[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 29, 2022]
Nos. 22-5089, 22-5090

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

PRAIRIE BAND POTAWATOMI NATION,
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

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BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellants in these consolidated appeals are the Prairie Band Potawatomi Nation (No. 22-5089) and the Miccosukee Tribe of Indians of Florida (No. 22-5090). The defendants-appellees are Janet L. Yellen, in her official capacity as Secretary of the United States Department of the Treasury; the United States Department of the Treasury; Debra A. Haaland, in her official capacity as Secretary of the United States Department of the Interior; the United States Department of the Interior; and the United States of America. The Shawnee Tribe was a plaintiff in the litigation consolidated in district court.

B. Ruling Under Review

The plaintiffs-appellants are appealing from the January 28, 2022 judgment and decision issued by the Honorable Amit. P. Mehta, United States District Court for the District of Columbia, in consolidated Case Nos. 20-cv-1999, 20-cv-2792, 21-cv-12, Dkt. Nos. and 99. No citation is yet available in the Federal Supplement. The district court's opinion can be found at 2022 WL 266710.

C. Related Cases

This Court heard an appeal arising from a district court case that was later part of the same consolidated litigation giving rise to these appeals. *Shawnee Tribe v. Yellen*, No. 20-5286 (D.C. Cir.) (appeal from No. 20-cv-1999 (D.D.C.)). A consolidated case challenging yet another aspect of the Treasury Department's disbursement of the appropriation at issue in this appeal was previously before this Court. *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, Nos. 20-5204, 20-5205, 20-5209 (D.C. Cir.). That case was also heard by the district court, Nos. 20-cv-1002, 20-cv-1059, 20-cv-1070 (D.D.C.), and the Supreme Court, *Yellen v. Confederated Tribes of the Chehalis Reservation*, Nos. 20-543, 20-544 (U.S.). Although they are not currently pending, two other cases before the district court challenged the distribution of the same appropriation at issue here. *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136 (D.D.C.) (voluntarily dismissed on July 2, 2020); *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (D.D.C.) (voluntarily dismissed on July 9, 2020), *appeal filed*, No. 20-5171 (D.C. Cir.) (appeal voluntarily dismissed on July 16, 2020).

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GLOSSARY

ANC	Alaska Native Corporation
Br.	Appellants' Opening Brief
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
HUD	Department of Housing and Urban Development
IHBG	Indian Housing Block Grant
JA	Joint Appendix

INTRODUCTION

This appeal involves adjustments made to the amounts awarded by the Department of the Treasury to Tribal governments under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) after this Court's decision in *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021). That decision concerned Treasury's use of a tribe's formula area population—a measure used for certain tribal housing programs that generally corresponds to the population of the area in which a tribe exercises authority—as a metric to estimate the number of persons to whom a tribe will need to provide services, which was in turn used as one of three measures used as proxies to estimate the tribe's "increased expenditures" due to the pandemic, 42 U.S.C. § 801(c)(7). The Court explained that while formula area population may be a reasonable proxy for increased expenditures in many cases, it was likely not a reasonable proxy for the plaintiff tribe in that case, which had a formula area population of zero but thousands of enrolled members to whom the Tribal government averred that it provided services. *Shawnee Tribe*, 984 F.3d at 101-102.

Treasury responded to this Court's decision by using part of the funds that had been allocated to Alaska Native Corporations (ANCs) but encumbered by ongoing litigation about whether ANCs are eligible tribes under the statute. Treasury reallocated those funds based on disparities between formula area population and the number of enrolled members. Specifically, for each federally recognized tribe,

Treasury calculated the ratio of formula area population to enrollment and then ranked all tribes based on that ratio. Treasury then redistributed a portion of the funds previously allotted to ANCs (approximately $80 million) according to this ranking, with the 100th percentile—those tribes with a formula area population of zero—receiving 100% of the difference, *i.e.*, all of what they would have received had Treasury used enrollment for all federally recognized tribes, and with the additional allocation tapering down to the 85th percentile. Treasury explained that this reallocation sought to provide additional funds to federally recognized tribes based on the extent to which formula area population may have served as an unreasonable proxy for increased expenditures, while also preserving the funds previously allotted to ANCs.

Plaintiffs-appellants are among the tribes that received supplemental allocations. They challenge the methodology by which Treasury calculated the supplemental allocations, primarily urging that Treasury should not have distinguished among tribes within the top 15% of the population-to-enrollment ranking used to reallocate funds. Notably, they do not challenge Treasury's determination to limit the supplemental allocations to this 15% of tribes and thus accept that the ratio of formula area population to enrollment is a relevant consideration. Plaintiffs, in other words, propose ranking tribes based on the ratio of formula area population to enrollment in order to select the top 15%, but entirely

ignoring that ratio in making supplemental allocations to the chosen group. As the district court recognized, Treasury acted well within its discretion to not only limit supplemental allocations to the Tribal governments whose population-based expenditures were most likely underestimated by the original metric but also to base that reallocation on the extent to which those expenditures may have been underestimated, thereby phasing out the reallocation. The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1362. JA231, 293. The district court entered final judgment for the federal government on May 9, 2022. JA367-368 (order); *see* JA334-366 (opinion). Plaintiffs filed timely notices of appeal on May 25 and May 26, 2022. JA369-374; *see* Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Congress appropriated $8 billion for distribution to Tribal governments to assist with increased expenditures attributable to the current pandemic. The Treasury Department allocated these funds among tribes using a three-part formula that took account of population, employment, and government expenditures. Treasury initially based the population measurement on each Tribal government's

Indian Housing Block Grant (IHBG) formula area population. But in response to this Court's decision in *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021), Treasury reallocated a portion of funds based on disparities between the tribes' formula area population and enrollment, in order to address those scenarios where formula area population, alone, might be an insufficient proxy for increased expenditures. The question presented is whether Treasury's final allocation was arbitrary and capricious.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory Background

By early March 2020, COVID-19 was spreading throughout the United States and causing a "public health emergency and economic crisis." H.R. Rep. No. 116-420, at 2-3 (2020). On March 27, 2020, Congress passed the CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Title V of the CARES Act appropriated $150 billion "for making payments to States, Tribal governments, and units of local government," 42 U.S.C. § 801(a)(1), for "necessary expenditures incurred due to the public health emergency with respect to [COVID-19]," *id.* § 801(d)(1). Of the $150 billion, Congress reserved $8 billion "for making payments to Tribal governments."

Id. § 801(a)(2)(B). Congress directed the Secretary of the Treasury to make the payments within 30 days of the Act's March 27, 2020 enactment. *Id.* §801(b)(1).

The CARES Act provided certain instructions about how funds should be distributed. For States and local governments, the Act provided detailed instructions and formulas for determining the amounts to be paid. Specifically, the amount paid to each State was to be the share of the appropriation (less amounts reserved to Tribal governments and the territories) proportional to the State's share of the total population of the 50 States, reduced by any payments made directly to local governments, and with a guaranteed minimum payment of $1.25 billion. 42 U.S.C. § 801(b)(2), (c)(1), (c)(2)(A), (c)(4). Local governments with populations exceeding 500,000 could receive shares of their States' allocations proportional to each local government's share of the State's population. *Id.* § 801(c)(5), (g)(2). Payments to the District of Columbia and the territories (made from a special reservation of $3 billion out of the full appropriation) likewise were to be proportional to each recipient's share of the total relevant population. *Id.* § 801(a)(2)(A), (c)(6). The Act specified that Treasury had to use the most recent available data from the Census Bureau to determine the populations of States and local governments. *Id.* § 801(c)(8).

Congress took a different approach with respect to the payments to Tribal governments. Instead of directing the Secretary to use specific formulas or data, the CARES Act provided that the amount paid to a Tribal government should be:

> the amount the Secretary [of the Treasury] shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to [its] aggregate expenditures in fiscal year 2019 . . . and determined in such manner as the Secretary determines appropriate to ensure that all amounts available . . . for fiscal year 2020 are distributed to Tribal governments.

42 U.S.C. § 801(c)(7).

II. Factual Background and Procedural History

A. Initial Allocations in 2020

1. On March 31, 2020, the federal government formally requested input from tribal leaders on how to allocate the funds, scheduling telephonic "consultation sessions," along with the Bureau of Indian Affairs, and also inviting the submission of written comments. JA428. Federal officials stressed the dual needs of devising "a fair and transparent method for allocating these funds" and "arriv[ing] at it quickly" given the statutory mandate to distribute funds within 30 days. JA443. And while considering how to allocate funds, Treasury also requested from Tribal governments various information about Tribal population, land base, employee numbers, and overall expenditures. JA748.

