SUPREME COURT OF THE UNITED STATES

No. 16–498

DAVID PATCHAK, PETITIONER *v.* RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

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

[February 27, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY and JUSTICE GORSUCH join, dissenting.

Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical pending case of *Smith* v. *Jones*, "Smith wins." *Bank Markazi* v. *Peterson*, 578 U. S. ___, ___, n. 17 (2016) (slip op., at 13, n. 17). Today, the plurality refuses to enforce even that limited principle in the face of a very real statute that dictates the disposition of a single pending case. Contrary to the plurality, I would not cede unqualified authority to the Legislature to decide the outcome of such a case. Article III of the Constitution vests that responsibility in the Judiciary alone.

I

A

Article III, §1 of the Constitution confers the "judicial Power of the United States" on "one supreme Court" and such "inferior Courts" as Congress might establish. That provision, our cases have recognized, is an "inseparable element of the constitutional system of checks and balances," which sets aside for the Judiciary the authority to decide cases and controversies according to law. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 58 (1982) (plurality opinion). "Under the basic concept

of separation of powers," the judicial power to interpret and apply the law "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011) (internal quotation marks omitted).

The Framers' decision to establish a judiciary "truly distinct from both the legislature and the executive," The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton), was born of their experience with legislatures "extending the sphere of [their] activity and drawing all power into [their] impetuous vortex," *id.*, No. 48, at 309 (J. Madison). Throughout the 17th and 18th centuries, colonial legislatures routinely functioned as courts of equity, "grant[ing] exemptions from standing law, prescrib[ing] the law to be applied to particular controversies, and even decid[ing] the merits of cases." Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 Colum. L. Rev. 1648, 1662 (2001). In Virginia, for instance, Thomas Jefferson lamented that the assembly had, "in many instances, decided rights which should have been left to judiciary controversy." Notes on the State of Virginia 120 (W. Peden ed. 1982). And in Pennsylvania, the Council of Censors—a body charged with ensuring compliance with the state constitution—denounced the state assembly's practice of "extending their deliberations to the cases of individuals" in order to ease the "hardships which will always arise from the operation of general laws." Report of the Committee of the Pennsylvania Council of Censors 38, 43 (F. Bailey ed. 1784). "[T]here is reason to think," the Censors reported, "that favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief." *Id.,* at 38.

Given the "disarray" produced by this "system of legisla-

tive equity," the Framers resolved to take the innovative step of creating an independent judiciary. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 221 (1995). They recognized that such a structural limitation on the power of the legislative and executive branches was necessary to secure individual freedom. As James Madison put it, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." The Federalist No. 47, at 303 (citing 1 Montesquieu, The Spirit of the Laws).

The Constitution's division of power thus reflects the "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS* v. *Chadha*, 462 U. S. 919, 962 (1983) (Powell, J., concurring in judgment). The Framers protected against that threat, both in "specific provisions, such as the Bill of Attainder Clause," and in the "general allocation" of the judicial power to the Judiciary alone. *Ibid.* As Chief Justice Marshall wrote, the Constitution created a straightforward distribution of authority: The Legislature wields the power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). Article III, in other words, sets out not only what the Judiciary can do, but also what Congress cannot.

Congress violates this arrangement when it arrogates the judicial power to itself and decides a particular case. We first enforced that rule in *United States* v. *Klein*, 13 Wall. 128 (1872), when the Radical Republican Congress passed a law targeting suits by pardoned Confederates. Although this Court had held that a pardon was proof of loyalty and entitled claimants to damages for property seized by the Union, see *United States* v. *Padelford*, 9 Wall. 531, 543 (1870), Congress sought to block Confederate supporters from receiving such compensation. It

therefore enacted a statute barring rebels from using a pardon as evidence of loyalty, instead requiring the courts to dismiss for want of jurisdiction any suit based on a pardon. This Court declared the law unconstitutional. Congress, in addition to impairing the President's pardon power, had "prescribe[d] rules of decision to the Judicial Department . . . in cases pending before it." *Klein*, 13 Wall., at 146. The Court accordingly held that the statute "passed the limit which separates the legislative from the judicial power." *Id.*, at 147.

