UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SHAWNEE TRIBE, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al. *Defendants*.	Case No. 1:20-cv-01999-APM
THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF THE TREASURY and UNITED STATES OF AMERICA, *Defendants*.	Case No. 1:20-cv-02792-APM
PRAIRIE BAND POTAWATOMI NATION, *Plaintiff*, v. STEVEN T. MNUCHIN, in his official capacity as SECRETARY, U.S. DEPARTMENT OF TREASURY *Defendant*.	Case No. 1:21-cv-012-APM

PLAINTIFFS' JOINT MOTION FOR PRELIMINARY INJUNCTION
DIRECTING IMMEDIATE INTERIM DISTRIBUTION OF CARES ACT FUNDS

Plaintiffs, the Miccosukee Tribe of Indians of Florida ("Miccosukee Tribe"), the Shawnee Tribe, and Prairie Band Potawatomi Nation ("Prairie Band Potawatomi") (collectively, "Plaintiff Tribes" "Tribes" or "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 65(a), move the Court for a preliminary injunction[1] ordering Defendant, the United States Department of the

[1] This Joint Preliminary Injunction Motion is the second preliminary injunction sought by the Plaintiff Tribes. Currently, an injunction has been entered in favor of the Shawnee Tribe directing Defendants to withhold approximately $12 million from the remaining approximately $530 million in CARES Act funding. *See* Dkt. 55. Though fully briefed, the preliminary injunction motions

Treasury ("Treasury"), to make an immediate and material interim distribution of CARES Act funds to the Plaintiff Tribes. As set forth in the accompanying memorandum, the CARES Act required Treasury to distribute funds to Tribal Governments within 30 days of enactment. That deadline passed almost eleven months ago. Despite repeated requests for an interim disbursement, Treasury has refused to act, stating that it needs until the end of April, 2021, to determine a new distribution formula for all Tribal Governments, and that it will then make interim distributions at some unspecified time afterwards.

There is no doubt that that Treasury acted arbitrarily and capriciously when, in its initial population-based distribution of CARES Act funds, it determined that the Miccosukee Tribe and the Shawnee Tribe had ***zero members,*** and that Prairie Band Potawatomi had only 883 members, when its actual enrollment was 4,561. The Plaintiff Tribes cannot wait any longer to receive CARES Act funds that Treasury should have distributed to them almost eleven months ago. Treasury's unreasonable delay warrants intervention by the Court. *See* 5 U.S.C. § 706(1) (requiring a reviewing Court to "compel agency action unlawfully withheld or unreasonably delayed"). Thus, the Plaintiff Tribes file this joint-motion, respectfully requesting that the Court enter a preliminary injunction requiring Treasury to make an immediate and material interim distribution of CARES Act funds.

Counsel for the Miccosukee Tribe has advised defendants' counsel of this motion. As of the time of filing, however, defendants' counsel has not advised whether defendants oppose the relief requested.

Plaintiffs respectfully requests the Court to hold oral argument on the motion.

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filed by the Miccosukee Tribe and Prairie Band Potawatomi seeking to set aside approximately $2 million and $7.6 million, respectively, remain pending before the Court.

Dated: March 26, 2021

Respectfully submitted,

/s/ Daniel G. Jarcho

Daniel G. Jarcho (D.C. Bar # 391837)
George B. Abney*
Daniel F. Diffley*
Jean E. Richmann*
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, N.W.
Washington, D.C. 20004
Phone: (202) 239-3300
Fax: (202) 239-3333
daniel.jarcho@alston.com
*Admitted *pro hac vice*

Counsel for Miccosukee Tribe of Indians of Florida

s/ Carol E. Heckman
Carol E. Heckman*
James P. Blenk*
Lippes Mathias Wexler Friedman, LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
Telephone: (716) 853-5100
checkman@lippes.com
jblenk@lippes.com
*Admitted *pro hac vice*

- and -

Michael G. Rossetti, DC Bar No. 477122
1900 K Street, NW
Suite 730
Washington, DC 20006
Telephone: (202) 888-7610
mrossetti@lippes.com

Counsel for Prairie Band Potawatomi Nation

/s/ Pilar M. Thomas
Pilar M. Thomas
QUARLES & BRADY LLP

One South Church Avenue, Suite 1800
Tucson, Arizona 85746
Admitted *pro hac vice*