Representatives from Tribal governments took varied and opposing positions on how Treasury should allocate the $8 billion. Some tribes, for example, urged that Treasury should eschew any "formula" and have tribes "tell" the federal government their "needs are on a Tribe by Tribe basis." JA465-466; *see, e.g.*, JA447, 577. Some thought that distributions should be "uniform and equal" among tribes with residual allotments "as the need arises." JA450. Some thought there should be fixed minimums and maximums per tribe, *see, e.g.*, JA447-448, 499, 513, while others "discourage[d] any minimum," urging that would be "arbitrary." JA479. Some stressed the size of a tribe's geographic area, which may inform costs such as running an "ambulance service" and other "emergency medical services." JA544, 558. Others stressed particular needs of "rural areas" where travel to hospitals can be costly, resources such as food may need "to be flown" in, and communications infrastructure may be lacking. JA450-451; *see* JA472-474, 567. Some thought that the allocation should be based on the "number of employees that a Tribe has." *E.g.*, JA456, 551. Others urged that "population" should be "a factor" because it captures "people to serve." JA499; *see, e.g.*, JA456, 499, 650. In contrast, some urged that population lacks "any meaningful connection to the tribal economies actually affected by the global pandemic" and noted that Congress "used population to distribute funding to states but not tribes." JA651 (summarizing comments). Many stressed the need to receive funds "quickly." *E.g.*, JA458.

In discussing the use of some population-related data, some tribes pointed to their number of enrolled members, *see, e.g.*, JA651 (summarizing comments), while others focused on the fact that Tribal governments provide services to people who are not enrolled members and often do not provide services to enrolled members who live elsewhere. Thus, some urged that "Tribal citizenship is not an accurate approximation as many tribes have citizens across the country," and "in Alaska, there is simply no accurate count of the membership of many Alaska Native villages." JA650 (summarizing comments). Some emphasized that tribal "citizens, as well as the noncitizens [they] serve, cannot access vital services [their] Tribal Government provides as the only services provider . . . in [a] small rural community." JA522; *see* JA523 (explaining that another tribe "consists of 5,500+ members" but has "a Native American service population of 25,000 from Tribes across the U.S. located within [their] service area"). Some emphasized the number of people who "reside on [their] reservation" and stressed the number of local cases and cost of operating "health facilities" and purchasing "personal protection equipment." JA503-504; *see* JA505-509 (describing local resource drain, curfews, travel restrictions, and possibility of "closing [their] borders").

2. On May 5, 2020, the Secretary approved a method of allocating the $8 billion. JA747-756. Treasury explained that because the funds were to be used for future increased expenditures, "any allocation formula" would "yield only an

estimate of increased eligible expenditures." JA751, 754. And given the statutory mandate, Treasury stressed "considerations of administrative feasibility" and a focus "to the extent administratively feasible" on "necessary expenditures that are due to the public health emergency." JA751, 754.

Treasury decided that it would divide the $8 billion using a combination of three factors. JA747-756. First, Treasury would consider population, which was "expected" to "correlate" 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." JA748, 752, 755. Specifically, Treasury selected population data used by the Department of Housing and Urban Development for its Indian Housing Block Grant program. JA748, 752-753. This is the adjusted census population of Native American and Alaska Native persons living within defined areas allotted to tribes. *See Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 97 (D.C. Cir. 2021); *see also* 24 C.F.R. Pt. 1000, Subpt. D. Treasury explained that this measure "corresponds broadly with the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend." JA752-753, 755-756. This measure is also "reliable and consistently-prepared," in that it is "based on Census Bureau data," and "incorporates adjustments to address overlapping jurisdictions." JA748, 752-753, 756; *see also* U.S. Dep't of the Treasury, *Coronavirus Relief Fund*

Frequently Asked Questions 1 (June 4, 2020) (*Coronavirus Relief Fund Frequently Asked Questions*).[1] Treasury's allocation of the $8 billion would also guarantee a population-based minimum of $100,000. JA753, 756.

Second, Treasury would take into account the number of employees each Tribal government had. JA748, 752, 755. This "employment data" was "expected to correlate reasonably well with expenditures related to the effects of the emergency" such as "economic support to those experiencing unemployment or business interruptions." JA748, 752, 755.

Third, Treasury would base the remaining distribution on total expenditures of Tribes and tribally owned entities. JA748, 752, 755. These expenditures were "expected to correlate reasonably well with the variability in the per person costs of service delivery in different tribal environments." JA748, 752, 755.[2]

B. Prior Litigation

The distribution of these $8 billion has been the subject of extensive litigation. First, a number of federally recognized tribes sued, arguing that only federally

[1] https://home.treasury.gov/system/files/136/FAQ-on-Tribal-Population-Data.pdf.

[2] Treasury based 60% of the allocation on population and decided that it would finalize the "specific weight of employment and expenditure data" after receiving that data from tribes. JA748-749. In the end, Treasury decided to distribute 30% of the funds based on employment data and the remaining 10% based on expenditures for fiscal year 2019. *Coronavirus Relief Fund Allocations to Tribal Governments* 1 (June 17, 2020), https://perma.cc/28YM-6GTL.

recognized tribes and not Alaska Native Corporations (ANCs), which also participate in many federal programs, are eligible to share in the funds. *See Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434, 2438-2441 (2021). As a consequence, the funds allotted to ANCs (initially over $500 million) remained tied up in litigation until June 2021, when the Supreme Court ultimately agreed with Treasury that ANCs are eligible. JA340-341; *see Chehalis*, 141 S. Ct. at 2438, 2440-2441, 2452.

Second, four days after the 30-day statutory deadline to distribute funds had passed, and before Treasury had announced its allocation method, several tribes sought mandamus to compel Treasury to distribute funds. *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136, 2020 WL 2331774, at *2 (D.D.C. May 11, 2020). The district court denied relief but invited those litigants to renew their request shortly and made clear that the court might soon reach a different conclusion about mandamus. *Id.* at *8. In June 2020, the district court granted a renewed motion and "ordered Treasury to distribute all remaining Title V funds not encumbered by ongoing litigation." JA340; *see Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136, 2020 WL 3250701, at *4 (D.D.C. June 15, 2020). Treasury promptly distributed all of the remaining Funds, except for the funds initially allocated to ANCs and a negligible portion of funds that were not

distributed for logistical reasons. *See* Notice, *Agua Caliente*, No. 20-cv-1136 (D.D.C. June 25, 2020), Dkt. No. 45.

Third, and most directly relevant here, over the eight months following Treasury's announcement of its chosen allocation method, three tribes—Shawnee Tribe, Miccosukee Tribe of Indians of Florida, and Prairie Band Potawatomi Nation—filed separate suits to challenge Treasury's use of formula area population when dividing up the $8 billion "based on increased expenditures," 42 U.S.C. § 801(c)(7). These tribes urged that Treasury should have instead used tribal enrollment, *i.e.*, the number of enrolled members of the tribe wherever they may live. JA337-338; *see Shawnee Tribe*, 984 F.3d at 97-98 (describing Shawnee suit); JA29-47 (Miccosukee complaint); JA94-1116 (Prairie Band complaint). The district courts denied motions for preliminary injunctions and dismissed the suit by the Shawnee Tribe, holding that Treasury's allocation was committed to agency discretion. JA338-339; *see also Shawnee Tribe*, 984 F.3d at 98.

In an appeal brought by the Shawnee Tribe, this Court reversed and remanded for the district court "to consider the merits and to enter a preliminary injunction." *Shawnee Tribe*, 984 F.3d at 96. This Court explained that the directive to the Secretary to allocate funds "in such manner as [he] determines appropriate" is broad and discretionary but that "however the Secretary chooses to exercise his discretion," it is circumscribed by the directives that (1) the "amount paid to ... a Tribal

government" is "based on increased expenditures" and (2) "all amounts available ... are distributed to Tribal governments." *Id.* at 100 (alterations in original) (quoting 42 U.S.C. § 801(c)(7)).

The Court declined the *Shawnee* plaintiff's invitation "to proceed to the merits and find that the Secretary's methodology based on population and use of IHBG data was arbitrary and capricious." *Shawnee Tribe*, 984 F.3d at 101 (quotation marks omitted). The Court explained that the district court had not addressed the merits of the Shawnee's Administrative Procedure Act claim and "the administrative record ha[d] not been filed." *Id.* (quoting the federal government's brief at 34). The Court, however, reversed the district court's denial of a preliminary injunction and held that the Shawnee were likely to succeed on the merits. *Id.* at 101-103. The Court observed that "[t]he Secretary chose the IHBG formula area population data as a proxy for 'increased expenditures.'" *Id.* at 102. But the Court held that this population was, "at least with respect to some tribes, an unsuitable proxy." *Id.* In particular, the Court stated that the Shawnee Tribe has a formula area "population of zero" but has thousands of enrolled members and represented that it was "provid[ing] essential services to its citizens residing on-reservation and off-reservation." *Id.* (Court's alteration, quoting complaint). "On this record," the Court held that "the Shawnee Tribe is likely to succeed in its claim that the IHBG data is not a suitable proxy for 'increased expenditures.'" *Id.* The Court suggested

that the same was "likely true for amicus the Miccosukee Tribe" (a plaintiff-appellant here), which represented that it has hundreds of enrolled members but, like the Shawnee Tribe, a formula area population of zero. *Id.*

