[ORAL ARGUMENT NOT SCHEDULED]
Nos. 22-5089, 22-5090

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRAIRIE BAND POTAWATOMI NATION AND MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiffs-Appellants,

SHAWNEE TRIBE,

Plaintiff-Appellee,

v.

JANET L. YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF THE TREASURY; DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:20-cv-01999

BRIEF FOR APPELLANTS PRAIRIE BAND POTAWATOMI NATION AND MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

I. Parties Appearing Below

The parties below appeared before the United States District Court:

1. Shawnee Tribe, Plaintiff in Case No. 1:20-cv-01999-APM.

2. Miccosukee Tribe of Indians of Florida, Plaintiff in Case No. 1:20-cv-23182-KMV, transferred to 1:20-cv-027920-APM, and then consolidated with 1:20-cv-01999-APM.

3. Prairie Band Potawatomi Nation, Plaintiff in Case No. 1:21-cv-00012-APM, consolidated with 1:20-cv-01999-APM.

4. Steven T. Mnuchin, in his official capacity as then Secretary of the United States Department of the Treasury, Defendant in Case No. 1:21-cv-00012-APM and 1:20-cv-01999-APM.

5. United States Department of the Treasury, Defendant in Case No. 1:20-cv-23182-KMV and 1:20-cv-01999-APM.

5. David Bernhardt, in his official capacity as Secretary of the United States Department of the Interior, Defendant in Case No. 1:20-cv-01999-APM.

6. United States Department of the Interior, Defendant in Case No. 1:20-cv-01999-APM.

7. United States of America, Defendant in Case No. 1:20-cv-23182-KMV and 1:20-cv-01999-APM.

8. Janet L. Yellen, in her official capacity as then Secretary of the United States Department of the Treasury, Defendant in Case No. 1:21-cv-00012-APM and 1:20-cv-01999-APM.

No others appeared as parties or *amici curiae*.

II. Parties and Amici Appearing in this Court

The parties appearing before this Court are as follows:

1. Miccosukee Tribe of Indians of Florida ("Miccosukee"), Plaintiff-Appellant in Case No. 22-5090, which has been consolidated with Case No. 22-5089.
2. Prairie Band Potawatomi Nation ("Prairie Band"), Plaintiff-Appellant in Case No. 22-5089.
3. Janet L. Yellen, in her official capacity as Secretary of the United States Department of the Treasury, Defendant-Appellee in Case No. 22-5089.
4. United States Department of the Treasury, Defendant-Appellee in Case No. 22-5089.
5. Debra A. Haaland, in her official capacity as Secretary of the United States Department of the Interior, Defendant-Appellee in Case No. 22-5089.
6. United States Department of the Interior, Defendant-Appellee in Case No. 22-5089.

7. United States of America, Defendant-Appellee in Case No. 22-5089.

The Plaintiffs-Appellants are not aware of any other party that intends to appear as a party or *amicus curiae*.

III. Ruling Under Review

The ruling under review is United States District Court Judge Amit Mehta's January 28, 2022 Order ("District Court Order") denying Plaintiffs-Appellants' Motion for Summary Judgement; denying Plaintiffs-Appellants' Miccosukee and Prairie Band Amended Motion for Summary Judgement; and granting Defendants' Cross-Motion for Summary Judgment. *See Shawnee v. Yellen*, No. 20-cv-1999 (APM), 2022 WL 266710, --- F.Supp.3d ---- (D.D.C. January 28, 2022).

IV. Related Cases

On June 8, 2020, Plaintiff-Appellant Prairie Band commenced an action in the United States District Court for the District of Columbia, where it was assigned Case No. 1:20-cv-01491. After the District Court denied Prairie Band's motion for a preliminary injunction, that case was discontinued without prejudice but later refiled on January 2, 2021, under Case No. 1:21-cv-00012-APM, after Shawnee's appeal to this Court (Case No. 20-5171) was successful. Prairie Band's refiled case was then consolidated into 1:20-cv-01999-APM.

On June 18, 2020, Shawnee filed a virtually identical case in the United States District Court for the Northern District of Oklahoma where it was assigned Case No. 20-cv-00290-JED-FHM. On July 28, 2020, that case was transferred in its entirety to the United States District Court for the District of Columbia, where it was assigned Case No. 20-cv-01999-APM. Shawnee's motion for preliminary relief was also denied by the Court below (*Shawnee Tribe v. Mnuchin*, 480 F.Supp.3d 230 (D.D.C. Aug. 19, 2020)), and the case was subsequently dismissed. *Shawnee Tribe v. Mnuchin*, No. 20-CV-1999 (APM), 2020 WL 5440552, at *4 (D.D.C. Sept. 10, 2020).

On July 31, 2020, Miccosukee commenced an action in the Southern District of Florida, which was assigned Case No. 1:20-cv-23182-KMV. The case was transferred in its entirety to the United States District Court for the District of Columbia, Case No. 1:20-cv-02792-APM (D.D.C.) and then consolidated with Case No. 20-cv-01999-APM (D.D.C.).

Shawnee took an appeal in this case to this Court, Case No. 20-5286, based on the District Court's denial of its motion for preliminary injunction. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 96 (D.C. Cir. 2021). Miccosukee and Prairie Band participated as *amici curiae* in this Court.

Counsel are not aware of any other related cases pending before this Court.

RESPECTFULLY SUBMITTED this 9 day of May, 2022.

