UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, et al., Plaintiffs, v. STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, Defendant.	Case No. 1:20-cv-1136-APM

DEFENDANT'S OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Steven Mnuchin, in his official capacity as Secretary of the Treasury, hereby files this memorandum in opposition to the Amended Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 12) ("Motion" or "Mot.") filed by Plaintiffs Agua Caliente Band of Cahuilla Indians, Ak-Chin Indian Community, Arapaho Tribe of the Wind River Reservation, Cherokee Nation, Chicksaw Nation, Choctaw Nation of Oklahoma, Snoqualmie Indian Tribe, and Yurok Tribe of the Yurok Reservation.

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INTRODUCTION

Plaintiffs' Motion was premised on the fact that none of the $8 billion dollars reserved for Tribal governments under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act had yet been made to Tribal governments. That has since changed. Defendant recently announced that it has begun paying 60% of the appropriated money (or $4.8 billion) to Tribal governments. As of the morning of May 6, 2020, approximately $3.4 billion in payments had already been made, including to all eight Plaintiff Tribes in this case. This development confirms what was already apparent—that Plaintiffs cannot satisfy their high burden of establishing the factors that would warrant their extraordinary request for full relief under the guise of a temporary restraining order.

Before Defendant can pay hundreds of Tribal governments under the CARES Act, Defendant is required by that statute to determine the appropriate amount for each Tribal government. Although Congress wanted this money to be disbursed within 30 days, it was equally concerned that the money not be doled out haphazardly. Toward that end, Congress prescribed consultations among Defendant, the Department of Interior, and Indian Tribes to arrive at an amount "that is based on increased expenditures of each[] Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019." 42 U.S.C. § 801(c)(7). That process is more complex than that for State and local governments, *compare id.* §§ 801(c)(1)-(5), it took more than 30 days and, despite significant progress, is not yet complete.

Plaintiffs want to cut that process short and get the money now. But while their frustration is understandable, the CARES Act requires Defendant to make payments consistent with the statutory dictates above. Perhaps acknowledging as much, Plaintiffs never suggest *how much* money should be disbursed to each Tribal government within "24 hours of [the Court's] Order." Proposed Order (ECF No. 4-1) at 3. That is a telling omission, fatal to the relief that Plaintiffs propose. In short, they never specify what, exactly, they want this Court to order Defendant to do.

In any event, Plaintiffs cannot succeed on the merits of their unreasonable-delay claim. They rest exclusively on the 30-day deadline in the statute. But while a statutory deadline may

inform the standard against which an agency is held, violation of a statutory deadline is not per se unreasonable. Instead, an alleged delay is gauged by a multifactor, fact-specific test. Apart from the 30-day deadline in the CARES Act, the *only* evidence that Plaintiffs offer on this front is that State and local governments have received payments. But as the Court is aware, the formula for paying those governments was significantly different that the discretion vested in Defendant vis-à-vis the Tribal governments.

Against that scant evidence, Defendant shows below that it has reasonably endeavored to meet an exacting standard. The agency has labored diligently to arrive at a fair, appropriate allocation of Coronavirus Relief Fund payments. *See generally* Ex. 1 (Kowalski Decl.). Indeed, Defendant has now commenced payments on 60%, or approximately $4.8 billion, of the total sum. The fact that a portion of that money remains to be paid, nine days after the statutory deadline, does not negate the reasonableness of Defendant's efforts. On the record before the Court, there is no factual or legal basis to grant the relief sought by Plaintiffs.

Nor can Plaintiffs show that extreme or very serious damage would result if they do not obtain these funds within 24 hours. Once again, the arguments and evidence they offer have been overcome by recent events. Even without those developments, however, Plaintiffs would fall short. Most of the harms they recite were caused by the COVID-19 pandemic, not any delay by Defendant. More critically, no declarant explains how the difference between getting payments in the next 24 hours, as opposed to the next week or month, will cause extreme or very serious damage. That, too, is a fatal shortcoming of Plaintiffs' motion.

Finally, the balance of equities favors allowing Defendant to determine appropriate amounts before disbursing them. While Congress wanted payments to be made within 30 days, it also wanted those payments to be determined in a defined way. And while Plaintiffs may have an interest in getting these payments more quickly, *every* Tribal government has an interest in getting the appropriate amount of funding. Those interests would be dashed if this Court ordered Defendant to simply make payments now—without regard to the amounts.

