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

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Movant-Tribes' Reply confirms that several important points are not in dispute here. The parties appear to agree that Treasury could only re-allocate a limited portion of the relevant funds in order to preserve sufficient funds for Alaska Native Corporations ("ANCs"). And the parties agree that, in the Revised Methodology, Treasury had to draw lines to determine who would get supplemental payments and in what amount; indeed, as the Movant-Tribes concede, Treasury was "well within its rights to limit the supplemental payments to the 15% of Tribes that had been severely undercounted." Pls.' Reply, at 13. The Movant-Tribes' challenge to the Revised Methodology has narrowed to a single objection: although the lines Treasury drew in their favor are lawful, every line Treasury drew that did not benefit the Movant-Tribes—and thus benefited *other* Tribal entities—is unlawful.

The Revised Methodology, however, is not unlawful simply because Treasury could have adopted a different methodology under which the Movant-Tribes would have received more money. The Revised Methodology is a rational attempt to calculate supplemental payments for certain qualifying tribes in light of a number of unique and challenging circumstances, and ultimately, each Plaintiff received a supplemental payment (even though most Tribes did not). Ironically, although Tribes profess that the Revised Methodology is inequitable, their requested relief—an order requiring additional payments for only *them* out of funds slated for ANCs—would result in allocations far less fair than those called for by the Revised Methodology. The Court should deny the Tribes' Motion for Summary Judgment and grant the Defendants' Cross-Motion for Summary Judgment.

Although Treasury's methodology for allocating the relevant Coronavirus Aid, Relief, and Economic Security ("CARES") Act funds (the "Funds") proved satisfactory for most tribes, the

D.C. Circuit found that it was likely inadequate with respect to a few. Specifically, the D.C. Circuit noted that Treasury had to allocate the Funds "based on . . . [COVID-related] expenditures," and that Treasury's methodology relied on a data source—Indian Housing Block Grant ("IHBG") program census data—which provided an inadequate estimate for certain tribe's COVID-related expenditures. Treasury then agreed to modify its methodology to account for this potential defect. However, by this point, most of the Funds had already been distributed, and the remaining Funds were largely slated for ANCs that had not received *any* portion of the Funds for nearly a year and a half. Thus, Treasury had to craft a revised methodology that provided supplemental payments to certain tribes in light of the D.C. Circuit's decision, while preserving sufficient funds for ANCs—all on an expedited timeline to ensure that the relief payments would go out promptly.

Treasury eventually adopted an updated methodology (the "Revised Methodology") that, when combined with the original methodology, helped ensure that tribes would receive relief payments based on their expenditures. In particular, the Revised Methodology relied on Plaintiffs' preferred data source—tribal enrollment counts—to provide supplemental payments to tribes for whom the IHBG data may have provided an especially inadequate estimate of expenditures. To identify the tribes that would receive supplemental payments, the Revised Methodology generated a ratio for each tribe by dividing its IHBG figure by its enrollment figure (an "IHBG-to-enrollment ratio"). The Revised Methodology then ranked each tribe using its IHBG-to-enrollment ratio, and the 15% of tribes with the lowest ratios—the tribes for whom IHBG data was likely especially inadequate—qualified for supplemental payments (the "qualifying tribes" or "top 15%" tribes).

To determine the amount each qualifying tribe would receive, the Revised Methodology first calculated what each tribe would have received if Treasury had used enrollment data, rather than IHBG data, from the start (its "enrollment allocation"). Treasury, however, could not ensure

that each qualifying tribe would receive its enrollment allocation (or a significant, fixed percentage thereof), while simultaneously preserving sufficient funds for the ANCs. The Revised Methodology thus again referred to the IHBG-to-enrollment ratio rankings, and issued the tribe with the lowest ratio (the tribe likely most harmed by the IHBG data) a significant percentage of its enrollment allocation, while issuing each subsequent qualifying tribe a correspondingly lower percentage of its enrollment allocation. Under this formula, each Plaintiff received a meaningful supplemental payment, even though many tribes whose enrollment figures exceed their IHBG figures received no supplemental payment.

