No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMISH INDIAN NATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tucker Act, 28 U.S.C. 1491(a)(1), or Indian Tucker Act, 28 U.S.C. 1505, grants the Court of Federal Claims subject-matter jurisdiction over an Indian tribe's claim for money damages against the United States, based on the United States' purported violation of sources of law that do not themselves mandate a damages remedy for their violation.

2. Whether the United States may be required to pay damages for failing to provide an Indian tribe with a statutorily defined portion of a statutory fund, where Congress enacted limited appropriations for that fund and those appropriations were exhausted over a decade before the tribe filed its action for money damages.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 657 F.3d 1330 (Pet. App. 1a-22a) and 419 F.3d 1355 (Pet. App. 78a-114a). The opinions of the Court of Federal Claims are reported at 90 Fed. Cl. 122 (Pet. App. 23a-77a) and 58 Fed. Cl. 114 (Pet. App. 115a-134a).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2011. A petition for rehearing was denied on January 26, 2012 (Pet. App. 355a-356a). On April 13, 2012, the Chief Justice extended the time within which to file a

petition for a writ of certiorari to and including May 25, 2012. On May 16, 2012, the Chief Justice further extended the time to June 1, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Tucker Act of 1887, ch. 359, 24 Stat. 505, as amended (28 U.S.C. 1491(a)(1)), provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1).

Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, as amended (28 U.S.C. 1505), which is commonly known as the Indian Tucker Act, provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. 1505.

Other pertinent provisions are set out in the appendix to the petition (Pet. App. 388a-390a).

STATEMENT

The Samish Indian Nation (Samish or Tribe) filed this suit for money damages against the United States by invoking the jurisdictional provisions of the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505. Pet. App. 359a. The Federal Circuit held that the Court of Federal Claims (CFC) had subject-matter jurisdiction over the Tribe's claim for damages allegedly resulting from the United States' violation of the Due Process Clause and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*

1. a. In 1972, a group of individuals of Samish descent (Group) petitioned the Department of the Interior (Interior) for federal recognition as an Indian tribe. Pet. App. 4a, 83a. Tribal-recognition decisions have long been regarded as political questions committed to the political branches, see *Baker* v. *Carr*, 369 U.S. 186, 215 & n.43 (1962), and, in 1972, Interior acted on tribal-recognition requests "on a case-by-case basis at the discretion of the Secretary [of the Interior (Secretary)]." 43 Fed. Reg. 39,361 (1978); Pet. App. 80a. In 1978, the Secretary promulgated regulations governing the recognition process. See 25 C.F.R. Pt. 54 (1979), redesignated at 25 C.F.R. Pt. 83 (1982). By their terms, those regulations applied "only" to American Indian groups that were "not currently acknowledged as Indian tribes by [Interior]," 25 C.F.R. 54.3(a) (1979), and provided a "first come, first serve" process for such groups to petition for federal recognition, 25 C.F.R. 54.9(c) (1979); accord 25 C.F.R. 83.3(a), 83.9(c) (1982).

In 1979, the Group filed a revised petition for recognition under the 1978 regulations. Pet. App. 83a, 273a; cf. *id.* at 168a. Interior subsequently proposed finding that the

Group did not satisfy the criteria for recognition, but it offered an opportunity to submit written rebuttal evidence. 47 Fed. Reg. 50,110 (1982). After several delays resulting from a Freedom of Information Act request filed by the Group, Interior issued a final agency decision denying recognition in 1987. 52 Fed. Reg. 3709.

b. In 1989, the Group sought judicial review. Pet. App. 84a. The district court in *Greene* v. *Lujan* vacated Interior's decision and remanded. *Id.* at 337a-354a (1992 WL 533059 (W.D. Wash. 1992)). The court concluded that the Group's evidence did not establish at summary judgment that Interior previously "treated the Samish as a recognized tribe" or that "the Samish received benefits because of their tribal status." *Id.* at 342a, 347a (noting that the government's evidence indicated that the "Samish knew they were not recognized"). But the court determined that "individual members" of the Group had lost federal benefits after 1975 "when [tribal] acknowledgment became a prerequisite to continuing eligibility," *id.* at 342a, 349a; that those individual plaintiffs were entitled to due process, *id.* at 350a-352a; and that the process due was a "formal adjudication under the APA," *id.* at 352a-353a. The court accordingly held that Interior's "informal administrative hearing" on the recognition petition violated "due process." *Id.* at 353a. The Ninth Circuit affirmed. *Greene* v. *Babbitt*, 64 F.3d 1266, 1271-1275 (1995).

c. On remand, in 1994, an administrative law judge (ALJ) held a formal evidentiary hearing. Pet. App. 175a. In 1995, the ALJ recommended that the Samish be recognized as a tribe. *Id.* at 239a-336a (recommended decision).

On November 8, 1995, the Assistant Secretary for Indian Affairs met with the Interior attorney who had represented the agency in opposing the Group's petition before the ALJ and who, in that meeting, unsuccessfully attempt-

ed to persuade the Assistant Secretary to deny recognition. Pet. App. 146a-147a & n.5, 195a. Later that same day, the Assistant Secretary issued Interior's final agency decision recognizing the Samish as a tribe. *Id.* at 174a-238a (agency decision). The Assistant Secretary determined that, although the Samish had "not been federally recognized as a separate and distinct tribe since the early 1900's," the government would recognize the Samish as a tribe going forward, because the "the newly acknowledged tribe" had satisfied the relevant recognition criteria based on, *inter alia*, its 1986 membership roll. *Id.* at 177a-178a, 195a, 198a. The Secretary, after denying a reconsideration request by two competing Indian tribes opposing recognition, ordered that the Samish be recognized as a tribe effective April 1996. *Id.* at 165a-166a, 172a.

d. After Interior granted the Tribe's recognition petition, the Tribe filed a motion in the civil action in which the district court previously had ordered a formal agency adjudication, "seek[ing] to reinstate certain of the [ALJ's proposed] findings" that the Assistant Secretary did not adopt. Pet. App. 141a. In 1996, the district court granted that motion. *Id.* at 140a-163a (*Greene* v. *Babbitt*, 943 F. Supp. 1278 (W.D. Wash.)).

