No. 16-2484

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACCORD, DEBORAH CANARY; VERONICA CASEY; PATRICIA COLBERT; VIVIAN COURCY; DONNA DEFARIA; KIM DORSEY; FRANCIS LAGACE; WILL COURCY; ANTONIO DEFARIA; KELLY DORSEY; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; ROBERT LINCOLN; CHRISTINA MCMAHON; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY; LOUISE SILVIA; FRANCIS CANARY, JR.; MICHELLE LEWRY; RICHARD LEWRY,

Plaintiffs-Appellees,

v.

MASHPEE WAMPANOAG INDIAN TRIBE,

Defendant-Appellant,

BUREAU OF INDIAN AFFAIRS, U.S. Department of Interior; RYAN ZINKE, in his official capacity as Secretary – U.S. Department of the Interior; LAWRENCE ROBERTS, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior; U.S. DEPT OF THE INTERIOR; UNITED STATES,

Defendants.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 1:16-cv-10184-WGY

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over the case below pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*., and 28 U.S.C. § 1331. The District Court entered a Rule 54(b) judgment in Appellees' favor on July 26, 2016. Appellant's ADD0162. The Government filed a Rule 59(e) motion on August 24, 2016, which the District Court resolved on October 12, 2016. Appellant's ADD0167.

For the reasons stated in Part VI of the Argument, this Court lacks jurisdiction to consider Appellant's appeal. A district court's order remanding a case back to an agency is generally an unreviewable non-final order; this Court has appellate jurisdiction for such an order only when the Government appeals. The Government abandoned its appeal, instead opting to pursue further agency proceedings on remand.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that the Indian Reorganization Act, 25 U.S.C. § 5129, makes unambiguously plain that the phrase "all persons who are descendants of such members" refers to "all persons of Indian descent who are members of any recognized Indian tribe now [in 1934] under Federal jurisdiction."

2. Whether this Court has jurisdiction to consider this appeal when the decision on review is an order remanding the case back to the agency, the agency abandons its appeal, and the agency has issued a new decision that is on review in another federal court.

INTRODUCTION

This appeal concerns what it means to be an "Indian" for purposes of the Indian Reorganization Act, 25 U.S.C. ch. 45 ("IRA"). The IRA defines "Indian" as:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.[1]

25 U.S.C. § 5129 (formerly § 479).

The question before the Secretary of Interior, and now this Court, is how the clause "members of any recognized tribe now under Federal jurisdiction" in the first definition informs the second definition's clause, "all persons who are descendants of *such* members." The Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the words "now under Federal jurisdiction" means under federal jurisdiction in 1934, when Congress enacted the IRA.

As the District Court correctly held, the natural reading of the phrase "such members," as used in the second definition, is to read it as a reference to the

[1] The bracketed numbers are inserted by convention to identify the three categories of "Indians" eligible for services under the IRA. The first definition is sometimes referred to as the "membership class" or Class 1. The second definition is sometimes referred to as the "descendant class" or Class 2. The Third category consists of Indians with the requisite blood quantum, irrespective of tribal status. That category is not at issue here.

entirety of the antecedent clause in the first definition: "all persons who are descendants of members of any recognized tribe under Federal jurisdiction in 1934." But the Secretary in the 2015 Record of Decision (ROD) did not read it that way. Instead, the Secretary determined that the phrase "such members" only referred to the first half of the antecedent phrase, specifically reading "such members" to "incorporate 'members of any recognized tribe,' but not the phrase 'now under Federal jurisdiction.'" Appellant's ADD97. There is no interpretive principle that would allow for such a contorted reading—one that lops off half of a cross-referenced statutory provision.

The Secretary's interpretation in 2015 (which the Secretary himself long ago abandoned in this Court) would let the second definition swallow the first one whole: if "such members" meant only *any* recognized Tribe now in existence, it would be far easier to qualify as "Indian" for purposes of the IRA under the second definition than the first, which the second definition purports to incorporate. The District Court correctly recognized that the Secretary's grammatical contortions cannot be right. As the principal drafter of the IRA explained, the second definition covers *unenrolled* children and *unenrolled* adult Indians living on reservations as of June 1, 1934, who are not covered by the first definition. *See infra* at 29-30. That reading of § 5129 is compelled by its plain text (and legislative history) and is how the Department previously read the IRA's eligibility requirements in a formal

solicitor's opinion and in an administrative adjudication. That same straightforward reading of the statute was adopted by the Secretary of the Department of Health and Human Services in an administrative proceeding applying the IRA's Indian preference in employment, and is supported by a commentator's detailed analysis of the IRA's eligibility requirements. *See infra* at 35-40.

As the lone Appellant left in this appeal, the Tribe seeks to defend the Secretary's misreading of the statute. At the outset, this Court lacks jurisdiction to hear the Tribe's arguments; under the remand rule, only the Secretary can appeal a non-final district-court order remanding agency action. Here, the Secretary has accepted the District Court's ruling and has issued a new decision on the same subject, which the Tribe is now challenging in another court. Although the Tribe complains that it is impractical for the remand rule to apply here because litigation concerning the post-remand agency action is before another court, that does not make the Tribe's challenge any more justiciable here, especially as the impracticality is of the Tribe's own making.

Even if this Court reaches the merits of the Tribe's argument, it will find no reason to reverse the District Court's decision. The thrust of the Tribe's argument is that the phrase "such members" is ambiguous, because, in other contexts, the word "such" has been deemed to introduce a statutory ambiguity. But there is no

such ambiguity here. And even if this Court were to entertain Appellant's statutory gymnastics and determine that the phrase is ambiguous, the Secretary's interpretation of it was not reasonable under *Chevron*'s second step.[2]

The Court should dismiss this appeal under the remand rule. But if this Court opts to exercise jurisdiction, the District Court's decision should be affirmed.

STATEMENT OF THE CASE

I. FACTUAL AND LEGAL BACKGROUND

A. The *Carcieri* decision

The Tribe acknowledges that the Department struggled for years to find a path to IRA eligibility following the Supreme Court's *Carcieri* decision. In that case, the Supreme Court voted 8-1 to reject the Secretary's broad reading of the IRA's definition of "Indian," specifically repudiating the Secretary's interpretation of the word "now" in § 5129 (formerly § 479) which defines who is an eligible "Indian" under the IRA:

> The term "Indian "as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [3] shall further include all other persons of one-half or more Indian blood.

