**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JULIA CAVAZOS, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>DEBRA HAALAND, *et al.*,<br><br>Defendants. | Civil Action No. 1:20-cv-2942 (CKK) |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7, Plaintiffs hereby move this Court for summary judgment on all claims in their Complaint (ECF No. 3). In support of this motion, Plaintiffs submit the accompanying Memorandum of Law in Support of Their Motion for Summary Judgment, and a proposed order.

For the reasons explained in the Memorandum of Law, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment, declare that Defendants' refusal to enforce the requirements of the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act violates the Administrative Procedure Act, and order Defendants to enforce the requirements of the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act by compelling the Saginaw Chippewa Indian Tribe of Michigan to reinstate Plaintiffs as Tribe members contemporaneous with the date of their disenrollment. Pursuant to Local Rule 78.1, Plaintiffs request an oral hearing on this Motion.

Respectfully submitted,

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Date: March 19, 2021

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Date: March 19, 2021

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## GLOSSARY OF ABBREVIATIONS

AS-IA: Assistant Secretary–Indian Affairs

BIA: Bureau of Indian Affairs

DOI: Department of the Interior

JFA: The Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. 99-346, 100 Stat. 674 (1986)

IRA: Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934)

OAH: Office of Administrative Hearings

SoR: Statement of Reasons, submitted by Plaintiffs to BIA pursuant to 25 C.F.R. § 2.10 (April 2, 2019)

## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are disenrolled members of the Saginaw Chippewa Indian Tribe of Michigan (the "Tribe"). Plaintiffs move for summary judgment because Defendants, the Secretary of the Interior (the "Secretary") and other senior Interior Department officials, have failed to fulfill their nondiscretionary duty to enforce The Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. 99-346, 100 Stat. 674 (1986) ("JFA"). Defendants' failure enabled the Tribe to do exactly what the JFA forbids—namely, expelling Tribe members enrolled pursuant to the JFA. Defendants' failure to act violates the JFA and the Administrative Procedure Act, 5 U.S.C. §§ 706(1), (2)(A) ("APA").[1]

This case is about a promise betrayed. The catalyst was the meddling of Interior Department's Bureau of Indian Affairs ("BIA") in 1937, when the Tribe applied for federal recognition. The Tribe's proposed constitution defined Tribal "membership" to embrace all Tribe members. BIA instead forced the Tribe to enact a constitution restricting membership to the small percentage of members living on the reservation.

After the Tribe won substantial judgments in the early 1970s against the United States, BIA was charged under the Indian Judgment Funds Distribution Act to distribute the funds to benefit "all those entities and individuals entitled to receive funds." 25 U.S.C. § 1403. BIA determined that a "substantial number of descendants of the treaty group," *i.e.*, the Bands that comprise the Tribe, while not Tribe "members[]" under the 1937 Constitution, were "equally entitled to participate in these judgment funds." AR-000720. BIA recommended that Band descendants share in the funds, and Congress adopted BIA's recommendation.

In 1983, BIA was again tasked to distribute judgment funds, and it again insisted that Band

[1] The Senate confirmed Debra Haaland as Secretary of the Interior on March 15, 2021.

descendants share in the distribution. This time the Tribe proposed that it receive all of the funds, to be put in an "Investment Fund" to benefit the Tribe, even though this meant that Band descendants entitled to nearly eighty percent of the funds would receive nothing. The proposal was rejected. After two years of legislative maneuvering, BIA agreed not to oppose legislation giving the funds to the Tribe, but only on the condition that the Tribe allow any Band descendants who would have participated in the judgment fund distribution and could show one-quarter Indian blood to enroll in the Tribe. BIA and the Band descendants initially opposed the proposal because they feared that the Tribe, after receiving the funds, might disenroll the Band descendants. They withdrew their opposition only after Congress added several provisions to shield the Band descendants from disenrollment. Because the JFA intended to expand Tribal membership and protect new members ("JFA Enrollees"), a provision was added to prevent the Tribe from redefining membership to enable the disenrollment of the JFA Enrollees. Another provision was added to protect the JFA Enrollees' right to the Investment Fund and to prohibit the Tribe from using the Fund in a manner that discriminates against the JFA Enrollees. With these provisions in place, and with Congress's charge to the Secretary to enforce the JFA's provisions, BIA and the House sponsor promised that the "descendants' rights and the descendants' privileges are fully protected" by the JFA. AR-000940. But for that promise, the legislation would have foundered.

As the JFA required, the Tribe initially enrolled Plaintiffs and hundreds of other Band descendants similarly situated. But since then, the Tribe has expelled hundreds of JFA Enrollees, including Plaintiffs, upending their lives and repudiating the bargain struck in the JFA. When the Tribe started to disenroll JFA Enrollees, BIA and the Secretary ignored their prior commitment to enforce the statute and stood on the sidelines, thus betraying their promise to protect the JFA Enrollees from disenfranchisement.

Plaintiffs are entitled to summary judgment. DOI's failure to enforce the JFA is irreconcilable with the JFA's text, purpose, and DOI's prior commitments, on which Plaintiffs relied. Congress required that the Secretary enforce the JFA's provisions, including its nondiscrimination mandate. In enforcing the JFA, the Secretary "may take such action as the Secretary may determine to be necessary and appropriate." JFA § 5(b)(2), AR-001237. The plain text and legislative drafting history demonstrate that the Secretary has a mandatory duty to enforce the JFA's nondiscrimination mandate. DOI unlawfully withheld agency action when it refused to enforce the JFA's nondiscrimination mandate.

Even if the Secretary's power to enforce the JFA's provisions is discretionary, the Secretary's failure to enforce the JFA's nondiscrimination mandate is arbitrary, capricious, and an abuse of discretion. DOI's failure to intervene is neither supported by the administrative record nor consistent with the APA standard of review. *See Miley v. Lew*, 42 F. Supp. 3d 165, 170 (D.D.C. 2014). DOI has disregarded its own established policy that Plaintiffs are entitled to share in the judgment funds at issue, and failed to provide a reasoned analysis for its departure from its own policy. Plaintiffs' motion for summary judgment should be granted.

## STATEMENT OF FACTS

### I. Historical Background

To understand why Plaintiffs' disenrollment violates the JFA and why DOI must enforce the JFA, it is necessary to understand the history that prompted the statute's enactment.

#### A. Early Treaties and Allotment of Reservation Land

During the eighteenth century, the Swan Creek, Black River, and Saginaw Bands (the "Bands") of Chippewa Indians lived in Michigan's southern peninsula. BIA Research Report (Oct. 3, 1983) [hereinafter 1983 Report], AR-000710, at AR-000710–11. In four exploitative treaties between 1805 and 1819, the Bands ceded their land to the United States. *Disenrollments by*

*Saginaw Chippewa Tribe of Mich.* (DOI, Jan. 30, 2020) [hereinafter Decision], AR-001844, at AR-001845. In 1855, the Government—now treating the Bands as a single entity, the Chippewa Indian Tribe of Michigan—established the Isabella Reservation for the Bands. *Id.* The 1855 treaty created a process to allot land to each family or single adult. Report by G. Russell Overton [hereinafter Overton], AR-001265, at AR-001270–73. In 1864, a second treaty established a process to allot land to Tribe members who were minors during the first allotment period. *Id.* at AR-001282, AR-001301–02.

The allotment process was "an Odyssey of epic proportions" that took sixteen years to complete. *Id.* at AR-001273. The Commissioner on Indian Affairs recorded allotments in "allotment rolls," which listed Tribe members eligible for land allotments. There are many allotment rolls, and no roll lists all eligible land recipients at any point in time. Importantly, Tribe members eligible to receive land as of 1872 were listed in allotment rolls prepared in 1871 and 1872. *Id.* at AR-001285, AR-001289. The 1871 and 1872 allotment rolls were based in part on a census of the Tribe conducted in 1867 (sometimes referred to as the 1868 census), and are therefore the most comprehensive lists of contemporaneous Tribe members ever compiled. *Id.* at AR-001273, AR-001282–85, AR-001301.

Unfortunately, corruption, fraud, and outright land theft were rampant during the Grant administration of the 1870s. *Id.* at AR-001289–91, AR-001294. Instead of gathering together on the Isabella Reservation, most Tribe members who had received allotments lost their land and left, scattering across their ancestral homeland. By 1880, fewer Tribe members lived in Isabella County than in villages across lower Michigan. *Id.* at AR-001304.

Meanwhile, the next generation of Tribe members who came of age were allotted the remaining Reservation land, and were recorded in the allotment rolls of 1883, 1885, and 1891. *Id.*

at AR-001301. The 1883, 1885, and 1891 allotment rolls were not comprehensive lists of Tribe members. They listed only those Tribe members who obtained allotments *after* 1872, and most Tribe members had already received an allotment and been listed on either the 1871 or 1872 roll. *Id.* at AR-001301–02. Indeed, the 1883, 1885, and 1891 rolls together contain fewer than one-sixth the number of names as do the 1871 and 1872 rolls, or less than 15% of the names listed in the five rolls combined. *Id.* at AR-001301, AR-001303; Tribe Answer, ECF No. 18–1, ¶ 30. Notably, the younger generations included on the 1883, 1885, and 1891 rolls were often relatives (*e.g.*, a grandson, a nephew) of those listed in the 1871 and 1872 rolls. Overton at AR-001301.

**B. Dispersal of the Bands**

The vision of an enduring Reservation for the Tribe was never realized. By the 1930s, Tribe members owned only 1,600 of the over 98,000 acres initially set aside for allotment. *Id.* at AR-001271, AR-001304. "[T]here is substantial agreement that the federal government largely mishandled, or ignored, its part of the bargain" in allotting Reservation land. *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 690 F. Supp. 2d 622, 628 (E.D. Mich. 2010). Most allotment recipients—particularly the Tribe members listed in the 1871 and 1872 rolls—never resided on their land, or were evicted soon after moving to the Reservation, mainly because of the perfidy and negligence of the federal agents overseeing the allotment process. Overton at AR-001272–1301. Nevertheless, the dispersed Tribe maintained close ties, and most members—even those who had lost their land on the Reservation—remained participants in Tribal life. *Id.* at AR-001272.