Nicole L. Simmons
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
Admitted *pro hac vice*

Luke Cass
QUARLES & BRADY LLP
1701 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel to The Shawnee Tribe

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MEMORANDUM IN SUPPORT OF
PLAINTIFFS' JOINT MOTION FOR PRELIMINARY INJUNCTION
DIRECTING IMMEDIATE INTERIM DISTRIBUTION OF CARES ACT FUNDS

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INTRODUCTION

Almost one year ago to the day, on March 27, 2020, Congress passed The CARES Act to provide emergency economic relief in response to the COIVD-19 pandemic. The Act required Treasury to distribute $8 billion in funds to Tribal Governments no later than 30 days after enactment, by April 26, 2020. That deadline passed eleven months ago. Almost three months ago, on January 5, 2021, the D.C. Circuit held that the Shawnee Tribe was likely to succeed on the merits of its claim that Treasury acted arbitrarily and capriciously in using IHBG data to distribute CARES Act funds. *See Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021).

Seemingly oblivious to the urgency with which Congress required Treasury to act in distributing CARES Act funds to Tribal Governments, Treasury has now advised the Court that it will not distribute any additional funds to Miccosukee, Shawnee, and Prairie Band Potawatomi until *after* it develops a new distribution formula covering numerous other Tribes (which are not included in this litigation). According to Treasury, it will "endeavor" to complete its new formula by April 30, 2021 and will distribute payments at some later, unspecified time.

The Plaintiff Tribes cannot wait any longer to receive CARES Act funds that Treasury should have distributed to them almost eleven months ago. Treasury's unreasonable delay warrants intervention by the Court. *See* 5 U.S.C. § 706(1) (requiring a reviewing Court to "compel agency action unlawfully withheld or unreasonably delayed").

ARGUMENT

I. THE COURT SHOULD DIRECT TREASURY TO MAKE IMMEDIATE AND MATERIAL INTERIM DISTRIBUTIONS TO THE PLAINTIFF TRIBES.

A. Plaintiffs Have Satisfied the Four-Factor Test Justifying a Preliminary Injunction to Prevent Further Irreparable Harm from Treasury's Arbitrary and Capricious, and Unreasonably Delayed, Agency Actions

To obtain the requested preliminary injunction, Plaintiffs must "make a 'clear showing that four factors, taken together, warrant relief: (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) a balance of the equities in its favor; and, (4) accord with the public interest.'" *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 321 (D.C. Cir. 2018). Both this Court and the D.C. Circuit have *already* issued rulings establishing that the four factors have been satisfied.

First, Plaintiffs are likely to succeed on the merits of their claim that Treasury has unlawfully withheld and unreasonably delayed distribution of the CARES Act funds.[2] In *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, this Court held that a different tribe was likely to succeed on the merits of its claim that a much *less* egregious delay in distribution of CARES Act funds constituted agency action unlawfully withheld or unreasonably delayed within the meaning of the APA. No. 20-cv-01136, 2020 U.S. Dist. LEXIS 104354, at *8 (D.D.C. June 15, 2020). The CARES Act requires distribution of all funds "not later than 30 days after" March 27, 2020 (*i.e.*, by April 26, 2020). 42 U.S.C. § 801(b)(1). The Court issued its *Agua Caliente* ruling on June 15, 2020, at which point Treasury had distributed some but not all of the funds. Applying the six-factor test for unreasonable delay set forth in *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), the Court held that "[t]he passage of now 50 days beyond the congressional deadline — marking over twice as long as Congress intended for distribution of all CARES Act funds — weighs in favor of finding unreasonable delay." *Agua Caliente*, 2020 U.S. Dist. LEXIS 104354, at *5. It is now more than *330 days* since the congressional deadline passed,

[2] Plaintiff has today filed an amended complaint asserting an APA claim for agency action unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1).

and Treasury still has not distributed all of the CARES Act funds. It necessarily follows that the Plaintiff Tribes are likely to succeed on the merits of their unreasonable delay claims.

