UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

The Shawnee Tribe,

Plaintiff,

v.

Janet Yellen, in her official capacity as Secretary of the Treasury, et al.,

Defendants.

Case No. 20-cv-1999

CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Two Plaintiff Tribes argue that the new methodology the Department of the Treasury adopted for allocating relief funds is arbitrary and capricious under the Administrative Procedure Act ("APA"). In so doing, however, they obscure the circumstances that prompted the new methodology in the first place. Treasury was not constructing this methodology on a blank slate; most funds from the relevant appropriation had already been disbursed under the original methodology in an effort to approximate "increased expenditures" borne by Tribal governments. The lion's share of the remaining funds were apportioned to Alaska Native Corporations ("ANCs"), which have thus far received *no* aid from this appropriation—despite, as the Supreme Court recently confirmed, their eligibility for such aid. *Yellen v. Confederated Tribes of the Chehalis Rsrv.*, -- S. Ct. --, 2021 WL 2599432 (2021). In crafting a new methodology, Treasury had to thus address unique concerns raised by a handful of Tribes while preserving sufficient funds for ANCs. Under these circumstances, the new methodology reasonably balances competing considerations and thus survives the highly deferential arbitrary and capricious inquiry. The Court should deny Plaintiffs' Motion for Summary Judgment, and grant the Defendants' Cross-Motion for Summary Judgment.

In March 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act which, among other things, called on Treasury to promptly allocate a pool of funds to qualifying Tribal entities "based on increased" COVID-related "expenditures." Treasury initially created a methodology that relied on regularly-maintained census population data to serve as a proxy for such expenditures, and promptly made payments thereunder. The original methodology was almost entirely uncontroversial: only three Tribes (the Plaintiffs here) sued to challenge Treasury's methodology. And on appeal from this Court's denial of a preliminary

injunction, the D.C. Circuit only found the original methodology likely to be problematic in one limited respect: Treasury's population-based tranche (60%) of payments was based on a population figure of "0" for Plaintiff Shawnee, and therefore was "not a suitable proxy for 'increased expenditures[]'" for that Tribe. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021) (quoting 42 U.S.C. § 801(c)(7)). The D.C. Circuit held that the same was "likely true" of two other Tribes, including Plaintiff Miccosukee, because their populations had likewise been recorded as "0." *Id.*

Treasury then voluntarily revised its methodology to account for this alleged defect. Because the relevant appropriation is limited, however, Treasury could not allocate the full amount by which each Tribe was allegedly underpaid without significantly reducing the amounts that other Tribal governments would receive. Thus, the new methodology sensibly provided the greatest payments to those who were most "underpaid" and gradually reduced payments to Tribal governments as their original payments better approximated their expenditures.

Treasury's new methodology used both census population data *and* enrollment data to address the "potential for under-counting" in "certain scenarios in which IHBG formula area population counts might prove insufficient." Under this methodology, Treasury first measured the spread between each Tribe's census population figure and the Tribe's enrollment figure. The 15% of Tribes with the widest spreads qualified for a supplemental payment. To calculate the payments themselves, the new methodology determined what each Tribe would have received if Treasury had used enrollment data, rather than census population data, for all Tribes from the start ("enrollment allocations"), and then awarded each Tribe a percentage of its enrollment allocation based on the size of its census-enrollment spread. Thus, Tribes with significant spreads—including

all Tribes with a census population count of zero—received the highest share of their enrollment allocations.

The new methodology thus struck a reasonable balance between competing considerations: it involved a formula that prioritized payments to those Tribes for whom the census data may have proven especially inadequate (and the only Tribes that the D.C. Circuit in *Shawnee* held were likely to succeed); issued each of these Tribes a supplemental payment pegged to its enrollment data (Plaintiffs' own preferred data source); and preserved sufficient funds for ANCs. Importantly, each Plaintiff received a significant supplemental payment under this methodology.

