[ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2020]

No. 20-5286

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

SHAWNEE TRIBE,

Plaintiff-Appellant,

v.

STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL S. RAAB
DANIEL TENNY
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

All parties appearing before the district court and in this Court are listed in the Brief for Appellants. The Prairie Band of Potawatomi Nation and the Miccosukee Tribe have filed amicus briefs in this Court.

B. Rulings Under Review

The rulings under review by Judge Amit P. Mehta are (1) a memorandum opinion and order issued on August 19, 2020 (Dkt No. 43), denying the plaintiff's motion for preliminary injunction; and (2) an order issued on September 10, 2020 (Dkt No. 49), granting the defendant's motion to dismiss. The first is available at 2020 WL 4816461; the memorandum opinion (Dkt No. 48) accompanying the dismissal order is available at 2020 WL 5440552.

C. Related Cases

This case has not previously been before this or any other court. A related case is currently pending before the district court. *See Miccosukee Tribe of Indians of Florida v. United States Dep't of the Treasury*, No. 20-cv-2792 (D.D.C.). Although they are not currently pending, two other cases before the district court challenged the distribution of the same appropriation at issue here. *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-1136 (D.D.C.) (voluntarily dismissed on July 2, 2020); *Prairie Band*

Potawatomi Nation v. Mnuchin, No. 20-cv-1491 (D.D.C.) (voluntarily dismissed on July 9, 2020), appeal No. 20-5171 (D.C. Cir.) (voluntarily dismissed on July 16, 2020). Another case challenging yet another aspect of the appropriation at issue in this appeal was previously before this Court. *See Confederated Tribes of the Chehalis Reservation v. Mnuchin*, __ F.3d __, No. 20-5204, 2020 WL 5742075 (D.C. Cir. Sept. 25, 2020), *pets. for cert. filed*, *Alaska Native Village Corp. Ass'n, et al. v. Confederated Tribes of the Chehalis Reservation*, No. 20-544 (S. Ct. filed Oct. 21, 2020); *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, No. 20-543 (S. Ct. filed Oct. 23, 2020).

/s/ Thomas Pulham
Thomas Pulham

TABLE OF CONTENTS

Page

GLOSSARY xi

INTRODUCTION 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

PERTINENT STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Factual Background 4

C. Prior Proceedings 7

1. Other Litigation 7

2. The *Shawnee Tribe* Litigation 10

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 18

ARGUMENT 18

I. This Court Can Provide Relief In This Case. 18

II. The District Court Properly Dismissed The Tribe's Complaint. 21

A. The Secretary's Allocation Of Funds From The Appropriation In § 801(a)(2) Is Unreviewable 22

B. The Tribe's Remaining Arguments Are Without Merit 32

III. The District Court Properly Denied Preliminary Injunctive Relief. 35

A. The Tribe Has Failed To Demonstrate A Likelihood Of Success On The Merits. 35

B. The Balance of Equities Weighs Against Preliminary Injunctive Relief. 43

CONCLUSION 45

CERTIFICATE OF COMPLIANCE

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s)**

ABF Freight Sys., Inc. v. NLRB,
510 U.S. 317 (1994) 38

Agua Caliente Band of Cahuilla Indians v. Mnuchin,
No. 20-cv-01136, 2020 WL 3250701 (D.D.C. June 15, 2020) 9, 10

American Fed'n of Labor & Cong. of Indus. Orgs. v. Chao,
409 F.3d 377 (D.C. Cir. 2005) 37

Arkansas Dairy Coop. Ass'n v. U.S. Dep't of Agric.,
573 F.3d 815 (D.C. Cir. 2009) 36

Brock v. Cathedral Bluffs Shale Oil Co.,
796 F.2d 533 (D.C. Cir. 1986) 33

CC Distribs., Inc. v. United States,
883 F.2d 146 (D.C. Cir. 1989) 28, 35

City of Houston v. Department of Hous. & Urban Dev.,
24 F.3d 1421 (D.C. Cir. 1994) 14, 19, 20

Claybrook v. Slater,
111 F.3d 904 (D.C. Cir. 1997) 28, 29

Confederated Tribes of Chehalis Reservation v. Mnuchin,
465 F. Supp. 3d 152 (D.D.C. 2020) 30

Confederated Tribes of Chehalis Reservation v. Mnuchin,
No. 20-cv-01002, 2020 WL 3489479 (D.D.C. June 26, 2020) 7, 8

Confederated Tribes of Chehalis Reservation v. Mnuchin,
No. 20-5204, 2020 WL 5742075 (D.C. Cir. Sept. 25, 2020) 8, 29

Davis v. Pension Benefit Guar. Corp.,
571 F.3d 1288 (D.C. Cir. 2009) 36

Drake v. FAA,
291 F.3d 59 (D.C. Cir. 2002) 15, 21, 27, 28

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 37

Gross v. United States,
390 U.S. 62 (1968) 36

Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,
920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) 17, 36

Heckler v. Chaney,
470 U.S. 821 (1985) 15, 21, 25, 26, 32

Independent Bankers Ass'n of Am. v. Heimann,
613 F.2d 1164 (D.C. Cir. 1979) 35

Jackson v. Mabus,
808 F.3d 933 (D.C. Cir. 2015) 37

Kreis v. Secretary of Air Force,
866 F.2d 1508 (D.C. Cir. 1989) 37

Lincoln v. Vigil,
508 U.S. 182 (1993) 11, 14, 21, 22, 24, 25, 26

Local 1219, Am. Fed'n of Gov't Emps. v. Donovan,
683 F.2d 511 (D.C. Cir. 1982) 28

Maine Cmty. Health Options v. United States,
140 S. Ct. 1308 (2020) 19

Make The Road New York v. Wolf,
962 F.3d 612 (D.C. Cir. 2020) 26, 27

Milk Train, Inc. v. Veneman,
310 F.3d 747 (D.C. Cir. 2002) 16, 28, 40, 41

National Ass'n of Reg'l Councils v. Costle,
564 F.2d 583 (D.C. Cir. 1977) 19

Navy Chaplaincy v. U.S. Navy,
697 F.3d 1171 (D.C. Cir. 2012) 18

Nken v. Holder,
556 U.S. 418 (2009) 35

Padula v. Webster,
822 F.2d 97 (D.C. Cir. 1987) 34

Physicians for Soc. Responsibility v. Wheeler,
956 F.3d 634 (D.C. Cir. 2020) 22, 33

Planned Parenthood of Wis., Inc. v. Azar,
942 F.3d 512 (D.C. Cir. 2019) 20

Prairie Band Potawatomi Nation v. Mnuchin,
No. 20-cv-1491, 2020 WL 3402298 (D.D.C. June 11, 2020) 8, 9, 12, 13

Ramah v. Navajo Sch. Bd.,
87 F.3d 1338 (D.C. Cir. 1996) 32

Secretary of Labor v. Twentymile Coal Co.,
456 F.3d 151 (D.C. Cir. 2006) 31, 33

Sherley v. Sebelius,
644 F.3d 388 (D.C. Cir. 2011) 36

Sierra Club v. Jackson,
648 F.3d 848 (D.C. Cir. 2011) 18, 22, 27

Sierra Club v. U.S. E.P.A.,
167 F.3d 658 (D.C. Cir. 1999) 40

Southwest Airlines Co. v. Transportation Sec. Admin.,
650 F.3d 752 (D.C. Cir. 2011) 16, 38

Steenholdt v. FAA,
314 F.3d 633 (D.C. Cir. 2003) 32, 33

Texas v. United States,
798 F.3d 1108 (D.C. Cir. 2015) 34

Webster v. Doe,
486 U.S. 592 (1988) 15, 24, 27, 37

West Virginia Ass'n of Cmty. Health Ctrs., Inc. v. Heckler,
734 F.2d 1570 (D.C. Cir. 1984) 19

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 35

Wrenn v. District of Columbia,
864 F.3d 650 (D.C. Cir. 2017) 36

Statutes:

Administrative Procedure Act,
5 U.S.C. § 701(a)(2) 2, 14, 15, 21

Coronavirus Aid, Relief, and Economic Security Act,
Pub. L. No. 116-136, 134 Stat. 281 (2020) 3

