UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, et al., Defendants.	Case No. 4:20-cv-290-JED-FHM

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER AND IN RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

For nearly three months, the D.C. District Court has presided over a slew of cases concerning the Department of Treasury's distribution of funds earmarked for Tribal governments in the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. These cases involve challenges to *whom* Treasury may disburse the funds, how *quickly* Treasury must disburse the funds, and *how* Treasury may calculate each recipient's share. Those cases were all deemed related to one another and, therefore, assigned to a single judge, The Hon. Amit P. Mehta. Consequently, Judge Mehta has been immersed in the relevant statutory and factual background, and has issued decisions in each with an eye towards the effect on all interested parties. Treasury has administered, and continues to administer, the relevant funds in a manner consistent with Judge Mehta's orders.

Plaintiff The Shawnee Tribe now brings suit in this Court, replicating a claim litigated before Judge Mehta in *Prairie Band Potawatomi Nation v. Mnuchin*,[1] where the plaintiff claimed—like Plaintiff here—that Treasury's method for allocating the relevant funds relies on imperfect Tribal population data. The *Prairie Band* plaintiff had requested—again, similar to Plaintiff here—that the court prevent distribution of all or some portion of the remaining funds, and order Treasury to craft a new distribution methodology that compensates Tribes that were allegedly underpaid under the original methodology. Ultimately, Judge Mehta denied the plaintiff's request for emergency relief in *Prairie Band*, concluding, among other things, that the selection of an allocation methodology for the relevant CARES Act funds is committed to Treasury's discretion, and is thus not reviewable. Further, with certain limited exceptions, Judge

[1] No. 20-CV-1491 (APM), 2020 WL 3402298 (D.D.C. June 11, 2020).

Mehta later ordered Treasury to promptly distribute the relevant funds.

Plaintiff now expressly asks this Court to undermine Judge Mehta's legal conclusions. Indeed, Plaintiff admits that it brought this suit in response to Judge Mehta's order requiring prompt distribution of the vast majority of the relevant funds, asserting that this order "defies logic and is so counterproductive as to be truly astonishing." TRO Mot., at 14. Given the significant overlap between this case and cases before Judge Mehta, the Court should transfer this matter to the D.C. District Court. Alternatively, should the Court retain this matter, it should deny Plaintiff's motion for a preliminary injunction, largely for the reasons set forth in the Court's order denying Plaintiff's ex parte motion for a temporary restraining order.

First, the Court should transfer this matter pursuant to the first-to-file rule and/or 28 U.S.C. § 1404(a). Allowing Plaintiff to pursue its claim in this Court while the D.C. District Court resolves other, related litigations unnecessarily wastes judicial resources and creates a risk of inconsistent rulings. Transferring the matter to the D.C. District Court would allow a single decision-maker—who is already familiar in the relevant legal background and litigation history—to resolve related disputes pertaining to Treasury's distribution of the relevant funds. Significantly, the vast majority of the remaining CARES Act funds designated for Tribal governments are currently subject to an injunction in the D.C. District Court. Allowing this case to proceed here would result in two separate district courts assessing what Treasury may do with the same pool of money.

Second, should the Court retain this case, Plaintiff is unlikely to prevail on the merits. As the Court surmised in its TRO Order, Plaintiff's claim (like the *Prairie Band* plaintiff's claim) is likely to falter since it challenges an agency action that is unreviewable. Additionally, even if the Court were to entertain Plaintiff's APA claim, Treasury's distribution methodology certainly survives the deferential "arbitrary and capricious" standard.

Third, the balance of equities counsels against Plaintiff's requested relief. As the Court correctly noted in its TRO Order, Plaintiff unjustifiably delayed bringing suit. Indeed, Judge Mehta found that the *Prairie Band* plaintiff was dilatory in raising its challenge, and the Plaintiff here has waited *even longer*. Granting emergency relief would require Treasury to reconfigure its methodology for allocating the remaining funds, which would delay the process even more. Additionally—again, as the Court correctly noted—Plaintiff's requested relief may harm other Tribal entities receiving (or designated to receive) CARES Act funds. Plaintiff demands compensation from a finite pool of money that is currently earmarked for other entities entitled to these funds. If Plaintiff secures its requested relief, another entity (or multiple entities) may receive less than it or they otherwise would have received.