In directing the entry of a preliminary injunction, the Court clarified that it was not necessarily requiring Treasury "to create a whole new methodology based on a different data set with other flaws, or to make individualized determinations for each tribe, risking further delay of the distribution of funds." *Shawnee Tribe*, 984 F.3d at 103 (quoting the federal government's brief at 44). Instead, the Court enjoined Treasury from distributing $12 million of the remaining funds. *Id.* "Whether the Secretary" would "have to devise a new methodology," the Court clarified, "depends on the merits, which the district court will address in the first instance." *Id.*

C. Reallocation in 2021

1. By this time, "limited Title V funds remained" because Treasury (acting pursuant to statutory mandate and an order from the district court) had distributed most of the $8 billion, save $530 million that were allocated to Alaska Native Corporations but tied up in litigation. *See* JA340-341; Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021)[3] (cited by the Supreme Court in *Chehalis*). Based on this Court's *Shawnee* decision, Treasury

[3] https://perma.cc/JWZ7-CGG8.

undertook a process of reconsidering the role of formula area population as a proxy for increased expenditures and determining how it could "reallocate" some of the remaining funds to address the increased expenditures of tribes, like the Shawnee, for whom formula area population may not be a reasonable proxy for increased expenditures. JA214, 341; *see* JA787-788. To preserve the status quo, the district court entered preliminary injunctions preventing disbursement of disputed funds. JA344; *see* JA214-215, 220. The district court, however, denied motions for mandatory injunctions that would require additional payments before Treasury had reconsidered its allocation. JA214-220.

Treasury again convened consultation sessions and invited written comments. JA757-758. Treasury explained that other than "a very small amount from some tribes that haven't claimed their funds," the amounts "allocated to the federally recognized tribes ha[d] already been paid" and any further allocation "would necessarily have to come from the amount allocated to Alaska[] Native Corporations," which were allocated "on the same basis" as amounts allocated to federally recognized tribes but had not been paid due to then-ongoing litigation. JA834-835; *see* JA881.[4]

[4] Treasury stated that it would need to devise two reallocations—one if the Supreme Court held that ANCs were eligible and one if the Supreme Court held that ANCs were ineligible (thereby freeing up over $500 million). JA770, 880-881.

Once again, commenters had varying suggestions. Some noted differences among tribes in "enrollment criteria" and observed that some tribes may have lower enrollment numbers but play a "greater" role for "the regional tribal population in their area." JA777-778. In contrast, others (such as the plaintiffs here) urged that formula area population is not a useful figure. *See, e.g.*, JA779-785. Some suggested that funds should be reallocated using "a combination" of enrollment and formula area population. JA776. Some suggested that Treasury should ensure that it reallocates some funds to the three tribes that sued—Shawnee, Prairie Band, and Miccosukee—and then redistribute ANC funds to those tribes that "were either zeroed out" in the population-based part of the formula "or grossly underfunded" as compared to their preferred enrollment population. JA837-838; *see* JA853 (similar). One tribe with a vastly greater number of enrolled members than formula area population acknowledged that it has "tribal members who live in all 50 states" and does not know "all of the needs of [the] tribal members because of their being scattered about." JA846-847.

ANCs objected to reallocating the funds that had been assigned to them but, due to the happenstance of litigation, had still not been paid nearly a year after the statutory deadline for distributing funds. Some ANCs explained that under Alaska's unique structure, they were supporting people who did not live in "their home villages" and did not receive support from any federally recognized tribes, which

often only support tribal members "in th[eir] village[s]." *E.g.*, JA885-886, 889-893, 909. Some ANCs explained that they also support Alaska Natives who are not enrolled members of any tribe. *E.g.*, JA892, 896. ANCs explained that given their unique role in Alaska, redistributing funds from ANCs to federally recognized tribes would be "taking money away from the Alaska Native people." JA925. Some ANCs also stressed the particular harm of taking funds away from entities that serve some of most remote parts of the country, where transporting food and medical supplies is particularly complex and treacherous. JA893, 899, 926.

2. On April 29, 2021, Treasury decided to reallocate a portion of the funds that had been previously assigned to ANCs but had been the subject of preliminary injunctions and were awaiting a decision by the Supreme Court on *Chehalis*. JA1386-1396. Treasury explained that it had selected formula area population as part of its multi-part allocation because formula areas "correspond broadly to the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend"; "[a]djustments are made to address issues of overlapping jurisdiction"; and "the data are easily accessible and regularly maintained by [the Department of Housing and Urban Development (HUD)], which allowed for immediate disbursement." JA1391. "For many Tribes," Treasury continued, "this data, in conjunction with employment and

expenditure data used to allocate the remaining 40%" of the fund "provided a reasonable proxy for estimating the increased expenditures for each Tribe." JA1391.

Treasury observed, however, that "[s]everal Tribes that were assigned a population of zero, or a low population that approaches zero for their IHBG formula areas despite having substantial enrollment" had challenged the allocation methodology, and this Court "found that at least one Tribe assigned an IHBG formula area population of zero was likely to succeed." JA1386-1387. Although these lawsuits had "not been finally resolved," Treasury determined that it would "revise its methodology" and reallocate funds to certain federally recognized tribes by "reduc[ing] the amounts allocated to ANCs but not yet paid because of litigation [then] pending in the Supreme Court." JA1386-1387.

Treasury explained 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." JA1395. "That is particularly true where the Tribe does not have a formula area (*e.g.*, 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." JA1395. "Even for Tribes that do have formula areas," Treasury reasoned, "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." JA1395. Treasury therefore explained that "[w]here 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." JA1395. "For these Tribal governments, formula area population is less likely to be an accurate proxy for increased expenditures." JA1395.

Treasury accordingly adopted a reallocation that "takes as a starting point the population shares that were inputs into the [2020] allocation and reallocates based on disparities between this input and an enrollment-based approach." JA1400. Treasury explained that it was "reallocat[ing] a portion of the remaining, unpaid" funds to address "scenarios in which IHBG formula area population counts might prove insufficient." JA1395. Treasury also stressed that that "[t]he funds available for reallocation are limited and therefore only the most substantial disparities can be addressed." JA1387, JA1396.

Treasury accordingly decided to "compare" each Tribe's "IHBG formula area population against the Tribe's enrollment data." JA1387, 1396. Specifically, Treasury calculated "the ratio between each Tribe's IHBG population and its

enrollment." JA342 (summarizing the calculation); *see* JA1387-1388, 1395-1396.[5] Treasury then ranked the tribes by "population-to-enrollment ratio" and reallocated funds from ANCs to federally recognized tribes based on this ranking. JA1387-1388, 1395-1396; *see* JA1398-1340.[6] Treasury thus applied a formula that would reallocate the most funds to the highest ranked tribe—the tribe with the largest proportional disparity between formula area population and enrollment would receive the largest share of what it would have received under an enrollment-only method, with that share decreasing for each lower ranked tribe. JA1400; *see* JA1388-1389 & n.4, 1396. Every tribe ranked in the 85th percentile and above (including the plaintiffs) would receive some reallocated funds. JA1387-1388, 1396.

Treasury explained that reallocating funds to "Tribes above this threshold" would focus additional payments on those tribes where the prior formula-based

[5] Plaintiffs mistakenly reference enrollment figures that they submitted to Treasury in April 2020. *See* Br. 3, 13-14, 19-20. But Treasury explained that, where available, it was using enrollment data collected by the Bureau of Indian Affairs. JA1396. Plaintiffs have not challenged that decision.

[6] Treasury explained that ANCs would not be eligible for a redistribution. JA1388, 1396. "Although ANCs' shareholder totals are much larger than their formula area populations, ANCs do not have enrolled members, which is the source of the issue to be addressed in this reallocation." JA1388, 1396. And "given the large number of their shareholders, were ANCs to be eligible for an additional payment . . . on account of the large differences between their formula area population and their total number of shareholders, Treasury would not be able to provide effective relief to those federally recognized Tribes" with significant "disparit[ies] between their formula area population and enrollment." JA1396.

population most likely undercounted their COVID-related increases in expenditures "while still retaining sufficient allocations for ANCs," which also have significant COVID-related expenditures. JA1387. And Treasury explained that by "phas[ing] out" the redistribution, "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," 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 [the] formula area population based allocation." JA1399; *see* JA1388-1389 & n.4, 1396, 1399-1400.[7] As the district court summarized the formula, this calculation "us[ed] both the IHBG population counts" and "Tribal enrollment," with enrollment most heavily weighted for those Tribal governments where formula area population was least likely to serve as a good proxy for increased expenditures. JA356. This meant that the tribes whose increased expenditures were most likely underestimated in the initial allocation "would receive a higher percentage of the available funds" than tribes whose relevant, increased expenditures were less likely underestimated. JA342-343; *see* JA1395, 1400.

[7] Treasury subsequently made a "minor modification" to the formula to ensure that in determining the reallocation, Treasury used the same IHBG figure for each tribe that it used when determining the initial payments. JA1399-1401. That modification is not at issue here.