As relevant here, the district court held that the *ex parte* meeting on the day of the Assistant Secretary's favorable recognition decision "violated the Samish Tribe's Fifth Amendment due process rights" by "render[ing] the proceedings fundamentally unfair," Pet. App. 154a-155a, and violated an APA provision governing formal agency adjudication, *id.* at 155a-156a. See *id.* at 137a-138a.[1] As a rem-

[1] The district court also initially concluded that the *ex parte* contact "violated the terms of the [c]ourt's order" approving a 1992 joint status report and that the Interior attorney who participated in the meeting was thus in "contempt of court." Pet. App. 156a-157a, 162a-163a. On

edy, the court "reinstate[d]" three sets of the ALJ's "proposed findings" that the court concluded had been erroneously rejected by the Assistant Secretary as a result of the *ex parte* meeting. *Id.* at 161a-162a; see *id.* at 138a, 147a.

One of the reinstated sets of findings, in the district court's view, indicated that Interior "could not adequately explain why the Samish had been omitted from a list of federally recognized tribes prepared during the 1970s." Pet. App. 138a (citing ALJ Findings 1-3, *id.* at 272a-273a, and final agency decision, *id.* at 198a-199a, 231a-232a). According to the court, the ALJ's proposed findings were that the Samish's omission from the list was not "based on actual research" or "intended to be used * * * for determining which Indian groups [w]ere to be recognized by the United States." *Id.* at 161 n.13 (citing final agency decision, *id.* at 198a-199a, 231a-232a); see also *id.* at 150a.

According to the ALJ's proposed findings (Pet. App. 272a-273a), Patricia Simmons, an employee of the Bureau of Indian Affairs (BIA), had testified at the 1994 hearing that, in 1966, she prepared a "preliminary list" of Indian tribes "with whom we had dealings" that was "never intended to be a list of federally recognized tribes." *Id.* at 272a. Ms. Simmons stated that she initially "just listed everybody" on whom the BIA had a file records section, and that her 1966 list included the Samish. *Id.* at 272a-273a. But by 1969, Ms. Simmons testified, she had requested BIA Area Offices and Agency Superintendents to identify "which of the groups listed had a 'formal relationship' with them" and, based on the responses, she "restricted her list to 'those groups who had a formal organization approved by [Interior].'" *Ibid.* The Samish were omitted from that 1969

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reconsideration, the court amended its decision and withdrew that contempt finding. *Id.* at 135a.

list, she explained, because the Portland Area Office "advised her that they were 'recognized for claims purposes only.'" *Id.* at 273a. Ms. Simmons acknowledged in her 1994 testimony that she "had no record of this" and that the Area and Agency responses "have been lost." *Ibid.* Ms. Simmons also stated that "her revised list was 'generally' consulted to determine groups' legal status," while acknowledging that she did not have "authority to make such decisions." *Ibid.*

2. In 2002, the Tribe filed this action for money damages in the CFC, alleging that the government "wrongfully and arbitrarily refused to treat the Tribe as a recognized tribe" from 1969 to 1996 and that, "[a]s a result," the Tribe did not receive federal benefits available to "federally recognized Indian tribes" during that period. Pet. App. 357a-358a, 368a, 384a. As relevant here, the Tribe asserted jurisdiction under the Tucker and Indian Tucker Acts, *id.* at 359a, and sought money damages for the purportedly "wrongful" refusal to recognize it as a tribe, which allegedly "prevented the Tribe * * * from receiving * * * benefits" from 1972 to 1983 under the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act), Pub. L. No. 92-512, 86 Stat. 919 (31 U.S.C. 1221 *et seq.* (1976) and 31 U.S.C. 6701 *et seq.* (1982)) (repealed 1986). Pet. App. 373a-374a, 384a.[2]

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[2] The 1982 codification of Title 31, which moved the Revenue Sharing Act from 31 U.S.C. 1221 *et seq.* to 31 U.S.C. 6701 *et seq.*, altered the text of several provisions but "did not make any substantive change in the law." *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 n.1 (1985); cf. *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227-228 (1957). Congress later repealed the Revenue Sharing Act in 1986 when appropriations for the Act ended. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 14001(a)(1) and (e)(1), 100 Stat. 327, 329.

a. The Revenue Sharing Act established a Trust Fund of appropriated monies and provided that the Secretary of the Treasury "shall, for each entitlement period, pay out of the Trust Fund" to each State and "unit of local government" a "total amount equal to the entitlement" of that entity as "determined under [the Act] for such period." 31 U.S.C. 1221(a), 1224(a) (1976); see 31 U.S.C. 6702(a), 6703(a) and (b) (1982). A "unit of local government" included "the recognized governing body of an Indian Tribe * * * which performs substantial governmental functions." 31 U.S.C. 1227(d)(1) (1976); see 31 U.S.C. 6701(a)(5)(B) (1982) (recodified definition).

The Revenue Sharing Act further provided that "[i]n order to qualify for any payment" under the Act, a State or unit of local government "must establish * * * to the satisfaction of the Secretary" of the Treasury, "in accordance with [Department of the Treasury (Treasury)] regulations," that it would satisfy a series of requirements. 31 U.S.C. 1243(a) (1976); see 31 U.S.C. 6704(a) (1982); see also 31 C.F.R. 51.10-51.11, 51.30-51.34, 51.40 (1973); 31 C.F.R. 51.11(b), 51.40-51.45, 51.100 (1980). With respect to Indian tribes, Treasury accepted the Secretary of the Interior's certification that a tribe had a "recognized governing body" and "perform[ed] substantial governmental functions" as "prima facie evidence of that fact." 31 C.F.R. 51.2(i) (1973); see 31 C.F.R. 51.2(j) (1986). Of the "more than 500 recognized Indian tribes and Alaskan native villages" identified by the Comptroller General in 1976, approximately 200 "did not receive revenue sharing funds," because "[i]n most cases" they "did not meet the various eligibility criteria" under the Act. Comptroller General, General Accounting Office, GGD-76-64, *Changes Needed in Revenue Sharing Act for Indian Tribes and Alaskan Native Villages* 8 (1976), http://archive.gao.gov/f0202/093733.pdf.

