13 23:5,13 26:2,2 27:19,21 27:23 31:6 33:13 34:19 46:24 50:5 51:21 53:22 Scalia 6:10 7:6 7:14,25 8:4 11:8 12:7,12 18:18 19:18,24 20:5,13,17,20</p>	<p>20:25 21:3,5,11 21:16 22:19 23:2,7 25:7,16 25:21,24 26:21 26:25 31:9,14 36:9,18 39:13 39:23 40:3 47:11 50:23 51:4,8 52:11,20 53:2 56:17 57:7 Scalia's 10:8 48:13 scenario 6:9 scene 17:14 scheme 55:10,12 scope 17:22 18:14 43:13 44:12 45:21 second 4:17 21:9 21:18 35:17 52:7 56:5 Secretary 1:11 5:1 6:8 7:10 8:15 9:2,10,11 11:1 13:19 14:1 14:3,8,13,14 16:8 23:20 27:24 28:8 30:25 32:15 44:3,13 56:9,12 Secretary's 7:4 8:9 section 4:21 5:18 5:19 6:7 7:22 21:19,22,24 22:3,6,6,18,19 23:3,5,7,9,10 23:24 42:24 43:1,19 44:4,15 55:4 56:6 57:10 see 20:2 24:13 42:16 44:1 seek 16:18 20:1 24:17,19 35:9 52:5</p>	<p>seeking 8:7,7 15:19 23:8 25:18 26:4 32:6 32:7,7,14 33:2 46:3 seeks 4:19 self-governance 11:4 send 16:13 sense 10:17,17 24:9 sentence 22:19 55:25 56:5 separate 28:14 42:6 43:23 serve 11:3 set 5:10 7:5 21:25 24:17 34:9 55:20 sets 51:18 setting 10:6 shed 32:8 shifted 25:3,3 shifts 23:19 short 54:9 show 42:11 side 34:6 simple 42:7 simply 29:7 38:17 47:14 51:2 52:17 single 41:16,17 sir 36:19 situation 5:24 9:12,18 50:25 six 38:23 39:17 39:24 45:4 Solicitor 1:24 34:18 somebody 5:13 11:14 18:11 51:13 Somebody's 9:9 soon 43:10 53:25 sorry 12:3 21:13</p>	<p>26:9 37:12,14 52:8 sort 29:14 Sotomayor 4:24 5:15,24 9:18 12:19 26:7,10 31:21 32:1,2,5 32:10,13 34:24 35:14,19 36:21 37:10 38:7,18 38:20 39:7 41:8 41:15 49:4,10 49:21 50:1,15 sought 14:8,10 15:25 16:6 20:9 20:14,15 56:8 57:5 South 48:4,4 sovereign 4:16 10:1 17:24 18:1 18:8,22 19:15 19:21 20:7 21:18 23:11,12 25:3 26:12 28:5 28:11,25 33:7 33:12,15 57:14 57:24,25 58:12 58:12,19 sovereignty 19:7 speaking 12:18 specific 20:24 29:14 34:17 43:15,24 44:1 specifically 33:24 43:20 spite 45:6 52:3 springs 31:2 stand 19:22 standing 4:18 6:4 6:9,15 9:1,12 9:15,17 10:4,5 14:25 35:16 36:3,7 38:24 42:11,17 started 46:24</p>	<p>state 5:20 9:17 11:21 28:11 30:20 40:23 44:19 57:24,25 statement 10:2 States 1:1,21 4:15 6:2 18:11 18:16 19:12,14 19:17 20:10 23:1,14 25:5 32:8 48:3,4 51:6 55:14 56:2 56:10 status 40:16,24 42:6 statute 5:3 10:15 10:16,20,21 20:8 22:11 26:11 30:23 51:20 54:2 55:15 56:7 statutory 26:15 stay 13:10 14:5,8 step 22:12 sticking 54:14 stop 23:23 24:17 24:22 25:13 strikes 10:8 strip 19:6,7,14 stripping 20:10 stronger 46:14 studied 22:23 subject 11:20 30:12 44:11 55:10 submitted 59:2,4 subsection 21:17 22:12 subsequently 30:6 suddenly 17:14 sue 17:9 28:23 50:4,5,10 56:23 sued 30:15 sues 18:11</p>
---	--	--	--	---