**C. The Indian Reorganization Act**

In 1934, the Tribe sought federal recognition under the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) ("IRA"). As required by the IRA, the Tribe submitted a draft constitution to the Commissioner of Indian Affairs. The Tribe's draft constitution stated that *all* members of the historic Bands and their descendants were members of the Tribe. Overton at AR-

001310; Diba Jimooyung, Telling Our Story: A History of the Saginaw Ojibwe Anishinabek 97 (Charmaine M. Benz et al. eds., 2005) [hereinafter Jimooyung]. The draft constitution used the comprehensive 1867 census roll (which was incorporated into the 1871 roll, but not the later rolls) to determine membership in the Bands. Overton at AR-001310, AR-001312.

The Commissioner rejected the Tribe's proposal and forced the Tribe to make two significant changes to its draft constitution. *Id.* at AR-001312. First, the Commissioner insisted on a "residency requirement," limiting membership in the Tribe to the minority of Band descendants who lived on the Reservation at the time of ratification. *Id.* Second, the Commissioner required that *only* the allotment rolls of 1883, 1885, and 1891 be used to determine eligibility for membership in the Tribe. *Id.* These rolls, however, were maintained by the government, meaning the Tribe could not have known that they comprised less than 15% of the Tribe's recorded ancestors. *Id.*; Jimooyung at 107; Tribe Answer ¶ 30. In 1937 the Tribe relented and adopted a Constitution that included the government-mandated provisions. 1937 Const., AR-001567, at AR-001569. Thus, the government effectively splintered the Tribe, imposing terms that excluded a majority of the Tribe's rightful membership. The 1937 Constitution would not be amended for nearly fifty years.

**D. The Judgment Funds**

In the 1970s, the United States awarded the Saginaw, Swan Creek and Black River Chippewas four money judgments—Dockets 13-E, 59, 13-F, and 57—as compensation for land the government had taken from the Bands under several treaties. 1983 Report at AR-000710. The 1973 Indian Judgment Funds Distribution Act, which governed the distribution of the funds, required the Secretary to submit a distribution plan to Congress to "best serve the interests of all those entities and individuals entitled to receive funds." 25 U.S.C. § 1403.

In 1976, BIA prepared a report ("1976 Report") to identify the individuals entitled to

receive the Docket 57 funds, which totaled more than $16.5 million. AR-000716. The 1976 Report found that, although a "substantial number" of unenrolled Band descendants did not qualify for membership under the 1937 Constitution, they were "equally entitled to participate in these judgment funds." *Id.* at AR-000720. The 1976 Report accordingly recommended that all descendants of the treaty group—the Band descendants—share in the funds. *Id.* at AR-000721. The 1976 Report recommended the Docket 57 funds be distributed on a per capita basis to Band descendants, including unenrolled lineal descendants of the 1871, 1872, 1883, 1885, and 1891 allotment rolls. *Id.* at AR-000722. Congress approved the per capita distribution. 1983 Report at AR-000713–14. Approximately 79% of the funds (over $13 million) went to Band descendants who were not Tribe members under the 1937 Constitution. *See Hearing on JFA, S. 1106, Before Senate Select Comm. on Indian Affairs*, 99th Cong. 263 (1985) [hereinafter *1985 S. Hearing*], AR-000515, at AR-000546 (statement of Arnold Sowmick, Tribal Chief). As lineal descendants of individuals on the 1871 or 1872 rolls, each Plaintiff (or his or her parents) was eligible to receive Docket 57 funds. *See* 1986 Report at AR-000720–21.

In 1983, BIA prepared the 1983 Report to recommend a distribution plan for Dockets 13-E, 59, and 13-F funds. AR-000710. BIA again recommended that the judgment funds be distributed on a per capita basis to all Band descendants, because it would be "unfair" to restrict funds to Tribe members, thereby compensating "only a portion of the descendants of the Bands which were wronged and for which these awards represent compensation . . . ." *1985 S. Hearing* at AR-000541 (submission by Hazel Elbert, Acting Director of Indian Services, BIA). Unhappy with its limited share of the Docket 57 funds, the Tribe objected to the distribution plan for the remaining dockets. *Id.* at AR-000572 (prepared statement of Thomas Wilson, General Counsel for the Tribe). The Tribe lobbied Congress to override the Secretary and distribute all of the remaining

judgment funds directly to the Tribe. *Id.* at AR-000571–72.

## II. The Judgment Funds Act

Congress enacted the JFA in 1986 to settle a dispute between the Tribe, the many Band descendants who had been excluded from membership ("excluded Band descendants"), and BIA over how to distribute the funds from Dockets 13E, 13F, and 59, as well as the undistributed Docket 57 funds (the "JFA Funds"). After two years of negotiations, Congress inscribed in law the following compromise: In exchange for all of the JA Funds, the Tribe agreed to enroll the excluded Band descendants of at least one-quarter Indian blood who applied during an open enrollment period and to refrain from using the JFA Funds in a way that discriminated against the excluded Band descendants who enrolled. *See* Jimooyung at 129. The drafting history of the JFA underscores the nature of the bargain memorialized in the JFA.

### A. The 1984 Congressional Proceedings

In 1984, Senator Donald Riegle, at the Tribe's request, introduced a bill to abrogate the Secretary's distribution plan and name the Tribe as sole beneficiary of the JFA Funds. S. 2823, AR-000725. S. 2823 proposed the creation of an Investment Fund, administered by the Tribe, into which all the JFA Funds would be deposited. *Id.* at AR-000727–28.

Under S. 2823, thousands of excluded Band descendants who were entitled to per capita payments under the Secretary's distribution plan would receive nothing. For this reason, representatives of the excluded Band descendants vigorously opposed S. 2823 in testimony to the Senate Select Committee on Indian Affairs ("Senate Committee"). *Hearing on JFA, S. 2823, Before Senate Committee*, 98th Cong. 1028 (1984) [hereinafter *1984 S. Hearing*], AR-000739, at AR-000865–69. In keeping with the Secretary's duty to ensure that the distribution of funds "best serve the interests of all those entities and individuals entitled to receive funds," 25 U.S.C. § 1403, BIA testified against the Tribe's proposal. *1984 S. Hearing* at AR-000826–27 (statement of John

Fritz, Deputy AS-IA).

On September 18, 1984, the Senate Committee revised S. 2823 to condition the distribution of the JFA Funds to the Tribe on the Tribe's adopting:

> [A] constitutional provision or ordinance which would enable a person who meets the existing twenty-five per centum blood quantum for tribal membership to become an enrolled member of the tribe, without regard to past or present residency or nonresidency of such person or such person's parents on the tribe's reservation.

S. Rep. No. 98-608, AR-000881, at AR-000881–82. This revision struck a compromise by allocating the JFA Funds to the Tribe, if, but only if, the Tribe gave those excluded Band descendants of one-quarter Indian blood the opportunity to join the Tribe and share the benefits of the Investment Fund. The Tribe did not object. *See 1984 S. Hearing* at AR-000835 (statement of Arnold Sowmick).

On April 15, 1985, to meet the requirements of the compromise bill, the Tribal Council proposed an amendment to the 1937 Constitution to open membership to "*All descendants*" of Band members listed in the existing constitutional base rolls—the allotment rolls of 1883, 1885, or 1891—of one-quarter Indian blood. *1985 S. Hearing* at AR-000560 (Resolution L & O-03-85) (emphasis added). The proposed amendment would eliminate the 1937 Constitution's residency requirement, which had unfairly benefited, as a whole, the inheritors of allotments made in the 1880s.[2] Resolution L & O-03-85 provided for an eighteen-month "Open Enrollment" period following the adoption of the amendment. *Id.* The Resolution also sought to ensure that the enrollees who did not live on the Reservation were full participants in Tribal government. One

[2] There appears to be substantial overlap between the population of Band descendants barred from membership due to the residency requirement and the population of Band descendants who trace their ancestry lineally to the 1871 or 1872 rolls and collaterally to the later rolls. These Band descendants' lineal ancestors received allotments in the 1870s—not in the 1880s or 1890s—and the majority of their ancestors lost their Reservation land during the 1870s. *See supra* pages 3–5; Overton at AR-001289–91, AR-001294, AR-001304.

proposed amendment would create two new off-Reservation voting districts, *id.* at AR-000561–62; and the second would require that any further constitutional amendments be approved by majority vote in each district, *id.* at AR-000568.

**B. The 1985 Senate Proceedings**

S. 2823 was not enacted into law during the 1984–85 congressional session. *Id.* at AR-000519. On May 8, 1985, the bill was reintroduced in the Senate as S. 1106. *Id.* at AR-000520. Section 4(a) of S. 1106 conditioned the distribution of the JFA Funds on the Tribe's ratification of "resolution L and O-03-85," effectively incorporating the language of the resolution's proposed amendments into the JFA. *Id.* at AR-000523–24. The Tribe reaffirmed its support for the bill. *Id.* at AR-000542–44 (statement of Arnold Sowmick).

Meanwhile, the excluded Band descendants continued to oppose the bill. *See id.* at AR-000606–644 (statements of Band descendants). Among their concerns was that S. 1106 did not guarantee the Tribe would adhere to the constitutional amendments proposed in Resolution L & O-03-85 and enroll those who met the revised membership requirements. *See id.* at AR-000626 (statement of Victoria Miller). The excluded Band descendants were also skeptical that the Tribe would fulfill its duty to administer the Investment Fund to the benefit of all Tribe members. *Id.* at AR-000611 (prepared statement of Paul Johnson).

After listening to these concerns, a staff attorney on the Senate Committee asked:

> [I]f there were stronger commitments or guarantees made by the tribe that persons who met the enrollment criteria would not be denied membership in the tribe, and if there were stronger commitments or guarantees that the descendancy groups, particularly those of one-quarter blood or more, would be allowed to participate in the investment program and the planning of investments, would the descendancy group—again, those of one-quarter blood or more—continue to oppose this legislation?

*Id.* at AR-000640. A representative for the excluded Band descendants acknowledged that such guarantees might enable them to support the bill, but only if those guarantees were incorporated

into it. *Id.* BIA also testified that S. 1106 lacked the needed protections to ensure the Investment Fund would benefit the JFA Enrollees. *Id.* at AR-000530 (statement of Hazel Elbert).

On July 30, 1985, the Senate Committee again revised S. 1106 to strengthen its protections of the JFA Enrollees. S. Rep. No. 99-119, AR-000924. Newly added Section 3(b)(3) prohibited the distribution of any income from the Investment Fund until eighteen months after the ratification of the required constitutional amendments, *id.* at AR-000924–25, thereby ensuring that excluded Band descendants could apply for membership and enroll before the Tribe distributed Investment Fund income. The Senate also added Section 9(a) to the bill to prohibit "[a]ny distribution or expenditure of the income of the Investment Fund, and any program or activity funded, in whole or in part, by the principal or income of the Investment Fund" that discriminates against "individuals who become members of the tribe after the date on which the amendments to the constitution" are ratified. *Id.* at AR-000925.