The Revised Methodology therefore addressed the D.C. Circuit's concern with respect to the original methodology by using the Plaintiffs' preferred data source (tribal enrollment counts), preserved sufficient funds for ANCs, and promptly provided supplemental payments to multiple tribes. In light of the circumstances, the Revised Methodology, along with the original methodology, represent a reasonable attempt to allocate funds based on each tribe's relative expenditures, and thus they survive the inherently deferential standard applicable to arbitrary and capricious claims under the Administrative Procedure Act ("APA"). Nevertheless, the Movant-Tribes (the "Tribes") continue to challenge the Revised Methodology, focusing on two principal theories. Neither has merit.

First, the Tribes argue that the Revised Methodology calculated their supplemental payments by referring to their IHBG-to-enrollment ratios, and so their supplemental payments were "based on" those ratios, rather than "based on" their increased expenditures. As a threshold matter, this argument improperly isolates a single variable in a broader formula. Treasury calculated each Tribe's payments using a number of data points—*e.g.*, employment data, IHBG data, enrollment data—that, when *combined*, provide a reasonable estimate for the Tribes'

expenditures. Treasury used the IHBG-to-enrollment ratios to estimate the degree to which the IHBG data provided an inadequate estimate of any given tribe's expenditures, and thus even these ratios helped to ensure that a tribe's payments would be "based on" its expenditures.

In any event, the Tribes' argument assumes, with no support, that payments are "based on" expenditures only if they are based *solely* on expenditures. Multiple courts, however, have found that a decision is "based on" a particular factor when that factor serves as a "starting point" for the decision; the decision need not be based "solely" on that factor. Thus, here, the Revised Methodology issued payments "based on" expenditures even if, as the Tribes suggest, the IHBG-to-enrollment ratios do not serve as a viable proxy for expenditures. Again, the Revised Methodology did not calculate supplemental payments by looking only to IHBG-to-enrollment ratios. It also relied upon tribal enrollment data which, according to the Tribes, undoubtedly provides a valid estimate of each tribe's relative expenditures. Thus, by relying on enrollment data, the Revised Methodology issued supplemental payments "based on" expenditures, even if they were based on other considerations as well (*e.g.*, IHBG-to-enrollment ratios).

Further, in calculating any given tribe's allocation, any methodology would have to consider variables beyond just the tribe's expenditures. For example, any methodology would also have to consider the amount of funds available for distribution, along with the estimated expenditures of other tribes. Additionally, even the Tribes' proposed alternatives would require Treasury to consider factors beyond just tribal expenditures. For example, the Tribes contend that Treasury should have paid the "top 15%" tribes a fixed amount per "uncounted enrollee" (defined as the difference between a Tribe's enrollment figure and IHBG figure). But Treasury identified the "top 15%" tribes by referring to IHBG-to-enrollment ratios, and so even *that* methodology would have allocated funds, in part, "based on" IHBG-to-enrollment ratios. Accordingly, the

Revised Methodology calculated payments "based on" tribal expenditures, even if it considered other factors as well.

The Tribes' second theory is that the Revised Methodology is arbitrary and capricious because it does not pay each qualifying tribe the same amount per "uncounted enrollee." But an agency need not treat all relevant parties alike if there is a sound basis for differential treatment. Here, Treasury could not issue a meaningful supplemental payment to each tribe for whom IHBG data may have proven inadequate while also maintaining sufficient funds for ANCs. Thus, Treasury had to devise a methodology that would identify a limited set of tribes that would qualify for supplemental payments and also calculate an appropriate amount for each. Ultimately, Treasury chose to rely on the IHBG-to-enrollment ratios for each task since these ratios provide a reasonable estimate for the degree to which the IHBG figures alone served as an insufficient proxy for the increased expenditures of that particular tribe. Treasury decided it could only provide meaningful supplemental payments to the 15% of tribes with the lowest ratios, and that it would also prioritize payments for tribes with the lowest ratios among the "top 15%" tribes—which included the group of tribes the D.C. Circuit focused on, namely, the tribes with an IHBG population of zero. This is a reasonable basis for not paying each tribe a fixed sum per "uncounted enrollee."

