NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 20-5286

THE SHAWNEE TRIBE,

Plaintiff-Appellant,

v.

STEVEN T. MNUCHIN, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; DAVID LONGLY BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia in Case No. 1:20-cv-01999-APM, Honorable Amit P. Mehta, U.S. District Judge

BRIEF OF *AMICUS CURIAE* PRAIRIE BAND POTAWATOMI NATION IN SUPPORT OF PLAINTIFF-APPELLANT

CAROL E. HECKMAN
JAMES P. BLENK
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202

- and -

MICHAEL G. ROSSETTI
1900 K Street, NW, Suite 730
Washington, DC 20006
(202) 888-7610
checkman@lippes.com
jblenk@lippes.com
mrossetti@lippes.com

Counsel for Prairie Band Potawatomi Nation

October 16, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Except for the following, all parties and *amici* appearing in this Court are listed in the Brief of Plaintiff-Appellant.

Prairie Band Potawatomi Nation

B. Rulings Under Review. References to the rulings at issue appear in the Brief of Plaintiff-Appellant.

C. Related Cases. Related cases appear in the Brief of Plaintiff-Appellant.

/s/ Michael G. Rossetti
Michael G. Rossetti

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Prairie Band Potawatomi is a sovereign governmental entity that is exempt from Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1.

/s/ Michael G. Rossetti
Michael G. Rossetti

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STATEMENT OF INTEREST[1]

Prairie Band Potawatomi Nation ("Prairie Band") is a federally recognized Tribal government that provides essential governmental services to its 4,561 enrolled citizens living on- and off-reservation. Prairie Band possesses sovereign authority over the Prairie Band Potawatomi Nation Reservation located in Jackson County, Kansas.

Like Appellant-Petitioner, the Shawnee Tribe ("Shawnee"), Prairie Band was harmed by the United States Department of the Treasury's use of a metric that is maintained by HUD as part of the administration of the Indian Housing Block Grant Program ("IHBG Metric") as a proxy for Prairie Band's population, instead of using the actual population of the Prairie Band, for the allocation of CARES Act[2] funds to Tribal governments. Due to Treasury's use of the IHBG Metric, the Prairie Band's population was *undercounted* by 3,678 citizens – or 80% of its population (Appx54)- resulting in a CARES Act award estimated to be $7.6 million lower than what Prairie Band would have received if its actual tribal population had been considered.

[1]No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amici funded the preparation of this brief. All parties have consented to the filing of this brief.

[2] Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. 116-136, 134 Stat. 281 (2020)

Prairie Band has a particular interest in the appeal before this Court because Prairie Band was harmed by the same legal issues that are presented in this appeal. On June 8, 2020, Prairie Band sued Treasury under the APA. *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-CV-1491 (APM) (D.D.C. filed on June 8, 2020) ("Prairie Band Litigation"). In the Prairie Band Litigation, the United States District Court for the District of Columbia (Mehta, J.) denied a preliminary injunction to Prairie Band based on the Court's conclusion that Treasury's allocation of Title V funds was unreviewable. *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-CV-1491 (APM), 2020 WL 3402298 (D.D.C. June 11, 2020). In fact, the District Court in this case relied on its own decision in the Prairie Band Litigation as a basis for denying Shawnee's application for preliminary injunction and for granting of the Treasury's motion to dismiss. (Appx2-3, Appx5-8, Appx14-16.)

If Shawnee succeeds in forcing Treasury to reconsider its allocation methodology, Prairie Band will be entitled to funds distributed according to the revised allocation. Likewise, if Shawnee succeeds in establishing a right to monetary relief against Treasury, Prairie Band would have a claim under the same theory. More broadly, like Shawnee, Prairie Band has an interest in the administration of funds directed to Tribal governments that considers the historic, geographic, and political reality of Tribal governments.

FACTUAL STATEMENT

Prairie Band believes that this Court's consideration of Shawnee's appeal would be improved by consideration of the following facts in addition to those set forth in Shawnee's opening brief. Beyond supporting the underlying merits of Shawnee's action, these facts are relevant to the question of reviewability because they demonstrate that this challenge does not go to the close calls that an agency might make in the course of administering public funds. Instead, Treasury's errors – and Shawnee's challenge – relate to Treasury's indefensible decisions on the primary issues relevant to the distribution of the Title V funds.