<p>suffers 4:11 suggest 33:11 suggested 9:18 suggesting 44:19 47:25 suggestion 12:22 suggests 48:25 suit 4:11,20 14:7 14:15,19 15:19 18:8,12 20:2,25 21:3,4,7,9 22:3 22:4,7 26:20 28:3,7 30:5 33:7,12 36:23 37:4,18,18,19 37:23 39:25 42:15 44:21 45:14,16,17,24 46:15 47:7,15 48:15 51:16 52:17,17,21 54:15,21 55:2 57:10 58:4,8,16 suits 4:16 19:25 23:8 26:4,14 27:7 51:12,15 suppose 8:14 16:11,12 27:16 44:23 51:9 52:16 supposed 36:18 Supreme 1:1,21 sure 24:14 28:21 34:22 40:16 56:16,25 surely 31:14,14 surrounding 27:19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:4 3:1,1,9 29:19 take 5:2,12 6:12 7:4,12,16 9:2 11:2,16 19:16</p>	<p>23:19 24:3 25:14 32:15 34:20 35:4,11 37:24,25 40:7 45:22 48:15 50:14 56:12 taken 5:9 13:2 13:14 15:6,9,15 15:20,25 17:19 27:25 30:5 31:3 32:19,19,25 36:23,24,25 37:2,7,11,18 38:16 39:18 40:10 43:8,9,22 43:23,25 45:4 46:15 48:19,20 49:14 56:24 takes 12:13 35:7 37:20 38:22 39:19 49:5 53:16 57:8 talking 17:11 36:24 42:13 taxing 11:20 tell 4:24 25:17 32:5,11 34:23 tells 22:10 30:11 terms 9:21 49:8 test 12:15 36:6 testified 26:22 Thank 18:25 29:16,17,21 38:14 40:3 53:11 58:25 theory 34:25 35:6,12 36:22 36:25 38:20 39:2 49:5,15,19 50:2 thing 18:4 24:10 46:17 47:19 things 13:18 22:24 think 4:25 6:8</p>	<p>8:16 9:25 13:17 13:18,25 14:1,4 18:3 23:10 24:8 29:13 36:3,5 38:7 39:15,15 40:12 41:10 43:18 47:11 48:12 49:1,2 50:8,22,25 54:25 55:19,24 58:2 thinking 14:25 38:7,8 thinks 10:13,21 third 51:16 thought 8:21 14:13 19:20 25:7,16 36:9,11 37:13 41:8,10 48:13,22 three 6:17,21,25 27:7 44:20 tied 10:10 time 16:18 17:24 17:25 18:24 33:20,23 34:10 34:13,16 44:19 53:10 54:1 57:8 57:14 58:20 timely 4:25 5:16 times 49:2 timing 5:8 17:5 45:22 46:8 54:11 title 4:17 5:12 7:4 9:2 11:13,24 12:9,13 13:7 14:7 15:1,2,8 15:10 16:9 19:6 19:14,16,25 20:9,12,14,14 20:22,22 21:15 21:20 22:1,5,8 23:8,13,14,15 23:18,19,21,24</p>	<p>24:3,22 25:2,3 25:4,13,14,14 25:18,22 26:1,5 26:16 27:25 28:1,16 29:25 30:16 31:2,5,10 31:12 32:8,22 32:24,25 33:1,3 33:5 35:2,10 37:21,25 38:17 39:4,11,12,20 40:16 42:1,6 45:24 46:1,2,3 46:4,9,20,22 46:25 47:6,7,10 48:16,17,18,20 48:23 49:6,7,14 49:15,16,17 50:9,11,12,17 51:12 52:1,2,4 52:6,12 53:4,19 53:20 54:16 55:2,3,12,13 55:19,21 56:2,9 56:22,23,24 57:2,2,6,9,10 told 40:13 47:20 52:20 tort 18:12 totally 23:17 51:4 touch 22:25 track 30:10 52:9 tract 40:19 41:17 traditional 51:13 transfer 5:22 8:1 8:8,11 11:19 16:2,19,20 30:16 50:16 transferred 5:13 8:19 45:24 46:2 46:9 54:5 transform 37:20 38:16 treat 16:11</p>	<p>trial 16:15 tribal 11:3,20 28:25 tribe 5:23,25 6:1 6:3,3,9 8:17 9:7 9:19,21 13:2 17:7 27:16,17 27:21 28:5,7,13 40:11,13 41:1 44:5,7 52:20,22 53:3 56:13 58:16 tribes 10:24 tribe's 8:21 10:3 tried 28:12 true 7:19,20 8:13 8:24 trust 4:17 5:2,10 5:12 6:12,17 7:4,13,16 13:2 13:14 15:6,9,15 15:20,25 17:19 17:21 22:20 24:16 30:5 31:3 32:15,19,20 35:5 37:2 38:16 38:18,22 40:11 40:24 42:6 43:8 43:9,22,24 44:1 45:4 46:15 50:10 56:13 57:4 trusted 6:19 try 51:21 trying 9:14 12:1 30:2 Tuesday 1:18 turned 25:25 turning 53:19 twice 35:21 two 4:11 5:7 13:18 20:4 22:23 25:9 32:24 51:18 55:6,24</p>
--	---	--	---	--