Critically, the Tribes do not oppose differential treatment based on IHBG-to-enrollment ratios, so long as it benefits them. In its opening brief, Treasury noted that the limited funds available for re-distribution would be diluted if Treasury had to guarantee each tribe a fixed sum per "uncounted enrollee." In response, the Tribes clarified that they do not oppose Treasury's decision to issue supplemental payments only to the "top 15%" tribes based on their IHBG-to-enrollment ratios; they only oppose Treasury's use of those ratios to then calculate how much each

qualifying tribe will receive. The Tribes, however, cannot have it both ways. At both steps—selecting the Tribes who will receive payments and calculating the amount each will receive—the IHBG-to-enrollment ratios play the same role: they estimate the degree to which the IHBG figures alone served as an insufficient proxy for the increased expenditures of any given tribe. If, as Plaintiffs concede, those ratios justify Treasury's decision to issue *no* supplemental payment to 85% of the tribes—including several whose enrollment figures exceed their IHBG figures—then those same ratios should justify Treasury's decision to reduce the amounts paid to those whose ratios approached tribes who received no supplemental payment.

Indeed, once Treasury decided to limit supplemental payments to the "top 15%" tribes, it was perfectly sensible for Treasury to vary the payments rates for the "top 15%" tribes. If Treasury had instead chosen to pay each of the "top 15%" tribes the same, fixed sum per "uncounted enrollee," a tribe at the bottom of the "top 15%" would be paid at the same rate as a tribe at the top of the list, whereas a tribe ranked just below the "top 15%" cutoff would receive *no* supplemental payment at all. Rather than institute that type of "sharp cliff," Treasury opted to use a more linear, descending payment scale. Accordingly, Treasury's decision to calculate payments by referring to the qualifying tribe's IHBG-to-enrollment ratios is reasonable, and the Revised Methodology therefore survives the deferential arbitrary and capricious inquiry. The Court should grant Defendants' Cross-Motion for Summary Judgment, and deny the Tribes' Motion for Summary Judgment.

ARGUMENT

I. The Revised Methodology survives the highly deferential arbitrary and capricious standard.

The Tribes do not dispute that an arbitrary-and-capricious inquiry asks only whether the agency action at issue is "reasonable and reasonably explained." *Fed. Commc'ns Comm'n v.*

Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021). Nor do the Tribes dispute that the nature of this inquiry varies by context. *See WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 817 (D.C. Cir. 1981) ("[T]he parameters of the 'arbitrary and capricious' standard of review will vary with the context of the case."); *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."). Thus, here, the Court must ask whether the Revised Methodology is reasonable in light of the prevailing circumstances, namely, that Treasury had to promptly craft a revised methodology that (i) identified Tribes for whom IHBG may have served as an especially inadequate proxy for COVID-related expenditures (a task further complicated by the difficulty in estimating any Tribe's expenditures with precision), and (ii) calculated the additional amount Treasury could and should issue each of those Tribes while preserving sufficient funds for ANCs, entities which had received none of the Funds for nearly a year and a half. Treasury had to complete this task while also accounting for the D.C. Circuit's decision in *Shawnee Tribe v. Mnuchin*, which found that IHBG data uniquely harmed a handful of Tribes that were assigned an IHBG figure of zero. *See* 984 F.3d 94, 98 (D.C. Cir. 2021). And although the Tribes dispute the degree to which the Court should defer to Treasury's judgment, *see infra* at 18-20, they do not dispute that the arbitrary-and-capricious standard is inherently deferential, *see Prometheus*, 141 S. Ct. at 1158.

The Tribes cannot show that the Revised Methodology is arbitrary and capricious under the relevant standard. The Revised Methodology reasonably utilized enrollment data to provide supplemental payments to tribes for whom IHBG data may have been especially inadequate—all to ensure that, in conjunction with the 2020 distribution, every tribe would have received a payment based on its expenditures. To be sure, the Tribes do not deny that, due to budgetary limitations, Treasury could not simply ensure that each tribe received its "enrollment allocation"

(*i.e.*, what it would have received it Treasury had used enrollment data, rather than IHBG data, from the start). Thus, Treasury had to adopt a methodology that relied on more than just enrollment data to calculate supplemental payments.

Ultimately, Treasury decided to look to each tribe's IHBG-to-enrollment ratio—which estimates the degree to which IHBG data may have proven inadequate for any given tribe—to identify the tribes that would qualify for supplemental payments, and also to help calculate the amount each of those Tribes would receive. *See* Coronavirus Relief Fund Allocations to Tribal Governments, Apr. 30, 2021, at 3 (https://home.treasury.gov/system/files/136/Allocations-to-Tribal-Governments-April-30-2021.pdf) (the "Revised Methodology"). The qualifying tribes with the lowest ratios received a significant portion of their enrollment-allocation, and conversely, the qualifying tribes ranked towards the bottom of the "top 15%" received less significant portions of their enrollment allocations. *See id.* Thus, under this formula, tribes who initially received the minimum population-based payment because they had IHBG figures of zero—*e.g.*, the tribes the D.C. Circuit focused on in *Shawnee*, 984 F.3d at 102—received the lion's share of their enrollment allocations. Unlike those tribes, Prairie Band, which received a population-based payment of $2,456,891 in April of 2020, received a lower percentage of its enrollment allocation. *See* Am. MSJ, at 6, 10, 11 n.5.

