UNITED STATES DISTRICT COURT
FOR THE DISTRICT COLUMBIA

THE SHAWNEE TRIBE, Plaintiff, v. STEVEN T. MNUCHIN, in his official capacity as Secretary of the United Stated Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR Defendants.	)	Case No. 1:20-cv-01999 APM

PLAINTIFF THE SHAWNEE TRIBE'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The essence of Defendants' defense in this case is that Congress gave them free license to discriminatorily disregard the federal recognition of a tribe based on participation in other federal programs and find it non-existent for the purposes of awarding desperately needed relief funds under Title V of the CARES Act. This is absurdity in its truest form, and a tragedy for all tribal members who have endured Defendants' callous and arbitrary actions.

Defendants' Motion to Dismiss ("Motion") is yet another example of their efforts to hide their gross misdeeds behind procedural posturing, mischaracterizing The Shawnee Tribes' arguments and delaying this suit further. Case in point: Defendants' two-page Motion contains no substantive legal arguments, no binding law and no facts whatsoever. Instead, Defendants incorporate over 100 pages of legal briefing across two separate cases leaving The Shawnee Tribe and this Court to guess the basis of Defendants' Motion. Not only does the Motion fail to meet the

most basic motion practice requirements under federal and local rules, but it vitiates fundamental notions of fairness. Defendants then assert that this Court's prior injunctive relief orders in this and a completely separate case are now the law of the case. Black letter D.C. law is clear that interlocutory orders are not law of the case and the Court is free to revisit any decision it has made. These issues are fatal to the Motion.

Defendants' next seek Rule 12(b)(1) dismissal for a lack of subject matter jurisdiction, despite the existence – for nearly a decade – of clear District of Columbia ("D.C.") Circuit case law expressly holding that reviewability and violations of the Administrative Procedure Act's ("APA") arbitrariness prohibition are Rule 12(b)(6) matters, and not jurisdictional in nature. Notwithstanding the Defendants' efforts to deny this Court lacks jurisdiction, these claims are reviewable under the APA which grants Court subject matter jurisdiction here under the APA's presumption of reviewability. Defendants presume that because a lump sum appropriation is involved that it is automatically unreviewable. But not all lump sum appropriations are unreviewable. Regardless of whether the presumption of unreviewability applies, The Shawnee Tribe has overcome it because Title V contains sufficient law and standards by which to review Defendants' decision. Defendants admittedly are not the experts in this matter; they are not appropriating Title V funds between programs; they are not free to use the funds as they see fit. In fact, Title V expressly limits the use of the funds, as well as Defendants' discretion. Even if the Title V express limitations and standards are ignored, Defendants have cabined their own discretion in "informal policy statements."

Since the Defendants' decisions are reviewable, Defendants fare no better under the Rule 12(b)(6) standard. It is clear The Shawnee Tribe has alleged facts sufficient to state a claim, and that Defendants have engaged in arbitrary and capricious decisionmaking when they "based" their

distribution of Title V funds on objectively false data in contravention of reason and Title V mandates. Thus, Defendants' Motion should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Background

A. Legal Background.

This lawsuit arises out of the distribution of funds under Title V of the CARES Act ("Coronavirus Relief Fund" or "CRF"), Pub. L. 116-136, 134 Stat. 281 (2020), which was signed into law on March 27, 2020. Pursuant to Title V of the CARES Act, which amends the Social Security Act (42 U.S.C. 301 et seq.), Congress appropriated only $8 billion (out of $150 billion) in direct aid to "Tribal governments" specifically to provide economic relief for, in part, tribal governments impacted by the COVID-19 pandemic. 42 U.S.C. § 801(a)(2)(B).

In Title V, Congress specifically directed Defendants that:

> 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 … relative to aggregate expenditures in fiscal year 2019 by the Tribal government*** … and determined in such manner as the Secretary determines appropriate ***to ensure that all amounts available*** under subsection (a)(2)(B) for fiscal year 2020 ***are distributed to Tribal governments***.

Id. § 801(c)(7) (emphasis added). Title V does not define the term "increased expenditures" or "aggregate expenditures", but it does define "Tribal governments" as "the recognized governing body of an Indian tribe." *Id.* § 801(g)(5); *see also Confederated Tribes of Chehalis Reservation v. Mnuchin ("Chehalis")*, —— F. Supp. 3d. ——, 2020 WL 1984297, at *5 (D.D.C. Apr. 27, 2020). There is no dispute that The Shawnee Tribe is a federally recognized Tribal government as defined by Title V and thus is entitled to CRF to pay for its increased COVID-19 expenditures. [Dkt.

2, Verified Compl., ¶ 10].

Title V also expressly limits the use of the CRFs. A Tribal 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 are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019." 42 U.S.C. § 801(d)(1). Use of funds are also subject to other provisions in the Social Security Act, 42 U.S.C. §§ 254-256. CARES Act, Sec. 5001(b).

B. Factual Background

1. After requisite consultation, Treasury adopts a distribution methodology that includes population as one factor for CRF awards.

On March 31, 2020, Defendants provided notice to The Shawnee Tribe requesting the Tribe's attendance on April 2 and 9, for telephonic consultations, the purpose of which was to "develop[] the methodology or formula" to allocate the CRF, and not to select any data used within it. [*Prairie Band Potawatomi Nt. v. Mnuchin et. al.*, 20-cv-01491-APM, at Dkt. 2-2].[1] On April 2 and April 9, 2020, Treasury and the Interior held telephonic consultation sessions where federal officials heard from representatives of Tribal governments from across the United States. [Dkt. 2, ¶ 12]. These consultations were led by Interior and Treasury, and included Mr. Dan Kowalski, Senior Advisor to the Secretary, who was delegated authority by the Secretary of the Treasury to administer the CRF payments to the Tribal governments.

During the April 2 consultation, Mr. Kowalski expressly admitted that "***I am not an expert***

[1] The Shawnee Tribe respectfully requests that this Court take judicial notice of the documents contained herein, to the extent they are not central to or attached with the Verified Complaint. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (when considering a Rule 12(b)(6) motion, the Court can consider the allegations within the four corners of the complaint as well as "any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice.").

on Tribal issues." [*Prairie Band*, No. 1:20-cv-01491-APM, at Dkt. 2-3, lines 14:3-4 (April 2, 2020 Transcript prepared by Defendants, portions of which are attached hereto as "Exhibit A" for this Court's convenience); *see also Chehalis*, No. 1:20-cv-01002-APM, Dkt. 90-1 at Appendix Record ("AR") 15; *Agua Caliente Band of Cahuila Indians v. Mnuchin*, No. 1:20-cv-01136-APM, at 26-1, ¶ 2]. Mr. Kowalski nonetheless assured the tribes that Treasury's policy was to achieve "a ***fair and transparent*** method for allocating these funds." [Exhibit A, lines 15:6-8 (emphasis added); Dkt. 90-1 at AR 16]. During the consultation, several tribes proposed using tribal member population as a factor in the distribution of funds. [*See, e.g.*, Exhibit A, lines 19:10-15, 28:12-16, 71:16-20, 85:3-5; Dkt. 90-1 at AR 20, 29, 72, 86]. Other tribes suggested land base size or number of employees, upon which Treasury sought further thoughts. [Exhibit A, lines 120:9-14; Dkt. 90-1 at AR 121 (MR. KOWALSKI: I have a question for the President. So what do you think about land mass as an indicator of relative need? We've heard a number of people talk about population and you talk about the size of your Tribal land. How well correlated is that to needs in your view?); Exhibit A, lines 123:11-124:5; Dkt. 90-1 at AR 124-25 (MR. KOWALSKI: Thank you. Thank you for putting employees as another thing that we need to think about in our weighting scheme that we may have to come up with.)].