Two Plaintiff Tribes—Prairie Band and Miccosukee (hereinafter, the "Movants")—nonetheless argue that this new methodology, and the original methodology, are both arbitrary and capricious. The Movants' claims lack merit. *First*, the Court lacks jurisdiction over the Movants' claims insofar as they challenge only the original methodology. As this Court has now concluded twice, if the Movants prevailed on this claim, they could (at most) secure an order directing Treasury to do what it has already done: adopt a revised methodology. Accordingly, the Court can offer no further relief to the Movants on this claim, and thus the claim is moot. The Court may only assess the Movants' claim that the original methodology, *as modified by the revised methodology*, is allegedly arbitrary and capricious.

Second, the revised methodology is a rational complement to Treasury's original methodology under these circumstances. The arbitrary and capricious standard varies based on the relevant circumstances, and courts generally show great deference to agency decisions that require complex data analyses and policy judgments. As explained above, in light of the relevant circumstances, the new methodology strikes a reasonable balance between the competing considerations, and thus satisfies the deferential arbitrary and capricious standard. In response, the

Movants contend that if Treasury is going to rely, in part, on enrollment data, then it is obligated to pay each Tribe a fixed amount per enrollee, regardless of the circumstances. Of course, the Movants do not explain how Treasury could have guaranteed each Tribe a meaningful amount per enrollee while preserving sufficient funds for the ANCs. Treasury was constrained by a zero-sum appropriation, and thus ultimately had to devise a method for focusing payments on Tribes for whom the census population data may have been especially inadequate (*e.g.*, those with a census population figure of zero). In light of the circumstances, this is a reasonable approach.

Furthermore, the Movants' preferred approach—whereby Treasury guarantees each Tribe the same, fixed per-enrollee rate—could have resulted in each Plaintiff receiving *less* money. If Treasury had to ensure that every Tribe received the same per-enrollee rate, this principle would presumably apply to *all* Tribes, not just the 15% of Tribes with the highest census-enrollment spread. And if Treasury had to make a per-enrollee payment to each Tribe from the very limited pool of funds available for redistribution—again, Treasury has to preserve sufficient funds for ANCs—then each recipient would likely receive a small (and for some, potentially negligible) supplemental payment. To the extent the Movants argue that they do not object to Treasury focusing on the 15% of Tribes with the greatest census-enrollment spreads, then they seek to have it both ways: they are fine with Treasury not guaranteeing each Tribe the same per-enrollee rate, so long as it results in the *Movants* receiving more money.

The Movants also contend that the new methodology does not issue payments "based on increased expenditures," as instructed by the CARES Act. But the whole point of the new methodology is to provide supplemental payments to account for the degree to which the original methodology did *not* adequately provide payments to certain Tribes "based on" their "expenditures." And in so doing, the new methodology relies on enrollment data, the precise data

source the Movants promote here. Accordingly, the new methodology is not arbitrary and capricious, and Treasury is entitled to judgment as a matter of law on this claim.

BACKGROUND

I. Statutory and regulatory background.

In March 2020, Congress enacted the CARES Act, which, among other things, appropriated $8 billion dollars for "payments to Tribal governments" (the "Funds"). 42 U.S.C. § 801(a)(2). The Act tasked the Treasury Department with disbursing the Funds, and described the process by which the funds should be allocated among qualifying Tribal governments:

> [T]he amount paid . . . to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government . . . relative to aggregate expenditures in fiscal year 2019 by the Tribal government . . . and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

42 U.S.C. § 801(c)(7). The Act provides no further, specific guidance on how Treasury must allocate the funds; it does not specify the precise amount that each Tribal government should receive, or otherwise specify the particular formula (or data source) that Treasury must utilize for allocating funds based on "increased expenditures." Additionally, the Act notes that, "[s]ubject" to certain exceptions not relevant here, "not later than 30 days after March 27, 2020, the Secretary [of Treasury] shall pay each . . . Tribal government," from the Funds, "the amount determined for" the "Tribal government." 42 U.S.C. § 801(b).