Plaintiffs are also likely to succeed on the merits of their claims alleging arbitrary and capricious agency action. The D.C. Circuit's decision in *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021), and the Miccosukee Tribe and Prairie Band Potawatomi's prior preliminary injunction briefings in this case (which are incorporated herein by reference), establish a likelihood of success on the arbitrary-and-capricious claims. In *Shawnee*, the D.C. Circuit held that the Shawnee Tribe was likely to succeed on the merits of its claim that Treasury had acted arbitrarily and capriciously in determining its CARES Act distribution amount based on a population of zero, and that the data used to determine that amount was not a reasonable proxy for population. *Id*. at 102. In so ruling, the D.C. Circuit expressly noted Treasury's equally faulty zero-population determination for the Miccosukee Tribe. *Id*. Treasury elected not to seek rehearing on this issue, and the time to do that has lapsed. *See* Fed. R. App. P. 35(c), 40(a)(1). Treasury therefore has no basis for objecting to the *Shawnee* ruling here.

Although Prairie Band Potawatomi was not a "zero-population" claim, its claim presents equal merit to that of the Shawnee Tribe and the Miccosukee Tribe. Specifically, as already noted above, Treasury erred by adopting IHBG data as a proxy for tribal population, which the D.C. Circuit determined an unreasonable proxy. *See Shawnee*, 984 F.3d at 102. ("The IHBG formula area population data is, at least with respect to some tribes, an unsuitable proxy.") Indeed, the same idiosyncrasies in the IHBG data that that caused Treasury to overlook Shawnee and Miccosukee caused Treasury to undercount Prairie Band Potawatomi's population by 80%. *See id*., p. 97 (discussing calculation of IHBG data).

Third, this Court has already decided that tribes will likely face irreparable harm if Treasury does not promptly distribute CARES Act funds. In *Agua Caliente*, the Court emphasized that there is a presumption of irreparable harm to the tribes arising directly from Congress's policy judgment that "Tribal governments are in dire need of emergency relief to aid in their public health efforts . . . ." 2020 U.S. Dist. LEXIS 104354, at *9–10. The Court properly concluded that "[c]onsidering the public health challenges presented by the COVID-19 pandemic, the damage done by further delay cannot be fully cured by later remedial action, rendering Plaintiffs' harm irreparable." *Id.* at *10. And this Court has already "accept[ed] that Plaintiff would suffer irreparable harm absent injunctive relief" preserving to Tribal governments the necessary funds to combat the COVID-19 pandemic. (*See* Dkt. 43, p. 8).

Finally, this Court and the D.C. Circuit already have determined that the remaining preliminary injunction factors have been satisfied. In *Agua Caliente*, this Court held that the balance of equities and public interest favored a preliminary injunction compelling "immediate disbursement of the remaining Title V funds," because it would be "patently unfair to make Tribal governments wait any longer to receive the remaining CARES Act funds." *Id.* at *11 (citation omitted). In *Shawnee*, the D.C. Circuit held that the remaining preliminary injunction factors had been satisfied as to that tribe's claim for arbitrary and capricious agency action. The Court tied those factors to a strong likelihood of success on the merits and relied substantially on the general rule that there is "no public interest in the perpetuation of unlawful agency action." *Shawnee*, 984 F.3d at 102 (citation omitted).

B. The Court Has Equitable Authority to Direct Treasury to Make an Interim Distribution

The Court has equitable authority under the APA to direct Treasury to make the interim distribution, to prevent continuing irreparable harm to the Plaintiff Tribes. Treasury is simply

wrong when it asserts that the only available remedy is a remand. *See e.g. Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1068 (D.S.D. 2007) (ordering the Secretary of the Interior to disburse withheld "$303,368 in SY 06-07 funds" under the Indian Self-Determination and Education Assistance Act for failing to comply with declination statutes and regulations). While a remand is the typical APA remedy, the Court has authority to direct other relief, including "detailed remedial orders," in "extraordinary circumstances." *N.C. Fisheries Ass'n, Inc., v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008); *See, e.g., Cobell v. Norton*, 240 F.3d 1081, 1107 (D.C. Cir. 2001) (rejecting argument that "insofar as plaintiffs sought relief under the APA, the district court exceeded its power by ordering the Interior and Treasury Departments to take the specific actions toward fulfilling their fiduciary obligations."). Few circumstances could be more extraordinary than a once-in-a-century pandemic causing a public health emergency and economic devastation that Congress sought to remedy through emergency funds (still languishing at the agency almost a year after the statutory deadline for their distribution).