In the context of errors of this magnitude, the question of reviewability asks not whether Congress intended for each of Treasury's marginal decisions to be subject to judicial review. The question instead is whether Congress intended for Treasury to be allowed to make rudimentary and unexplained errors and still evade judicial review.

A. The IHBG Metric Is Not a Suitable Metric for the Approximation of Increased COVID-19 Expenditure

Despite requesting enrollment data from Tribal governments only weeks earlier, Treasury elected – without advance warning to Tribal governments – to allocate the Title V funds based on "on population data used in the distribution of the Indian Housing Block Grant[.]" (Appx99-100). As Shawnee laid out in its opening brief, Treasury thereby failed to account for the citizens of Tribal

governments that do not participate in the Indian Housing Block Grant Program or participate only to a small degree. (Shawnee Br., pp. 10-12.)

Treasury's adoption of the IHBG Metric was equally irrational for tribes that *do* participate in the Indian Housing Block Grant Program because Treasury failed to acknowledge that the IHBG Metric is neither quantitatively nor qualitatively related to "Tribal population," which is the measure that Treasury determined would "correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency." (Appx99.)

The IHBG Metric is an algorithm – not a tally, or even projection, of "Tribal population" (Appx99). The IHBG Metric begins with the Census projection of the number of individuals who consider themselves "American Indian or Alaska Native" ("AIAN"), on Census forms, within a certain geographic area. 24 C.F.R. § 1000.330. The IHBG Metric is further limited to estimated AIAN in a gerrymandered "formula area" associated with a Tribal government (*Id.*). The "formula area" consists of (i) a Tribal government's formula area as it existed in 2003 (24 C.F.R. § 1000.302(3)); (ii) nine static categories of property (§ 1000.302(1)(i - ix)); and (iii) areas added by application of a Tribal government and at discretion of United States Department of Housing and Urban Development (§ 1000.302(2)). Then, the IHBG Metric is artificially capped at "twice a…tribe's enrolled

population" (24 C.F.R. § 1000.302(5)). These machinations are reflected in fractional values.

According to Treasury, it adopted the IHBG Metric because it was purportedly a "reliable and consistently-prepared" metric, which was plainly contradicted by the fact that Shawnee and other tribes were assigned a population of zero. (Appx99.)

Aside from the fact that Shawnee and other tribes are not recognized, the IHBG Metric's greatest shortcoming is that it fails to credit tribes for enrolled citizens who live outside the formula area, to whom the Tribal government owes duties. As a measure of housing need, the typical purpose of the IHBG Metric, this may be reasonable. After all, if a tribal citizen is not living in the area, she is not driving housing demand in the area. But COVID-19 expenditures are better captured, both qualitatively and quantitatively, by Tribal citizenship, *i.e.*, the persons who are served by Tribal governments.

B. Treasury's Adoption of the IHBG Metric Was Criticized by Independent Subject Matter Experts

Two papers by the Harvard Project on American Indian Economic Development ("Harvard Project") promptly and incisively criticized Treasury's decision to use the IHBG Metric for the purpose of projecting unanticipated COVID-19 expenditures that Tribal governments would incur. *See* Randall K.Q. Akee, Eric C. Henson, Miriam R. Jorgenson & Joseph P. Kalt, *Policy Brief No. 2: Dissecting*

the US Treasury Department's Round 1 Allocations of CARES Act COVID-19 Relief Funding for Tribal Governments (2020) (Hereinafter referred to as "Policy Brief 2."); Randall K.Q. Akee, Eric C. Henson, Miriam R. Jorgenson & Joseph P. Kalt, *Policy Brief No. 3: Proposal for a Fair and Feasible Formula for the Allocation of CARES Act COVID-19 Relief Funds to American Indian and Alaska Native Tribal Governments* (2020) (Hereinafter referred to as "Policy Brief 3.")

The Harvard Project criticized the qualitative relationship between the IHBG Metric and tribal population. The Harvard Project asserted that the most accurate count of population is enrollment because this is the true measure of "the population to which tribal governments are responsible and over which they have jurisdiction." Policy Brief 2, at p. 14. The choice of the IHBG Metric represented an "arbitrary and capricious deviation[] from known facts regarding various tribes' enrolled citizenship counts." *Id*.