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

28 U.S.C. § 1362 1

42 U.S.C. § 801(a)(1) 3, 18

42 U.S.C. § 801(a)(2)(A) 3

42 U.S.C. § 801(a)(2)(B) 3, 30

42 U.S.C. § 801(b)(1) 4

42 U.S.C. § 801(b)(2) 3

42 U.S.C. § 801(c)(1) 3, 29

42 U.S.C. § 801(c)(2)(A) 3

42 U.S.C. § 801(c)(3)-(6) 29

42 U.S.C. § 801(c)(4) 3

42 U.S.C. § 801(c)(5) 3

42 U.S.C. § 801(c)(6) 3

42 U.S.C. § 801(c)(7) 1, 2, 4, 15, 22, 23, 24, 27, 31, 37

42 U.S.C. § 801(c)(8) 4, 29

42 U.S.C. § 801(d) 23

42 U.S.C. § 801(d)(1) 4, 24

42 U.S.C. § 801(g)(1) 43

42 U.S.C. § 801(g)(5) 30, 43

Regulations:

24 C.F.R. § 1000.330(b)(1) 39

24 C.F.R. § 1000.330(c) 39

24 C.F.R. § 1000.336 39

Legislative Material:

H.R. Rep. No. 116-420 (2020) 3

Other Authorities:

Orders:

Confederated Tribes of the Chehalis Reservation v. Mnuchin, No. 20-5204 (D.C. Cir. Sept. 14, 2020) 20

Confederated Tribes of the Chehalis Reservation v. Mnuchin,
No. 20-5204 (D.C. Cir. Sept. 30, 2020) 8, 18, 19

1 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*
(3d ed. 2004), https://www.gao.gov/assets/210/202437.pdf 19

GLOSSARY

A[#]	Appellant's Appendix
Br.	Appellant's Opening Brief
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
IHBG	Indian Housing Block Grant

INTRODUCTION

In Title V of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Congress appropriated $8 billion to assist tribal governments in addressing the COVID-19 pandemic. The statute tasked the Secretary of the Treasury with distributing the funds based on the tribes' anticipated expenditures "in such manner as the Secretary determines appropriate." 42 U.S.C. § 801(c)(7). And it gave the Secretary only 30 days to make those allocations—at the same time as the Secretary was distributing over $140 billion in similar aid to States and local governments.

The Shawnee Tribe (the Tribe) brought suit to challenge the manner in which the Secretary allocated these emergency relief funds. The Tribe claims that it was arbitrary and capricious for the Secretary to rely on a well-established and consistently updated data source maintained by another federal agency in one component of his allocation formula. The district court denied the Tribe's request for preliminary injunctive relief and dismissed the Tribe's complaint, holding that the Secretary's allocation of funds from this lump-sum appropriation was committed to his discretion and therefore not subject to judicial review. The Tribe appeals.

STATEMENT OF JURISDICTION

The Tribe invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1362. A28.[1] The district court denied the Tribe's motion for preliminary injunction

[1] Citations to "A" refer to the Appendix filed by the Tribe.

on August 19, 2020, A1-12, and dismissed the complaint on September 10, 2020, Dkt No. 49; *see also* A13-22. The Tribe filed a timely notice of appeal on September 16, 2020. A23. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Congress appropriated a lump sum of $8 billion for distribution to tribal governments to assist with increased expenditures attributable to the current pandemic. The operative statute authorized the Secretary of the Treasury to distribute the funds "in such manner as the Secretary determines appropriate." 42 U.S.C. § 801(c)(7). The questions presented on this appeal are:

1. Whether the Court can provide relief to the Tribe.
2. Whether the selection of an allocation methodology is committed to agency discretion by law under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).
3. If the Secretary's actions are subject to judicial review, whether the district court abused its discretion in denying preliminary injunctive relief.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory Background

By early March 2020, a viral disease known as COVID-19 was spreading throughout the United States, resulting in an "ongoing public health emergency and

economic crisis." H.R. Rep. No. 116-420, at 2-3 (2020). On March 27, 2020, Congress passed the CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

Title V of the CARES Act appropriates $150 billion "for making payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Of this amount, Congress reserved $8 billion "for making payments to Tribal governments." *Id.* § 801(a)(2)(B). The money made available by this $8 billion appropriation will be referred to here as the "Funds."

The CARES Act further authorizes the Secretary of the Treasury to distribute the funds appropriated by Title V. The Act provides detailed instructions and formulas to the Secretary for determining the amounts to be paid to States and local governments. Each State is guaranteed a minimum payment of $1.25 billion. 42 U.S.C. § 801(c)(2)(A). Beyond that, the Act provides that the amount paid to each State is the share of the appropriation (less amounts reserved to Tribal governments and the territories) proportional to the State's share of the total population of the 50 States, reduced by any payments made directly to local governments. *Id.* § 801(b)(2), (c)(1), (c)(4). Local governments with populations exceeding 500,000 may receive shares of their States' allocations proportional to each local government's share of the State's population. *Id.* § 801(c)(5), (g)(2). Payments to the District of Columbia and the territories (made from a special reservation of $3 billion out of the full appropriation) are likewise proportional to each recipient's share of the total relevant population. *Id.* § 801(a)(2)(A), (c)(6). The Act specifies that the Secretary must use

the most recent available data from the Bureau of the Census to determine the populations of States and local governments. *Id.* § 801(c)(8).

Congress took a different approach with respect to the payments to tribal governments. Instead of directing the Secretary to use specific formulas or data, the CARES Act provides that

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

42 U.S.C. § 801(c)(7).

The CARES Act directs the Secretary to make these payments within 30 days of the statute's enactment. 42 U.S.C. § 801(b)(1). Recipients may use the funds to cover only "necessary expenditures incurred due to the public health emergency." *Id.* § 801(d)(1).

B. Factual Background

Federal officials consulted with representatives of tribal governments through "telephonic consultation sessions" and also "solicited written comments . . . regarding their views on potential methodologies for the allocation of Title V funds." A31; *see also* A98 (noting that these actions were "[i]n accordance with Treasury's Tribal consultation policy); A75-97 (excerpts of consultation sessions). Following this

consultation, the Secretary announced on May 5, 2020, the methodology that would be used to distribute the Funds. A98-100.

The Secretary noted that a certain level of imprecision was inevitable "due to the statutory design," which required payments to be made well before a tribe's increased expenditures could be known with any certainty. A98-100. Further, the Secretary determined that he could not rely solely on a mechanical adjustment to past tribal budgets or reports of current expenditures because Congress had limited the use of appropriated funds to those expenditures "that are due to the public health emergency," and not all expenses related to tribally owned businesses would be eligible. A98. Rather, the Secretary decided that it would be "reasonable and appropriate to allocate payments based on a formula [that] takes into account population data, employment data, and expenditure data." *Id.* These categories were chosen based on an assessment of "the reliability, verifiability, and relevance of available data," as well as "considerations of administrative feasibility—a particularly important factor in light of the need for prompt payment to Tribal governments to meet immediate needs." *Id.*

The Secretary determined that payments would be made in two stages. First, "60 percent of the $8 billion reserved for Tribal governments" would be distributed "immediately based on population." A99. The Secretary expected tribal population "to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased

costs . . . and public health needs." *Id.* Further, by using a "reliable and consistently-prepared data for this key variable," payments could be made right away. *Id.* To that end, the Secretary selected a specific population measure—the census-derived American Indian and Alaska Native data used by the Department of Housing and Urban Development's Indian Housing Block Grant (IHBG) program. The IHBG data used does not measure tribal enrollment, but rather counts the population of each tribe's "formula area." *Id.* The formula area "corresponds broadly to the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend," and it "incorporates adjustments to address overlapping jurisdictions." A99-100. For tribes with a population of fewer than 37 members in their formula area, the Secretary provided a minimum payment of $100,000. A100.