The Court should exercise its equitable authority under the APA to address these extraordinary circumstances by compelling the monetary relief mandated by the CARES Act. The APA empowers the Court to review "final agency action for which there is no other adequate remedy in a court" and to issue remedies "other than money damages." 5 U.S.C. §§ 702, 704. However, "not every award of money qualifies as 'money damages' for purposes of the APA." *ITSServe All., Inc. v. Cuccinelli*, No. 20-cv-00201, 2020 U.S. Dist. LEXIS 215883, at *11 (D.D.C. Nov. 17, 2020) (Mehta, J.). In the seminal case *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court held that courts have authority to issue monetary remedies under the APA if they fall outside the definition of "money damages." In so ruling, the Supreme Court drew a sharp

distinction between "money damages" (which *substitute* for a loss) and the equitable remedy of specific performance (which mandates monetary payments required by statute):

> Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

Id. at 895 (citation omitted). A court has authority to order monetary payment under the APA if the suit "seeks[s] to enforce the statutory mandate itself, which happens to be one for the payment of money" and does not seek "money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated." *Id*. at 900 (emphasis in original). Put another way, "[w]here a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages" and the Court can award that specific relief under the APA. *Am.'s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 829 (D.C. Cir. 2000); *accord ITSServe Alliance*, 2020 U.S. Dist. LEXIS 215883, at *15–16.[3]

Here the Court has authority to order an interim distribution in this case, to enforce the CARES Act mandate that Treasury "shall pay" the appropriated CARES Act funds to Tribal Governments "not later than 30 days after" March 27, 2020. 42 U.S.C. § 801(b)(1). Indeed, this Court evidently *already has decided* that it has such authority. In *Agua Caliente*, the Court issued a monetary-relief order under the APA to enforce that very same statutory mandate, by

[3] By contrast, claims that *do* seek money damages against the United States must be pursued under the Tucker Act and (if over $10,000) exclusively in the Court of Federal Claims. 28 U.S.C. §§ 1346(a)(2), 1491(a); *see also* 28 U.S.C. § 1505 (expressly extending Tucker Act jurisdiction to claims by Indian Tribes). Tucker Act claims for money damages and APA claims for monetary relief are mutually exclusive. The APA covers claims "for which there is no other adequate remedy." 5 U.S.C. § 704. When no adequate remedy exists under the Tucker Act (because the claim is not for "money damages"), there is a remedy under the APA. Conversely, when an adequate remedy does exist under the Tucker Act (because the claim is for "money damages"), there is no APA remedy.

"compelling the Secretary to distribute . . . [CARES Act] funds." *Agua Caliente*, 2020 U.S. Dist. LEXIS104354, at *8.

Such monetary relief is proper under the APA, because it is not an award of "money damages." The recent decision in *Lummi Tribe of the Lummi Reservation v. United States* strongly supports that conclusion. 870 F.3d 1313, 1320 (Fed. Cir. 2017). In *Lummi*, the Federal Circuit reviewed an analogous claim for monetary relief under the same Indian Housing Block Grant ("IHBG") program implicated by Treasury's methodology in the present case. The plaintiff tribes in *Lummi* had received IHBG grants which — like the CARES Act distributions at issue here — had to be spent only on activities specified in the statute. The defendant agency (HUD) alleged that the statutory restrictions had not been followed, claimed the plaintiff tribes had been overpaid as a result, and offset the alleged overpayments against future grants to the same tribes. The tribes sued to recoup the disputed grant money, arguing that "HUD improperly deprived them of grant funds to which they were entitled" under the statute (*id*. at 1316) — just as the Plaintiff Tribes here claim Treasury has improperly deprived them of CARES Act funds to which they are entitled under the CARES Act. The Federal Circuit held that the claims in *Lummi* were for equitable relief, not "money damages," because the plaintiffs sought a remedy for having "been allocated too little in grant funding." *Id*. at 1318. Here, the Plaintiff Tribes seek a directly analogous equitable remedy for an under-allocation of CARES Act funds (properly asserted under the APA), not money damages.