In Policy Brief 3, the Harvard Project added that actual enrollment should be used as the proper metric for determining any population-based allocation of Title V Funds because "[t]ribes are governing entities, populated by citizens—persons to which tribal governments owe duties of service and over whom they have jurisdiction." Policy Brief 3, at p. 6. A Tribal government's obligations to its citizens does not end at the Tribe's borders because "tribe after tribe is reaching beyond its geographic borders to serve their off-reservation citizens[.]" *Id.*. Thus,

"the appropriate measure of population in a sound allocation formula is the number of enrolled tribal citizens immediately before the coronavirus pandemic struck the U.S." *Id.*

Conversely, the use of the IHBG Metric, which "focuses on the racial make-up of the residents of reservations and related tribal areas" is "wholly inappropriate data for the purposes of federal funding—*i.e.*, the CARES Act—that is explicitly aimed at supporting the economic stability and function of tribal governments." *Id.*

The Harvard Project concluded that: (1) the use of different, publicly available, population datasets has a significant impact on the amount of funding each Tribal government received; (2) Treasury's decision to use the IHBG Metric resulted in "a number of tribes receiving *de minimis payments*" (including Shawnee) that did not reflect the actual population of Tribal governments or Tribal needs; (3) "Treasury's decision to use racial population data from … [the Indian Housing Block Grant Program] demonstrably produce[d] arbitrary and capricious allocations of CARES Act funds across tribes," and (4) the IHBG Metric was not reliable for Treasury's stated purpose, resulting in "arbitrary and capricious allocations of the CARES Act monies." Policy Brief 2, p. 2.

SUMMARY OF ARGUMENT

The District Court erred by applying a presumption of non-reviewability based on the District Court's conclusion that the Title V Funds were a lump-sum

appropriation. In fact, the Title V Funds were a specific appropriation - or line-item appropriation - and therefore a challenge is entitled to a presumption of reviewability, which can only be overcome by clear and convincing evidence that Congress intended to preclude judicial review.

The District Court also erred in concluding that Title V of the CARES Act provided no measurable standards to limit Treasury's discretion. To the contrary, Congress not only expressed its intent that Tribal governments be funded, but that that funding should be based on consultation with Tribal governments (§ 801(c)(7)) and correspond to increased and unanticipated COVID-19 expenditures from March 2020 to December 2020 (42 U.S.C. § 801(d)).

Treasury's allocation failed both requirements. Tribal population corresponds rationally with increased COVID-19 expenditures, but the IHRG Metric - which does not even purport to capture tribal population - does not. And Treasury failed to meaningfully consult with the Tribal governments. Instead, Treasury played bait and switch by requesting tribal population but then – without notice – utilizing the IHBG Metric apparently without any understanding of its severe limitations. (Appx44, Appx98-99.)

A court is more than capable of assessing whether Treasury engaged in meaningful tribal consultations and in addition adhered to reasoned, rational decision making in selecting allocation formulas. More specifically, the Court

should assess whether the Treasury offered a reasoned, rational explanation for abandoning its intended reliance on enrollment, for adopting an ill-fitting IHBG Metric as a proxy for COVID-19 expenditures, for ignoring citizens of dozens of Tribal governments that are undercounted by the IHBG Metric and ignoring entirely several Tribal governments that are excluded from the IHBG Metric. These circumstances not only are entitled to judicial review, they compel it.

Finally, and in response to the issue raised in this Court's Order, dated September 25, 2020, Shawnee's case and this appeal will remain justiciable whether or not the appropriation of Title V funds lapses or whether the remaining funds reserved for the Alaska Native Corporations are distributed by Treasury.

For the reasons that follow, this Court should grant the relief requested by the Shawnee Tribe.

ARGUMENT

I. Treasury's Allocation of CARES Act Funds is Reviewable

"The APA establishes 'basic presumption of judicial review [for] one suffering legal wrong because of agency action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, ___ U.S. ___, 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020) (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967)).

This presumption is subject to the "quite narrow[]" (id.) exception for "agency action [that] is committed to agency discretion by law." 5 U.S.C. §701(a)(2). The courts apply "a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486, 135 S. Ct. 1645, 1651, 191 L. Ed. 2d 607 (2015) (internal quotation marks and citations omitted). That presumption is rebutted "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct…*[b]ut the agency bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." Id.* (emphasis added; internal quotation marks and citations omitted). In other words, the exception only applies when there are "clear and convincing indications that Congress intended to bar review." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. ___, 136 S. Ct. 2131, 2134, 195 L. Ed. 2d 423 (2016) (internal quotation marks and citations omitted); see also *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 390, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (When considering this exception, courts determine whether "congressional intent to preclude judicial review is fairly discernible from the statutory scheme.")