At the second stage, the remaining 40% of the Funds would be distributed "based on employment and expenditures data of Tribes and tribally-owned entities." A99. The Secretary determined that "employment data is expected to correlate reasonably well with expenditures related to the effects of the public health emergency, such as the provision of economic support to those experiencing unemployment or business interruptions due to COVID-19-related business closures." *Id.* The expenditures data, meanwhile, "is expected to correlate reasonably well with the variability in the per person costs of service delivery in different tribal environments." *Id.* In contrast to population data, the Secretary did not have a ready

source of data for employment and expenditures and therefore asked Tribal government to submit this information. Final payments would be made after the data were "received, reasonably verified, and accounted for in the allocation formula." *Id.*[2]

The Secretary has distributed most of the Funds, except for a relatively small amount (under $1 million) allocated to tribes that have not provided payment information and $533 million allocated to Alaska Native regional and village corporations (ANCs), which is the subject of ongoing litigation.[3]

C. Prior Proceedings

1. Other Litigation

Several different parties brought suit in district court, challenging various aspects of the Secretary's plan to distribute the Funds. First, a set of tribes challenged the Secretary's decision to distribute a portion of the Funds to ANCs, on the ground that they are not "Tribal governments" as that term is used in the CARES Act. *See Confederated Tribes of Chehalis Reservation v. Mnuchin*, No. 20-cv-01002, 2020 WL 3489479, at *1 (D.D.C. June 26, 2020). The district court granted the plaintiffs' motion for a preliminary injunction, halting the distribution of any funds to ANCs,

[2] In the end, the Secretary decided to distribute 30% of the Funds based on employment data and the remaining 10% based on expenditures for fiscal year 2019. A101.

[3] Of the total reserved for ANCs, approximately $162 million would be for population-based payments. That is the pool of funds from which the Tribe seeks an increased payment. *See, e.g.*, Opening Brief (Br.) 21.

but then ultimately granted summary judgment for the government. *Id.* This Court reversed on appeal, agreeing with the plaintiffs that ANCs "are not eligible for funding under Title V of the CARES Act." *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, __ F.3d __, No. 20-5204, 2020 WL 5742075, at *10 (D.C. Cir. Sept. 25, 2020). But "to ensure an opportunity for orderly review of this Court's . . . decision, as well as the government's ability to disburse the disputed funds upon completion of the litigation," the Court suspended "any expiration of the appropriation for Tribal governments" in § 801(a)(2)(B) until final action on any petition for rehearing en banc or for writ of certiorari. Order, *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 20-5204 (D.C. Cir. Sept. 30, 2020). Both the government and a group of intervenors have sought Supreme Court review of this Court's decision. *See Alaska Native Village Corp. Ass'n, et al. v. Confederated Tribes of the Chehalis Reservation*, No. 20-544 (S. Ct. filed Oct. 21, 2020); *Mnuchin v. Confederated Tribes of the Chehalis Reservation*, No. 20-543 (S. Ct. filed Oct. 23, 2020).

Second, one tribe brought suit challenging the Secretary's allocation methodology, arguing that the decision to rely on the IHBG population data was arbitrary and capricious because it undercounted the tribe's actual population. *See Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491, 2020 WL 3402298 (D.D.C. June 11, 2020). The plaintiff sought emergency relief enjoining the Secretary from distributing any of the remaining Funds. *Id.* at *1. The district court denied the motion, holding that the Secretary's selection of an allocation methodology was

committed to agency discretion and therefore not subject to judicial review under the Administrative Procedure Act (APA). *Id.*. The plaintiff filed a notice of appeal but later voluntarily dismissed both the appeal and the underlying suit. *Prairie Band Potawatomi Nation v. Mnuchin*, No. 20-cv-1491 (D.D.C. dismissed July 9, 2020), No. 20-5171 (D.C. Cir. dismissed July 16, 2020).[4]

Third, a group of tribes brought suit to challenge the timing of the Secretary's distribution of the Funds. The district court denied the plaintiffs' initial motion for emergency relief without prejudice but later granted a renewed motion for preliminary injunction. *See Agua Caliente Band of Cahuilla Indians v. Mnuchin*, No. 20-cv-01136, 2020 WL 3250701, at *1 (D.D.C. June 15, 2020). At that time, the Secretary had started the second round of distributions but had withheld $679 million "to resolve any potential adverse decision in litigation over [the] methodology for calculating disbursements," such as the *Prairie Band* suit described above. *Id.* (quotation marks omitted). The district court acknowledged "the Secretary's efforts to date to distribute more than 90% of the $8 billion appropriated by Congress, and do to so in a fair and equitable manner," but held that the withholding of funds related to ongoing litigation "cannot be justified." *Id.* at *2. The court therefore entered an injunction requiring the Secretary to distribute all remaining Funds, except for those that had been allocated to

[4] A similar case challenging the Secretary's use of the IHBG data and the scope of consultations before its adoption remains pending in the district court. *See Miccosukee Tribe of Indians of Fla. v. U.S. Dep't of the Treasury*, No. 20-cv-2792 (D.D.C.).

ANCs and were the subject of the *Chehalis* litigation. *See id.* at *1 n.1, *4. The Secretary has complied with this injunction.

2. The *Shawnee Tribe* Litigation

a. Like the plaintiff in *Prairie Band*, the Shawnee Tribe also challenges the manner in which the Secretary allocated the first wave of distributions from the Funds. The Tribe claims that the Secretary's "decision to adopt the IHBG Race-Based Data for the basis of calculating the Population Award was arbitrary and capricious." A37; *see also id.* (asserting that the "rationale for adopting" the data was "based on inaccurate inferences" regarding its nature). The Tribe further claims that even if "use of the IHBG formula for calculating the Population Award was not arbitrary and capricious," the Secretary acted unreasonably in using what the Tribe characterized as the "plainly wrong population number of zero" for the Tribe included within the dataset provided by HUD, instead of using "accurate data documenting The Shawnee Tribe's actual population." *Id.* The Tribe sought declaratory relief that the "use of the IHBG data to distribute Title V funds" was arbitrary and capricious, and injunctive relief prohibiting the Secretary from "distributing, disbursing, or otherwise depleting any further that portion of the reserved $679 million intended to resolve the amount of funds for Oklahoma tribes" until "The Shawnee Tribe's accurate population data is used and funds are distributed" to it. A40-41.

The Tribe's complaint was filed on June 18, 2020, in the district of Oklahoma, after the district court in the District of Columbia had held that the manner in which the Secretary allocated the Funds was not subject to judicial review, and after that same court issued injunctive relief requiring the Secretary to distribute the previously reserved $679 million. *See supra* pp. 8-10. The district court in Oklahoma first denied the Tribe's request for a temporary restraining order, noting that the Secretary had "released almost all" of the Funds before the suit was filed (a fact "known to the Tribe's counsel before the filing of this suit"), and that "[w]hat remains . . is already spoken for." Dkt No. 19, at 2. That district court then transferred the action to the district court in D.C. because it could not "grant the requested relief without 'trenching upon the authority' of its sister court" that had already issued rulings in the other litigation described above. Dkt No. 25, at 6; *see also id.* at 5 ("[B]ecause the relief sought by the Shawnee would necessarily come at the expense of the ANCs, the Shawnee's suit is effectively a collateral attack on the injunction granted by the D.C. court in [*Chehalis*].").

b. The district court denied the Tribe's motion for a preliminary injunction. The court adhered to its prior conclusion in *Prairie Band* that "[t]he Secretary's selection of the HUD tribal population data set, however imperfect it may be, is a discretionary agency action that is not subject to judicial review." A2. The court explained that, "under the Supreme Court's decision in *Lincoln v. Vigil*, [508 U.S. 182 (1993),] 'as long as an agency allocates funds from a lump-sum appropriation to meet

permissible statutory objectives, § 701(a)(2) of the APA gives the courts no leave to intrude.'" A3 (quoting *Prairie Band*, 2020 WL 3402298, at *1). The court found nothing in the statutory text to overcome that presumption of non-reviewability that attaches to such actions—"Congress's general instruction to allocate funds based on 'increased expenditures' 'in such manner as the Secretary determines appropriate'" was "no more restrictive than the statutory directives at issue" in *Lincoln* and provided "no statutory reference point by which to judge the Secretary's decision to use HUD's population data set, as opposed to some other." A4-5 (quotation marks omitted). Because that decision was not subject to judicial review, the district court concluded, the Tribe has failed to demonstrate a likelihood of success on its APA claim.