Moreover, tribes suggested various preexisting models Defendants could use. One such tribe recommend that the current Indian Health Service methodology through the annual year Funding Agreement be used because "these funds have been negotiated between sovereign Tribal Nations and the Federal Government – the mechanism is already in place." [Exhibit A, lines 126:10-127:20; Dkt. 90-1 at AR 127-28 (In response, Mr. Kowalski states: "Yes, thank you. I can tell you that I don't really know what a distribution looks like at this point. That I think is the point of the Consultation. I know we are interested in working with BIA and learning from BIA what

models are out there for distributing funds")]. Indeed, as Governor Stephen Roe Lewis of the Gila River Indian Community pointed out:

> There is no formula contemplated in the Act. And it is our strong belief that we need to have a process that is ***need based.*** I will repeat, that is need based. … Each Tribe has all the information it needs to prepare a certified estimate of needs and we must do that, all of us. There is information that all Tribes have that is readily available and can be completed in an hour or two. And that is what the Act anticipates. One, the 2019 budget, two, the Tribe's budget for FY 2020. … If we don't take the time now, and there is still time to do this within the timeframe remaining, then we will end up shortchanging Indian Country.

[*Prairie Band*, 20-cv-01491-APM, at Dkt. 2-4, lines 106:3-108:6 (April 9, 2020 Transcript prepared by Defendants, portions of which are attached hereto as "Exhibit B"); *see also* Dkt. 90-21 at AR 304-06].

By the April 9 consultation session, Treasury had "determined that a formula [for distributing CRF] makes sense. It's hard to do anything other than a formula in the time that's available…." [Exhibit B, lines 18:7-11; *see also* Dkt. 90-1 at AR 216]. Moreover, as of the April 9, 2020 consultation, Treasury had led The Shawnee Tribe, among other tribes, to believe that it was likely to use population as a key component of that distribution formula. For example, on April 8, 2020, the Department Interior ("Interior") through the Bureau of Indian Affairs ("BIA") specifically requested The Shawnee Tribe's certified tribal member population [Dkt. 2, ¶ 13]. Indeed, during the April 9, 2020 consultation session, Chairperson Jaime Stuck for the Nation of Nottawaseppi Huron Band of the Potawatomi noted she was "aware that both Treasury and Interior officials have a preference for utilizing a simple formula or criteria for distributing these funds within Indian Country in order to expedite delivery of these critically needed funds … [but] we do not support a formula based on a single criteria such as Tribal population." [*Id.*, lines 73:4-18].

By April 13, 2020, following the close of the consultation period, it became abundantly clear that Defendants had determined to use population in the distribution formula for allocating

the CRFs because they began specifically requesting population and other data from the tribes. On April 13, 2020 and following the close of the consultation period, Treasury published a form entitled "Certification for Requested Tribal Data" on its website. The Certification explicitly required Tribal governments to certify tribal "[p]opulation." [Dkt. 2, ¶ 14; Dkt. 2-1]. Treasury broadly defined tribal population as the "[t]otal number of Indian Tribe Citizens/Members/Shareholders, as of January 1, 2020." [Dkt. 2-1]. The Shawnee Tribe timely submitted its Certification, including its certified tribal population of **3,021** to Treasury by Defendants' requested deadline of April 17, 2020. [Dkt. 2, ¶¶ 13-15]. Neither the Interior nor Treasury ever questioned The Shawnee Tribe's enrollment data, nor have Defendants disputed the accuracy of that information in this case.

2. After adopting its distribution methodology to include tribal population data, Defendants separately decided to use Indian Housing population data in that formula instead of the Tribe's certified data.

After having determined population would be a data component of the distribution, requesting the Tribe submit its certified tribal enrollment population data for that sole purpose and receiving the Tribe's certified population data, Defendants decided instead to use the faulty population data from the Indian Housing Block Grant ("IHGB") formula. After requiring tribes to submit, and certify, several categories of data by April 17, 2020, the Defendants' jointly announced on May 5, 2020, an outline of the selected allocation formula: 60% of the CRF would be allocated to tribes "based on population data used," ("Population Award") and 40% of the CRF would be allocated to tribes based on tribal employment and further expenditure data, not yet available. (the "May 5 Announcement"). [Dkt. 2, ¶ 26; Dkt. 3-4].[2] Secretary Mnuchin's and Secretary Bernhardt's

[2] Cited in the Verified Complaint at footnote 6 as U.S Dept. of the Treasury, Coronavirus Relief Fund Allocations to Tribal Governments (May 5, 2020),

stated, but wholly unsupported, reasoning was that "Tribal population [was] expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs." [Exhibit C, p. 2]. The allocation and distribution formula for the "Population Award" also included a minimum payment of $100,000 for tribes with a population of less than 37 members. [*Id.*, p. 3]. [Dkt. 3-4].]. Because The Shawnee Tribe was erroneously listed as non-existent with a population of **zero** in the IHBG population data, the Tribe received the minimum distribution instead of a more equitable distribution based on its certified population of 3,021. [Dkt. 2, ¶ 26].

The May 5 Announcement was plainly the culmination of the Defendants' decision-making process for how to allocate the Title V funds, the distribution formulas selected, the type of data it would use in those distribution formulas, and the source of that data. In the May 5 Announcement, Defendants noted their distinct decisions on how to allocate the CRFs from the decision of what data to use under that formula. For instance, their methodology announcement is made under one heading, namely, the "***Allocation determination***," and their separate decision to use IHBG population data is contained under another heading called "***Tribal population data***." [*Id.*, pp. 1-2]. Nowhere in the May 5 Announcement is there any indication that Defendants' "***Allocation determination***" and decision to use IHBG population data were one in the same or even made at the same time.

Apparently, in a retroactive effort to bolster their decision to use IHBG population data, on June 4, 2020, the Treasury issued a post hoc explanation in the CRF Frequently Asked Questions ("FAQs") on Tribal Population. In the FAQs, Treasury admits it used the population data from the

https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf, (last visited June 16, 2020). Courtesy copy is attached hereto as "Exhibit C."

IHBG program "***after*** making the determination that it is the most ***consistent and reliable*** metric" to use in the formula. [*Prairie Band*, 20-cv-01491-APM, at Dkt. 2-12, p.1 (attached hereto as "Exhibit D" for convenience) (emphasis added)]. Logically, Defendants could not have deemed the IHBG population data the "most consistent and reliable" without first analyzing all other data, including the previously submitted certified tribal population data. Defendants never provided any explanation to The Shawnee Tribe why the certified tribal population data it requested and received (as opposed to plainly erroneous data in the IHBG), was inaccurate and not consistent and reliable.

On June 12, 2020, Defendants issued an additional press release acknowledging that had Treasury relied on data "provided by the Bureau of Indian Affairs, rather than the [IHBG] data" – a policy in which they adopted for the formula – a $679 million difference would have resulted. [Dkt. 2, ¶ 35; Dkt. 3-4, p.2]. As such, Defendants voluntarily withheld those amounts "to resolve any potentially adverse decision in litigation," which it found "a prudent court" of action. While this may not rise to the level of an admission that the Defendants should not have used the IHBG data, it certainly reflects that alternative data was available that would have given the Tribe additional funding.

In that same June 12 press release, Defendants illustrated their consistent approach to their dual stage decisionmaking process under Title V. Like their distinct decisions to use a formula based on population data and then the IHBG data within the formula, Defendants also staged their decisions related to the employment and expenditure award. In the May 5 Announcement, Defendants acknowledged they made the decision to use employment and expenditures as a basis to distribute the other 40% of CRFs. [Exhibit C, p. 1; Dkt. 3-4]. Defendants, however, waited until "after receiving" "additional information from Tribal governments" to determine what weight that data would be given in that formula, which was not announced until June 12. [Dkt. 3-4].

3. The objectively false IHBG population data rendered The Shawnee Tribe non-existent for the purposes of its CRF award.

Despite The Shawnee Tribe providing certified population data of 3,021 members only week earlier, Defendants instead decided to allocate the Tribe's share of the Population Award based on obviously false IHBG population data. [Dkt. 2, ¶ 19]. Under the IHBG population data, ***twenty-five Tribal governments, including The Shawnee Tribe***, are listed as having a population of ***zero***, a legal and factual impossibility. [*Id.*, ¶ 21; *see also* Dkt. 2-2, pp. 2-16]. Within the same IHBG data, and only a few columns over, The Shawnee Tribe has ***2113 enrolled members*** ("Tribal Enrollment Data"), which the Defendants also chose to ignore. [Dkt. 2, ¶ 22; Dkt. 2-2, p. 10].