A. The District Court Erred by Applying a Presumption of Non-Reviewability to Shawnee's APA Challenge

The District Court initially erred by concluding that Treasury's allocation of funds was *presumptively* non-reviewable because it was a lump-sum appropriation.

Shawnee Tribe v. Mnuchin, No. 20-CV-1999 (APM) (Appx3) ("The court applies this presumption of non-reviewability here, just as it did in Prairie Band.") As shown below, the Title V funding was not a lump-sum appropriation as that term is used by the Federal Government or as that term has been used in case law in this context.

The District Court in both the Prairie Band Litigation and in instant case misconstrued the concept of lump-sum appropriation. The Government Accountability Office distinguishes between lump-sum appropriation and line-item appropriation as follows:

> A lump-sum appropriation is one that is made to cover a number of Appropriations specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object described.

2 U.S. Gov't Accountability Office, *Principle of Federal Appropriations Law*, 6-5 (3d Ed. 2004) (accessed at: https://www.gao.gov/assets/210/202819.pdf). Here, there was only one purpose prescribed for the $8,000,000,000 of Title V funds directed to Tribal governments: direct distribution to Tribal governments. *See* 42 U.S.C. §§ 801(a)(2)(B), 801(c)(7).

The same distinction is observed in case law in this circuit. In this circuit, lump-sum appropriation refers to the type of appropriation at issue in *Lincoln v. Vigil*, 508 U.S. 182, 185, 113 S. Ct. 2024, 2027–28, 124 L. Ed. 2d 101 (1993), where

the Supreme Court "considered lump-sum appropriation, which contained no restrictions on use of the funds, for a program not mentioned in a statute or the agency's regulations." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002). Or, as the district court in *Milk Train* noted, lump-sum appropriation means "amounts unrestricted [that can] be[] used as [an] agency [sees] fit to achieve its overall statutory obligations." *Id.*, 167 F.Supp.2d 20, 29 (D.D.C. 2001) reversed in Part, vacated in Part by *id*., 310 F.3d 747.

The Title V Funds at issue here were not lump-sum appropriations as that term is used in practice. The Title V Funds, in the amount of $8,000,000,000 (42 § 801(a)(2)(B)), were specifically allocated to Tribal Governments to be distributed by Treasury in accordance with § 801(c)(7) for expenses described in § 801(d). Hardly a lump-sum appropriation, Treasury was not authorized to spend the funds at all, but only to distribute them to their intended recipients. And even for the ultimate recipients – e.g., Tribal governments – there were specific strings attached (§ 801(d)) under the penalty of recoupment (§ 801(f)).

Just as the funding in *Milk Train*, the Title V Funds are for a "for a specific purpose, for a specific period of time, and for a specific group of beneficiaries" and intended to compensate the entities for unanticipated shortfalls. *Id.*, 167 F.Supp.2d at 29. As follows, the Title V Funds are not a lump-sum appropriation. *See Policy & Research, LLC v. United States Dep't of Health & Human Servs*., 313 F. Supp. 3d

62, 75 (D.D.C. 2018) (citing *Milk Train,* 310 F.3d 747, as an example of a "non-lump sum appropriation"). The district court therefore erred in concluding that the Title V funds were a lump-sum appropriation deserving of a presumption of non-reviewability. (Appx3.)

B. The District Court Erred by Concluding that the Title V Funds Lacked Sufficient Judicially Manageable Standards for Court Review

The relevant statute plainly included criteria that constrained Treasury's discretion in distributing the funds. Section 801(c)(7) provides:

> 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.

42 U.S.C. § 801(c)(7)(emphasis added). Here, there are at least three qualifications that provide a framework for judicial review and analysis: (i) "each" tribe; (ii) "based on increased expenditures" relating to COVID 19 and (iii) after consultation with Indian Tribes and the Secretary of the Interior. *Id.*

Congress did not choose "based on increased expenditures" as a mere aspiration, open to unconstrained interpretation by Treasury. Section 801(d) expressly requires that the "increased expenditures" must relate to a Tribal government's necessary expenditures related to COVID-19 that were not previously budgeted for and were actually incurred by the Tribal government between March 1, 2020 and December 30, 2020. *Id.* at § 801(d). Congress required the Inspector General of the Department of the Treasury ("Inspector General") to monitor and oversee the disposition of the Title V Funds and empowered the Inspector General to recoup funds that had been expended by Tribal governments for a purpose other than those authorized by §801(d). 42 U.S.C. § 801(f).