Of course the Revised Methodology does not, and could not, allocate funds based on a perfectly accurate accounting of each tribe's relative expenditures—a task no methodology could perform, particularly in light of the timeframe that Congress established for payment. *See* Revised Methodology, at 3 ("[T]he precise funding needs of Tribes cannot be determined with precision"). Indeed, although the Tribes insist that Treasury should have paid each qualifying tribe the same, fixed rate per "uncounted enrollee," there is no indication that each tribe's relative expenditures

correlated perfectly with its enrollment count. To the contrary, the Tribes do not dispute that tribes with high enrollment numbers may achieve economies of scale in delivery, thereby reducing their per-enrollee costs. Other variables may have also impacted any given tribe's relative COVID-related expenditures, beyond simply its raw enrollment figure; *e.g.*, the region within which the tribe resides, the economic industries in which its members primarily participate, and the health initiatives it may have adopted. Thus, certain tribes with significant enrollment numbers may have had relatively minor per-enrollee expenditures, whereas certain tribes with lower enrollment numbers may have had greater per-enrollee expenditures.

Given the number of relevant variables, any methodology, by necessity, must rely on a rough estimate of any given tribe's expenditures. The Revised Methodology must be judged against this backdrop. *See supra* at 7; *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."). Thus, in light of the relevant circumstances, the Revised Methodology survives the deferential arbitrary and capricious inquiry.

In an attempt to show that the Revised Methodology is nonetheless unlawful, the Tribes argue in their Reply that the Revised Methodology (i) does not distribute funds "based on" expenditures, (ii) treats similarly situated tribes differently without sufficient justification, and (iii) is not entitled to significant deference. The Tribes' arguments lack merit.

i. The Revised Methodology issues supplemental payments "based on" expenditures.

The Tribes argue that because the Revised Methodology calculated their supplemental payments, in part, by referring to their IHBG-to-enrollment ratios, the payments were "based on"

those ratios, and thus were not "based on" expenditures, as required by 42 U.S.C. § 801(c)(7). The Tribes, however, improperly isolate a single data point in a larger equation. To determine what portion of the Funds the tribes would receive, Treasury relied on a number of data sources—including employment data, IHBG data, and enrollment data—all of which, when combined, helped to provide a reasonable estimate of the tribes' relative expenditures. Treasury also used IHBG-to-enrollment ratios to estimate the degree to which IHBG data may have proven inadequate for certain tribes. *See supra* at 2-3; Defs.' MSJ at 9-11. Thus, these ratios were used to help ensure that qualifying tribes would receive payments "based on" their expenditures.

But even assuming that the IHBG-to-enrollment ratios do not help ensure that payments are issued "based on" expenditures, the Revised Methodology did not calculate the Tribes' supplemental payments by referring *only* to their IHBG-to-enrollment ratios. The Revised Methodology also relied on the Tribes' enrollment data—an undeniable proxy for their expenditures—and so the Tribes' supplemental payments were "based on" expenditures, even if they were not based *solely* on expenditures. "In the context of statutory interpretation, courts have held that the plain meaning of 'based on' is synonymous with 'arising from' and ordinarily refers to a 'starting point' or a 'foundation.'" *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000) (collecting cases); *see also Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urb. Dev.*, 367 F. App'x 884, 890 (10th Cir. 2010) ("Applying the ordinary definition of 'based on' means the factors form the basis, beginning, or starting point, of the formula."). "[T]he phrase 'based on' . . . does not necessarily require that" an agency decision "rest solely" on the specified variable. *Sierra Club v. Env't Prot. Agency*, 356 F.3d 296, 306 (D.C. Cir. 2004), *amended sub nom. Sierra Club v. E.P.A.*, No. 03-1084, 2004 WL 877850 (D.C. Cir. Apr. 16, 2004). Here, the Revised Methodology used the Tribes' enrollment allocations as the "starting point" or "foundation" for

their supplemental payment awards. *See* Defs.' MSJ, at 9-11. Although the methodology then adjusted the enrollment allocations by referring to the Tribes' IHBG-to-enrollment ratios—to account for practical considerations, such as budgetary limitations, *see supra* at 2-3—at most, this means only that the payments were not based *solely* on the Tribes' relative expenditures. It does not mean the payments were not based on expenditures at all.