[2] *Chevron, U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

555 U.S. at 388 (brackets added). The Secretary read "now" to mean "now *or hereafter*," *i.e., at the time the land was taken into trust*. 555 U.S. at 382, 386, 391. Only Justice Stevens accepted this reading, *id.* at 408-09 (Stevens, J., dissenting), which would have significantly expanded the Secretary's trust authority under the IRA. For the other eight members of the high court, "now" meant "1934," the date of the IRA's enactment. *Id.* at 381-83 (majority opinion); *id*. at 396-97 (Breyer, J., concurring); *id.* at 400 (Souter, J., concurring in part). The *Carcieri* majority said the definitions of "Indian" in § 5129 established "plain and unambiguous restrictions on the Secretary's trust authority," and specifically held that "'now under Federal jurisdiction' in § 5129 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id*. at 395 (majority opinion). Moreover, the Court observed that "[w]hen Congress has enacted a definition with 'detailed and unyielding provisions,' as it has in § [5129], this Court must give effect to that definition even when 'it could be argued that the line should have been drawn at a different point.'" *Id*. at 393 n.8 (citations omitted).

The *Carcieri* majority reasoned that the plain language of § 5129 compelled reading "now" as the date of the IRA's enactment, without any need to resort to the interpretative aid of legislative history, much less any need to consider the Department's reading of the statute. *Id.* at 389-91.

Justice Breyer (joined by Justices Ginsburg and Souter) was not convinced that "now" in § 5129 was free of ambiguity but agreed with the majority that § 5129 imposed clear limitations on IRA eligibility, with the legislative history, including the Secretary's contemporaneous statements, favoring the reading given by the majority. *Id*. at 396-97. The critical historical document cited and quoted by Justice Breyer, and referenced approvingly by Justice Thomas' majority opinion, is a contemporaneous Department circular written by Indian Commissioner John Collier in 1936. As Justice Breyer explained, the Collier Circular showed the Department understood the language of § 5129 to impose a temporal limitation to 1934. *Id*. at 397. Justice Breyer expressly rejected the Secretary's argument that the Court should defer to the Department's contrary reading of the statute, finding such deference was not warranted under either *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944) or *Chevron*. *Id.* at 396. Indeed, his concurrence concluded that the IRA's history showed that "Congress did not intend to delegate interpretative authority to the Department." 544 U.S. at 397. In other words, eight members of the Supreme Court held that Congress did not intend the Secretary to alter the "detailed and unyielding" definitions of eligibility contained in § 5129.[3]

[3] Justices Souter and Ginsburg joined in Justice Breyer's interpretation of § 5129, although ultimately, they put themselves in the dissenting category for reasons
(footnote continued)

B. Stymied by *Carcieri* on the first definition, the Secretary contorts—in the Tribe's favor—the second definition's cross-reference to the first definition

Under *Carcieri*, the Mashpees were not entitled to "Indian" status under the IRA's first definition.[4] Like the Narrangansett Tribe whose "Indian" status was before the Supreme Court in *Carcieri*, the Mashpees were subject to the jurisdiction of colonial and state governments—not the federal government—throughout their long history.[5] So the Secretary tried a different path, using the second definition to accomplish what he could not do through the first. This case represents the first time ever that the Secretary relied exclusively on the second definition of "Indian" and abandoned the first definition that the Department previously applied to every other tribal applicant seeking trust land under the IRA.

C. Interior issues the flawed Mashpee 2015 Record of Decision

The Secretary devoted 41 of 137 pages in the 2015 ROD to the *Carcieri* issue. None of the analysis addressed the numerous contrary readings by the

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unrelated to the statute's interpretation. They argued that the case should be remanded to the Department to determine whether the Narragansetts were "under federal jurisdiction" in 1934, despite the fact that there was no evidence in the record to support such a finding, and the Department had elected not to press such an argument in light of the Narragansetts' well documented history under colonial and state—and not federal—jurisdiction. *Carcieri*, 555 U.S. at 400-01.

[4] This conclusion was finally memorialized in the Secretary's September 7, 2018 Record of Decision (JA90).

Department and others that adopted the natural reading of the statute's plain text, including a formal opinion by the Department's solicitor and the Department's official stance in an adversarial administrative hearing. *See infra* at 28-29. The 2015 ROD did not identify anything in the text or structure of § 5129 that would call for deviating from the statute's plain meaning.

II. PROCEDURAL HISTORY

Plaintiffs-Appellees, a group of local residents concerned with the Tribe's attempt to take land into trust for the purpose of building a casino, filed a lawsuit under the Administrative Procedure Act to set aside the 2015 ROD. JA091-126. The District Court heard cross-motions for summary judgment limited to the issue of the Secretary's authority to take land into trust for the Mashpee Tribe. JA056-57. At the hearing, the Secretary conceded that the reading advanced by Plaintiffs would not produce an absurd result. JA165. In its post-hearing brief, the Secretary further acknowledged that the interpretation of the second definition offered by Plaintiffs would include persons who were not covered under the first definition and thus the second definition was not rendered surplusage by adopting the natural reading of the text. United States' Supplemental Memorandum of Law in Support of United States' Motion for Partial Summary Judgment, ECF No. 75-1, at 5 ("To

[5] *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 945-946 (D. Mass. 1978); Plaintiffs' Local Rule 56.1 Statement of Facts in Support of Motion for (footnote continued)

be sure, one could be a descendant of a 'recognized Indian tribe' who is not a member of that tribe, and thus need to resort to the reservation residence requirement, as Plaintiffs' argue.").

The District Court applied the plain meaning rule without resort to interpretative aids or giving deference to the Secretary's reading, just as the Supreme Court had done in construing § 5129 in *Carcieri*. The District Court concluded that "the second definition of 'Indian' in Section 479 of the IRA unambiguously incorporates the entire antecedent phrase—that is 'such members' refers to 'members of any recognized Indian tribe now under Federal jurisdiction.' Thus, no deference is due the Secretary's interpretation." JA051.

The Tribe elected to intervene as a defendant in the case after the District Court issued its ruling (ECF No. 113), and appealed from the judgment. JA0001. The federal government appealed from the judgment but then voluntarily withdrew its appeal.

SUMMARY OF THE ARGUMENT

1. There is nothing ambiguous about the IRA's use of the phrase "such members" in § 5129: "such" refers to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," not just "all persons of Indian descent who are members of any recognized Indian tribe."

Summary Judgment on First Cause of Action Fact No. 5 (JA179).

The statute's use of the word "such" does not automatically inject ambiguity such that *Chevron* deference is appropriate. Contrary to the "such" cases cited by the Tribe, this is not an instance where the word "such" can refer to multiple antecedent clauses in a statute, thus triggering ambiguity. "Such" here means one thing—the preceding antecedent phrase—and nothing in § 5129 telegraphs that Congress intended for "such" to mean only half of that phrase. The Supreme Court had no difficulty holding in *Carcieri* that the meaning of the cross-referenced part of the IRA—the word "now"—was plain; so, too, is the IRA's use of the word "such."