D. Further Litigation

All three plaintiff tribes in these consolidated suits received additional funds. JA343. After Treasury announced its reallocation, the Shawnee Tribe accepted the additional funds and declined to litigate further. JA335. Prairie Band and Miccosukee filed second amended complaints challenging the reallocation. JA344; *see* JA228-313.

The district court granted summary judgment for the federal government. JA334-368. The court declined to rule on plaintiffs' prior challenge to the May 2020 allocation, which plaintiffs had "incorporate[d] by reference" into their requests for relief. JA347. The court explained that Treasury had reconsidered the May 2020 allocation in light of subsequent events—including this Court's *Shawnee* decision and the payment of significant funds—and had announced a different approach that no longer uses IHBG population data as the sole measure of population but instead blends that measurement with tribal-enrollment to allocate funds (along with other employment and expenses). JA347-348. All that could be done, the court observed, was to order Treasury to reevaluate its methodology in light of the potential shortcomings of certain tribes of using IHBG formula area population, which Treasury had done. JA348.

The court thus reviewed the ultimate allocation—the initial May 2020 allocation as modified by the May 2021 reallocation. JA350. The court observed

that in directing Treasury to determine how to allocate the $8 billion appropriation, "Congress gave the Secretary latitude to 'exercise his discretion.'" JA352 (quoting *Shawnee Tribe*, 984 F.3d at 100). Specifically, Treasury was to distribute funds "based on increased expenditures." JA354-355 (quoting 42 U.S.C. § 801(c)(7)). That did not require "awards to be precisely correlated to increased expenditures—which would be nearly impossible to accomplish" and it did "not require them to be distributed pro rata." JA354. Instead, Treasury had to use increased expenditures as "a 'starting point' or the 'primary basis.'" JA355-356 (quoting *International Union v. Mine Safety & Health Admin.*, 626 F.3d 84, 92 (D.C. Cir. 2010)). And given the impossibility of perfect predictions about future expenditures as well as the statutory mandate to distribute funds quickly, Treasury had discretion in how to gauge increased expenditures. JA355-356.

The court explained that although "Treasury made a misstep" in relying solely on "IHBG data as the source of population counts for certain Tribes," Treasury then "sought to cure the shortfall" by "using both IHBG population counts" and "Tribal enrollment." JA356. The court concluded that Treasury had reasonably used this combination to "estimate the degree to which the IHBG population-based count" would tend to underestimate increased expenditures and to mitigate any shortfall. JA356. The court found unpersuasive plaintiffs' contention that Treasury had to use a "methodology that simply replaced IHBG population" with "enrollment." JA356.

The court observed that the CARES Act imposes no such requirement. JA356. And Treasury's decision to reallocate funds was, in all events, a rational way to address the potential downsides of using IHBG formula area population given that most of the $8 billion appropriation had been spent "and what remained was a pool of available funds meant for ANCs, pending the outcome of litigation before the Supreme Court." JA356. Even had tribal enrollment rather than formula area population been the only rational proxy, the limited funds remaining meant that Treasury "[could] not pay each Tribe what it would have received if Treasury had used enrollment data from the start." JA356 (alteration in original). Rather, Treasury reasonably "track[ed]" this Court's "reasoning in *Shawnee* and the Plaintiffs' complaints" by identifying those tribes for which formula area population was most likely not a good proxy. JA357.

The district court additionally held that Treasury acted well within its discretion in choosing a "phase-out method," *i.e.*, trying to make the final payments closer to tribal enrollment for those tribes with the largest relative difference between formula area population and enrollment. JA357. The court noted that plaintiffs did not dispute the reasonableness of reallocating funds only to tribes in the top 15% of tribes ranked according to population-to-enrollment ratios—a cutoff that "benefitted the Plaintiff Tribes" by limiting the number of tribes "eligible for what little funding remained." JA358-359. Instead, plaintiffs challenged only "the descending

percentage of awards" and urged that Treasury had to allocate funds to those 15% of Tribal governments on a "set per-enrollee amount." JA358-359. The court explained that the "fundamental flaw" in plaintiffs' position is that plaintiffs themselves embrace Treasury's decision to treat population-to-enrollment ratios as significant and, therefore, Treasury's recognition that not all uses of formula area population are the same. JA359. For the same reasons that Treasury could distinguish the top 15% of tribes from the next 85%, Treasury could also distinguish among those eligible 15%. JA359. Indeed, the court added, "given the 'relatively limited funding available,'" Treasury "focus[ed]" on addressing "the starkest disparities" and therefore "used the population-to-enrollment ratio to 'identify the . . . tribes that were likely most harmed by the IHBG data, and to what degree." JA359-360 (second alteration in original).

For similar reasons, the district court rejected plaintiffs' related contention that Treasury had arbitrarily treated similar parties differently. JA360-366. The court noted that Treasury's reallocation identified the "scenarios" where formula area population posed the greatest risk of being a poor "proxy for increased expenditures." JA362. Treasury had explained that where tribes had a "zero-population count" or otherwise had "'an especially large disparity between formula area population and enrollment figures,'" there was a "'particular[]'" risk that formula area counts were "an insufficient proxy for increased expenditures." JA362-

363 (emphasis omitted) (quoting Treasury's explanation). The "population-to-enrollment" ratio that Treasury used both to determine the top 15% and to phase out the reallocation was therefore a reasonable means to determine which Tribes may have been most "'significantly undercounted' and had the 'greatest need.'" JA363 (quoting Treasury's 2021 reallocation decision). The court addressed its own prior suggestion that there was a curious "disparity" among tribes in the final allocation. JA365. With the benefit of the full administrative record, the court explained that this reflected "the complex procedural history" and is "a function of a disbursement methodology that, when viewed in light of all relevant circumstances, was entirely reasonable." JA365.

E. June 15, 2022 Adjustment in Payment Amounts

Since the district court's decision and after plaintiffs filed their opening brief, there have been additional factual developments regarding Treasury's implementation of the challenged reallocation formula. Because this case involves a challenge to Treasury's selection of a methodology for allocating additional funds, and not to Treasury's implementation of the methodology, the administrative record does not contain Treasury's data about specific tribes' populations, calculations, and payment amounts. *See generally* JA757-1402. The government is nonetheless apprising the Court of these developments so that the Court has an accurate and current understanding of the facts, particularly because plaintiffs' opening brief

makes factual representations about how the reallocation method played out in practice and appears to draw inferences from those facts about the reallocation methodology. *See, e.g.*, Br. 11.

As the federal government explained in a June 30, 2022 letter to the Court, after plaintiffs filed their opening brief, the federal government discovered an issue with Treasury's implementation of the revised allocation formula, and Treasury offered additional payments to the fourteen Tribes affected by it, which include the Miccosukee Tribe of Indians of Florida, a plaintiff-appellant here. Treasury notified plaintiffs of these developments on June 15, 2022, and sent notifications to all affected tribes on the same day. For the Court's reference, the notification to Miccosukee is included in the addendum to this brief; while not technically part of the record in this case (which, as noted, concerns the selection of a methodology rather than its implementation), it would be a proper subject of judicial notice and should help to clarify the current facts and circumstances for the parties and the Court.

Specifically, as explained, the 2021 reallocation relied on a ratio of each tribe's formula area population to each tribe's enrollment. In making payments based on that formula, Treasury inputted formula area populations published by HUD. *See* Letter from J. Leibenluft, Chief Recovery Officer, to T. Cypress, Chairman, Miccosukee Tribe, at 2 (June 15, 2022) (attached in addendum). Treasury

recently discovered that for certain tribes with zero formula area populations, for technical reasons, HUD codes the populations as very small fractions instead of as zero. *See id.* That coding makes no difference in funding outcomes in the programs that HUD administers using the data, but it did have an effect on Treasury's payments under the reallocation formula, resulting in some tribes with formula area populations of zero being treated as if they had different, small fractional populations and therefore being treated differently from one another. *See id.* Treasury has addressed that issue to ensure that tribes with zero formula area population are treated as such. *See id.* Consequently, all zero-population tribes are now treated—as the reallocation formula always intended—as having a zero population and are thus all treated the same by the reallocation formula. *See id.* Treasury has offered additional payments to those tribes affected, including the Miccosukee, a plaintiff-appellant here. *See id.* at 1, 3. This adjustment in payments had no effect on Prairie Band, the other plaintiff-appellant. Treasury regrets that it did not identify this mistake in implementing the challenged methodology earlier.

The federal government made clear that it would not oppose a request by plaintiffs to supplement or amend their opening brief so that plaintiffs' brief can reflect the accurate factual scenario and so that the parties can describe their positions on the recent development's effect, if any, on the issues raised in this appeal, through orderly briefing. Letter to M. Langer, Clerk of the Court, at 1-2,

Prairie Band Potawatomi Nation v. Yellen, Nos. 22-5089, 22-5090 (D.C. Cir. June 30, 2022). The Miccosukee, who were affected by this issue, have not responded to this letter. Prairie Band, who were not affected, filed a response on July 11. Prairie Band "opposes" the "attempt to inject new facts" but also urges that the June 15 adjustment is not a change in "implementation" but is "a policy change" that "changes the 2021 Reallocation Methodology." Letter to M. Langer, Clerk of the Court, at 1-2, *Prairie Band Potawatomi Nation v. Yellen*, Nos. 22-5089, 22-5090 (D.C. Cir. July 11, 2022). Prairie Band also declined to file an amended brief, instead suggesting that "if Treasury wishes to rely on [these] facts" that are not in the administrative record, Treasury "must get those facts into the record before the court" and that "Treasury should go first in briefing." *Id.* at 2-3. As noted, the change in circumstances is not directly relevant to the issue before the Court, which concerns Treasury's selection of a methodology, and the government is not advancing any argument based on the change in circumstances.