Accordingly, the Court should transfer this matter to the D.C. District Court or deny Plaintiff's motion for a preliminary injunction.

BACKGROUND

Congress enacted the CARES Act on March 25, 2020, in response to the COVID-19 pandemic. Among other things, the Act appropriated $8 billion dollars for "payments to Tribal governments" (the "Funds"). 42 U.S.C. § 801(a)(2). The Act tasks the Treasury with disbursing the Funds, and in addressing to whom the Funds shall be disbursed, and in what amount, the Act states:

> [T]he amount paid . . . to a Tribal government shall be *the amount the Secretary shall determine*, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) . . . and determined *in such manner as the Secretary determines appropriate* to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

42 U.S.C. § 801(c)(7) (emphasis added). Consistent with this provision, on May 5, 2020, Treasury announced the methodology by which it would disburse the Funds. *See* Coronavirus Relief Fund Tribal Allocation Methodology, U.S. Department of the Treasury, https://home.treasury .gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation- Methodology.pdf, at 1 (May 5, 2020) (hereinafter "Allocation Mem."). Under this methodology, Treasury committed to disburse the Funds in two waves. In the first wave, Treasury sought to immediately disburse 60 percent of the Funds based roughly on Tribal population size. *See id.* at 2. To ensure speedy disbursement of the Funds, Treasury, in its discretion, chose to rely on pre-existing and reliable data to estimate Tribal populations: the Decennial Census American Indian Alaskan Native ("AIAN") data used by the Department of Housing and Urban Development ("HUD") in its Indian Housing Block Grant ("IHBG") Program. *See id.* For the second wave of payments, constituting 40 percent of the Funds, Treasury calculated payments based on employment and expenditure data. *See id.*

A number of parties brought suit in the D.C. District Court, challenging various aspects of Treasury's plan to distribute the funds. First, a set of Tribes challenged Treasury's decision to distribute a portion of the funds to Alaska Native regional and village corporations ("ANCs") on the ground that ANCs are not "Tribal governments" under the CARES Act, and are thus not eligible for these funds. *See Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-CV-01002 (APM), 2020 WL 3489479, at *1 (D.D.C. June 26, 2020). The D.C. District Court granted the plaintiffs' motion for a preliminary injunction—halting the distribution of any funds to ANCs—but then ultimately granted summary judgment for the government and dissolved its preliminary injunction. *See id.* However, the court then issued an injunction-pending-appeal of its summary judgment order, and thus Treasury is currently withholding funds designated for ANCs. *See Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002, ECF No. 107

(D.D.C. July 7, 2020). Second, certain Tribes brought suit claiming that Treasury was not moving expeditiously enough in distributing the second wave of funds. *See Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), 2020 WL 3250701, at *1 (D.D.C. June 15, 2020). The court denied their initial motion for emergency relief, but then granted their subsequent motion for emergency relief, holding that Treasury must promptly distribute all of the Funds, except for the funds allocated to ANCs, which were initially withheld pursuant to the court's preliminary injunction in *Chehalis*.[2] *See id.* at *1, 4.