2. There is no need to resort to the interpretive canons given the plainness of the language here; the canons cannot be used to create an artificial ambiguity where there is otherwise none. And in any event, the canons support the plain-text reading. The Tribe says the District Court's plain reading will make parts of § 5129 surplusage, but it is the Tribe's interpretation that does just that—expand the second definition of "Indian" so broadly that the first definition becomes pointless, making it easier for descendants to qualify for federal benefits than the people they descended from. That cannot be right.

3. The District Court's interpretation of § 5129 finds support both in the legislative history of the IRA, as well as the Executive Branch's subsequent constructions of it. Indian Commissioner John Collier, the IRA's principal drafter,

provided a contemporaneous representation of Congress's intent: one in which the second definition, the "descendant class" definition of "Indian," was to be construed narrowly, as a safety net for unenrolled Indians descended from the "member class." By contrast, Commissioner Collier expected that most qualifying "Indians" would qualify under the first definition. Interior and the Department of Health and Human Services (which also applies certain Indian laws) carried that narrow construction of "Indian" forward in recent decades, suggesting that the 2015 ROD was a sharp break from Interior's longstanding treatment of the issue.

ARGUMENT

I. STANDARD OF REVIEW AND RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION

The District Court's construction of the IRA's eligibility requirements presents a question of law that is reviewed de novo. *G. v. Fay Sch.*, 931 F.3d 1, 3 (1st Cir. 2019) ("Our review of this question of statutory interpretation is de novo."); *Action for Boston Cmty. Dev., Inc. v. Shalala*, 136 F.3d 29, 32 (1st Cir. 1992).

The Tribe challenges the District Court's articulation of the legal standards involved in statutory construction, arguing that the District Court failed to apply "this Court's black-letter law that an agency's legal conclusion 'engender de novo review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within the sphere of its authority.'" AOB11

(quoting *Jianli Chen v. Holder*, 703 F.3d 17, 21 (1st Cir. 2012)). At issue then is whether, as the Tribe contends, the District Court was obligated to give "some deference" to the Secretary's reading of § 5129 (and perhaps invoke other interpretative aids) in determining in the first instance whether the text of § 5129 is ambiguous. The District Court concluded that under the plain meaning rule as applied by the Supreme Court in *Carcieri*—and *Chevron*'s well-established two-step framework—the task of determining ambiguity is exclusively for the court and rests on the statutory text (and structure) without employing interpretive aids such as legislative history and without deferring (either partially or fully) to the Secretary's interpretation. JA039-JA040.

The Supreme Court's statutory construction analysis in *Carcieri* confirms the correctness of the District Court's recitation of the law and its application of the plain meaning rule to the language of § 5129.

Statutory construction begins with the language of the IRA itself. *Carcieri,* 555 U.S. at 387; *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (citation and internal quotation marks omitted)). As this Court recently stated:

> We have generally recognized that the words of the statute are the first guide to any interpretation of the meaning of the statute . . . if the

> meaning is plain. First, we determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. If the statute's language is plain, the sole function of the courts is to enforce it according to its terms. However, if the language is not plain and unambiguous, we then turn to other tools of statutory construction, such as legislative history.

Stauffer v. IRS, 939 F.3d 1, 7 (1st Cir. 2019) (citations and internal quotation marks omitted). Courts are to "give effect to the statute's plain meaning 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.'" *Seahorse Marine Supplies, Inc. v. P.R. Sun Oil Co.,* 295 F.3d 68, 74 (1st Cir. 2002) (quoting *Parisi by Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995)); *In re Sunterra Corp*., 361 F.3d 257, 265 (4th Cir. 2004) (absurdity exists "when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense." (quoting *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000) (internal quotation marks omitted))).

As *Carcieri* and *Chevron* instruct, if a federal statute is unambiguous, no deference is owed to the federal agency that administers it. 555 U.S. at 387-391; *Barnhart,* 534 U.S. at 462 ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation"); *NLRB v. Beverly Enters.-Mass., Inc*., 174 F.3d 13, 22 (1st Cir. 1999) ("[I]f the legislative intent is clear, we

do not defer to the agency and we end the *Chevron* analysis at step one"); *Neang Chea Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (plain meaning of "immediate relative" is clear under 8 U.S.C. § 1151(b)(2)(A)(i), such that court did not need to defer to agency). *Chevron* deference to an agency's interpretation of a statute "is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004); *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009).[6]

Because the "detailed and unyielding" language of § 5129 was clear, the Supreme Court in *Carcieri* rejected applying *Chevron* and *Skidmore* deference to its interpretation. 555 U.S. at 395. Justice Breyer looked at that same clear expression of congressional intent and concluded that Congress did not intend to

[6] The Tribe incorrectly relies on two immigration decisions (AOB at 11-12) to suggest that the First Circuit does not follow *Chevron*'s two-step test approach to interpreting federal statutes, and instead calls for courts to consider an agency's interpretation of a statute at the outset of judicial review, effectively collapsing step two into step one. The two cited cases are part of a line of decisions in the First Circuit pertaining to immigration appeals. The language quoted by the Tribe is found only in these immigration decisions, and ties back to the Supreme Court's decision in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), which states the BIA should be given *Chevron* deference "as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" The language extracted from First Circuit immigration cases (however it might be characterized) does not signal a departure from *Chevron*'s two-step process, and has no application here.

delegate to the Secretary its interpretative authority regarding IRA eligibility criteria and thereby allow the Secretary to define the scope of his own authority. *Id* at 396 (Breyer J., concurring). In the view of the Supreme Court, the detailed and unyielding eligibility standards set out in § 5129 must be given their plain meaning as unambiguously expressed in the statute. 555 U.S. at 394-395.

II. THE DISTRICT COURT PROPERLY REJECTED THE SECRETARY'S MISREADING OF § 5129.

A. The plain meaning rule dictates reading "such members" to incorporate "now under Federal jurisdiction" into the second definition of "Indian" in § 5129.