We have frequently reiterated this basic premise of the separation of powers. In *Pope* v. *United States*, 323 U. S. 1 (1944), the Court recognized that "changing the rules of decision for the determination of a pending case" would impermissibly interfere with judicial independence, but held that such concerns were absent when Congress consented to a claims settlement pursuant to its broad power "to provide for the payment of debts." *Id.,* at 9; see *Chadha*, 462 U. S., at 966, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated."). As we also explained in *United States* v. *Sioux Nation*, 448 U. S. 371, 398 (1980), because Congress has "no judicial powers" to render judgment "directly," it likewise cannot do so indirectly, by "direct[ing] . . . a court to find a judgment in a certain way." That sort of legislative intervention constitutes an exercise of the judicial power, leaving "the court no adjudicatory function to perform." *Id.*, at 392. Most recently, we reaffirmed the fundamental proposition that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *Bank Markazi*, 578 U. S., at ___, n. 17 (slip op., at 13, n. 17).

B

As the plurality acknowledges, *ante*, at 14, the facts of this case are stark. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) sought land on which to build a casino. The Band identified a 147-acre tract of land in rural southwestern Michigan (called the Bradley Property), and in 2005 the Secretary of the Interior announced a final decision to take the property into trust on behalf of the Band. See 70 Fed. Reg. 25596 (2005).

Fearing an "irreversibl[e] change [to] the rural character of the area," David Patchak, a neighboring landowner, filed a lawsuit challenging the transfer. *Patchak* v. *Jewell*, 828 F. 3d 995, 1000 (CADC 2016). The suit alleged that the Secretary lacked statutory authority to take the Bradley Property into trust. The Secretary asserted several grounds for dismissing the case, but this Court ultimately granted review and determined that "Patchak's suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209, 212 (2012) (*Patchak I*).

Following remand, while summary judgment briefing was underway in the District Court, the Band persuaded Congress to enact a standalone statute, the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act), to terminate the suit. Pub. L. 113–179, 128 Stat. 1913. Section 2(a) of the Act provides that the land "described in . . . 70 Fed. Reg. 25596"—the Bradley Property—"is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."

Then Congress went further. In §2(b) it provided:

> "NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be

promptly dismissed."

When Congress passed the Act in 2014, no other suits relating to the Bradley Property were pending, and the six-year statute of limitations on challenges to the Secretary's action under the Administrative Procedure Act had expired. See 28 U. S. C. §2401(a). The Committees that recommended the legislation affirmed that the statute would make no "changes in existing [Indian] law." H. R. Rep. No. 113–590, p. 5 (2014); S. Rep. No. 113–194, p. 4 (2014).

Recognizing that the "clear intent" of Congress was "to moot this litigation," the District Court dismissed Patchak's case against the Secretary. *Patchak* v. *Jewell*, 109 F. Supp. 3d 152, 159 (DC 2015). The D. C. Circuit affirmed, also based on the "plain" directive of §2(b). 828 F. 3d, at 1001.

II

Congress has previously approached the boundary between legislative and judicial power, but it has never gone so far as to target a single party for adverse treatment and direct the precise disposition of his pending case. Section 2(b)—remarkably—does just that.

The plurality cites a smattering of "narrow statutes" that this Court has previously upheld. *Ante*, at 14. Yet none is as brazen as §2(b), either in terms of dictating a particular outcome or in singling out a particular party. Indeed, the bulk of those cases involved statutes that prospectively governed an open-ended class of disputes and left the courts to apply any new legal standard in the first instance. In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856), for example, we addressed an enactment that permanently altered the legal status of a public bridge going forward by reclassifying it as a postal road. That provision, we later said, did not prescribe an "arbitrary rule of decision" but instead "left [the court] to

apply its ordinary rules" to determine whether the redesignation of the structure meant that it was an obstruction of interstate commerce. *Klein*, 13 Wall., at 146–147. And in *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429 (1992), the statute at issue made reference to specific cases only as a shorthand for identifying preexisting environmental law requirements. *Id.*, at 440. The statute applied generally—"replac[ing] the legal standards" for timber harvesting across 13 national forests—and explicitly reserved for judicial determination whether pending and future timber sales complied with the new standards. *Id.*, at 437.