For each of the Revenue Sharing Act's "entitlement periods" (lasting one year or less) from 1972 to 1986, Congress appropriated a specified sum for deposit into the Trust Fund. 31 U.S.C. 1224(b) and (c), 1261(b) (1976 & Supp. V 1981); see 31 U.S.C. 6701(a)(1), 6703(b) (1982 & Supp. III 1985).[3] The Act initially provided formulae for dividing the total amount in the Fund for each entitlement period among the States, 31 U.S.C. 1225(a) (1976), and for further dividing each State's allocation among the State itself and the "units of local government" within that State. 31 U.S.C. 1226(a) (1976 & Supp. V 1981). The Act later separated the funds appropriated for the Trust Fund into amounts for state governments and for units of local government, 31 U.S.C. 6703(b)(1) and (2) (1982 & Supp. III 1985), and provided formulae for dividing those amounts between state and local governments, 31 U.S.C. 6705, 6707(a), 6708-6709 (1982). Congress deemed the allocation of a fixed appropriation "essential," because funding "should be set at a specific figure so that the cost of the program will be definite and ascertainable beforehand." H.R. Rep. No. 1018, 92d Cong., 2d Sess., Pt. 1, at 7 (1972);

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[3] The Revenue Sharing Act provided appropriations for the Fund through 1976, 31 U.S.C. 1224(b) (1976), after which Congress enacted annual appropriations for the Fund through September 1986. See Department of Housing and Urban Development–Independent Agencies Appropriations Act (HUD-IAAA), 1986, Pub. L. No. 99-160, Tit. II, 99 Stat. 924; HUD-IAAA, 1985, Pub. L. No. 98-371, Tit. II, 98 Stat. 1230; HUD-IAAA, 1984, Pub. L. No. 98-45, Tit. II, 97 Stat. 232; HUD-IAAA, 1983, Pub. L. No. 97-272, Tit. II, 96 Stat. 1172-1173; HUD-IAAA, 1982, Pub. L. No. 97-101, Tit. II, 95 Stat. 1429; HUD-IAAA, 1981, Pub. L. No. 96-526, Tit. II, 94 Stat. 3058; HUD-IAAA, 1980, Pub. L. No. 96-103, Tit. II, 93 Stat. 782; HUD-IAAA, 1979, Pub. L. No. 95-392, Tit. II, 92 Stat. 801; HUD-IAAA, 1978, Pub. L. No. 95-119, Tit. II, 91 Stat. 1082; Economic Stimulus Appropriations Act of 1977, Pub. L. No. 95-29, Tit. I, ch. I, 91 Stat. 122.

S. Rep. No. 1050, 92d Cong., 2d Sess., Pt. 1, at 11 (1972) (same). In 1976, Congress further amended the Act to forbid any increase to "a payment made for any entitlement period" after 1976 to any State or "unit of local government" unless it had made "a demand therefor * * * within 1 year of the end of the entitlement period." 31 U.S.C. 1221(b) (1976); see 31 U.S.C. 6702(c) (1982); 31 C.F.R. 51.26(b)(2) (1980); 31 C.F.R. 51.26(b)(3) (1984).

b. In 2003, the CFC dismissed the Tribe's suit. Pet. App. 115a-134a (58 Fed. Cl. 114). As relevant here, the court held that 28 U.S.C. 2501's six-year statute of limitations barred the Tribe's claim to statutory benefits that it might have obtained between 1969 and 1996 if it had been recognized at that time. Pet. App. 125a-126a.

c. The Federal Circuit reversed in part and remanded. Pet. App. 78a-114a (419 F.3d 1355). The court held that the Tribe's "claims to federal benefits for the 1969 to 1996 period are not time barred." *Id.* at 79a, 101a-113a.

The court of appeals concluded that, because the recognition of an Indian tribe is a non-justiciable "political question," the Tribe's damages claims—which are premised on the government's allegedly "wrongful" failure to recognize the Tribe—"did not accrue until the [Tribe] * * * obtained a final ruling by a district court under the APA that the government's refusal to accord historical acknowledgment between 1978 and 1996 was arbitrary and capricious." Pet. App. 102a; see *id.* at 103a, 111a. The court reasoned that Interior's 1978 recognition regulations provided "a limited role for judicial intervention" in this otherwise non-justiciable context with "APA review to ensure that the government followed its regulations and accorded due process." *Id.* at 111a. Reflecting that limited role, the court of appeals explained, the district court's 1996 decision in *Greene* had held that the government violated the "APA

and due process," *id.* at 88a, which justified reinstating ALJ findings that "support the [Tribe's] contention" that it "would have been extended federal recognition prior to 1996." *Id.* at 112a-113a (stating that the findings indicate that "the government was arbitrary and capricious in dropping the Samish from the 1969 BIA list"); see *id.* at 103a. In other words, in the court of appeals' view, the "district court's determination provide[d] a predicate 'wrongful' element in this action" by confirming that "the government was arbitrary and capricious in refusing the Samish federal acknowledgment under the [1978] regulations before 1996." *Id.* at 113a. Because that determination became fixed upon the district court's entry of judgment in November 1996, the court of appeals held that the Tribe satisfied the six-year limitations period by filing suit in October 2002. *Ibid.*