Finally, one Tribe brought suit claiming that Treasury impermissibly relied on data from HUD's IHBG program which "undercounted Plaintiff's tribal population." *Prairie Band*, 2020 WL 3402298, at *1. The plaintiff there moved for emergency relief, asking the Court to (i) enjoin Treasury from distributing any or some of the remaining Funds, and (ii) order Treasury to modify its allocation methodology moving forward to compensate Tribes that were allegedly underpaid under Treasury's original methodology. *See id.*

The court, however, denied the plaintiff's motion on three principal grounds. First, the court concluded that Treasury's distribution methodology is unreviewable since the CARES Act grants Treasury discretion in determining how the Funds will be allocated. *See id.* (concluding that selection of appropriate distribution methodology is "committed to agency discretion by law," and the "court therefore lacks jurisdiction to consider Plaintiff's challenge."); TRO Order, at 3 ("In *Prairie Band*, the Court held that allocation of tribal funds under Title V was subject to the administration's discretion and therefore unreviewable."). Second, the court concluded that the plaintiff was dilatory in seeking relief, since it brought suit nearly a month after Treasury had

[2] The court gave Treasury the option of withholding an additional $7.65 million for the *Prairie Band* litigation, *see Agua Caliente*, 2020 WL 3250701, at *3 n.3, but Treasury declined this option.

publicized its distribution methodology. *See Prairie Band*, 2020 WL 3402298, at *2. And third, the Court found that any further delay in distributing the funds would be against the public interest. *See id.* The plaintiff initially filed a notice of appeal of the court's preliminary injunction order, and has since filed a notice of voluntary dismissal. *See* Notice of Appeal Transmission, *Prairie Band Potawatomi Nation v. Mnuchin*, 20-cv-1491, ECF No. 27 (D.D.C. June 16, 2020); Notice of Voluntary Dismissal, *Prairie Band Potawatomi Nation v. Mnuchin*, 20-cv-1491, ECF No. 30 (D.D.C. July 9, 2020).

Thus far, Treasury has nearly completed distribution of the Funds, except for funds allocated for ANCs, and an additional, negligible amount that has not been transmitted due largely to logistical issues. *See* Notice, *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-01136, ECF No. 45 (June 25, 2020); TRO Order, at 2. Plaintiff now brings suit, claiming, like the *Prairie Band* plaintiff, that Treasury's decision to "issue[] funds based upon the . . . IHBG" data is arbitrary and capricious under the Administrative Procedure Act ("APA"). Compl. ¶ 5. Plaintiff thus asks the Court to issue an order "restrain[ing]" Treasury "from disbursing a portion of the remaining" Funds, totaling $12 million in their estimation, *see* TRO Mot., at 2, and requiring Treasury to compensate Plaintiff based on a different Tribal population data set—the precise relief denied to the *Prairie Band* plaintiff. TRO Mot., at 1.

Defendants now move the Court to transfer this matter to the D.C. District Court pursuant to the first-to-file rule and/or 28 U.S.C. § 1404. The Court should grant Defendants' motion to transfer this matter, or otherwise deny Plaintiff's motion for a preliminary injunction.

I. The Court should transfer this case to the U.S. District Court for the District of Columbia pursuant to the first-to-file rule, or 28 U.S.C. § 1404(a).

"The Tenth Circuit generally follows the first to file rule." *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159, 1164 (N.D. Okla. 2010). "[U]nder the first-to-file rule, when related cases are

pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." *Id.* at 1165 (citing *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999)). "The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Id.* at 1166. In determining whether the first-to-file rule applies, the Court must consider three factors: "(1) the chronology of actions; (2) the similarity of parties, and (3) the similarity of issues." *Id.* at 1167.

Here, all three factors counsel in favor of a transfer. First, it is indisputable that the related lawsuits in the D.C. District Court were filed prior to Plaintiff's suit here. Second, the parties are similar. All of the cases include the Department of the Treasury and/or Secretary Mnuchin, who are ultimately responsible for distributing the funds at issue here. Although Plaintiff is not a party to the D.C. District Court cases, "the parties need not be identical in order to transfer pursuant to the first to file rule."[3] *Id.* at 1168. And third, the issues are undoubtedly similar. For example, the complaints in both this case and *Prairie Band* challenge Treasury's methodology for distributing the relevant funds on the ground that Treasury allegedly utilizes inaccurate Tribal population data. Further, both complaints include a request for injunctive relief requiring Treasury to withhold some portion of the Funds and devise a new distribution methodology to compensate the plaintiff for the alleged underpayment. And both this case and *Agua Caliente* involve challenges to what Treasury may or must do with the remaining Funds; Plaintiff here claims that Treasury must use a new allocation formula that further compensates Plaintiff, and the *Agua Caliente* plaintiff is