The district court further concluded that the balance of equities also counseled in favor of denying preliminary injunctive relief (although the court did accept the Tribe's claim of irreparable harm). A8. Because nearly all of the Funds had been distributed except for the amount allocated to ANCs, the burden of injunctive relief here would "fall almost exclusively" on that group, "whose share of CARES Act funds, through no fault of their own, has already been delayed far beyond the statutory deadline." A9. Given the ANCs' interest in the same funds, granting relief to the Tribe would require "a judicial rebalancing" of the Secretary's allocations, which the district court concluded was improper. *Id.*

c. Following another round of briefing, the district court dismissed the Tribe's complaint for failure to state a claim. The court incorporated its reasoning from the two prior decisions holding that the Secretary's "allocation methodology is not reviewable under the APA," A15 (citing *Prairie Band*, 2020 WL 3402298); *see also* A1, and rejected the additional arguments the Tribe had advanced since. For example, the Tribe had pointed to "various limitations it sees within Title V as providing a judicially reviewable standard." A17. But the court observed that none of these limitations applied to "the exercise of discretion that [the Tribe] actually challenges in this lawsuit—the Secretary's chosen methodology for determining *how much* funding to disburse to Tribal governments." *Id.* The Tribe also argued that *Lincoln* applied only when "policy reasons *also* support the determination that the funding decision is committed to agency discretion by law." A18 (quotation marks omitted). The court declined to adopt this "policy-focused test," particularly in a case "where, as here, Congress has expressly evinced intent to leave the determination of how to allocate funding to the Secretary's discretion." *Id.* And finally, the Tribe argued that the Secretary had cabined his own discretion through "informal policy statements," pointing to a statement made by a Treasury official on a phone call that the Secretary wanted to adopt "a fair and transparent method for allocating these funds." A19 (quotation marks omitted). The court rejected the argument that "such an informal, aspirational representation" could provide a judicially manageable standard for reviewing agency action. *Id.*

SUMMARY OF ARGUMENT

I. There is no justiciability obstacle to the award of relief in this case. This Court has suspended the expiration of the appropriation at issue. Even if it had not, this Court or the district court could authorize further distributions following a final judgment. *See City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). In the event that all Funds are distributed before this case is resolved, it would become moot. But there is currently no likely prospect of mootness here. The Secretary is currently enjoined from distributing any Funds to ANCs and does not intend to re-allocate the remaining Funds to other recipients until final action by the Supreme Court on the pending petitions for writs of certiorari in the litigation about the eligibility of ANCs to receive CARES Act funding.

II. The district court properly dismissed the Tribe's complaint. The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies to various "categories of administrative decisions that courts traditionally have regarded" as unsuitable for judicial review, including "[t]he allocation of funds from a lump-sum appropriation." *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993). As long as the agency allocates funds "to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude." *Id.* at 193.

There is no dispute here that, following consultation, the Secretary's allocation methodology resulted in payments to "Tribal governments" for "increased

expenditures" related to the pandemic. *See* A98. The Secretary's action therefore complied with statutory objectives, and the Tribe does not contend otherwise. Rather, the Tribe "challenges the manner in which the Secretary allocated a portion of the $8 billion." A14. But the CARES Act imposes no restriction on the manner in which the funds must be allocated. On the contrary, it expressly leaves it to the Secretary to select a manner he "determines appropriate." 42 U.S.C. § 801(c)(7).

Even if the Secretary's action were not presumptively unreviewable, judicial review would still be unavailable because the CARES Act provides "no meaningful standard against which to judge the [Secretary's] exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Section 801(c)(7) states that the methodology shall be "determined in *such manner as the Secretary determines appropriate*." 42 U.S.C 801(c)(7) (emphasis added). This type of language "fairly exudes deference" to the Secretary and "foreclose[s] the application of any meaningful judicial standard of review." *Webster v. Doe*, 486 U.S. 592, 600 (1988). Both the Supreme Court and this Court have repeatedly relied on the "distinction between a subjective standard (whether the agency thinks that a condition has been met) and an objective one (whether the condition in fact has been met) in deciding that agency action was unreviewable." *Drake v. FAA*, 291 F.3d 59, 72 (D.C. Cir. 2002). By adopting a subjective standard, the CARES Act "provides no relevant 'statutory reference point' for the court other than the [Secretary's] own views of what is an 'appropriate' manner of distribution."

Milk Train, Inc. v. Veneman, 310 F.3d 747, 751 (D.C. Cir. 2002). Consideration of the overall legislative scheme underscores this conclusion.

The Tribe attempts to locate several limitations on the Secretary's discretion. But as the district court observed, the Tribe "points to no statutory limitation on the exercise of discretion that it actually challenges in this lawsuit—the Secretary's chosen methodology for determining how much funding to disburse to Tribal governments." A17 (emphasis omitted). Nor has the Secretary bound his own discretion. In the absence of a manageable standard by which to measure the Secretary's action, this Court cannot review that action for abuse of discretion. The district court's judgment should therefore be affirmed.

III. The district court previously denied the Tribe's motion for preliminary injunction based on its conclusion that the Secretary's action was not subject to judicial review. If this Court concludes, however, that judicial review is available, the ordinary next step would be to remand to the district court for further consideration. But if this Court proceeds to address the matter in the first instance, it should conclude that an injunction is not warranted.

The statutory language authorizing the Secretary to adopt an allocation methodology he determines appropriate calls, at a minimum, for "particularly strong" deference to the Secretary's judgment. *See Southwest Airlines Co. v. Transportation Sec. Admin.*, 650 F.3d 752, 756 (D.C. Cir. 2011). The Secretary was charged with identifying an appropriate allocation methodology based on increased expenditures

relative to aggregate expenditures in fiscal year 2019 that would allow for prompt distribution in an administratively feasible manner. The Secretary concluded that Tribal population would correlate well with the most relevant types of expenditures—those that were incurred due to the public health emergency and could be covered using the Funds. He specifically determined to use data maintained by the Department of Housing and Urban Development's IHBG program for the population component his allocation methodology because those data are well-maintained and easily accessible, familiar to the parties involved, and more reliable in this context than enrollment figures on account of their relation to the geographic area in which each tribe would be expected to incur eligible expenditures. These justifications are more than adequate to establish the reasonableness of the Secretary's determination. At a minimum, they sufficiently mark his decisionmaking path.

Because a likelihood of success on the merits is a required element for a preliminary injunction, the Court need not review the other factors. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020). In any event, the district court did not abuse its discretion in concluding that the balance of equities weighs against an injunction. The remaining Funds are currently allocated to the ANCs. Thus, any relief to the Tribe would come at the expense of these other groups, who have gone without needed funding through no fault of their own. And even if the ANCs are ultimately unable to receive those funds, the Tribe cannot demonstrate that it has a superior claim over other federally

recognized tribes that could make similar claims. Regardless of whether the Tribe could establish irreparable injury, the district court did not abuse its discretion by denying a preliminary injunction when no other element weighed in the Tribe's favor.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). The Court reviews a district court's "ultimate decision to deny injunctive relief, as well as its weighing of the preliminary injunction factors," for abuse of discretion, but in doing so it reviews "the district court's legal conclusions de novo and its findings of fact for clear error." *Navy Chaplaincy v. U.S. Navy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012).

ARGUMENT

I. This Court Can Provide Relief In This Case.

In an order filed on September 25, 2020, the Court directed the parties "to address whether this Court can provide relief to appellant after the CARES Act appropriation lapses or the remaining CARES Act funds are obligated."

The statutory appropriation at issue in this litigation made funds available "for fiscal year 2020," which ended on September 30, 2020. 42 U.S.C. § 801(a)(1). On that day, however, this Court entered an order suspending "any expiration of the appropriation for Tribal governments." Order, *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 20-5204 (D.C. Cir. Sept. 30, 2020). Now that the

government and the intervenors have filed petitions for writs of certiorari in that case, the Court's order remains in effect until seven days after any final action by the Supreme Court. *Id.*

Regardless, it is established that courts may authorize the expenditure of funds "after the funds have expired for obligational purposes." 1 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 5-83 (3d ed. 2004), https://www.gao.gov/assets/210/202437.pdf.[5] "As long as the suit is filed prior to the expiration date," as it was here, "the court acquires the necessary jurisdiction and has the equitable power to 'revive' expired budget authority." *Id.* at 5-85. Accordingly, once there is a final judgment in this case, a court can authorize the government to disburse funds to federally recognized tribes. *See City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *West Virginia Ass'n of Cmty. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1576-1577 (D.C. Cir. 1984); *see also National Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977) (describing authority to "reallocate funds which had been illegally awarded to the wrong category of recipients" and to redirect funds that have already been obligated).

The Treasury Department has already obligated to the ANCs the funds that the Tribe seeks a share of here. But as the sources cited above indicate, this poses no obstacle to relief by this Court. If this Court's decision in *Chehalis* is not disturbed on

[5] Courts regularly look to this manual for principles of appropriations law. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020).

further review, the government could reallocate and distribute the remaining Funds to federally recognized tribes, including the Shawnee Tribe (possibly pursuant to a further order of the district court).