### C. The 1986 House Proceedings

On August 1, 1985, the Senate referred S. 1106 to the House Select Committee on Interior and Insular Affairs. S. 1106 - Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act [hereinafter S. 1106 Legislative History], Congress.gov, https://www.congress.gov/bill/ 99th-congress/senate-bill/1106/all-actions, https://perma.cc/47QJ-H93L. On March 20, 1986, the House Committee amended Section 4(b) of the bill to prohibit ratification of any Tribal constitutional amendments for eighteen months after the adoption of the constitutional amendments proposed in Resolution L & O-03-85. H. Rep. No. 99-502, AR-000912, at AR-000913. That amendment ensured that "new members of the tribe [could] register and obtain their tribal membership before any further changes are made to the tribal Constitution." *Id.* at AR-000918. The Committee also added language to the JFA's enforcement provision, Section 5, creating a procedure for the Secretary to assume control of the Investment Fund if the Tribal

Council materially fails to administer the Investment Fund in accordance with the JFA. *Id.* at AR-000918–19.

Only after these revisions did BIA support S. 1106. *See id.* at AR-000920 (DOI endorsement of S. 1106, Feb. 28, 1986). BIA was particularly persuaded by Section 9(a) prohibiting "discrimination in the distribution or expenditure of fund monies" and revisions to Section 5(b)(2), which "*require[s]* secretarial intervention" if the Tribe administers the Investment Fund contrary to the JFA. *Id.* at AR-000921 (emphasis added).

During the House debates, Representatives William Schuette, the original sponsor of S. 1106's companion bill in the House, H. 2983, and Morris Udall, the House Committee Chair, emphasized that S. 1106's nondiscrimination mandate was intentionally robust to ensure the excluded Band descendants—the soon-to-be JFA Enrollees—would not be subject to discrimination:

> [Mr. SCHUETTE:] Section 9 includes an antidiscrimination clause, again to *protect the descendants*, which requires that any and all expenditures—underline that—any and all expenditures *must benefit all members*, those located on and those located off the reservation.

132 Cong. Rec. 13,050 (1986), AR-000936, at AR-000940 (emphasis added). Rep. Udall agreed with Rep. Schuette's characterization of the bill's nondiscrimination mandate. *Id.*

The excluded Band descendants still feared "that once membership was opened to those with 25 percent Saginaw-Chippewa blood quantum, the Constitution could be amended once more to disenfranchise these new members." *Id.* Rep. Schuette assured the House that "*[t]his will not happen*. With [Section 4], the descendants' rights and the descendants' privileges are *fully* protected." *Id.* (emphasis added).

On June 10, 1986, the House passed S. 1106. S. 1106 Legislative History. A week later, the Senate adopted the House's amendments. *Id.* On June 30, President Reagan signed the JFA

into law. *Id.* On November 4, 1986 the Tribe ratified the amendments in Resolution L & O-03-85 (the "1986 Amendments") and the 1986 Constitution took effect. 1986 Const., AR-000097.

## III. After the Judgment Funds Act

### A. 1986-1996: Open Enrollment and Integration

The JFA-mandated eighteen-month Open Enrollment period began on November 4, 1986 and ended on May 4, 1988. *Fisher v. Saginaw Chippewa Tribal Clerk* (SCIT Ct. App. 2001), AR-000053, at AR-000068. The Tribe received more than 3,000 applications and accepted approximately 800 new members. Tribe Answer ¶ 47. The Tribe understood the 1986 Constitution to require the enrollment of *all* Band descendants of one-quarter Indian blood, regardless of whether they lived on the Reservation and regardless of whether they descended lineally or collaterally from an individual listed on one of the constitutional base rolls. Aff. of April Borton, former Tribal Enrollment Office File Clerk (Oct. 14, 2016) ¶¶ 9–16, AR-000108, at AR-000109–10. BIA trained Tribal staff on evaluating the membership applications, and the Tribe followed BIA's instructions to enroll "any applicant for membership who had been certified as eligible to participate in Docket 57 and who was of at least one-quarter blood Indian." *Id.* ¶ 16, AR-000110.

On February 2, 1987, shortly after the Tribe began Open Enrollment, the Tribal Council codified its enrollment procedures in the Enrollment Ordinance of the Saginaw Chippewa Indian Tribe of Michigan ("Ordinance 14"). *See* AR-000117. Ordinance 14 provided for the enrollment of any "descendant" of an individual listed on a constitutional base roll who met the blood quantum requirement and applied for membership during Open Enrollment. *Id.* § 4, AR-000117. Ordinance 14 made clear that disenrollment was permissible only where an enrolled member enrolled in another tribe. *Id.* § 9, AR-000119.

The Tribe enrolled many members who showed collateral descent (descent from a relative through a sibling of an ancestor) from an individual listed on one of the constitutional base rolls,

but who were also lineal descendants (relatives in the direct line of descent) of an individual listed on the 1871 or 1872 rolls. All Plaintiffs are among the approximately 800 Band descendants (or their children) who were enrolled as members of the Tribe pursuant to the JFA. Decision at AR-001855. Each Plaintiff demonstrated that he or she qualified for membership under the 1986 Constitution's criteria, *i.e.* traced his or her ancestry to an individual on a constitutional base roll and met the one-quarter Indian blood requirement. *See* Request for Assistance Pursuant to the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act [hereinafter Pet.], AR-000001, at AR-000041; *see generally* Exhibits to Pet.

The Tribe never questioned the legitimacy of Plaintiffs' membership in the years following Open Enrollment. Plaintiffs became integrated into the social and cultural life of the Tribe. *See, e.g.*, Holzhausen Decl. ¶¶ 8-14, AR-001692, at AR-001693–94. Like other Tribe members, Plaintiffs attended Tribal events, voted in Tribal elections, and depended on services provided by the Tribe. *See, e.g.*, *id.* at AR-001692–96.

**B. 1996-2000: Early Disenrollment Efforts**

The Tribe's willingness to uphold its end of the bargain memorialized in the JFA and the 1986 Amendments quickly eroded, and in 1996 the Tribal Council amended Ordinance 14 to authorize a new basis for disenrollment: having used "deficient, erroneous or fraudulent evidence" to enroll. Ordin. 14 § 10(b) (am. July 22, 1996), AR-000123, at AR-000128–29.[3] Following the amendment to Ordinance 14, the Tribal Council attempted to disenroll several members, exclusively targeting JFA Enrollees. *Pet'rs' Opening Br.* at 19 & n.112, AR-001752, at AR-001770; *see, e.g.*, Lown Decl. ¶ 14, AR-001361, at AR-001364. For the first time, the Tribal

[3] There is record evidence that the Tribe attempted to disenroll a JFA Enrollee as early as 1994. *See* Borton Aff. ¶ 22, AR-000111. However, the disenrollment campaign did not begin in earnest until 1996, after the Tribe amended Ordinance 14.

Council contended that some JFA Enrollees were erroneously enrolled because their ancestry could not be traced *lineally* to an individual on the constitutional base rolls. *See, e.g.*, Lown Decl. ¶ 14, AR-001364. The expulsion effort failed because the JFA Enrollees were in fact descendants of the Bands and met the one-quarter Indian blood requirement, thus satisfying the enrollment criteria in the 1986 Constitution. *See* Tribe Answer ¶ 62. Indeed, Ordinance 14 considered individuals listed on annuity rolls from the 1860s—including the 1867 census roll incorporated into the 1871 allotment roll—to be full blood "Saginaw Chippewa." Ordin. 14 § 1(b) (am. July 22, 1996), at AR-000123.

### C. 2000-2011: The Second Disenrollment Attempt

In 2000, the Tribal Council amended Ordinance 14 for a second time. The amended Ordinance 14 limited membership to *lineal* descendants of individuals listed on the constitutional base rolls, Ordin. 14 § 7(a)(3) (am. Dec. 19, 2000), AR-000147, at AR-000153–54, even though the Tribe had not amended its Constitution to reflect such a substantial change in membership criteria. In 2003, the Tribal Council created the Office of Administrative Hearings ("OAH") to conduct hearings and make membership recommendations to the Tribal Certifier. *See* Ordin. 14 § 13 (am. Apr. 9, 2003), AR-000179, at AR-000199. With the OAH in place, the Tribe reopened the final enrollment decisions (made via Open Enrollment) of hundreds of JFA Enrollees, including many Plaintiffs. *See, e.g.*, Decisions to Reopen Final Enrollment Decisions, AR-000229–75.

Eventually, the Tribe halted the disenrollment proceedings against Plaintiffs and reaffirmed their membership. Aff. of Michele Stanley, former At Large Tribal Council Member (Oct. 17, 2016) ¶¶ 5, 9-13, AR-000277, at AR-000277–78. In 2005, the Tribal Appellate Court ruled that the 1986 Constitution authorized a "very, very limited *implied* power to disenroll on grounds of fraud or mistake." *Snowden v. Saginaw Chippewa Tribe of Mich.* (SCIT Ct. App. 2005)

(emphasis in original), AR-000212, at AR-000223. In 2009, the Tribal Council directed OAH to dismiss with prejudice any then-pending disenrollment cases, concluding that the definition of "descendant" under the 1986 Constitution included both lineal and collateral descendants. Stanley Aff. ¶¶ 5, 9-13, AR-000277–78. The Tribal Council based its conclusion on statements made by Tribal leaders during JFA negotiations and the Tribe's practice of enrolling collateral descendants during Open Enrollment. *Id.* Upon learning that their cases had been dismissed with prejudice, Plaintiffs believed the ordeal was over and their membership secure. Holzhausen Decl. ¶ 15, AR-001694.

**D. 2011-Present: Mass Disenrollment**

In 2011, the Tribal Council again amended Ordinance 14. *See* Ordin. 14 (am. Apr. 8, 2011), AR-000281. The 2011 amendment granted the Tribal Certifier the authority to seek judicial review of all prior determinations by OAH that a member met the Tribe's membership criteria, *id.* § 14(b), AR-000318, thus paving the way to reopen OAH decisions which had not yet been dismissed with prejudice. *See* Decision at AR-001853.