[3] Although the Department of the Interior, and its Secretary, are listed as Defendants in this matter, there is no dispute that the agency actions under challenge—the selection of an allocation methodology, and subsequent disbursement of funds pursuant to this methodology—were taken by Treasury. *See supra* at 6-7. Thus, their addition to the present lawsuit is immaterial at best.

arguing that Treasury must use a new distribution formula that excludes ANCs.

Additionally, the underlying policy rationales for the first-to-file rule support Defendants' request for a transfer. First, "efficiency is advanced by having one judge decide" issues pertaining to the manner in which the Funds must be distributed. *Id.* at 1172. Judge Mehta "knows the history of the D.C. Action[s]," is steeped in the relevant statutory background, and is best positioned to assess the relationship between his prior orders and claims and the relief Plaintiff pursues here. *Id.*

Further, any ruling for Plaintiff here could "trench upon the authority of [a] sister court[]." *Id.* at 1166. In fact, Plaintiff expressly invites this Court to undermine the D.C. District Court's conclusion that Treasury cannot withhold funds to potentially compensate Tribes that are challenging Treasury's distribution methodology. *See* TRO Mot., at 14 ("The present action and request for emergency relief were prepared and filed" in response to the "D.C. District Court [order requiring Treasury] to dispense" the Funds, a ruling Plaintiff claims "defies logic" and is "truly astonishing."). Additionally, allowing Plaintiff to proceed in this Court would result in two separate district courts presiding over what Treasury may do with the same pool of money. All but a negligible portion of the outstanding Funds are earmarked for ANCs, and these funds are currently subject to the D.C. District Court's injunction-pending appeal. *See supra* at 7. Here, any order requiring additional payment to Plaintiff would almost certainly require Treasury to dip into the funds earmarked for ANCs—funds that are currently tied up in a D.C. District Court injunction.

Further, to grant Plaintiff any relief, the Court would also have to reject a number of the D.C. District Court's conclusions, including that (i) the selection of a distribution methodology is committed to Treasury's discretion, and is not subject to review, and (ii) a plaintiff is not entitled to emergency relief if it challenges Treasury's distribution methodology a month (or more) after the methodology was published. Accordingly, the Court should transfer this matter to the D.C.

District Court so that a single decision-maker may assess all similar claims concerning Treasury's allocation of the Funds.

Finally, the Court may also transfer this matter pursuant to 28 U.S.C. § 1404. Under this provision, a district court may "transfer any civil action to any other district or division where it might have been brought" if it serves "the interest of justice" and is more "convenien[t] [for] parties and witnesses." *Id.* § 1404(a). This provision "was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks omitted). In assessing whether transfer is appropriate, a Court may look to "considerations of a practical nature that make a trial easy, expeditious and economical." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991).

Here, for the reasons set forth above, a transfer would be "expeditious and economical," allowing Judge Mehta—who is familiar with the relevant legal and litigation background—to resolve this matter in a manner consistent with his prior rulings concerning Treasury's disbursement of the Funds. "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (internal quotations and citation omitted). Courts in this district have recognized that "other similar claims in another jurisdiction" have "weighed strongly and conclusively in favor of transfer to the jurisdiction where the other claims were pending. *Collier v. Am. Greetings Corp.*, No. 10-cv-625-JHP-FHM, 2012 WL 13020817, at *3 (N.D. Okla. June 19, 2012), *report and*

recommendation adopted, No. 10-CV-625-JHP-FHM, 2012 WL 13027384 (N.D. Okla. July 6, 2012) (quotation marks omitted) (collecting *nine* cases from various districts in which the courts concluded that "the presence of a related case in the transferee forum is a powerful reason to grant a change of venue").