In selecting to use the patently false IHBG population data, however, Treasury inexplicably determined that the "Tribal ***[E]nrollment***" Data reflecting The Shawnee Tribe had over 2,000 enrolled member was also inaccurate but Treasury never made any determination with respect to the requested certification of tribal "[p]opulation" based on Defendants' own definition of that term. [*Compare id.*, p. 2 *with* Dkt. 2-1 (defining "[p]opulation")]. Stated differently, Defendants decided to use certain IHBG population data for the Tribe, despite the obviously false nature of that data though they had access to other population data, including the IHGB Tribal Enrollment Data, the Tribe's certified population data, and the BIA enrollment data. At no time prior to the Treasury's May 5 Announcement did they give The Shawnee Tribe notice that they intended to use the objectively false IHBG population data. [Dkt. 2, ¶ 25]. As stated, based on the Defendants' Population Award distribution, The Shawnee Tribe received only $100,000, which was the minimum allocation based on the false IHBG population data that reflect its non-existence. Defendants have never provided an explanation to the Tribe as to how it determined that the Tribe does not exist or how a tribe that does not exist can incur COVID-19 expenses, which is a precondition under Title V to distribute funds.

C. Procedural Posture

After the May 5 Announcement, The Shawnee Tribe engaged in extensive discussions and efforts with Defendants to obtain relief, which are not at issue here, but Defendants have refused to revisit their use of objectively false data. [Dkt. 2, ¶¶ 26-36]. As such, on June 18, 2020, The Shawnee Tribe filed this instant suit and a Motion for Ex Parte Temporary Injunction (the "PI Motion") in the Northern District Court of Oklahoma where the Tribe resides, and Defendants' arbitrary and capricious decisions are felt. [Dkts. 2-3].

In its Verified Complaint, The Shawnee Tribe alleges Defendants acted arbitrarily and capriciously and contrary to law under the APA when they (1) selected their methodology; (2) separately decided to use IHBG population data within that methodology indicating The Shawnee Tribe had zero population, which was objectively false and legally impossible on its face; and (3) refused to correct their known and admitted use of this false data. [Dkt. 2, Sections B and C (alleging separate decisions), ¶¶ 63-63 (same), 66]. Based on these actions, Defendants failed to meet the quintessential purpose of Title V of the CARES Act, which is to pay for "increased expenditures ***of each [not some] such Tribal government***." [*See id.*, ¶¶ 7-11). The Shawnee Tribe sought both injunctive and declaratory relief.

On June 29, 2020, the Oklahoma District Court denied the temporary restraining order and converted the PI Motion to one for preliminary injunctive relief. [Dkt. 19]. This matter was transferred to this Court on July 28, 2020, though no ruling had been made on the PI Motion. On August 19, 2020, after fully briefing The Shawnee Tribe's PI Motion, the Court issued a Memorandum Opinion and Order denying it. [Dkt. 43]. No express findings of fact were made. [*See generally id.*]. Despite denying the PI Motion, the Court recognized that The Shawnee Tribe had been irreparably harmed and declined Defendants' invitation to dismiss this lawsuit. [*Id.*].

On August 27, 2020, Defendants filed a two-page Motion that does not dispute or

challenge the facts alleged as set forth in the Verified Complaint, and in essence, argues this lawsuit should be dismissed in its entirety merely because the Court denied injunctive relief under a distinctly different legal standard and their selection of methodology remains within their sole discretion. [Dkt. 45]. As set forth below, The Shawnee Tribe disagrees.

II. Law and Argument

A. Defendants' Motion fails to meet fundamental motion practice requirements and should be denied on its face.

Defendants' Motion is completely devoid of any substantive factual or legal arguments that would support dismissal under either Rule 12(b)(1) or 12(b)(6); thus, it should be denied. The apparent legal basis of Defendants' two-page Motion are that Defendants should allegedly be permitted to incorporate briefing not at issue here, and that the Court has previously denied injunctive relief to The Shawnee Tribe and the Plaintiff in *Prairie Band*.

Defendants' Motion leaves The Shawnee Tribe guessing as to the legal and factual basis of their Motion by incorporating nearly 100 pages of briefing spanning two separate District Court cases. Defendants' Motion, however, "shall include or be accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of facts," and be stated "with ***particularity***" as to the grounds for seeking relief. LCvR 7; *see also* Rule 7(b) (emphasis added). This is aside from the fact that the Court may only review the briefing on ***this*** Motion in ***this*** case, the Complaint and any documents central thereto, and documentary evidence for which it may take judicial notice. *See St. Francis Xavier Parochial Sch.*, 117 F.3d at 624.[3] Nowhere in Defendants' Motion do they cite authority permitting them to incorporate injunctive relief briefing, particularly that which The Shawnee Tribe did not author

[3] Though the Court may also consider its resolution of disputed facts, the Defendants have asserted none in this case. [*See generally* Dkt. 43].

and from a case to which it was not a party.

In any event, Defendants' efforts to hang their hat on prior briefing and rulings – particularly those in a distinctly different case – has already been rejected in this Circuit. Within the D.C. Circuit, "[i]nterlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment." *Langevine v. Dist. of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997). This is especially true with respect to rulings on provisional remedies, such as injunctive relief. For example, in *Ramirez v. U.S. Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 20 n.1 (D.D.C. 2018), the Court explained:

> "Because issues litigated in a preliminary injunction action are not law of the case, the Court does not regard its prior determinations as binding for purposes of assessing Defendants' Motion to Dismiss. Rather, as explained below, the Court finds dismissal unwarranted based on consideration of the record and arguments presently before the Court."

Id. (internal citation and punctuation omitted); *see also Keepseagle v. Perdue*, 856 F.3d 1039, 1048 (D.C. Cir. 2017) (holding a district court's initial decisions are non-binding because "the law-of-the-case doctrine does not apply to interlocutory orders ... for they can always be reconsidered and modified by a district court prior to entry of a final judgment.") (internal quotation marks and citation omitted); *Otay Mesa Prop., L.P. v. United States Dep't of the Interior*, 344 F. Supp. 3d 355, 372 n.7 (D.D.C. 2018) ("To the extent that any portion of this Court's earlier ruling could be considered law of the case … this Court finds it proper to exercise its discretion to revisit this issue here in light of the Court's misunderstanding about the agency's arguments regarding its methodology.").[4] Nor may Defendants subsequently raise these issues in reply. *See Long v. U.S.*,

[4] Defendants' argument is also fundamentally flawed because it overlooks the fact that injunctive relief is decided under an entirely different legal standard than the legal standard disfavoring dismissal. *Compare Agua Caliente Band of Cahuilla Indians*, No. 20-cv-01136-APM, 2020 WL 2331774, at *3 (citing blackletter law that injunctive relief is "extraordinary and drastic remedy" that is "never awarded as [a matter] of right") (citations omitted) *with Cabrera Cabrera v. U.S.*

604 F. Supp. 2d 119, 123 (D.D.C. 2009) (rejecting new arguments raised for the first time on reply and not included in the underlying Rule 12(b)(6) motion) (citations omitted). Defendants' Motion simply fails to meet these fundamental motion practice requirements designed to fairly put The Shawnee Tribe and the Court on notice of the basis of their claims; thus, it should be denied.

B. Defendants' jurisdictional argument is meritless.

Even if Defendants' Motion survives the fatal procedural flaws above, substantively it lacks merit. The Shawnee Tribe can glean only two arguments from Defendants vague Motion: (1) Congress precluded review of Defendants' selection of methodology because the statutory language grants them sole discretion and it contains an abbreviated time-frame, which Defendants' ironically failed to honor; and (2) the allocation methodology is not arbitrary and capricious. None of these assertions are the proper basis of a Rule 12(b)(1) motion as Defendants contend. Moreover, they offer nothing to overcome the well-plead allegations above demonstrating this matter is reviewable and The Shawnee Tribe will be successful on the merits. Thus, Defendants' Motion should fail.