3. a. On remand, after the Tribe amended its complaint (Pet. App. 357a-387a), the CFC ordered the case dismissed for want of jurisdiction. *Id.* at 23a-77a (90 Fed. Cl. 122). The CFC stated that its jurisdiction under the Tucker Act and Indian Tucker Act must be based on a source of law that establishes a "substantive right" and that "mandate[s] compensation" from the government for damages sustained. *Id.* at 31a-32a (citation omitted). The court concluded, *inter alia*, that the Revenue Sharing Act was a money-mandating statute, *id.* at 40a-47a, but that no damages could be awarded because the appropriations for that Act "lapsed * * * almost twenty years before [the Tribe] filed suit," *id.* at 48a. See also *id.* at 38 n.10.[4]

[4] The CFC dismissed the balance of the Tribe's action, including in orders other than those at issue here. See 85 Fed. Cl. 525 (2009); 82 Fed. Cl. 54 (2008); Pet. App. 33a-39a, 48a-76a, 123a-126a; cf. *id.* at 101a (noting that the Tribe's claims were based on "a basket of thirty-[nine] treaties and statutes"). The court of appeals affirmed with respect to

b. The Federal Circuit again reversed in part and remanded. Pet. App. 1a-22a (657 F.3d 1330). As relevant here, the court held that the CFC "has jurisdiction over the [the Tribe's] allegations based on the Revenue Sharing Act," *id.* at 14a, because that claim for damages was "premised on [a] money-mandating statute[]" and falls "within the jurisdiction of the [CFC] pursuant to the Tucker Act, 28 U.S.C. § 1491(a), and the Indian Tucker Act, 28 U.S.C. § 1505," *id.* at 1a. Three aspects of that decision are significant here.

First, the court of appeals rejected the government's argument that "it had no duty to treat the Samish as federally recognized prior to 1996." Pet. App. 9a. The court stated that its prior decision in this case had already "ruled that the Government's failure to treat the Samish as a federally recognized tribe from 1969 to 1996 was 'wrongful' and 'arbitrary and capricious.'" *Ibid.* (citing 419 F.3d at 1373-1374 (Pet. App. 111a-113a)). That "wrongful failure to recognize the Samish," the court held, "gave rise to a damages claim." *Ibid.*

Second, the court of appeals acknowledged that, in addition to "wrongful" conduct, the Tucker and Indian Tucker Acts' waivers of sovereign immunity require that "[d]amages, if any, must be premised on [a] money-mandating statute[]." Pet. App. 5a, 9a. The court then stated that "[t]he analysis of whether a law is money-mandating contains two steps," first, whether "any substantive law imposes specific obligations on the Government" and, if so, "'whether the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties the

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all claims asserted by the Tribe on appeal, except the Revenue-Sharing-Act-based claim at issue in this petition. Pet. App. 6a-7a, 21a-22a; see *id.* at 78a-79a.

governing law imposes.'" *Id.* at 10a (quoting *United States* v. *Navajo Nation*, 556 U.S. 287, 291 (2009)). The court concluded that, in this case, "the Revenue Sharing Act is money-mandating," because, when in effect, it directed that funds "shall be allocated" to tribes and described those payments as "entitlements." *Id.* at 14a-15a. The court acknowledged that the D.C. Circuit in *National Association of Counties* v. *Baker*, 842 F.2d 369 (1988), cert. denied, 488 U.S. 1005 (1989), "determined that the Revenue Sharing Act did not mandate compensation" but disagreed with that holding. Pet. App. 16a.

Finally, the court of appeals recognized that "appropriations for the Revenue Sharing Act lapsed in 1983"[5] but held that the "lapse in appropriated funds," Pet. App. 16a-17a, did not preclude the Tribe from obtaining a damages award in its CFC action filed in 2002. *Id.* at 16a-21a. The court did not disagree that Congress had capped its appropriations to the Act's Trust Fund, but it concluded that the Act "was [not] capped in a manner that restricts the government's liability for damages." *Id.* at 18a-19a. The court reasoned that the Tribe did "not seek the release of appropriated funds," but rather sought "compensation * * * for an injury sustained due to the Government's wrongful failure to recognize the [Tribe]," which prevented the Tribe from "participat[ing] in programs to which [it was] entitled." *Id.* at 17a, 19a. The court was of the view that the Judgment Fund, 31 U.S.C. 1304 (2006), "was established to pay monetary damage judgments entered against the Government when other funds are unavailable" and, because no other

[5] Congress appropriated funds for the Revenue Sharing Act through September 1986, see p. 9 & n.3, *supra*. The court of appeals may have intended to refer to the Tribe's damages claim, which seeks compensation for funding allegedly lost under the Act from 1972 until 1983. See Pet. App. 373a.

funds were available, the Tribe was "eligible to receive monetary damages from the * * * Judgment Fund." Pet. App. 20a-21a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit has held that the limited waivers of sovereign immunity in the Tucker Act and Indian Tucker Act grant the CFC jurisdiction over a claim for money damages based on (1) its conclusion that Interior violated the APA and Due Process Clause in 1995, and (2) the Tribe's supposed eligibility for benefits during a period many years earlier under a *different* statute (administered by a *different* Department) that the government had *not* violated. That holding dramatically expands the relevant waivers of sovereign immunity by subjecting the government to suit for consequential damages that might flow from an agency's alleged violation of procedural provisions that themselves do not mandate a damages remedy for their violation. By decoupling the requirement that the plaintiff allege a government violation of a particular source of law and the requirement that the violated source of law must *itself* mandate a damages remedy, the Federal Circuit has disregarded the Court's pathmarking decisions in *United States* v. *Testan*, 424 U.S. 392, 401-402 (1976), and *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*), and 556 U.S. 287 (2009) (*Navajo II*). Review, and indeed summary reversal, are warranted on that threshold jurisdictional ground.