C. The Interim Distribution Should Be a Material Portion of the Amounts Previously Distributed to Tribes With an Equivalent Population

The judicial remedy for unreasonable agency delay is to compel the agency to act (consistently with its statutory obligations) without specifying exactly "how" the agency should act. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). To be clear, we do not suggest

that it is the Court's role to calculate a specific sum certain for Treasury to distribute or to dictate the specific population figure that Treasury must determine for the Plaintiff Tribes to calculate the interim distribution amount. However, it is plainly within the Court's broad equitable authority to impose the general legal boundaries that the agency must work within to calculate the interim distribution. As explained below, those boundaries are that (1) Treasury must determine the Plaintiff Tribes' populations based upon a rational consideration of the population information available to the agency (other than the IHBG data); and (2) the interim distributions should be the amounts previously distributed to other tribes with equivalent populations. minus an amount necessary to protect the interests of the other tribes and ANCs currently litigating CARES Act cases. The result should be an interim distribution that is a material portion of the amounts previously distributed to other tribes with an equivalent population.[4]

1. The Court Has Authority to, and Should, Dictate the Legal Boundaries Within Which Treasury Must Calculate the Interim Distribution Amount.

It is commonplace for a Court to set boundaries when remanding a matter to an agency. Remands do not occur in a vacuum — the agency is typically directed to "remand for further proceedings consistent with the judicial decision," with the court retaining jurisdiction over the remand where, as here, there has been "unreasonable delay of agency action or failure to comply with a statutory deadline." *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C. 2008). As part of its order that an interim distribution must occur, the Court should include guidance that

[4] Combined, the claims of the Miccosukee ($2 million), Shawnee ($12 million), and Prairie Band ($7,647,063) total $21,647,063. This amount represents only 4.08 percent of the remaining approximately $530 million in CARES Act funds. Thus, even a distribution of the full amount of the Plaintiffs' claims would not materially impact the amount of CARES Act funds remaining for distribution to other litigating Tribes or the ANC's.

will ensure that Treasury's determination regarding the Plaintiff Tribes proceeds within proper legal boundaries.

During recent status conferences, Treasury has emphasized its work on a new distribution methodology, suggesting that the agency has authority to make future distributions without the Court's supervision and involvement. The Court should easily reject that suggestion. Under the particular circumstances of this case, Treasury has no authority to issue *any* future distributions *except* as directed by a court order.

Congress appropriated the CARES Act funds at issue for fiscal year 2020, which ended on September 30, 2020. 42 U.S.C. §§ 801(a)91), (c)(7). As a general principle of appropriations law, an agency cannot "obligate" funds for expenditure after the end of the fiscal-year appropriations period. "If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have 'expired.'" 1 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* ("GAO Redbook") at 5–6 (3d ed. 2004), *available at* https://www.gao.gov/legal/appropriations-law/red-book.[5] *See also City of Houst. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) ("It is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury.") (citation omitted). These principles establish that Treasury has no authority — acting on its own — to

[5] Courts regularly look to the GAO Redbook for principles of appropriations law. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319–22 (2020).

increase CARES Act awards now (in fiscal year 2021) using CARES Act funds that expired at the end of fiscal year 2020.[6]

But that is not the end of the matter. Even though an agency may not unilaterally obligate "expired" funds, a court has equitable authority to direct the agency to award such funds to a plaintiff with a meritorious claim in litigation. The principle that a court order may authorize distribution of expired funds (even though the agency acting alone cannot) is well established by judicial decisions and confirmed by statute. *See, e.g.*, *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 56 (D.C. Cir. 1977) ("A congressional deadline on an agency's ability to take action on its own motion does not preclude an agency's authority to take later action on direction of a court exercising judicial review."); *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977) (confirming the "power of the courts to order that funds be held available beyond their statutory lapse date if equity so requires"); 31 U.S.C. § 1502(b) (expiration of appropriation "at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.").[7]

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[6] Funds are "obligated" at the time the agency takes an "action creating a definite liability against the appropriation." 2 GAO Redbook at 7-40. In the context of a federal assistance grant such as the one at issue here, the "obligation" occurs when the agency takes an action that establishes an "unconditional" and "firm commitment on the part of the United States" that is "communicated to the official grantee." *Id*. (citing 50 Comp. Gen. 857, 862 (1971)). Therefore the "'obligational event' for a grant generally occurs at the time of grant award." *Id*. at 10-107. It is significant here that an increase in a prior grant constitutes a *new* obligation: "[t]he clearest example of a change that creates a new obligation is where the amount of the [grant] award is increased." *Id*. at 10-108. If the "grantee has no legal right" to the additional funds based upon the original grant, "the increase in amount is a new obligation chargeable to appropriations current when the change is made." *Id*. (citing 41 Comp. Gen. 134 (1961); 39 Comp. Gen. 296 (1959); 37 Comp. Gen. 861 (1958)).