Even *Bank Markazi*, which disclaimed a number of limits on Congress's authority to intervene in ongoing litigation, did not suggest that Congress could dictate the result in a pending case. There, Congress inserted itself into a long-running dispute over whether terrorist victims could satisfy their judgments against Iran's central bank, enacting a statute that eliminated certain legal impediments to obtaining the bank's assets. We upheld the law because it "establish[ed] new substantive standards" and entrusted "application of those standards" to the court. 578 U. S., at ___ (slip op., at 18).

But the Court in *Bank Markazi* did not have before it anything like §2(b), which prevents the court from applying any new legal standards and explicitly dictates the dismissal of a pending proceeding. The Court instead stressed that the judicial findings contemplated by the statute in *Bank Markazi* left "plenty" for the court "to adjudicate" before ruling that the bank was liable. *Id.*, at ___, n. 20 (slip op., at 17, n. 20). The law, for instance, did not define the terms "beneficial interest" and "equitable title." The District Court needed to resolve the scope of those phrases. Nor did it decide whether the assets were owned by the bank. That issue was also assigned to the court. And lastly, the statute did not settle whether the assets were held in New York or Luxembourg. The court

had to sort that out too. See *ibid.*[1] Section 2(b) goes much further than the statute in *Bank Markazi* by disposing of the case outright, wresting any adjudicative responsibility from the courts. For all of the plurality's discussion of the Federalist Papers and "exclusive" judicial power, *ante*, at 5, it is idle to suggest that §2(b) preserves any role for the court beyond that of stenographer.

In addition, the Court in *Bank Markazi* repeatedly emphasized that the law was not a "one-case-only regime." 578 U. S., at ___ (slip op., at 1). The law instead governed a category of postjudgment execution claims filed by over a thousand plaintiffs who, in 16 different actions, had obtained judgments against Iran in excess of $1.75 billion—facts suggesting more generality than is true of many Acts of Congress.

By contrast, §2(b) targets a single pending case. Although the formal language of the provision—reaching any action "relating to" the Bradley Property—could theoretically suggest a broader application, its practical operation unequivocally confirms that it concerns solely Patchak's suit. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 851 (1986) (explaining that the Court "review[s] Article III challenges . . . with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary"). In an effort to identify a set of disputes to which §2(b) might apply, the plurality asserts that the provision extends to any action relating to the trust status of the property. *Ante*, at 15. Yet as the D. C. Circuit recognized, no other cases were pending when the provision was enacted; §2(b) affected "only . . . Patchak's lawsuit." 828 F. 3d, at 1003.

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[1] Not every Member of the Court thought these responsibilities adequate under Article III, see *Bank Markazi*, 578 U. S., at ___–___ (ROBERTS, C. J., dissenting) (slip op., at 12–13), but all save two did, and that's a comfortable enough margin to establish the point.

And as the Band concedes, no additional suits challenging the transfer could have been filed under the APA—or any other statute of which we are aware—due to the expiration of the statute of limitations. Brief for Respondent Band 6. The plurality thus is simply incorrect when it asserts that the Act applies to a broad "class of cases." *Ante*, at 8, 15. What are those cases?

This is not a question of probing Congress's "unexpressed motives." *Ante*, at 15. The text and operation of the provision instead make clear that the range of potential applications is a class of one. Congress, in crafting a law tailored to Patchak's suit, has pronounced the equivalent of "Smith wins."