On May 5, 2020, promptly after the CARES Act was signed into law, Treasury published its methodology for allocating the Funds among qualifying Tribal governments. *See* Coronavirus Relief Fund Tribal Allocation Methodology, U.S. Department of Treasury, https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-

Methodology .pdf, at 1 (May 5, 2020) (hereinafter, "Allocation Mem."). Under this methodology, Treasury committed to distribute the Funds in two waves. In the first wave, Treasury sought to immediately distribute 60 percent of the Funds based roughly on Tribal population counts, which were "expected to correlate reasonably well with the amount of increased expenditures" due to COVID-19. *See id.* at 2. To ensure speedy disbursement of the Funds, Treasury chose to estimate population counts using a pre-existing and regularly maintained data source: Decennial Census data used by the Department of Housing and Urban Development ("HUD") for its Indian Housing Block Grant ("IHBG") program. *See id.*; 24 C.F.R. § 1000.330(b)(1). As an additional measure to provide for an equitable distribution and in response to comments from Indian Tribes, Treasury also generally guaranteed a minimum payment of $100,000 to Tribal governments that would have otherwise received less than $100,000 under Treasury's methodology for estimating population count. *See* Allocation Mem., at 3. Treasury determined that the second wave of payments, constituting 40 percent of the Funds, would be "based on employment and expenditures data of Tribes and tribally-owned entities." *See id.*, at 2.

II. Litigation history.

Once Treasury published its methodology, it faced a series of lawsuits challenging *who* could receive the funds, *when* they would receive the funds, and in *what amount*.

First, certain parties brought suit, arguing that Treasury's methodology improperly allocated funds to certain entities—Alaska Native Corporations ("ANCs")—that, according to those plaintiffs, did not qualify for those funds under the CARES Act. *See Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 20 (D.C. Cir. 2020), *cert. granted sub nom. Alaska Native Vill. Corp. Ass'n, Inc. v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021), and *cert. granted sub nom. Mnuchin v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 976 (2021).

The Court ultimately granted summary judgment for Treasury, but the D.C. Circuit reversed, concluding that ANCs were not entitled to any of the Funds. *See id.* at 12. The Supreme Court has since reversed the D.C. Circuit, holding that ANCs *are* Tribal governments under the CARES Act. *Yellen v. Confederated Tribes of the Chehalis Reservation*, -- S. Ct. --, 2021 WL 2599432 (2021).

Second, although Treasury worked in earnest to rapidly develop a satisfactory methodology and promptly distribute the Funds, another group of parties brought suit seeking a preliminary injunction requiring Treasury to accelerate the distribution of the Funds. *See Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), 2020 WL 3250701, at *1 (D.D.C. June 15, 2020). Ultimately, the Court granted the preliminary injunction motion, *see id.* at *4, and Treasury promptly distributed all of the remaining Funds, except for the funds initially allocated to ANCs and a negligible portion of funds that were not distributed for logistical reasons, *see Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-CV-01136 (APM), ECF No. 45 (D.D.C. June 25, 2020).

Third, another group of parties—the Plaintiffs here—brought suit claiming that Treasury's methodology for issuing population-based payments was arbitrary and capricious because Treasury did not use a reliable data source when calculating Plaintiffs' population counts. *See Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 98 (D.C. Cir. 2021). The Court initially found that the determination of an appropriate allocation methodology was committed to Treasury's discretion under the relevant statutory provision, and was therefore not reviewable under the APA. *See id.* The D.C. Circuit, however, concluded that Treasury's allocation methodology is reviewable, and that the Shawnee Tribe was likely to prevail on its claim that the use of "the IHBG formula area population data [was]" unlawful "at least with respect to some tribes." *Id.* at 101-02. The D.C. Circuit noted, however, that Treasury still retains "discretion" to "determin[e] a method for

allocating funds" based on the limited guidance in section 801(c)(7), namely that the payments must be "based on increased expenditures." *Id.* at 100. The D.C. Circuit then remanded the case to the Court for further proceedings on the merits to determine "[w]hether the Secretary will have to devise a new methodology." *Id.* at 103.