BACKGROUND

On March 27, 2020, the President signed the CARES Act into law. Pub. L. 116-136, 134 Stat. 281 (2020). Title V of the CARES Act appropriates $150 billion through a "Coronavirus Relief Fund," codified as Subchapter VI to the Social Security Act at 42 U.S.C. § 801,[1] to States, Tribal governments, and units of local government.

The Coronavirus Relief Fund specifically reserved $8 billion for "Tribal governments." 42 U.S.C. § 801(a)(2)(B). Under Section 801, "the Secretary [of the Treasury][2] shall determine, in consultation with the Secretary of the Interior and Indian Tribes," the amount to pay each Tribal government. *Id.* § 801(c)(7). That amount shall be "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)." *Id.* But so long as he distributes all of the appropriated funds, the "manner" in which to determine the amount paid to each Tribal government is "as the Secretary determines appropriate." *Id.* The funds are to be disbursed "not later than 30 days after the enactment of this section," or April 26, 2020. *Id.* § 801(b)(1).

On April 30, 2020, four days after the statutory deadline, Plaintiffs filed suit. *See* Compl. (ECF No. 1).[3] The complaint states a single claim, ostensibly brought through three causes of action: the Declaratory Judgment Act, 28 U.S.C. § 2201; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1); and the Mandamus Act, 28 U.S.C. § 1361. *See* Am. Compl. ¶¶ 30-39. Plaintiffs ask the Court to declare that payments have been unlawfully withheld or unreasonably denied; to enjoin Defendant to disburse the funds within 24 hours; and to issue a writ of mandamus "requiring Defendant to disperse the Title V emergency relief funds to the Plaintiffs

[1] The CARES Act refers to "Title" VI of the Social Security Act, and to "Sec. 601" of Title 42. But in fact, the provisions have been codified as *Subchapter* VI and at 42 U.S.C. § *801*.

[2] Where Section 801 uses the term "Secretary," that refers to the Secretary of the Treasury. 42 U.S.C. § 801(g)(3).

[3] The complaint was later amended to add two Plaintiffs, but the substantive allegations remained the same. *See* Am. Compl. (ECF No. 11).

within 24 hours in a manner consistent with the CARES Act and this Court's April 27, 2020 Order." Am. Compl. (Prayer for Relief) ¶¶ 1-3.

On May 1, 2020, five days after the statutory deadline, Plaintiffs filed the instant Motion.[4] The motion seeks the same relief as does the underlying complaint. *Compare* Am. Compl. *with* Proposed Order (ECF No. 12-1) at 2-3.

On May 5, 2020, nine days after the statutory deadline, Defendant announced that it had started making payments from the Coronavirus Relief Fund.[5] Specifically, $4.8 billion would be paid out to Tribal governments, in all States, across several banking days. Defendant stated further that it was "endeavoring to make payments of the remaining amounts as promptly as possible consistent with the Department's obligation to ensure that allocations are made in a fair and appropriate manner."

The same day, Defendant published its *Coronavirus Relief Fund Tribal Allocation Methodology*.[6] That three-page document describes how Treasury currently anticipates allocating Coronavirus Relief Fund payments among the Tribal governments eligible for payments.

STANDARD OF REVIEW

Preliminary injunctive relief is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Dallas Safari Club v. Bernhardt*, -- F. Supp. 3d --, No. 19-cv-03696, 2020 WL 1809181, at *3 (D.D.C. Apr. 9, 2020) (Mehta, J.) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)) (citations and internal quotation marks omitted). A court may only grant the "extraordinary remedy . . . upon a clear showing that the plaintiff is entitled to such relief." *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v.*

[4] As was the complaint, the motion was later amended to add two Plaintiffs without other substantive change. *See* Am. Mot. (ECF No. 12).

[5] Joint Statement by Treasury Secretary Steven T. Mnuchin and Secretary of the Interior David L. Bernhardt on Distribution of Coronavirus Relief Fund Dollars to Native American Tribes (May 5, 2020), *available at* https://home.treasury.gov/news/press-releases/sm998.

[6] *Available at* https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf.

Armstrong, 520 U.S. 968, 972 (1997) (per curiam))). The movant's burden is still higher where, as here, the movant's requested "injunction is mandatory—that is, [ ] its terms would alter, rather than preserve, the *status quo* by commanding some positive act." *Id.* (citing *Singh v. Carter*, 185 F. Supp. 3d 11, 17 (D.D.C. 2016) (quoting *Electr. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014))).