<p>type 21:7 22:3 types 36:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 20:15 31:23 ultra 32:17 39:1 uncertain 9:21 48:24 unconstitutional 48:7 understand 5:15 10:2 14:24 40:7 42:17 45:21 54:3 understanding 10:23 40:10,17 41:4,6 58:22 understood 45:22,24 46:16 undertaken 19:11 undo 9:14 12:1 35:25 50:15,18 undone 41:3 unfortunately 34:13 unhappy 49:16 unilateral 47:15 United 1:1,21 4:15 6:2 18:11 18:16 19:12,14 19:17 20:10 22:25 23:14 25:5 32:8 48:3 48:4 51:6 55:14 56:2,10 unlawful 29:24 unravel 35:3 unscrambling 42:1 untimely 24:15 unusual 9:18 upset 48:16 50:11</p>	<p>use 6:13,14,18 6:22 7:3,21,24 8:4 10:7,10,15 10:16 11:2,5,12 11:14 12:21,24 36:13,13 43:10 43:10,11,24 44:1,5,5,7,9 U.S 5:3 23:15 26:5 37:1 50:6</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6,14 4:5 48:3 48:4 55:8 valid 4:25 27:24 Vegas 41:6 vest 40:25 viable 37:1 vicinity 11:6 view 48:15 vindicate 4:19 violation 4:22 5:2 vires 32:17 39:1 visit 35:21 visits 35:21 void 40:24</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 7:6 30:18 44:20 53:23 54:1 waive 20:7 waived 4:16 waiver 21:18 23:11 57:25 waives 28:5 waiving 23:12 walks 35:22 want 8:10,18 16:15 18:2 31:7 32:12 37:14 38:12,24 39:15 41:23 50:5,6 54:15 wanted 13:4</p>	<p>16:22 42:5 51:11,22 wants 15:7 25:13 41:22 Washington 1:17 1:25 2:2 wasn't 8:17 9:8 15:2 47:23 waste 36:14 wasting 44:18 way 12:7,10 20:17 25:2 26:2 35:19 46:24 49:17 52:13 53:5,17 57:17 58:5 ways 49:1 weakest 47:2,4 went 24:4 Westfall 18:10 18:13 we'll 4:3 26:2 we're 15:22 17:11 22:23,24 23:12 27:6 35:4 35:6 43:5 48:18 48:18 we've 22:22,23 whatsoever 20:21 wherefore 6:13 wholesale 22:13 win 22:11 window 8:14 9:24 30:9,20,22 31:9 31:11,13 words 11:24 23:23 46:19 54:13 works 25:2 wouldn't 18:9 20:3 41:25 42:1 wreak 19:7 wrong 16:12 19:16 22:16</p>	<p>36:10</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8,10,16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 35:21 years 6:17,21,25 35:3,9,24 37:4 38:23 39:17,24 44:20 48:17,17 49:18 50:5,11 50:13 51:1 52:15,15 53:23</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zone 4:20 11:15 12:14,17 36:4,5 49:24 zoned 12:23 41:14</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 34:19 57:13 10:06 1:22 4:2 11-246 1:5 2:3 3:7 4:4 19:3 11-247 1:13 2:1 3:4,13 4:8 53:14 11:08 59:3 12 50:11 52:16 12-year 50:18 19 3:7 1934 12:6 56:14 1998 57:23</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2a 21:6,14 2012 1:18 24 1:18 2409a(a) 21:7 56:1 25 25:12 26 25:12 27 25:13</p>	<p>29 3:10</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 45:11 30 8:20 14:18 30:10 31:14,25 47:21 30-day 5:11 8:10 8:14 9:1,5,13 9:24 13:6,20 14:20 30:9,19 30:21,25 31:9 31:11,13,22 48:10 31 24:2 38 24:2</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 3:4 53:12 463 43:1,3,17 465 43:4,5,17,20 43:21 44:4,15 49 46:17</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 4:21 5:18,20 6:7 7:22 53 3:13</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 35:3,8,24 37:4 49:18 50:5,13 51:1 52:14,15 53:23 6a 20:6 6-year 30:23</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>702 55:5 56:6</p>
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