The natural reading of "such members" leaves no room for any doubt as to what it references. It must refer to the antecedent phrase that contains the word "members"; that antecedent phrase is written as an undivided whole without any commas, semi-colons, or other punctuation that could potentially subdivide the phrase. Without any such punctuation or other indicia of divisibility, the plain reading calls for the incorporation of the entire undivided antecedent phrase as a matter of basic English grammar and usage. The entire antecedent phrase is italicized as a single unit in *Carcieri*, 555 U.S. at 388, where the Court quotes the definition of "Indian." Justice Stevens, in dissent, expressly connected the "now under federal jurisdiction" phrase to the second definition: "The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of blood quantum *or as descendants of members of 'any recognized tribe now under*

Federal jurisdiction.'" Id. at 401-02 (emphasis added). As the District Court correctly observed, "if ambiguity exists here it exists everywhere." JA043. No interpretative aid allows the Secretary (or the Tribe in his place) to argue that the cross-reference to "members" in the first definition, provided by "such members" in the second definition, lops off half of the antecedent phrase.

The straightforward grammatical reading of the text avoids altogether the Secretary's problem of interpreting what "portion" of the antecedent phrase, if any, to leave out. The incorporation of the whole antecedent comes naturally, subject only to the fail-safe measure that an absurd result will not be tolerated—with true absurdity required. *See In re Sunterra Corp.*, 361 F.3d at 265 (result may be characterized as absurd where it "is so gross as to shock the general moral or common sense"). Giving the second definition (descendant class) a narrow reading is hardly an absurd result, as the Secretary conceded. JA165. Indeed, it is fully supported by the IRA's legislative history. *See infra* at 27-30.

The District Court cited several cases to illustrate why "such members" was not ambiguous in the context of § 5129, and why incorporation of the entire antecedent was "compelled by the plain text of the statute." JA044 (citing *Takeda Pharm., U.S.A., Inc. v. Burwell*, 78 F. Supp. 3d 65, 99 (D.D.C. 2015) ("in accordance with its plain meaning, the term 'such drug' unambiguously refers back to the 'drug for which such investigations were conducted'") and *University*

Medical Center v. Thompson, 380 F.3d 1197, 1199-1201 (9th Cir. 2004) (noting that Medicare statute would be unambiguous and the "antecedent would be unmistakable" if "total" did not immediately precede the word "such"). Both *Takeda* and *Thompson* demonstrate that the natural reading of "such" may be free of ambiguity in any given statute. The court in *Takeda* summarized how to determine the meaning of the word "such" in a statute:

> The term "such," when used as an adjective, is an inclusive term, showing that the word it modifies is part of a larger group. *See, e.g.*, *Black's Law Dictionary* 1446 (7th ed. 1999) (defining "such" as "[o]f this or that kind," or "[t]hat or those; having just been mentioned"); *Am. Heritage Dictionary of the English Language* 1285 (New College ed. 1976) (defining "such" as "[b]eing the same as that which has been last mentioned or implied"). Relatedly, and even more important, "such" nearly always operates as a reference back to something previously discussed. *See United States v. Ashurov*, 726 F.3d 395, 398–99 (3d Cir. 2013) (citation, internal quotation marks, and alterations omitted) (noting that it is "a commonly recognized rule in American jurisprudence that the word 'such' naturally, by grammatical usage, refers to the last precedent"); *United States v. Chi Tong Kuok*, 671 F.3d 931, 945 n.8 (9th Cir. 2012) ("'Such' in this context means 'of the sort or degree previously indicated or implied.'") (quoting Webster's Third New Int'l Dictionary 2283 (2002); *Nieves v. United States*, 160 F.2d 11, 12 (D.C. Cir. 1947) ("The word 'such' is restrictive in its effect and obviously relates to an antecedent.").

Takeda Pharm., 78 F. Supp. 3d at 99.

The District Court's textual analysis of § 5129 finds further support in a D.C. Circuit decision, *Gates Fox Co. v. OSHRC*, 790 F.2d 154 (D.C. Cir. 1986) (Scalia, J.), which construed "such" in the context of an OSHA regulation. The

workplace safety regulation at issue required excavating companies to provide to their workers "self rescuers" which are "canister-like devices though which tunnel employees can breathe in the event of a loss of oxygen caused by a cave-in." *Id*. at 155. The statutory interpretation question focused on whether the employer needed to provide the self-rescuers throughout the tunnel operations or only at the advancing face where the forward tunneling actively occurs. OSHA cited the employer for not having self-rescuers at locations away from the advancing face. The employer argued that the OSHA regulation required self-rescuers to be available only in the vicinity of the advancing face. The D.C. Circuit agreed with the employer based on a straight-forward reading of the regulation's text. The OSHA regulation provided as follows:

> Bureau of Mines approved self-rescuers shall be available near the advancing face to equip each face employee. Such equipment shall be on the haulage equipment and in other areas where employees might be trapped by smoke or gas, and shall be maintained in good condition.

Id. The court observed that "[t]he first sentence of the regulation explicitly requires self-rescuers only 'near the advancing face'" and the court gave a natural reading to the word "such" (as in "such equipment") in the second sentence: "The second sentence begins '*[s]uch* equipment,' which is most naturally read to refer only to the equipment mentioned in the preceding sentence—viz., the self-rescuers that must be available 'near the advancing face to equip each face employee.'" *Id*.

at 156. In this way the D.C. Circuit identified the unmistakable antecedent and incorporated into "such equipment" that antecedent's qualifying language limiting its application to the advancing face. This is no different than what Judge Young did in naturally reading "such members" in the second definition of § 5129 to incorporate the antecedent's qualifying language "now under federal jurisdiction," which limited eligibility under the IRA.

These decisions demonstrate that proper reading of the adjective "such" is completely dependent on the text and structure of the statute, and in analogous circumstances, where the word "such" unambiguously refers to a single unified antecedent—and no other language in the statute points in a different direction—the natural, grammatical reading controls.

B. The Tribe relies on inapposite cases where the meaning of "such" was found to be ambiguous in the context of decidedly different statutes.

It is hardly surprising that the Tribe can find cases where the meaning of "such" was found to be unclear in a particular statute, especially when embedded in a confusingly written one. *E.g.*, *United States v. Krstic*, 558 F.3d 1010, 1013 (9th Cir. 2009), *vacated on other grounds by United States v. Colson*, 573 F.3d 915 (9th Cir. 2009). In *Krstic*, for example, The Ninth Circuit noted that "Congress has achieved in a single 124-word sentence a level of confusion it usually takes pages to create." 558 F.3d at 1013. To the same effect is *Hogar Agua y Vida en el*

Desierto v. Suarez-Medina, 36 F.3d 177 (1st Cir. 1994), in which this Court pointed out the "linguistic difficulties" created by the "most curious usage" of the "indeterminate modifier 'such'" in the Fair Housing Act. *Id.* at 181. But even when "such" is found to be ambiguous in situ, courts have recognized that it naturally refers to the immediately preceding antecedent and plausibly could be read to incorporate the complete antecedent. *Hogar,* 36 F.3d at 185-86; *see Krstic*, 558 F.3d at 1013. Both this Court in *Hogar* and the Ninth Circuit in *Kristic* ultimately concluded, based on the particular language and structure of the statute at issue in each case, that the natural reading could not have been what Congress intended. *Hogar*, 36 F.3d at 186; *Krstic*, 558 F.3d at 1016-1017.[7]