Thus, by referencing "increased expenditures" (§ 801(c)(7)), Congress sought to capture an objective, quantifiable amount that could be audited and analyzed. Congress provided a baseline, based on the state of budgets as of March 27, 2020 (§ 801(d)(2)), and specific qualified expenditures – those related to COVID-19 ((§ 801(d)(1)) incurred between March 1, 2020 and December 2020 ((§ 801(d)(3)). Congress expressed this concept quite precisely. Congress did not prescribe a vague policy end, such as "help Tribal governments." Any uncertainty in the Title V language is due to the prospective, proactive nature of Title V. It should not be confused with unbridled discretion.

Only one month ago, this Court reviewed the same statute and reversed Treasury's decision to include Alaska native corporations as recipients of CARES Act funding for Tribal governments. *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, ___ F.3d ___ No. 20-5204, 2020 WL 5742075, (D.C. Cir. Sept. 25, 2020). As this Court observed, "Nothing in the CARES Act expressly precludes review of spending decisions under Title V." *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 20-5204, ___ F.3d___, 2020 WL 5742075, *4 (D.C. Cir. Sept. 25, 2020).

Other precedent in this circuit compels the same conclusion here. *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (*amended* Aug. 6, 1996). In *Ramah*, this Court considered a challenge to the manner in which the Secretary of the Interior apportioned a funding deficit amongst various tribes that were eligible for such funding, where the authorizing statute contemplated funding deficits but placed no restriction on how the Secretary could apportion the deficit. Even in the absence of statutory guidance, this Court remanded the case for consideration of whether the agency's chosen approach "effectuate[d] the original statutory scheme as much as possible." *Id*. at 339 (*quoting City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977)).

The question presented in the instant challenge is no more difficult to define than in *Ramah* and certainly not beyond the capability of courts to review. *First*, the

court can determine whether Treasury's choice of the IHBG Metric was consistent with Congress' statutory directive to disburse funds "based on increased expenditures of each such Tribal government" (42 U.S.C. §801(7)) as much as possible, as compared to the actual enrollment data provided by tribes or maintained by Bureau of Indian Affairs. In other words, the court can assess whether undercounting Prairie Band citizenship by 80% and the Shawnee citizenship by 100% yielded a distribution that more closely correlated with anticipated expenditures than an approach that considered actual enrollment, which reflects the true scope of tribal responsibility for its citizens. *Second*, the Court can consider whether Treasury engaged in reasoned decisionmaking in reaching this conclusion. *Third*, the Court can assess whether Treasury consulted "with the Secretary of the Interior and Indian Tribes," in any meaningful way, on its election of the IHBG Metric, without providing notice or an opportunity to comment to Tribal governments. 42 U.S.C. §801(c)(7).

Section 801 provides a far more tangible and concrete standard than other instances where this Court has found sufficient statutory language to cabin judicial discretion. In *Cody v. Cox*, 509 F.3d 606 (D.C. Cir. 2007), for example, this Court reviewed agency action based on a challenge to conditions in veterans' nursing homes based on the statutory requirement to render "high quality and cost-effective" health care. *Id.*; *see also, Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1403 (D.C. Cir.

1995) (discretion to act "in the interest of justice" was sufficient to allow judicial review). In contrast to these open-ended concepts, which are subject to infinite interpretations and trade-offs, Treasury's task was only projecting an actual dollar amount, which would later be subject to audit and recoupment. 42 U.S.C. §801(f). It is illogical to conclude that Section 801 was too ethereal to hold Treasury to any standard of reason or rationality in projecting such amount (or the Tribal government's relative burden, in the case of a fixed allotment), where the Tribal government recipients of such an amount would be responsible for accounting for the disposition of every penny of that same amount.

In its analysis, the district court misapplied the Supreme Court's decision in *Lincoln v. Vigil*, 508 U.S. 182. There, the Supreme Court considered the Snyder Act, which "authorize[d] the [Indian Health] Service to 'expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,' for the 'relief of distress and conservation of health.'" *Id.* at 185 (*quoting* 25 U.S.C. § 13). The plaintiffs challenged the Indian Health Service's reallocation of funds from a program focusing on disabled Native American children in the Southwest to a nationwide program for such children. *Id.* at 184. The Supreme Court held that the cessation of funding for the Southwest disabled children program was not a reviewable action because "the appropriations Acts for the relevant period

do not so much as mention the Program, and both the [authorizing statutes] likewise speak about Indian health only in general terms." *Id.* at 193-94.