To obtain preliminary injunctive relief, a plaintiff must show that: (1) it "is likely to succeed on the merits"; (2) it "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [its] favor"; and (4) "an injunction is in the public interest." *Id.* (citing *Winter*, 555 U.S. at 20 (citations omitted)).[7] To obtain a *mandatory* preliminary injunction, moreover, a plaintiff must "show[] clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Singh*, 185 F. Supp. 3d at 17 (citing *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39 (collecting cases)). "Further, a preliminary injunction should not work to give a party essentially the full relief he seeks on the merits," as Plaintiffs do here. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969); *see also Singh*, 185 F. Supp. 3d at 17 (citing *Diversified Mortgage Inv'rs v. U.S. Life Ins. Co. of N.Y.*, 544 F.2d 571, 576 (2d Cir. 1976) (collecting cases)).

This case presents an underlying claim of unreasonable delay and seeks mandamus relief. Because APA § 706(1) reflects the traditional writ of mandamus, it permits judicial compulsion of agency action only within strict limits. *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (citing 5 U.S.C. § 706(1)). To show entitlement to mandamus, plaintiffs must

[7] In this jurisdiction, courts evaluate the four preliminary injunction factors on a "sliding scale"—if a "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). *Winter*, however, called that approach into question and sparked disagreement over whether the "sliding scale" framework continues to apply, or whether a movant must make a positive showing on all four factors without discounting the importance of a factor simply because one or more other factors have been convincingly established. *See Archdiocese of Washington v. Washington Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (explaining that the D.C. Circuit "has not yet decided whether *Winter* . . . is properly read to suggest a 'sliding scale' approach to weighing the four factors be abandoned").

demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (citing *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011)). In APA terms, courts can only compel "*discrete* agency action that it is *required to take.*" *SUWA*, 542 U.S. at 64 (emphasis in original). Thus, APA § 706(1) grants judicial review only if a federal agency has a "ministerial or non-discretionary" duty amounting to "a specific, unequivocal command." *Id.* at 63-64.

Ordering an agency to act "is an extraordinary remedy reserved for extraordinary circumstances." Mot. at 10 (quoting *In re Am. Rivers & Idaho Rivers Utd.*, 372 F.3d 413, 418 (D.C. Cir. 2004)); *accord In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 813 (9th Cir. 2015)). "Mandamus claims that, like this one, target agency delay, turn on 'whether the agency's delay is so egregious as to warrant mandamus.'" *Am. Hosp. Ass'n*, 812 F.3d at 189 (quoting *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO MEET THE EXTRAORDINARY BURDEN REQUIRED FOR MANDATORY PRELIMINARY INJUNCTIVE RELIEF.

As shown above, Plaintiffs face an exponentially high burden to obtain the relief sought here. First, their underlying claim is based on APA Section 706(1), which is a remedy reserved for extraordinary circumstances. Second, Plaintiffs seek a preliminary injunction on that claim, which is itself extraordinary relief. Third, Plaintiffs seek *mandatory* preliminary relief, which imposes an even higher burden. Put together, then, Plaintiffs must show a clear entitlement to relief on an underlying claim, which itself is granted only rarely, and that they face extreme or very serious harm otherwise. Particularly in light of the recent progress that Treasury has made in distributing available funds, Plaintiffs cannot demonstrate that this extraordinary remedy is warranted now.

A. Plaintiffs Must Proceed under the Administrative Procedure Act, not the Mandamus Act.

While Plaintiffs invoke both the APA and the Mandamus Act as causes of action in their Amended Complaint, and argue separately that that they "will likely succeed on the merits of their claim" and are "entitled to a writ of mandamus," Mot. at 4-5, 10-13, this case must be assessed under the APA, 5 U.S.C. § 706(1).

The writ of mandamus is available "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. But mandamus relief is available only if, among other conditions, "there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005) (quotation omitted). Because there *is* an adequate alternative remedy in this case—namely, APA § 706(1)—the Mandamus Act is unavailing. *See Navajo Nation v. Azar*, 302 F. Supp. 3d 429, 436 n.4 (D.D.C. 2018) (citing *Action Alliance of Senior Citizens v. Leavitt*, 483 F.3d 852, 858 (D.C. Cir. 2007) (noting that "mandamus's invariable condition" is "the absence of an alternative remedy"); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 53 (D.D.C. 2008) ("Because the Court finds that it has jurisdiction . . . pursuant to 28 U.S.C. § 1331 and the APA, it need not reach the question of whether mandamus is available . . . .")).

