No. 11-1448

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

REPLY BRIEF FOR THE PETITIONER

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The Samish Indian Nation (Tribe) brought this suit against the United States seeking, as relevant here, damages for federal funding from 1972 to 1983 that had been available to federally recognized tribes under the long-expired State and Local Fiscal Assistance Act of 1972 (RSA), but which the Tribe did not receive. Pet. 8; Pet. App. 373a-374a, 384a. The Tribe was not federally recognized at the time, and its failure to receive funds under the RSA therefore did not violate the RSA. The Federal Circuit did not conclude otherwise. Pet. 22 n.7. But the court nonetheless held that the Tribe can recover damages, reasoning that the Tribe's "inability to participate" in RSA funding was the result of the purportedly "'wrongful' and 'arbitrary and capricious'" failure to "recogniz[e]" the Tribe until 1996, and that the "wrongful failure to recognize the [Tribe] gave rise to a damages claim" under the Tucker Act and Indian Tucker

Act (Tucker Acts) because the RSA is a money-mandating statute. Pet. App. 9a, 19a (citation omitted); see *id.* at 14a-16a; Pet. 10-13. That ruling fundamentally disregards this Court's repeated holdings that the Tucker Acts require a plaintiff to allege that the government violated a particular source of law that *itself* mandates a damages remedy for *its* violation. Pet. 14-21. As explained in the petition, the court of appeals' error is so clear and such a marked departure from this Court's decisions in the *Navajo* cases and *Testan* that the decision below warrants summary reversal. Pet. 18-21, 24-26.

Now, after the United States filed its certiorari petition—without prior notice to the United States and without seeking leave from the Court of Federal Claims (CFC)—the Tribe filed a notice in the CFC purporting to dismiss "without prejudice" its claim for money damages under the RSA pursuant to CFC Rule 41(a)(1). Br. in Opp. (Opp.) App. 2a-3a. Although the Tribe does not say why it sought unilaterally to dismiss its RSA claim after ten years of litigation and its two successful appeals to the Federal Circuit, including the most recent appeal that reinstated the RSA claim, the only apparent reason for the Tribe's extraordinary action is to attempt to prevent this Court from reviewing and (perhaps summarily) reversing the Federal Circuit's ruling. Indeed, on the basis of its unilateral action, the Tribe now contends that this case is moot with respect to its RSA claim and urges this Court simply to deny review on that basis. Opp. 10. In the alternative, however, the Tribe acknowledges that because it is responsible for the asserted mootness, it would be "appropriate" for the Court to vacate the judgment of the court of appeals "with respect to matters relating to the [RSA] claim" and "re-

mand the matter for dismissal with prejudice." Opp. 10-11, 22. The Tribe's actions since the filing of the petition strongly reinforce the conclusion that the Federal Circuit's decision should not be permitted to stand. Cf. *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012) ("[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

In our view, the particular action the Tribe has taken in the CFC does not itself moot this case. The Tribe filed a notice expressly purporting to dismiss its claim "without prejudice," thereby allowing the Tribe to refile and renew its claim. Moreover, as explained below, Rule 41(a)(1) does not authorize what the Tribe has attempted to do. And because the Tribe was able to file its notice in the CFC only because the Federal Circuit's judgment and mandate returned the RSA claim to the CFC pending this Court's review, a reversal by this Court of the Federal Circuit's judgment would in turn undo any actions (including the purported Rule 41(a)(1) dismissal without prejudice) that were taken following the remand of that claim.

There is no need, however, for this Court to resolve those issues to dispose of this case. Looking beyond the precise step the Tribe took in the CFC, the Court may properly regard the Tribe's overall actions as a complete abandonment of its claim and all matters associated with it. And, in fact, the Tribe has argued in the alternative that it would be appropriate to vacate the Federal Circuit's decision and remand with directions to dismiss *with* prejudice. Although the Tribe's effort to avoid this Court's review on the merits is extraordinary, we conclude in the end that vacatur and dismissal with prejudice is the appropriate disposition.

1. The Tribe contends (Opp. 11-20) that the Federal Circuit properly applied this Court's Tucker Act precedents. That is incorrect. Indeed, the Tribe's response does not address the Federal Circuit's rationale and thus fails to proffer a credible defense on the merits.