II. Plaintiff Has Not Demonstrated Likelihood of Success on Its Claim.

A. The selection of a methodology for allocating the Funds is not reviewable under the APA.

Agency Discretion. The D.C. District Court properly found that the selection of a methodology for allocating the Funds is committed to Treasury's discretion, and is thus not subject to judicial review. The APA's judicial review provisions do not apply to "agency action" that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Under this provision, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "In such a case," the relevant statutory provision "can be taken to have committed the decisionmaking to the agency's judgment absolutely." *Id.* (internal quotation marks omitted).

As relevant here, the Supreme Court has expressly noted that "[t]he allocation of funds from a lump-sum appropriation is [an] administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). In this circumstance, "as long as the agency allocates funds . . . to meet permissible statutory objectives," the APA's "agency discretion" exception "gives the courts no leave to intrude." *Id.* 192-93. As the D.C. District Court noted, "*Lincoln* squarely applies here." *Prairie Band*, 2020 WL 3402298, at *1. The CARES Act requires Treasury to "allocat[e] . . . funds" to Tribal governments "from a lump-sum appropriation," and Treasury selected a methodology that undeniably distributes all of the funds to cover COVID-related expenditures, a "permissible statutory objective[]." Thus, under *Lincoln*,

the selection of an appropriate allocation methodology is committed to Treasury's discretion. The text of the relevant CARES Act provision confirms this conclusion. Although the Act requires Treasury to consult with Indian Tribes, and generally base its chosen methodology "on increased expenditures of each" Tribal government, the Act expressly notes that "the amount paid . . . to a Tribal government shall be . . . determined *in such manner as the Secretary determines appropriate*."[4] 42 U.S.C. § 801(c)(7) (emphasis added).

Further, the Tenth Circuit has stated that when a statute requires an agency to "act quickly" and "take expeditious steps" in "complex . . . circumstances," it may be inferred that the statute seeks to minimize "[j]udicial intervention," and has thus committed the relevant action to agency discretion. *Am. Bank, N.A. v. Clarke*, 933 F.2d 899, 903 (10th Cir. 1991). Here, of course, the CARES Act required Treasury to distribute the relevant funds within weeks of the statute's enactment, *see* 42 U.S.C. § 801(b)—a strong indication that Congress did not intend for judicial intervention into Treasury's allocation methodology, and thus it left the matter to Treasury's discretion. Accordingly, as the Court suspected, Plaintiff's challenge to Treasury's distribution methodology is not subject to review.[5] *See* TRO Order, at 3 (Plaintiff's "likelihood of success on

[4] Notably, in its TRO Motion, Plaintiff claims that it "cannot calculate" the precise amount it is allegedly owed "[b]ecause Treasury" makes the "actual calculations for its award amounts" and thus "this number . . . must be determined by the Treasury." TRO Mot., at 2 n.1. This confirms that the CARES Act, by its text, does not guarantee Plaintiff any particular amount (or an amount based on any particular formula). Plaintiff's entitlement to any of the Funds is based on whatever methodology Treasury selects.

[5] Plaintiff argues that this case is unique because Treasury used "objectively false" data in estimating Plaintiff's population. TRO Mot., at 8. But this was precisely the claim in *Prairie Band*. The plaintiff there asserted that the population count assigned to it under Treasury's methodology was false, and thus the plaintiff was allegedly underpaid. *See supra* at 8. Here, likewise, Plaintiff argues that Treasury, in its discretion, selected a distribution methodology that relied on data that imperfectly estimated its Tribal population. As the D.C. District Court concluded, however, this decision was *Treasury's* to make.

the merits is sufficiently in doubt" in light of Prairie Band's conclusion that the "allocation of tribal funds under Title V" is "unreviewable.").

