UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SHAWNEE TRIBE, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE TREASURY, et al. *Defendants*.	Case No. 1:20-cv-01999-APM
THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF THE TREASURY and UNITED STATES OF AMERICA, *Defendants*.	Case No. 1:20-cv-02792-APM
PRAIRIE BAND POTAWATOMI NATION, *Plaintiff*, v. STEVEN T. MNUCHIN, in his official capacity as SECRETARY, U.S. DEPARTMENT OF TREASURY *Defendant*.	Case No. 1:21-cv-012-APM

PLAINTIFFS' REPLY IN SUPPORT OF JOINT MOTION FOR PRELIMINARY INJUNCTION DIRECTING IMMEDIATE INTERIM DISTRIBUTION OF CARES ACT FUNDS

TABLE OF CONTENTS

INTRODUCTION

This is a unique and exceptional case that demands a unique and exceptional remedy: immediate, material distributions of CARES Act funds to the Plaintiff tribes. All credible sources point to that result. The statute's text expressly recognizes the urgent need for relief by requiring distribution of funds within 30 days. The Court has concluded, in the *Agua Caliente* case, that the devastation wrought by the pandemic justifies immediate relief. And the day-to-day experiences of Plaintiffs' members cry out for emergency assistance. Sadly, the Government has proven itself incapable of addressing this massive harm with the required urgency. The CARES Act mandates distributions within 30 days. But Treasury already has taken almost four times as long (since the January 5 D.C. Circuit ruling in the *Shawnee* case) to develop a new methodology, promising distributions at a future date that is impossible to predict.

The Court should forcefully reject the Government's plea for the Court to stand down while Treasury lumbers along its current path. The Court must evaluate Treasury's heavily-qualified promises of a new methodology, followed by new distributions, in the context of the agency's prior conduct: among other things, defending its position that tribes could have zero members, and defending its original methodology with a straight face (even now) on the ground that it "treat[ed] all Tribal entities the same, using a single data source for everyone (the IHBG data)." Defs' Br. at 13. Plaintiffs should not have to wait any longer for meaningful monetary relief. The Court should grant the motion for preliminary injunction.

ARGUMENT

I. THE COURT SHOULD ORDER TREASURY TO MAKE IMMEDIATE AND MATERIAL INTERIM DISTRIBUTIONS TO THE PLAINTIFF TRIBES

A. Plaintiffs Have Satisfied the Four-Factor Test for a Preliminary Injunction

Plaintiffs have satisfied the four-factor test for a preliminary injunction. The "most important" of the four factors is likelihood of success on the merits. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). The Government does not mention — and tacitly concedes — that Plaintiffs are likely to succeed on the merits of their claim for arbitrary and capricious agency action. *See* Pls' Br. at 3. It also does not persuasively rebut Plaintiffs' likelihood of success on their unreasonable-delay claim. The Government asserts that the Court has no authority to issue a remedy for unreasonable delay under the language of the CARES Act. Defs' Br. at 10–11. But it ignores the fact that the Court *already* has decided that it has such authority, and *already* has issued such a remedy, in the *Agua Caliente* case. Pls' Br. at 2.[1]

The Government also tacitly concedes that Plaintiffs will be irreparably harmed if they do not promptly receive CARES Act distributions. *See* Pls' Br. at 4. Its only response is to assert that Treasury might possibly make payments faster under a forthcoming methodology than under the directive of a preliminary injunction. Defs' Br. at 2, 17. Even if Treasury had the authority to make such unilateral payments without a Court order — which it does not as discussed below — the Government's vague statements about timing do not reduce the certain irreparable harm that

[1] The Government erroneously asserts that the agency action at issue (to be assessed for unreasonable delay) is its initial promulgation of the distribution methodology in March 2020. Defs' Br. at 15. To the contrary, the delayed agency action challenged here is the full distribution of the funds to which Plaintiffs are entitled. Pls' Br. at 2. The Government also erroneously asserts that Plaintiffs challenge Treasury's methodology *per se*. Defs' Br. at 15. However, Plaintiffs' challenge focuses on Treasury's reliance on patently false data instead of credible data requested, possessed by, and well known to, the agency.