Following remand, the Court instructed Treasury to "file a Status Report that advises whether the Treasury Department will re-consider the formula or data used to allocate the population-based distribution of" the Funds. 1/21 Minute Order. In response, Treasury informed the Court and the Plaintiffs that, instead of requiring the parties to re-litigate the propriety of Treasury's original methodology for issuing the population-based payments, it would voluntarily revise its methodology when allocating the remaining Funds. *See* ECF No. 60. Treasury noted that it would finalize its new methodology by April 30, 2021. *See id.*; ECF No. 62, at 2.

Nevertheless, Plaintiffs moved for a *second* preliminary injunction on March 26, 2021—*before* the new methodology was released—seeking an affirmative injunction compelling Treasury to "determine the Plaintiff Tribes' populations based upon a rational consideration of the population information available to the agency (other than the IHBG data)," and issue payments to Plaintiffs in an amount equal to 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." PI Mot., at 8. In support, Plaintiffs relied, in part, on their principal APA claim: that the population-based component of Treasury's original methodology was arbitrary and capricious.

The Court denied Plaintiffs' preliminary injunction motion. PI Order (Apr. 26, 2021), ECF No. 74. The Court first emphasized that, under "settled principles of administrative law," when "a court . . . determines that an agency made an error of law, the court's inquiry is at an end: the case

must be remanded to the agency for further action . . ..." *Id.* at 4. The Court explained that a detailed, affirmative injunction may be appropriate only when it calls for "'discrete action' that is 'legally required . . . about which an official had no discretion whatever.'" *Id.* The Court concluded that this "stringent standard" for a detailed, affirmative injunction was "not satisfied here" because "[t]he statutory provision" at issue "does not 'specific[ally], unequivocal[ly] command' Treasury to adopt a methodology to allocate funds under any criteria other than (1) the 'amount paid . . . to a Tribal government' must be 'based on increased expenditures" and (2) 'all amounts available . . . [must be] distributed to Tribal governments.'" *Id.* at 5.

III. Treasury unveiled a new methodology on April 30, 2021.

On April 30, 2021, following three new consultation sessions with Tribal entities, Treasury issued a revised methodology for allocating the remaining Funds. *See* Coronavirus Relief Fund Allocations to Tribal Governments, the Department of the Treasury, https://home.treasury.gov/system/files/136/Allocations-to-Tribal-Governments-April-30-2021.pdf (Apr. 30, 2021) (the "Revised Methodology"). This methodology reiterates that "[f]or many Tribes, [the IHBG] data . . . provided a reasonable proxy for estimating the increased expenditures for each Tribe" since "Formula areas correspond broadly to the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend." *Id.* at 2. However, in light of the D.C. Circuit's *Shawnee* decision, the methodology acknowledges that "although IHBG formula area population counts may typically be helpful in estimating a Tribal government's increased expenditures, in certain instances they may prove insufficient," *e.g.*, when a "Tribe does not have a formula area . . . and therefore has a formula area population of zero." *Id.*

However, "[t]he funds available for reallocation are limited and therefore" the methodology may only provide additional payments to Tribes for whom IHBG data may prove especially inadequate. *Id.* To determine which Tribes may qualify for supplemental payments, the methodology first generates a ratio for each Tribe, dividing its IHBG population count by its enrollment number ("IHBG-to-enrollment ratio"). The methodology then ranks the Tribes by their respective IHBG-to-enrollment ratios, and identifies the 15% of Tribes with the lowest ratios (*i.e.*, the Tribes with the disproportionally smallest IHBG figures compared to their enrollment figures). The 15% of Tribes with the lowest ratios qualify for supplemental payments.