Additionally, Plaintiff's procedural claim—that Treasury did not adequately consult with Tribes prior to adopting a distribution methodology—is equally non-reviewable. The CARES Act notes only that an appropriate distribution methodology must be selected "in consultation with the Secretary of the Interior and Indian Tribes." 42 U.S.C. § 801(c)(7). This provision provides no further guidance on the required consultation process; it "says nothing about how the Secretary should go about consulting with Indian Tribes, what topics he should address, or with what frequency." *Prairie Band*, 2020 WL 3402298, at *2. Thus, this provision requires only that Treasury generally consult with Indian tribes, but it leaves the relevant details of the consultation process to Treasury's discretion. Here, Plaintiff concedes that Treasury held two telephonic consultation sessions, and "solicited written comments from Tribal governments regarding their views on potential methodologies for the allocation of" the funds. TRO Mot., at 3. To the extent Plaintiff contends that the consultation process had to meet certain requirements not expressly enumerated in the statutory text, this claim is not reviewable. *See Prairie Band*, 2020 WL 3402298, at *2 ("Plaintiff's assertion that the Secretary failed to" properly "'consult' with Tribes before using the HUD data is also unreviewable.").

Finally, Plaintiff filed a supplemental notice indicating that the D.C. District Court rejected Treasury's non-reviewability argument in *Chehalis*. *See* ECF No. 18. But there, the D.C. District Court held only that it may review a claim challenging to *whom* Treasury distributes the funds, because the CARES Act clearly identifies the permissible recipients (i.e. "Tribal governments"). *See Chehalis*, 2020 WL 3489479, at *3 ("while the Secretary's decisions as to how much to disburse might not be reviewable, his decisions to whom to disburse those funds most certainly

is"). The court has made clear, however, that decisions over *how much* each Tribal government receives are not reviewable. *See id.* at 13 n.12 ("The decision" of how much to "award ANCs" from the "Title V funds . . . is an allocation determination that rests squarely within the broad discretion that Congress vested in the Secretary."); *Prairie Band*, 2020 WL 3402298, at *1. Accordingly, the Court should join the D.C. District Court, and conclude that the substance of, and process behind, Treasury's allocation methodology is committed to Treasury's discretion, and is therefore not reviewable.

Preclusion of APA Review. Treasury's allocation methodology is unreviewable for a separate, independent reason. The abbreviated time-frame for disbursing the Funds confirms that Congress did not intend for APA review of Treasury's disbursement of the Funds. The APA states that its remedy does not apply when a "statute[] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). Courts have long recognized that imminent statutory deadlines for administrative actions are strong indicia that Congress did not intend for these actions to be subject to judicial review. *See Morris v. Gressette*, 432 U.S. 491, 503-505 (1977) (reasoning that Congress did not intend for judicial review of DOJ decisions regarding changes to State voting procedures since "Congress had intended the approval procedure to be expeditious" and "reviewability would unnecessarily extend the period the State must wait for effecting its change."); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350 (1984) (citing to *Morris* as a prime example of a "statutory scheme" establishing that judicial review is unavailable). Here, given unique circumstances presented by a global pandemic, Congress ordered Treasury to distribute the Funds within thirty-days, 42 U.S.C. § 801(b)(1), and this Court has made clear in related litigation that Treasury cannot delay payments indefinitely beyond this date, *see Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), 2020 WL 2331774, at *1 (D.D.C. May 11, 2020). Litigation over the allocation

methodology of these funds would undeniably delay payment; indeed, Plaintiff here *requests* a delay. Thus, given the Act's language, and purpose, it is clear that Congress intended to preclude challenges relating to Treasury's disbursement of the Funds.

B. Treasury's allocation methodology is not arbitrary and capricious under the APA.

In any event, Plaintiff's claim fails on the merits since Treasury's disbursement methodology satisfies the deferential "arbitrary and capricious" standard. The relevant inquiry under the APA's "arbitrary and capricious" provision is "narrow," requiring only that "an agency examine the relevant data and articulate a satisfactory explanation for its action." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). A "court is not to substitute its judgment for that of the agency," and "should uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Id.* at 513-14. At bottom, "the question is whether the agency action was reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015); *Frontier State Bank Oklahoma City, Okla. v. F.D.I.C.*, 702 F.3d 588, 594 (10th Cir. 2012) ("the agency need only make a reasonable choice"). This is a "deferential standard." *Licon v. Ledezma*, 638 F.3d 1303, 1307 (10th Cir. 2011).