Importantly, *any* allocation methodology would have to calculate each tribe's share by considering factors beyond just the "increased expenditures of . . . such Tribal government." 42 U.S.C. § 801(c)(7). For example, each tribe's allocation would have to be determined, in part, by the amount of funds available for distribution, and also by the "increased expenditures" of *other* tribes who also qualify for the relevant funds. Moreover, the Tribes' own proposed alternative methodologies would call for payments "based on" more than just expenditure data. The Tribes claim that Treasury could have made a flat per-enrollee payment to each of the "top 15%" tribes. But Treasury assembled the "top 15%" tribe list by using IHBG-to-enrollment ratios, and so even this solution would issue payments based, in part, on those ratios. The Tribes also claim that Treasury could have issued supplemental payments only to the Tribes. *See* Pls.' Reply, at 14 & n.7. This too would result in an allocation scheme based on more than expenditure data; specifically, Treasury would be issuing funds, in part, "based on" which tribes decided to file suit. Thus, Treasury invariably had to consider factors beyond expenditures when calculating supplemental payments.

To support their theory, the Tribes do not offer a definition of "based on," or otherwise identify any criteria for determining when a payment is sufficiently "based on" increased expenditures. Instead, the Tribes generally assert that "there is a world of difference between *basing* payments on enrollment and merely *using* enrollment as one variable in a larger equation."

Pls.' Reply, at 4 (emphasis in original). But the Tribes fail to explain what, then, the term "based on" means, and what distinguishes it from "using" a variable in a "larger equation." If the Tribes are arguing that a payment is "based on" expenditures if it is based *only* on expenditures, Tribes provide no support for this assertion, and it is belied by applicable case law and their own concessions. *See supra* at 10-11. Alternatively, if the Tribes are suggesting that a payment is "based on" expenditures only if it is *largely driven* by expenditures, then Tribes have identified no criteria for determining when this standard is met. In any event, the payments issued to the Tribes were calculated, in significant part, based on their enrollment data, as well as other proxies for expenditures. *See supra* at 2-3. Again, the Tribes' enrollment allocations served as the starting point, or foundation, for their supplemental payments. *See id*.

The Tribes also resort to hypotheticals, suggesting that "[i]f you order 'the lobster' for dinner at a restaurant, and the waiter serves you lobster bisque, it would be little consolation to you that the soup has lobster in it." Pls.' Reply, at 4-5. But this example omits the key statutory language at issue: "based on." If one asked the server to bring a "lobster-*based*" item, that person would expect to receive any number of dishes containing lobster, including lobster bisque, lobster pasta, or even a lobster roll.

Accordingly, the phrase "based on" in the relevant statutory provision does not suggest that payments thereunder can *only* be calculated by using data that estimates tribes' expenditures. The Revised Methodology issued payments to the Tribes based, in significant part, on their enrollment data—a proxy for expenditures—and so those payments were "based on" expenditures.

ii. The Revised Methodology justifiably varies supplemental payments to qualifying tribes' in light of their respective IHBG-to-enrollment ratios.

In their Reply, the Tribes reiterate their argument that the Revised Methodology is arbitrary and capricious because it does not pay each of the "top 15%" tribes the same amount per "uncounted enrollee," defined as one who is counted in a tribe's enrollment figure but not in its IHBG figure. "[A]n 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, the Tribes do not dispute that, to preserve sufficient funds for ANCs, Treasury could only reallocate a limited pool of funds, and that Treasury could not pay each tribe whose enrollment figure exceeds its IHBG figure a meaningful, fixed amount per "uncounted enrollee." Thus, Treasury had to settle on a method for determining which tribes would receive supplemental payments and in what amount.