MICCOSUKEE TRIBE	PRAIRIE BAND POTAWATOMI NATION
/s/ Daniel G. Jarcho DANIEL G. JARCHO GEORGE B. ABNEY JEAN E. RICHMANN Alston & Bird LLP The Atlantic Building 950 F Street, N.W. Washington, D.C. 20004 202-239-3254	*/s/ Carol E. Heckman* CAROL E. HECKMAN JAMES P. BLENK Lippes Mathias LLP 50 Fountain Plaza, Suite 1700 Buffalo, New York 14202 716-853-5100 MICHAEL G. ROSSETTI Lippes Mathias LLP 1900 K Street NW Suite 730 Washington, DC 20006 202-888-7610

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GLOSSARY

Reference to the following terms in this brief shall have the following meanings:

1. "ANC(s)" means Alaska Native Corporation(s).
2. "CARES Act" means Coronavirus Aid, Relief and Economic Security Act. Public Law 116-136.
3. "HUD" means the Department of Housing and Urban Development.
4. "IHBG Metric" means the Census-derived population metric maintained by the Department of Housing and Urban Development as a component for the calculation of IHBG Program grants.
5. "IHBG Program" means the Indian Housing Block Grant Program.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 because this case arises under the laws of the United States. The District Court also had jurisdiction over this case pursuant to 28 U.S.C. § 1362 because this case was brought by Indian tribes recognized the Secretary of the Interior for claims under the laws of the United States.

The District Court entered its final judgment on January 28, 2022. The District Court Order appears in the Joint Appendix ("JA") at 367-368. Plaintiff-Appellant Prairie Band Potawatomi Nation ("Prairie Band") filed a timely notice of appeal on March 25, 2022. (JA.369.) Plaintiff-Appellant The Miccosukee Tribe of Indians of Florida ("Miccosukee") filed a timely notice of appeal on March 26, 2022. (JA.372.)

This appeal is from a final judgment (JA.334-669), disposing of all of the parties' claims. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

1. Whether Treasury's distribution of CARES Act funds to Tribal Governments was arbitrary and capricious because it rested on a formula that had no rational connection to the statutory directive to distribute funds based on anticipated increased expenditures due to COVID-19?

STATEMENT OF THE CASE

I. Background

A. The Coronavirus Aid, Relief and Economic Security Act.

Title V of the CARES Act (42 U.S.C. § 301 *et seq.*) appropriated $150 billion for "payments to States, Tribal governments, and units of local government" in connection with the COVID-19 pandemic. 42 U.S.C. § 801(a)(1). Of the $150 billion, Congress set aside $8 billion for payments to Tribal governments ("Title V funds"). *Id*. § 801(a)(2)(B).

Central to this APA challenge, Congress directed the Secretary of the Treasury ("Treasury") to pay Title V funds to each Tribal government "based on increased expenditures of each such Tribal government … relative to aggregate expenditures in fiscal year 2019 by the Tribal government." 42 U.S.C. § 801(c)(7). This directive was intended to offset expenditures that would be "due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)." 42 U.S.C. § 801(d)(1). While Treasury was directed to prospectively estimate the amount of "increased expenditures," Congress contemplated that such expenditures were specifically quantifiable (42 U.S.C. § 801(d)) and subject to recoupment if awarded in excess of the amount of "increased expenditures" experienced by a Tribal government (§ 801(f)). In sum, Congress directed Treasury to model and prepay actual expenditures.

In preparing the first distribution of Title V funds (the "2020 Distribution"), Treasury adopted three criteria to anticipate expenditures by Tribal governments, including "Tribal population," on which basis 60% of Title V funds would be distributed (the "Population Award").[1] (JA.752.) In Treasury's view, "[t]ribal population [was] expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs." (*Id.*) This correlation was not disputed by the parties, by this Court, or by the District Court.

To facilitate the calculation of the Population Award, Treasury solicited enrollment numbers from Tribal governments, and Prairie Band and Miccosukee timely notified Treasury that they had 4,561 and 605 members, respectively. (JA.233, 255, 296.) These enrollment figures included all members of Tribal governments, including members who live off-reservation.

Treasury then inexplicably abandoned tribal enrollment in favor of an artificial metric (the "IHBG Metric") maintained by the Department of Housing and Urban Development, for use in the Indian Housing Block Grant Program ("IHBG Program"). (JA.748, 751.) The IHBG Metric is designed to approximate the number

[1]Treasury awarded twenty percent (20%) of Title V funds on the basis of past expenditures by Tribal governments and the remaining twenty percent (20%) on the basis of a Tribal government's payroll.

of American Indian or Alaskan Native ("AIAN") persons living in a designated "formula area" (JA. 752). *See Shawnee Tribe v. Mnuchin* ("*Shawnee I*"), 984 F.3d 94, 96 (D.C. Cir. 2021) (discussing the IHBG Metric).

The IHBG Metric was affected by two (2) methodological flaws that rendered it defective as a proxy for tribal population for the purpose of projecting increased COVID-19 expenditures.[2] (JA.752-53.) *First*, inasmuch as the IHBG Program is concerned with housing, the IHBG Metric ignores all off-reservation members of the Tribal government, no matter how dependent those persons are on their Tribal government for services, like medical care during a global pandemic. (*See id.*) Thus, whatever its value for assessing housing needs, the IHBG Metric was the wrong measure of population for assessing a Tribal government's increased expenditures based on its broader welfare responsibility to its constituents.

Second, for some Tribal governments, including Shawnee Tribe ("Shawnee") and Miccosukee, the foregoing methodological flaws, combined with historical circumstances faced by the tribes, resulted in an IHBG Metric of zero members for the Tribal governments (the "Zero Tribes"). (JA.418.) That is, for the purpose of the IHBG Metric, these Tribal governments did not exist, even though they in fact

[2] Treasury later conceded this flaw when it issued its Revised Methodology on April 30, 2021. (JA.1395.)

served the interests of actual members, with substantial governmental and proprietary operations.

Aside from Treasury's poor choice of the IHBG Metric, the Population Award (JA.751-53) was quite simple. Treasury chose a pro-rata approach, so that Tribal governments would receive a certain amount per IHBG Metric "person,"[3] subject to one adjustment. (JA.753.)