The decision in *Hogar* illustrates how the plain meaning rule founders in the case of a poorly drafted statute that contains ten uses of the word "such" spread over four "provisos," and where this Court rejected the natural reading of the antecedent phrase because to do so would bring two or more "provisos" into conflict. *Hogar*, 36 F.3d at 179-180, 184-86. Likewise, if the natural reading of

[7] The Tribe misstates the holdings of these cases by suggesting that they stand for the proposition that "such" is inherently ambiguous. In essence the Tribe is arguing that inclusion of the word "such" in **any** statute will defeat its construction under the plain meaning rule. The case law refutes that radical proposition. Instead, the cases cited by the District Court and cited here in support of the plain meaning rule, make clear that the adjective "such" may be given its natural meaning according to the plain text of a statute. In the final analysis, whether
(footnote continued)

the word "such" will defeat the purpose of the statute or otherwise achieve an absurd result, that, too, provides an articulable basis to read "such" differently from its natural reading. *See Krstic*, 558 F.3d at 1015-17 (literal reading of the word "such" in criminal statute prohibiting fraudulently obtained immigration documents (18 U.S.C. § 1546) would effectively decriminalize conduct that Congress clearly sought to prohibit). But in the absence of any basis identified in the language or structure of the statute to dispense with the natural reading of its plain text, the language chosen by Congress must be honored and enforced. And so it is the case here, where the Secretary below (and the Tribe on appeal) did not identify—and cannot identify—any basis in the language or structure of § 5129 to reject the plain meaning of "such members."

Because the second definition of "Indian" in § 5129 of the IRA "unambiguously incorporates the entire antecedent phrase—that is, 'such members' refers to 'members of any recognized Indian tribe now under Federal jurisdiction, . . . no deference is due the Secretary's interpretation," as that interpretation is unambiguously wrong. JA051.[8]

"such" is ambiguous in the context of a specific statute has to be determined by the text and structure of the specific statute at issue.

[8] The Tribe criticizes the District Court for looking to dictionary definitions of "such," in particular its reliance on the "the definition of 'such' from *Merriam Webster's Collegiate Dictionary* . . . which was not even the first definition." (AOB 24). The District Court properly consulted two dictionaries and cited
(footnote continued)

C. The IRA's legislative history confirms Congress intended the descendant class (second definition) to be derived from members of tribes under federal jurisdiction in 1934 (first definition).

1. Congress's decision to narrow the IRA's eligibility criteria to exclude state-recognized tribes

The pertinent Senate Committee hearing testimony demonstrates the senators' concerns about adding to the Government's fiscal woes during the Great Depression, and wanting the statute to clearly define which *limited* groups of Indians the Government would support. *See* Karl A. Funke, *Educational Assistance and Employment Preference: Who is An Indian?*, 4 Am. Indian L. Rev.

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definitions that were pertinent to the analysis of § 5129—i.e., where "such" necessarily makes reference to an antecedent. (Contrary to the Tribe's assertion, the fact that "such" can sometimes refer to something "*to be* indicated or suggested" (AOB 24) makes no sense in the context of § 5129.) And the Tribe's criticism that the District Court did not select "the first definition" rests on a proven fallacy, namely, the false belief that the order in which the different senses of a word are listed in a dictionary reflects relative frequency of usage, with the first definition representing the primary or ordinary meaning of the word. Not so. *See* Stephen Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. Rev. 1915, 1926-38 (2011) (identifying the widespread misunderstanding that the first definition is the primary or ordinary meaning while quoting dictionary prefaces that expressly disclaim any such ranking). Indeed, the *Merriam Webster's Collegiate Dictionary* relied on by the District Court (the 2003 eleventh edition) contains "explanatory notes" that dispel any such ranking. It states that the "order of senses within an entry is historical: the sense known to have been the first use in English is entered first." *Id*. at 20a. Accordingly, the Tribe's dictionary-based criticism is without merit.

1, 19-25 (1976).[9] Senator Wheeler, Chairman of the Senate Committee and lead sponsor of the IRA (widely known as the Wheeler-Howard bill), together with the IRA's principal drafter and proponent, Indian Commissioner John Collier, discussed the "under Federal jurisdiction" requirement in the context of limiting eligibility by excluding state recognized tribes among others:

> THE CHAIRMAN: You would have to have a limitation after the description of the tribe.
>
> COMMISSIONER COLLIER: Would this not meet your thought, Senator. After the words, "recognized Indian tribe" in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help."

Id. at 25 (quoting *Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs* 266, 73 Cong., 2d Sess. (1934)). This colloquy makes clear that Congress intended to exclude from the IRA the large number of Indians who were members of state recognized tribes and were being provided for by the states. *See id*. at 22-25 ("The Senate Committee thought that the unrestricted language, 'members of any recognized tribe,' would be interpreted to include members of nonfederally recognized tribes (i.e., state recognized tribes or Indians merely living in a tribal manner but without any political relationship with the federal government).").

[9] A copy of the Funke article was submitted in the District Court as Exhibit 8 to Plaintiffs' Request for Judicial Notice or, Alternatively, to Supplement the Administrative Record, ECF No. 61 (filed July 7, 2016).

Congress chose not to assume the burden of supporting state recognized tribes and other Indians who were not already under the care of the federal government, *id.* at 23, and crafted language to prevent that from happening, *id.* at 24-25. Commissioner Collier proposed to insert the language "under Federal jurisdiction," *id.* at 25, which Congress accepted. In this way, Commissioner Collier found a "way to modify the membership class and descendant class definitions with their unrestricted blood quantums so that those two classes are limited to only federally recognized tribes, thus limiting the nonfederally recognized tribal or unaffiliated Indians to be covered exclusively by the one-half blood definition." *Id.*[10]

2. Commissioner Collier's interpretation of the second definition.

Collier issued a Department circular, dated March 7, 1936, in which he explained various aspects of the IRA including its eligibility criteria ("Collier