Like the Tribe, Br. 25, the government understands the Court to ask whether this case would remain a live controversy if all of the funds currently obligated to the ANCs have been distributed before a final decision is made in this case. The government disagrees with the Tribe, however, that its request for declaratory relief would save this case from mootness in that circumstance. Br. 27. The general rule is that when appropriated "funds have been disbursed, this Court 'cannot reach them in order to award relief.'" *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516 (D.C. Cir. 2019) (quoting *City of Houston*, 24 F.3d at 1426). A case might be saved from mootness where a plaintiff "seeks declaratory relief as to an ongoing policy," but this exception would not apply here, where the funding at issue was pursuant to a one-time appropriation and the Tribe does identify any such continuing policy. *Id.* (quotation marks omitted).

Ultimately, however, there is no likely prospect of mootness here in the near future. The remaining Funds have not been distributed, and there is no immediate risk that they will be distributed given the ongoing review in *Chehalis*. An injunction prohibiting the distribution of Funds to ANCs currently remains in place, *see* Order, *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 20-5204 (D.C. Cir. Sept. 14, 2020), and the Secretary has not expressed an intention to re-allocate the remaining

Funds to other recipients while the *Chehalis* litigation is pending in the Supreme Court. There is therefore no justiciability obstacle to the award of relief in this case.

II. The District Court Properly Dismissed The Tribe's Complaint.

The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision applies to various "categories of administrative decisions that courts traditionally have regarded" as unsuitable for judicial review. *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). An agency action that falls into one of these categories is "presumptively outside the bounds of judicial review." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). The Supreme Court has expressly recognized that "an agency's allocation of funds from a lump-sum appropriation" is among those categories of decisions. *Lincoln*, 508 U.S. at 193.

Section 701(a)(2) also applies if the statute authorizing agency action "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In such a case, the APA's "presumption of reviewability" is lost because "it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.* at 830-31. In other words, "the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.* at 830.

Both approaches here lead to the same conclusion: the CARES Act appropriated $8 billion to assist Tribal governments with expenses related to the COVID-19 pandemic but expressly left it to the Secretary to "determin[e] in such

manner as the Secretary determines appropriate" how those funds should be allocated among eligible recipients. 42 U.S.C. § 801(c)(7). Because the Secretary's action is committed to agency discretion by law, the Tribe's challenge is unreviewable, and its complaint was properly dismissed for failure to state a claim. *See Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

A. The Secretary's Allocation Of Funds From The Appropriation In § 801(a)(2) Is Unreviewable.

1. As noted above, "[t]he allocation of funds from a lump-sum appropriation is [an] administrative decision traditionally regarded as committed to agency discretion." *Lincoln*, 508 U.S. at 192. It is therefore subject to the same "presumption of non-reviewability" that shields an agency's decision not to institute enforcement proceedings. *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020). Of course, "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes." *Lincoln*, 508 U.S. at 193. But as long as the agency allocates funds "to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude." *Id.*

The "operative statute" authorizing the Secretary to distribute the funds provides that

> the amount paid . . . 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 . . . and determined in such manner as the Secretary determines appropriate to ensure that all amounts available . . . are distributed to Tribal governments.

42 U.S.C. § 801(c)(7). There is no dispute here that, following consultation, the Secretary's allocation methodology resulted in payments to "Tribal governments" for "increased expenditures" related to the pandemic. *See* A98. (Indeed, the CARES Act requires recipients to use allocated funds for COVID-related expenditures. *See* 42 U.S.C. § 801(d).). Nor is there any dispute that—but for intervening litigation and the failure of a few tribes to provide necessary processing information—the Secretary would have distributed all of the Funds. The Secretary's action therefore complied with statutory objectives, and the Tribe does not contend otherwise. *See* A7 (noting that the Tribe "does not allege that the Secretary allocated CARES Act funds for anything other than their stated statutory purpose").

Rather than seek to enforce any statutory limitation imposed on the Secretary, the Tribe "challenges the manner in which the Secretary allocated a portion of the $8 billion." A14. The thrust of the Tribe's complaint is that the data set relied on by the Secretary provided an imperfect measure of tribal population—which the Tribe equates with enrollment—and that adjustments should be made to correct perceived inaccuracies. But the CARES Act imposed no restriction on the manner in which the funds must be allocated. It did not require the Secretary to use population figures at all, much less preclude the Secretary from using a specific population measure related to tribal jurisdiction as part of a formula for estimating increased expenditures, and it certainly did not require the distribution of funds based on a tribe's self-reported (and self-defined) enrollment. On the contrary, Congress expressly left it to the Secretary

to distribute funds in such manner as he "determines appropriate," 42 U.S.C. § 801(c)(7), under conditions where "any allocation formula" would necessarily involve "estimat[ion]," A98.

The Tribe attempts to distinguish *Lincoln* by arguing that there was "literally no law to apply" in that case but "there is law to apply" here. Br. 34. But whether there is "law to apply" is a different inquiry—though one that also counsels against judicial review here, *see infra* pt. II.A.2—from whether an agency action is of the type that is traditionally committed to agency discretion. *See Webster*, 486 U.S. at 608-09 (Scalia, J., dissenting), *cited in Lincoln*, 508 U.S. at 191. The categorical rule that supported *Lincoln's* holding is equally applicable here.

The appropriation at issue here took a slightly different form from the one considered in *Lincoln*, but both preserved agency discretion in similar ways. In that case, Congress appropriated a finite sum of money annually to the Indian Health Service to spend under statutes that "speak about Indian health only in general terms" and left it to the agency to allocate the funds to various programs as it saw fit. 508 U.S. at 194. Here, Congress appropriated a sum to assist Tribal governments with "necessary expenditures incurred due to the public health emergency" and left it to the Secretary to distribute a limited amount of funds among eligible recipients as he sees fit. 42 U.S.C. § 801(c)(7), (d)(1). The Secretary's selection of an allocation methodology based in part on specific population data supplied by another government agency "clearly falls within the [Secretary's] statutory mandate" to

distribute funds based on increases in tribal expenditures. *Lincoln*, 508 U.S. at 194. And as the district court observed, "Congress's general instruction to allocate funds based on 'increased expenditures' 'in such manner as the Secretary determines appropriate' is no more restrictive than the statutory directives at issue" in *Lincoln*. A4.

The Tribe further argues that certain "policy rationales" invoked in *Lincoln* do not apply here. Nothing in *Lincoln* suggests that the these considerations—which were offered to explain why allocations from lump-sum appropriations are categorically presumed to be unreviewable—are conditions that must be met before its holding is applied to another case. *See* A18 (noting that the Tribe "provides no authority to support its policy-focused test"). In any event, the Secretary's action here does exhibit many of these same characteristics. The selection of an appropriate allocation methodology required "a complicated balancing of a number of factors which are peculiarly within [his] expertise." *Lincoln*, 508 U.S. at 193 (quoting *Chaney*, 470 U.S. at 831). Because the law required prompt distribution, well before eligible expenses would be incurred, let alone ascertained, the task required considerable judgment. *See* A98 (noting that "any allocation formula will yield only an estimate of increased eligible expenditures"). The Secretary took into account "the reliability, verifiability, and relevance of available data," as well as "considerations of administrative feasibility" and what type of formula would permit payments to be made most quickly. A98-99. He had to consider whether statutory purposes were

better advanced by distributing a greater share of funding to one type of tribe or another—for example, those holding large physical land holdings versus those with large populations. *See* A98-99; *cf. Lincoln*, 508 U.S. at 193 (allocations require a determination whether "'resources are best spent'" on one program or another). And he considered which method of allocation "best fits the agency's overall policies," *Lincoln*, 508 U.S. at 193, of focusing specifically on "expenditures that are due to the public health emergency," rather than simply looking at "expenditures associated with large tribally-owned businesses," A98-99.

Because nothing in the CARES Act "overcomes the presumption of non-reviewability that attaches to the Secretary's discretion over how to allocate the $8 billion lump-sum appropriation under Title V," A8, that allocation decision is committed to agency discretion.