Ultimately, the Revised Methodology resolved each issue by referring to each tribe's IHBG-to-enrollment ratio, which reasonably estimates the degree to which, for any given tribe, the IHBG data may have served as an inadequate proxy for COVID-related expenditures. *See* Revised Methodology, at 2. Under this methodology, qualifying tribes with the highest IHBG-to-enrollment ratios—including tribes with IHBG figures of zero—received the greatest share of their enrollment allocations. Qualifying tribes with lower ratios, by contrast, received correspondingly lower shares of their enrollment allocations. Although those tribes also had low IHBG-to-enrollment ratios, they had positive IHBG figures, and thus they initially received more than the minimum population-based payment; *e.g.*, Prairie Band received a population-based payment of $2,456,891 roughly a year ago, compared to Shawnee's initial population-based payment of $100,000. *See* Pls.' Am. MSJ, at 6.

Treasury's approach is consistent with the D.C. Circuit's *Shawnee* decision, which specifically found that the IHBG data was likely "not a suitable proxy for 'increased expenditures'" for "the Shawnee Tribe" and "the twenty-four other tribes *with no IHBG population*." 984 F.3d at 102 (emphasis added). This is sufficient to justify differential treatment among the qualifying tribes. After all, as the Tribes concede, "an agency is generally afforded discretion in line drawing." Pls.' Reply, at 13.

Critically, in their Reply Brief, the Tribes acknowledge that they have no objection to differential treatment based on IHBG-to-enrollment ratios, so long as it benefits them. Specifically, in its opening brief, Treasury noted that if it had to pay each tribe a fixed rate per "uncounted enrollee," the pool of available funds would be diluted, likely resulting in each Plaintiff receiving far less in supplemental payments. *See* Defs.' MSJ, at 17-18. The Tribes, in response, concede that Treasury can limit supplemental payments to the 15% of tribes with the lowest IHBG-to-enrollment ratios, even though this would deny supplemental payments to many tribes whose enrollment figures exceed their IHBG figures. *See* Pls.' Reply, at 13. However, although the Tribes do not oppose Treasury's use of a ranking system based on IHBG-to-enrollment ratios to limit the number of tribes that would qualify for payments, they *do* oppose the use of the same ranking system to then determine how much each qualifying tribe would receive. The Tribes, however, cannot have it both ways.

To rationalize their position, the Tribes argue that "Treasury was well within its rights to limit the supplemental payments to the 15% of Tribes that had been severely undercounted by the IHBG population data," but that there was allegedly no basis for treating the "severely undercounted" Tribes differently. Pls' Reply, at 13. That argument misses the point: Treasury identified the "15% of Tribes that had been severely undercounted" *by referring to the IHBG-to-*

enrollment ratios. Again, those ratios provide a reasonable estimate for the degree to which IHBG data may have been inadequate for any given tribe, thus allowing Treasury to identify the 15% of tribes that were likely most harmed by the IHBG data, and to what degree. If those ratios, and what they represent, justify drawing distinctions among tribes to determine which ones should receive supplemental payments, those same ratios should justify drawing distinctions among the qualifying tribes to determine how much each should receive.

In fact, once Treasury decided to limit supplemental payments to the "top 15%" tribes, it was perfectly sensible for Treasury to then vary payment rates among the "top 15%" tribes. If Treasury had simply paid each of the "top 15%" tribes the same amount per "uncounted enrollee," a tribe just below the 15% cut-off would receive no supplemental payment, whereas the Tribe ranked just one spot higher—the tribe *just above* the 15% cut-off—would receive the same "per enrollee" rate as the tribe at the top of the list. Instead of creating this type of "sharp cliff" at the 15% mark, Treasury reasonably chose to phase out the supplemental payments as it went further down the IHBG-to-enrollment ratio rankings.

The Tribes also make a number of other arguments to show that the Revised Methodology is arbitrary and capricious because it does not pay each qualifying tribe the same rate per "uncounted enrollee." These arguments undermine the Tribes' position: If Treasury cannot treat tribes within the top 15% differently based on IHBG-to-enrollment ratios, then it presumably cannot treat *any* tribes—top 15% or not—differently based on these ratios. Treasury would have to guarantee each tribe the same, fixed rate per uncounted enrollee, diluting the available funds and likely *reducing* the Tribes' population-based allocations. Thus, if the Tribes prevail on this argument, they are likely entitled to no further payments.