[7] In the parallel ANC litigation, the D.C. Circuit affirmatively enjoined the lapse of appropriations until 7 days after final action in the case by the Supreme Court. Order, *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, D.C. Cir. No. 20-5204 (September 30, 2020). A court order is still necessary to direct distribution of the funds in the future; the purpose of the injunction was to assure the court's ability to award future equitable relief to litigants.

In this case, therefore, a court order now must authorize any CARES Act distribution. In authorizing such a distribution, this Court necessarily has equitable authority to police the legal parameters applicable to the distribution to ensure that the agency acts lawfully.[8]

2. The Court Should Direct Treasury to Determine the Interim Distribution Amount Based Upon the Amounts Previously Distributed to Other Tribes With an Equivalent Population

A "fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy, Inc. v. Fed. Energy Regul. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). It is axiomatic that an agency must treat similarly-situated parties the same way unless there is a legitimate rationale for treating them differently. *See, e.g.*, *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 687 (D.C. Cir. 2007) ("[A]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."); *Seaworld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) ("treating similar cases dissimilarly [is] the paradigmatic arbitrary and capricious agency action").

Here there is no legitimate basis for distinguishing the Plaintiff Tribes from other tribes with equivalent populations who received larger distributions. The Court, therefore, should direct Treasury to determine the interim distribution amount based upon the amount previously paid to other tribes with equivalent populations.[9]

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[8] When addressing the same appropriation-expiration issue in the related ANC litigation, Treasury did not take a position on whether it had authority to disburse funds without a court order. But the agency did state that "even if it could not disburse the remaining funds after September 30 on its own accord, it could do so pursuant to an appropriate court order . . . ." Response to Plaintiffs' Emergency Motion to Suspend Lapse of Appropriation, *Confederated Tribes*, D.C. Cir. No. 20-5204 (filed September 30, 2020), at 4. Treasury then emphasized that it "intends to join the other parties in securing any necessary order to ensure that the funds can be disbursed." *Id*. Given that statement of intent, it is hard to understand how Treasury could suggest here that it intends to distribute funds without a court order.

[9] The Plaintiff Tribes have already calculated those amounts and, pursuant to their original preliminary injunction motions, have asked that those amounts be set aside. Shawnee's original

We do not suggest that the Court should direct which population figures to use (or what data to rely upon) in determining which tribes are situated similarly to the Plaintiff Tribes. However, the D.C. Circuit's recent decision in *Shawnee* confirms that Treasury cannot make an arbitrary and capricious population determination. *Shawnee*, 984 F.3d at 102. The Court should direct Treasury to determine the Plaintiff Tribe's populations based upon a rational consideration of the tribal population information available to the agency (other than the IHBG data that the agency previously relied upon).[10]

3. The Court Should Direct Payment of an Interim Distribution That Protects the Interests of Other Litigating Tribes and ANCs, But Not Non-Litigating Tribes.

The Plaintiff Tribes recognize that the Court must take into account the interests of other *litigants* before it by adjusting the interim distribution to account for the possibility that other tribes or ANCs with pending CARES Act litigation may eventually be entitled to a share of the remaining funds.[11] The Court, however, should make clear that Treasury cannot make analogous adjustments

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preliminary injunction motion has been granted, while Miccosukee and Prairie Band Potawatomi's motions remain outstanding. Miccosukee and Prairie Band Potawatomi respectfully request that the Court act on their original preliminary injunction motions so that any interim distribution made pursuant to this motion can be appropriately allocated to the amounts set aside for each Plaintiff Tribe.

[10] The *Shawnee* decision confirms that it would be arbitrary and capricious for Treasury to rely upon the IHBG data. *Id*.

[11] For example, Treasury could make an immediate distribution to the Plaintiff Tribes of 80-percent of the population-based distribution each Tribe would have received had Treasury used their certified population data, as opposed to the clearly erroneous IHBG data. Certainly, at this point Treasury must recognize that the IHBG data severely undercounted the population of the Plaintiff Tribes. For purposes of making an immediate interim distribution, Treasury can simply substitute the certified population data provided by the Plaintiff Tribes for the flawed IHBG data and then recalculate a distribution amount using its original formula. For example, although Miccosukee certified to Treasury that it had a population of 605, the IHBG population data used by Treasury listed Miccosukee as having a population of zero. Treasury can immediately fix this error by simply substituting Miccosukee's certified population (605) for the erroneous IHBG population (0), and then multiply 605 by the amount Treasury initially determined should be distributed per tribal member. Miccosukee believes this will result in a population distribution amount of

to account for potential distributions to tribes that are not currently litigating over CARES Act funds. As explained above, because the fiscal year has ended Treasury cannot make any CARES Act distribution in the absence of a court order. And as explained below, the Court only has jurisdiction to order a distribution to tribes with pending litigation.