2. Even if the Secretary's action "does not fall within one of those almost-automatically unreviewable categories," like the one at issue in *Lincoln*, "that does not move the ball far" in the Tribe's favor. *Make The Road New York v. Wolf*, 962 F.3d 612, 633 (D.C. Cir. 2020). "It means only that a 'presumption of [APA] reviewability' attaches." *Id.* But such a presumption would be rebutted here because the CARES Act provides "no meaningful standard against which to judge the Secretary's exercise of discretion." *Chaney*, 470 U.S. at 830.

The CARES Act contains "no statutory limitation on the exercise of discretion that [the Tribe] actually challenges in this lawsuit—the Secretary's chosen

methodology for determining how much funding to disburse to Tribal governments." A17 (emphasis omitted). Section 801(c)(7) states that the methodology shall be "determined in *such manner as the Secretary determines appropriate*." 42 U.S.C 801(c)(7) (emphasis added). This type of language "heralds Congress's judgment to commit the decision exclusively to agency discretion." *Make The Road*, 962 F.3d at 632. For example, in *Webster v. Doe*, 486 U.S. 592, 600 (1988), the Supreme Court held that a statute authorizing an agency official to terminate an employee whenever the official "shall *deem* such termination necessary or advisable" "fairly exudes deference" to the official and "foreclose[s] the application of any meaningful judicial standard of review." And in *Drake v. FAA*, 291 F.3d 59, 72 (D.C. Cir. 2002), this Court held that a statute that permits an official to act whenever she "is of the opinion" that a condition is satisfied affords the agency "virtually unbridled discretion over such decisions." *Id.* (emphasis omitted).

Both the Supreme Court and this Court have repeatedly relied on the "distinction between a subjective standard (whether the agency thinks that a condition has been met) and an objective one (whether the condition in fact has been met) in deciding that agency action was unreviewable." *Drake*, 291 F.3d at 72 (discussing *Webster*, 486 U.S. at 600); *see also, e.g.*, *id.* ("What may be *thought* necessary may not in fact *be* necessary, but a court may pass judgment only on the latter, not the former."); *Sierra Club*, 648 F.3d at 856 (holding that a statute directing the Administrator to "take such measures, . . . as necessary to prevent the construction or modification" of

certain facilities "leaves it to the Administrator's discretion to determine what action is 'necessary'"); *Claybrook v. Slater*, 111 F.3d 904, 909 (D.C. Cir. 1997) ("Rather than allowing adjournment when it *is* in the public interest, section 10(e) authorizes the agency representative to *determine* whether adjournment is in the public interest."); *CC Distribs., Inc. v. United States*, 883 F.2d 146, 153 (D.C. Cir. 1989) ("[T]he statute does not provide an objective standard by which a court can assess which functions must be performed by government employees; instead, it expressly leaves that decision to the Secretary's determination."). Indeed, in another case challenging the distribution of emergency assistance appropriated by Congress, this Court held that a statute directing that funds be disbursed "in a manner determined appropriate" by the Secretary of Agriculture committed the matter to agency discretion. *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002). The Court explained that the statute "provides no relevant statutory reference point for the court other than the decisionmaker's own views of what is an 'appropriate' manner of distribution." *Id.* (quotation marks omitted).

The conclusion that Congress deliberately committed the selection of an allocation methodology to the Secretary is confirmed by "a fair appraisal of the legislative scheme, including a weighing of practical and policy implications of reviewability." *Local 1219, Am. Fed'n of Gov't Emps. v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982) (quotation marks omitted); *see also Drake*, 291 F.3d at 70 (explaining that courts consider "both the nature of the administrative action at issue and the

language and structure of the statute"). Statutory provisions governing payments to States, local governments, and territories all set out strict formulas for calculating payment amounts and even identify the relevant data to use when applying those formulas. *See* 42 U.S.C. § 801(c)(1), (3)-(6), (8). This divergent treatment underscores the intent to provide the Secretary with discretion in choosing how to distribute the Funds to tribal governments.

Further, the combination of a limited appropriation and a requirement to distribute all of it means that the award of additional funds to the Tribe necessarily means that another eligible recipient receives less. How to strike that balance is a decision better made in advance by the responsible agency looking at the whole scheme comprehensively, rather than by a court looking solely at the party before it. *See* A9 ("Granting Plaintiff's request for relief would amount to a judicial rebalancing of the allocation decisions made by the Secretary, which the court is in no position to do."). And finally, Congress set a very short deadline for the Secretary to distribute the Funds. While short statutory deadlines do not affirmatively "preclud[e] judicial review by implication," *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 20-5204, 2020 WL 5742075, at *4 (D.C. Cir. Sept. 25, 2020), this Court has recognized that they are a relevant consideration when deciding whether an administrative action should be viewed as committed to agency discretion, *see Claybrook*, 111 F.3d at 908 (explaining that "a court should hesitate to second-guess" decisions made "under time pressure").

The Tribe claims that the statute provides several manageable standards by which to assess the Secretary's discretion. But the Tribe "points to no statutory limitation on the exercise of discretion that it actually challenges in this lawsuit—the Secretary's chosen methodology for determining how much funding to disburse to Tribal governments." A17 (emphasis omitted). For example, the CARES Act appropriated funds for distribution to "Tribal governments," a defined term under the statute. 42 U.S.C. § 801(a)(2)(B), (g)(5). Unlike in the *Chehalis* litigation, upon which the Tribe relies, Br. 37, the Tribe does not argue that the Secretary contravened this limitation, *see Confederated Tribes of Chehalis Reservation v. Mnuchin*, 465 F. Supp. 3d 152, 161 (D.D.C. 2020) (distinguishing "decisions as to *how much* to disburse" from "decisions concerning *to whom* to disburse those funds"). The Tribe's assertion that "Congress required Treasury to pay 'each such Tribal government'—not just some of them"—is doubly mistaken. Br. 37. Nothing in the CARES Act requires that every single tribe receive money under each component of a multi-part allocation formula, and in any event, the Secretary determined that all tribes (including the Shawnee Tribe) would receive a minimum payment for the population-based component. A100; *see also* A33 (Tribe admitting receipt of this payment).

Similarly unavailing is the Tribe's assertion that "Congress expressly cabined the Government's discretion about how to distribute these funds by requiring it to be rationally 'based' on COVID-19 increased expenses." Br. 38. "[E]ven if an instruction to allocate funds 'based on increased expenditures' could be read as a

statutory constraint of some kind, Title V cannot be reasonably read to place any restriction on *how* the Secretary must allocate the $8 billion to achieve that goal." A18. Instead, Congress provided that the allocation is to be "determined in such manner *as the Secretary determines appropriate*." 42 U.S.C. § 801(c)(7) (emphasis added). This provides no manageable standard to assess the Tribe's core complaint, that the Secretary chose a data set it did not like and then failed to correct perceived inaccuracies relative to its preferred measure.[6]

The Tribe provides no statutory basis for imputing a judicially enforceable "rationality" limitation on the Secretary's determination of how to allocate scarce funds to eligible entities. The CARES Act contains no such language; it requires only that the Secretary determine his manner to be appropriate. To the extent that the Tribe would ground this additional requirement in the purposes of the CARES Act or in the APA itself, such an argument is squarely foreclosed by this Court's case law. *See, e.g.*, *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 158 (D.C. Cir. 2006);

[6] The statutory requirement that the Secretary engage "in consultation with the Secretary of the Interior and Indian Tribes," 42 U.S.C. § 801(c)(7), does not restrict the (Treasury) Secretary's discretion to determine the manner of allocation. At most, it imposes a procedural requirement that the Secretary must satisfy before making his determination. The Tribe acknowledges that such a consultation occurred. A31; *see also* A98 (explaining that the consultation was conducted "[i]n accordance with Treasury's Tribal consultation policy").

Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003).[7] Indeed, were this court to accept this "rationality" standard "as a basis for review of the [Secretary's] action, there would be 'law to apply' in every agency action" and "no agency action could ever be committed to agency discretion by law." *Steenholdt*, 314 F.3d at 639.