In any event, the Tribes' arguments lack merit. First, they contend that the administrative record does not support Treasury's justification for varying payments to qualifying tribes in light of their IHBG-to-enrollment ratios. *See* Pls.' Reply, at 7. The Revised Methodology, however, expressly states that "IHBG formula area population counts may . . . prove insufficient . . . *particularly . . . where [Tribes have] . . . a formula area population of zero*" (*i.e.*, the tribes with the lowest IHBG-to-enrollment ratios). Revised Methodology, at 2 (emphasis added). The Revised Methodology also states that it "determine[s]" where IHBG data may have potentially "undercounted . . . expenditures" by looking to each tribes' "[IHBG-to-enrollment] ratio." Revised Methodology, at 3. This supports Treasury's argument here that IHBG-to-enrollment ratios may reflect the degree to which IHBG data may have served as an inadequate proxy for expenditures.

The Tribes also argue that Treasury "knew" that tribes with the lowest IHBG-to-enrollment ratios were not "underpaid the most" since "Treasury had certified enrollment data for each Tribe and knew what it had paid each Tribe under the original methodology." Pls.' Reply, at 8. The Tribes appear to argue that the tribes with the most "uncounted enrollees" were necessarily "underpaid" the most, and so Treasury should have calculated payments based on "uncounted enrollees" rather than IHBG-to-enrollment ratios. But this assumes, with no support, that all tribes necessarily spent the same amount per enrollee due to the COVID-19 pandemic. As explained above, it is possible that 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.[1] *See supra* at 8-9. Thus, contrary to the Tribes'

[1] To clarify, Treasury does not dispute that enrollment data or IHBG data may, at least for most Tribes, provide a reasonable estimate of each Tribe's relative expenditures for the purpose of crafting an allocation methodology. Treasury, however, disputes the Tribes' assertion that Treasury could only make distributions based on tribal enrollment data, because, in their view, that is the only accurate data source.

assertion, the Revised Methodology is not "demonstrably wrong" in concluding that tribes with the lowest IHBG-to-enrollment ratios were likely harmed the most by Treasury's initial, exclusive reliance on IHBG data.

Finally, the Tribes argue that the D.C. Circuit's *Shawnee* decision does not justify the Revised Methodology's focus on tribe's with IHBG figures of zero, and that, regardless, the Court allegedly found that the reasoning in *Shawnee* applies equally to Prairie Band. But *Shawnee* focused on tribes with an "IHBG formula area population . . . of zero," and noted that these tribes were likely harmed because they "received the minimum payment of $100,000, even though" they had positive enrollment figures and likely incurred meaningful expenses. 984 F.3d at 102. And although the Court cited *Shawnee* when granting Prairie Band's preliminary injunction motion, the Court simply noted that Prairie Band's "legal claim is substantially similar" to Shawnee's claim. ECF No. 74, at 8. Unlike the D.C. Circuit's *Shawnee* decision, the Court did not sift through record evidence and reach any conclusion concerning the magnitude of harm suffered by Prairie Band, much less conclude that Prairie Band was likely harmed to the same degree as the "zero population" tribes. Thus, in crafting a revised methodology that accounted for relevant federal court precedent, Treasury justifiably prioritized the "zero population" tribes.[2]

Accordingly, Treasury justifiably calculated the supplemental payments for qualifying tribes by considering, in part, their respective IHBG-to-enrollment ratios. Treasury was not obligated to pay each qualifying tribe the same amount per "uncounted enrollee."

[2] The Tribes argue that Treasury did not treat all of the "zero population" tribes the same way, since Miccosukee did not receive the same "per uncounted enrollee" rate as Shawnee. But again, although the Revised Methodology prioritized relevant "zero population" tribes, it ultimately calculated their respective payments, in part, by referring to their IHBG-to-enrollment ratios. Miccosukee had a lower enrollment, and thus a higher ratio, and so it was paid at rate that was slightly distinct from Shawnee.

iii. The Revised Methodology is entitled to significant deference.

The Tribes spend a number of pages arguing that Treasury is not entitled to the "extreme degree" of deference typically provided to complex agency decisions that draw upon an agency's unique expertise. Pls.' Reply, at 10-12. Ultimately, little hinges on this issue. Even if the Court does not show "extreme deference" towards the Revised Methodology, the Tribes do not dispute that this methodology is still entitled to meaningful deference. The Tribes do not deny that the arbitrary-and-capricious standard is inherently deferential towards the government. *See supra* at 7. Nor do they deny that 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). Here, of course, the CARES Act "entrust[ed]" Treasury with a novel mission (estimate relative Tribal expenditures and construct an appropriate allocation methodology on a quick timeline) and it provided "only" a "grandly general guide[]" (payments should be "based on" expenditures).