In 2013, the Tribe's Appellate Court further cleared the path for disenrollment, breaking with precedent and holding that the phrase "[a]ll descendants" in the 1986 Constitution meant only lineal descendants. *Kequom v. Atwell*, No. 12-CA-1051 (SCIT Ct. App. 2013), AR-000133, at AR-000140. The *Atwell* court further set aside OAH's finding that the Enrollment Office had "followed a 'policy' of collateral tracing [during Open Enrollment] and had not committed 'gross negligence' within the meaning of" Ordinance 14. *Id.* at AR-000135. Although acknowledging that "'collateral tracing' was practiced" during Open Enrollment, *id.* at AR-000134, the court held that appellees' failure to locate a *written* policy meant that enrollment of collateral descendants was "neither law nor policy" but "[a]t best . . . an informal practice." *Id.* at AR-000139. As such, "officials involved *should have known* the impermissibility of reading collateral relatives into [the 1986 Constitution]

and were therefore grossly negligent." *Id.* (emphasis in original).

In the wake of *Atwell*, the Tribal Council yet again amended Ordinance 14. *See* Ordin. 14 (am. May 14, 2014), AR-000327. The 2014 amendment authorized the reopening of disenrollment cases the Tribal Council had dismissed with prejudice in 2009, including many of Plaintiffs' cases. *Id.* § 11(b)(2)(D), AR-000328. The Tribe initiated disenrollment proceedings before OAH against hundreds of JFA Enrollees between 2011 and 2015. Pet. at 13. This time, the Tribe succeeded in disenrolling hundreds of members, including Plaintiffs. *See* Tribe Answer ¶¶ 2, 69; Declarations of various Plaintiffs, AR-001361–1649.31.

## IV. Disenrollment Adversely Impacted the Mental and Emotional Health of Plaintiffs and Deprived Them of Numerous Benefits

Plaintiffs have become Native Americans without a tribe. Before being disenrolled, Plaintiffs spent decades as active participants in Tribal life, fully recognized as members of the community. Disenrollment robbed Plaintiffs of their heritage and identity and has inflicted ongoing stigmatic injury and severe emotional distress.

Plaintiffs were always Band descendants, and many felt connected to their heritage from a young age. Plaintiff Donald Lee Lown recalls visiting the grave of his great-grandmother, who is buried in the "original Chippewa Indian cemetery." Lown Decl. ¶ 3, AR-001361. Late Plaintiff Simon Perez recounted how, long before he was enrolled, his mother and grandmother taught him about his Chippewa heritage; he "learned about Chippewa traditions and participated in the Chippewa community by going to tribal powwows with [his] family each year, beginning when [he] was around twelve years old." Perez Decl. ¶ 6, AR-001472–73. Plaintiff Elizabeth Douglass recalls that her grandmother's Native American artistry and stories of her grandfather, a tailor and a wigwam maker, "left a lasting impression" on her and "molded [her] into the person [she] is today." Douglass Decl. ¶¶ 4-6, AR-001502–03.

Joining the Tribe gave Plaintiffs the recognition and belonging that was missing in their lives. Simon Perez described how it felt to join the Tribe: "Membership in the Tribe gave me a strong sense of community and belonging because most of my friends and family were members. Being part of the Tribe made me feel Chippewa. It made me feel like I was connected to my heritage and my ancestors." Perez Decl. ¶ 7, AR-001473.

Many Plaintiffs became passionately involved in the Tribe. In 1988, late Plaintiff Dolly Holzhausen volunteered on the Tribe's Cultural Board, which she chaired for five years. Holzhausen Decl. ¶ 9, AR-001693. Holzhausen organized classes in drum-making, beading, and language, voted in Tribal elections, and helped plan the Tribe's semiannual powwows. *Id.* ¶¶ 9–11, AR-001693–94. Disenrollment was a body blow: "Disenrollment has caused me to lose my friends, my community, and my sense of who I am. I have become very depressed as a result, and I've seen a doctor for depression. My doctor also told me all the stress from being disenrolled has contributed to my medical problems." *Id.* ¶ 24, AR-001696. Lown describes the agonizing stigma of disenrollment:

> Being stripped of my tribal membership . . . has wedged a divide between me and my fellow Tribe members. Being disenrolled carries a negative stigma. Many Tribe members will no longer speak with me because I am no longer seen as a real member of the community. . . . I no longer get to see all my family and friends who live on the reservation because I do not feel welcomed or comfortable enough to go [to] the reservation. I am no longer able to attend tribal events and meetings. Even tribal events open to the public are not an option for me because I feel so unwelcomed and stigmatized for being disenrolled.

Lown Decl. ¶ 18, AR-001365.

Disenrollment also deprived Plaintiffs of many practical benefits of membership, including medical and dental insurance, Tribal health care services, elder care, housing subsidies, educational opportunities, and per capita cash payments. Late Plaintiff Rick Fowler described his difficulty affording health care after losing Tribal insurance. Fowler Decl. ¶¶ 17–18, AR-001508,

at AR-001510–11. Plaintiff Luann McNally describes the financial difficulties she and her husband have faced since losing their per capita payments. McNally Decl. ¶¶ 4–7, AR-001550. Elizabeth Douglass describes having to leave college after losing the educational subsidies she received from the Tribe prior to her disenrollment. Douglass Decl. ¶ 15, AR-001504. After disenrollment, Plaintiff Gloria Narvais, an active member of the Tribal Senior Center, saw her children lose their medical insurance and access to the Tribal health clinic. Narvais Decl. ¶ 14, AR-001426, at AR-001429–30. Narvais's grandchildren were forced to leave the Tribe's free Montessori school, and her daughter's family was deprived of access to Tribal low-income housing. *Id.* For a more complete description of the hardships Plaintiffs have endured, see AR-001361–1649.31.

The Tribe told Congress it planned to use the Investment Fund to "build an economic base that will enhance the opportunities for [the Tribe's] people to improve their standard of living," *1985 S. Hearing* at AR-000549 (statement of Ruth Moses, Tribal Sub-Chief), and to "provide a better and brighter future for [the Tribe's] children, which our ancestors were unable to do in 1805, 1807, and 1817." *Id.* at AR-000547 (statement of Arnold Sowmick). In the 1980s, when the JFA was enacted, the Tribe was in extremely poor financial shape. *Tribe Answer to Pet'rs' Statement of Reasons*, AR-001723, at AR-001728. The Investment Fund has been a roaring success and revitalized the Tribe. Stripping Plaintiffs of their membership has left them far worse off than when they enrolled in the Tribe. Their identity has been taken, their lives upended, and their share of the fruits of the Investment Fund wrongfully denied them. But for the broken promise of the JFA, Plaintiffs would have received the per capita payments under the BIA's initial distribution plan.

## PROCEDURAL HISTORY

### I. Initial Requests for Secretarial Intervention

In July 2015, Plaintiffs wrote to BIA requesting the agency stop the Tribe from unlawfully disenrolling JFA Enrollees. Statement of Reasons [hereinafter SoR], AR-001335, at AR-001349.

Plaintiffs' counsel met with the Solicitor's Office regarding the July 2015 letter. The Secretary took no action. *Id.* On October 19, 2016, Plaintiffs submitted a petition ("Petition") requesting "the Secretary to enforce the JFA by (1) preventing the Tribe from continuing its ongoing, illegal disenrollment of Petitioners; and (2) directing the Tribe to reinstate or re-enroll the Petitioners that it already had disenrolled." *Id.*; *see also* Pet., AR-000001. Plaintiffs again met with the Solicitor's Office on December 6, 2016. SoR at AR-001349. Again, the Secretary took no action. *Id.*

## II. Prior District Court Proceeding

On April 18, 2018, Plaintiffs filed a complaint in this Court challenging the Secretary's failure to act and claiming that the failure violated the JFA and the Administrative Procedure Act ("APA"). On January 7, 2019, the Court dismissed the complaint without prejudice on the ground that Plaintiffs failed to exhaust their administrative remedies. *Cavazos v. Zinke*, No. 18-891 (CKK), 2019 WL 121210 (D.D.C. Jan. 7, 2019).

## III. Plaintiffs' Renewed Request for Action

On February 7, 2019, Plaintiffs submitted a renewed Request for Action to the Deputy Director of BIA. *See* 25 C.F.R. § 2.8(a); SoR at AR-001350. The request asked for a response to Plaintiffs' Petition and action to re-enroll Plaintiffs. BIA failed to respond.

On March 4, 2019, Plaintiffs submitted a Notice of Appeal to DOI's Assistant Secretary for Indian Affairs ("AS-IA"), the "next official in the process," pursuant to 25 C.F.R. §§ 2.8(b) and 2.9. AR-001316. On April 2, 2019, Plaintiffs filed a Statement of Reasons pursuant to 25 C.F.R. § 2.10. AR-001335. On April 10, 2019, the AS-IA requested briefing from the parties to enable DOI to "render a well-informed agency decision." Scheduling Order, AR-001650. Plaintiffs filed Supplemental Documentation on April 26, 2019, including the signed declarations of four disenrolled Tribe members highlighting the severe and ongoing harm suffered by Plaintiffs. AR-001665–1712. Plaintiffs and the Tribe each submitted Opening Briefs on June 12, 2019, and

Response Briefs on July 1, 2019. *See* AR-001752; AR-001775; AR-001805; AR-001823.

## IV. The DOI Decision

On January 30, 2020, DOI issued the Decision denying Plaintiffs' Petition. AR-001844. The Decision held that "the [JFA] does not confer on the Secretary authority over Tribal membership and enrollment," and therefore, the Secretary could not "intervene in what is, at its heart, a tribal enrollment dispute." *Id.* at AR-001845, AR-001863. DOI failed to address Plaintiffs' central argument that the JFA was *intended specifically* to affect Tribal membership matters. *See Pet'rs' Opening Br.* at AR-001754.

DOI made two key findings in denying Plaintiffs' Petition. First, DOI construed Section 5(b)(2)—the provision empowering the Secretary to enforce the JFA—to apply in only limited circumstances. Section 5(b)(2) begins:

> The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of this Act. After notice and hearing, the Secretary may take such action as the Secretary may determine to be necessary and appropriate to assume administration of the Investment Fund if it is determined that the Tribal Council has materially failed to administer the Investment Fund in accordance with the requirements of this Act.