B. The Tribe's Remaining Arguments Are Without Merit.

The Tribe contends that "[t]his Court has already held in *Chehalis*" that, "regardless of the lump sum nature of Title V[,] Treasury's funding decisions are reviewable." Br. 32. This argument conflates two separate exceptions to the APA's provisions on judicial review: § 701(a)(1) and § 701(a)(2). "The former applies when Congress has expressed an intent to preclude judicial review. The latter applies in different circumstances[,] even where Congress has not affirmatively precluded review . . . ." *Chaney*, 470 U.S. 830. *Chehalis* held that Congress did not preclude judicial review of the Secretary's actions under Title V, and thus engaged in judicial review to determine whether certain entities were eligible to receive funds at all. The

[7] One of the Tribe's *amici* appears to suggest that that this Court took a different approach in *Ramah v. Navajo Sch. Bd.*, 87 F.3d 1338 (D.C. Cir. 1996), asking whether the agency's action "effectuate[d] the original statutory scheme as much as possible," "[e]ven in the absence of statutory guidance" on the particular matter at hand. *See* Br. *Amicus* Prairie Band of Potawatomi Nation 15 (quoting *Ramah*, 87 F.3d at 1348). But the statute in *Ramah* in fact provided quite explicit guidance. *See* 87 F.3d at 1348 ("[T]he Act informs the Secretary exactly how the full funding should be allocated, and that method provides a meaningful standard by which to review the Secretary's dissemination of the insufficient funds as well." (emphasis omitted)); *see also* A16 (distinguishing *Ramah*).

Court did not consider whether some of those actions might be committed to agency discretion.

The Tribe is also mistaken to rely on Treasury's "guidance documents, statements, and selection process." Br. 40. This Court's case law establishes that "manageable standards" for guiding judicial review "may be found in formal and informal policy statements and regulations as well as in statutes." *Physicians for Soc. Responsibility*, 956 F.3d at 643 (quoting *Steenholdt*, 314 F.3d at 638). "But '[i]n determining whether agency statements create such a standard,' the operative question is 'whether the statements create binding norms.'" *Twentymile Coal*, 456 F.3d at 159 (alteration in original) (quoting *Steenholdt*, 314 F.3d at 638).

None of the materials cited by the Tribe do so. The statement of a Treasury official during a phone consultation that the Department "want[s] a fair and transparent method for allocating these funds," Br. 40 (quoting A78), does not bind the Secretary (even if a subordinate official could theoretically do so). It "merely announce[s] [the Secretary's] tentative intentions for the future, leaving himself free to exercise his informed discretion," and in any event is phrased in such general terms that it would not supply a legal standard upon which this Court could evaluate the Secretary's exercise of discretion. *Twentymile Coal*, 456 F.3d at 159 (second alteration in original) (quoting *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986)). The Tribe also suggests that the Secretary's determination that population "is expected to correlate reasonably well" with expenditures, A99, limited his discretion

to use IHBG as the source of its population data. Br. 40. But it makes no sense to suggest that one part of the Secretary's allocation decision prevented him from adopting another part of it. There is certainly no evidence that the Secretary intended this unexpected result. *See Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("[A]n agency pronouncement is transformed into a binding norm if so intended by the agency.").

Finally, having urged this Court to hold that its claims are subject to judicial review, the Tribe proceeds to invite this Court to undertake such review, "find the Government violated the APA, and direct the lower court to enter judgment in favor of The Shawnee Tribe." Br. 42-50, 58. The Court should decline the invitation for several reasons. First, the district court has not addressed the merits of the Tribe's APA claim and should have the first opportunity to do so. This is "a court of review, not one of first view." *Texas v. United States*, 798 F.3d 1108, 1115 (D.C. Cir. 2015) (quotation marks omitted). Second, the Tribe never moved for summary judgment in district court. It therefore asks this Court to grant relief—final judgment in its favor—that it never requested in the district court. Third, the administrative record has not been filed in this case. That record might illuminate some issues pressed by the Tribe on appeal now, including exactly what data was before the Secretary when he selected an allocation methodology and whether Secretary considered some of the purported defects in that data. *See* Br. 44-49.

The Tribe identifies no prior decision of this Court entering final judgment in such circumstances. As far as the government is aware, in the "only instance in which this court has short-circuited the district court in such a matter," *CC Distribs.*, 883 F.2d at 156, "[t]he parties cross-moved for summary judgment in the lower court," and the "full record" was before the court of appeals, *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979). Neither condition is satisfied here. If this Court reverses the order dismissing the Tribe's complaint, it should remand to the district court for consideration of the merits by in the first instance.

III. The District Court Properly Denied Preliminary Injunctive Relief.

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To prevail, the moving party must establish (1) that it is "likely to succeed on the merits"; (2) that it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) that the "balance of equities" tips in its favor; and (4) that "an injunction is in the public interest." *Id.* at 20. The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A. The Tribe Has Failed To Demonstrate A Likelihood Of Success On The Merits.

A foundational requirement for obtaining preliminary injunctive relief is that the plaintiff demonstrate a likelihood of success on the merits. Indeed, because

"likelihood of success is an independent, free-standing requirement for a preliminary injunction," even a "strong showing" on another factor could not "make up for failure to demonstrate a likelihood of success on the merits." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Where a plaintiff fails to clear this initial hurdle, the Court need not "proceed to review the other three preliminary injunction factors." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) (quoting *Arkansas Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009)).

1. The district court concluded that the Tribe had failed to demonstrate a likelihood of success on its APA claim because the APA does not provide for judicial review of the Secretary's selection of an allocation methodology. It did not consider whether the Tribe would be likely to succeed on that claim if judicial review were available. This Court ordinarily declines to resolve claims and arguments not addressed by a district court in deciding a preliminary injunction motion. *See Sherley v. Sebelius*, 644 F.3d 388, 397-98 (D.C. Cir. 2011). And because "the decision whether to grant a preliminary injunction is a matter of discretion, not a question of right," *id.* at 398, a threshold determination by this Court that the Tribe's claim is reviewable does not make it "inevitable" that the Tribe will secure injunctive relief, *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (quoting *Gross v. United States*, 390 U.S. 62, 71 (1968)). Accordingly, if this Court concludes that the district court erred with

respect to reviewability, the ordinary course would be a remand for the district court to consider the Tribe's likelihood of success. Regardless of which court undertakes the inquiry, however, the Tribe would still not be likely to succeed on the merits of its APA claim because the standard of review would be extremely deferential.

Under ordinary circumstances, the scope of review of agency action under the APA is narrow. A "court is not to substitute its judgment for that of the agency," and "should uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quotation marks omitted). At bottom, "the question is whether the agency action was reasonable and reasonably explained." *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015).

In this case, the Court's review is even more deferential. The CARES Act provides that any payment to a Tribal government shall be "determined in such manner as the Secretary determines appropriate." 42 U.S.C. § 810(c)(7). As noted above, such statutory language "fairly exudes deference" to the Secretary. *Webster*, 486 U.S. at 600. Even if it is not enough to foreclose review altogether, at a minimum § 801(c)(7) "by its terms 'substantially restrict[s] the authority of the reviewing court to upset the Secretary's determination." *American Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 393 (D.C. Cir. 2005) (Roberts, J., concurring in part and dissenting in part) (alteration in original) (quoting *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989)). Indeed, this Court has observed that such statutory

language calls for "particularly strong" deference to agency judgments. *See Southwest Airlines Co. v. Transportation Sec. Admin.*, 650 F.3d 752, 756 (D.C. Cir. 2011) ("Our deference is particularly strong here because the statute says that the fee is based on the amount TSA 'determined' the airlines paid in 2000."); *see generally ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) ("When Congress expressly delegates to an administrative agency the authority to make specific policy determinations . . . the [agency's] views merit the greatest deference.").

The Secretary's action here easily passes muster. He was faced with a task of identifying an appropriate allocation methodology based on increased expenditures relative to aggregate expenditures in fiscal year 2019 that would allow for prompt distribution in an administratively feasible manner. But because "actual expenses could not be predicted quickly," Dkt No. 25, at 2, "any allocation formula" would necessarily involve "an estimate of increased eligible expenditures," A98. The Secretary determined that Tribal population would "correlate reasonably well" with this more targeted category of expenditures most relevant to the statute. A99. And because "reliable and consistently-prepared" population data was already available, payments based on population could be made immediately. A99. For these reasons, the Secretary "determined to distribute 60 percent" of the Funds based on population. A99.

The Secretary specifically selected population data used by the IHBG program for a number of reasons. First, this data is well-maintained and easily accessible. The

IHBG data is "based on Census Bureau data" and "updated annually . . . to reflect demographic shifts at the county level." A99, 103; *see also* 24 C.F.R. § 1000.330(b)(1). Indeed, the Secretary used the same Census Bureau data to allocate funding to States and local governments under the CARES Act that the Department of Housing and Urban Development uses to update its IHBG data. The IHBG data has the further benefit of being publicly available and familiar to tribal governments, who "have already been provided the opportunity to scrutinize and challenge its accuracy." A99; *see also* 24 C.F.R. §§ 1000.330(c), 1000.336.