The methodology then determines how much each qualifying Tribe will receive. First, the methodology calculates what each Tribe would have received if, instead of using IHBG data, Treasury had used enrollment data for the population-based disbursement of the original methodology (each Tribe's "enrollment allocation"). The methodology then awards each qualifying Tribe a certain percentage of its enrollment allocation based on its IHBG-to-enrollment ratio. Those with the lowest IHBG-to-enrollment ratios, such as the Tribes with IHBG populations of zero, receive the highest percentage of their enrollment allocations; conversely, those with progressively higher ratios receive comparatively lower percentages of their enrollment allocations. In short, the Revised Methodology directed a limited pool of funds where they were needed the most.

All three Plaintiffs, regardless of where they fell out in the hierarchy of IHBG-to-enrollment ratios, benefitted from the Revised Methodology. Shawnee and Miccosukee—both of whom had IHBG population counts of zero—were allocated supplemental payments of $5,202,604 and $825,196, respectively. *See* Am. MSJ, at 10. Prairie Band, which was previously allocated

$2,456,891 based on its IHBG population count, was allocated a supplemental payment of $1,604,853. *See* Am. MSJ, at 6, 10, 11 n.5.

Treasury acknowledges that, as with any formula that relies on imperfect data, this methodology may not capture the relative "funding needs of [each Tribe] . . . with precision." Revised Methodology, at 3. Nevertheless, the methodology "[will] provide additional assistance to those with the greatest need based on the circumstances . . . while still retaining sufficient allocations for ANCs." *Id.* Considering the two methodologies together, Treasury has fulfilled its statutory mandated to apportion $8 billion to Tribal governments based on their increased expenditures.

Two Plaintiffs—Prairie Band and Miccosukee ("Movants")—now move for summary judgment, claiming that the new methodology is arbitrary and capricious under the APA. For the reasons that follow, those claims lack merit and the Court should grand Defendants' cross-motion for summary judgment.

ARGUMENT

I. Plaintiffs' APA claims against the original methodology are moot.

"To satisfy Article III's [jurisdictional] requirements," the Plaintiffs[1] must show, "throughout the course of litigation," that their alleged "injury will be redressed by a favorable decision." *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003). "If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001).

[1] To be sure, Shawnee has not filed a renewed summary judgment motion. However, all of the Plaintiff Tribes have asserted claims focusing only on the original methodology, and the mootness argument applies to all of these claims.

Here, the Court cannot provide the Plaintiffs with any meaningful relief for their original claim beyond ordering Treasury to do what it has already done—forgo any further use of its original methodology and develop a revised methodology—and so Plaintiffs' original claims are moot. "Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995); *see also N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012) ("When a district court reverses agency action and determines that the agency acted unlawfully, ordinarily the appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal."). Thus, it is "a perfectly uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016). Treasury has "replaced [the] challenged" allocation methodology, and so Plaintiffs' claims are now moot.

This Court recognized as much in its recent denial of Prairie Band's motion to modify its preliminary injunction. PI Order 5 (June 23, 2021) ("Prairie Band fails to explain how its challenge to Treasury's original allocation method—the 2020 Distribution—is not now moot."). The Court should reach the same conclusion here, and enter judgment in Defendants' favor on the claims challenging only the original methodology.

At times, "[t]he APA" does allow "a reviewing court to *compel* agency action," but only "under narrow circumstances." *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (emphasis added). Under the APA, "Courts" may only "compel an agency

to take a *discrete* agency action that it is *required* to take." *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (emphasis in original). "Action is 'legally required' if the statute provides a *specific, unequivocal command* to an agency or a *precise, definite act* . . . about which [an official has] no discretion whatever." *Pub. Citizen, Inc. v. Fed. Energy Regulatory Comm'n*, 839 F.3d 1165, 1172 (D.C. Cir. 2016) (internal quotation marks omitted and emphasis added). Even "when an agency is compelled by law" to take *some* agency action, if "the manner of its action is left" largely "to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004). Thus, "[o]nly in extraordinary circumstances" do courts "issue detailed remedial" injunctions in APA cases. *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008); *see also Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("Once . . . the district court held that the" agency's action was unlawful, it "should have remanded to the [agency] for further proceedings consistent with its" order. "Not only was it unnecessary for the court to retain jurisdiction to devise a specific remedy for the [agency] to follow, but it was error to do so.").

