

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued December 4, 2020

Decided January 5, 2021

No. 20-5286

SHAWNEE TRIBE,  
APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS  
SECRETARY OF THE UNITED STATES DEPARTMENT OF THE  
TREASURY, ET AL.,  
APPELLEES

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:20-cv-01999)

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*Pilar M. Thomas* argued the cause for appellant. With her on the briefs were *Luke Cass*, *Scott McIntosh*, and *Nicole L. Simmons*.

*Michael G. Rossetti* was on the brief for *amicus curiae* Prairie Band Potawatomi Nation in support of appellant.

*Daniel G. Jarcho* was on the brief for *amicus curiae* the Miccosukee Tribe of Indians of Florida in support of appellant.

*Thomas Pulham*, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, and *Michael S. Raab* and *Daniel Tenny*, Attorneys. *Adam C. Jed*, Attorney, entered an appearance.

Before: TATEL, GARLAND\*, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: The Shawnee Tribe, located in Oklahoma, challenges the allocation of funds under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which Congress enacted in response to the current public health emergency. The district court, finding that the allocation of funds under the CARES Act was unreviewable, denied the Tribe’s motion for a preliminary injunction and then dismissed the case. For the reasons set forth below, we reverse and remand for the district court to consider the merits and to enter a preliminary injunction promptly.

## I.

Title V of the CARES Act appropriated \$150 billion “for making payments to States, Tribal governments, and units of local government,” 42 U.S.C. § 801(a)(1), for “necessary expenditures incurred due to the public health emergency with respect to [COVID-19],” *id.* § 801(d)(1). Congress directed the Secretary of the Treasury to make the payments within thirty days of the Act’s March 27, 2020 enactment. *Id.* § 801(b)(1).

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\* Judge Garland was a member of the panel at the time this case was argued but did not participate in the final disposition of the case.

Of the \$150 billion, Congress reserved \$8 billion for payments to “Tribal governments,” *id.* § 801(a)(2)(B), and specified that the amount to be paid

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

*Id.* § 801(c)(7).

Following consultation with Tribal government representatives, the Secretary published on April 13 a form requesting enrollment data from all 574 federally recognized Tribal governments “to help apportion Title V funds.” *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, 976 F.3d 15, 20 (D.C. Cir. 2020). In response, the Shawnee Tribe certified that it had 3,021 enrolled members.

The Secretary subsequently announced his chosen methodology for distributing funds. *See* U.S. Department of the Treasury, *Coronavirus Relief Fund Allocations to Tribal Governments* (May 5, 2020) (“May 5 Document”), <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf>. Because data about increased expenditures for fiscal year 2020 were “unknown” and could only be “estimate[d]” at that point, the Secretary “determined that it [was] reasonable and appropriate to allocate payments based on a formula [that] takes into account population data, employment data, and expenditure

data.” *Id.* at 1. Sixty percent of the \$8 billion would be distributed “immediately based on population,” while the remaining forty percent would be distributed later “based on employment and expenditures data.” *Id.* at 2.

For the sixty percent based on population, the Secretary explained that “Tribal population [wa]s expected to correlate reasonably well with the amount of increased expenditures of Tribal governments related directly to the public health emergency, such as increased costs to address medical and public health needs.” *Id.* Rather than using the enrollment numbers submitted by the tribes, however, the Secretary relied on “Tribal population data used by the Department of Housing and Urban Development (HUD) in connection with the Indian Housing Block Grant (IHBG) program.” *Id.* According to the Secretary, the data were “reliable and consistently-prepared,” and the Tribal governments were “familiar” with the data and had been able to previously “scrutinize and challenge its accuracy.” *Id.*

The IHBG data does not reflect actual tribal enrollment. Instead, it estimates a tribe’s “population” in a geographical “formula area” based on population numbers drawn from census projections of the number of individuals who consider themselves “American Indian or Alaska Native” on census forms. *See* 24 C.F.R. §§ 1000.302, 1000.330; *see also* May 5 Document at 2. A Tribal government’s formula area is defined to be its formula area as it existed in 2003, any of its land that falls into nine categories (including “reservations for federally recognized Indian tribes”), and any other areas added by application of the Tribe and at HUD’s discretion. *See* 24 C.F.R. § 1000.302. A formula area, the Secretary explained, “corresponds broadly with the area of a Tribal government’s jurisdiction and other areas to which the Tribal government’s provision of services and economic influence extend.” May 5

Document at 2–3. Because the IHBG data does not reflect actual enrollment, a tribe’s IHBG “population” sometimes exceeds its actual enrollment numbers. 24 C.F.R. § 1000.302. A tribe’s IHBG formula area population is thus capped at twice its “enrolled population.” *Id.* § 1000.302(5).

The Secretary’s decision to use IHBG data had an unfortunate impact on the Shawnee Tribe. Even though the table displaying the IHBG data included HUD enrollment figures indicating that the Tribe had 2,113 enrolled members, the IHBG data reported that the Tribe had a formula area population of zero. So although the Tribe had over \$6.6 million in expenditures in 2019, Compl. Ex. A, and although it “incurred significant medical and public health expenses in responding to the devastation resulting from the COVID-19 pandemic,” *id.* ¶ 62, it received just \$100,000—the minimum payment for tribes with a population of fewer than thirty-seven, *id.* ¶ 26. *See Barker v. Conroy*, 921 F.3d 1118, 1121 (D.C. Cir. 2019) (explaining that on “appeal from the district court’s grant of a motion to dismiss, ‘we must accept as true all material allegations of the complaint’” (quoting *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011))). Twenty-four other tribes also had formula area populations of zero, including amicus curiae Miccosukee Tribe of Indians of Florida, which has 605 enrolled members. Miccosukee Tribe’s Br. 2.

On June 18, the Shawnee Tribe sued the Department of the Treasury, the Secretary of the Treasury, the Department of the Interior, and the Secretary of the Interior (collectively, the Secretary) in the Northern District of Oklahoma. *See Shawnee Tribe v. Mnuchin (Shawnee Tribe I)*, No. 20-CV-290, 2020 WL 4334908 (N.D. Okla. July 28, 2020). Seeking declaratory and injunctive relief, the Tribe contended that the Secretary acted arbitrarily, capriciously, and unlawfully by using population as a proxy for increased expenditures,

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