SUMMARY OF ARGUMENT

Congress appropriated $8 billion for distribution to Tribal governments to assist with increased expenditures attributable to the current pandemic. The Treasury Department allocated these funds among tribes using a three-part formula that took account of population, employment, and government expenditures. Treasury initially based the population measurement on each Tribal government's

Indian Housing Block Grant formula area population. But in response to this Court's decision in *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 (D.C. Cir. 2021), Treasury reallocated a portion of funds based on disparities between the tribes' formula area population and enrollment, in order to address those scenarios where formula area population, alone, might be an insufficient proxy for increased expenditures.

Treasury reasonably responded to the concern that this Court discussed in *Shawnee Tribe,* by reallocating some of the limited, remaining funds away from Alaska Native Corporations (ANCs) to tribes with especially large disparities between formula area population and the number of enrolled members. Plaintiffs accept most aspects of Treasury's revised methodology, and their limited challenge here is without merit. Plaintiffs accept Treasury's determination that only tribes with a high disparity between formula area population and enrollment should receive any adjustment at all. They agree with Treasury's determination that the "zero population" tribes identified by this Court in *Shawnee Tribe* should receive funds as if the methodology had used tribal enrollment, rather than formula area population, as the measure of population for all federally recognized tribes. They challenge only Treasury's determination that although it would allocate some additional funds to tribes that do not have a zero formula area population, it would provide a lesser allocation for those tribes than for the zero-population tribes.

Thus, plaintiffs do not challenge the relevance of the metrics used by Treasury but rather challenge the precise formula used to reallocate limited funds. They do not and could not claim that the statute mandates any particular formula. Nor do they debate that any reallocation will necessarily be imperfect. As the district court recognized, Treasury acted well within its discretion not only to limit supplemental allocations to the Tribal governments whose population-based expenditures were most likely underestimated by the original metric, but also to base that reallocation on the extent to which those expenditures may have been underestimated, thereby phasing out the reallocation. The district court's judgment should be affirmed.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo. *New LifeCare Hosps. of N.C., LLC v. Becerra*, 7 F.4th 1215, 1222 (D.C. Cir. 2021).

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT TREASURY'S ALLOCATION OF FUNDS WAS WELL WITHIN ITS DISCRETION

A. The Final Allocation Was Not Arbitrary and Capricious

1. This appeal presents a narrow issue. Treasury has already distributed funds based on its original allocation using three data sources—population, employment, and expenses—and plaintiffs do not take issue with that general framework. The issue presented here concerns the possibility that the measure of population that Treasury originally used—based on the so-called "formula area" used in connection

with certain housing programs—was an unreasonable predictor of increased expenditures. In particular, this Court, in the *Shawnee Tribe* decision, noted one of the few Tribal governments that has no formula area at all, even though it may be responsible for providing services to tribal members. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 101-102 (D.C. Cir. 2021). This appeal concerns whether Treasury reasonably reallocated a portion of funds based on disparities between the tribes' formula area population and enrollment, in order to address those scenarios where formula area population, alone, might be an insufficient proxy for increased expenditures.

It would not have been appropriate, even if it had been feasible, to respond to the concerns expressed in this Court's decision by dispensing with formula area population altogether. Absent a perfect data set that measures the number of persons to whom each Tribal government provides relevant services, Treasury explained that formula area population was generally a reasonable proxy for person-based increased expenditures because formula area "corresponds broadly to the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend." JA1395; *accord* JA751-753, 755-756; *see* JA748, 752-753, 755 (explaining that Treasury considered population because it would "correlate" 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"). These areas are "developed through negotiated rulemaking" with Indian tribes and are used not only by HUD to provide housing assistance but also by other federal programs, such as the Department of Transportation's Tribal Transportation Program. *Coronavirus Relief Fund Frequently Asked Questions* 1 & n.1; *see also* 23 U.S.C. § 202(b)(3)(B).

In contrast, as explained by commenters, Tribal governments may provide services, such as medical and health assistance, to people who are not tribal members but live near the tribe, and Tribal governments may not provide tribal services to enrolled members who live far away. Using tribal enrollment as a proxy for increased expenditures may thus overestimate person-based expenditures by basing the allocation on enrolled members who live far away and do not receive any, or as many, relevant services from their tribe as those who live on or near tribal lands. *See* JA650 (summarizing comments). Using tribal enrollment may also underestimate increased expenditures by ignoring Native Americans and Alaska Natives who live near tribes in which they are not enrolled members but depend on those tribes for services. *E.g.*, JA522-523, 777-778; *see also, e.g.*, JA503-509 (emphasizing the local impact of the pandemic, the number of people who "reside on [their] Reservation," the number of local cases, and costs of operating "health facilities" and purchasing "personal protection equipment"); *see also Coronavirus Relief Fund Frequently Asked Questions* 2 (explaining that enrollment "does not necessarily

distinguish between members living within the tribal area from those living outside the tribal area").

Formula area populations are also often more practical. Formula area populations are based on "reliable and consistently prepared" data, drawing on census counts. JA748, 751-753, 755-756; *see* 24 C.F.R. § 1000.330. Formula area population also "address[es] overlapping jurisdictions," such as geographic areas occupied by multiple tribes. JA748, 752-753, 755-756; *see also Coronavirus Relief Fund Frequently Asked Questions* 2 (describing formula area as "a specific geographic area attributed to each tribe" that "include[s] adjustments to address overlapping jurisdictions"). Indeed, in Alaska (home to hundreds of eligible Tribal governments), Native Villages (federally recognized tribes), village ANCs, and regional ANCs provide services in overlapping areas. *See* 1 *Cohen's Handbook of Federal Indian Law* § 4.07[3][b][ii][B], [d][i] (Nell Jessup Newton et al. eds. 2017); *see, e.g.*, *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434, 2438-2439 (2021); *see also* 43 U.S.C. §§ 1602(c), (g), (j), 1606(a), 1607. And while ANCs have no enrolled members (but do have shareholders), ANCs provide services to Alaska Natives who are enrolled members of Villages or are not enrolled members of any tribe. *See Chehalis*, 141 S. Ct. at 2443, 2447; *see, e.g.*, JA956, 979, 992. The formula area populations allocate recipients of services accordingly and thus address "the unique circumstances of Alaska." 24 C.F.R. §§ 1000.302(4), 1000.327; *cf.*

Chehalis, 141 S. Ct. at 2438, 2443 (describing "the unique circumstances of Alaska").

It also would have been infeasible for Treasury to develop an entirely new methodology based on a metric other than formula area, given that the vast majority of the funds had already been disbursed based on the original methodology. For that reason as well, Treasury appropriately limited the reallocation of funds to the problem identified by this Court in *Shawnee Tribe*: that there may be certain scenarios where formula area population is "not a suitable proxy for 'increased expenditures.'" 984 F.3d at 102. In particular, this Court indicated that formula area population was likely unreasonable for a Tribal government that has a formula area "population of zero" but appears to "provid[e] essential services to its citizens." *Id.*

2. Treasury accordingly modified the final distribution by using formula area population "as a starting point" but then "reallocat[ing]" funds from ANCs "based on disparities between" formula area population "and an enrollment-based approach." JA1400. Treasury sought to identify those "instances" where formula area population "may prove insufficient" and to address the problem in those instances by also considering enrollment. JA1395, 1400. Treasury explained that "[w]here there is an especially large disparity" between the two, "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."

JA1395. Treasury thus applied a formula that measures and ranks that difference, by "compar[ing]" the two figures using the "ratio" between them and then reallocating funds based on the disparity—the tribes with the biggest proportional disparity between formula area population and enrollment received the largest share (100%) of what they would have received under an enrollment-only method, with that share decreasing for each lower ranked tribe. JA1387-1389 & n.4, 1396, 1400.