AR-001237. DOI reasoned that the second sentence of Section 5(b)(2) must be read to "clarify" (thus limiting the scope of) the first sentence, so that Congress intended the Secretary to enforce the JFA only "in the event that the Tribe mismanaged the actual Investment Fund." Decision at AR-001858. DOI rejected the natural reading of the text, namely that the first sentence permits the Secretary to determine how to enforce the JFA, and that the second sentence specifies an enforcement mechanism for which notice and hearing are required, without displacing the first sentence of Section 5(b)(2).

Second, DOI concluded that Plaintiffs did not establish that "a *requirement* of the Act has been violated," and that "[t]he Tribe's disenrollment actions . . . do not constitute discrimination

within the meaning of Section 9(a)." Decision at AR-001856–57, AR-001860 (emphasis in original). DOI reasoned that because the "Tribe's judiciary has already determined that [Plaintiffs'] disenrollment complied with tribal law," Plaintiffs' disenrollment was not an act of discrimination but "merely a consequence of their not satisfying Tribal membership criteria." *Id.* at AR-001861. In so concluding, DOI failed to appreciate that the Tribe rewrote its membership criteria to target Plaintiffs for disenrollment, without amending the 1986 Constitution.

DOI's fallback was that, even if Plaintiffs were disenrolled in violation of the 1986 Constitution, the JFA did not forbid the Tribe from changing the membership criteria established by the 1986 Amendments. Section 5(a) prohibited the Secretary from transferring the JFA Funds to the Tribe until after the Tribe had ratified the constitutional amendments that would permit Plaintiffs to enroll as Tribe members. Nonetheless, DOI noted that:

> Under the Petitioners' reasoning, Section 5(a) effectively requires the Tribe to not just ratify its proposed constitutional amendments, but also adhere to those amendments in perpetuity in exchange for the judgment funds. But the condition precedent to *ratify* constitutional amendments does not, by itself, establish a separate requirement to subsequently *maintain* those amendments unchanged and for all time.

Decision at AR-001857 (emphasis in original). DOI did not limit its rationale which, if correct, would have given the Tribe latitude to amend its Constitution to permit disenrollment of every JFA Enrollee *the day after* the Tribe received the JFA Funds. DOI made no mention of the drafting history of the JFA, other than to support the obvious proposition that no party to the negotiations understood the JFA to require the enrollment in the Tribe of *all* Docket 57 recipients. *Id.* at AR-001858–59.

## STANDARD OF REVIEW

This Court has held that:

> [W]hen a party seeks review of agency action under the Administrative Procedure Act (APA) before a district court, the district judge sits as an appellate tribunal. The

> entire case on review is a question of law. Accordingly, the standard set forth in Rule 56 does not apply . . . . Summary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review.

*Miley*, 42 F. Supp. at 170 (internal citations and punctuation omitted).

The Court must compel agency action where the agency "failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphases removed). The Court reviews the agency decision under the arbitrary and capricious standard. *Miley*, 42 F. Supp. at 170. The Secretary's interpretation of the JFA is not entitled to *Chevron* deference because it was not "the result of . . . formal adjudication or notice-and-comment rulemaking." *Air Transp. Assoc. of Am., Inc. v. FAA*, 921 F.3d 275, 279 (D.C. Cir. 2019).

At issue in this case is DOI's decision not to enforce the JFA. DOI's decision is a final agency action that is reviewable under the APA. *See Aguayo v. Jewell*, 827 F.3d 1213, 1223 (9th Cir. 2016). "When a plaintiff has previously sought relief from the BIA, federal jurisdiction is proper'" including where the agency decision under review involves the legality of Tribal disenrollment decisions. *See id.* (citing *Alto v. Black*, 738 F.3d 1111, 1123 (9th Cir. 2013)).

## ARGUMENT

DOI abdicated its duty to ensure that the Tribe adheres to the fundamental bargain Congress codified in the JFA. Congress agreed to give all of the JFA Funds to the Tribe if, and only if, the Tribe both: (1) enabled the excluded Band descendants of one-quarter Indian blood—who would otherwise be entitled to a per capita distribution of the JFA Funds—to become full-fledged members of the Tribe, and (2) agreed that DOI would ensure that those JFA Funds were never used in a manner that discriminated against the JFA Enrollees. Nothing in the JFA suggests that membership could be time-limited or conditional. To the contrary, Congress understood that Plaintiffs and other prospective enrollees would not have agreed to the JFA bargain and sacrificed

their per capita shares of the judgment funds if their membership could be revoked at any time, without democratic process, at the whim of the Tribal Council. Congress included provisions in the JFA to ensure that if the Tribe reneged on its commitments, the Secretary would step in and staunch the discrimination against the JFA Enrollees. It is DOI's failure to do so which gives rise to this case. Plaintiffs urge the Court to hold the Secretary to her obligations under federal law, and to restore Plaintiffs' rights under the JFA.

## I. The Tribe's adoption of a lineal descendancy standard for membership—and its discriminatory disenrollment of Plaintiffs—violates the JFA.

### A. The 1986 Constitution unambiguously requires the Tribe to recognize the membership of collateral descendants.

The 1986 Constitution requires the Tribe to recognize the membership of "*[a]ll* descendants"—both lineal and collateral—of the 1883, 1885, and 1891 allotment rolls, provided they satisfy the one-quarter Indian blood criteria. 1986 Const. art. III, § 1, AR-000098. That "[a]ll descendants" includes collateral descendants is clear from the plain text of the constitutional amendments required by the JFA, as well as the text, purpose, and history of the JFA, and the Tribe's draft constitution that DOI rejected in 1937. Any possible doubt is erased by the Tribe's adherence to that understanding during Open Enrollment and for nearly a decade afterwards.

Article III of the 1986 Constitution reads:

> Membership of the Saginaw Chippewa Indian Tribe shall consist of . . . *[a]ll descendants* of persons whose names appear on any rolls enumerated in subsection (a) of this section who are at least one-quarter degree Indian blood born prior to or within one year of the effective date of approval of this Amended Constitution by the Secretary of Interior; provided that such descendants duly apply for membership in the Saginaw Chippewa Indian Tribe of Michigan within 18 months of the effective date of [this] amended Constitution.

1986 Const., art. III, § 1(c) (emphasis added), AR-000098.

The plain meaning of "descendant" includes individuals who descend collaterally from an ancestor. The Fifth Edition of Black's Law Dictionary—current when the JFA was enacted in

1986—defines "descendent" as one "in the bloodstream of the ancestor." *Descendent*, Black's Law Dictionary (5th ed. 1979). It defines "lineal descendent" as a subcategory of "descendent" meaning one "in the line of descent from the ancestor." *Id.* More recent editions of Black's emphasize that "descendant" is broader than "lineal descendant," defining "descendant" as "[s]omeone who follows in the bloodline of an ancestor, *either lineally or collaterally*." *Descendant*, Black's Law Dictionary (9th ed. 2009) (emphasis added); (10th ed. 2014) (same definition); (11th ed. 2019) (same definition).[4]

The 1986 Constitution does not merely use the term "descendant." It clarifies that "all" descendants of one-quarter Indian blood are eligible for membership. Because the 1986 Constitution does not define "all," the term is interpreted "in accordance with its ordinary meaning." *See Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 116 (D.D.C. 2017). The word "all" is "unambiguous in its scope and covers the entirety of [the modified term] with no limitation whatsoever." *Id.* "The term 'all' ordinarily means 'the whole amount, quantity, or extent of' a thing." *Id.* (quoting *All Definition*, Merriam–Webster Online, https://perma.cc/3ZRN-NQ2A). Thus, the inclusion of "all" in Article III, Section 1(c) of the 1986 Constitution precludes any reading of "descendants" that narrows the "whole . . . extent" of the term. *See id.* The adjective "all" in the 1986 Constitution demonstrates that "[a]ll descendants" cannot refer merely to some *subset* of descendants.

[4] The only edition of Black's since 1951 (if not earlier) that has not clearly defined "descendant" as broader than "lineal descendant" is the Seventh Edition (1999), which is also the only edition cited by the Tribal Court of Appeals in 2013 to support the exclusion of collateral descendants. *See Atwell* at AR-000137. The Seventh Edition was not current when the JFA was enacted in 1986, nor when *Atwell* was decided in 2013. It sheds no light on the "original meaning," *see, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) of "descendant." Moreover, the *Atwell* court's reasoning both fails to acknowledge and contradicts its own words from 2001, when it defined "[a]ll descendants" to require only "consanguinity," a term which clearly encompasses collateral descendants. *See Fisher v. Saginaw Chippewa Tribal Clerk* (SCIT Ct. App. 2001) at AR-000059; *see also* Consanguinity, Black's Law Dictionary (11th ed. 2019).

The JFA's drafting history confirms that the participants in the debate leading to the JFA's enactment understood "[a]ll descendants" to include collateral descendants. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) ("[T]he drafters will know what [a regulation] was supposed to include or exclude."); *see also Starr Int'l Co. v. United States*, 910 F.3d 527, 537 (D.C. Cir. 2018) (noting that a treaty should be interpreted according to the "shared expectations of the contracting parties" (quotation omitted)). The parties to the JFA negotiations repeatedly and consistently used the terms "descendancy group," "descendant entity," or "descendants" to refer to *all* unenrolled Band descendants BIA identified as intended beneficiaries of the docket funds—not just the subset of excluded Band descendants who traced their ancestry lineally to the constitutional base rolls. *See, e.g.*, 1976 Report at AR-000720–21; *1984 S. Hearing* at AR-000827–30, AR-000832–33, AR-000835, AR-000840, AR-000842, AR-000855, AR-000866, AR-000867–68; *1985 S. Hearing* at AR-000519, AR-000530, AR-000533, AR-000538, AR-000581, AR-000606, AR-000633, AR-000640, AR-000642; 132 Cong. Rec. at AR-000940, AR-000942; 132 Cong. Rec. 13748 (1986), AR-000944, at AR-001026. For example, when a Senate Committee staff attorney spoke of revising the draft JFA to add "stronger commitments or guarantees that the descendancy groups, particularly those of one-quarter blood or more, would be allowed to participate in the investment program and the planning of investments," *1985 S. Hearing* at AR-000640, everyone understood he was referring to the entire group of unenrolled Band descendants who would have received per capita payments of docket funds had the JFA not been passed, and who also met the one-quarter Indian blood criteria.