For Tribal governments with an IHBG Metric population of less than thirty-seven (37), including the Zero Tribes, Treasury awarded a floor award of $100,000. (JA.753.) Although Treasury was ignorant of the circumstances affecting the Zero Tribes, Treasury provided a sound justification for the floor itself. (*Id.*) Treasury explained that smaller Tribal governments have greater costs per member than larger tribes:

> The decision to apply a minimum payment to such Indian Tribes reflects the greater relative significance that variations in population would have at the low end of the range and the greater marginal costs that small Indian Tribes have in providing services to their people. The decision to apply a minimum payment to such Indian Tribes reflects the greater relative

[3] The IHBG Metric is further complicated because it tracks and distinguishes single-race AIAN and all AIAN persons. (JA.1398) A Tribal government's Population Award was based on the figure that was greatest, relative to other Tribal governments. (JA.753.) As a result, it is the Plaintiffs-Appellants' understanding that there were likely two *per capita* amounts, with one assigned to Tribal governments with proportionately greater single-race AIAN population in the government's formula area, and likewise for Tribal governments that were relatively larger by multi-race AIAN population. (*See id.*)

> significance that variations in population would have at the low end of the range and the greater marginal costs that small Indian Tribes have in providing services to their people.

(*Id*.) As Treasury rightly observed, *ceteris paribus*, an 11 member tribe spends more *per capita* than a 111 member tribe, which spends more *per capita* than a 1,111 member tribe. (*See id.*)

In sum, aside from the accommodation for what Treasury perceived to be the smallest tribes, the touchstone of the Population Award in the 2020 Distribution was a *per capita* analysis based on the reasoning that each additional tribal member correlated to the same amount of increased pandemic expenditure regardless of tribe. (*See* JA.751-52.)

B. Treasury's Reliance on the IHBG Metric Resulted in a Significant Undercount of the populations of Prairie Band, Shawnee and Miccosukee.

By using Prairie Band's IHBG Metric value of 747, Treasury undercounted Prairie Band's tribal enrollment by 3,814 members, or eighty-three percent (83%) of its population. (JA.292, 421.) Prairie Band's IHBG Metric corresponded to a Population Award of $2,456,891 in the 2020 Distribution. (JA. 292.)

And by assigning a population of zero and awarding the floor award of $100,000, Treasury ignored 605 Miccosukee citizens and 3,021 Shawnee citizens. (JA. 233-34, 418, 421.)

Treasury distributed the Population Awards ($4.8 billion in total) in or about May of 2020. (JA.754-56.) Treasury initially held back $3.2 billion to be awarded on employment and historical expenditure data. (JA.748.)

C. Prior Procedural History

i. The Parties litigate the Population Award

After the Population Award was announced, and while Treasury was still in possession of approximately $3.2 billion of Title V funds, Prairie Band filed a Complaint challenging Treasury's use of the IHBG Metric instead of tribal enrollment as the appropriate measure of tribal population. *Potawatomi Nation v. Mnuchin*, Case No. 1:20-cv-01491-APM (D.D.C.). Prairie Band brought an immediate motion to enjoin the release of the balance of Title V funds. The District Court denied Prairie Band's motion for preliminary injunction on the basis that, *inter alia*, Treasury's allocation methodology did not present a reviewable question under the APA, and thus, there was insufficient merit in the underlying action to warrant a preliminary injunction. *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-CV-1491 (APM), 2020 WL 3402298, at *1 (D.D.C. June 11, 2020).

Prairie Band ultimately withdrew its complaint without prejudice and voluntarily dismissed an appeal to this Court (Case No. 20-5171). Near in time, Shawnee and then Miccosukee commenced suits against Treasury, with substantially similar allegations. (JA.29-47.) Shawnee's Complaint was dismissed

by the District Court on the same reviewability issue. *Shawnee Tribe v. Mnuchin*, No. 20-CV-1999 (APM), 2020 WL 5440552, at *2 (D.D.C. Sept. 10, 2020). Shawnee thereafter pursued an appeal to this Court.

In the appeal captioned *Shawnee v. Mnuchin* ("*Shawnee I*"), this Court held that "the IHBG data is not a suitable proxy for 'increased expenditures,'" especially with respect to tribes who were assigned an IHBG population of zero. *Shawnee I*, 984 F.3d at 102. This Court directed that a preliminary injunction be entered in Shawnee's favor. *Id*.

Prairie Band refiled its complaint on January 4, 2021. (JA.94-121.) After consolidating all three lawsuits on remand, the District Court issued preliminary injunctions enjoining Treasury from disbursing certain Title V funds on the basis that Miccosukee and Prairie Band were both likely to succeed on the merits of their challenges to the 2020 Distribution. (JA.215.) Prairie Band's injunction was granted in the amount of approximately $7.6 million[4] and Miccosukee's was granted

[4]The amount sought and obtained by Prairie Band Potawatomi was based on a comparative analysis of allocation methodologies using the IHBG Metric versus enrollment. (JA.1061-91.) The analysis was performed by independent scholars at *The Harvard Project on American Indian Economic Development*, who noted that Prairie Band Potawatomi was among the Tribal governments most negatively impacted by Treasury's selection of the IHBG Metric. *See* Randall K.Q. Akee, Eric C. Henson, Miriam R. Jorgenson & Joseph P. Kalt, Policy Brief No. 2: Dissecting the US Treasury Department's Round 1 Allocations of CARES Act COVID-19 Relief Funding for Tribal Governments, p. 10 (May 18, 2020) (Table 4). This table appears at JA.1070.

in the amount of $2 million for a total amount restrained of $9,647,063. (JA.215.) With reference to Prairie Band's complaint in particular, the District Court held that Prairie Band's claims were on a par with the Zero Tribes (*id*.):

> [B]ecause Prairie Band Potawatomi Nation claims that Treasury's original methodology vastly undercounted its population, see Prairie Band Potawatomi Nation's First Am. Compl., ECF No. 67, ¶ 12, its legal claim is substantially similar, and thus warrants the same injunctive relief.

(JA.220.)

ii. The Chehalis Litigation regarding allocations for ANCs

Although most of the Title V funds were paid long before remand after *Shawnee I*, Treasury remained in possession of funds that had been allocated to Alaska Native Corporations (ANCs). (JA.213, 1396.) The ANC funds had not been paid yet because the ANCs' entitlement to Title V funds was subject to ongoing litigation. (*Id*.) In June of 2021, the Supreme Court ultimately held that the ANCs were entitled to funds. *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. ---, 141 S. Ct. 2434, 2452 (2021).