The practical result of Treasury's reallocation methodology was that the "zero population" tribes identified by this Court in the last appeal received funds as if the methodology had used tribal enrollment, rather than formula area population, as the measure of population for all federally recognized tribes. Thus, Shawnee (the plaintiff in the last suit) and Miccosukee (one of the plaintiffs here) are receiving funds using the enrollment metric exclusively (as well as employment and expenditure data).[8]

The risk of formula area population being "an unsuitable proxy" for "increased expenditures," *Shawnee Tribe*, 984 F.3d at 100-102, is most evident in the case of tribes that do not have a formula area or otherwise have a formula population of zero, and Treasury could plausibly have stopped there. *See* JA1395. For tribes that have a formula area but have only a small formula area population, a

[8] As noted above, when making payments using the reallocation formula, Treasury previously inputted inaccurate formula area populations for several tribes, including Miccosukee. Treasury has now addressed that issue. *See supra* pp. 26-29.

disparity between tribal enrollment and formula area population may reflect the reasons that formula area population was selected as a metric in the first place: that enrollees may live far from the tribe's jurisdictional boundaries and thus be less likely to receive relevant services from the tribe. *See* JA1395; *see also* JA522-523, 650, 752-753, 755-756, 777-778, 847. But Treasury determined that it would make further adjustments and reallocate additional funds—thus taking them from ANCs, because only funds previously allocated to ANCs are available to be reallocated—for some other tribes that have formula area populations but have great proportional disparities between their formula area populations and the number of tribal enrollees.

Any such adjustment will necessarily be imperfect. The available data does not confirm for each tribe how well formula area population or enrollment will "correlate" 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"—the entire purpose of factoring in population. JA748, JA752; *see* JA1391, 1395. A disparity between formula area population and enrollment may suggest that the tribe has enrollees who live far from the Tribal government and do not receive any, or as many, relevant tribal services (one of Treasury's original justifications for using formula area population as a metric); that tribal members who are served by the Tribal government are not captured in the formula area population (plaintiffs' concern); that there are simply data

imperfections or anomalies; or any number of other potential conclusions or combinations thereof.

Given the constraints it was operating under, Treasury had to draw lines and make judgments about how to use the available, quite imperfect, data to arrive at a methodology. *See Federal Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). As the district court summarized, the final allocation thus "us[ed] both the IHBG population counts" and "Tribal enrollment," with enrollment most heavily weighted for those Tribal governments where formula area population was least likely to serve as a good proxy. JA356. This "ensure[d]" that the tribes whose increased expenditures were most likely underestimated in the initial allocation "would receive a higher percentage of the available funds" than tribes whose increased expenditures were less likely underestimated. JA342-343; *see* JA1395, 1400.

3. The ordinary standard for arbitrary and capricious review is "deferential," *Prometheus*, 141 S. Ct. at 1158, and particular deference is warranted here in light of the unusual circumstances of this case. The only direction Congress provided was that Treasury should apportion the $8 billion among Tribal governments as "*the Secretary shall determine*[] . . . based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to [its] aggregate expenditures in fiscal year 2019" and "determined in such manner as *the*

Secretary determines appropriate to ensure that all amounts available . . . for fiscal year 2020 are distributed to Tribal governments." 42 U.S.C. § 801(c)(7) (emphases added); *see Shawnee Tribe*, 984 F.3d at 100. Although this Court held in *Shawnee Tribe* that the directive to base the allocation on increased expenditures meant that the Secretary's determination was not insulated from judicial review, Congress's explicit delegation makes clear that it sought to grant considerable discretion to the Secretary. *See Southwest Airlines Co. v. Transportation Sec. Admin.*, 650 F.3d 752, 756 (D.C. Cir. 2011) (concluding that such statutory language calls for "particularly strong" deference to agency judgments); *American Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 393 (D.C. Cir. 2005) (Roberts, J., concurring in part and dissenting in part) (noting that similar phrasing "fairly exudes deference to the Secretary." (quoting *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989))).

The fact that Treasury was charged with acting quickly and using imperfect data sources as proxies for future changes in expenditures, all in relation to a once-in-a-century pandemic, also counsels in favor of providing wide latitude to the Secretary. *See Alaska Airlines, Inc. v. Transportation Sec. Admin.*, 588 F.3d 1116, 1120 (D.C. Cir. 2009) (explaining that determinations that "involve complex judgments" and "data analysis" must "receive an extreme degree of deference") (quotation marks omitted)); *see also Department of Commerce v. New York*, 139 S.

Ct. 2551, 2571 (2019) (calling for deference where the decision requires "value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty"). Treasury explained from the start that "any allocation formula" would "yield only an estimate of increased eligible expenditures." JA751, 754. And given the statutory mandate to move quickly and the overarching economic and public health needs, Treasury stressed "considerations of administrative feasibility." JA751, 754. "It is not infrequent that the available data does not settle a regulatory issue." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). In the absence of "perfect empirical or statistical data," an agency must only make "a reasonable predictive judgment," *Prometheus*, 141 S. Ct. at 1160, and must "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion," *State Farm*, 463 U.S. at 52; *see Inteliquent, Inc. v. Federal Commc'ns Comm'n*, 35 F.4th 797, 802 (D.C. Cir. 2022). As discussed, Treasury's determinations here readily satisfy that standard.

B. Plaintiffs' Arguments Lack Merit

1. Plaintiffs do not dispute significant portions of Treasury's methodology. Plaintiffs embrace Treasury's decision to rank tribes by population-to-enrollment ratio and to use that ranking to determine what tribes will get some additional funds. Plaintiffs also welcome Treasury's decision not to reallocate funds to tribes below the 85th percentile in that ranking, thereby limiting the number of other tribes

eligible to receive reallocated funds. Plaintiffs thus seem to accept that the closer the enrollment is to the formula area population, the more likely the formula area population is a good proxy for increased expenditures. It is thus common ground that the "zero population" tribes described in this Court's *Shawnee* decision should receive a supplemental allocation such that they receive funds entirely based on enrollment, and tribes outside the top 15% in terms of ratio of enrollment to formula area population should receive no supplemental allocation.

The only question is how to treat the tribes in between. At one extreme, plaintiffs urge that tribes like Prairie Band—which has a formula area population of approximately 750 and an enrollment of 4,515—should be treated the same as the zero population tribes.[9] At the other, as noted, Treasury could have chosen, but did not, to treat them the same as the tribes outside the top 15% (*i.e.*, limit the reallocation to the zero population tribes). Treasury chose an intermediate approach, and "phased out" the benefit by gradually reducing the adjustment.

It is hard to see how any of these options could be arbitrary and capricious, and Treasury's intermediate approach is, in any event, entirely reasonable. Treasury's decision to "reallocate[]" funds from ANCs "based on disparities

[9] As noted, plaintiffs mistakenly reference enrollment figures that they submitted to Treasury in April 2020. *See* Br. 3, 13-14, 19-20. But Treasury explained that, where available, it was using enrollment data collected by the Bureau of Indian Affairs. JA1396. Plaintiffs have not challenged that decision.

between" formula area population "and an enrollment-based approach," JA1400, ensures that all zero population tribes receive an allocation that only takes account of enrollment (as well as employment and expenditures) and that other tribes receive an allocation based on a combination of formula area population and enrollment, with the additional, enrollment-based payments tapering down to the 85th percentile of tribes ranked using a population-to-enrollment ratio. This approach was a reasonable effort to conform to the broad statutory criteria, is in "a zone of reasonableness," and takes account of "the relevant issues." *Prometheus*, 141 S. Ct. at 1158. Treasury "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Inteliquent, Inc.*, 35 F.4th at 802 (quoting *State Farm*, 463 U.S. at 43); *see also Alliance of Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 197 (D.C. Cir. 2015) (explaining that while courts should not be "a rubber stamp for agency actions," nor should they sit as a "peer review board for an academic journal of econometrics").

2. Plaintiffs' contrary argument is largely premised on their mistaken view that the objective of Treasury's adjustments was to come as close as possible to the allocation that would have occurred had Treasury never used formula area population at all and simply allocated funds based on tribal enrollment. The problem Treasury was solving—and the problem identified by this Court in *Shawnee Tribe*—

was much more limited. As discussed above, in some cases tribal enrollment may greatly overestimate increased expenditures, such as when tribe members live far from the tribe's jurisdiction and receive relevant services from other sources. Treasury thus retained formula area population as the main measure of population—and, for 85% of tribes, the only measure—and merely sought to adjust it in circumstances where formula area population was most likely to be an insufficient proxy for increased expenditures.

Plaintiffs are thus wrong to declare that the reallocation was "disconnected" from either the goal of estimating "increased expenditures" or Treasury's initial decision to "prorate" the allocation based in part on the number of people each Tribal government serves. Br. 17-18, 22-24. To the contrary, the greater the disconnect between the two measurements, the more likely that 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." JA1395. Accordingly, the greater the disconnect, the more that tribe's final allocation would be weighted toward enrollment rather than formula area population. *See* JA1387-1389 & n.4, 1395-1396, 1399-1400.

Plaintiffs are similarly wrong to assert (Br. 19-20) that by phasing out the reallocation—rather than having the same total per-enrollee allocation above the

85th percentile—Treasury failed to treat like cases alike. As noted, it is common ground that Treasury's reallocation was properly based not only on the level of formula area population and enrollment, but also on the ratio between the two. The claimed anomaly of having a tribe with a larger formula area population and larger enrollment receive a smaller amount of funds, *see* Br. 19-20, arises from plaintiffs' failure to account for this ratio that plaintiffs otherwise embrace. Consider a hypothetical tribe with a formula area population of zero and an enrollment of 10,000, and a second hypothetical tribe with a formula area population of 9,500 and an enrollment of 11,000. For the first tribe, the formula area population is likely not an appropriate metric, and it would receive funds based on its enrollment of 10,000. For the second tribe, its formula area population appears to be a reasonable metric, and it would fall well outside the 15% of tribes entitled to adjustments, and receive funds based on its formula area population of 9,500. Thus, although the first tribe has a lower formula area population and a lower enrollment, it would receive more funds than the second tribe.

