UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN T. MNUCHIN, in his official capacity as Secretary of the United Stated Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR Defendants.	)	Case No. 1:20-cv-01999 APM

SUPPLEMENTAL BRIEF OF
THE SHAWNEE TRIBE RE: REVIEWABILITY

The Shawnee Tribe (the "Tribe") submits this Supplemental Brief as permitted by the Court at the Preliminary Injunction Hearing that occurred today, August 12, 2020. This supplemental briefing addresses the Court's narrow question of whether the Department of Treasury's ("Treasury") decision to use objectively false data to determine that the Tribe's population is extinct for the purposes of calculating Title V fund awards could be reviewable where its selection of a population proxy methodology presumably[1] is not. As a threshold matter, these two decisions are not legally inextricably intertwined as Defendants contend and, to hold otherwise, would give Treasury free license to use objectively false data in its distribution of federal funding and hide its clear error behind an unreviewability veil.

[1] Although The Shawnee Tribe disputes that the selection of the population proxy is unreviewable, for the purposes of this Supplemental Brief only, it presumes it is.

Setting aside the absurdity of this result, there is nothing in the case law that renders this decision unreviewable merely because the Treasury's initial decision to select a population proxy methodology may be. Rather, the case law says the opposite: namely, that even where a presumption exists that a particular decision is unreviewable, the Court can – and must – go further to review whether Treasury itself cabined its own discretion and that is the standard by which this Court may adjudge Treasury's decision-making under the Administrative Procedures Act ("APA").

In *Policy and Research LLC v. United States Department of Health and Human Services et al.*, 313 F. Supp. 3d 62 (2018), for example, the District Court of Columbia ("D.C. Court") expressly held that, while a federal agency's allocation of congressionally-appropriate grant funding is presumptively unreviewable, the Government itself provided applicable standards by which the court could review and judge the agency's decisions. In that case, plaintiffs sued the U.S. Department of Human Health and Services and its Secretary (collectively, the "Government") under the APA for its administration of the Teen Pregnancy Prevention Program ("TPPP") after the Government had terminated the plaintiff's TPPP grant funding without explanation. *Id.* at 67. On cross-motions for summary judgment, there was no dispute that Government's termination of the TPPP grant funding violated the APA. Instead – not unlike Treasury here – the Government "placed all of its eggs into the unreviewability basket" and argued that there was no meaningful standard by which to judge its decisions; thus, the D.C. Court could not reach the merits of the case. *Id.* at 67-68.

The Court disagreed and held that, while a federal agency's allocation of congressionally-appropriated grant funding may be presumptively unreviewable, the Government had provided standards by which to judge its decision to terminate that funding. In doing so, the D.C. Court set

forth the applicable reviewability standard as follows:

> Within the D.C. Circuit, evaluating whether or not an agency's action is committed to agency discretion by law—and is therefore reviewable as a threshold matter—involves a two-step inquiry. … First, a court must consider the *nature* of the administrative action at issue to determine whether there is a presumption in favor of, or against, judicial review. … Indeed, although the APA ordinarily presumes that a federal court may review an agency's actions, some types of administrative actions actually carry the *opposite* presumption—i.e., with respect to certain matters, a federal court presumptively *cannot* review the agency's decisions, *see, e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 192, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (lump-sum appropriations)….

Id. at 73 (internal citations and quotations omitted). Even where the court presumptively cannot review an agency's funding allocation decision, however, it must proceed to the second step by determining whether the statute ***or the agency itself*** has cabined its own discretion. To be sure, "agencies frequently cabin their own discretionary funding determinations by generating formal regulations ***or other binding policies*** that provide meaningful standards for a court to employ when reviewing agency decisions. *Id.* at 76 (emphasis added). Thus, regardless of the presumptively unreviewable nature of the Government's initial funding decision, the agency itself had cabined its discretion defining when and how termination may occur; thus, the decision to terminate the grants was reviewable. Moreover, not unlike Treasury here, the Government asserted its decisions to terminate the TPPP funding was merely an extension of their unreviewable discretion, which the D.C. Court found "clever, but wrong." *Id.* at 79.

This standard was later reaffirmed by the D.C. Court in *Center for Biological Diversity v. Trump*, -- F. Supp. 3d –, 2020 WL 1643657 (2020). In that case, plaintiffs filed two lawsuits against President Donald Trump and executive officials ("Government") alleging that their allocation of Treasury Forfeiture Funds ("TFF") to construct a southern United States border wall violated the APA. *Id.* *15. In response, the

Government yet again alleged that those decisions were unreviewable because they were committed to agency discretion by law. The D.C. Court disagreed. In doing so, the D.C. Court made the distinction between "the Court venturing into areas 'committed to agency discretion'—such as how best to use TFF funds—and the Court applying statutory interpretation principles to determine whether the Secretary's actions follow Congress's dictates." *Id.* Because the statute limited the use of TFF funds to "law enforcement activities of any Federal agency," the Government's decision to use TFF funds to construct a border wall was reviewable.

Even *Milk Train v. Veneman* allows for a bifurcated review and approach. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751-52 (D.C.C. 2002). In that case, the Court held that the Secretary of Agriculture's decision to cap the maximum eligible production levels, which determined the amount of federal subsidies for dairy farmers, was unreviewable as the statute gave the Secretary the discretion to make this determination. But, the unreviewable aspect of that portion of the decision did not prevent the court from finding that a related decision – the Secretary's use of improper data to allocate subsidies – was reviewable. In other words, the unreviewability of a decision pursuant to the general discretion authority under the statute did not preclude the court from looking at the reasonableness of the data used when implementing that same authority.

Even assuming Treasury's choice of the population proxy methodology is presumptively unreviewable, that initial decision is entirely distinct from the separately reviewable decision to use objectively false data. Like in *Milk Train*, this court can bifurcate the reviewability analysis.

Arguably, Treasury has cabined its own discretion when it created the policy of

using population as a proxy for increased COVID-19 expenditures. Treasury's selection of a particular population proxy methodology or how best to allocate the Title V awards is no different than the Governments discretionary decision in *Trump* on "how best to use TFF funds." Yet, even then, the D.C. Court held that nothing precluded the Court from determining whether that use comported with congressional dictates or purpose. Thus, while Treasury may have broad discretion to determine how best to allocate Title V awards, the Court can competently determine whether the decision to use of objectively false data in that allocation is consistent with Treasury's own "policy" and achieves Title V's purpose of compensating the Tribe for increased COVID-19 expenditures. On its face, it does not.

Regardless, Treasury has cabined its own discretion when it decided to use population as a proxy. Treasury expressly issued guidance on its decision to use population as a proxy to achieve Title V objectives to compensate the Tribe for increased COVID-19 expenditures. In doing so, it cabined its discretion to calculate COVID-19 increased expenditures to population, which gives this Court a meaningful standard by which to judge Treasury's exercise of discretion in using false data that showed zero population for the Tribe. Stated differently, Treasury decided to use population as a proxy for increased COVID-19 expenditures and, in doing so, cabined any discretion it may have had to pull numbers out of the sky or make numbers up. This separate decision by Treasury, which effectively renders the Tribe non-existent, is undisputedly false and a separate violation of the APA.

The cases cited above show there is no legal principle that would prohibit this Court from reviewing Treasury's use of false data merely because its selection of

methodology may be discretionary. Thus, the decision to use the false data is reviewable.

Respectfully dated this 12th day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 12th of August, 2020, the foregoing document was filed with the Court using the CM/ECF system and served which provided service to all parties through their attorney of record.

/s/ *Dawn McCombs*