But before the Supreme Court decided the matter, Prairie Band and Miccosukee were able to obtain injunctions restraining amounts sufficient to pay them *per capita* payments, as though the Tribal government's enrollment had been considered in the Population Award of the 2020 Distribution. (JA.215, 220.)

D. Treasury Created the Revised Methodology that Reallocated Funds to Tribal Governments that were prejudiced by Treasury's use of the IHBG Metric Procedural History.

i. The Revised Methodology

Following *Shawnee I*, Treasury set out to devise a new methodology to correct for Treasury's error in selecting the IHBG Metric ("Revised Methodology"). As part of its process, Treasury hosted three virtual meetings with Tribal leaders and sought written comments from them as well. (JA.1395) During these meetings, Treasury expressed a commitment to "working to make sure that we can fix past mistakes of previous formulas and allocations," specifically the "population-based allocation." (JA.768-69, 788.) To that end, Treasury sought from Tribal leaders "thoughts about the population-based allocations made in May 2020," as well as their thoughts regarding "using enrollment as the basis for a reallocation." (JA.772.) The meetings and comments reflected a consensus among Tribal leaders in favor of "using self-certified Tribal enrollment data in the reallocation formula." (JA.1387.) Treasury solicited updated enrollment data from Tribal governments. (JA.1396.)

In order to fund a 2021 Distribution to beneficiaries of Treasury's Revised Methodology, Treasury reallocated approximately $85 million from ANCs.[5]

[5] The precise amount reallocated from ANCs was never disclosed by Treasury. The $85 million amount is based on a comparison of records in this administrative proceeding, compared to amounts referenced in the *Chehalis* litigation. *Compare* JA.1396 (referencing $450 million remaining for ANCs) *with* JA.214 (referencing approximately $535 of remaining funds at issue)

To distribute these funds, Treasury ranked the Tribal governments based on the percentage by which their populations were undercounted by the use of the flawed IHBG Metric ("Ratio-Rank"). (JA.1388 (Step 3).)

In the Ratio-Rank, Treasury applied an additional, unexplained adjustment to the Zero Tribes, which resulted in larger Zero Tribes being ranked higher than smaller Zero Tribes, even though both tribes were undercounted by the same percentage. (JA.1388 (note 4).) The basis for this additional adjustment was never explained in the administrative record, and Treasury's methodology directly conflicted with the agency's rationale for the floor award, which recognized lower marginal costs for larger tribes than for smaller tribes. (JA.756.)

Tribes were then segregated. The eighty-five percent (85%) of Tribal governments that were *least* undercounted (many of which were overcounted) by Ratio-Rank were then lopped off and ineligible for 2021 Distribution. (JA.1398 (Step 4.) Separate and apart from the Ratio-Rank, Treasury modeled an alternative to the Population Award that used enrollment, rather than the IHBG Metric, to make a pro rata calculation. This concept is referred to as the "Shortfall Calculation." (JA.1388 (Steps 1-2).)

Finally, Treasury abandoned a consistent *per capita* approach in favor of an over-engineered sliding scale. Rather than simply using the Ratio-Rank to establish a cut-off, Treasury used the Ratio-Rank to establish a linearly declining percentage of payment (the Phaseout). (JA.1388.89.) The Revised Methodology then allocated funds on a declining basis to the remaining fifteen percent (15%) of Tribal Governments. Treasury explained:

> For each Tribe, Treasury then subtracted the CRF IHBG-based allocation from the enrollment-based allocation and multiplied that amount by a linearly declining share such that the Tribe with the highest population-to-enrollment ratio received 100% of the difference between the amount it would have received under the enrollment-based allocation and the IHBG formula area population-based allocation [(the "Shortfall Calculation")], and Tribes with population-to-enrollment ratios closest to the 85th percentile receive only a small fraction of the difference between the Tribe's enrollment based allocation and CRF formula area population based allocation.

(JA.1399.) In essence, Tribal governments would be entitled to an amount consisting of the Shortfall Calculation *times* the Ratio-Rank (from 88/88 at the 100th percentile to 1/88 at the 85th percentile). (JA.1388-89.)

The Phaseout all but ignored the most immediate impact of Treasury's flawed choice of the IHBG Metric: Treasury's failure to make *per capita* payments to Tribal governments on behalf of their members, which was captured, in its entirety, in the Shortfall Calculation.

ii. The Phaseout created disparities in *per capita* payments to undercounted Tribal governments

The Phaseout caused the large Zero Tribes to receive more money, on an absolute *and per capita* basis, than smaller Zero Tribes. And the Zero Tribes received far more on a *per capita* basis than many severely undercounted tribes would receive. These discrepancies are evident in the 2021 Distribution to the litigants in the case:

	2021 Distribution	Certified Enrollment	IHBG Pop.	# of Members not Counted by IHBG	2021 Dist. per Member not Counted
Shawnee	$ 5,202,604	3,021	0	3,021	$1,721
Miccosukee	$ 825,196	605	0	605	$1,363
Prairie Band	$ 1,604,853[6]	4,562	747	3,815	$420

(JA.302, 332; Pls.' Mot. Summ. J., Ex. D, No. 20-CV-1999 (D.D.C.), ECF No. 88-4[7], Pls. Reply in Supp. Of Mot for Summ. J., District Court ECF No. 93.) As Shawnee was far from the largest Zero Tribe by Ratio-Rank, the discrepancies are likely even more stark outside the scope of the litigants in the underlying case.[8]

[6] This value increased, from $864,141, since the Plaintiff-Appellants briefed their Motion for Summary Judgment, due to a supplemental payment from Treasury to Prairie Band resulting from a calculation error associated with the 2021 Distribution but not related to the issues on appeal.

[7] Subsequent citation to the District Court's docket in this case (20-CV-1999) will to "District Court ECF No. ___."