Plaintiffs suffer. Treasury's claims that it is "currently poised to complete" and "hopes to be finished with" a new methodology by April 30, and that it is "committed to begin issuing payments thereunder promptly afterwards" are wholly speculative. Defs' Br. at 2, 15. Those representations are particularly shaky given that Treasury has not committed to issuing payment before the Supreme Court decides the ANCs' case, which may not be until "the end of June." Defs' Br. at 12.

Furthermore, the Government's claim that it would take significant time to determine the interim distribution amounts is simply not credible. How much time could it really take to (1) calculate the populations of the three Plaintiff tribes using a different data source; (2) determine how much Treasury previously paid other tribes with the same populations; and (3) discount that amount by a small percentage that would protect the other litigating tribes to the extent necessary? Paying the Plaintiffs 100 percent of the funds they seek would only reduce the amount available to the litigating ANCs by 4 percent. Pls' Br. at 8 n.4. It should not be difficult for Treasury to determine a discount to that full amount that would substantially satisfy Plaintiffs' claims on an interim basis while further reducing the impact on the ANCs.

Finally, the Government does not even respond to Plaintiffs' analysis of the remaining two preliminary injunction factors, namely the balance of the equities and the public interest. Pls' Br. at 4. The Government instead argues that the Court should deny the motion because Plaintiffs filed it after the Court set the summary judgment briefing schedule (without showing any prejudice from the motion's timing). Defs' Br. at 2, 16. The Government's argument is unsupportable. During the same February 25 conference in which the Court set the briefing schedule, the Court also requested Treasury to consider making interim distributions and report back on its decision. On March 5, Treasury rejected the Court's suggestion, reporting that it "does not intend to make

advance payments to Plaintiffs without first ascertaining the amount Plaintiffs, and others, may receive under a revised methodology." Status Report (filed March 5, 2021), Dkt. No. 62, at 1. Treasury's decision not to consider interim distributions triggered this motion, which was filed shortly thereafter. Since Treasury will not do the right thing, Plaintiffs have requested the Court to step in. There is absolutely no reason that Plaintiffs cannot seek preliminary relief at the same time that they pursue a later final adjudication on the merits. Immediate relief is essential, and the summary judgment briefing will not even conclude until late May.

The Government's only other defense is the vague assertion that quick interim distributions might potentially harm other unidentified parties in unspecified ways. Defs' Br. at 2, 17. If the Government is referring to other litigating tribes, the assertion is baseless because their interests can be easily protected through the discount described above. If the Government is referring to non-litigating tribes, their interests are irrelevant. The Government tacitly concedes that the Court has no authority to direct distribution of CARES Act funds to them. *Compare* Pls' Br. at 13–14 *with* Defs' Br. at 14. And the Government cannot unilaterally distribute funds to them either. Pls' Br. at 9–11. The equities tip sharply in favor of immediate injunctive relief.

B. The Court Has Equitable Authority to Direct Treasury to Make an Interim Distribution

Plaintiffs' opening brief established that the Court has authority to reach beyond the typical remand remedy and issue affirmative relief in extraordinary circumstances such as those arising from the pandemic. Pls' Br. at 5. The Government concedes that a remedial injunction is appropriate in extraordinary circumstances. Defs' Br. at 9–11. And the Government does not dispute that the pandemic has created extraordinary circumstances here.[2]

[2] The Government notes dicta in the D.C. Circuit's *Shawnee* decision suggesting that the agency may need to create a new methodology on remand. Defs' Br. at 6, 11. The Circuit obviously did

The Government also largely ignores the Court's authority to compel monetary payments under the doctrine announced in *Bowen v. Massachusetts*, 487 U.S. 879, 900 (1988). Under *Bowen*, the Court has authority under the APA to issue such an order when a plaintiff seeks to enforce a statutory mandate for the payment of money. *Id*. at 900; *see also Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000). That of course is exactly what Plaintiffs seek here, under the CARES Act provision requiring that the Government "shall pay" the appropriated funds to Tribal Governments "not later than 30 days after" March 27, 2020. 42 U.S.C. § 801(b)(1).

We acknowledge that the Court's authority to order payment differs somewhat under Plaintiffs' arbitrary-and-capricious claim (asserted under 5 U.S.C. § 706(2)(A)) than under their claim for agency action unlawfully withheld or unreasonably delayed (asserted under 5 U.S.C. § 706(1)). The Court has authority to order payment under the arbitrary-and-capricious claim for the simple, straightforward reason that the CARES Act entitles Plaintiffs to the payment of money. *See, e.g.*, *Resolute Forest Prods. v. United States Dep't of Agric.*, 219 F. Supp. 3d 69, 72 (D.D.C. 2016) (compelling payment as remedy for arbitrary-and-capricious claim under *Bowen*); *Bronston v. Kemp*, 722 F. Supp. 372, 378–79 (S.D. Ohio 1989) (same).