Here, the Court has already found that section 801(c)(7) does not "specific[ally], unequivocal[ly] command" Treasury to issue payments to Plaintiffs pursuant to a different methodology that includes certain mandatory aspects that the Plaintiffs would prefer. *See* PI Order, at 4-5. Accordingly, the Court cannot issue Plaintiffs' requested injunction, or otherwise require Treasury to adopt any particular methodology. The Court, at best, can vacate Treasury's original methodology, and instruct Treasury to do what it has already done (construct a new methodology). Plaintiffs' claims against the original methodology are therefore moot. Plaintiffs may only pursue their claims challenging the original methodology *as modified by the revised methodology*.

II. Treasury's Revised Methodology is not arbitrary and capricious.

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Id.* "[T]he parameters of the 'arbitrary and capricious' standard of review will vary with the context of the case." *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 817 (D.C. Cir. 1981); *see also Maggard v. O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982) ("[T]he concept of 'arbitrary and capricious' review defies generalized application and must be contextually tailored. . . . A reviewing court may also be more or less likely to give the fact-finder the benefit of the doubt depending on the circumstances.").

The Court should be especially deferential here in light of the relevant circumstances. To start, when "Congress entrusts a novel mission to an agency and specifies only grandly general guides for the agency's implementation of legislative policy, judicial review must be correspondingly relaxed." *Nat'l Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983). The CARES Act, of course, provides only a "general guide" for Treasury to allocate the relevant funds; namely, that the allocation must be "based on increased expenditures," 42 U.S.C. § 801(c)(7). "It otherwise provides no direction or formula by which the court could ascertain how much [Movants] might be owed." PI Order 6, ECF No. 90.

Additionally, "agency determinations" that "involve complex judgments" and "data analysis" may "receive an extreme degree of deference." *Alaska Airlines, Inc. v. Transportation Sec. Admin.*, 588 F.3d 1116, 1120 (D.C. Cir. 2009); *Appalachian Power Co. v. E.P.A.*, 249 F.3d 1032, 1051–52 (D.C. Cir. 2001) ("[a]gency determinations based upon highly complex and technical matters are entitled to great deference."). Here, Treasury faced challenging

circumstances that required it to balance multiple competing interests, while engaging in a complex analysis involving multiple data sources. From the start, Treasury had to perform the inherently difficult task of constructing a methodology, on an expedited timeline, that allocates funds based on an estimate of each qualifying Tribe's COVID-related "expenditures." Recent circumstances then further complicated Treasury's task. In light of the D.C. Circuit's *Shawnee* decision, Treasury crafted a complementary methodology, which sought to assess the degree to which IHBG data may have provided an inadequate estimate for certain Tribes' relevant expenditures, and calculate additional payments for these Tribes from a limited pool of funds—all while retaining sufficient funds for ANCs. And Treasury had to complete this task—which involved additional consultation sessions—on yet another expedited timeline.

Under these circumstances, which warrant "an extreme degree of deference," the Revised Methodology satisfies arbitrary and capricious review. This methodology responds to the D.C. Circuit's decision in *Shawnee*, which concluded that—for those Tribes with IHBG population counts of zero—IHBG data is likely an inadequate proxy for COVID-related expenditures. *See* 984 F.3d at 102 (questioning whether IHBG data was appropriate "for the Shawnee Tribe or the twenty-four other tribes with no IHBG population"). To reach that conclusion, the D.C. Circuit compared those Tribes' enrollment to their IHBG figures. *Id.* The Revised Methodology does the same thing, providing the highest supplemental payments to those Tribes whose ratios were the widest. And to make that comparison, Treasury used Plaintiffs' preferred data source: Tribal enrollment data. In short, the Revised Methodology rectifies the problem suggested by the D.C. Circuit using Plaintiffs' preferred data.