III

The plurality refuses to "jealously guard[ ]" against such a basic intrusion on judicial independence. *Northern Pipeline*, 458 U. S., at 60. It instead focuses on general tenets of jurisdiction stripping. In its view, §2(b) falls comfortably within Congress's power to regulate the jurisdiction of the federal courts, and accordingly does not constitute an exercise of judicial power.

But nothing in §2(b) specifies that the statute is jurisdictional. That has special significance: To rein in "profligate use of the term 'jurisdiction,'" this Court in recent cases has adopted a "bright line" rule treating statutory limitations as nonjurisdictional unless Congress "clearly states" otherwise. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013); *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 515–516 (2006). The Gun Lake Act does not clearly state that it imposes a jurisdictional restriction—the term is not mentioned anywhere in the title, headings, or text of the Act. Indeed, we have previously found that nearly identical statutory language "says nothing about whether a federal court has subject-matter jurisdiction." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 164 (2010).

Compare 17 U. S. C. §411(a), the statute in *Reed Elsevier* ("no civil action . . . shall be instituted"), with §2(b) ("an action . . . shall not be filed or maintained").[2] And since the Gun Lake Act was passed well after our series of cases setting forth a clear statement rule, we may "presume" that Congress was conscious of that obligation when it drafted §2(b). *United States* v. *Wells*, 519 U. S. 482, 495 (1997).

After stretching to read §2(b) as jurisdictional, the plurality dedicates considerable effort to defending Congress's broad authority over the jurisdiction of the federal courts. *Ante*, at 7–10. That background principle is undoubtedly correct—and undoubtedly irrelevant for the purposes of evaluating §2(b). For while the greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction, at a certain point that lesser exercise of authority invades the judicial function. "Congress has the power (within limits) to tell the courts what *classes* of cases they may decide, but not to prescribe or superintend how they decide those cases." *Arlington* v. *FCC*, 569 U. S. 290, 297 (2013) (majority opinion of Scalia, J.) (emphasis added; citations omitted). In other words, Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding.

Klein, after all, drew precisely the same distinction when it considered the provision stripping jurisdiction

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[2]The plurality suggests an analogy to *Gonzalez* v. *Thaler*, 565 U. S. 134 (2012), which addressed in passing the familiar hurdle in habeas proceedings that "an appeal may not be taken" unless a judge issues a "certificate of appealability." *Id.,* at 142 (quoting 28 U. S. C. §2253(c)(1)). But that gatekeeping requirement—which dates back to 1908—has long been understood as a direct limitation "on the power of federal courts to grant writs of habeas corpus," *Miller-El* v. *Cockrell*, 537 U. S. 322, 336–338 (2003), and appears alongside other provisions that speak in "clear jurisdictional language," *Gonzalez*, 565 U. S., at 142 (internal quotation marks omitted). Nothing similar is at issue here.

over any suit based on a pardon. Chief Justice Chase's opinion for the Court explained that if the statute had "simply" removed jurisdiction over "a particular class of cases," it would be regarded as "an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." 13 Wall., at 145, 146. But because the withdrawal of jurisdiction was a "means to an end," founded "solely on the application of a rule of decision," the Court held that the law violated the separation of powers. *Ibid.*; see R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015) (recognizing that "not every congressional attempt to influence the outcome of cases, even if phrased in jurisdictional language, can be justified as a valid exercise of a power over jurisdiction").

Contrary to the plurality, I would hold that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case. Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding. Does the plurality really believe that there is a material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith* v. *Jones*, Smith wins"? In both instances, Congress has resolved the specific case in Smith's favor.

Over and over, the plurality intones that §2(b) does not impinge on the judicial power because the provision "changes the law." See *ante*, at 6–7, 10–14. But all that §2(b) does is deprive the court of jurisdiction in a single proceeding. If that is sufficient to change the law, the plurality's rule "provides no limiting principle" on Congress's ability to assume the role of judge and decide the outcome of pending cases. *Northern Pipeline*, 458 U. S., at

73.