Although the APA "carried forward" the traditional writ of mandamus, and the standards for obtaining relief through either "are essentially the same," *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir. 2010), these should not be viewed as two separate claims by Plaintiffs, such that they might fail on one but succeed on the other.

B. Plaintiffs Have Not Shown a Clear Entitlement to Relief on the Merits of Their Unreasonable-Delay Claim.

The "most important factor" regarding preliminary relief is "whether [Plaintiffs] have established a likelihood of success on the merits." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). Plaintiffs must make a clear showing of entitlement in order to obtain a mandatory preliminary injunction. *Singh*, 185 F. Supp. 3d at 17 (citing *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39 (collecting cases)). In this case, they have not shown that "the agency's delay is so

egregious as to warrant mandamus." *Am. Hosp. Ass'n*, 812 F.3d at 189 (quoting *Core Commc'ns*, 531 F.3d at 855).

Plaintiffs are correct that an unreasonable-delay claim is assessed under the six factors in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"), and accurately set fort those factors, Mot. at 10.[8] Unlike the requirement of a clear duty to act in a ministerial or non-discretionary manner, which is a jurisdictional requirement, "in situations where the statute imposes a deadline or other clear duty to act, the bulk of the *TRAC* factor analysis may go to the equitable question of whether mandamus *should* issue, rather than the jurisdictional question of whether it *could*." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016). As Plaintiffs put it, "the existence of a clear duty to act must be coupled with evidence of unreasonable agency delay in taking action." *Id.* at 9. But even assuming that the duty at issue here is amenable to mandamus relief, Plaintiffs do not couple that duty with evidence of unreasonable delay. Under the *TRAC* factors, the Motion should be denied.

1. *TRAC* factors 1 and 2: the rule of reason.

The first and second *TRAC* factors—which collectively govern *how long* a delay is to be deemed unreasonable—are the "most important" of the *TRAC* factors. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (citing *Core Commc'ns*, 531 F.3d at 855).

As to these factors, Plaintiffs rely solely on "the CARES Act's explicit mandate that the Secretary distribute Title V funds to Tribal governments by April 26, 2020." Mot. at 4 (citing 42

[8] Those factors include: (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *See generally TRAC*, 750 F.2d at 79-80.

U.S.C. § 801(b)(1)).[9] But the 30-day deadline is not the only "explicit mandate" in Title V of the CARES Act. Defendant is also required, before it can disburse any funds, to determine an amount, "in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or tribally-owned entity of such Tribal government)." 42 U.S.C. § 801(c)(7). Even assuming that Defendants face a non-discretionary duty to dole out funds within 30 days irrespective of whether Treasury has completed its calculations, the Court must assess the reasonableness of any delay in that action with an eye toward the decidedly discretionary task of determining the payment amounts. *See Chehalis* Op. at *5 (suggesting, without holding, that Defendant's "decisions as to *how* much to disburse might not be reviewable").

As to the 30-day deadline itself, Plaintiffs are correct that the deadline lapsed mere days ago, "[b]ut the question is not that simple." *SAI v. DHS*, 149 F. Supp. 3d 99, 120 (D.D.C. 2015) (rejecting the argument that violation of a statutory deadline is "prima facie unreasonable"). Under *TRAC*, the Court must apply a "rule of reason." *TRAC*, 750 F.2d at 80. And although that rule may be informed by the kind of statutory timetable in 42 U.S.C. § 801(b)(1), it is equally clear that failure to meet such a timetable does not necessarily trigger relief under *TRAC*.

In this case, the 30-day deadline must be understood in context. It governs payments to State, local, and Tribal governments. 42 U.S.C. § 801(b)(1). But while the formula for State and local governments is spelled out in the statute, the amounts to be paid to Tribal governments are committed to Defendant's discretion. More than that, the stature required certain consultations to

[9] Plaintiffs suggest that the Court has "already determined that the plain language of the CARES Act mandates disbursement of Title V funds by April 26, 2020." Mot. at 4 (citing *Confederated Tribes of the Chehalis Reservation v. Mnuchin*, No. 1:20-cv-1002 (APM), 2020 WL 1984297, at *2 (D.D.C. Apr. 27, 2020) ("*Chehalis* Op."). But the cited portion of the Court's prior opinion comes from the "Statutory Background" section, in which the Court merely quoted the statute. It did not opine on the questions presented in this case or by this motion. And if anything, the Court's opinion recognized that the 30-day deadline is *not* absolute: The Court entered a preliminary injunction on the day after the statutory deadline and yet expressly contemplated that Defendant could nonetheless reserve payments to the Alaska native corporations pending final judgment. *Id.* at *16.