This result is not anomalous (and, as noted, arises only from portions of Treasury's methodology with which plaintiffs agree). The point is that Treasury's methodology is not designed merely to compare raw numbers among tribes. Treasury's approach assesses which of two imperfect data sources is likely to be a better proxy for increased expenditures and how Treasury should weight those

measurements for each Tribal government. Plaintiffs' effort to identify an anomaly merely reflects the fact that the hypothetical circumstances discussed above can occur not only when comparing tribes that received adjustments and tribes that did not, but also when comparing among tribes that received adjustments. In the final distribution for the Shawnee Tribe (discussed at Br. 19), which had a formula area population of zero but over 3,000 enrolled members, Treasury's formula based the allocation entirely on enrollment. But for plaintiff Prairie Band (discussed at Br. 19-20), which had a formula area population of approximately 750 and roughly 4,500 members, Treasury's formula gave material weight to both enrollment and formula area population. Treasury could not do the same for Shawnee, which did not have a formula area population, as this Court explained in its prior decision. That is the reason that Shawnee received more funding despite having lower enrollment; unlike for Prairie Band, there was likely no reliable figure other than the enrollment figure that contributed to their population-based allocation.

Plaintiffs also cannot adequately account for the anomalies inherent in their preferred approach. Plaintiffs propose ranking tribes based on the ratio of formula area population to enrollment in order to select the top 15%, but then entirely ignoring that ratio in making supplemental allocations to the chosen group. If the ratio is relevant to determining who should get a supplemental allocation, it remains relevant to determining how large a supplement each tribe should receive. Plaintiffs

would also require Treasury to create a cliff between the last tribe eligible for a supplemental allocation and the first tribe that was ineligible, instead of phasing out the benefits of the supplemental allocation gradually.[10] And as a consequence of what plaintiffs urge is the only reasonable approach, Treasury would either have had to (1) reallocate less money to those tribes who were most likely undercounted by using formula area population, or (2) take substantially more funds away from ANCs and the people they serve, which had the misfortune of having their funds being held up for nearly a year as litigation over their eligibility proceeded all the way to the Supreme Court.

Plaintiffs' suggestion (Br. 24-27, 28-30) that Treasury failed to explain phasing out the reallocation suffers from many of the same flaws. Plaintiffs posit that Treasury departed from a "strict *per capita* analysis of 'increased expenditures.'" Br. 24-25. Allocating funds based on formula area population, enrollment, or some combination of the two are all ways to allocate funds "*per capita*"; the difference is merely how population is calculated. Plaintiffs' insistence (Br. 24-25) that Treasury adopted some additional unexplained step or was required

[10] Plaintiffs wrongly suggest (Br. 29) that cliffs are irrelevant because tribes who receive no funds may never "know" how close they were to receiving funds and could not "jockey" to change their ranking. Arbitrariness is not just about the perception of arbitrariness or the risk of gamesmanship. (And much as plaintiffs have determined how much certain tribes were paid, other tribes could likely do the same thing.)

to perform "a comparative analysis of projected 'increased expenditures' between those Tribal governments ranked lowest to highest on Ratio-Rank," fundamentally misunderstands the adjustment that Treasury was making. Treasury did not deviate from its prior methodology. Treasury adjusted it to account for concerns about the data source originally used to project increased expenditures.

Treasury provided ample explanation such that its "path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974)). As Treasury consistently explained, it believed that formula area population was, as a general matter, a good measure of population for purposes of predicting increased expenditures (and thus the best input for any *per capita* allocation here). Treasury thus took formula area population "as a starting point" and reallocated funds "based on disparities" between formula area population and enrollment. JA1400. It is entirely natural to calibrate the amount of reallocation to the degree of the disparity, by analyzing "the impact" of the initial "methodology on certain Tribes" and determining a further "methodology pursuant to which it will reallocate a portion of the remaining, unpaid funds." JA1394. In particular, Treasury was "reallocat[ing] a portion of the remaining, unpaid" funds to address "scenarios in which IHBG formula area population counts might prove insufficient," and reallocation was warranted only to the degree that "there is an especially large

disparity between formula area population and enrollment figures" because it is that "difference" that "suggests that the Tribal government has a need for funding to provide services" that was "not reflected in its formula area population." JA1395.

Treasury thus explained that it would rank the tribes' "population-to-enrollment ratio[s]" and use those ratios to "provide additional assistance to those with the greatest need based on the circumstances" of the disparity between population and enrollment, "while still retaining sufficient allocations for ANCs." JA1396. Treasury described the formula with reallocations "linearly phased out" such that the highest ranked tribes—those with zero formula population—receive what they would have received if Treasury had evaluated all federally recognized tribes using enrollment, and each lower ranked tribe receives slightly less, which redistributes funds "between the 100th and 85th percentiles." JA1388 & n.4, 1396; *see* JA1398-1399; *see also* JA1386-1387, 1394-1395 (explaining that this Court "found that at least one Tribe assigned an IHBG formula area population of zero was likely to succeed," that "Tribes with formula area populations that are substantially smaller than the number of their enrolled members expressed frustration," and that Treasury must balance any reallocation against the harm to ANCs and the "hard-to-reach populations" that ANCs serve). As the district court observed, this calculation "ensure[d]" that the tribes whose increased expenditures were most likely underestimated in the initial allocation "would receive a higher percentage of the

available funds" than tribes whose increased expenditures were less likely underestimated. JA342-343; *see* JA1395, 1400.

3. As discussed above, Treasury's final allocation was in no respect arbitrary and capricious, and the district court's judgment should be affirmed. In addition, plaintiffs' contention regarding the proper remedy in the event they prevail is mistaken. It is black-letter law that a conclusion that agency action was arbitrary and capricious should ordinarily result in a remand for the agency to correct any defects in its reasoning or in its action. *See Immigration & Naturalization Servs. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (stating that a "judicial judgment cannot be made to do service for an administrative judgment" and "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (similar); *City & County of San Francisco v. Federal Energy Regulatory Comm'n*, 24 F.4th 652, 661 (D.C. Cir. 2022) (similar).

There is no basis for the court to direct a particular outcome on remand, as plaintiffs suggest. And this is no mere technicality. There is no plausible argument that Treasury only has one available option. If this Court rejects Treasury's methodology, it should be up to Treasury in the first instance to address any defects the Court identifies. Depending on the Court's reasoning, Treasury could reasonably provide further explanation for its existing methodology, conclude that a different

combination of population measurements should be considered, or determine that fewer dollars should be based on population at all. Treasury could also potentially conclude that there are other ways to address any possible shortfall (albeit with the limited funds remaining). In addition, if the existing distribution were arbitrary and capricious, Treasury should have the discretion to devise a new methodology for all affected tribes rather than providing relief only for the two plaintiffs-appellants here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JULY 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,475 words according to the count of Microsoft Word. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Adam Jed
ADAM C. JED

ADDENDUM

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42 U.S.C. § 801

§ 801. Coronavirus relief fund

(a) Appropriation

(1) In general

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated for making payments to States, Tribal governments, and units of local government under this section, $150,000,000,000 for fiscal year 2020.

(2) Reservation of funds

Of the amount appropriated under paragraph (1), the Secretary shall reserve—

(A) $3,000,000,000 of such amount for making payments to the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa; and

(B) $8,000,000,000 of such amount for making payments to Tribal governments.

(b) Authority to make payments

(1) In general

Subject to paragraph (2), not later than 30 days after March 27, 2020, the Secretary shall pay each State and Tribal government, and each unit of local government that meets the condition described in paragraph (2), the amount determined for the State, Tribal government, or unit of local government, for fiscal year 2020 under subsection (c).

(2) Direct payments to units of local government

If a unit of local government of a State submits the certification required by subsection (e) for purposes of receiving a direct payment from the Secretary under the authority of this paragraph, the Secretary shall reduce the amount determined for that State by the relative unit of local government population proportion amount described in subsection (c)(5) and pay such amount directly to such unit of local government.

(c) Payment amounts

(1) In general

Subject to paragraph (2), the amount paid under this section for fiscal year 2020 to a State that is 1 of the 50 States shall be the amount equal to the relative population proportion amount determined for the State under paragraph (3) for such fiscal year.

(2) Minimum payment

(A) In general

No State that is 1 of the 50 States shall receive a payment under this section for fiscal year 2020 that is less than $1,250,000,000.

(B) Pro rata adjustments

The Secretary shall adjust on a pro rata basis the amount of the payments for each of the 50 States determined under this subsection without regard to this subparagraph to the extent necessary to comply with the requirements of subparagraph (A).