Because non-litigating tribes have made no claim to additional CARES Act funds, they have no justiciable "case or controversy" before the Court. It is well established that "'[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements' of a case or controversy, . . . unless one party is *actually seeking judicial relief against another*." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1338 (11th Cir. 2007) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (emphasis added). There simply is no "case or controversy" with respect to a party that "*never made any claim of its own for judicial relief* . . . ." *Dillard*, 495 F.3d at 1338 (emphasis in original).

In the absence of a justiciable case or controversy, the Court lacks jurisdiction to impose a judicial remedy requiring Treasury to distribute CARES Act funds to non-litigating tribes. "[A] court's power to issue any form of relief . . . is contingent on its subject-matter jurisdiction over the case or controversy." *United States v. Denedo*, 556 U.S. 904, 905 (2009). The Court has no jurisdiction to order relief for the non-litigating tribes, because there is no case or controversy as to those tribes *See, e.g.*, *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008). It would be an *ultra*

approximately $2 million. To avoid possibly overpaying the Plaintiff tribes, and to protect the interests of other litigating Tribes and the ANC's, Treasury could make an interim distribution of approximately 80 percent of this revised distribution amount.

vires act of judicial largesse to order CARES Act distributions to the non-litigating tribes and, thus, any interim relief should not include such tribes.[12]

II. TREASURY'S UNILATERAL WORK ON A NEW METHODOLOGY SHOULD NOT DIVERT THE COURT FROM ORDERING RELIEF IMMEDIATELY

The Court also should reject Treasury's suggestion that the Court should temporarily stay its hand and wait for the agency to adopt a new methodology before ordering distribution of additional funds. Treasury's unilateral work on a new methodology should not divert the Court from ordering relief immediately to prevent irreparable harm.

A. The Equities Favor Immediate Action by the Court

We explain above why Treasury has no authority to issue new distributions without the involvement and supervision of the Court. But even if Treasury did have such authority to issue new distributions under its new methodology, the equities strongly favor judicial relief *now*, without waiting for Treasury to act. *Cf. Shawnee*, 984 F.3d at 102 (rejecting Treasury request for a remand and proceeding to rule on the merits of the preliminary injunction motion, "given the urgency of the matter.").

Agencies do not have carte blanche to pull the rug out from under APA challenges by taking matters back into their own hands and arguing that the Court does not need to remain involved. To the contrary, an agency ordinarily seeks the Court's leave through a motion for voluntary remand when it wants to revisit a decision challenged under the APA without confessing

[12] It is worth noting that an agency has no inherent legal obligation to treat non-litigating parties the same as litigating parties under all circumstances. For example, even when an agency is bound by a Circuit decision with respect to particular litigating parties, the agency typically has a "right to refuse to acquiesce" in that decision with respect to parties in other Circuits that have not litigated. *See, e.g.*, *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014) (quoting *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1992)). When the agency does refuse to acquiesce, it may properly regulate non-litigating parties differently than parties who have litigated (as long as there is a legitimate rationale for the differential treatment).

error (as Treasury seeks to do here). *See Limnia, Inc. v. U.S. Dept. of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (collecting cases). A "district court has broad discretion to decide whether and when to grant an agency's request for a voluntary remand." *Id.* at 381. And a district court properly rejects the agency's requested remand if it would "unduly prejudice the non-moving party." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018).

Here, Treasury effectively (and unilaterally) attempts to force a remand without first filing a motion seeking the Court's leave. That does not mean that the Court has no role controlling the fairness of that process. The Court should assert its authority to prevent prejudice by granting relief immediately instead of waiting until after the agency's unilateral efforts run their course. As this Court already has ruled in *Agua Caliente*, the equities tip sharply in favor of getting the funds to pandemic-stricken tribal areas immediately. The Court should not stand down to await ongoing work within the agency that Treasury initiated unilaterally. If the Court were to wait for that methodology to be developed and implemented, it may or may not be adequate, and it may or may not lead to another round of extended litigation. In the meantime, the agency would stymie the central objective of the CARES Act, which is to distribute needed funds to the tribes as soon as possible.