JFA negotiations focused on the potential exclusion of many Docket 57 judgment fund recipients from the benefits of the JFA Funds, because they would otherwise have been entitled to payments. *See supra* pages 8–13. Although multiple parties expressed concern about the exclusion

of descendants who could not show one-quarter Indian blood, no party expressed concern about the eligibility of hundreds of Docket 57 recipients who, like Plaintiffs, met the one-quarter Indian blood requirement but showed collateral, rather than lineal, descent. This omission would be glaring—indeed, inexplicable—unless one recognizes that all parties understood collateral descendants to be included in the umbrella of "all descendants" in the 1986 Constitution.

The Tribe repeatedly confirmed its understanding that eligibility extended to all Band descendants who satisfied the one-quarter Indian blood requirement. In the September 1985 issue of the *Tribal Observer*, then Tribal Chairman Arnold Sowmick wrote that the amendments proposed in Resolution L & O-03-85 would, if adopted, mean "[a]ll Saginaw, Swan Creek, and Black River descend[a]nts of one-quarter Indian blood quantum will be eligible to enroll in the Tribe." AR-001095, at AR-001100; *see also* Tribal Observer (Oct. 1986), AR-001104, at AR-001111 (same). A leading Tribe official told Congress that "[a]ll descendants of at least one-quarter degree Indian blood will have the opportunity to apply for membership." *1985 S. Hearing* at AR-000552 (statement of Alvin Chamberlain, Council Member & Chairman of the Constitutional Review Committee).

Chief Sowmick also testified that "[o]ur proposed revision . . . opens membership to *any person* who is at least one-fourth Saginaw Chippewa blood." *1984 S. Hearing* at AR-000835 (emphasis added). The version of Ordinance 14 in place prior to the Tribe's disenrollment efforts permitted applicants to meet the Saginaw Chippewa blood quantum criteria by showing descent from an individual listed on the 1867 census roll, *see* Ordin. 14 § 1(b) (am. July 22, 1996), AR-000123, and that roll was incorporated into the 1871 and 1872 allotment rolls, *supra* page 4. Because each Plaintiff is a lineal descendant of an individual listed on the 1871 or 1872 allotment rolls, and because each Plaintiff showed one-quarter Indian blood, each Plaintiff undisputedly

qualifies as "any person who is at least one-fourth Saginaw Chippewa blood" who, according to Chief Sowmick's testimony to Congress, was eligible for membership in the Tribe.

Contemporaneous statements of members of Congress demonstrate that Congress took the Tribe at its word. *See, e.g.*, Letter from Rep. Bill Schuette to Jerome Hart (Sept. 5, 1985), AR-001134 ("The tribal constitution has been amended to open membership to those who can establish 25% Saginaw Chippewa Indian Blood, even to those who were not born on the reservation and who do not live on it now. . . . Once [BIA] approves the percentage of Saginaw Chippewa blood, membership is automatic.").

The Tribe enrolled hundreds of collateral descendants during Open Enrollment, demonstrating its understanding that the 1986 Constitution required enrollment of collateral descendants. During Open Enrollment, the Tribal Enrollment Office adopted BIA's instruction to enroll "any applicant for membership who had been certified as eligible to participate in Docket 57 and who was of at least one-quarter [Indian blood]." Borton Aff. ¶¶ 13, 16, AR-000109–10. In August 1988, "the issue of [a] family's enrollment on th[e] basis of collateral tracing to a [constitutional] base roll was questioned" within the Tribal Enrollment Office. *Id.* ¶ 20, AR-000110. In response, the Tribe's attorneys advised that collateral tracing was permissible under both the 1986 Constitution and the JFA, and in March 1989 Chief Sowmick issued a memorandum to the Tribal Enrollment Office to that effect. *Id.* ¶¶ 20–21, AR-000110–11. The Tribe's extended "course of conduct" evidences its understanding that the 1986 Constitution permits collateral descendants to be members and directly conflicts with the DOI's Decision. *See O'Connor v. United States*, 479 U.S. 27, 33 (1986); *cf. Starr Int'l*, 910 F.3d at 537 (when interpreting a treaty, "a court should consult . . . the postratification understanding of the contracting parties."); *Deutsche Bank Nat. Trust Co. v. FDIC*, 109 F. Supp. 3d 179, 197 (D.D.C. 2015) (internal

quotations omitted). This understanding remained unchallenged for a decade.

It was not until 1996—when the Tribe began its disenrollment campaign—that anyone objected to the membership of collateral descendants. The Tribe's early disenrollment attempts failed because the Tribe could not pretend that collateral descendants were not Saginaw Chippewa, as there was conclusive evidence to the contrary. *See, e.g.*, Ordin. 14 § 1(b)(2) (am. July 22, 1996), AR-000123; Tribe Answer ¶ 62. As recently as 2009, the Tribal Council conducted a review of Open Enrollment and determined that the Tribe understood "[a]ll descendants" to include collateral descendants when it adopted the 1986 Amendments. Stanley Aff. ¶¶ 8-13, AR-000277–78. Indeed, the Tribal Council was so confident in its finding that it voted to dismiss with prejudice numerous disenrollment cases then pending against collateral descendants. *Id.* ¶ 8, AR000277–78.

The DOI Decision fails to address the dictionary definition of "all" "descendants" and the extensive history documenting the shared understanding that collateral descendants of one-quarter Indian blood are eligible for Tribal membership. DOI disagrees that the 1986 Constitution permits collateral tracing based *only* on the undisputed point that the JFA Amendments "permit inclusion on tribal rolls of *many additional descendants* of the historic tribe." *See* Decision at AR-001858–59 (emphasis added). DOI speculates that the words "many additional" implies that "[a]ll descendants" excludes collateral descendants. *Id.* That speculation is just that—pure speculation—and is not supported by the record. The parties to the JFA negotiations knew that Band descendants who were entitled to a per capita payment under the BIA's proposed distribution of judgment funds, but who could not show one-quarter Indian blood, would not be eligible for membership under the 1986 Constitution and would therefore receive no benefit of the JFA bargain. Plaintiffs agree that the JFA Amendments would permit the enrollment of many, but not all, additional Band descendants, and this fact is consistent with Plaintiff's argument and with the drafting history

outlined above. DOI thus relied on an undisputed fact that is consistent with Plaintiffs' argument, without appearing to comprehend that consistency, in concluding that the 1986 Constitution and the JFA do not permit collateral tracing, all while ignoring extensive record evidence to the contrary. Refusing even to acknowledge this evidence is the height of arbitrariness.

In effect, DOI asks the Court to read a phantom provision limiting eligibility to "lineal" descendants into the 1986 Constitution. DOI misconstrues not only the 1986 Constitution's text, but also the JFA drafting history that led to the ratification of the 1986 Amendments. Under DOI's interpretation, Band descendants of one-quarter Indian blood who trace collaterally to the constitutional base rolls—a core part of the "descendancy group" with which the JFA negotiators were so concerned—would receive no benefit of the JFA bargain. Such an understanding flies in the face of the everyday meaning of the words in the 1986 Constitution, representations made by DOI, the Tribe, and members of Congress during the drafting and ratification of the JFA, and BIA's own instructions to the Tribe during Open Enrollment.

**B. The Tribe's discriminatory disenrollment of Plaintiffs violates the JFA.**

The JFA prohibits the Tribe from using JFA Funds in a way that discriminates against JFA Enrollees. Section 9(a) reads:

> Any distribution or expenditure of the income of the Investment Fund, and any program or activity funded, in whole or in part, by the principal or income of the Investment Fund, shall not discriminate against (1) individuals who become members of the tribe after the date on which the amendments to the constitution of the tribe referred to in section 4(a) are adopted . . . or (2) members of the tribe who do not reside on the reservation of the tribe.

JFA § 9(a)(1)–(2), AR-001239. By targeting Plaintiffs for mass disenrollment, the Tribe violates the statute by discriminatorily depriving Plaintiffs of the benefits of the Investment Fund.[5]

[5] Section 3 requires the Tribal Council to "administer the Investment Fund in accordance with the provisions of this Act." JFA § 3(a)(2), AR-001235. Discrimination under Section 9 therefore also violates Section 3.

The record demonstrates unequivocally that Plaintiffs were victims of a targeted disenrollment campaign. In 1996, the Tribal Council first amended Ordinance 14 to allow disenrollment of members based on "erroneous enrollment." *See supra* page 15. It immediately initiated disenrollment procedures against JFA Enrollees who descend collaterally from individuals listed on the constitutional base rolls, including Plaintiffs.[6] The sole purpose and effect of the Tribal Council's continuing amendments to Ordinance 14—including those permitting the reversal of OAH decisions confirming membership and judicial review of cases previously dismissed with prejudice—was to remove obstacles to disenrolling the JFA Enrollees. There is no evidence on record that the Tribe has ever attempted to disenroll a member who was not a JFA Enrollee, let alone engaged in any other mass disenrollment campaign.

Nor can the *Atwell* decision justify DOI's non-intervention. First of all, a court decision is not a constitutional amendment, and the only way the Tribe could legally redefine its constitutional membership criteria under the JFA and the IRA is to amend its Constitution. Nor is the reasoning of *Atwell* persuasive. Rather, *Atwell* has every attribute of motivated reasoning. It begins with a conclusion, then tries to justify it, ultimately to no avail. The *Atwell* court cherry-picked the one edition of Black's Law Dictionary that narrowly defined "descendant," *supra* page 25 n.4, ignored prior Tribal Court rulings that the 1986 Constitution permits collateral descendants to be Tribe members, overlooked longstanding Tribal Council statements and decisions, made no mention of the drafting history of the JFA, did not address why the excluded Band descendants would have

[6] Although Plaintiffs need not establish a motive for targeting JFA Enrollees to show that the Tribe violated the JFA's nondiscrimination mandate, it bears mentioning that the 1996 amendment was roughly contemporaneous with the Tribe's announcement that it would begin distributing proceeds from its recently constructed casino on a per capita basis to Tribe members, creating a financial incentive to shrink the pool of recipients. *See Pet'rs' Opening Br.* at AR-001770–71 (citing contemporaneous news coverage and urging the Secretary to investigate the link between the casino and disenrollment, which the Secretary ignored).

supported the JFA and joined the Tribe if membership was revocable at the Tribe's will, and simply declared that the Tribe's leaders engaged in gross negligence for decades—an assertion that is irreconcilable with history.