Further, the Revised Methodology is especially entitled to deference given the complex task it had to perform. *See supra* at 7-9. The D.C. Circuit has made clear that "[a]gency determinations based upon highly complex and technical matters are entitled to great deference." *Domestic Sec., Inc. v. S.E.C.*, 333 F.3d 239, 248 (D.C. Cir. 2003). Here, Treasury had to promptly estimate the degree to which IHBG data may have proven inadequate for certain Tribes and craft a corrective measure to address this potential issue, all while preserving sufficient funds for ANCs. This alone justifies meaningful deference towards the Revised Methodology.[3]

[3] The Court may defer to the Revised Methodology, and the "highly complex" and "technical matters" involved, even if the methodology did not draw on Treasury's unique expertise. In *Domestic Sec.*, the D.C. Circuit applied "great deference" to an SEC decision concerning a

To show that the Court should not defer to the Revised Methodology, the Tribes note that the D.C. Circuit and this Court held that the Plaintiffs were likely to prevail on the merits of their claims against the original methodology. *See* Pls.' Reply, at 12. But it is unclear how those decisions rendered Treasury's task in crafting a revised methodology less complex. Although they identified a potential flaw in the original methodology—that IHBG data is likely inadequate for certain tribes—they did not chart a clear course Treasury must or should follow to address this potential flaw while accounting for other considerations (*e.g.*, the need to retain sufficient funds for ANCs). The Tribes then argue that "the fact that Treasury voluntarily adopted the revised methodology justifies less deference, as it appears to have been an attempt . . . to short circuit meritorious APA claims on mootness grounds." Pls.' Reply, at 12. True, Treasury did voluntarily revise its methodology in response to a federal court decision; but again, it is unclear why this means the Revised Methodology is not entitled to deference, and the Tribes unsurprisingly cite to no case to support this argument.

Finally, the Tribes argue that Treasury did not have to make any complex policy judgment, or undertake any complex data analysis, because the "additional Tribal consultations . . . reflected a consensus . . . in favor of 'using self-certified Tribal enrollment data in the reallocation formula.'" Pls.' Reply, at 12. But Treasury was not spared from having to render complex policy judgments, or conduct data complex data analyses, simply because a group of interested parties pushed for a particular solution. Treasury still had to assess this proposal and others, and select one that properly accounted for the varying interests at stake. Regardless, the alleged "consensus" the Tribes

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complex and technical question: whether a piece of software was "technological[ly] feasib[le]" and sufficiently "[in]expensive." *Id.* at 249. Importantly, there was no indication that this inquiry within the SEC's unique "expertise." To the contrary, the SEC reached it decision by relying on public feedback, including comments indicating that certain entities "expressed an interest in" using the software, thus suggesting that the software was indeed "viable." *Id.*

reference concerned only the type of data Treasury should use—"Tribal enrollment data"—but it did not identify *how* Treasury should use that data to allocate the limited funds available for re-distribution. *See* Pls.' Reply, at 12. As explained above, Treasury could not simply ensure that each tribe would receive its "enrollment allocation," and so Treasury had to develop an alternative formula for utilizing enrollment data to decide who would receive supplemental payments and in what amount—an inherently complex task. *See supra* at 2-3, 7-9.

Accordingly, in crafting a Revised Methodology, Treasury had to make sensitive policy judgments, and conduct a complex data analysis, under challenging circumstances. The Court should show the Revised Methodology a significant degree of deference.

II. Plaintiffs' claims relating solely to the original methodology are moot.

Although the Tribes assert that their "challenge to the original methodology is not moot," they argue only that they may pursue a claim "against the original methodology *(as modified by the revised methodology)*." Pls.' Reply, at 15 (emphasis added). Treasury never argued that *that* claim is moot. Treasury argued only that Plaintiffs' claims against the original methodology, in isolation, are moot since the Court could not award any relief for that claim beyond ordering Treasury to do what it has already done voluntarily: adopt a revised methodology. *See* Defs.' MSJ, at 11-13; See PI Order (June 23, 2021), at 5 ("Prairie Band fails to explain how its challenge to Treasury's original allocation method—the 2020 Distribution—is not now moot."). Plaintiffs do not appear to dispute that argument, and so the Court should enter judgment against the Plaintiffs on their claims against the original methodology.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 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.

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