B. Treasury Has Not Proven That the New Methodology Would Moot Plaintiffs' Current Claims

The Court also should reject Treasury's assertion that the Court should stay its hand on the ground that the new methodology would allegedly moot Plaintiffs' claims in the near future. A claim only becomes moot "when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party" (*Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (citations omitted)), and that Treasury has a "heavy burden" to meet that standard. *Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010). Here, there is no way

to determine whether the adoption of a new methodology would preclude any effectual relief on the Plaintiff Tribes' claims.

First, notwithstanding Treasury's vague predictions about the timing and possible content of a new methodology, there is no way to know for certain when the new methodology may be adopted and what its relationship to the old methodology may be. The Court should not base a ruling now upon a predicted future action by the agency — regardless of how accurate the prediction may appear to be at this time. *See PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 798 (D.C. Cir. 2004) (refusing to conclude that result of remand to agency could be foreseen because "[w]e know no such thing"); *Group Against Smog & Pollution, Inc. v. U.S. EPA*, 665 F.2d 1284, 1291 (D.C. Cir. 1981) (holding that EPA's mere intention to promulgate new standards did not moot the present controversy regarding its current standards); *Compare Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10th Cir. 2010) (case was mooted by EPA's ***issuance*** (as opposed to mere contemplation) of a new biological opinion that superseded the ones that the plaintiffs had challenged, and when there was no real contention that the new biological opinion was either a "mirror image" of the old one or just a "superficial" change).

Second, the distribution amounts under a future methodology would need to be known with certainty in order to determine whether the Court is unable to grant "any effectual relief whatever" on Plaintiffs' claims. And such distribution amounts are currently unknowable. The parties would still have a live dispute if the new methodology yielded payments to the Plaintiff Tribes that are less than the payments sought in their pending claims. *See Forney v. Apfel*, 524 U.S. 266, 271 (1998) (decision "granting in part and denying in part the remedy requested" leaves the litigant "aggrieved"); 5 U.S.C. § 702 (according right of judicial review to person "aggrieved by agency action").

Finally, an agency decision to supersede the old methodology with a new methodology — instead of treating the Plaintiff Tribes the same way as similarly-situated tribes under the old methodology — would be a live controversy under Plaintiffs' existing claims to the extent that the new methodology diminished recovery under those existing claims. A particular focus of that controversy would be any new methodology that diminished Plaintiffs' recoveries (under its current claims) by issuing payments to tribes that are not currently seeking increased payments through litigation. As explained above, neither the agency nor the Court has authority to order such payments. If Treasury nevertheless adopted a new methodology that seeks to channel funds to non-litigating tribes, the parties plainly would have a live controversy as to the diversion of funds that would otherwise satisfy Plaintiffs' pending claims.

CONCLUSION

The Court should order Treasury to immediately make the interim distribution described above.

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Respectfully submitted,

/s/ Daniel G. Jarcho
Daniel G. Jarcho (D.C. Bar # 391837)
George B. Abney*
Daniel F. Diffley*
Jean E. Richmann*
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, N.W.
Washington, D.C. 20004
Phone: (202) 239-3300
Fax: (202) 239-3333
daniel.jarcho@alston.com
*Admitted *pro hac vice*

Counsel for The Miccosukee Tribe of Indians of Florida

/s/ Carol E. Heckman
Carol E. Heckman*
James P. Blenk*
Lippes Mathias Wexler Friedman, LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
Telephone: (716) 853-5100
checkman@lippes.com
jblenk@lippes.com
*Admitted *pro hac vice*

- and -

Michael G. Rossetti, DC Bar No. 477122
1900 K Street, NW
Suite 730
Washington, DC 20006
Telephone: (202) 888-7610
mrossetti@lippes.com

Counsel to Prairie Band Potawatomi Nation

/s/ Pilar M. Thomas
Pilar M. Thomas
QUARLES & BRADY LLP
One South Church Avenue, Suite 1800
Tucson, Arizona 85746
Admitted *pro hac vice*

Nicole L. Simmons
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
Admitted *pro hac vice*

Luke Cass
QUARLES & BRADY LLP
1701 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel to The Shawnee Tribe