The Decision fails to engage with any of the evidence detailed above, and instead dismisses the charge of discrimination based on two observations. First, the Decision observes that "[a]t least one of the Petitioners appears to have resided on the reservation at the time the Tribe initiated the disenrollment proceedings," and "[n]othing in the record suggests that all 800 members [enrolled pursuant to the JFA] have been targeted for disenrollment." AR-001861. The DOI's argument—that a policy is discriminatory only if it targets every single person in a class, and at the same time does not affect a single individual outside that class—has no place in discrimination law, in any context. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group."). The Decision provides no reason to invent a new, narrower standard for discrimination for purposes of the JFA's nondiscrimination mandate. Neither the Tribe nor BIA has contested Plaintiffs' claim that all disenrolled members were JFA Enrollees who were collateral descendants of an individual on one of the constitutional base rolls. Second, the Decision points to the lack of record evidence that "any descendant known to trace lineally to one of the enumerated base rolls has been wrongfully disenrolled." Decision at AR-0001861. But that assertion supports, not refutes, Plaintiffs' argument that the Tribe has discriminatorily targeted collateral, not lineal, descendants.

The Decision also misconstrues the JFA's nondiscrimination mandate. The Decision reasons that, because the JFA prevents discrimination only against "members of the Tribe," the JFA does not protect Plaintiffs because they are no longer "members." *Id.* at AR-001860–61. This

reasoning is tautological. Plaintiffs all became members of the Tribe and were members for a decade or more before the Tribe disenrolled them. As JFA Enrollees, Plaintiffs are shielded by the statute's nondiscrimination clause, now and at the time of their disenrollment. And even under DOI's reasoning, Plaintiffs prevail: although Section 9(a)(2) of the JFA protects "members," Section 9(a)(1) also protects "*individuals* who become members of the tribe after the date on which the amendments . . . are adopted and ratified," a class that undeniably includes all Plaintiffs. AR-001239. Congress, in taking pains to protect "individuals" who were enrolled pursuant to the JFA, made clear that the Tribe could not elude Section 9 simply by retroactively revoking, in bulk, the membership of those individuals. The Tribe's disenrollment of Plaintiffs violated Section 9 of the JFA.

### C. The Tribe's adoption of a lineal descendancy membership requirement was a de facto constitutional amendment in violation of the JFA.

As detailed above, the JFA required the Tribe to amend its constitutional membership criteria in order to receive the JFA Funds. The statute prompted a Tribal constitutional amendment redefining who is eligible to be a Tribe member, and further mandates that any subsequent change to the Tribe's membership criteria could only be achieved by amending the Constitution through the process detailed therein. Section 4(b) of the JFA states that constitutional amendments "may only be adopted in accordance with the provisions of such constitution and applicable Federal law." AR-001236. The IRA provides that the Tribe may only amend its Constitution after: (1) "a majority vote of the adult members of the tribe" and (2) the "approv[al] [of] the secretary." 25 U.S.C. § 5123(a)(1)–(2); *see also Hudson v. Zinke*, 453 F. Supp. 3d 431, 433 (D.D.C. 2020). The Secretary is bound to reject any amendment that was not approved in a lawful election or is "contrary to applicable laws." *Id.* § 5123(c)(2)–(3). "[A]pplicable laws" include, of course, the JFA's nondiscrimination clause. And the 1986 Amendments to the Tribe's Constitution require "a

majority vote of the qualified voters in each of the three voting districts" to pass constitutional amendments. 1986 Const. art VII, AR-000104. The majority vote includes the two off-Reservation districts in which JFA Enrollees would be disproportionately represented. *See id.* Art. IV, § 2, AR-000100. Members who were collateral descendants obviously would not have voted for a constitutional amendment expelling themselves, nor would the Secretary approve such a constitutional amendment.

To disenroll JFA Enrollees, the Tribe needed to redefine its membership criteria. But the Tribe had no option that complied with the 1986 Constitution, so it simply bypassed the democratic process the JFA and its Constitution required and amended Ordinance 14 instead. To use an ordinance as a de facto constitutional amendment to change Tribal membership criteria violates the JFA.

DOI concluded that the Tribe did not violate the JFA because "the condition precedent to *ratify* constitutional amendments does not, by itself, establish a separate requirement to subsequently *maintain* those amendments unchanged and for all time." Decision at AR-001857 (emphasis in original). Of course the Tribe retains the power to amend its Constitution, but the Tribe did not amend the 1986 Constitution; it just ignored it. The JFA, the IRA, and the 1986 Amendments uniformly require the Tribe to follow its own constitutional requirements in doing so. And here the Tribe made no effort to amend its Constitution. The Tribe has no authority to repudiate the 1986 Amendments via ordinance, administrative fiat, judicial decree, or administrative action. Indeed, under the Secretary's reasoning, were the Tribe to have formally adopted the 1986 Amendments and then immediately announced its intention to ignore them and refuse to enroll a single new member, the government would have been powerless to object. Surely Congress understood the JFA to be more than a paper tiger.

In sum, the Tribe's disenrollment of Plaintiffs violated the JFA by adopting an impermissible lineal descendancy requirement for membership and discriminatorily targeting Plaintiffs for disenrollment using an impermissible extra-constitutional means.

## II. The Secretary's refusal to enforce the JFA was unlawful under the APA.

The Administrative Procedure Act, 5 U.S.C. § 706(1), directs the Court to "compel agency action unlawfully withheld or unreasonably delayed." Even where action is discretionary, a refusal to act must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). The Secretary's unlawful refusal to act, in direct contravention of the requirements of the JFA that clearly prohibit the Tribe's discriminatory disenrollment of Plaintiffs, violates these standards.

The Decision acknowledges that the JFA "plainly permits the Secretary to take enforcement actions . . . where a requirement of the Act has been violated." Decision at AR-001856–57 (emphasis removed). But the plain, compulsory language of Section 5(b)(2) does more than "permit" the Secretary to enforce the JFA; it requires her to do so. The text and drafting history of Sections 9(a), 4(a), and 3(a)(2)—the key provisions that protect the rights of the JFA Enrollees, and for which Section 5(b)(2) provides the means of enforcement—confirm that Congress intended that these protections have teeth.

Even if Section 5(b)(2) imposes a discretionary duty to enforce the JFA, the Secretary's refusal to act here was arbitrary, capricious, and an abuse of discretion. The language and history of Sections 9(a), 4(a), and 3(a)(2) demonstrate that Congress expected the Secretary to protect JFA Enrollees from disenfranchisement and would act swiftly and decisively to safeguard the JFA Enrollees facing discriminatory expulsion from the Tribe. Failing to do so was arbitrary, capricious, and an abuse of discretion.

**A. Section 5(b)(2)'s plain text mandates that the Secretary enforce the JFA.**

The plain language of the JFA's enforcement provision compels the Secretary to enforce the JFA's requirements. Courts interpret words of a statute in context, not in isolation. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1750 (2020) ("[W]e must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally.").

Section 5(b)(2)'s first sentence provides that "The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the *requirements* of this Act." AR-001237 (emphasis added). "The word 'requirements' . . . clearly suggests a mandatory regime. Certainly, in common parlance 'requirement' means something compelled, not merely suggested." *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 155 (D.C. Cir. 1990). "A call for 'requirements' assumes that the regulated community will be required to follow . . . dictates." *Id.* at 156. The Secretary alone is authorized to enforce the JFA's requirements. Congress, in drafting Section 5(b)(2), necessarily understood that the Secretary will *require* the Tribe to follow the dictates of the JFA, not that the Secretary *might require* the Tribe to follow them. After all, courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quotation omitted). Otherwise, "the requirements of this Act" would not be "requirements" at all. The Secretary's reading of the Act renders hollow Rep. Schuette's assurance that disenrollment "will not happen . . . . [T]he descendants' rights and the descendants' privileges are fully protected." 132 Cong. Rec. at AR-000940.

DOI focuses on the words "may take such action," to argue that Section 5(b)(2) merely confers discretion on the Secretary whether to enforce the JFA's requirements. Decision at AR-

001856–57. That reading is implausible. It converts the word "requirements" into "suggestions." Absent enforcement, "requirements" become non-requirements. When read in context, it is clear the word "may" in Section 5(b)(2) confers discretion on the Secretary to determine what method of enforcement is necessary and appropriate, not whether to enforce the JFA's requirements at all. As an example, consider a loan agreement that reads, "You may pay me in whatever currency you may determine to be convenient to reimburse the required amount." Despite the words "you may pay me," only by willful misconstruction could the sentence be read to make the loan repayment itself optional. *Cf. Guar. Tr. Co. of N.Y. v. Henwood*, 307 U.S. 247, 250–56 (1939) (construing mortgage terms that "Bonds may be payable" in several currencies and rejecting both debtor's argument that it need not repay the $100,000 it borrowed, and lender's argument that debtor was required to repay the loan in each of the currencies listed).

### B. The statutory context and drafting history of the JFA confirm that Section 5(b)(2) imposes on the Secretary a duty to enforce the JFA's requirements.

Even if "may" could plausibly be read to modify the Secretary's duty to "take action," "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000). "The word 'may' . . . usually implies some degree of discretion[, but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *Id.* at 198–99 (quoting *Citizens & S. Nat. Bank v. Bougas*, 434 U.S. 35, 38 (1977)). As discussed *supra*, the JFA includes multiple provisions intended to ensure that the JFA Enrollees receive their share of the JFA Funds. And these requirements are enforceable only by the Secretary under Section 5(b)(2).

#### *1. The mandatory language of Sections 9(a), 4(b), and 3(a)(2) demonstrates Congress's intent that these provisions are to be enforced by the Secretary.*

A court's duty "is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S.

473, 486 (2015) (internal quotation marks omitted). Only the Secretary can enforce the JFA's provisions intended to protect the JFA Enrollees—provisions written as requirements, not suggestions—and Section 5(b)(2) mandates that the Secretary do exactly that. Under Section 9(a), "*[a]ny* distribution or expenditure of the income of the Investment Fund, and *any* program or activity funded, in whole or in part, by the principal or income of the Investment Fund, *shall not* discriminate against . . . individuals who become members of the tribe after the amendments to the constitution of the Tribe . . . [are] ratified." AR-001239 (emphasis added). "Shall not" language in a statute signals a mandate. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018). Under Section 4(b), "*[a]ny* amendments to the constitution of the tribe other than the amendments referred to in subsection (a) may *only* be adopted in accordance with the provisions of such constitution . . . ." AR-001236 (emphasis added). *See Branch v. Smith*, 538 U.S. 254, 291 (2003) (Stevens, J., concurring) (holding a statute "uses the word 'only' to create a categorical prohibition"). Finally, under Section 3(a)(2), the Tribal Council "*shall* administer the Investment Fund in accordance with the provisions of this Act." AR-001235 (emphasis added). Each of these provisions—Sections 9(a), 4(a), and 3(a)(2)—contain mandatory language, demonstrating that Congress intended them to be enforced. Taken in context, *see King*, 576 U.S. at 486, Section 5(b)(2) mandates action; otherwise, the mandatory language that runs through the JFA is illusory. That the Secretary has the sole power to enforce them drives home that the Secretary's duty is mandatory.