be held before the amounts for Tribal governments could be determined—consultations which were *not* required vis-à-vis State or local governments. Thus, unsurprisingly, it has taken Defendant longer to determine the appropriate amounts for Tribal governments than it has for State or local governments. Kowalski Decl. ¶ 7. Mindful of the 30-day deadline, Defendant has also taken seriously its responsibility to arrive at an allocation methodology that meets the requirements of the statute and that takes into account the needs of Tribes as shared during the Tribal consultation process. *Id.* ¶ 7. Given the competing statutory directives, it would make little sense to treat the 30-day deadline as rigid or absolute, for mandamus purposes.

But even if 30 days were the "rule of reason" to be applied, Plaintiffs cite no case where an agency missed a deadline by five days and was then ordered by a court to comply within 24 hours—or anything close to that scenario. In *People's Mojehedin,* the only case cited by Plaintiffs on this score, the D.C. Circuit had found constitutional error in the agency's decision and remanded with instructions to correct that error. 680 F.3d 832, 835 (D.C. Cir. 2012). That remand was in July 2010. *Id.* The petition for a writ of mandamus was filed twenty months later. *Id.* at 836. The Court drew the "rule of reason," for *TRAC* purposes, from the 180-day deadline for the agency to review petitions under the relevant statute, and concluded that the rule-of-reason factor supported mandamus. *Id.* at 837. Thus, Plaintiffs' leading case on that factor is one in which the agency missed its deadline by more than a year. And yet, even when it issued its decision four months later, the D.C. Circuit still refused to grant the relief requested by the petitioner (a decision within 30 days). Instead, the court gave the agency *another* four months to comply with the remand order. *Id.* In sum, the agency was given 22 months past its six-month deadline to comply.[10]

People's Mojahedin is just one example where, despite significant transgression of

[10] The D.C. Circuit in *People's Mojahedin* was also clearly troubled by other factors, not present here. For example, the court called it "decisive" that the agency had not just failed to take administrative action, but had "failed to heed our remand." *Id.* at 837. The D.C. Circuit also noted that failure to make a final decision frustrated judicial review, insofar as it allowed the State Department to maintain a terrorism designation while precluding the designee from seeking judicial review. *Id.*

statutory deadlines, the court refused to compel immediate action. *See, e.g., In re United Mine Workers of Am.*, 190 F.3d 545 (D.C. Cir. 1999) (ordering, despite an 11-year delay past a 90-day deadline, the agency to file periodic status reports); *In re Barr Labs., Inc.*, 930 F.2d 72, 74-76 (D.C. Cir. 1991) (refusing, even though "by the FDA's own account, its expected future delay will range from more than *double* the allotted time to nearly *quadruple*" it, to order compliance by any particular date, or even to retain jurisdiction over the case) (emphasis in original); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (finding, given that the agency had "made some progress" toward the regulatory goal, despite an unreasonable delay, "reason for the court to stay its hand for the time being"). Plaintiffs' proposed relief—a 24-hour deadline because Defendant missed a 30-day deadline by nine days—is unreasonable under D.C. Circuit precedent.

Courts will refrain from granting relief even after finding an unreasonable delay, moreover, because mandamus is equitable in nature. *See Barr Labs.*, 930 F.2d at 74 ("The issue before us, then, is not whether the FDA's sluggishness has violated a statutory mandate—it has—but whether we should exercise our equitable powers to enforce the deadline."). Importantly, "[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a violation: respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *Id.* (citing *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988)). In *Barr Laboratories*, for example, the D.C. Circuit agreed that the FDA had violated a statutory mandate to act on the petitioner's applications but nonetheless refrained from compelling agency action.[11]

In this case, there is ample reason for the Court to refrain from ordering the relief sought

[11] Courts outside the D.C. Circuit have similarly refrained from compelling agency action, even where a statutory deadline was exceeded. *See Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 463 (8th Cir. 2018) (refraining from compelling agency action, despite the failure to meet a statutory deadline, where the agency "made extensive efforts to comply" and because Congress, which "demonstrated on-going interest in the issue, can determine that its directive ha[d] been unreasonably delayed, and take appropriate action"); *id.* ("We are wary of becoming the ultimate monitor of Congressionally set deadlines, as 'courts are not charged with general guardianship against all potential mischief in the complicated tasks of government.'") (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 146 (1940)).