The methodology also provides supplemental payments to certain Tribes who had *non-zero* IHBG population counts if their IHBG-to-enrollment ratios are sufficiently low. This

methodology thus guaranteed a supplemental payment to each Plaintiff, and to similarly situated Tribes. And although the Revised Methodology may not perfectly calculate each Tribe's relative COVID-related expenditures—a feat that *no* methodology could perform—it is nonetheless reasonable in light of the circumstances. An arbitrary-and-capricious inquiry demands nothing more. *See Appalachian Power Co. v. E.P.A.*, 249 F.3d 1032, 1052 (D.C. Cir. 2001) ("That a model is limited or imperfect is not, in itself, a reason to remand agency decisions," and courts "must defer to the agency's decision on how to balance the cost and complexity of a more elaborate model against the oversimplification of a simpler model."); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1225 (D.C. Cir. 1996) ("[The agency] has balanced the need for an early, rough estimate . . . against the danger of that estimate being too rough. We must defer to the agency's decision about how to strike that balance unless it is unreasonable.").

To argue that the Revised Methodology is arbitrary and capricious, the Movants primarily assert that it does not pay each Tribe the same amount per "uncounted enrollee," defined as one who is counted in a Tribe's enrollment figure but not its IHBG figure. But "an agency" may "treat[] similarly situated parties differently" so long as it "provide[s] [an] adequate explanation," and it must also "justify its failure to take account of circumstances that appear to warrant different treatment for different parties." *Petroleum Commc'ns, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). Here, as explained above, in light of the limited appropriation under the CARES Act, Treasury could not both pay each Tribe a fixed, meaningful amount per "uncounted enrollee," and also reserve a sufficient amount for the ANCs. Thus, Treasury had to use its judgment to decide not only which Tribes would receive supplemental payments, but also the amount of each payment. The Revised Methodology explains that only the Tribes with the "most substantial disparities" between their IHBG and enrollment figures, as measured by the IHBG-to-enrollment ratio, will

qualify for supplemental payments. *See* Revised Methodology, at 2. It is entirely rational, given limited resources, to give them to the Tribes most affected by the original methodology.

Accordingly, among the qualifying Tribes, and consistent with the D.C. Circuit's decision in *Shawnee*, the Revised Methodology provides those with the lowest IHBG-to-enrollment ratios—including and especially Tribes with IHBG population counts of zero—with a more significant portion of their enrollment allocations to account for the fact that the prior methodology was likely to have underpaid them the most. Unlike Tribes in Prairie Band's position—who were assigned positive IHBG population figures—each "zero population" Tribe previously received the minimum population-based payment of $100,000. And although Prairie Band also had a low IHBG-to-enrollment ratio, it was not assigned an IHBG population of zero, and received a population-based payment of $2,456,891 roughly a year ago. *See* Pls.' Am. MSJ, at 6. Thus, Treasury's conclusion that it would focus limited funds on the Tribes whose IHBG figures were especially low in comparison to their enrollment figures, and who initially received the lowest population-based payments, is certainly sufficient to justify any differential treatment.

Furthermore, the Movants' argument, if accepted, could cause the Movants and similarly situated Tribes to be allocated *smaller* supplemental payments. If Treasury had to pay each Tribe the same, fixed amount per "uncounted enrollee," that fixed amount could apply also to the Tribes who are *not* among the 15% of Tribes with the lowest IHBG-to-enrollment ratios. And if Treasury had to pay *all* Tribes a fixed amount per "uncounted enrollee"—while still maintaining sufficient funds for ANCs—the limited pool of funds available for redistribution would be diluted, thus resulting in each Tribe receiving far smaller (and potentially negligible) supplemental payments. If, on the other hand, the Movants agree that Treasury can focus payments on the 15% of Tribes

with the lowest IHBG-to-enrollment ratios, then Movants seek to have it both ways: they are fine with differential treatment, so long as it benefits *them*.