This case is readily distinguishable on multiple grounds. *First*, *Vigil* involved a lump-sum appropriation rather than a line-item appropriation, as we have here. As already shown above, different standards apply depending on the type of appropriation at issue.

Second, the instant case – unlike *Vigil* - does not involve the cessation of discretionary funding. *See also Policy & Research,* 313 F. Supp. 3d at 76 (cessation of funding presumptively unreviewable). In such instances, a court is ill-equipped to make comparisons between the terminated program and an alternative program. Here, by contrast, the denial of funds to tribes that were zeroed out or grossly undercounted by the IHBG Metric necessarily increased funds to other tribes. Treasury was in a position to justify the IHBG Metric, with reference to the statute (i.e., to reflect differences in COVID-19 expenditures). Yet Treasury simply failed to do so, even in its post-hoc rationalizations for its methodology.

Third, in this case, Congress tasked Treasury with compensating Tribal governments for increased expenditures that would be incurred due to COVID-19. Whereas the Snyder Act funding at issue in *Vigil* invited the agency to reach its own conclusion about the meaning of a general goal (relief of distress and conservation of health of Indians (*id*. at 185), free from a particular time horizon, the CARES Act

funding tasked Treasury with assessing a far more tangible problem of accounting and budgeting for COVID-19 expenditures for the term of several months. In doing so, Congress prescribed both a means (*i.e.*, direct aid to Tribal governments for unbudgeted expenditures related to COVID-19) and an end (relieving Tribal governments of increased financial burdens), as opposed to simply an end, as in *Lincoln v. Vigil*, 508 U.S. 182. The District Court was therefore simply wrong when it concluded that the "the CARES Act's broad purpose is comparable to the breadth of the statutes in *Vigil*, and its text is no more limiting." (Appx4.)

Fourth, the instant funding is also distinguishable because Treasury's responsibility related to matters outside of Treasury's expertise. As the *Lincoln v. Vigil* Court observed:

> [A]n agency's allocation of funds from a lump-sum appropriation requires "a complicated balancing of a number of factors which are peculiarly within its expertise": whether its "resources are best spent" on one program or another; whether it "is likely to succeed" in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all."

Lincoln v. Vigil, 508 U.S. at 193 (*quoting Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 1656, 84 L. Ed. 2d 714 (1985)). While Treasury might reasonably be credited with some expertise in the area of budgeting and accounting, its election of the IHBG Metric – as a proxy for population, which, in turn, might be a proxy for COVID-19 expenditure – strayed far from Treasury's area of expertise. The

Treasury is not, in this instance, applying its expertise to choose among several programs it annually administers in pursuit of a policy direction chosen by Treasury.

And Treasury's deficit in expertise in this area was manifest. After reasonably identifying actual population as a constituent proxy for COVID-19 expenditure, Treasury jettisoned that approach for the IHBG Metric, without justifying, rightly or wrongly, the superiority of the IHBG Metric, versus actual population, as a proxy for COVID-19 expenditure. (Appx44, Appx99-100) To this day, and even after attempts to rationalize its decision *post hoc*, Treasury has yet to explain why the IHBG Metric better corresponds to COVID-19 expenditures than actual population figures. (Appx96-104.) Treasury has done little more than describe the IHBG Metric and has struggled at that. (Appx96-104.) Treasury's most substantive response has been to create a reserve fund for under-compensated Tribal governments, essentially admitting to the error in its approach. (Appx102.)

Finally, at least three broader policy implications compel a finding of reviewability. *First*, reviewability is appropriate here because it places only a minor burden on Treasury.

Second, reviewability of Treasury's action does not invite frivolous challenges. Here, with respect to the Title V Funds, Tribal governments have only challenged Treasury's inclusion of Alaskan Native Corporations as recipients of

Title V Funds and Treasury's use of the IHBG Metric, while billions of dollars in other funding, on alternative bases, were distributed without challenge. (Appx101.)