by Plaintiffs. First and foremost, the predicate to their motion has changed fundamentally: 60% of the Coronavirus Relief Fund payments to Tribal governments are now in the process of being made. Kowalski Decl. ¶ 14. And indeed, Plaintiffs themselves have received payments. *Id.* That announcement was the culmination of constant, diligent work by Defendant to get the appropriate payments made. *Id.* ¶¶ 3-14. Consistent with its obligations under the CARES Act, Defendant undertook intensive consultations and data collection in order to determine the appropriate amounts to be paid. *Id.* ¶¶ 5-6. All told, Defendant anticipates that it has spent approximately 2,200 hours on efforts to determine appropriate payment amounts. *Id.* ¶ 10. That determination continues in earnest, as Defendant plans to solicit additional data to be sure that its payment amounts are ultimately faithful to the statute's payment provisions. *Id.* ¶ 15.

Defendant was met with significant challenges in fulfilling this task. Namely, while the CARES Act provides that the Tribal allocation is to be "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)," 42 U.S.C. § 801(c)(7), it is of course unknown at this time what a Tribal government's increased expenditures will be over the course of the period beginning March 1, 2020, and ending December 30, 2020, during which expenses to be covered using payments from the Coronavirus Relief Fund may be incurred. *See id.* § 801(d). Accordingly, Defendant had to devise a formula that would approximate increased expenditures while also ensuring that all appropriated amounts are distributed to Tribal governments. *Id.* ¶ 6. Defendant's considerations in this regard are discussed in the above-referenced *Coronavirus Relief Fund Tribal Allocation Methodology* posted on its website (the "*Methodology*").

In fulfilment of its discretion, Defendant has determined to make its first round of payments by reference to population. Kowalski Decl. ¶ 13. But unlike with respect to the population-based statutory formula applicable to States, Territories, and local governments, for which Congress required Defendant to use readily available Census Bureau data, Defendant had to make a determination as to what was the most reliable data available and whether adjustments would need

to be made to use that data in this context. For population, Defendant was able, after due consideration, to refer to a largely preexisting source of data from the Department of Housing and Urban Development and for that reason was able to begin making the first round of payments to Tribal governments on May 5, 2020. *Methodology* at 2-3. With respect to the further distributions that are to be based on employment and expenditure data, Defendant expects it will need to solicit additional information from the Tribes in the coming days, Kowalski Decl. ¶ 15, review that information, and develop an appropriate methodology for allocating the remaining payments using that information. *Id.* ¶ 16.

The complicated nature of this task is in stark contrast to the seemingly simple nature of Plaintiffs' proposed injunction: pay out $8 billion within 24 hours. *See* Proposed Order (ECF No. 12-1). That is, of course, only half the picture; Plaintiffs never say *how much* should be paid out, or *to whom*. Defendant would need additional details (the what and whom) in order to know *how* to comply with the injunction.

But it is axiomatic that, under the APA, a court cannot tell an agency how to accomplish the action compelled. *SUWA*, 542 U.S. at 64 ("[APA section] 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'") (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947) (emphasis added)) (citing also L. Jaffe, *Judicial Control of Administrative Action* 372 (1965); K. Davis, *Administrative Law* § 257, p. 925 (1951)); *id.* 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."). The prohibition on "programmatic challenges . . . is vital to the APA's conception of the separation of powers." *Id. Accord Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010) ("broad review of agency operations is just the sort of 'entanglement' in daily management of the agency's business that the Supreme Court has instructed is inappropriate.").

The unworkability of Plaintiffs' proposed relief, and the inability to cure that proposal

without trespassing the APA, is yet further reason to refrain from ordering the relief they seek.

2. *TRAC* factors 3-5: competing interests.

Under the third and fifth *TRAC* factors, the Court must consider prejudice caused by delay, especially when human health and welfare are at stake. Defendant does not dispute that payments made from the Coronavirus Relief Fund will allow Tribal governments to pay wages, provide health benefits, and offer essential government services. *Accord* Mot. at 11. Congress knew that when it passed the CARES Act. But Congress also directed Defendant to undertake a specific analysis, after specific consultations, to arrive at an allocation determination. And precisely *because* human welfare is at stake, it is all the more important that Treasury's determination not be cut short; *i.e.*, that every Tribal government get the amount that Treasury determines to be appropriate.