Here, Treasury's decision to distribute a portion of the Funds based on IHBG population data undoubtedly satisfies this deferential standard. Treasury had to quickly settle on a methodology based on a number of (often competing) factors. For example, the methodology had to (i) be based on increased expenditures relative to aggregate expenditures in fiscal year 2019, (ii) allow for prompt distribution, and (iii) be administratively feasible. Treasury opted, in its discretion, to use the pre-existing IHBG population data for a number of reasons. First, this data is well-maintained and easily accessible. When calculating this data, HUD adjusts for any "statistically significant for [American Indian and Alaska Native] population confirmed by the

U.S. Census Bureau" and updates the figure "annually using the U.S. Census Bureau county level Population Estimates for Native Americans." 24 C.F.R. § 1000.330(b)(1). Thus, on balance, this data provides a reasonable estimate for Tribal populations even if, in certain discrete cases, it produces an estimate that does not fall within the true population range.

Second, other programs that provide benefits to Tribal governments also rely on the sources used for the IHBG population data. For example, the Tribal Transportation Program provides funding based, in part, on the same Decennial Census AIAN data used for the IHBG program. Frequently Asked Questions on Tribal Population, U.S. Department of Treasury, https://home.treasury.gov/system/files/136/FAQ-on-Tribal-Population-Data.pdf, at 1 (June 4, 2020) (hereinafter, "FAQ Mem."). Thus, there is precedent for Treasury's reliance on this data.

Third, Treasury concluded that data from other sources, including Tribal enrollment certifications, was unreliable. *See* Kowalski Declaration ¶¶ 6-7, *Prairie Band Potawatomi Nation v. Mnuchin*, 20-cv-1491, ECF No. 16-1 (D.D.C. June 10, 2020) (hereinafter, "Kowalski Dec."). As Plaintiff points out, Treasury did receive Tribal population certifications. *See* Kowalski Decl. ¶¶ 5-6. But there were a number of problems with these certifications. For example, certain Tribes submitted multiple certification forms, others provided incomplete forms, and still others failed to respond altogether. *See* Kowalski Decl. ¶ 6. Additionally, Treasury found consistency issues with the enrollment data provided by Tribes, since different Tribes had different criteria for assessing whether someone was truly a Tribal member. *See* Kowalski Decl. ¶ 7. The IHBG data, by contrast, *is* consistent, and utilizes verifiable criteria—Decennial Census AIAN data for each formula area—to estimate each Tribe's population. These justifications are adequate and render Treasury's determination "reasonable."

Additionally, to be sure, the Act does not *require* Treasury to look to Tribal population, or any other specific type of data. It states only that the Funds must generally be distributed based on "increased expenditures of each such Tribal government." 42 U.S.C. § 801(c)(7). Treasury refers to Tribal population data simply as a means to estimate a Tribe's relevant increased expenditures, which is inherently uncertain. Allocation Mem., at 1 ("By necessity . . . any allocation formula will yield only an estimate of increased eligible expenditures."). Thus, even a flawless Tribal enrollment count would still provide only a rough estimate of the amount of any given Tribe's increased COVID-related expenditures. Treasury's chosen methodology is not "arbitrary and capricious" simply because Plaintiff claims that Treasury could have picked a marginally less imperfect formula.

In response, Plaintiff first argues that the IHBG data assigns twenty-five Tribes a population of zero. *See* PI Mot., at 9. But Treasury's methodology addresses this scenario by guaranteeing Tribal governments a minimum payment of $100,000 if, under Treasury's disbursement methodology, they are found to have a population below thirty-seven. This is a sensible protective measure. Although this does not provide Plaintiff with the level of compensation it prefers, Treasury reasonably concluded—in its discretion—that it would nonetheless rely on IHBG data given its relative strengths vis-à-vis the alternatives.