Third, reviewability is appropriate here because it has enormous consequences. If Treasury (or similarly situated agencies) is allowed to proceed without review under the Administrative Procedure Act, Treasury will be much more likely to act illogically in the future and to frustrate Congressional directives. Treasury's use of the IHBG Metric – the rationale for which has still not been explained – is a prime example of this risk. The consequences for Treasury's decisions were enormous, with huge disparities in funding between tribes with similar populations. And considering Treasury's near-immediate recognition of the merit of Prairie Band's challenge as evidenced by Treasury's creation of a reserve fund (Appx102), it seems entirely possible that Treasury would have taken a completely different approach if Treasury had been tasked to sit down for a few hours to explain *why*. In other words, a sound administrative process might have actually yielded its intended purpose of a more sound result.

The lives of millions of citizens of Tribal governments have been affected by Treasury's uncritical and unexplained adoption of the IHBG Metric, and this Court's failure to review Treasury's action will justify even more of the same.

II. The Instant Case is Justiciable – and not moot.

Even in the event that this court's decision in *Chehalis* is overturned, thereby depriving Treasury of the $162.3 million it currently could use to right the wrong it has perpetrated against the Shawnee Tribe, the Shawnee Tribe's claims remain ripe for review for at least two reasons in addition to those set forth Shawnee in its opening brief. *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, ____ F.3d ___, No. 20-5204, 2020 WL 5742075 (D.C. Cir. Sept. 25, 2020).

A. Notwithstanding the distribution of the CARES Act funds, Shawnee and other tribes are entitled to payment from the reserve fund that Treasury created.

Treasury's regulatory actions created a remedy of money damages for tribes that were harmed by Treasury's use of the IHBG Metric in lieu of actual population. On June 12, 2020, Treasury announced a reserve fund that would compensate plaintiffs in actions challenging Treasury's use of the IHBG Metric rather than actual population. Treasury's notice stated:

> Reserved funds
>
> At this time, Treasury has determined to reserve $679 million from amounts that would otherwise be paid to Tribal governments, which represents an estimate of the difference in total payment amounts to Tribal governments if Treasury had made population-based payments based on tribal enrollment data provided by the Bureau of Indian Affairs, rather than the Census-based Indian Housing Block Grant data used for the first distribution as announced on May 5, 2020. These reserved funds

> would be available to resolve any potentially adverse decision in litigation on this issue with respect to payments from the Fund to Tribal governments. In particular, given that the Judgment Fund is unavailable to compensate plaintiffs seeking additional CARES Act payments, this reserve is intended to enable Treasury, if necessary, to address claims for additional payment presented in litigation. Although Treasury is not required to maintain this reserve, Treasury has concluded that it is a prudent course at this stage as a policy matter.

(Appx102.)

"The Tucker Act, 28 U.S.C. § 1491, authorizes [the Federal Court of Claims] to exercise jurisdiction over claims founded either upon the Constitution, or any Act of Congress or *any regulation of an executive department*, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort." *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 593 (2011) (quotation marks omitted and emphasis added). "However, the statute does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates a right to money damages." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011).

By creating a reserve fund, Treasury authorized monetary claims based on the harms caused to Tribal governments by Shawnee in its selection of the IHBG Metric that are independent of the survival Title V appropriation or the existence of funds governed by such appropriation. By referencing litigation, while only APA

litigation was pending against Treasury on this topic, Treasury necessarily adopted the APA as the "separate source of substantive law that creates a right to money damages." *ARRA Energy*, 97 Fed. Cl. at 19. Accordingly, Shawnee's APA challenge will not be rendered moot by the expiration of the Title V appropriation or the exhaustion of funds appropriated thereunder.

B. Notwithstanding the distribution of the CARES Act funds, Shawnee is entitled to declaratory judgment because Shawnee's challenge to this emergency funding is conduct that is capable of repetition, yet likely to evade review.

The harm that Treasury has done to the Shawnee Tribe and other similarly situated tribes is the type of action that is "capable of repetition, yet evading review," *South Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911), and thus falls within one of the exceptions to the mootness doctrine applied by this court, which generally requires that "[i]f events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001).

As this Court explained in *People for the Ethical Treatment of Animals, Inc. v. United States Fish & Wildlife Serv.*, 59 F. Supp. 3d 91, 96-98 (D.D.C. 2014), the 'capable of repetition, yet evading review' exception was first articulated in *South Pacific*, 219 U.S. at 515, and refined by the Supreme Court in several later cases.

The Supreme Court has required two elements that must be satisfied for this exception to apply: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

This Court has further articulated the exception's boundaries, stating at least three other analyses. First, this court has found that "[actions] of less than two years' duration ordinarily evade review." *Burlington N. R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996). Second, this court has held that that short duration must be "typical of the challenged action." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). Finally, the plaintiff must "make a full attempt to prevent his case from becoming moot, an obligation that includes filing for preliminary injunctions and appealing denials of preliminary injunctions." *Newdow v. Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010).