1. Defendants failed to raise any issues that are jurisdictional in nature.

Defendants contend, in a footnote, that reviewability is a Rule 12(b)(1) issue that divests this Court of subject matter jurisdiction, which is an inaccurate statement of D.C. law. The D.C. Circuit and this Court have made clear that "[a] complaint seeking review of agency action 'committed to agency discretion by law' has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6), ***not under the jurisdictional provision of Rule 12(b)(1).***" *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (rejecting that discretionary decisions

Citizenship & Immigration Serv., 374 F. Supp. 3d 153, 158-59 (D.D.C. 2019) (court must take as true plaintiff's well-plead allegations of the complaint under both Rule 12(b)(1) and 12(b)(6)).

may be properly resolved under Rule 12(b)(1) and resolving confusion in the D.C. Circuit on this point) (emphasis added). Though Defendants' cite to *Milk Train Inc. v. Veneman*, 310 F.3d 747, 751 (2002) to support that reviewability is a jurisdictional issue, that Court mentions jurisdiction in a single sentence without any analysis whatsoever and is dicta. Even if *Milk Train Inc.'s* passing comment is not dicta, *Sierra Club* is the more recent decision on this question. Thus, reviewability, whether based on timeliness or discretion is not a jurisdictional issue to be decided under Rule 12(b)(1).

2. Defendants' decisions are reviewable under the APA

Even assuming reviewability is a jurisdictional matter, as a general rule, the requisite starting point under the APA is a "'***strong presumption*** favoring judicial review of [an] administrative action." 5 U.S.C. § 702; *Abbott Lab. v. Gardner*, 287 U.S. 136 (1967); *Mach Mining LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015) (emphasis added); *see also Lincoln v Vigil*, 508 U.S. 182, 190 (1993) ("we have read the APA as embodying a 'basic presumption of judicial review'")(internal citations omitted). While APA review does not apply to "agency action committed to agency discretion by law", 5 U.S.C. § 701(a)(2), at the heart of this exception is the question of whether there is any law to apply and whether congress evinced any intent to deny judicial review. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Vigil*, 508 U.S. at 190. Reviewing courts are to look at the statute itself, and "where the relevant statute 'is drawn so that court would have no meaningful standard against which to judge the agency's exercise of discretion'," then such a decision can be said to be "committed to agency discretion." *Id.*

Notwithstanding the "basic presumption" of review, there are "certain administrative decisions that courts traditionally have regarded as 'committed to agency discretion'." *Id.* at 191.

One such rare instance where an agency's discretion is presumptively unreviewable is where Congress has appropriated funds to an agency in a lump sum and the appropriation does not "statutorily restrict[] what can be done with those funds." *Id.* at 192.

The mere fact that a lump sum appropriation has been made, however, does not make it automatically unreviewable. Although the Supreme Court has held that ***certain*** allocations of funds from a lump-sum appropriation may be unreviewable under section 701(a)(2) of the APA, "this ***narrow*** exception does not 'typically' or 'presumptively' extend to all allocations of appropriated funds." *Id.* at 193; *see also Planned Parenthood of New York, Inc. v. U.S.*, 337 F. Supp. 3d 308, 324-25 (S.D.N.Y.) (emphasis added) (expressly rejecting the argument that lump sum allocations are, by their very nature alone, presumptively unreviewable). Indeed, even under *Lincoln v. Vigil*, upon which Defendants (and this Court) heavily rely, judicial review is not available only "in those ***rare*** circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Vigil*, 508 U.S. at 190-91 (citations omitted). Regardless, "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." *Id.* at 193. The statutory language in Title V provides the requisite meaningful standards, congressional circumscription, and limitations on agency discretion to make it sufficiently different from *Vigil*, such that *Vigil* does not apply.

Title V's statutory language also satisfies the law of this Circuit. The D.C. Circuit employs a two-step analysis to determine whether such an administrative decision is committed to agency discretion, and whether that exercise of discretion is reviewable: the court must first look at the nature of the statute and then, to the language and structure of the statute. *Sierra Club*, 648 F.3d 848, 855 (D.C. Cir. 2011). As to the nature of the statute at issue, the D.C. Circuit has also generally held that certain categories of statutes are "presumed immune from judicial review," including

purported "lump sum appropriations." *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634 (D.C. Cir. 2020) (citing *Vigil*). But the D.C. Circuit has also determined that this presumption against reviewability is rebuttable, and judicial review is available if the statute, regulations, or formal or informal policies provide the legal standards or limitations by which a court can judge the exercise of the agency's discretion. *Id.* at 642-643; *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (legal standards to apply "may be found in formal or informal policy statements")(citing *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987); *Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002)); see also *Vigil*, 508 U.S. at 193.

a. The nature of Title V is sufficiently distinct and *Vigil* does not apply.

Vigil does not stand for the black letter proposition that all lump sum appropriations are presumptively unreviewable. In *Vigil*, the Supreme Court held that absent any limiting language in a lump sum appropriation, the Court could not review a decision by the Indian Health Service (IHS) to cease funding a specific Indian health care program. *Vigil*, 508 U.S. at 193-194. The annual lump sum appropriation at issue in *Vigil* was intended to fund Indian health care programs authorized under two laws – the Snyder Act and the Indian Health Care Improvement Act. Together, the annual appropriation bill and the authorizing statutes provided discretionary authority to the IHS for over 30 years to fund health care programs for Indians. The Court held that Congress did not provide any statutory limitations on how IHS could use those funds or what programs IHS could administer with those funds. *Id.* at 193 ("the appropriations Acts for the relevant period do not so much as mention the Program [discontinued], and … speak about Indian health only in general terms"). In other words, there was no "law to apply." *Id.* at 191; *Citizens to Protect Overton Park*, 401 U.S. at 410.

To further support its analysis, the Court explained several policy reasons for why Congress might not provide limiting language in a lump sum appropriation and why the Court

would not second guess the IHS discretion to re-allocate its agency program funding. *Vigil*, 508 U.S. at 192-193. The Court noted that through lump sum appropriations, Congress may want to "give an agency the capacity to … distribute the funds among some or all of the permissible objects as it sees fit," to allow "flexibility to shift funds within a particular appropriation account so that the agency can make necessary adjustments for unforeseen developments and changing requirements" or "balance a number of factors that are peculiarly within its expertise." *Id.*

Tellingly, courts have been properly distinguishing the review of agency decisions in the context of lump sum appropriations from *Vigil* ever since. For example, in *Ramah Navajo School Board v. Babbitt*, the D.C. Circuit held that it could review the Secretary of the Interior's decisions to distribute funds from a lump sum appropriation to tribes for contract support costs under the Indian Self Determination and Education Assistance Act ("ISDEAA"). 87 F.3d 1338, 1342 (D.C. Cir. 1996). Applying the *Overton Park* analysis, the D.C. Circuit compared the language of the ISDEAA to the language of the Snyder Act and appropriation bill at issue in *Vigil*. Finding sufficient language in the ISDEAA to limit the Secretary's funding decisions, the D.C. Circuit determined judicial review of the distribution of the lump sum appropriation was proper. *Id.* at 1347. Furthermore, because the Secretary had also adopted regulations and policies related to allocating the lump sum funds for contract support costs amongst the tribes, the D.C. Circuit found that those regulations also provided standards against which to review the Secretary's allocation decision. *Id.* 1349-1350. Because the D.C. Circuit identified sufficient standards and legislative language in the ISDEAA to limit the Secretary's discretion, the Court found that *Vigil* did not govern its decision to review the Secretary's action. *Id.* at 1347.

In *Mt. Evans Co. v. Madigan*, 14 F. 3d 1444 (10th Cir. 1994), the Tenth Circuit similarly found that a lump sum funding decision by the Secretary of Agriculture was subject to judicial

review because, unlike in *Vigil*, the appropriation language contained mandatory funding language and specific purposes for the "use" of the funds, *Id.* at 1448. In that case, plaintiffs sued the Secretary for failure to spend funds to rebuild a destroyed building that the plaintiff operated as a vendor for the Forest Service. As Treasury has done here, the Secretary argued that the funding (rebuild) decision was not subject to judicial review under *Vigil*. *Id.* The Tenth Circuit disagreed. The funding language at issue stated, in relevant part: "any moneys … are hereby appropriated … to cover the cost to the United States of any improvement, protection or rehabilitation work on lands under the administration of the Forest Service." *Id.* at 1449. The Tenth Circuit dismissed the Secretary's argument because, as the Tenth Circuit aptly read *Vigil* to require, a lump sum appropriation is unreviewable ***only*** "when the statute does not restrict what can be done with those funds." *Id.* at 1449. Instead, the 10th Circuit found that the Secretary could not spend the funds at issue on whatever the Secretary wished and could only spend the funds on that which Congress explicitly authorized. *Id.* at 1450. This explicit language that prescribed how funds must be used was clearly the type of language that "circumscribed agency discretion to allocate resources by putting restrictions in the operative statute." *Id.* (citing *Vigil*, 508 U.S. at 191).