Finally, the Movants argue that the Revised Methodology does not award payments "based on increased [COVID-related] expenditures" since it does not allocate funds to each Plaintiff Tribe based on its population (as measured by enrollment data), but rather allegedly allocates funds based on each Plaintiff Tribe's IHBG-to-enrollment ratio. But this argument isolates one variable—the IHBG-to-enrollment ratio—in a broader formula. As explained above, under the Revised Methodology, most Tribes receive no supplemental payment because, as Plaintiffs do not dispute, the original methodology—which issued payments based on IHBG data, employment data, and expenditure data—was an adequate proxy for those Tribe's COVID-related expenditures. With respect to the Tribes for whom IHBG data may be an unsuitable proxy, the Revised Methodology provides a supplemental payment using a formula that relies on enrollment data—the data source urged by the Movants themselves. But Treasury cannot substitute the data in these circumstances wholesale; *i.e.*, it cannot pay each Tribe what it would have received if Treasury had used enrollment data from the start. There simply are not enough remaining funds to do so, especially now that ANCs are definitively eligible for their allocations.[2] Thus, Treasury reasonably determined to pay those Tribes whose IHBG-to-enrollment ratios were the lowest, which tracks the D.C. Circuit's reasoning in *Shawnee* and the Plaintiffs' complaints all along. With the two methodologies working in tandem, Treasury has reasonably calculated payments "based on increased expenditures" while accounting for the relevant circumstances.

[2] This also leaves aside that, for the vast majority of Tribes, the IHBG data remains the better proxy.

To be sure, under the Revised Methodology, certain Tribes may receive payments that are disproportionately higher than their actual, COVID-related expenditures. But the same would be true under Movants' proposal, whereby Treasury would issue a fixed, per-enrollee payment to each Tribe. There is no indication in the record, and no reason to think, that each Tribe necessarily spent the same amount per enrollee due to COVID-19. Certain Tribes with significant enrollment figures may have had relatively lower COVID-related expenditures, while others with low enrollment figures may have had relatively higher COVID-related expenditures. Tribes with more enrollees can also achieve economies of scale in the delivery of healthcare and other services, thereby *reducing* the per-enrollee costs and making the Movants' proposal particularly unsuitable.

Given all of these variables, any methodology will necessarily provide an imperfect estimate of each Tribe's relative COVID-related expenditures. Not surprisingly, therefore, Congress only tasked Treasury with making payments "based on" increased expenditures. 42 U.S.C. § 801(c)(7). Treasury's fulfilment of that task must be judged in light of the relevant circumstances. *See Appalachian Power*, 249 F.3d at 1052 ("That a model is limited or imperfect is not, in itself, a reason to remand agency decisions," and courts "must defer to the agency's decision on how to balance the cost and complexity of a more elaborate model against the oversimplification of a simpler model."). In light of the "extreme degree of deference" the Court must show in these circumstances, the Revised Methodology is not arbitrary and capricious. *Alaska Airlines*, 588 F.3d at 1120.

Finally, for the reasons set forth in the Court's orders denying Plaintiffs' most recent preliminary injunction motions, the Court should enter summary judgment against Plaintiffs' claim that Treasury is obligated to issue a fixed amount to each Plaintiff. PI Order 6 (June 23, 2021) ("As a result, this court likely lacks the authority to direct Treasury to pay the tribe a sum certain."),

ECF No. 90 (citing PI Order 4 (Apr. 26, 2021), ECF No. 74). Indeed, if the Court agrees that the Revised Methodology is lawful, Plaintiffs cannot establish that Treasury was obligated to issue payments pursuant to any other methodology.

CONCLUSION

For these reasons, the Court should grant Defendants' Cross-Motion for Summary Judgment, and deny Plaintiffs' Motion for Summary Judgment.

Dated: July 9, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ERIC R. WOMACK
Assistant Branch Director

/s/ Kuntal Cholera
Kuntal V. Cholera
Jason C. Lynch
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Rm. 11214
Washington, DC 20005
Tel: (202) 514-1359
Email: kuntal.cholera@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2021 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Kuntal Cholera

Kuntal V. Cholera
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005

Attorney for Defendants