The Federal Circuit further erred in holding that the CFC could order monetary relief to compensate the Tribe for funding it did not receive under the Revenue Sharing Act from 1972 to 1983. Congress appropriated a fixed sum of total funding under that Act for discrete periods of time and directed that those limited appropriations be divided among eligible States and units of local government, includ-

ing certain recognized Indian tribes. Because those appropriated funds were fully exhausted a decade before the Tribe was federally recognized and 16 years before it filed this action, no appropriated funds, under the Judgment Fund or otherwise, could properly be used to pay the Tribe on its damages claim. This Court is considering a materially similar question in *Salazar* v. *Ramah Navajo Chapter*, No. 11-551 (argued Apr. 18, 2012). If the Court does not summarily reverse the court of appeals' ruling on the first question presented, it should hold this petition pending its decision in *Ramah Navajo*.

A. The Tucker Act And Indian Tucker Act Waive Sovereign Immunity Only For Claims That The United States Violated A Substantive Source Of Law That Itself Mandates A Damages Remedy For The Violation

The Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505 (Tucker Acts), provide limited waivers of the United States' sovereign immunity from a claim for money damages if two requirements are satisfied: First, the plaintiff must allege that the government violated a provision of substantive law identified in the Tucker Acts and, second, that source of substantive law must *itself* mandate a damages remedy for its violation. Those black-letter principles governing these significant but limited waivers of the United States' sovereign immunity have been definitively established by this Court in *Testan*, *Navajo I*, and *Navajo II*. The Federal Circuit's contrary holding cannot be squared with those decisions and threatens an unprecedented expansion of the United States' immunity from damages claims.

1. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo I*, 537 U.S. at 502

(quoting *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) (*Mitchell II*)). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver must be "strictly construed * * * in favor of the sovereign," *Lane* v. *Peña*, 518 U.S. 187, 192 (1996), and "not 'enlarge[d] . . . beyond what the language requires.'" *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (citation omitted); see *Cooper*, 132 S. Ct. at 1448.

The Tucker Act provides a "[l]imited" waiver of the United States' immunity from suit (*Navajo II*, 556 U.S. at 289) by granting the CFC jurisdiction over—

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Indian Tucker Act extends the terms of the Tucker Act to Indian tribes by allowing a tribe to bring suit in the CFC on a claim that "otherwise would be cognizable in the [CFC] if the claimant were not an Indian tribe," 28 U.S.C. 1505. See *Navajo II*, 556 U.S. at 290; *Navajo I*, 537 U.S. at 502-503 & n.10. The Indian Tucker Act (but not the Tucker Act) additionally permits suit on certain claims arising under "treaties of the United States" and "Executive orders," 28 U.S.C. 1505, but the two Acts otherwise provide the "same access" to relief. *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*).

While the text of the two Tucker Acts addresses damages claims "founded * * * upon" (28 U.S.C. 1491(a)(1)) or "arising under" (28 U.S.C. 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot

every claim invoking the Constitution, a federal statute, or a regulation is cognizable." *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (quoting *Testan*, 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); accord *Navajo I*, 537 U.S. at 503.

A tribal plaintiff asserting a non-contract claim under the Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. *Navajo II*, 556 U.S. at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Ibid.* (quoting *Navajo I*, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo I*, 537 U.S. at 506; see *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) (holding that the government's duties vis-a-vis Indian tribes are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles"); *Navajo II*, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Navajo II*, 556 U.S. at 290-291 (quoting *Navajo I*, 537 U.S. at 506) (brackets and citation

omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that *themselves* require payment of a damages remedy. *Testan*, 424 U.S. at 400-401 (citing *Eastport S.S. Corp.*, 372 F.2d at 1009); *id.* at 397-398; see also *Navajo I*, 537 U.S. at 503, 506; *Mitchell II*, 463 U.S. 216-218.

In other words, "the basis of the federal claim—whether it be the Constitution, a statute, or a regulation"—that is identified in the first step of the analysis can in turn give rise to a claim for money damages under the Tucker Act only if "that basis '*in itself* can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Testan*, 424 U.S. at 401-402 (ellipsis and citation omitted). The Tucker Acts therefore "waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)" "*only if*" the "other source of law" creating "the right or duty" that the government has allegedly violated "'can fairly be interpreted as mandating compensation.'" *Navajo II*, 556 U.S. at 290 (quoting *Testan*, 424 U.S. at 400); accord *AAFES* v. *Sheehan*, 456 U.S. 728, 739-741 (1982) (Tucker Act "jurisdiction * * * cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages.").

b. The Court's foundational decision in *Testan* illustrates this basic point. The plaintiffs in *Testan* were civil service employees who worked in federal positions classified at grade 13 on the General Schedule (GS-13), but who contended that their positions should have been classified as higher-paying GS-14 positions. 424 U.S. at 393-394. In 1969, the plaintiffs petitioned their employing agency to

reclassify their positions. When their request was denied, they sought administrative review before the Civil Service Commission, which also denied their request. The plaintiffs then filed suit in the Court of Claims, seeking money damages in the form of backpay to compensate them for the lost salary to which they would have been entitled if their positions had been properly classified as GS-14. *Id.* at 394. The Court of Claims concluded that the asserted "violation of the Classification Act g[a]ve[] rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications." *Id.* at 399. This Court reversed and ordered dismissal of the suit. *Id.* at 407-408 (citation omitted).

The Court held that Tucker Act jurisdiction was lacking because the statute that the government allegedly violated —the Classification Act—was not itself money mandating. *Testan*, 424 U.S. at 398-405. The Court explained that, under the Tucker Act, the "basis of the federal claim—whether it be the Constitution, a statute, or a regulation"—must "in itself * * * fairly be interpreted as mandating compensation," and "nothing * * * in the Classification Act" mandated compensation for a violation of its prescriptions. *Id.* at 401-402.