The Tribe argues (Opp. 11, 14) that the Federal Circuit applied this Court's two-stage Tucker Act analysis by finding that the RSA creates a duty to pay tribes and can fairly be interpreted as providing a damages remedy. But the Tribe fails to address the core submission in the government's petition: A plaintiff must allege that the government violated a statute that *itself* mandates a damage remedy for *its* violation. Pet. I, 14, 18-20. Here there could have been no violation of the RSA by the Department of the Treasury. The RSA authorized payments only to federally "recognized" tribes. Pet. 8, 22 n.7. The recognition of tribes is an unreviewable political question by the Executive Branch that is the responsibility of the Department of the Interior, not Treasury, Pet. 3, 23 n.7, and the Tribe concededly was not recognized until 1996, well after the 1972-1983 time frame for its RSA claim. Pet. App. 373a, 384a. Indeed, the Tribe makes no claim to have applied for RSA funds when the statute was in effect.

The Federal Circuit nonetheless concluded that the Tribe could recover damages for unreceived RSA funding because the Interior Department's failure to regard it as a federally recognized tribe during the relevant period was "wrongful." Pet. App. 9a, 19a. But that determination was based on a violation of the Administrative Procedure Act (APA) and Due Process Clause, neither of which is money-mandating. Pet. 20-21; see Pet. 4-6, 10-11.

The Tribe contends (Opp. 15-19) that the government mischaracterizes the Federal Circuit's decision by focusing on that court's discussion of the government's purportedly "wrongful" failure to recognize the Tribe until 1996 as the basis for the Tribe's RSA claim. But that purportedly "wrongful" conduct is *precisely* what the Tribe successfully argued to the Federal Circuit was the basis for its claim.

The very first lines of the Tribe's reply brief, for instance, make clear that its RSA claim "aris[es] from the government's arbitrary and wrongful actions in failing to treat the Tribe as a federally recognized tribe from 1969 until 1996," because, "[b]ut for the government's misconduct, the Tribe would have received" federal funding under the RSA which was available "to all federally recognized tribes." C.A. Reply Br. 1. The Tribe specifically cited the court decisions that found a violation of the APA and Due Process Clause in the Interior Department's assertedly "'wrongful' and 'arbitrary and capricious'" recognition decision, and it argued that this "arbitrary and capricious treatment of the [Tribe]" provided the "predicate 'wrongful' element in this action." *Id.* at 1-2. The Tribe emphasized that because the Federal Circuit had "already held that the government's failure to treat [the Tribe] as federally recognized from 1969 to 1996 was wrongful," "[t]he issue now" was simply whether the RSA was "money-mandating for purposes of a Tribe that was wrongfully excluded from receiving [RSA] funds." *Id.* at 5. The Tribe thus argued that it was unable to receive RSA funds "*solely* because the government wrongfully and arbitrarily failed to treat the [Tribe] as a federally recognized tribe" and that its damages could be "measured by the value of the federal funds" that it could have received "if the Tribe had been

properly treated as federally recognized." Resp. C.A. Br. at 14, 46 (emphasis added); see also, *e.g.*, *id.* at 6, 45-46, 51.

In short, the Tribe itself argued that the Interior Department's purportedly "wrongful" non-recognition of the Tribe, which did not violate the RSA, gave rise to its claim for damages under the RSA. As the petition explains, that theory, which the Federal Circuit adopted, amounts to a prohibited award of consequential damages for a violation of the APA and the Due Process Clause, threatens a significant expansion of the government's liability, and contravenes this Court's longstanding Tucker Act and Indian Tucker Act precedents, which require plaintiffs to allege the government's violation of a substantive provision that is also itself money mandating. Pet. 14, 18-26. This Court found that requirement to be "clear" three decades ago, Pet. 25-26, yet the Tribe provides no defense of the Federal Circuit's decision in this regard.[1] That omission speaks volumes and confirms that the significant departure from this Court's precedents by the Federal Circuit—the court with exclusive appellate jurisdiction in cases under the Tucker Acts—warrants summary reversal on the merits.