Under the fourth *TRAC* factor, moreover, the Court must consider competing agency priorities. In that respect, the D.C. Circuit's decisions in *Mashpee Wamponoag* and *Barr Laboratories* are instructive. In *Barr Laboratories*, the FDA officials were not "twiddling their thumbs"; rather, the agency was simply unable to meet the deadline with the resources available. 930 F.2d at 75 (alterations omitted). Similarly in *Mashpee*, the agency's delay was "attributable, at least for the most part, to a shortage of resources addressed to an extremely complex and labor-intensive task." 336 F.3d 1094, 1100 (D.C. Cir. 2003). To the extent that the resources were insufficient, the court held that that was "a problem for the political branches to work out." *Barr Labs.*, 930 F.2d at 75. But the D.C. Circuit stopped short, in both cases, or ordering expedited completion of tasks that would require reordering the agency's priorities—and rightly so.

Similarly here, Defendant's failure to meet the 30-day deadline cannot be attributed to idleness. If anything, Defendant was simply unable to complete its congressionally-assigned tasks—which were "complex and labor-intensive," *Mashpee*, 336 F.3d at 1100—within the timeframe allotted. Defendant's staff has been working diligently since the CARES Act passed to determine appropriate payment amounts to the Tribal governments. Kowalski Decl. ¶¶ 3-14.

Defendant conducted the required consultations, *id.* ¶ 5, requested and analyzed data, *id.* ¶ 6, and was faced with no shortage of obstacles in its way. *Id.* ¶¶ 8-9. At the same time, Defendant was able to disburse billions of dollars to State and local governments under Title V of the CARES Act before the 30-day deadline. *Id.* ¶¶ 7, 17. And although the task is not yet complete, and will require further data collection and analysis, Defendant started disbursing more than half of the money a mere nine days after the deadline. *Id.* ¶ 14. That is not cause for mandamus relief.

Plaintiffs' only argument with respect to the fourth *TRAC* factor is misleading. They suggest that, because State, local, and Tribal governments are all subject to the same 30-day deadline, it must be that Defendant has ignored Tribal governments "in favor of other priorities," namely the State and local governments. Mot. at 13. But as described above, the CARES Act prescribes different payment amounts to Tribal governments than it does for State and local governments. *Compare* 42 U.S.C. § 801(c)(7) *with id.* § 801(c)(1)-(5). That was Congress' choosing, not Defendant's. And the difference provides ample, reasonable explanation why payments to Tribal governments would lag slightly behind the State and local governments.

3. *TRAC* factor 6: agency intent.

Under the sixth *TRAC* factor, Plaintiffs disclaim any allegation that Defendant is "acting maliciously or with improper motive." Mot. at 13. But elsewhere, Plaintiffs refer to Defendant's "ongoing refusal to disburse Title V funds," *id.* At 3, elsewhere calling it "flouting," *id.* at 12, as if Defendant is able to disburse funds immediately but is simply choosing not to. That is not accurate. While Defendant takes the 30-day deadline seriously, Defendant must also take seriously the responsibility to determine an appropriate amount and manner of payment. Kowalski Decl. ¶ 7. It continues to do so. *Id.* ¶¶ 15-16.

C. Plaintiffs Have Not Demonstrated Imminent, Extreme Damage Absent the Relief they Seek.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp.*, 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974), internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury." *In re*

Navy Chaplaincy, 534 F.3d 756, 766 (D.C. Cir. 2008) (internal quotation marks and citation omitted). The party seeking injunctive relief must show that its injury is "both certain and great," and that it is "actual and not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). "The key word in this consideration is *irreparable*. . . . The possibility that adequate . . . corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* (quoting *Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925).

The legal question presented by this motion is not whether Plaintiffs face irreparable harm from COVID-19, or whether they would be marginally better off if they received funds today instead of tomorrow. The question is whether Plaintiffs will suffer "extreme or very serious damage will result from the denial of the injunction." *Singh*, 185 F. Supp. 3d at 17 (citing *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39 (collecting cases)), *i.e.*, if they do not receive funds in the next 24 hours. Plaintiffs have not carried that burden.