The instant circumstances clearly meet both tests enumerated by the Supreme Court as well as the additional analyses required by this court. The Treasury's action was styled and carried out as an emergency action on an extraordinarily fast timeline, preventing much of the typical deliberation and public engagement that helps strengthen the government's actions (and undercutting the statutorily required consultation with Indian tribes, as described in Shawnee's opening brief at pp. 38-

39). Further, as shown in the Shawnee's opening brief, p. 7, Congress has debated (and in fact the House of Representatives has passed) legislation that would require Treasury to distribute funds in the same manner or based on the same language. Given the ongoing public health and economic emergency occurring on Indian lands, it is reasonable to presume that Congress may take further emergency action, and it would compound Treasury's wrong to allow it to evade review for relying on an inaccurate and inappropriate metric once again.

Further, Treasury's action is both significantly shorter than two years in duration, the amount of time this court has found necessary to allow review, and can reasonably be expected to be similarly short in future analogous situations. Finally, the Shawnee Tribe has availed itself of all available means to right the Treasury's wrong, clearly meeting the *Newdow* standard.

From a policy perspective, review in this instance would satisfy the purposes laid out by the Supreme Court in *South Pacific*, 219 U.S. 498. In that case, as in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309 (1897), the Supreme Court held that this exception to the mootness doctrine is especially important in circumstances that involve securing public rights by or against the government. "Private parties may settle their controversies at any time…and in any such case the court, being informed of the facts, will proceed no further in the action. [Where,] however, there has been no extinguishment of the rights (whatever they

are) of the public," a court may still render its judgment. *Trans-Missouri*, 166 U.S. at 309–10. Interests "of a public character" are susceptible to declaratory judgment, regardless of whether the government is "respondent [or] complainant." *South Pacific*, 219 U.S. at 516. Here, the public character is, if anything, heightened by the trust relationship the federal government holds with the Indian tribes. The Treasury is acting not merely as a governmental entity, bound to act rationally and fairly (which it has failed to do), but also as a trustee and fiduciary for the Indian tribes. *See*, *e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

Thus, even in the event that the $162.3 million Treasury currently possesses is distributed, the Shawnee Tribe is still entitled to, at the very least, declaratory relief.

CONCLUSION

Based on the foregoing, Prairie Band respectfully requests that this Court (1) find that the Government's spending decisions under Title V are reviewable; (2) reverse the District Court's dismissal of Shawnee's complaint; and (3) find the Government violated the APA; or in the alternative, reverse the District Court's denial of the preliminary injunction pending a resolution on the merits and direct the District Court to preliminarily enjoin the Government from further distribution of Title V funds.

DATED this 16th day of October, 2020.

LIPPES MATHIAS WEXLER FRIEDMAN LLP

s/Michael G. Rossetti
Carol E. Heckman
James P. Blenk
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
Telephone: (716) 560-7744
checkman@lippes.com
jblenk@lippes.com

- and -

Michael G. Rossetti (DC Circuit Bar No. 62520)
1900 K Street, NW
Suite 730
Washington, DC 20006
Telephone: (202) 888-7610
mrossetti@lippes.com

Counsel to Prairie Band Potawatomi Nation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,273 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Michael G. Rossetti
Michael G. Rossetti

United States Court of Appeals
for the District of Columbia Circuit

CERTIFICATE OF SERVICE

I, Melissa Pickett, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LIPPES MATHIAS WEXLER FRIEDMAN LLP, Attorneys for Amicus Curiae to print this document. I am an employee of Counsel Press.

On **October 16, 2020,** counsel has authorized me to electronically file the foregoing **BRIEF OF AMICUS CURIAE PRAIRIE BAND POTAWATOMI NATION IN SUPPORT OF PLAINTIFF-APPELLANT** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

Scott Alan McIntosh
Quarles & Brady LLP
1701 Pennsylvania Avenue, NW
Suite 700
Washington DC 20006
202-372-9512
scott.mcintosh@quarles.com

Adam C. Jed
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington DC 20530
adam.c.jed@usdoj.gov

Unless otherwise noted, 8 paper copies have been filed with the Court by U.S. Express Mail within the time permitted by rule.

October 16, 2020

/s/ Melissa Pickett
Melissa Pickett
Counsel Press