Moreover, the Court explained that neither plaintiff in *Testan* asserted that he was "denied the [salary] of the position to which he was appointed." *Testan*, 424 U.S. at 402. Instead, each argued that the government's wrongful failure to reclassify his position denied him "the benefit of a position to which he *should have been*, but was not, appointed." *Ibid.* (emphasis added). That claim for consequential damages, the Court held, was not cognizable under the Tucker Act, because "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." *Id.* at 403. And because the Classification Act was not money mandating,

the Court determined that "retroactive reclassification resulting in money damages" was unavailable and only "prospective reclassification" could be sought in another forum. *Ibid.*; cf. *id.* at 405 (holding that the Back Pay Act did not apply "to wrongful-classification claims").

Testan applies *a fortiori* here. Like the *Testan* plaintiffs, who sought compensation for an injury sustained due to the government's allegedly "wrongful civil service classification" that deprived them of the ability to earn higher pay "during the period of their wrongful classifications," 424 U.S. at 403-404, the Tribe in this suit (as the court of appeals recognized) seeks "compensation * * * for an injury sustained due to the Government's [allegedly] wrongful failure to recognize the [Tribe]," which in turn allegedly deprived the Tribe of benefits for which it purportedly would have been eligible if it *had* been recognized when the Revenue Sharing Act was in effect. Pet. App. 19a. And like *Testan*, where Tucker Act jurisdiction was lacking because the Classification Act (which the government purportedly violated) was not money mandating, such jurisdiction is similarly foreclosed here. The Due Process Clause does not mandate compensation for procedural violations. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam); *James* v. *Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998) (stating that this principle is "well established"). The APA likewise is not money-mandating. *Wopsock* v. *Natchees*, 454 F.3d 1327, 1332-1333 (Fed. Cir. 2006). To the contrary, the APA makes clear that its authorization for courts to set aside final agency action extends only to "relief other than money damages." 5 U.S.C. 702. The district court action in *Greene* simply challenged the process by which Interior adjudicated the Tribe's recognition petition under the 1978 recognition regulations, and the Federal Circuit recognized that that was the

only and "limited role for judicial intervention." Pet. App. 111a.

2. a. The Federal Circuit did not even attempt to base jurisdiction under the Tucker Acts on the theory that the APA and Due Process Clause were money mandating. The Federal Circuit nonetheless held that the "wrongful failure to recognize the Samish [that] gave rise to a damages claim" was the purportedly "'wrongful' and 'arbitrary and capricious'" conduct that it identified in its 2005 decision. Pet. App. 9a (citing *id.* at 111a-113a). That 2005 decision concluded that the "predicate 'wrongful' element in this action" was supplied by the 1996 "final determination from the district court [in *Greene*] * * * that the government's conduct underlying its refusal to accord federal recognition" before 1996 "under the [1978 acknowledgment] regulations" was "arbitrary and capricious." *Id.* at 111a, 113a. As noted above, the district court decision in *Greene*, in turn, held that Interior's adjudication of the Tribe's petition for recognition under those regulations violated the APA and Due Process Clause. *Id.* at 154a-156a; see pp. 5-6, *supra* (discussing the 1996 decision).

Resting Tucker Act and Indian Tucker Act jurisdiction on violations of the APA and Due Process Clause without determining that those provisions mandate a damages remedy for their violation flatly contradicts this Court's teachings in *Testan*, *Navajo I*, and *Navajo II*. But the Federal Circuit's reliance on the district court's finding of APA and due-process violations is particularly inexplicable here, because the *ex parte* meeting that the district court held unlawful occurred on the *same day* that the Secretary granted the Tribe's petition for recognition (November 8, 1995). See pp. 4-5, *supra*. Any agency error in that regard could not have materially delayed the agency's decision recognizing the Tribe later that very same day. Nor could

it have affected the Tribe's asserted eligibility for Revenue Sharing Act funding from 1972 to 1983 (Pet. App. 373a), because funding under the Act ended nearly a decade before the *ex parte* meeting occurred.[6]

b. The Federal Circuit's decision to base Tucker Act jurisdiction on its view that the Revenue Sharing Act was money mandating, Pet. App. 9a, 14a-15a, reflects a significant departure from this Court's decisions limiting Tucker Act jurisdiction over statutory claims to claims alleging a violation of a money-mandating statute.

The Federal Circuit's error appears to have resulted from its new and fundamentally mistaken understanding of the relevant analysis. After the court of appeals identified "wrongful" conduct in the form of an APA or due-process violation by Interior, Pet. App. 9a, it proceeded to determine whether a *different* statute (the Revenue Sharing Act) that was *not* violated by its implementing agency (Treasury) was "money mandating," *id.* at 10a, 14a-15a.[7] The court

[6] To the extent that the court of appeals' 2005 decision might be read to conclude that the ALJ's proposed findings that the district court reinstated "support the Samish contention" that the government was "arbitrary and capricious" in creating a list *in 1969* of tribes that omitted the Samish, see Pet. App. 112a, that reading also would provide no basis for Indian Tucker Act jurisdiction. Under that reading, jurisdiction would still depend on the view that the government violated the APA's prohibition on "arbitrary" or "capricious" final agency action, 5 U.S.C. 706(2)(A), but the APA does not (and the court of appeals did not find it to) mandate a damages remedy for a violation of its provisions. See pp. 20-21, *supra*. Moreover, the ALJ's reinstated findings did not purport to identify arbitrary or capricious agency action in connection with that informal list drawn up by a BIA employee over 25 years earlier. The findings (Pet. App. 272a-273a) merely describe the hearing testimony of a government employee, without drawing conclusions from that testimony. See pp. 6-7, *supra* (discussing the reinstated findings).