Other lower courts that have held similarly. *Planned Parenthood of New York, Inc.*, 337 F. Supp. 3d at 324-25 (this rare exception applies "only '[w]here Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds'," thereby providing no meaningful standard by which to judge the agency's actions); *Multnomah Cnty. v. Azar*, 340 F. Supp. 3d 1046, 1061-62 (D. Or. 2018) (the mere fact that a statute contains some discretionary language does not make it unreviewable and the use of the word "shall" and other mandates in the statute provide a standard against which to judge the agency's discretion).

Like the funding language in *Ramah* and *Madigan*, the law at issue here contains explicit limitations on the amount and use of funds distributed from the purported lump sum appropriation in Title V; thus, it is materially different from the lump sum appropriation at issue in *Vigil* where there is quite literally no statutory language on the proper use or administration of the lump sum appropriated fund at all. *Vigil*, 508 U.S. at 193. For instance, Title V expressly requires the following: (1) mandatory allocations to tribes of $8 billion; (2) CRFs must only be distributed to Tribal governments; and (3) "the amount paid" must be "based on increased expenditures of each such Tribal government." 42 U.S.C. § 801(c)(7); *Agua Caliente Band of Cahuilla v. Mnuchin*, 20-cv-01136, 2020 WL 2331774, at *6 (D.C. May 11, 2020) (allocations under Title V are expressly limited and "shall be 'based on increased expenditures'"). This language also requires that the Secretary ensure that all Tribal governments that seek funds actually obtain funds. The Secretary has no discretion to deny funds to a Tribal government. Moreover, the Secretary must allocate funds in such a way as to "[e]nsure that all amounts available . . . are distributed to Tribal governments," thus, divesting any discretion to withhold funds "for any purpose the Secretary wants." *Madigan*, 14 F. 3d at 1450. Overall, this is language of a mandatory nature and not a discretionary one and provides sufficient legal standards by which to judge Defendants' actions.

Finally, Title V contains an explicit statutory authorization on the use of funds by the recipient – not Treasury. Specifically, "[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 are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019." 42 U.S.C. § 801(d)(1). Use of funds are also subject to other provisions in the Social Security Act, 42 U.S.C. § 254-256. *See* CARES Act, Sec. 5001(b). However, while Treasury has no role is determining up

front how funds can be used – for example, Treasury has not required Tribes to provide information about specific use of funds in order to receive funds – Treasury is charged by Congress to monitor the use of funds, and to establish auditing and reporting requirements of funding recipients. 42 U.S.C. § 801(f). This includes the authority to recoup funds that have been improperly used (creating a retroactive limitation on the use of funds enforced by the Treasury). 42 U.S.C. §801(f)(2).

As in *Madigan*, the statutory language of Title V explicitly limits how the funds can be used and spent, which further exhibits Congress intent to circumscribe Defendants' discretion. *Vigil*, 508 U.S., at 192. Moreover, Congress expressly cabined Defendants' discretion on how to distribute these funds by requiring it to be rationally "based" on COVID-19 increased expenses. Although Defendants have argued repeatedly that CRFs need only be used for COVID-19 "increased expenditures," that is not the only requirement in Title V. Instead, the statute expressly requires that any amounts distributed be "based on increased expenditures of each such Tribal government … relative to aggregate expenditures in fiscal year 2019 by the Tribal government." 42 U.S.C. § 801(c)(7) (emphasis added); *Agua Caliente Band of Cahuilla*, 20-cv-01136, 2020 WL 2331774, at *6 (allocations under Title V are expressly limited and "shall be 'based on increased expenditures'") (emphasis added). Simply put, it is not enough that funds be merely used for COVID-19 expenses, regardless of how or in what amount distributed; rather, Congress expressly cabined Defendants' discretion to distribute these funds in a way that they are rationally "based" on COVID-19 increased expenses. Because Title V contains sufficient standards and legislative language to limit the Secretary's discretion, *Vigil* should not govern this Court's decision to review the Defendants' actions. *Ramah*, 87 F.3d at 1347.

Furthermore, the mere existence of discretionary authority is not enough to support a claim that an administrative decision is committed to agency discretion. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 641 (2005). Defendants wrongly argue that as long as the funds are allocated "to meet permissible statutory objectives" – which the Defendants presume to have occurred – then they have met the *Vigil* test. As shown above, the *Vigil* test is not that simple. Rather, neither the Defendants nor this Court are free to ignore the express "restrictions in the operative statute." *Vigil*, at 193; *Ramah*, 87 F.3d at 1344.

Taken together, Title V's statutory language contains a clear expression of Congress intent to limit the Treasury's discretion to determine the funding amount, the funding recipient, the funds allocation and the use of funds. Unlike *Vigil*, where there was literally no law to apply, here Congress has provided several explicit bumper guards and standards that the Court can apply and that limit the Treasury's responsibility to determine funding amounts. The D.C. Circuit has found such meaningful standards in statutes requiring far less. *Physicians for Soc. Responsibility*, 956 F.3d at 643 (finding statute reviewable where an Army Board "may excuse a failure to file … if it finds it to be in the interest of justice."). As such, Defendants' decisions, while discretionary, are not "committed to agency discretion by law" and thus are reviewable.

In contrast, Defendants admit, and this Court has ruled, that the question of "who" is entitled to Title V funds is reviewable. [Dkt. 21, pp. 12-13]; *see also Chehalis*, —— F. Supp. 3d. – ——, 2020 WL 1984297, at *1 (determining Alaskan Native Corporations ("ANCs") are Tribal governments entitle to CRFs). In *Chehalis*, the Defendants were challenged on their interpretation of the term "Tribal government." *Id.* Here, the Defendants have arguably interpreted the term "increased expenditure" to include the concept of tribal population. [*See* Exhibits C-D]. Defendants offer no principled legal position or explanation on why their interpretation of one

term in Title V is reviewable, but not their interpretation of another term. *See Chehalis*, —— F. Supp. 3d. ——, 2020 WL 1984297, at *5 (holding that determining "who" is entitled to such funds under the CARES Act was reviewable, even though Congress allocated a lump-sum amount).

b. There are no policy reasons to avoid judicial review as Congress has not relied on Treasury expertise or evinced an intent to deny judicial review.

A lump sum appropriation may avoid judicial review under 5 U.S.C. 702(a)(2) only where, with no law to apply, policy reasons ***also*** support the determination that the funding decision is committed to agency discretion by law. For example, if such a decision is "peculiarly within [the agency's] expertise"; requires allocations between "one program or another"; and involves decisions as to whether a "program best fits the agency's overall policies." *Vigil*, 508 U.S. at 193 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)); *Milk Train Inc.*, 310 F.3d at 752 (relying on Secretary's expertise and implementation of farm policy in reviewing allocation of funds to dairy farmers). Although Defendants rely on that portion of Title V stating that funding should be "determined in such a manner as deemed appropriate," that language expressly applies to the requirement that all funds should be distributed, not the preceding portion of the sentence limiting what amounts Tribal governments should receive. 42 U.S.C. § 801(c)(7) ("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"). There is no indication that this latter language obviates the former mandate that Treasury "shall" pay CRFs to each Tribal government "based on increased expenditures."

Relatedly, there is nothing about Treasury's role in the distribution of Title V funds that is "peculiarly within [its] expertise." Indeed, Mr. Kowalski expressly admitted "***I am not an expert on Tribal issues***." [*Prairie Band*, No. 1:20-cv-01491-APM, at Dkt. 2-3, lines 14:3-4]. For this very reason, Congress required Treasury to consult with the experts, namely, the tribes themselves.