In my view, the concept of "changing the law" must imply some measure of generality or preservation of an adjudicative role for the courts. The weight of our jurisdiction stripping precedent bears this out. Almost all of the examples the plurality cites, see *ante*, at 10, 13, contemplated the wholesale repeal of a generally applicable jurisdictional provision. See *Hallowell* v. *Commons*, 239 U. S. 506, 508 (1916) ("The [provision] applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all."); *Cary* v. *Curtis*, 3 How. 236, 245 (1845); see also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234 (1922). The Court, to date, has never sustained a law that withdraws jurisdiction over a particular lawsuit.

The closest analogue is of course *Ex parte McCardle*, 7 Wall. 506 (1869), which the plurality nonchalantly cites as one of its leading authorities. *McCardle* arose amid a pitched national debate over Reconstruction of the former Confederacy. William McCardle, an unreconstructed newspaper editor, was being held in military custody for inciting insurrection. After unsuccessfully applying for federal habeas relief in the circuit court, McCardle appealed to the Supreme Court, raising a broad challenge to the constitutionality of Reconstruction. The Court heard argument on his habeas appeal over the course of four days in March 1868. Before the Court could render its decision, however, the Radical Republican Congress—in an acknowledged effort to sweep the case from the docket—enacted a statute withdrawing the Supreme Court's appellate jurisdiction in habeas cases. Van Alstyne, A Critical Guide to Ex parte McCardle, 15 Ariz. L. Rev. 229, 239–241 (1973).

The Court unanimously dismissed McCardle's appeal. In a brief opinion, Chief Justice Chase sidestepped any

consideration of Congress's attempt to preclude a decision in the case. Faced with a "plain[ ] instance of positive exception," the Court held that it lacked power to review McCardle's claims. 7 Wall., at 514.

The Court's decision in *McCardle* has been alternatively described as "caving to the political dominance" of the Radical Republicans or "acceding to Congress's effort to silence the Court." Meltzer, The Story of *Ex parte McCardle*, in Federal Courts Stories 73 (V. Jackson & J. Resnick eds. 2010). Read for all it is worth, the decision is also inconsistent with the approach the Court took just three years later in *Klein*, where Chief Justice Chase (a dominant character in this drama) stressed that "[i]t is of vital importance" that the legislative and judicial powers "be kept distinct." 13 Wall., at 147.

The facts of *McCardle*, however, can support a more limited understanding of Congress's power to divest the courts of jurisdiction. For starters, the repealer provision covered more than a single pending dispute; it applied to a class of cases, barring anyone from invoking the Supreme Court's appellate jurisdiction in habeas cases for the next two decades. In addition, the Court's decision did not foreclose all avenues for judicial review of McCardle's complaint. As Chase made clear in the penultimate paragraph of the opinion—and confirmed later that year in his opinion for the Court in *Ex parte Yerger*, 8 Wall. 85 (1869)—the statute did not deny "the whole appellate power of the Court." 7 Wall., at 515. McCardle, by taking a different procedural route and filing an original habeas action, could have had his case heard on the merits.[3]

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[3]The plurality surmises that *McCardle* reserved an alternative avenue for relief in response to a perceived problem under the Suspension Clause. *Ante*, at 9, n. 4. But regardless of the basis for that reservation, our point is simply that, in sustaining a jurisdictional repeal that leaves a claimant without any prospect for relief, the plurality goes beyond what the Court in *McCardle* upheld.

Section 2(b), on the other hand, has neither saving grace. It ends Patchak's suit for good. His federal case is dismissed, and he has no alternative means of review anywhere else. See 25 U. S. C. §1322(a) (providing that state courts, absent the consent of the tribe, may not exercise civil jurisdiction over trust land). Section 2(b) thus reaches further than the typical jurisdictional repeal, which "takes away no substantive right but simply changes the tribunal that is to hear the case," *Landgraf*, 511 U. S., at 274. Because §2(b) singles out Patchak's suit, specifies how it must be resolved, and deprives him of any judicial forum for his claim, the decision to uphold that provision surpasses even *McCardle* as the highwater mark of legislative encroachment on Article III.