[7] The Federal Circuit did not conclude that the government violated the Revenue Sharing Act by failing to pay the Tribe funding from 1972

then stated that its "analysis of whether a law is money-mandating contains two steps": (1) whether "any substantive law imposes specific obligations on the Government" and (2) "whether the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained." *Id.* at 10a (quoting *Navajo II*, 556 U.S. at 291). That newly reformulated approach mistakenly transformed the clear standard articulated in *Testan* and *Navajo I* and *II* into one under which jurisdiction may be based on allegedly "wrongful" conduct violating a *non*-money-mandating provision that allegedly deprived a plaintiff of the opportunity to obtain benefits under "any" *other* statute (which the government did not violate) that

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to 1983. Nor would such a conclusion have been possible. By its terms, the Revenue Sharing Act limited its funding to Indian tribes having a "*recognized* governing body * * * which performs substantial governmental functions." 31 U.S.C. 1221(a)(2), 1227(d)(1) (1976) (emphasis added); see 31 U.S.C. 6701(a)(5)(B), 6702(a) (1982). Even a recognized tribe had to establish that it would satisfy other eligibility requirements "to the satisfaction of the Secretary" of the Treasury before Treasury could provide it funding. 31 U.S.C. 1243(a) (1976); see 31 U.S.C. 6704(a) (1982); see p. 8, *supra*. As a result, if Treasury had disbursed Revenue Sharing Act funding to the Tribe from 1972 to 1983, it would have *violated* the Act because the Tribe was not recognized by Interior as a tribe until 1996 and had not shown to the Secretary that it would satisfy the Act's eligibility requirements.

The Federal Circuit's decision is particularly troubling in this context, where a core predicate for funding—federal recognition—was a political question committed to the Executive Branch and the Secretary exercised that authority to give the Tribe federal recognition effective April 1996. See pp. 3, 5, *supra*. No court has concluded that the Tribe was or must have been recognized by the United States from 1972 to 1983. By allowing the Tribe to pursue retrospective damages for its non-recognition during that period, the Federal Circuit has encroached upon a responsibility committed to the Executive Branch.

imposes "specific obligations" on the government and might be fairly read to require compensation for non-payment.

Although the Federal Circuit extracted quotations from this Court's jurisprudence when articulating its standard, Pet. App. 10a, it reassembled them in a hodgepodge. Under this Court's decisions, the money-mandating inquiry is the second half of the analysis, not a separate two-part analysis itself. See pp. 17-18, *supra*. This Court's focus on "specific rights-creating or duty imposing statutory or regulatory prescriptions" applies not to the money-mandating question, but to the first part of the Tucker Act inquiry: whether a plaintiff alleged that the government abridged a constitutional, statutory, or regulatory provision that establishes the specific right or duty that the government violated. *Ibid.* Under the second part of the inquiry, it is that specific duty that the government allegedly violated which must also mandate payment in the event of a violation. *Ibid.* The Federal Circuit, by separating "wrongful" conduct from the money-mandating statute, has disregarded the essential connection between the two steps of the analysis that is necessary to bring a plaintiff's claim within the statutory waiver of sovereign immunity: The claim must be based on the violation of a provision that itself mandates a damages remedy for its violation. See pp. 18-20, *supra*.

Those errors threaten a significant expansion of the government's liability for money damages and disrupts this Court's previously well-settled law governing Tucker Act and Indian Tucker Act suits. The long-established rule has been that erroneous final agency action may be corrected on a prospective basis through judicial review under the APA, but that consequential damages for APA violations are unavailable. Suits under the Tucker Act and Indian Tucker Act thus provided a damages remedy only if the United States violated a clear duty or right established in a sub-

stantive (not procedural) source of law that itself mandated monetary compensation for its violation. By overhauling the legal framework, the Federal Circuit has imposed a potentially significant new burden on the public fisc for violations of the APA and other non-money-mandating provisions. That potential cost creates new fiscal incentives to appeal or seek review of arguably erroneous decisions of courts overturning agency action, and could adversely influence other decisions (like tribal recognition) that lie in the discretion of the Executive Branch.

The Federal Circuit's new approach, moreover, will bind the lower courts in this context. The Federal Circuit has exclusive appellate jurisdiction over all appeals from the CFC, including all actions under the Tucker Acts. 28 U.S.C. 1295(a)(3); see 28 U.S.C. 1491(a)(1), 1505. It also has exclusive appellate jurisdiction over district court cases based "in whole or in part" on the Little Tucker Act (28 U.S.C. 1346(a)(2)), except for the small subset of those cases that are founded on an internal-revenue statute or regulation. See 28 U.S.C. 1295(a)(2).

Review is warranted to correct the Federal Circuit's extraordinary departure from this Court's jurisprudence construing Congress's limited waiver of sovereign immunity in the Tucker Act and Indian Tucker Act. Indeed, summary reversal would be appropriate. *Testan* held long ago that the Tucker Act confers jurisdiction over damages claims for statutory violations only if the statute that was allegedly violated itself mandates a damages remedy. See pp. 18-20, *supra*. That analysis applies equally to the other sources of law listed in the Tucker Act and Indian Tucker Act. This Court thus emphasized three decades ago that "*Testan* makes [it] clear" that "jurisdiction * * * cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." *Sheehan*,

456 U.S. at 739. And the Court has consistently applied the same analytical framework to the Indian Tucker Act. See, *e.g.*, *Navajo II*, 556 U.S. at 290-291 (citing *Testan*). Because the Federal Circuit's error under this Court's existing precedents is both "clear" and fundamental, summary reversal is warranted.

B. The Judgment Fund Does Not Authorize The Payment Of Damages Based On The Tribe's Claim To A Portion Of A Statutory Trust Fund For Which Appropriations Lapsed Years Before The Tribe Filed Suit

Congress enacted fixed, limited appropriations for deposit into the Revenue Sharing Act's Trust Fund and directed the Secretary of the Treasury to "pay out of the Trust Fund" a defined share of the amount in that Fund for each entitlement period to each eligible State and local government, including each eligible recognized tribe. 31 U.S.C. 1221(a) (1976); 31 U.S.C. 6702(a) (1982); see pp. 8-9 & n.3, *supra*. The Federal Circuit did not dispute that Congress's limited appropriations to the Trust Fund had "lapsed," nor did it dispute that the appropriations had "capped" the total amount for distribution under the Act. See Pet. App. 19a.