Tellingly, Treasury eventually used population data from an entirely different federal program – the IHBG program – because it lacked the expertise to make this determination on its own. Moreover, because these funds are not intended for Treasury's own use, there are no allocations between "one program or another," and no decisions as to whether a "program best fits the agency's overall policies." *See Vigil*, 508 U.S. at 193. Finally, unlike the Secretary of Agriculture, the Secretary of Treasury is not responsible for implementing national policy related to COVID-19 relief. The Treasury's role here is important but ministerial. In the end, policy rationale does not support the Defendants' contention that its decisions, including the "Allocation determination" and the use of objectively false IHBG population data, to distribute the Title V lump sum appropriation is unreviewable by this Court.

c. Defendants made two distinct decisions, both of which are reviewable.

Defendants persist in their mischaracterization that this case is only about the allocation methodology. It is not. Neither The Shawnee Tribe's Verified Complaint nor PI Motion argued that Defendants' selection of the methodology alone was the basis of this lawsuit. [Dkt. 2, Sections B and C (alleging separate decisions), ¶¶ 63-63 (same), 66; Dkt. 6, p. 3; *see generally* Dkt. 3].[5]

[5] The Court also found that The Shawnee Tribe raised, for the first time in the oral argument for the PI Motion, that the decision to use population as a proxy for COVID-19 expenses (i.e., the methodology) was a separate decision than its decision to use the objectively false IHBG population data. [Dkt. 43, p. 5]. The Shawnee Tribe, however, has raised this issue in nearly every pleading and brief filed in this case to date. [*See, e.g.,* Dkt. 2, Sections B and C (alleging decision to use population as a proxy occurred after consultation with tribes and the decision to use IHBG data in the formula occurred after receiving population values from tribes and finding them invalid), ¶¶ 63-63 (same), 66; Dkt. 9, pp. 2, 6-10 ("Defendants' allegation that Plaintiff's Motion is solely based on 'challenging the methodology' … is a misreading of the Motion and a mischaracterization of the facts. To the contrary, the crux of the Motion is that Defendants used, and failed to correct, objectively false (not merely inaccurate) data …."; Dkt. 22, p. 1 ("Defendants mischaracterize [again] Plaintiff's case, which does not solely challenge the methodology ***but also challenges the use of patently and objectively false data in that methodology***" (emphasis added)); Dkt. 40 (Defendants' two distinct decisions are not "inextricably intertwined")]. Instead, it was

Indeed, The Shawnee Tribe has outlined extensive well-plead facts, which must be taken as true, demonstrating Defendants engaged in a bifurcated decision-making process, each of which warrants separate review. As stated above, by the April 9, 2020 consultation session, Treasury had already decided that a formula was necessary to distribute CRF awards as it would be "hard to do anything [else]." [Exhibit B, lines 18:7-11]. During that same consultation, Treasury led The Shawnee Tribe, among other tribes, to believe that population would be a key component of that distribution formula. [*Id.*, lines 73:4-18]. This belief was further supported on April 13, 2020, when both the Interior, through the BIA, and Treasury requested The Shawnee Tribe to provide its tribal population. [Dkt. 2, ¶¶ 13-14; Dkt. 2-1]. The Shawnee Tribe timely certified its tribal population to Treasury was 3,021, and neither the Interior nor Treasury ever questioned that data. Only ***after*** the decision had been made to use a formula and population as a component of it – which prompted their collection of population data from tribes in the first instance – did Defendants separately determine which data to use within that formula, namely, the false IHBG data. [Exhibit C]. The record clearly reflects that the Defendants had a choice of population data to use, and that this choice was made separate from, and after, the decision to use population as one factor in the distribution of funds.

Moreover, these two decisions are not legally inextricably intertwined and, to hold otherwise, would give Treasury free license to use objectively false data in their distribution of federal funding and hide their clear error behind an unreviewability veil. Rather, the case law says the opposite: namely, that even where a presumption exists that a particular decision is unreviewable, the Court can – and must – go further to review whether Treasury itself cabined its

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Defendants that disputed this fact for the first time at oral argument on the PI Motion, despite The Shawnee Tribe clearly setting forth that allegation numerous times before the hearing.

own discretion and that is the standard by which this Court may adjudge Treasury's decision-making under the Administrative Procedures Act ("APA").[6]

In *Policy and Research LLC v. United States Department of Health and Human Services et al.*, 313 F. Supp. 3d 62 (D. D.C. 2018), for example, the District Court of Columbia ("D.C. Court") expressly held that, while a federal agency's allocation of congressionally-appropriate grant funding is presumptively unreviewable, the Government itself provided applicable standards by which the court could review and judge the agency's decisions. In that case, plaintiffs sued the U.S. Department of Human Health and Services and its Secretary (collectively, the "Government") under the APA for its administration of the Teen Pregnancy Prevention Program ("TPPP") after the Government had terminated the plaintiff's TPPP grant funding without explanation. *Id.* at 67. On cross-motions for summary judgment, there was no dispute that Government's termination of the TPPP grant funding violated the APA. Instead – not unlike Treasury here – the Government "placed all of its eggs into the unreviewability basket" and argued that there was no meaningful standard by which to judge its decisions; thus, argued the Government, the D.C. Court could not reach the merits of the case. *Id.* at 67-68.

The Court disagreed and held that, while a federal agency's allocation of congressionally-appropriated grant funding may be presumptively unreviewable, the Government had provided standards by which to judge its decision to terminate that funding. Even where the court presumptively cannot review an agency's funding allocation decision, however, it must proceed to determine whether the statute ***or the agency itself*** has cabined its own discretion. *Physicians for*

[6] Even *Milk Train*, which Defendants cite with approval, allows for a bifurcated review and approach. *Milk Train, Inc.*, 310 F.3d at 751-52 (holding the Secretary of Agriculture's decision to cap the maximum eligible production levels, which determined the amount of federal subsidies for dairy farmers, was unreviewable but finding that a related decision – the Secretary's use of improper data to allocate subsidies – was reviewable).

Soc. Responsibility, 956 F.3d at 643; *Steenholdt*, 314 F.3d at 638. To be sure, "agencies frequently cabin their own discretionary funding determinations by generating formal regulations ***or other binding policies*** that provide meaningful standards for a court to employ when reviewing agency decisions." *Id.* at 76 (emphasis added). Thus, regardless of the presumptively unreviewable nature of the Government's initial funding decision, the agency itself had cabined its discretion defining when and how termination may occur; thus, the decision to terminate the grants was reviewable. Moreover, not unlike Treasury here, the Government asserted its decisions to terminate the TPPP funding was merely an extension of their unreviewable discretion, which the D.C. Court found "clever, but wrong." *Id.* at 79.

This standard was later reaffirmed by the D.C. Court in *Center for Biological Diversity v. Trump*, —— F. Supp. 3d ——, 2020 WL 1643657 (D. D.C. 2020). In that case, plaintiffs filed two lawsuits against President Donald Trump and executive officials ("Government") alleging that their allocation of Treasury Forfeiture Funds ("TFF") to construct a southern United States border wall violated the APA. *Id.* *15. In response, the Government yet again alleged that those decisions were unreviewable because they were committed to agency discretion by law. The D.C. Court disagreed. In doing so, the D.C. Court made the distinction between "the Court venturing into areas 'committed to agency discretion'—such as how best to use TFF funds—and the Court applying statutory interpretation principles to determine whether the Secretary's actions follow Congress's dictates." *Id.* Because the statute limited the use of TFF funds to "law enforcement activities of any Federal agency," the Government's decision to use TFF funds to construct a border wall was reviewable. *See also Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1, 6 (D.D.C. 2018) ("[E]ven an action that is within the agency's statutory authority may still be arbitrary and capricious if the agency fails to exhibit reasoned decision-making."). Thus, nothing precludes this

Court from bifurcating Defendants' April decision to use population as a proxy and their later May decision to use IHBG population data.