2. a. The Tribe bases its assertion of mootness on its filing of a "notice of dismissal" in the CFC that purports to dismiss "without prejudice" the Tribe's RSA claim, without "affect[ing] claims that were previously dismissed involuntarily" by the lower courts. Opp. App. 2a-3a. Although the Tribe asserts that CFC Rule 41(a)(1)

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[1] The Tribe attempts (Opp. 19-20) to distinguish *United States* v. *Testan*, 424 U.S. 392 (1976), on its facts, but this Court has long understood *Testan*'s legal holdings to extend to Tucker Act claims generally. See Pet. 17-18, 25-26.

permits it to dismiss the RSA claim unilaterally without a court order, Opp. 8-9, it does not.

CFC Rule 41(a)(1), like Federal Rule of Civil Procedure 41(a)(1), allows a plaintiff to "dismiss an action without a court order" by filing a "notice of dismissal" in certain circumstances. CFC R. 41(a)(1)(A). That authority to dismiss an "action" contrasts with the broader authority in Rule 41(b) to dismiss either an "action or any claim" in the action. The courts of appeals that have addressed the issue, including the Federal Circuit, thus have held that Rule 41(a) does not permit "voluntary dismissal of fewer than all the claims" against a defendant. *Gronholz* v. *Sears, Roebuck & Co.*, 836 F.2d 515, 517-518 (Fed. Cir. 1987). A plaintiff wishing to dismiss a claim must instead amend its complaint under Rule 15(a). *Ibid.*[2] Under Rule 15(a), a plaintiff may amend its complaint only once and thereafter may amend only with the opposing party's written consent or leave of court. CFC R. 15(a)(1) and (2); accord Fed. R. Civ. P. 15(a)(1) and (2).

The Tribe's numerous non-RSA claims resolved by the lower courts "in earlier stages of the litigation" remain live until the time has passed to seek this Court's review from a final judgment resolving all claims in this

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[2] Accord, *e.g.*, *Bailey* v. *Shell W. E&P, Inc.*, 609 F.3d 710, 720 (5th Cir.), cert. denied, 131 S. Ct. 428 (2010); *Hells Canyon Pres. Council* v. *United States Forest Serv.*, 403 F.3d 683, 687-688 & nn.4-5 (9th Cir. 2005) (citing cases); *Klay* v. *United Health Group*, 376 F.3d 1092, 1106 (11th Cir. 2004*); Berthold Types Ltd.* v. *Adobe Sys. Inc.*, 242 F.3d 772, 777 (7th Cir. 2001); *Gobbo Farms & Orchards* v. *Poole Chem. Co.,* 81 F.3d 122, 123 (10th Cir. 1996). CFC Rule 41 tracks Federal Rule of Civil Procedure 41 verbatim in all relevant respects. Decisions construing the latter thus "appl[y] with equal force" to the former. *Kraft, Inc.* v. *United States*, 85 F.3d 602, 605 n.6 (Fed. Cir. 1996).

action. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964). And because the Tribe has amended its complaint twice, it cannot at this late stage unilaterally dismiss its RSA claim. CFC R. 15(a)(1). It must seek the government's consent or court approval to do so. CFC R. 15(a)(2).

That procedural distinction is significant. A Rule 41(a) dismissal without prejudice, for instance, permits the plaintiff to refile the same claim later, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 397 (1990), deprives court rulings of collateral-estoppel effect because they are not necessary to the dismissal, *United States* v. *Alaska*, 521 U.S. 1, 13 (1997), and can preclude the defendant from obtaining "prevailing party" status, thereby defeating its entitlement to recover litigation costs and, if available, attorney's fees, *RFR Indus., Inc.* v. *Century Steps, Inc.*, 477 F.3d 1348, 1352-1353 (Fed. Cir. 2007); see, *e.g.*, *Lorillard Tobacco Co.* v. *Engida*, 611 F.3d 1209, 1215 (10th Cir. 2010); cf. 28 U.S.C. 2412(a) and (b). Such results are particularly troubling where, as here, a plaintiff purports to invoke Rule 41(a)(1) after a decade of litigation and two appeals filed by the plaintiff. Rule 41(a) was designed to "allow[] a plaintiff to dismiss an action without the permission of the adverse party or the court only during the brief period before the defendant had made a significant commitment of time and money." *Cooter & Gell*, 496 U.S. at 397. The CFC (and Civil) Rules thus properly funnel plaintiffs through Rule 15—and the filters of a defendant's consent or a court's leave, which can lead to dismissals *with* prejudice—to eliminate claims when, as here, the case has proceeded through significant litigation on the merits.