Indeed, although the stakes of this particular dispute may seem insignificant, the principle that the plurality would enshrine is of historic consequence. In no uncertain terms, the plurality disavows any limitations on Congress's power to determine judicial results, conferring on the Legislature a colonial-era authority to pick winners and losers in pending litigation as it pleases. The Court in *Bank Markazi* said it was holding the line against this sort of legislative usurpation. See 578 U. S., at ___–___, and n. 17, ___ (slip op., at 12–13, and n. 17, 18). The plurality would yield even that last ditch.

IV

While the plurality reaches to read the Gun Lake Act as stripping jurisdiction, JUSTICE GINSBURG's concurrence, joined by JUSTICE SOTOMAYOR, strains further to construe §2(b) as restoring the Government's sovereign immunity from suit. To reinstate sovereign immunity after it has been waived, Congress must express "an unambiguous intention to withdraw" a remedy. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1019 (1984). Congress has not made that showing here. Section 2(b)—which provides that "an

action . . . relating to the [Bradley Property] . . . shall be promptly dismissed"—bears none of the unmistakable hallmarks of a provision withdrawing the sovereign's consent to suit.

The concurrence first relies on a hunch, based on the Court's earlier determination that Patchak's suit was not barred by sovereign immunity. See *Patchak I*, 567 U. S., at 224. But hunches do not make for an unambiguous expression of intent. Nor, of course, does one lone reference to "immunity" in the legislative history. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 37 (1992) ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon . . . cannot be supplied by a committee report.").

Saving the text for last, the concurrence fails to identify a single instance where the Court has treated a statute that does not mention "immunity," "consent to be sued," or even the "United States" as restoring sovereign immunity. The only basis for its interpretation is the purported similarity between the language of the Gun Lake Act and the waiver of immunity in the Administrative Procedure Act. In drawing this comparison, however, JUSTICE GINSBURG leaves out the critical element of that waiver. See *ante*, at 2 (opinion concurring in judgment). In full, the APA provision states that a suit "shall not be dismissed . . . *on the ground that it is against the United States*." 5 U. S. C. §702 (emphasis added). Section 2(b), as noted, contains no such reference to the sovereign.

As for JUSTICE BREYER's concurrence, "dot[ting] all the i's," "simplif[ying] judicial decisionmaking," and "eliminat[ing] the cost of litigating a lawsuit" are nothing but cavalier euphemisms for exercising the judicial power. *Ante*, at 2. JUSTICE BREYER assumes that §2(a) is constitutionally unobjectionable, and that §2(b) seeks the same "real-world result." *Ibid.* But if §2(a) is constitutional, it is because the provision establishes new substantive

standards and leaves the court to apply those standards in the first instance. That is the rule set forth plainly in *Bank Markazi*. And if that is so, §2(b) does not simply supplement §2(a)—it short-circuits the requisite adjudicative process and decides the suit outright. The proper allocation of authority under the Constitution is very much part of the "real world." Pursuant to that basic equilibrium, Congress cannot "gild the lily" by relieving the Judiciary of its job—applying the law to the case before it.

* * *

The Framers saw this case coming. They knew that if Congress exercised the judicial power, it would be impossible "to guard the Constitution and the rights of individuals from . . . serious oppressions." The Federalist No. 78, at 469 (A. Hamilton). Patchak thought his rights were violated, and went to court. He expected to have his case decided by judges whose independence from political pressure was ensured by the safeguards of Article III—life tenure and salary protection. It was instead decided by Congress, in favor of the litigant it preferred, under a law adopted just for the occasion. But it is our responsibility under the Constitution to decide cases and controversies according to law. It is our responsibility to, as the judicial oath provides, "administer justice without respect to persons." 28 U. S. C. §453. And it is our responsibility to "firm[ly]" and "inflexibl[y]" resist any effort by the Legislature to seize the judicial power for itself. The Federalist No. 78, at 470.

I respectfully dissent.