(3) Relative population proportion amount

For purposes of paragraph (1), the relative population proportion amount determined under this paragraph for a State for fiscal year 2020 is the product of—

(A) the amount appropriated under paragraph (1) of subsection (a) for fiscal year 2020 that remains after the application of paragraph (2) of that subsection; and

(B) the relative State population proportion (as defined in paragraph (4)).

(4) Relative State population proportion defined

For purposes of paragraph (3)(B), the term "relative State population proportion" means, with respect to a State, the quotient of—

(A) the population of the State; and

(B) the total population of all States (excluding the District of Columbia and territories specified in subsection (a)(2)(A)).

(5) Relative unit of local government population proportion amount

For purposes of subsection (b)(2), the term "relative unit of local government population proportion amount" means, with respect to a unit of local government and a State, the amount equal to the product of—

(A) 45 percent of the amount of the payment determined for the State under this subsection (without regard to this paragraph); and

(B) the amount equal to the quotient of—

(i) the population of the unit of local government; and

(ii) the total population of the State in which the unit of local government is located.

(6) District of Columbia and territories

The amount paid under this section for fiscal year 2020 to a State that is the District of Columbia or a territory specified in subsection (a)(2)(A) shall be the amount equal to the product of—

(A) the amount set aside under subsection (a)(2)(A) for such fiscal year; and

(B) each such District's and territory's share of the combined total population of the District of Columbia and all such territories, as determined by the Secretary.

(7) Tribal governments

From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

(8) Data

For purposes of this subsection, the population of States and units of local governments shall be determined based on the most recent year for which data are available from the Bureau of the Census.

(d) Use of funds

A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);

(2) were not accounted for in the budget most recently approved as of March 27, 2020, for the State or government; and

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

(e) Certification

In order to receive a payment under this section, a unit of local government shall provide the Secretary with a certification signed by the Chief Executive for the unit of local government that the local government's proposed uses of the funds are consistent with subsection (d).

(f) Inspector General oversight; recoupment

(1) Oversight authority

The Inspector General of the Department of the Treasury shall conduct monitoring and oversight of the receipt, disbursement, and use of funds made available under this section.

(2) Recoupment

If the Inspector General of the Department of the Treasury determines that a State, Tribal government, or unit of local government has failed to comply with subsection (d), the amount equal to the amount of funds used in violation of such subsection shall be booked as a debt of such entity owed to the Federal Government. Amounts recovered under this subsection shall be deposited into the general fund of the Treasury.

(3) Appropriation

Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated to the Office of the Inspector General of the Department of the Treasury, $35,000,000 to carry out oversight and recoupment activities under this subsection. Amounts appropriated under the preceding sentence shall remain available until expended.

(4) Authority of Inspector General

Nothing in this subsection shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

(g) Definitions

In this section:

(1) Indian Tribe

The term "Indian Tribe" has the meaning given that term in section 5304(e) of Title 25.

(2) Local government

The term "unit of local government" means a county, municipality, town, township, village, parish, borough, or other unit of general government below the State level with a population that exceeds 500,000.

(3) Secretary

The term "Secretary" means the Secretary of the Treasury.

(4) State

The term "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

(5) Tribal government

The term "Tribal government" means the recognized governing body of an Indian Tribe.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

June 15, 2022

Chairman Talbert Cypress
Miccosukee Tribe

Re: Additional Coronavirus Relief Fund Payment

Via Email (talbertc@miccosukeetribe.com)

Dear Chairman Cypress:

We are notifying you that the Department of the Treasury has made an adjustment in the calculation of your Tribal government's allocation under the Coronavirus Relief Fund (CRF). On April 30, 2021, Treasury announced a reallocation of a portion of the CRF to certain Tribal governments. Your Tribal government received a payment in 2021 pursuant to this reallocation and is now entitled to an additional payment of $117,886.00. Information regarding how to accept this payment is provided below.

Explanation of previous reallocation

Treasury originally allocated funding for Tribal governments from the CRF partially on the basis of each Tribal government's formula area population under the Indian Housing Block Grant (IHBG) program administered by the Department of Housing and Urban Development (HUD). Treasury subsequently adopted the reallocation methodology announced on April 30, 2021, in order to provide additional payments when there is a substantial disparity between the Tribe's IHBG formula area population count and its Tribal enrollment. Treasury recognized that, where there is an especially large disparity between formula area population and enrollment, 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. That is particularly true where the Tribal government has a formula area population of zero.

Accordingly, Treasury calculated a population-to-enrollment ratio for each federally-recognized Tribe. Only the 85th percentile of Tribal governments according to that ratio were eligible for payment. Furthermore, the amount that each of those Tribal governments was entitled to receive was phased-out on a linear basis according to its rank based on that ratio. Treasury paid Tribal governments with a zero formula area population an amount equal to the full difference between the formula area-based payment received from Treasury in 2020 and what the Tribal government would have received under the enrollment-based allocation described in the April 30, 2021, reallocation announcement, available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/coronavirus-relief-fund.

Explanation of adjusted payment amount

Treasury calculated the population-to-enrollment ratio using the publicly available IHBG formula area population values for each Tribal government for the IHBG fiscal year 2020 final allocation. This data includes three Tribal governments participating in CRF that have zero formula area population and several other Tribes that have formula area population values in fractional amounts between zero and one. Tribal governments with a fractional formula area population between zero and one received a smaller fraction of the difference between the population-based payment they received in 2020 and the amount they would have received under the counterfactual enrollment-based approach discussed in the reallocation methodology. Treasury has since learned from HUD that these fractional formula area population values between zero and one do not represent actual differences in the formula area population of these Tribes and of the three Tribes participating in CRF that are listed as having a formula area population of zero, as calculated in accordance with HUD's regulation at 24 CFR part 1000, subpart D. Errors are created if HUD runs the IHBG formula with population values missing or population values of zero, so HUD replaces missing data with placeholder values of .0001 or .0002. When no data is available, as is the case when a Tribe does not have a formula area, .0001 is used. When the Tribe does have a formula area and population data, but the population according to the Decennial Census is zero, HUD uses .0002 as a placeholder. Using these placeholder numbers does not impact funding outcomes in the IHBG program.

The IHBG formula, which was developed through negotiated rulemaking with Tribes, incorporates multiple adjustments that impact each Tribe's population number. When these adjustments are applied to the placeholder values, the resulting numbers may vary, but are less than one. For each of the Tribal governments for which placeholder values were used by HUD, HUD has confirmed that the actual formula area population when calculated pursuant to the methodology provided in 24 CFR part 1000, subpart D is zero.

Treasury has now recalculated your reallocation using a formula area population of zero. As such, under this recalculation, your Tribal government is entitled to the additional payment amount specified above. With this additional payment, your Tribal government will receive the full amount of the difference between the formula area-based payment received from Treasury in 2020 and the amount that would have been distributed by Treasury under the enrollment-based allocation described in the reallocation announcement.

Requirements related to use of funds, reporting, and recordkeeping

As with the prior payments from the CRF, this payment will be subject to the restrictions on the use of funds provided in section 601(d) of the Social Security Act (42 U.S.C. § 601(d)), as added by the CARES Act, and guidance issued by Treasury, and all Tribal governments are required to submit reports to Treasury with respect to the use of such funds.

Please note in particular that payments from the CRF may only be used to cover costs that were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021 (the "covered period"). Treasury issued updated guidance regarding this requirement on December

14, 2021, which is available at https://home.treasury.gov/system/files/136/CRF-Guidance_Revision-Regarding-Cost-Incurred.pdf. Although this period has now passed, Tribal governments may use this payment to cover outstanding amounts on a contract or other obligation for an eligible expenditure that was entered into by December 31, 2021.

Alternatively, Tribal governments may use this payment to reimburse eligible costs that were incurred during the covered period and paid for by the Tribal government using its own funds. Please note that if your Tribal government uses this payment to reimburse itself for a previously incurred cost, and that cost was incurred in a year for which an audit prepared under the Single Audit Act has already been submitted, the Tribal government may need to adjust its financial statements and the single audit reporting package for that year. As such, Treasury suggests that Tribal governments discuss the effect of any such reimbursements with their auditors. Treasury will provide additional information to your Tribal government regarding upcoming deadlines for reporting of obligations covered using CRF payments and expenditures of CRF payments to meet such obligations.

Additional information regarding the CRF, including Treasury's guidance on what constitutes an eligible expenditure, is available on Treasury's website at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/coronavirus-relief-fund. Information from the Treasury Office of Inspector General regarding recordkeeping and reporting is available on its website at https://oig.treasury.gov/cares-act.

Information on how to accept this payment

Please notify Treasury as to whether you will accept this additional payment by sending an email to CoronavirusReliefFund@treasury.gov by **July 31, 2022**, and please confirm that payment should be made to the same banking account in which you have previously received CRF payments or whether you would like to change that account.
Please contact CoronavirusReliefFund@treasury.gov with any questions regarding this payment.

Regards,

Jacob Leibenluft
Chief Recovery Officer