[10] Justice Breyer's concurring opinion in *Carcieri* introduced the concept that a tribe could be "under Federal jurisdiction" in 1934 but separately and later "recognized" by the federal government. 555 U.S. at 397 (Breyer, J. concurring). Before *Carcieri*, the Department, its constituent tribes, litigants, and commentators like Karl Funke treated federal recognition and federal jurisdiction as occurring at the same time. The 1976 article by Funke is written from the pre-*Carcieri* perspective that if a tribe is federally recognized it is necessarily under federal jurisdiction and vice versa. The author ultimately believed federal recognition/jurisdiction should be "ambulatory" and measured at the time of applying for employment, based on the policy to give employment preference to Indians, but understood the legislative history could be read to make the
(footnote continued)

Circular"). JA170. That document convinced Justice Breyer that the Secretary's reading of "now" in § 5129 of the IRA was wrong and warranted no deference to the agency. *Carcieri*, 555 U.S. at 397. Strangely, the Department had not produced this critical document in *Carcieri* despite many years of litigation in the district court and this Court and lodged it for the first time in the Supreme Court. This document carries the same dispositive weight here as in *Carcieri* because it contains Commissioner Collier's contemporaneous interpretation of the second definition of "Indian." He explained the descendant class (or Class 2) would cover "unenrolled descendants of such members residing on a reservation on June 1, 1934." AR0000409-10 (referenced in JA170). Such unenrolled members would include minor children who are not carried on the tribal rolls until they reach majority age. Collier noted that not many persons would fall in the descendant class: "There will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of the tribe . . . and hence included under Class 1." JA170. Collier's observation of the substantial overlap between Class 1 (first definition) and Class 2 (second definition)—and his corresponding observation that few applicants would need to qualify under Class 2 because they would qualify under Class 1—proves the plain reading of the statute

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recognition/jurisdiction attach to the date of the IRA's enactment in 1934, Funke, *supra*, at 31, as *Carcieri* ultimately held.

is correct and likewise disproves the alternative reading advanced first by the Secretary and now only by the Tribe. The principal drafter of the IRA, and its implementer, understood that the "under federal jurisdiction" limitation contained in the first definition was incorporated into the second definition.

III. THE TRIBE'S ARGUMENTS FOR REJECTING THE PLAIN MEANING OF § 5129 ARE UNAVAILING.

A. The Tribe relies on inapposite interpretive canons.

Interpretive canons are properly used to discern congressional intent where the plain language of a statute does not make that intent clear. It is not appropriate to use these canons to try to create ambiguity where none exists. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.");[11] *see also Carcieri*, 555 U.S. at 394 n.8 (the Indian canon does not apply to the "detailed and unyielding" eligibility requirements stated in § 5129); *id*. at 414 (Stevens, J., dissenting) (criticizing majority for not applying Indian canon of construction). The majority and

[11] The Supreme Court's statutory analysis in *Catawba* confirms the correctness of the District Court's analysis here. In construing Section 5 of the Catawba Act, the Supreme Court concluded that "them" and "their" in the second sentence unmistakably referred to the antecedent-compound subject "tribe and its members" in the first clause of that sentence. *Id*. at 506-07. When statutory language is clear, the Indian canon does not apply.

concurring opinions in *Carcieri* likewise foreclose any consideration of the IRA's "remedial purpose" in interpreting § 5129. The Supreme Court made clear that § 5129 establishes "detailed and unyielding" standards for eligibility under the IRA that are set by Congress and not meant to be to be reinterpreted, relaxed and re-drawn by the Secretary to suit his current view of the IRA's broad remedial purpose. The *Carcieri* decision precludes the Secretary from doing so. 555 U.S. at 394 n.8 (majority); *id*. at 396-97 (Breyer, J., concurring).

B. The Tribe wrongly argues the District Court's reading renders language in § 5129 surplusage, as it is the Tribe's reading that does that.

The Secretary below (and Tribe on appeal) argue that the interpretation adopted by the District Court creates "surplusage" but never explain how "fully incorporating the 'under Federal jurisdiction' requirement" of the first definition into the second definition (through "such members") creates surplusage, much less renders meaningless the separate statutory eligibility requirements in the second definition. All the incorporation does is make clear that the descendant class—Indians who qualify as an "Indian" under the second definition—must be descended from members of a recognized tribe that was under Federal jurisdiction in 1934. In other words, the genealogical root stock for the descendant class is the universe of tribal members who belonged to a federally recognized tribe that was under federal jurisdiction in 1934. This is what Congress prescribed in 1934 to

limit the pool of eligible Indians. *See* Funke, *supra*, at 18. And this is precisely how the principal drafter (and the implementer) of the IRA interpreted the first and second definitions at the time.

The Tribe ignores the text and context of the second definition in arguing that the plain reading would render the second definition surplusage "because if a person could establish they were "Indian" under the first definition [i.e., "all persons of Indian descent who are members of any recognized Indian tribe now [in 1934] under Federal jurisdiction"], there would be no need whatsoever for that person to further demonstrate residence on a reservation on June 1, 1934, as required by the second definition." ECF No. 38, p. 12. This argument is nonsensical. Indeed, it is the Tribe's interpretation of the second definition that creates surplusage because it swallows the entire first definition. No one would need to qualify under the first definition if the second definition is interpreted the way the Tribe advocates.

As the Collier Circular makes clear, persons who qualify under the first definition are eligible for IRA benefits under that definition. They need not resort to the second definition to qualify. Congress created the descendant class as an alternative to the membership class, to enable *unenrolled* tribal members (minor children and others) to come under the IRA, provided those descendants were

living the tribal life on a reservation as of June 1, 1934, and those persons descended from a member of a tribe that was under federal jurisdiction in 1934.

Interior's re-writing of § 5129 to free the descendant class from the "under Federal jurisdiction" requirement comes down to a policy choice about the operative genealogical root stock for the descendant class—that is, who the universe of qualifying ancestors would be for Indians claiming descendant status under the second definition. By writing § 5129 as it did, Congress necessarily chose the narrower universe of ancestors who were members of a recognized tribe that was under federal jurisdiction in 1934, rather than the broader universe of descendants of members of any recognized tribe, including "state recognized" tribes and other groups of Indians who were under state jurisdiction. Funke, *supra*, at 22-25. The Secretary's ungrammatical reading—which de-linked the descendant class from the "now under Federal jurisdiction" requirement—erases the lines drawn by Congress and re-writes the statutory eligibility criteria the way the Secretary wanted them to be in 2015. In doing so, the Secretary unlawfully overstepped his authority just as he did in *Carcieri.* He apparently recognized as much by withdrawing his appeal here.[12]

[12] Of course, even if some language were rendered surplusage by the District Court's reading (it is not), the plain meaning of the statute controls. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (where the plain meaning of the statute (footnote continued)

As the Supreme Court stated in *Carcieri*, Congress established "detailed and unyielding" standards for eligibility, and the Secretary is not free to vary the plain meaning rule and straightforward incorporation of the temporal restriction of the first definition into the second definition because either the Secretary or the Tribe (or this Court) thinks Congress should have drawn the line elsewhere. *Carcieri*, 555 U.S. at 394 n.8.