Rather, the Federal Circuit concluded that the Revenue Sharing Act was not "capped in a manner that restricts the government's liability for damages," because the Tribe did "not seek the release of appropriated funds" and instead sought "compensation under the Tucker Act for damages for * * * [its] inability to participate in programs to which" it would have been "entitled" under the Revenue Sharing Act if it had been recognized as a tribe between 1972 and 1983. Pet. App. 19a. The court reached that conclusion based on its view that the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), does not restrict payments from the Judg-

ment Fund, 31 U.S.C. 1304 (2006), to supplement capped appropriations under a substantive program, and that the Judgment Fund authorized the payment of a money judgment in this case, because "other funds [were] unavailable" for payment. Pet. App. 17a, 20a-21a. The court of appeals' holding fundamentally misapprehends the critical limitations on expenditures from the federal fisc contained in the Anti-Deficiency Act and Judgment Fund. Those limitations are currently at issue before this Court in *Salazar* v. *Ramah Navajo Chapter*, No. 11-551 (argued Apr. 18, 2012).

This Court has previously recognized that the Judgment Fund is not "an all-purpose fund for judicial disbursement." *OPM* v. *Richmond*, 496 U.S. 414, 432 (1990). It exists solely to pay "final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for." 31 U.S.C. 1304(a) (2006). Here, Congress has already provided for the payment of all allowable funding to state and local governments under the Revenue Sharing Act from a Trust Fund into which Congress directed fixed and *limited* appropriations. See p. 9 & n.3, *supra*. Moreover, the Revenue Sharing Act specified that the money in the Fund be *divided* among state and local governments found to be eligible; each such government's "entitlement" to funds was a defined fraction of the Fund, *ibid.*; and all payments were to be paid by the Secretary of the Treasury "*out of* the Trust Fund," 31 U.S.C. 1221(a) (1976) (emphasis added), in order to ensure that the total amount of funding would be "set at a specific figure so that the cost of the program will be definite and ascertainable beforehand." See H.R. Rep. No. 1018, 92d Cong., 2d Sess., Pt. 1, at 7 (1972) (*House Report*). As the government explained in a materially similar context in *Ramah Navajo*, "[t]he restrictions that Congress imposed on those sums may not be circumvented

by seeking additional amounts from the Judgment Fund," because "Congress provided for the payment of [all Revenue Sharing Act funds] in [its] appropriations [to the Fund]." Gov't Br. at 53, *Ramah Navajo*, *supra*.; see *id.* at 52-54.

The Federal Circuit's decision erroneously overrides the statutory cap on total appropriations that Congress deemed "essential" to limiting the cost of the Revenue Sharing Act to the public fisc. See *House Report* 7. To that end, Congress expressly forbade any increase to "a payment made for any entitlement period" after 1976 to any funding recipient unless the recipient had made "a demand therefor * * * within 1 year of the end of the entitlement period." 31 U.S.C. 1221(b) (1976); see 31 U.S.C. 6702(c) (1982). That requirement, when combined with the Revenue Sharing Act's instruction to divide the total sum appropriated for the Trust Fund among the eligible governmental entities and to pay such money out of the Trust Fund itself, see pp. 8-9, *supra*, confirms that "payment" was "otherwise provided for" in congressional appropriations to the Fund within the meaning of 31 U.S.C. 1304. The Judgment Fund was therefore unavailable to pay any CFC judgment based on the Tribe's Revenue-Sharing-Act-based claim; and because all appropriations to the Act's Trust Fund lapsed long ago, no damages remedy is available to the Tribe in this case.

This Court has recently heard oral argument in a similar case involving similar issues. In *Ramah Navajo*, a plaintiff class of Indian tribes and tribal organizations brought suit against the Secretary of the Interior to recover certain contract support costs that each class member incurred in implementing self-determination contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq*. Congress required the Secretary to enter into such contracts but, beginning in fiscal year 1994, imposed a statutory cap on the annual appropriations available to pay

tribal contract support costs at a level below that necessary to pay all tribes in full. See Gov't Br. at 4-5, 7-10, *Ramah Navajo*, *supra*. The Tenth Circuit held that, although Congress provided only limited and insufficient appropriations for the payment of all those costs, the tribal plaintiffs could nevertheless recover from the Judgment Fund without abridging the limitations on the payment of monies from the Treasury under the Appropriations Clause of the Constitution. *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054, 1076-1077 (2011), cert. granted, 132 S. Ct. 995 (2012).

The Court's decision in *Ramah Navajo* may address the availability of the Judgment Fund to pay damages judgments based on claims that government officials have failed to make payments that, if made, would have exceeded the congressional appropriation for such payments, in violation of the Anti-Deficiency Act. Indeed, the Tribe's claim in this case is weaker than those at issue in *Ramah Navajo*, because, unlike the class in *Ramah Navajo*, the Tribe here never entered into a contract or otherwise applied for its purported share of the statutory Trust Fund before the appropriated funds had been exhausted. The appropriations for the Revenue Sharing Act Trust Fund ended in 1986, a decade before the Tribe was recognized as a tribe and 16 years before the Tribe filed this suit. For those reasons, if the Court does not at this time reverse the Federal Circuit's ruling on the threshold question under the Tucker Act and Indian Tucker Act (see pp. 14-25, *supra*), it should hold this petition pending its decision in *Ramah Navajo*.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals summarily reversed. In the alternative, the petition should be held pending the Court's decision in *Salazar* v. *Ramah Navajo Chap-*

ter, No. 11-551, and then disposed of accordingly. If the Court adopts neither of those courses, the petition for a writ of certiorari should be granted for plenary review.

Respectfully submitted.

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