The JFA prohibits the Tribe from using Investment Funds in a manner that discriminates against JFA Enrollees. JFA § 9(a), AR-001239. Congress ensured that the Tribe could not change the rules on Investment Fund expenditures (and membership) by limiting the Tribe's ability to amend its Constitution without support from the off-Reservation Tribe members and approval by the Secretary. *See* JFA § 4(b), AR-001236; 1986 Const. art. VII, AR-000104. Viewed as a whole,

the JFA was drafted to stop any unfair distribution of the JFA Funds at every stage of the process: before the enrollment of JFA Enrollees, *see* § 5(a), during Open Enrollment, *see* §§ 3(b)(3), 4(b), and after JFA Enrollees became members, *see* §§ 9(a), 4(b), 3(a)(2). AR-001235–39. Congress's goal was to ensure that the JFA's protections of the JFA Enrollees remained airtight. DOI's decision to stand by while the Tribe dismantles the protections for JFA Enrollees is irreconcilable with the JFA's text and purpose.

*2. The drafting history shows Congress intended the JFA's protections to be enforceable.*

The JFA's drafting history also demonstrates that protecting JFA Enrollees from disenrollment was "the crucible of congressional concern." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985). The history reaffirms the JFA's textual mandate that the Secretary enforce its requirements, at least when the Tribe violates the nondiscrimination clause. If not, the provisions "would serve no real purpose." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008). The JFA's drafting history is "yet another strike against" DOI's statutory interpretation. *See Ams. for Clean Energy v. EPA*, 864 F.3d 691, 708–09 (D.C. Cir. 2017) (Kavanaugh, J.).

As set forth above, each step of the JFA's drafting history shows Congress's deep concern for protecting the JFA Enrollees. *See supra* pages 8–13. The Senate Committee determined the Tribe's distribution proposal was unfair to descendants who were not Tribe "members" due to the 1937 Constitution, and so (1) revised the bill to require the Tribe to expand membership eligibility as a condition precedent to receiving the JFA Funds, and (2) enhanced the bill's protections of JFA Enrollees by adding the nondiscrimination mandate. Even then, the House Committee saw the need for more protections. BIA's sustained opposition to the legislation ended only when the bill was further amended to "require[] secretarial intervention" to enforce its requirements. H. Rep.

No. 99-502 at AR-000921. At each stage in the process, Congress imposed stronger and more targeted requirements on the Tribe to ensure "the descendants' rights and the descendants' privileges [were] fully protected," a fact repeatedly emphasized on the House floor. 132 Cong. Rec. at AR-000940.

The drafting history refutes DOI's contention that Congress made optional the enforcement of the most fundamental requirement of the JFA—that the Tribe not discriminate against JFA Enrollees. Without enforcement of this requirement, enrollment under the JFA would have been non-binding and revocable at the Tribe's will. Given the lengths to which Congress went to protect the JFA Enrollees, permitting their disenrollment would be so at odds with Congress's goal in the JFA that it cannot be allowed to stand. *See Pub. Citizen v. DOJ*, 491 U.S. 440, 454 (1989).

**C. The Secretary's failure to act is arbitrary, capricious and an abuse of discretion.**

Even if the Secretary has some modicum of discretion regarding the enforcement of Sections 9(a), 4(b), and 3(a)(2), the APA requires that she properly exercise that discretion. For the reasons set forth in Argument Sections II(A) and (B) above, the Secretary's decision not to enforce the JFA's nondiscrimination mandate in these circumstances is an abuse of discretion.

The APA also requires that an agency "engage[] in reasoned decisionmaking and its decision [be] adequately explained and supported by the record." *Clark Cnty. v. FAA*, 522 F.3d 437, 441–43 (D.C. Cir. 2008) (Kavanaugh, J). When, as here, an agency changes its position on a policy issue, the "agency must offer 'a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy.'" *United Steel v. MSHA*, 925 F.3d 1279, 1284 (D.C. Cir. 2019) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

The burden on DOI to provide a "detailed justification" and "reasoned explanation" is especially heavy in this case because DOI has done a complete about-face on its policy regarding the JFA's impact on Tribal membership requirements and the Secretary's duty to protect the JFA

Enrollees. During Open Enrollment, BIA instructed the Tribe to enroll "any applicant for membership who had been certified as eligible to participate in Docket 57 and who was of at least one-quarter blood Indian." Borton Aff. ¶ 16, AR-000110. Now, DOI asserts the JFA never intended for such applicants to have been enrolled. Decision at AR-001859. Making matters worse, DOI fails to even acknowledge its own change in position: from forcefully advocating for the JFA Enrollees' rights before Congress in 1985 and 1986 to arguing that the "rights" created in the JFA are just empty promises. Yet DOI does not explain why it abandoned its commitment to Plaintiffs or changed its understanding of the JFA. DOI's failure to recognize and explain this seismic change in policy renders its Decision arbitrary, capricious, and an abuse of discretion.

An agency must "provide a more detailed justification" for a change in policy "when its prior policy has engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515. It is hard to imagine a case in which reliance interest are more pronounced than this one. Based on BIA's representations that the Secretary would protect Plaintiffs from disenrollment, Plaintiffs took what they were led to believe was an irrevocable, life-transforming step and joined the Tribe, only to be cast aside three decades later. Yet again, DOI fails to acknowledge the devastating impact its non-enforcement of JFA requirements has had on Plaintiffs, other than to ghoulishly suggest that they "remain eligible to enroll in another Tribe." Decision at AR-001863. Plaintiffs have no other Tribe.

DOI also fails to address Plaintiffs' central argument that the JFA was intended specifically to affect "tribal membership matters." *Id.* at AR-001858. DOI's failure "to consider an essential aspect of the problem before it," standing alone, renders the Decision arbitrary and capricious. *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Having wrongly concluded that the Tribe did not violate the JFA, the Decision claims forcing the Tribe to reinstate Plaintiffs as Tribe members would be an "unnecessary" intrusion into Tribal self-governance. Decision at AR-001856. But the Decision's invocation of Tribal sovereignty injects an issue that does not exist here. Plaintiffs seek to compel DOI to enforce a federal statute that overrides any claim to sovereignty the Tribe might assert (although by seeking intervention in this action, the Tribe has waived sovereign immunity). *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (noting that "Congress has plenary authority over tribes"); *see also Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986).

Holding the Tribe to the bargain it struck does not offend the Tribe's sovereignty, but acknowledges it. Tribal sovereignty includes the power to strike bargains with the United States—bargains that, so long as they are in effect, bind both Tribe and government with the force of law. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (holding the United States to the letter of its bargain granting land to the Five Civilized Tribes). These bargains are reciprocal, not one-way streets. *See Cherokee Nation*, 267 F. Supp. 3d at 123–40 (holding tribe to the letter of its bargain to grant equal membership rights to former slaves).

The Tribe had agency here. It could have accepted BIA's 1983 proposal for a per capita distribution of the judgment funds. But for the Tribe's quest for all of the judgment funds, the JFA would not have been enacted. The Tribe did not have to urge Senator Riegle to introduce the JFA or continue to support the JFA. The Tribe exercised its sovereignty by amending its Constitution to receive all of the millions of dollars of remaining judgment funds and allow the enrollment of all qualified members of the descendants Bands.[7] The judgment funds did not come

[7] Indeed, the Tribe concedes in its Opening Brief before the agency that "resolving the question of tribal membership was essential in getting the Judgment Funds Act passed." *Tribe's Opening Br.* at AR-001783.

unencumbered. In accepting the JFA Funds, the Tribe chose to subject its use of those funds to the JFA's terms, including the prohibition of discrimination against the JFA Enrollees. DOI's invocation of Tribal sovereignty is nothing more than an empty excuse for leaving Plaintiffs, Tribe members under the JFA and the 1986 Constitution, with no remedy at all.

**III. The Court Should order the Secretary to require the Tribe to reinstate Plaintiffs.**

Judge Hogan's opinion in *Cherokee Nation* illuminates the path that this Court should follow. That case holds that the Cherokee Nation wrongly excluded from Tribal citizenship "descendants of freedmen who were held as slaves by Cherokees and ultimately listed on the Dawes Freedmen Roll." *Cherokee Nation*, 267 F. Supp. 3d at 139. Pursuant to a treaty provision granting Cherokee Freedmen a right to Tribal citizenship coextensive with that of native Cherokees, "[t]he Cherokee Nation can continue to define itself as it sees fit but must do so equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen." *Id.* at 140. Substitute "statute" for "treaty" and the cases are indistinguishable. The Tribe can similarly define itself as it sees fit, but must do so equally and evenhandedly with respect to both its members enrolled prior to the JFA's enactment and the JFA Enrollees. Indeed, the contours of tribal sovereignty are preserved by such an outcome. Just like the Cherokee Freedmen, Plaintiffs in this case meet all of the Tribe's constitutional requirements for membership, became enrolled members of the Tribe under BIA's auspices, but have been unlawfully subject to discrimination and cast out of the Tribe.

The Secretary's enforcement authority includes the power to require the Tribe to reinstate Plaintiffs as Tribe members. The JFA confers substantial authority on the Secretary to rectify violations of the Act, so long as the measures she imposes are "necessary and appropriate" to compel compliance with the Act. JFA § 5(b)(2), AR-001237. This language shows that Congress designed Section 5(b)(2) to allow the Secretary to meet any unanticipated problems that arise in

ensuring fair treatment of the JFA Enrollees. Reinstating Plaintiffs as Tribe members contemporaneous with the date of their disenrollment is the most appropriate remedy here, as no other remedy could make Plaintiffs whole.

## CONCLUSION

For the foregoing reasons, the Court should find that the DOI Decision violated the APA and JFA in contravention of the Secretary's duty to protect Plaintiffs and order Defendants to require the Tribe to reinstate Plaintiffs to their rightful membership status.*

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