IV. BOTH THE DEPARTMENT OF INTERIOR AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES HAVE INTERPRETED THE SECOND DEFINITION NARROWLY IN KEEPING WITH ITS PLAIN TEXT.

The Secretary's interpretation of the second definition of "Indian" in the 2015 ROD is unprecedented. The Department never before read § 5129 that way, and it appears no one else has either. This includes the drafters and implementers of the IRA (as noted above), counsel for the Department of the Interior, and the Secretary of the Department of Health and Human Services—who all read the second definition according to its plain unambiguous text, contrary to the Secretary's interpretation in the 2015 ROD.

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produces the surplusage, it is to be preferred over a construction which creates ambiguity, as the plain construction best "respects the words of Congress").

A. Interior's 1976 Solicitor Opinion

The Associate Solicitor for Indian Affairs was called upon to construe § 5129 in relation to the "descendant class" for purposes of the Indian preference in employment. The particular issue was whether the "members" or the "descendants" mentioned in the second definition had to be alive and residing on a reservation as of June 1, 1934. The Associate Solicitor's opinion did not address the "under federal jurisdiction" requirement. But the Associate Solicitor concluded that the IRA's legislative history supported giving a narrow construction to the descendant class and formally opined that that the descendants had to be alive and living on a reservation as of June 1, 1934. AR000443; 42 Fed. Reg. 27,609, 27,610 (May 31, 1977) (adopting clarification of who is an eligible Indian under the IRA). The solicitor's opinion rejected the open-ended universe of eligible Indians in the descendant class that arises from the Secretary's reading of § 5129 in the 2015 ROD.

B. Interior's litigation position in *Garvais v. Department of Interior* (July 8, 2004)

In an Indian preference administrative proceeding, the Department took a litigation position consistent with the plain reading of the second definition (opposite of its position in the 2015 ROD) and advocated in support of the Department's prior narrow reading of the descendant class. The plaintiff in *Gervais* challenged the Department's narrow construction of the descendant class

and specifically argued (as the Tribe does here and the Secretary did below) that the narrow interpretation "renders [the descendant class] redundant and mere surplusage." The administrative law judge accepted the Department's narrow interpretation of the descendant class and rejected the plaintiff's statutory construction arguments for reading it broadly (*Garvais v. Dep't of the Interior*, 2004 MSPB LEXIS 3395 (July 8, 2004))—the very same arguments advanced by the Secretary below and upon which the Tribe now relies on appeal to justify the Secretary's ungrammatical and unprecedented reading.

C. The 2015 Indian Health Service Guideline[13]

The Indian Health Service, an agency within the Department of Health and Human Services, provides services to eligible Indians and in that role has consistently read § 5129 in keeping with its plain meaning, both before and after *Carcieri*:

> Guidelines for Interpretation of Indian.
>
> (1) "Members of any recognized Indian Tribe now under Federal jurisdiction . . . "are those persons officially enrolled in accordance with such Tribes' constitutional membership criteria.
>
> (2) Applicants applying as "Descendants of such members who were, on June 1, 1934, residing within the present boundaries of

[13] A copy of the Indian Health Manual (excerpt) was submitted as Exhibit 10 to the Request for Judicial Notice (ECF No. 61). See Rule 56.1 Statement Fact 13 (ECF No. 60).

> any Indian reservation" shall meet all three of the following criteria:
>
> a. Be descended from a member of any recognized Tribe now under Federal jurisdiction; and,
>
> b. Have been born on or before June 1, 1934; and
>
> c. Have been residing within the present boundaries of any Indian reservation on June 1, 1934.

Indian Health Manual, pt. 7, ch. 3, § 7-3-1, *Indian Preference: Human Resources Administration and Management, Introduction*, *available at* https://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p7c3#7-3.1F.

The Secretary did not address in either the 2015 ROD or in his District Court briefs this body of contrary precedent, and neither does the Tribe on appeal.

V. THE SECRETARY'S READING OF § 5129 IS UNREASONABLE AND PRODUCES ABSURD RESULTS.

Setting aside the Secretary's ignorance of the rules of English grammar and usage, and the demonstrably false claims that incorporating the complete antecedent phrase would render language surplusage (2015 ROD at 91), the Secretary's reading of § 5129 is unreasonable, as reflected by his decision to abandon his appeal. The surgical removal of the 1934 "under federal jurisdiction" requirement for the descendant class, when combined with the Secretary's suddenly loose understanding of what constitutes an "Indian reservation" under the IRA (2015 ROD at 95-102), would open wide a major back-door to IRA eligibility

through which thousands of Indians living under state jurisdiction could qualify for IRA benefits. That reading of the second definition erases that congressional line-drawing with respect to the descendant class. It requires no federal tribal affiliation in 1934 and makes current members of state-recognized tribes eligible to receive IRA benefits if they otherwise can demonstrate residency on a "reservation" (which the Secretary apparently believes can be just about any parcel of land) in 1934. While this result-oriented interpretation of the second definition was acceptable to the Secretary in 2015, it reduces to shambles the "detailed and unyielding" eligibility criteria established by Congress in 1934, as recognized and respected by the Supreme Court in *Carcieri*.

It also produces absurd results. By de-linking the descendant class from the "now under Federal jurisdiction" requirement that applies to the "member class" in the first definition, the Secretary makes second definition descendants eligible for IRA benefits when first definition "members" would not be. Enrolled members are covered only if they are members of a recognized tribe that was under federal jurisdiction in 1934, while persons in the descendant class are eligible whether or not they are descended from a member of such a tribe. For example, a child born to an enrolled member of a state-recognized tribe would be eligible under the IRA, whereas the child's parents (the enrolled adult members of the state recognized tribe) would not be. This result makes no sense and reveals the Secretary's

transparently result-oriented reading of § 5129 in deciding to take land into trust for the Mashpees so that they can open a casino.[14]

The Supreme Court's decision in *Carcieri* precludes the 2015 ROD's forced, unnatural, and result-oriented reading of the definition of "Indian." There is no principled reading of the IRA that can provide a different outcome for the Mashpees compared to the Narragansetts.

VI. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL.

As Appellees explained in their response to this Court's October 4, 2019 Order to Show Cause, this Court lacks jurisdiction over this appeal because the District Court's Rule 54(b) judgment remanding the case back to the agency became an unreviewable non-final order when the federal government bowed out of its appeal, and subsequent events at Interior mooted the case.