[8] The administrative record compiled by Treasury did not include a schedule of all payments made under the Revised Methodology. And despite multiple requests by Plaintiffs-Appellants, Treasury refused to disclose the amounts of payments to any

And, even after accounting for the total funds received across both the 2020 and the 2021 distributions, the discrepancies remain stark. For example, Shawnee (which was assigned an IHBG population count of zero) received an award of $5,200,000 pursuant to the 2021 reallocation and the minimum award of $100,000 pursuant to the 2020 allocation—around $5.3 million in total for its 3,021 members. (JA.302, 332, 343.) By contrast, Prairie Band, which had been assigned an IHBG population count of 747, received around $3.3 million in total funding for 4,561 enrolled members across the two distributions. (JA.302, 332, 343; *see* note 7, *supra*.) All told, Shawnee received around forty percent (40%) more Title V funds than Prairie Band for an enrolled population that is one-third lower.

II. Procedural History

On May 19 and May 21, 2021, respectively, Plaintiffs Miccosukee and Prairie Band filed second amended complaints challenging the 2021 Distribution. (JA.228, 289.) When presented with the merits, the District Court declined to set aside Treasury's Revised Methodology and granted summary judgment to Treasury.

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other Tribal governments. Another Zero Tribe, the Delaware Tribe of Indians (Eastern), had an enrolled population of in excess of 11,000 (JA.421), and likely received a 2021 Distribution in the range of $18-$23 million and a net distribution that may have exceeded $2,000 per member.

(JA.334-366.) Treasury remains in possession of $6,042,210 that is subject to a preliminary injunction granted to Prairie Band and Miccosukee.[9]

SUMMARY OF ARGUMENT

The instant appeal solely addresses Treasury's decision to implement the Phaseout, which caused gross disparities in *per capita* allocations among the eighty-fifth percentile of Tribal governments determined to have a "need for funding." (JA.1395) According to Treasury's counsel and the District Court, this inequitable distribution was justified because some Tribal governments were "worse off" than other Tribal governments. (JA.365.) But this perceived injury was entirely a function of uncounted tribal members, which was accounted for in the Shortfall Calculation. (JA.1388 (Steps 1-2).) The Phaseout (JA.1388 (Step 5)) does not correct any harmful effect of the 2020 Distribution that is related to "increased expenditures." (*See* Point I-A, *infra*.)

In addition to impermissibly deviating from Treasury's statutory mandate, and in violation of principles of reasoned decision-making, the Phaseout treated similarly situated tribes differently, without a rational basis (Point I-C, *infra*).

The District Court failed to follow this Court's guidance from *Shawnee I*, where this Court held that Treasury's "discretion is limited to 'determin[ing]' a

[9] It is Plaintiffs-Appellants' understanding that Treasury remains in possession of the original amount enjoined ($9,647,063) less the 2021 Distributions to Prairie Band and Miccosukee. (JA.215.)

method for allocating funds that is 'based on increased expenditures.'" *Id*., 984 F.3d at 100. Instead, the District Court granted so much discretion to Treasury that "increased expenditures" was rendered meaningless. (Point I-C-i, *infra*.) In affirming the Phaseout, the District Court accepted a series of justifications offered by Treasury, but these were not supported by the case law, were illogical and were absent from the administrative record. (Point I-C-ii, *infra*.)

Finally, Plaintiffs-Appellants ask this Court to fashion an appropriate remedy for the Plaintiffs-Appellants or to remand this case for further proceedings in the District Court. (Point II, *infra*.)

STANDARD OF REVIEW

When considering challenges to agency action under the APA, "the district judge sits as an appellate tribunal. This Court reviews questions of law in the APA context *de novo*. *Holland v. Nat'l Mining Ass'n,* 309 F.3d 808, 814 (D.C. Cir. 2002). "The entire case on review is a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (quotations and citations omitted). In a case like this one, in which the District Court reviewed an agency action under the APA, this Court will "review the administrative action directly, according no particular deference to the judgment of the District Court." *Holland*, 309 F.3d at 814.

ARGUMENT

POINT I: TREASURY'S REVISED METHODOLOGY WAS ARBITRARY AND CAPRICIOUS.

A. The Allocation of Awards for the 2021 Distribution Has No Coherent Connection to Increased Expenditures Due to Covid.

When an agency is charged with administering a statute, the agency's "power to act" and "how" it acts are "authoritatively prescribed by Congress." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). Here, as the Court held in *Shawnee I*, Treasury's discretion under Title V of the CARES Act "is limited to 'determining' a method for allocating funds that is 'based on increased expenditures'" due to COVID. *Shawnee I*, 984 F.3d at 100, *quoting* 42 U.S.C. § 801(c)(7). "[H]owever the Secretary chooses to exercise his discretion" in allocating funds to Tribal governments under the statute, [s]he "***must***" do so based on a methodology that is "based on increased expenditures" caused by the pandemic. *Id.* (emphasis added).

For the Population Award of the 2020 Distribution, Treasury tried, albeit with grave missteps, to use Tribal population as a proxy for increased spending due to COVID. *See* JA.1395 ("In its original decision, Treasury selected IHBG formula area population as the relevant measure of population…"). Treasury's allocation of funds for the 2021 Distribution, however, is disconnected from both the statutory objective (increased expenditures) and the agency's own original premise that a pro-rata allocation per tribal member is the proper mechanism for meeting that objective.

The primary beneficences of Treasury's Phaseout are the twenty-five (25) Zero Tribes, which had the highest Ratio-Rank. *See* Ex. A (AR-08) at 3. (But even these Tribal governments were treated arbitrarily and unequally based on their total population within the group of Zero Tribes (JA.1388-89).) The Zero Tribes achieved this status not because of their projected COVID expenditures based on population, but because Treasury has, without contemporaneous explanation, deemed these Tribal governments to be those most significantly affected by the agency's *qualitative* mistake in the 2020 Distribution. But this qualitative mistake has no relationship to "increased expenditures." 42 U.S.C. § 801(c)(7). Treasury's *quantitative* mistake, *i.e.*, the one reasonable expected to correspond with expenditures, is entirely captured by Treasury's Shortfall Calculation.