Plaintiff also argues that Treasury ignored allegedly superior data for Tribal population counts, such as Tribes' certified population enrollment figures. *See id*. But Treasury did not ignore other data sources; it concluded that, based on the relevant considerations, it would rely on the reliable pre-existing IHBG data. *See supra* at 17-18; Kowalski Decl. ¶ 8 ("Treasury considered various alternative sources of population data for Indian Tribes."). "An agency typically has wide latitude in determining the extent of data-gathering necessary to solve a problem." *Milk Train, Inc.*

v. Veneman, 310 F.3d 747, 754 (D.C. Cir. 2002) (internal quotation marks omitted); *see also Sierra Club v. U.S. E.P.A.*, 167 F.3d 658, 662 (D.C. Cir. 1999) (A court must "generally defer to an agency's decision to proceed on the basis of imperfect" data "rather than to invest the resources to conduct the perfect study.").

Finally, Plaintiff protests that Treasury inadequately consulted with Tribes. But as noted in *supra* at 12, the CARES Act required only that Treasury generally consult with the Tribes. The Act provided no further requirements for or restrictions on the consultation process. As Plaintiff concedes, Treasury did consult with Tribes, and thus Treasury satisfied its statutory obligation. *See id.*

III. The Balance of Equities Counsels Against Plaintiff's Request for Emergency Relief.

The Court should deny Plaintiff's request for emergency relief given Plaintiff's delay in bringing suit. As the Court stated in its order denying Plaintiff's TRO request:

> [Plaintiff] has not adequately explained why it waited so long to file this suit. The Department announced its methodology for the allocation of the first tranche of disbursements on May 5th, 2020, and the Tribe was told on May 13th that there was no process by which it could challenge its distribution amount. The Prairie Band of the Potawatomi Nation, which also suffered under the Department's chosen methodology, filed suit a full week before the plaintiff. Even there, the court found that the Prairie Band had unduly delayed in bringing suit.

TRO Order, at 3 (citations omitted); *see also GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) ("delay may justify denial of a preliminary injunction"). Had Plaintiff brought suit and moved for emergency relief earlier, Treasury could have litigated the motion concurrently with the emergency relief request in *Prairie Band*, thus promptly resolving all challenges to Treasury's allocation methodology before finally disbursing the remaining Funds.

Additionally, Plaintiff's requested relief—requiring Treasury to withhold at least $12 million dollars which otherwise be allocated to other entities—may harm the entities that have not yet received payments from Treasury. Again, as the Court aptly noted:

> It is possible that . . . [entities still awaiting payments] were . . . shorted in the same way the Tribe claims that it was. Moreover, even if their pro-rata shares were inflated at the expense of the Shawnee Tribe, the same would be true of many other tribes that have already received their disbursements. It is unclear why the entirety of the disputed $12 million should be assessed against [entities] whose disbursements, through no apparent fault of their own, have been delayed.

TRO Order, at 3. Thus, even assuming—without conceding—that Plaintiff has alleged irreparable harm,[6] its requested relief would simply shift this harm to other Tribal governments. Accordingly, the balance of equities counsel against Plaintiff's request for emergency relief.

CONCLUSION

For the foregoing reasons, this case should be transferred to the U.S. District Court for the District of Columbia. Alternatively, Plaintiffs' motion should be denied.

Dated: July 9, 2020

Respectfully submitted,

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[6] The magnitude of any alleged harm is also uncertain. Plaintiff itself concedes that it does not know how much it would have received had Treasury used a different data set in estimating Tribal populations. *See* TRO Mot., at 2 n.1. Additionally, if Treasury had used a different data set, and other Tribes were also entitled to more funds (and to a greater degree than Plaintiff), it may be that Plaintiff would have received only a negligible amount of additional funding. The Court should not grant Plaintiff's request for extraordinary, emergency relief based on a speculative theory of harm.

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