A somewhat narrower standard applies to Plaintiffs' separate and independent claim for agency action unlawfully withheld or unreasonably delayed. Under that claim, the Court can compel the agency to take a discrete action it is required by statute to take. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). In this context, "discrete" agency action means one that fits within the definitions of agency actions set forth in the APA, 5 U.S.C. § 551(13). *Id*. at 62–63. The CARES Act meets this standard too. The statute unequivocally requires the Government to

---

not foreclose other remedies by noting that conventional possibility. The issue of remedies was not briefed by the parties or squarely before the Court.

make payments to Plaintiffs. And those payments fit within the definitions of agency actions set forth in 5 U.S.C. § 551(13). *See* Miccosukee Tribe First Amended Complaint (filed March 26, 2021), Dkt. No. 66, at ¶85 ("The Treasury Secretary's failure to respond to the Miccosukee Tribe's demand for an additional Population Distribution that would cure the agency's population-determination error was a failure to take an 'agency action' within the meaning of 5 U.S.C. § 551(13) because it was a failure to issue a 'grant of money' within the meaning of 5 U.S.C. § (11)(A)."). It therefore is not surprising that the Court already decided, in *Agua Caliente*, that it has authority under the CARES Act to remedy unreasonable delay by commanding payments to tribes, as it did in that case.[3]

The Government seeks to further narrow the unreasonable delay standard, erroneously claiming that the Court cannot grant relief unless the *statute itself* specifically and unequivocally commands Treasury "to issue Plaintiffs payments pursuant to a different methodology that includes certain mandatory aspects that the Plaintiffs would prefer." Defs' Br. at 1, 10–11. But

[3] The Government erroneously suggests that the narrower standard applicable to unreasonable-delay claims *also* applies to Plaintiffs' other APA claim for arbitrary and capricious agency action. There is no support for that suggestion in the case law. The Government omits limiting references to unreasonable-delay claims when quoting cases addressing the narrower standard. *Compare Elec. Privacy Info. Ctr. v. IRS*, 910 F.3d 1232, 1234 (D.C. Cir. 2018) ("The APA allows a reviewing court to compel agency action 'unlawfully withheld' under narrow circumstances. 5 U.S.C. § 706(1).") *with* Defs' Br. at 9 ("At times, '[t]he APA' does allow 'a reviewing court to compel agency action,' but only 'under narrow circumstances.' [citing *Elec. Privacy Info. Ctr.*]"). *Compare Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) ("Section 706(1) permits judicial review of agency inaction, but only within strict limits. 5 U.S.C. § 706(1). Courts can compel an agency 'to take a *discrete* agency action that it is *required to take*.'") *with* Defs' Br. at 9 ("Under the APA, 'Courts' may only 'compel an agency to take a *discrete* agency action that it is *required* to take.' [citing *Anglers*]."). *Compare Norton*, 542 U.S. at 65 ("Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.") *with* Defs' Br. at 10 ("Even 'when an agency is compelled by law' to take *some* agency action, if 'the manner of its action is left' largely 'to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.' [citing *Norton*].").

that is not the law. As explained above, the Court can compel unreasonably-delayed agency actions as long as they are mandated by statute and defined as agency actions in the APA (like the payments requested here). The additional "mandatory aspects" that the Government refers to are legal boundaries established by applicable administrative-law, appropriations-law, and justiciability doctrines (independent of the express statutory language that empowers the Court to grant relief). Pls' Br. at 7–14. Such legal-boundary directives to agencies are a commonplace facet of judicial remedies under the APA. *See* Pls' Br. at 8-9. The Government does not prove otherwise through boilerplate references to agency discretion on remand. *See* Defs' Br. at 9, 11. The Court is well within its authority to compel interim payments subject to the limitations specified by Plaintiffs.