b. Even if the Tribe had properly invoked Rule 41(a), its notice of dismissal would not moot this case because the effect of the notice depends on the Federal Circuit's mandate remanding the case to the CFC. Remand proceedings based on "the mandate of the Court of Appeals" do "not moot [a] case" that is otherwise properly before this Court for review. *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); see, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 126 n.2, 128 n.3 (1991). Even if a trial court enters a judgment on remand, that purported disposition poses no barrier to certiorari review, because "reversal of [the court of appeals'] decision" would unwind the proceedings on remand to the trial court and dispose of the case according to the judgment of this Court. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

In *Villamonte-Marquez*, for instance, the court of appeals reversed and remanded for further proceedings based on its conclusion that the government's key evidence was inadmissible. The appellate mandate was issued, and, rather than pursue its case on remand, the government moved to dismiss its indictments under the criminal counterpart to Rule 41(a). The district court then entered a final judgment of dismissal. This Court later granted the government's subsequent and timely certiorari petition. In addressing jurisdiction, the Court specifically rejected the contention that the district court's post-mandate dismissal rendered the case moot, holding instead that reversal of the court of appeals' judgment "would reinstate the judgment" of conviction that the district court originally had entered in the case. 462 U.S. at 581 n.2; cf. *id.* at 594-596 (Brennan, J., dissenting).

The same logic applies here, where the Tribe's Rule-41(a)-inspired notice on remand purported to dismiss the Tribe's RSA claim without prejudice. A ruling by this Court holding that the Tucker Acts do not waive sovereign immunity from suit on the RSA claim would reverse the Federal Circuit's judgment that remanded that claim to the CFC and require entry of judgment for the government on the claim. That disposition would permanently terminate the Tribe's claim, in contrast to the Tribe's asserted dismissal of the claim "without prejudice."

3. For the foregoing reasons, the Tribe's notice of dismissal invoking Rule 41(a)(1) did not itself moot this case. The Tribe's overall actions, however, can be understood as irrevocably withdrawing its RSA claim. See *Deakins* v. *Monaghan*, 484 U.S. 193, 200-201 & n.4 (1988); *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225, 227 (1989). The Tribe does assert that its CFC notice has "mooted [this] action" and employs that mistaken rationale to support its alternative suggestion that, if the Court does not deny certiorari, it could appropriately vacate the Federal Circuit's judgment and remand with instructions to "dismiss[] with prejudice." Opp. 10-11, 22. But the Tribe nevertheless supports that disposition by citing *Deakins* (Opp. 10), which directed a dismissal with prejudice to ensure that a claim could not be revived. And there should in any event be no realistic prospect that the Tribe would refile its RSA claim, because to do so after unilaterally attempting to terminate the litigation of its claim after many years and on the verge of this Court's consideration of the certiorari petition would constitute an abuse of the judicial process, and because a renewed claim

would be barred by the statute of limitations, see Pet. App. 113a.

Vacatur thus is warranted if the Court concludes that the government's attempt to seek review of the merits of the Federal Circuit's ruling has been "frustrated by" mootness resulting from the "unilateral action of the [Tribe]," which "prevailed below." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). In such circumstances, the government "ought not in fairness be forced to acquiesce in the [Federal Circuit's] judgment," *ibid.*, and the "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).[3]

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For the foregoing reasons and those stated in the petition, the Court should grant certiorari, vacate the judgment of the court of appeals with respect to all matters relating to the Tribe's RSA claim, and remand with instructions to dismiss that claim with prejudice. Alternatively, the Court should grant certiorari and summarily reverse the judgment of the court of appeals on that claim.

Respectfully submitted.

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[3] In light of the Court's intervening decision in *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2193-2194 (2012), the United States no longer seeks the Court's review on the second question presented.