The federal district court in New Mexico applied a similar bifurcated analysis in *New Mexico Health Connections v. U.S. Dep't of Health and Human Services*, 340 F. Supp. 3d 1112 (D.N.M. 2018) *overruled on other grounds by* 946 F.3d 1138 (10th Cir. 2019). There HHS crafted a rule for allocating funds to health providers under the Affordable Care Act to compensate them for increased health cost risks. The Plaintiff did not take issue directly with the allocation method, but instead challenged the use of certain data within that method. *Id.* at 1162. HHS argued that its decision to use the challenged data was unreviewable, as the funds being distributed and allocated were from a lump sum appropriation to cover multiple program expenses under the ACA. The district court acknowledged that under *Vigil* the lump sum appropriation allocation itself was unreviewable, *id.* at 1174, but the decision to use certain data was reviewable. *Id.* ("That a court cannot evaluate the substance of an agency decision does not mean, however, that ***courts cannot evaluate whether the agency followed appropriate procedures in reaching that decision***.") (emphasis added). The district court then found that HHS' use of the challenged data was arbitrary and capricious because HHS failed to explain its rationale for using such data. Thus, nothing precludes this Court from reviewing Defendants' distinct decisions here.

d. Defendants own policy statements serve limit their discretion and provide the Court with a legal standard for review.

Even if this Court concludes that Congress did not cabin Defendants' discretion, and that the allocation and distribution methodology selected was unreviewable, Defendants own policy statements have cabined their discretion in the use of the objectively false IHBG data. *Steenholdt v. FAA*, 314 F.3d at 638. During the April 2, 2020 consultation, Mr. Kowalski made the informal policy statement that "Treasury want[s] … a fair and transparent method for allocating these

funds." [Exhibit A, lines 15:6-8]. Moreover, in Defendants' May 5 Announcement, they announced their determination to use population as a proxy for increased expenditures under Title V. [Exhibit C, p. 1]. In doing so, Defendants cabined their discretion to use objectively false data within that methodology, which was clearly not "fair and transparent," particularly given that Defendants admit they did not consult with the tribes with respect to their use of the IHBG population data.

Furthermore, the Defendants' purportedly selected the IHBG data because it was supposedly more consistent than the certified tribal population data. This is a "standard" selected by the Defendant through their policy selection of the IHBG data. If Defendants' were intending to use better data than what was otherwise available to them, including the certified tribal population data from the Tribal governments themselves, then their use of obviously and patently false data violates their own policy for selecting the IHBG data. This "data" policy provides the Court a meaningful standard by which to judge Treasury's use of objectively false data rendering The Shawnee Tribe – but not others – non-existent. This further supports the Court's jurisdiction to review the Defendants' decision to use IHBG population data.

Defendants' selection of a particular population proxy methodology or how best to allocate the CRF is no different than the Government's discretionary decision in Trump on "how best to use TFF funds." *Center for Biological Diversity*, —— F. Supp. 3d ——, 2020 WL 1643657, at *16. Yet, even then, the D.C. Court held that nothing precluded the Court from determining whether that use comported with congressional dictates or purpose. Thus, the Court can competently determine whether the decision to use objectively false data in that allocation is consistent with Treasury's own "policy" and achieves Title V's purpose of compensating the Tribe for increased COVID-19 expenditures. On its face, it does not. Thus, Defendants' wrongful actions here are

reviewable under the APA.

Nor is this an issue about underpayment of Title V funds. To be sure, the crux of this case is the fact that Defendants used objectively false (not merely inaccurate) data within that methodology that ***eliminated*** The Shawnee Tribe's population. For the purposes of Title V, The Shawnee Tribe is now non-existent. Defendants do not dispute that this data was false nor do they stand by their zero population finding in any of their pleadings, which they characterize as "imperfect" at best. [*See* Dkt. 21, p. 1].

For the reasons stated above, this Court has jurisdiction under the APA to hear this claim, the Defendants' decisions are reviewable; therefore, the Motion to dismiss on lack of jurisdiction grounds should be denied.

3. Defendants' Motion must also fail because Plaintiffs sufficiently state a claim and Defendants use of false population data was arbitrary and capricious and contrary to law.

To survive a motion to dismiss under Rule 12(b)(6), The Shawnee Tribe need only plead "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] [his or her] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Cabrera Cabrera v. U.S. Citizenship and Immigration Serv*., 374 F. Supp. 3d 153, 159 (D.D.C. 2019) (applying the *Twombly* and *Ashcroft v. Iqbal* standards). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 570; Cabrera, 374 F. Supp. 3d at 159. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint" and a Court "must . . . assume all the allegations in the complaint are true (even if doubtful in fact) … [and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Twombly*, 550

U.S. at 563; *Aktieselskabet AF 21 Nov. 2001 v. Fame Jeans*, 525 F.3d 8, 17 (D.C. Cir. 2008) (citations and internal quotations omitted); *see also Tooley v. Napolitano*, 586 F.3d 1006, 1007 (D.C. Cir. 2009) (declining to reject or address the government's argument that *Ashcroft* invalidated *Aktieselskabet*).

Furthermore, this 12(b)(6) Motion Must be Converted to a Summary Judgment Motion. The law is crystal clear: "the legal questions raised by a 12(b)(6) motion and a motion for summary judgment are the same." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1223 (D.C. Cir. 1993). This Circuit has emphasized that a 12(b)(6) motion in the context of the APA is categorically different because the court acts as an appellate tribunal. *Id.* In other words, unlike a traditional 12(b)(6) motion, in a 12(b)(6) motion brought under the APA, "the entire case on review is a question of law, and only a question of law." *Id.* at 1226. Accordingly, this Circuit warned in Marshall that 12(b)(6) motions in the context of APA should be converted to a summary judgment motion. *Id.* at 1226 n.5.

Since Marshall, courts have consistently converted 12(b)(6) motions—exactly like this motion—into summary judgment motions. *Cumberland Pharm. Inc. v. Food and Drug Admin.*, 981 F. Supp.2d 38, 47 (D.D.C. 2013) (converting 12(b)(6) motion to a summary judgment motion); *Bates v. Donley*, 935 F.Supp.2d 14, 22 (D.D.C. 2013) (same); Mdewakanton Sioux Indians of Minnesota v. Zinke, 264 F.Supp.32 116 (D.D.C. 2017). Based on the unequivocal case law, this 12(b)(6) motion should be converted to a summary judgment motion.

The Rule 56 standard does not apply to summary judgment motions under the APA. Rather, the district court determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Bates*, 935 F.Supp.2d at 22 (internal quotations and citations omitted).

Violations of the arbitrary-and-capricious mandate under the APA can take many forms. For example, if the agency fails to provide a factual basis upon which a court may conclude that the agency has actually engaged in reasoned decisionmaking, it has violated the APA. *Swedish Am. Hosp. v. Sebelius*, 773 F. Supp. 2d 1, 14 (D.D.C. 2011) (requiring an explanation for a challenged action); *see A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (noting that an agency is required to explain its decision so the court can fulfill its duty of ensuring non-arbitrary decisionmaking under the APA). An agency that, instead, transparently engages in policymaking, but arrives at its discretionary decision "by Ouija board or dart board, rock/paper/scissors, or even the Magic 8 Ball[,]" has still violated the APA's arbitrariness prohibition because its policy determination was not a reasoned one. *Make the Rd. N.Y. v. McAleenan* ("MTRNY"), 405 F. Supp. 3d 1, 47 (D.D.C. 2019), *rev'd on other grounds sub nom*., *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

An agency similarly violates the APA if it "entirely fail[s] to consider an important aspect of the problem," or if its decision "***runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise***." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, —— U.S. ——, 140 S.Ct. 1891, 1904-05 (2020). "Under any of these circumstances, it is the court's obligation to declare that the challenged rule is procedurally unlawful, and to vacate the agency's action under section 706(2)(A) of the APA." *See Regents*, 140 S.Ct. at 1904-05; *see also In re Roman Catholic Church of Archdiocese of Santa Fe*, 68 Bankr. Ct. Dec. 184, 2020 WL 2096113, at *5 (Bankr. D.N.M. May 1, 2020) (noting, in the context of the CARES Act, "courts retain an important role 'in ensuring the agencies have engaged in reasoned decisionmaking' by examining the reasons for the

agency decisions, or lack thereof, and determining 'whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'").