II. THE GOVERNMENT HAS NOT PROVED THAT A NEW METHODOLOGY WOULD MOOT PLAINTIFFS' CLAIMS

The Government's tepid Opposition appears to be grounded on the assumption that the merits of Plaintiffs' motion do not matter much, because issuance of a new methodology would allegedly moot Plaintiffs' claims (no matter how compelling they may be). The Court should easily reject the Government's assumption. Claims are only moot "when nothing turns on [their] outcome." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993). Here substantial monetary relief turns on the resolution of Plaintiffs' claims.

A. Treasury Does Not Have the Authority to Take the Action That It Asserts Would Moot Plaintiffs' Claims

Treasury does not even have the authority to take the action — issuance of a new methodology — that it asserts would moot Plaintiffs' claims. Plaintiffs' opening brief explains in detail why Treasury cannot unilaterally determine the allocation of CARES Act funds (without judicial direction) now that the 2020 fiscal year has ended. Pls' Br. at 9–10. The Government largely ignores that analysis and simply asserts that the D.C. Circuit injunction in the *Confederated*

Tribes case, barring expiration of the appropriation, gives the agency free reign to distribute funds without court involvement. Defs' Br. at 12, 14. The critical point that the Government ignores is the legal *principle* underlying that injunction. The only reason that a court has authority to enjoin expiration of a time-limited appropriation is to facilitate an equitable judicial remedy granting monetary relief from the appropriated funds. Pls' Br. at 10. That is why the *Confederated Tribes* injunction addresses disbursement of "disputed funds *upon completion of the litigation*." Order, *Confederated Tribes of the Chehalis Reservation, et al. v. Mnuchin*, No. 20-5204 (D.C. Cir. Sept. 30, 2020), Dkt. No. 1864207 (emphasis added). Undoubtedly, that is also why the Government agreed, in *Confederated Tribes*, that it would not attempt to disburse funds without a court order. Pls' Br. at 11 n.8. It is well established that this remedial authority of the court exceeds that of the agency acting unilaterally. *See, e.g.*, *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 56 (D.C. Cir. 1977) ("A congressional deadline on an agency's ability to take action on its own motion does not preclude an agency's authority to take later action on direction of a court exercising judicial review.") Without court direction, the agency is bound by the ordinary rule that it cannot obligate funds after the fiscal year ends. Pls' Br. at 9. Treasury simply has no authority to take the action that it asserts would moot Plaintiffs' claims.

B. The Government Has Not Proved That Issuance of a New Methodology Would Moot Plaintiffs' Claims

Even assuming *arguendo* that Treasury had the authority to issue a new methodology unilaterally (and did so), Plaintiffs' claims would remain live and justiciable. A live controversy would persist as long as Plaintiffs could receive a larger monetary recovery under their existing claims than they would under the new methodology. Pls' Br. at 16. If that were not the case, any agency could immunize itself from monetary liability for its own unlawful actions simply by withdrawing those actions once litigation commenced. An agency cannot manipulate the judicial

consequences of its own actions in that manner. *See, e.g.*, *Dow Chem. Co. v. United States EPA*, 605 F.2d 673, 679 (3d Cir. 1979) (withdrawal of rule by unrepentant agency did not moot controversy because otherwise "the timing and venue of judicial review could be effectively controlled by the agency").

The Government is simply wrong when it asserts that pending claims automatically become moot, under any and all circumstances, when an agency withdraws an action that is the target of those claims. Defs' Br. at 13–14 n.3. The mootness issue requires a much more probing and nuanced analysis. When an agency withdraws a challenged action, pending claims may or may not become moot, depending upon the circumstances. Mootness turns fundamentally on two issues. *First*, the Court must assess whether the plaintiff suffers continuing harm from the challenged action after it is withdrawn — for if harm from that action persists, so does the case or controversy. *See e.g.*, *Dow*, 605 F.2d at 679 (dispute over withdrawn agency rule was not moot because the rule's lingering effect created a "present harm that merits [the Court's] attention"); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (amendments to challenged rule did not moot claims as to "sources of alleged regulatory injury" that the amendments failed to resolve); *see also id.* (cessation of challenged conduct does not moot a claim unless "the effects of the alleged violation" have been "completely and irrevocably eradicated") (citing *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)); *Schorr v. Roberson*, 2018 U.S. Dist. LEXIS 124138 (D.D.C. Feb. 1, 2018) (citing *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991) ("In all the cases in which this court, (in line with Supreme Court precedent), has

found that the effects of an alleged injury were not eradicated, some tangible, concrete effect, traceable to the injury, and curable by the relief demanded, clearly remained.")).[4]