Like all agencies, Treasury must operate within the confines of a statute when implementing it. *City of Arlington*, 569 U.S. at 297. By looking for harms entirely unrelated to "increased expenditures," Treasury exceeded its statutory discretion, and the Revised Methodology should therefore be vacated. *See New Jersey v. E.P.A.*, 517 F.3d 574, 583 (D.C. Cir. 2008) (an agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit is discretion.") (quotation marks and citation omitted).

B. Similarly Situated Tribes Were Not Treated the Same for Purposes of Allocating the Awards for the 2021 Distribution.

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). 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 factual or legal basis for distinguishing either Prairie Band or Miccosukee from other tribes that received larger distributions of CARES Act funds per uncounted member. While Treasury has not disclosed any individual awards assigned under the 2021 Distribution other than the awards to the named Plaintiffs, the information in this case alone reveals gross disparities among similarly situated parties. (JA.302, 332; District Court Docket ECF Nos. 84-4, 93.)

In the 2021 distribution, Plaintiff Shawnee received an award of $5,200,000 for its 3,021 enrolled members after having received the minimum $100,000 payment as part of the 2020 Distribution. (*See id.*) Prairie Band, on the other hand, despite having 4,561 enrolled tribal members and an IHBG population of 747,

received just $3.3 million in total funding. (*See id.*) Whether from an IHBG Metric or enrollment approach, there is no rational basis for allocating 40% *more* funds to Shawnee for an enrolled population that is one-third *lower*.

Likewise, between Shawnee and Miccosukee Tribe, there was no reason to award fifteen percent (15%) less *per capita* to Miccosukee Tribe, when Miccosukee Tribe is smaller than Shawnee. Indeed, this approach directly conflicts with Treasury's rationale for the $100,000 floor award in the 2020 Distribution. (JA.753.)

Put another way, Shawnee received approximately $1,721 per uncounted tribal member in the 2021 Distribution while Miccosukee received only $1,355, even though both tribes had an IHBG population of zero. And Prairie Band received $420 per uncounted member, despite an eighty-three percent (83%) undercount of its substantial population.

As Treasury treated Miccosukee and Prairie Band differently from similarly situated Tribes without rational explanation, the District Court should have vacated the Revised Methodology. *See New Orleans Channel 20, Inc. v. F.C.C.*, 830 F.2d 361, 366 (D.C. Cir. 1987) (affirming standard that agencies must treat similarly situated parties alike); *accord Garrett v. F.C.C.*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (an agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways.").

C. The District Court Granted Too Much Deference to Treasury

The fundamental truth of the Revised Methodology is that it yielded *per capita* 2021 Distributions of $1,756 for Shawnee Tribe (uncounted pop. 3,021), $1,355 for Miccosukee Tribe (uncounted pop. 605) and $420 (uncounted pop. 3,815) for Prairie Band, after the 2020 Distribution which awarded funds on a fixed per unit quantity of IHBG Metric (except for the Tribal governments that received floor awards).

When first confronted with the harsh differences in the Supplemental Awards to Shawnee Tribe and Plaintiffs-Appellants, the District Court called them "puzzling to say the least." With respect to the Prairie Band in particular, the Court characterized the differential treatment as a "yawning disparity," and one which Treasury made no attempt to explain. (JA.332.) Even when granting summary judgment, the District Court conceded that the 2021 Distribution appeared "inequitable at first blush." (JA.365.) And, the District Court, in granting a preliminary injunction to the Prairie Band, found that its claims were substantially similar to those of the Zero Tribes. (JA.220.)

At summary judgment, the District Court granted unfettered discretion to Treasury, just as it had when it previously concluded that Plaintiffs-Appellants' challenge was not reviewable. *See Shawnee Tribe v. Mnuchin*, No. 20-CV-1999 (APM), 2020 WL 4816461 (D.D.C. Aug. 19, 2020); *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-CV-1491 (APM), 2020 WL 3402298, at *1 (D.D.C. June

11, 2020). As shown below, the District Court relied upon irrational justifications, and post-hoc rationalizations from Treasury's counsel. Crucially, none of these justifications were related to "increased expenditures." 42 U.S.C. § 801(c)(7).

i. The District Court incorrectly concluded that the 2021 Distribution was "based on increased expenditures."

The District Court stretched the statutory language so far as to render meaningless Treasury's plain statutory mandate: increased expenditures. 42 U.S.C. §801(c)(7). With the logical connection between Treasury's Phaseout so lacking, the District Court turned to case law, citing several cases broadly interpreting the phrase "based on" to expand an agency's authority. Thus, by the District Court's reckoning, Treasury's bare "rel[iance] on population data" was enough to clear the statutory mandate that requires focus on "increased expenditures." (JA.356.)

The case law cited by the District Court does not justify the "yawning disparities" caused by the Phaseout. (JA.332.) For example, in *Sierra Club v. EPA*, 356 F.3d 296, 306 (D.C. Cir. 2004), this Court addressed EPA's implementation of ozone control policies, concluding that EPA's analysis was "based on" photochemical grid modeling, where EPA had actually adjusted the model. *Id*. at 305. The adjustments were based on EPA's reasoned analysis that the models over-estimated ozone levels systemically and based on particular outlier sample dates that were consequential for the area at issue. *Id*.

EPA's analysis was "based on" the modeling because it was intended to be better that the model and it generally pursued the same end as the model. The Court specifically observed that "the analysis was employed to ensure that the model achieved its statutory purpose" and "appear[ed] well suited to that end." *Id*. at 306.

Likewise, in *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 6 (D.C. Cir. 2009), this Court interpreted "on the basis of a survey" to allow an agency to "refine" the survey data in pursuit of a "more accurate wage index." *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010) (regulation requiring annual safety training was "consistent with" recommendation in favor of quarterly safety training).