Second, other federal programs that provide benefits to tribal governments also rely on the sources used for the IHBG population data. For example, the Tribal Transportation Program provides funding based, in part, on the same Decennial Census American Indian and Alaska Native data used for the IHBG program. A103 & n.1. Thus, there is precedent for Treasury's reliance on this data, and even tribes who do not participate in the IHBG program would have reason to be familiar with it.

Third, the Secretary concluded that data from other sources, including tribal enrollment, were less reliable and less well-suited to this particular purpose. "Tribal enrollment does not provide a consistent measure of tribal population across tribes." A104. Nor does enrollment data distinguish between members living within the tribal area and those living far away. *Id.* The IHBG data, on the other hand, is tied to a tribe's formula area, generally meaning "the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic

influence extend." A100; *see also* A104 (describing formula area as "a specific geographic area attributed to each tribe" that "include[s] adjustments to address overlapping jurisdictions"). A measure of population related to a tribe's provision of services has obvious advantages when it comes to estimating increased expenditures due to the COVID-19 pandemic.

These justifications are more than adequate to establish the reasonableness of the Secretary's determination. At a minimum, they suffice to make his decisionmaking path reasonably discernable.

2. The Tribe offers four basic arguments in response.

First, the Tribe contends that the Secretary should have used or compiled a different data set to measure population. Br. 46-47. But "[a]n agency 'typically has wide latitude in determining the extent of data-gathering necessary to solve a problem.'" *Milk Train*, 310 F.3d at 754; *see also Sierra Club v. U.S. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) ("[Courts] generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.'"). The CARES Act tasked the Secretary with distributing $150 billion to States, Tribal governments, and local governments *within 30 days*. The population-based component of the allocation to Indian tribes accounted for approximately 3% of this total. The Secretary explained that he used the IHBG data because it was immediately available, consistently maintained, and better suited to this

particular task than enrollment data. In these circumstances, the "trade-off between the amount of uncertainty and error that is acceptable in view of the congressional purpose to get aid promptly" to eligible recipients "is the type of issue for which courts show great deference." *Milk Train*, 310 F.3d at 754.

Second, the Tribe contends that its population count in the IHBG data did not accurately reflect the Tribe's population. This argument fails altogether to account for the nature of formula area population and its relevance to the Secretary's action. Formula area population is not a general measure of population. It is specifically designed to measure the population of the "specific geographic area attributed to each tribe," where the tribe provides services to its members. A100, 104. Further, the Secretary did not use the IHBG data as a means of estimating tribal enrollment, but rather as a component of a formula to estimate increased expenditures, with a focus on those expenditures incurred as a result of the public health emergency and properly covered by the Funds. A minimum payment amount was established for tribes with low formula area populations, and a second distribution based on expenditure and employment data was provided later.

The Tribe does not identify any error in the calculation of its formula area population. Regardless, the relevant administrative action here is the Secretary's selection of an allocation methodology to distribute funds to hundreds of eligible tribes. The question before the Court is whether that action was arbitrary and capricious, not whether this particular tribe's population (as it understood the term)

was correct. For the reasons he provided, the Secretary's selection was not arbitrary or capricious. Nor was it unreasonable for the Secretary to decline to make ad hoc adjustments to the population data—or to entertain requests from each tribe for such adjustments—which would not necessarily improve the accuracy of the data in the aggregate but would necessarily significantly delay the completion of the analysis and the distribution of funding to all tribes.

Third, the Tribe notes that the appropriate distribution of CARES Act funds "is entirely unrelated to any participation in unrelated and elective federal programs" for housing and transportation benefits. Br. 47-48. But the Secretary did not allocate payments based on participation in these programs. Rather, the Secretary allocated 60% of the payments based on a specific population metric after determining it was the most appropriate basis for this allocation. For any tribe that was not included in the publicly available IHBG data set (because it had withdrawn from the program), the Secretary was able to obtain the missing population data directly from the Department of Housing and Urban Development because even non-participating tribes "have Decennial Census data attributed to their defined formula areas under the IHBG program." A100, 103. For the reasons described above—including that IHBG data is consistently updated and tribes are able to contest its accuracy—it was reasonable for the Secretary to use this data to measure tribal population.

Finally, the Tribe contends that the Secretary's decision "effectively rendered" it "extinct." Br. 49. It did no such thing. The CARES Act limited payments to the

recognized governing body of a federally recognized tribe. 42 U.S.C. § 801(g)(1), (5). The Secretary could not have provided any payment, even the minimum population-based payment, to a tribe he did determined did not exist. The Tribe admits that it received a population-based payment, A33, and it does not contend that it was shut out of funding under the employment and expenditures component of the Secretary's allocation formula.

B. The Balance of Equities Weighs Against Preliminary Injunctive Relief.

The district court correctly concluded that the balance of equities favored denying relief to the Tribe. The court observed that, because only remaining Funds that had not yet been distributed were allocated for the ANCs, any relief to the Tribe would come at the expense of the ANCs, "whose share of CARES Act funds, through no fault of their own, has already been delayed far beyond the statutory deadline." A9. This Court held in *Chehalis* that the ANCs are not eligible to receive funding under the CARES Act, but the government and the intervenors in that case have sought review of that ruling in the Supreme Court. As long as it remains possible that ANCs will receive the share of Funds the Secretary determined to pay them, "[t]he ANCs' interest in the designated Title V funds weighs against the requested injunctive relief." A9.

The Tribe fails to establish any error in this analysis, much less an abuse of discretion. The Tribe's argument takes as a given that ANCs are not eligible to

receive funding, but this matter has yet to be finally resolved. Even assuming that the remaining Funds are to be distributed only to federally recognized tribes, it would not follow that the public interest weighs in favor of reserving money to the Tribe. As the Oklahoma district court recognized in denying a temporary restraining order, the argument that other tribes "have no legitimate basis to claim those funds in the first instance," Br. 56, presumes that none of them were also underpaid, Dkt No. 19, at 3. As noted above, there is no plausible argument that the Secretary was compelled to make a single ad hoc adjustment in favor of a single tribe, without providing other tribes the opportunity to argue that the relevant data failed to capture the appropriate allocation for them in some way. Nor would the public interest be served by forcing the Secretary to create a whole new methodology based on a different data set with other flaws, or to make individualized determinations for each tribe, risking further delay of the distribution of funds.

The Tribe's argument that their interest in relief is supported by "the very purpose of these CARE[S] Act funds—intended to mitigate the public health crisis affecting everyone"—is equally unavailing. Br. 57. That purpose would be equally well served by disbursing the funds under the methodology determined by the Secretary. Absent a showing that no other tribe has unreimbursed expenditures, or that the Shawnee Tribe suffers a worse public health crisis than any other, it cannot reasonably claim that public health is only served by reserving funds for itself.

CONCLUSION

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

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL S. RAAB
DANIEL TENNY

/s/ Thomas Pulham
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division, Room 7323
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4332
thomas.pulham@usdoj.gov

October 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,296 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Thomas Pulham
Thomas Pulham

ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 801..... A1

42 U.S.C. § 801

§ 801. Coronavirus relief fund

(a) Appropriation

(1) In general

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

(2) Reservation of funds

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

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

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

(b) Authority to make payments

(1) In general

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

(2) Direct payments to units of local government

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

(c) Payment amounts

(1) In general

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

population proportion amount determined for the State under paragraph (3) for such fiscal year.

(2) Minimum payment

(A) In general

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

(B) Pro rata adjustments

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

(3) Relative population proportion amount

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

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

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

(4) Relative State population proportion defined

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

(A) the population of the State; and

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

(5) Relative unit of local government population proportion amount

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

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

(B) the amount equal to the quotient of—

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

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

(6) District of Columbia and territories

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

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

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

(7) Tribal governments

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

(8) Data

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

(d) Use of funds

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

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

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

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

(e) Certification

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

(f) Inspector General oversight; recoupment

(1) Oversight authority

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

(2) Recoupment

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

(3) Appropriation

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

(4) Authority of Inspector General

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

(g) Definitions

In this section:

(1) Indian Tribe

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

(2) Local government

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

(3) Secretary

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

(4) State

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

(5) Tribal government

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