Here, the primary legally-cognizable harm is Plaintiffs' receipt of a smaller monetary distribution than the law requires. *See, e.g.*, *Nat'l Env't Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (justiciable harm occurs if plaintiffs "would have been better off" if agency had "taken the course of action that they claim the law required"). Plaintiffs will suffer continuing harm from Treasury's legally-deficient distributions as long as monetary recovery under their pending claims would be larger than the amount they would receive under the new methodology. Under those circumstances, they obviously "would have been better off" (*id.*) recovering under their current claims than under the new methodology. Put another way, the harms from Treasury's original distributions would not be "completely and irrevocably eradicated" (*Motor & Equip. Mfrs.*, 142 F.3d at 459) — and therefore the claims would not be moot — as long as the new methodology yielded less money than the monetary award that Plaintiffs seek under their current claims. Such continuing harm from a deficient distribution is a realistic and troubling possibility here. The Government expressly *concedes* that Plaintiffs might receive less under the new methodology than they would by prevailing on their pending claims. Defs' Br. at 13.

Second, the Court must determine whether the remedy that the plaintiff seeks in the Complaint would, if granted, redress the continuing harm from the withdrawn agency action. "[T]he scope of a federal court's jurisdiction to resolve a case or controversy is defined by the

[4] The single case that the Government cites does not undermine the foregoing analysis. Defs' Br. at 13–14 n.3. In *Akiachak Native Cmty. v. United States DOI*, 827 F.3d 100 (D.C. Cir. 2016), the Court addressed a regulation that restricted the Interior Department from taking certain actions with respect to land in Alaska. In the midst of litigation challenging that regulatory restriction, the agency withdrew the regulation. There was no continuing harm from the original regulation, because the restriction that had harmed the plaintiff was eliminated. *Id.* at 106. As a result, the plaintiff's claims were moot.

affirmative claims to relief sought in the complaint" (or related cross-claims or counterclaims). *Akiachak*, 827 F.3d at 106. Accordingly, courts focus on the relief requested in the Complaint to determine whether "it is impossible . . . to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (citations omitted)). *See also Akiachak*, 827 F.3d at 106. Here, Plaintiffs' original and amended Complaints expressly request the Court to award additional monetary relief to remedy the continuing harm from Treasury's May 2020 distribution decision. That relief is readily available and is obviously not "impossible to grant." Treasury has more than sufficient funds to cover Plaintiffs' claims. The Court is well within its authority to grant Plaintiffs' requested relief. And issuance of a new methodology is not even relevant to that authority. The Government has not even come close to demonstrating that its new methodology would moot Plaintiffs' claims.

CONCLUSION

The Court should order the Government to make the immediate interim distribution requested by Plaintiffs.

Dated: April 15, 2021

Respectfully submitted,

/s/ Daniel G. Jarcho
Daniel G. Jarcho (D.C. Bar # 391837)
George B. Abney*
Daniel F. Diffley*
Jean E. Richmann*
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, N.W.
Washington, D.C. 20004
Phone: (202) 239-3300
Fax: (202) 239-3333
daniel.jarcho@alston.com
*Admitted *pro hac vice*

Counsel for The Miccosukee Tribe of Indians of Florida

/s/ Carol E. Heckman
Carol E. Heckman*
James P. Blenk*
LIPPES MATHIAS WEXLER FRIEDMAN, LLP
50 Fountain Plaza, Suite 1700
Buffalo, New York 14202
Telephone: (716) 853-5100
checkman@lippes.com
jblenk@lippes.com
*Admitted *pro hac vice*

- and -

Michael G. Rossetti, DC Bar No. 477122
1900 K Street, NW
Suite 730
Washington, DC 20006
Telephone: (202) 888-7610
mrossetti@lippes.com

Counsel to Prairie Band Potawatomi Nation

/s/ Pilar M. Thomas
Pilar M. Thomas
QUARLES & BRADY LLP
One South Church Avenue, Suite 1800
Tucson, Arizona 85746
Admitted *pro hac vice*

Nicole L. Simmons
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
Admitted *pro hac vice*

Luke Cass
QUARLES & BRADY LLP
1701 Pennsylvania Avenue, NW
Washington, DC 20006

Counsel to The Shawnee Tribe