Taken together, these cases establish nothing more than that an agency need not be slavishly beholden to a metric prescribed by Congress, where the agency makes a reasoned decision in pursuit of the "statutory purpose," without "abandoning" or "supplanting" the prescribed metric. *See Sierra Club v. Env't Prot. Agency*, 356 F.3d 296, 306 (D.C. Cir. 2004).

The Phaseout falls far outside the bounds of the foregoing "based on" cases because Treasury plainly supplanted its previously adopted preferred metric of population, without pursuing an end consistent with compensating Tribal Governments for anticipated increased expenditures, in both methodology and effect.

The Phaseout directs funds based on a percentage derived from the ranking of the degree to which Treasury had previously erred in counting the population of a Tribal Government (the Rank-Ratio). This is not a measure of population itself, but a value derived from the delta between two other metrics for counting population. And in effect, the Phaseout plainly is not based on population because it yields wildly different *per capita* awards to Tribal governments

Further, insofar as the Phaseout deviated from population, it was not for the express statutory purpose of compensating Tribal governments for "increased expenditures." After all, there is no logical reason that Ratio-Rank was driving expenditures for Tribal governments. And Treasury has never articulated such any such connection. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner.")

ii. Explanations for the Phaseout relied upon by the District Court were meritless.

a. *Treasury gave no justification for the Phaseout in the Administrative Record*

The District Court erred when it concluded that Treasury's Phaseout was supported by the administrative record. (JA.361-63.) To support the Revised Methodology resulting in the 2021 Distribution, the administrative record needed to reflect (i) a reasoned and concerted departure from Treasury's prior, strict *per capita*

analysis of "increased expenditures" and (ii) a comparative analysis of projected "increased expenditures" between those Tribal governments ranked lowest to highest on Ratio-Rank, within the eighty-fifth percentile threshold. The administrative record contains no comment or analysis on either of these points.

As a preliminary matter, no one asked for the Phaseout. Treasury described the consultation as follows:

> In these consultations, discussed further below, Tribal governments with zero or low formula area population numbers relative to their enrollment counts stated that the previous allocation did not provide sufficient funding to meet their pandemic-related needs. Tribal governments also stated that they were providing substantial assistance to members outside of their formula areas.

(JA.1395.) This input supports nothing other than a simple *per capita* corrective payment.

Treasury's own analysis of its task gave no hint of the strangely complicated Phaseout. Treasury stated:

> Treasury recognizes 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. That is particularly true where the Tribe does not have a formula area (for example, because it does not have a reservation or other area over which it exercises jurisdiction or is responsible for the provision of services), and therefore has a formula area population of zero. Even for Tribes that do have formula areas, their formula-area population may not provide a sufficiently accurate indication of the number of persons for whom the Tribe provides services more generally,

> including the many different health and social services provided during the public health emergency.

(JA.1395.) Again, this analysis centers on the tribal member as the relevant variable. That is, the tribal member, whether within or without the formula area, drives expenditure.

Finally, the specifics of Treasury's analysis explained the basis for the eighty-fifth percentile threshold but did not explain any basis for the Phaseout applied to the Tribal governments that met the threshold:

> For these reasons, and in recognition of court orders recognizing this potential for under-counting, Treasury has elected to reconsider its prior decision in part and reallocate a portion of the remaining, unpaid CRF funds pursuant to a new methodology that accounts for certain scenarios in which IHBG formula area population counts might prove insufficient. Where there is an especially large disparity between formula area population and enrollment figures, the difference suggests that the Tribal government has a need for funding to provide services to a significant number of people who are not reflected in its formula area population. For these Tribal governments, formula area population is less likely to be an accurate proxy for increased expenditures. **This reallocation will provide additional payments when there is a substantial disparity between the Tribe's IHBG formula area population count and its Tribal enrollment count.**

(JA.1395.)

In fact, Treasury never mentions any justification for the Phaseout at any place in the administrative record. Relatedly, Treasury never explained in the narrative

how Tribal governments were harmed in any way that was not accurately captured in the Shortfall Calculation. Treasury therefore acted arbitrarily and capriciously by taking action without "contemporaneous justification." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C. Cir. 2012) (*citing SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 459 (1943)). And the District Court erred by accepting post-hoc rationalizations from the government's litigation briefs in lieu of a contemporaneous justification by the agency in the administrative record. *See Nat'l Ass'n of Postal Supervisors v. United States Postal Serv.*, 26 F.4th 960, 975–76 (D.C. Cir. 2022) (rejecting justification offered by counsel in the course of litigation). Thus, whatever the merit of the arguments offered by Treasury's counsel, they should have been rejected by the District Court.

b. *The Phaseout is not justified as line-drawing*

The District Court chided Plaintiffs-Appellants for accepting the 85% cutoff (from which they benefited) yet challenging the Phaseout applied to the remaining 15% of Tribal governments (from which Plaintiffs-Appellants were harmed):

> Plaintiffs would have this court hold that Treasury was within its discretion to use the ratios to figure out the first part of the new methodology—which Tribes were likely most harmed by IHBG data (the top 15%)—but not the second part—"to what degree" the Tribes were harmed (the degree of disparity, which the phase-out method targets by ameliorating the starkest disparities the most). Plaintiffs have simply offered no real account for how both of those things can be true at the same time.

(JA.360.)

There is no inconsistency between accepting the eighty-fifth percentile threshold and challenging the allocation among the Tribal governments within that threshold. An agency's line-drawing exercise of establishing a threshold is subject to substantial deference. *See ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) (courts are generally unwilling to review agency line-drawing except where the line is "patently unreasonable"). Accepting the threshold does not require accepting an allocation within the threshold that is patently irrational.