Defendants consistently downplay their error in an effort to make it seem minimal. [*See* Dkt. 21, pp. 1, 11 n.7, 16 (arguing Plaintiff is overly concerned about "imperfect Tribal population data" or "data that was imperfectly estimated")]. To be sure, this case is not concerned with slight imperfections or misjudgments. Defendants determined that the population of The Shawnee Tribe was **zero** when it knew that data was false and "***so implausible*** that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43; *Regents of the Univ. of Cal.*, —— U.S. ——, 140 S.Ct. at 1904-05. There is simply no dispute in this case that The Shawnee Tribe still exists. This is quintessential agency action taken in an arbitrary and capricious manner, which amounts to nothing more than pulling numbers out of the sky. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 55, 132 S. Ct. 476, 485 (2011) (holding that, even where BIA has discretion to make decisions, "it must do so in some rational way. If the BIA proposed to [make its decision] . . . by flipping a coin . . . we would reverse the policy in an instant."); *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) ("If an agency fails or refuses to deploy [its] expertise—for example, by simply picking a permissible interpretation out of a hat—it deserves no deference."). Flipping a coin or picking a number out of a hat would have yielded no less inaccurate a figure for the population of The Shawnee Tribe than what Defendants did in this case.

Similarly, there is no dispute that Defendants' use of false data showing The Shawnee Tribe is ***non-existent*** runs directly counter to the Defendants' own data policy and evidence before the agency, namely, the population data Defendants requested and received. Though Defendants already had The Shawnee Tribe's accurate population data from two separate reliable sources,

namely, the BIA with Interior and the tribe itself, they elected to use the IHBG population data finding some – but not all – tribes extinct, which is factually and legally impossible on its face. Ironically, Defendants ignored the data from the very same organizations with whom Title V expressly required Defendants to consult, namely, the Interior and the tribes. Even this Court noted the curious nature of Defendants' actions, which wholly lacks explanation. *See Agua Caliente*, No. 20-cv-01136, 2020 WL 2331774, at *7 ("Plaintiffs are rightly upset … [where] the 60% distribution made by the agency relied not on data obtained from Indian tribes in the last few weeks, but on population data from [HUD] that was publicly available before the pandemic struck").

Nor have Defendants proffered any explanation for ignoring the population data they requested. The lone explanation for the use of the IHBG population data in lieu of the solicited population data was that they were in a rush, population certificates were "unreliable," and other programs use the HUD data. [Dkt. 21, pp. 14-15]. But Defendants admit they timely had the population data they requested directly from Plaintiff for Title V purposes and they separately had it from the BIA before that date. [*Id.*, p. 15]. Furthermore, it is entirely unclear how unnamed tribes' voluntary choice not to provide a certificate for Title V awards or the receipt of duplicative forms made the data they did receive "unreliable." In any event, Defendants' assertion is not supported by the record. Treasury determined that the "[t]ribal ***enrollment***" data in the IHBG was inaccurate – not the requested certification of tribal "[p]opulation" based on Defendants' own definition of that term.[7] [*Compare id.*, p. 2 *with* Dkt. 2-1 (defining "[p]opulation")]. And Defendants' assertion that slight differences in population existed because of how tribal

[7] Even if Defendants meant the certified population data was inaccurate, they then failed to explain their refusal to use the enrollment data in the IHBG population data placing them up the same proverbial creek.

governments characterized their "enrollment"[8] is nonsensical. Defendants had population data directly from the Tribes that was ***based on Defendants' definition***. [Dkt. 2, ¶ 14; Dkt. 2-1]. Defendants' post hoc explanation about unreliable enrollment data has no bearing on the population data they requested, defined and received. Defendants never provided explanation as to why the tribal ***population*** data they requested (as opposed to enrollment), was inaccurate. *Swedish Am. Hosp.*, 773 F. Supp. at 14 (requiring an explanation for a challenged action); *see A.L. Pharma, Inc.*, 62 F.3d at 1491 (noting that an agency is required to explain its decision). This lack of explanation alone is arbitrary and capricious.

The fact that housing and transportation programs use this data is irrelevant and runs directly counter to Title V's objective. Title V awards are only authorized to compensate tribes for "increased expenditures related" to COVID-19. Nowhere in Title V does it say that only those tribes who have a housing or transportation program are entitled to funds (again, a "who" decision), or previous participation in those programs is a prerequisite to incurring COVID-19 expenses. Indeed, the fact that the HUD data was created for ***elective*** program awards is illustrative of the fact that it is entirely unrelated to Title V objectives to compensate for non-elective COVID-19 expenses.[9] This decision is beyond "the bounds of reasoned decisionmaking" and cannot be defended on review. *Roman Catholic*, 2020 WL 2096113, at *5.

Critically, Defendants "entirely fail[ed] to consider an important aspect of the problem" when they determined The Shawnee Tribe (and others) non-existent. *Motor Vehicle Mfrs. Ass'n of*

[8] Relatedly, these differences in characterization of tribal members – the extent of which Defendants fail to provide – is a result of Defendants' lack of guidance and could have been remedied had they chosen to do so.

[9] Defendants' argument that they were not required to look at population is irrelevant. Again, Plaintiff does not challenge methodology but, once Defendants made population part of the equation, they had a duty to avoid using objectively false data that is "implausible." *Miami Tribe of Oklahoma*, 656 F.3d at 1142.

U.S., Inc., 463 U.S. at 43; *Regents of the Univ. of Cal.*, —— U.S. ——, 140 S.Ct. at 1904-05. It is axiomatic that a non-existent tribe cannot incur any expenses at all, let alone $100,000 worth of expenses, which is the minimum payment Defendants provided to extinct tribes. The mere fact that Defendants distributed funds ***to a tribe that does not exist*** demonstrates the $100,000 is not "based" on COVID-19 related expenses at all and, thus, fails to meet Title V statutory objectives.

Defendants' de minimus disbursement of $100,000 to The Shawnee Tribe runs counter to this statutory mandate, and thus the use of zero population to determine the award amount is contrary to law. The Shawnee Tribe was entitled, under Title V, to an amount of funding "based on increased expenditures", not an erroneous population amount. Defendants have no basis in law or fact to explain how a zero population number and an arbitrary $100,000 CRF award is "based" on The Shawnee Tribes COVID-19 "increased expenditures" or even remotely correlates to those costs. The mere fact that Defendants distributed funds to a tribe that – according to the Defendants erroneous data – does not exist demonstrates the $100,000 is not "based" on COVID-19 related expenses at all and, thus, fails to meet Title V statutory objectives. It is axiomatic that a tribe with no tribal members cannot incur any expenses at all, let alone $100,000 worth of expenses. As discussed below, this is the epitome of arbitrary and capricious.

Defendants' decisionmaking, even where discretionary, violates the APA arbitrariness prohibition when the decision amounts to nothing more than "by Ouija board or dart board, rock/paper/scissors, or even the Magic 8 Ball." *MTRNY*, 405 F. Supp. 3d at 47.[10] On balance, and

[10] There is also no dispute that Defendants failed entirely to consult with The Shawnee Tribe with respect to the decision to use the objectively false IHBG population data. Instead, Defendants claim they did not have to, despite express language requiring Defendants to consult the tribes in determining CRF awards and their admission they are not the experts. Defendants have independently failed to provide any valid basis for their failure to meet this objective of the statute, which does not piecemeal or diminish in any way Defendants' duty to consult.

taking The Shawnee Tribe's well-plead facts as true, Defendants have acted arbitrarily and capriciously, and fundamentally failed to honor Congress' intent in enacting Title V.

C. The Shawnee Tribe reserves the right to amend its Complaint as a matter course.

To the extent this Court finds The Shawnee Tribe's Verified Complaint deficient, The Shawnee Tribe reserves the right to amend its Verified Complaint pursuant to Rule 15(a)(1)(b).

III. CONCLUSION

Defendants seek to hide from their wrongful conduct behind a veil of unreviewability and blame-shifting. In the end, Defendants' Motion fails to meet even the most basic motion practice rules based on notions of fairness and notice, and should be dismissed on that basis alone. Defendants' Rule 12(b)(1) Motion fails on the merits because it raises no issues that would be jurisdictional in nature and the Defendants' actions are reviewable under the APA. Finally, Defendants' Rule 12(b)(6) Motion also fails because their "Allocation determination" and decision to use the objectively false IHBG population data is reviewable, arbitrary and capricious, and contrary to law. Defendants' Motion should be denied in its entirety, and the Court should enter judgment in favor of the Tribe.

Respectfully dated this 1st day of September, 2020.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 1st day of September, 2020, the foregoing document was filed with the Court using the CM/ECF system and served which provided service to all parties through their attorney of record.

/s/ *Dawn McCombs*