As an initial matter, all of the evidence and argument submitted by Plaintiffs in support of the Motion is obsolete. Plaintiffs are now receiving their shares of the 60% of the Coronavirus Relief Fund payments that are in the process of being paid based on population data. Kowalski Decl. ¶ 14. Plaintiffs must reconsider, in light of those developments, whether they still face extreme or very serious damage from any persistent delay. If they maintain those arguments, Plaintiffs must at least recalibrate the argument to be that any *further* delay of the *remaining* 40% of payments would cause them such harm, and offer evidence accordingly. Absent such supplemental evidence, the Motion can be denied for that reason alone. However, even considering the arguments and evidence submitted in support of the Motion, and assuming that the intervening events had not occurred, Plaintiffs' arguments and evidence would still fall short.

Many of the harms attested to by Plaintiffs cannot be attributed to any delay in payments. Plaintiffs argue, for example, that a "further delay in emergency relief funding from the CARES Act will cause irreparable harm by requiring Plaintiffs to further curtail essential government services and furlough or lay off employees." Mot. at 7. But Chief Batton declared, on behalf of the

Choctaw Nation, that "[i]n response to the COVID-19 crisis, the Tribe declared a state of emergency [and] placed all non-essential employees on administrative leave." Batton Decl. (ECF No. 13) at 1; *accord* Plata Decl. (ECF No. 15) ¶ 8; Miguel Decl. (ECF No. 16) ¶ 7; James Decl. (ECF No. 18) ¶ 7; de los Angeles Decl. (ECF No. 19) ¶ 8 ("In response to the COVID-19 crisis, the Tribe declared a State of Emergency *on March 11, 2020* [and] has placed many non-essential employees on leave or furlough.") (emphasis added); Ortiz Decl. (ECF No. 20) ¶ 10.[12] These declarations all state that employees were placed on administrative leave because of the pandemic, not Defendant's delay. Thus, they cannot serve as a basis for injunctive relief. *Cf. Dallas Safari Club v. Bernhardt*, No. 19-CV-03696 (APM), 2020 WL 1809181, at *5 (D.D.C. Apr. 9, 2020) (Mehta, J.) ("These 'injuries,' however, are costs that the individual Plaintiffs sustained *before* any delay in receiving an import permit. Thus, these costs cannot have been caused by any action or inaction on Defendant's part.").

To be sure, several declarants aver that they will have to lay off more employees absent additional funding. But none of the declarations distinguishes between the employees that have had to be furloughed because of the COVID-19 pandemic, before the CARES Act was even passed, and those that would have to be furloughed because the payments were made *nine days* after the statutory deadline.

Several of the declarations are, on their face, equivocal. *See* Batton Decl. at 2 ("It *may* also lead to furloughs or lay-offs that would otherwise have been avoided.") (emphasis added); Hoskin Decl. ¶ 7 ("It *may* also lead to furloughs or lay-offs that would otherwise have been avoided.") (emphasis added); Ortiz Decl. ¶ 11 (averring the threat of "*potential* shut down of departments and lay off of additional employees who *may* seek jobs elsewhere and not be available to return to the Tribe") (emphasis added). That is insufficient to carry Plaintiffs' extraordinary burden here. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting

[12] Mr. Greetham declares, on behalf of the Chicksaw Nation, that it is still able "to provide paychecks and benefits to employees who are unable to work." Greetham Decl. ¶ 7.

Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931)). Rather, the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* (quoting *Ashland Oil, Inc. v. FTC,* 409 F. Supp. 297, 307 (D.D.C.), *aff'd,* 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

D. The Balance of Interests Does Not Favor an Injunction.

The final two factors—the balance of equities and the public interest—merge when, as here, "the Government is the opposing party." *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 105 (D.D.C.) (quoting *Nken v. Holder,* 556 U.S. 418, 435 (2009)).

In this case, the statute itself displays the competing public interests. Against the need for speed, Congress pitted the need for mindful determination of payment amount. *Compare* 42 U.S.C. § 801(b)(1) *with id.* § 801(c)(7). It could have paid each tribal government an arbitrary amount, or even ordained that an arbitrary amount should be paid in the event that Defendant did not make payments within 30 days. It did neither. Instead, Defendant is required to pay amounts that it determines appropriate. *Id.* § 801(c)(7). After all, every dollar that goes to one Tribe is one that is taken from another, as this Court recently explained in its issuance of a preliminary injunction, *Chehalis* Op. at *7 ("Any dollars improperly paid to ANCs will reduce the funds to Plaintiffs."). Defendant takes seriously its obligation to make the full amount of payments as quickly as possible. But it also wants to make sure that it distributes those funds fairly. The balance of interests surely favors such an approach.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

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Respectfully submitted,

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