Plaintiffs-Appellants specifically attacked Treasury's use of the Phaseout because it caused *huge* discrepancies in the per capita funding received amongst Tribal governments that exceeded the eighty-fifth percentile threshold. The "starkest disparities" at the top of the ratio-rank were not different in kind from the general shortfalls experienced by the entire 15 percent of tribes, at least not in a way that had any relationship to increased expenditures.

c. *The risk of an abrupt cliff did not justify Treasury's Phaseout*

Once in litigation, Treasury's counsel advanced, and the District Court accepted, the additional rationale that the Phaseout had the advantage of avoiding a "sharp cliff" between the Tribal government inside and immediately outside the eighty-fifth percentile threshold, as measured by the Ratio-Rank. (JA.360 (note 6).) This justification was not properly considered by the District Court because it does

not appear in the administrative record. Further, this is not a rational justification for the Phaseout for at least three reasons.

First, there was no reason to think that Tribal governments at the edge of the eighty-fifth percentile threshold would even know of their placement there. Treasury has never made each Tribal government's specific Ratio-Rank known, even to the litigants. Thus, the first "runner up" would not even be aware of the fortune experienced by the Tribal government ahead of it in Rank-Ratio.

Second, by implementing the Phaseout, Treasury introduced new inequitable discrepancies in *per capita* receipts between those highly ranked and lowly ranked on the Ratio-Rank. Thus, the Phaseout redirected, rather than eliminated, the potential for "sour grapes" felt by other Tribal governments.

Third, the Revised Methodology addressed fixed variables retroactively. There is no risk that a Tribe could prospectively jockey for an eighty-fifth percentile ranking. Smoothing was therefore unnecessary to avoid unintended consequences.

d. *Treasury's finite resources did not justify the irrational Phaseout*

The District Court repeatedly excused Treasury's decision-making on the basis that Treasury was faced with a finite pool of funds that had been reallocated from ANCs. (JA.356, 358, 36, 365-66.) These arguments were post-hoc rationalizations offered by Treasury's counsel, and without support in the

administrative record. In any event, the amount of available funds provides no additional rational justification for the Phaseout.

Just as with the 2020 Distribution, Treasury approached the 2021 Distribution with a finite pool of resources and a defined universe of recipients. If it was sound and rational for Treasury to award per capita funds in the 2020 Distribution, it was sound and rational for Treasury to do so again in 2021, with appropriate adjustments for prior payments, so that the Tribal governments could achieve per capita parity amongst each other. Contrary to Treasury's contention, this approach would not have precluded Zero Tribes from realizing "substantial payments."[10] (JA.361.) Treasury has similarly failed to articulate how any particular magnitude of award has distinct value relative to achieving *per capita* parity, as Treasury had set out to do in 2020, or how any of these considerations are consistent with Treasury's statutory mandate of tracking "increased expenditures." 42 U.S.C. § 801(c)(7).

e. *The impossibility of perfection did not excuse Treasury's irrational Phaseout*

At its last point of retreat, the District Court adopted Treasury's counsel's argument "that there is no indication that each tribe's relative expenditures correlated perfectly with its enrollment count, and any methodology would inevitably overfund

[10] If there was *per capita* parity among the litigants below at Prairie Band's level ($1,064), Shawnee would have received nearly $3 million, and Miccosukee would have received approximately $500,000.

some Tribes and underfund others relative to their actual increased expenditures." (JA.364.)

From the outset, the CARES Act tasked Treasury to estimate 2020 expenditures relative to 2019 expenditures and to pay Tribal governments accordingly. *See* 42 U.S.C. §801(c)(7). Treasury decided to use tribal population as a proxy therefor. (JA.754-55.) That decision was not revisited by Treasury in any considered matter before Treasury introduced the Phaseout that was not based on population or, in turn, expenditures. Treasury's counsel's reliance on this point in this litigation was another example of a nonsensical and *post-hoc* rationalization that should have been rejected by the District Court. *See SEC v. Chenery*, 318 U.S. at 94 ("[T]the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained.")

D. Conclusion

Based on the foregoing, this Court should reverse the District Court Order, hold that Treasury's Revised Methodology was arbitrary and capricious and not "based on increased expenditures," and vacate the Revised Methodology.

POINT II: THIS COURT SHOULD DIRECT TREASURY TO COMPENSATE THE PLAINTFFS-APPELLANTS.

As the District Court would have it, Treasury was free to disproportionately compensate those Tribal governments that were "worse off" based on a ranking ratio. But Treasury had not been relieved of its statutory mandate by virtue of Treasury's own prior error. In the intervening time, Congress had not revised the CARES Act to remediate past harms. In 2020, Treasury embraced *per capita* compensation, but used the wrong measure of "population." (754-55.) Without a change in the intervening law or a wholesale policy change, Treasury was bound to allocate funds equitably and reasonably among affected Tribal governments. Given these constraints, Treasury had no choice but to allocate the reallocated funds in a manner that pursued *per capita* parity.

According to the administrative record, Treasury has already calculated the amount that all Tribal governments, including the Plaintiffs-Appellants, would have received if Treasury had awarded funds on a *per capita*, enrollment basis. (JA.1388.) Indeed, this is the amount that was awarded to the highest Ratio-Rank Tribal government. (JA.1388-89, 1399.) This Court should therefore direct Treasury to pay the Plaintiffs-Appellants on terms no worse than those offered to the highest Ratio-Rank Tribal government.

In the alternative, this Court should vacate the Revised Methodology and remand for further proceedings.

CONCLUSION

Based on the foregoing, the Plaintiffs-Appellants respectfully requests that this Court (1) reverse the District Court's dismissal; (2) grant judgment in favor of Plaintiffs-Appellants holding that Treasury's Revised Methodology is arbitrary and capricious and not based on "increased expenditures"; (3) vacate Treasury's Revised Methodology; (4) direct Treasury to issue a supplemental distribution to Plaintiffs-Appellants on *per capita* terms equal to the highest Ratio-Rank Tribal government in the 2021 Distribution; and/or (5) remand for further proceedings.

DATED this 9th day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I electronically filed the foregoing Opening Joint-Brief of Appellants Prairie Band Potawatomi Nation and Miccosukee Tribe with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that:

This brief complies with the type-volume limitation of 13,000 per Fed. R. App. P. 32(a) and D.C. Cir. Rules 28(c), 28(e), and 32 because this brief contains 7,294 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman 14-point font.

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