A. This appeal has been mooted by Interior's 2018 determination.

"The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (quoting *Steffel v. Thompson*, 412 U.S. 452, 460 n.10 (1974)). "[A] case is moot when the court

[14] Indeed, drawing such distinctions would create a perverse incentive for enrolled adult members of state recognized tribes to remove their names from the official tribal rolls and apply for land into trust as a "descendant" under the second definition. The Secretary's 2015 ROD ignores the absurdity of its interpretation which favors the interests of the "descendant class" over the "membership class."

cannot give any 'effectual relief' to the potentially prevailing party.'" *Horizon Bank & Tr. Co. v. Massachusetts*, 391 F.3d 48, 53 (1st Cir. 2004). "[I]f events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case." *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) (citation and internal quotation marks omitted).

This case was a live controversy three years ago when the District Court's decision was first appealed to this Court. But the passage of time and the failure by the Tribe to prosecute its appeal, have rendered the case moot. During the pendency of this matter, Interior's 2015 ROD, which had been at issue before the District Court, has been superseded by a new 2018 decision by Interior (the "2018 Determination"). Interior's abandonment of its earlier decision, which had been rejected by the District Court, in favor of the 2018 Determination, which is in sync with the District Court's 2015 decision, has mooted this appeal. *See, e.g., Akiachak Native Cmty v. U.S. Dep't of Interior,* 827 F.3d 100, 113 (D.C. Cir. 2016) ("when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot"); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (appeal is moot where challenged agency opinion is superseded by a new agency opinion); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (appeal of

orders "superseded by a subsequent FERC order" is "plainly moot"); *Ctr. for Science in the Pub. Interest v. Regan*, 727 F.2d 1161, 1165 (D.C. Cir. 1984) (noting that, where agency "did not appeal" from the district court's decision, and instead "superseded" a rule "by subsequent agency action," the appeal is moot, but "the district court should not be ordered to vacate its decision"). Any remedy lies in challenging the new agency decision—the 2018 Determination—which the Tribe has already done by appealing that determination to the District Court in the District of Columbia. *Akiachak*, 827 F.3d at 113 ("[I]f the agency promulgates a new regulation contrary to one party's legal position, that party may 'cure[] its mootness problem by simply starting over again.'" (citation omitted)). The operative decision that was before this Court has been superseded. Accordingly, this appeal is moot and must be dismissed.

B. The Tribe cannot seek appellate review of the District Court's remand order as a private-party intervenor standing alone.

Even if mootness does not squarely resolve the question of this Court's jurisdiction, a development in the appeal itself—specifically, Interior's decision to abandon the appeal—has stripped the Tribe of its ability to seek appellate review, and deprives this Court of jurisdiction. While the District Court properly issued a Rule 54(b) judgment enabling Interior and the Tribe to take an appeal, that judgment was only reviewable so long as Interior maintained its appeal. But when

the federal government bowed out of this appeal, appellate jurisdiction went with it.

"[D]ecisions to grant or deny 54(b) certifications" are reviewed "under an abuse of discretion standard." *ITV Direct, Inc. v. Healthy Solutions, L.L.C.*, 445 F.3d 66, 72 (1st Cir. 2006). A district court's decision to issue a Rule 54(b) judgment is within its sound discretion so long as the judgment is reviewable on appeal, either as a final order under 28 U.S.C. § 1291, or under some recognized exception to the final-judgment rule, such as the collateral-order doctrine. *See Lee-Barnes v. Puerto Ven Quarry Corp.*, 513 F.3d 20, 24-27 (1st Cir. 2008). "This court and others have said that generally orders remanding to an administrative agency are not final, immediately appealable orders." *Mall Properties, Inc. v. Marsh*, 841 F.2d 440, 441 (1st Cir. 1988). "There is a limited exception permitting a government agency to appeal immediately from a remand order under § 1291, but that path is not normally available to a private party." *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656-57 (D.C. Cir. 2013); *Mall Props.*, 841 F.2d at 442-43 (private party may not appeal an order remanding case to agency where the Government has not appealed). Even where a private party has intervened to appeal together with an agency, jurisdiction depends on the agency's continued participation; if the agency does not maintain its appeal, jurisdiction lapses. *See, e.g., Sierra Club*, 716 F.3d at 656-57 (no jurisdiction where Government

"abandon[s] its appeal"); *Mall Props.*, 841 F.2d at 442-43 (City of New Haven may not appeal as an intervenor if "the government is not challenging the district court's ruling*"); see also Global Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 43 (1st Cir. 2005) (holding that, because this Court had jurisdiction over the state agency's appeal, it also had jurisdiction over the private party's appeal on the same side). This rule functionally makes the government party a necessary and indispensable party for any appeal of an agency remand order.

The District Court did not abuse its discretion in carving out a Rule 54(b) judgment for Appellees to expedite appellate review: at the time it did so, there was every indication that Interior would appeal the District Court's adverse ruling. And Interior did just that, prosecuting its appeal for over four months after it filed its notice of appeal. But Interior then decided to drop its appeal and acquiesced to the District Court's decision, thereby depriving this Court of jurisdiction. The collateral-order doctrine functionally requires Interior to participate in this appeal as a necessary and indispensable party. *See, e.g., Mall Props.*, 841 F.2d at 442-43. Because Interior is now absent, the Tribe cannot press its own appeal. *Sierra Club*, 716 F.3d at 656-57; *Mall Props.*, 841 F.2d at 442-43. That the Tribe disagrees with the District Court's decision to "impose[] a new or unsettled legal standard on the agency" does not make its appeal jurisdictionally sound. *Mall Props.*, 841 F.2d

at 443. The Tribe's recourse is not this appeal. It is to challenge the agency's post-remand determination, which it has already done in the District of Columbia. *See Sierra Club*, 716 F.3d at 657 ("[A] private party dissatisfied with the action on remand may still challenge the remanded proceedings—as well as the remand order requiring them—after the proceedings are complete.").

The Tribe complains that forcing it to litigate the pre-remand determination as part of the post-remand proceedings is inefficient, and it claims that this Court has jurisdiction under the doctrine of "practical finality." But "practical finality" applies only when "treating the district court's remand order as unappealable would 'effectively preclude[]' plaintiffs from ever challenging the district court's decisions," *In re Long-Distance Tel. Serv. Federal Excise Tax Refund Litig.*, 751 F.3d 629, 633 (D.C. Cir. 2014), not when the other venue is merely inconvenient for the appealing party. *See also Stubblefield v. Windsor Capital Grp.*, 74 F.3d 990, 996 (10th Cir. 1996) ("We have repeatedly stressed a narrow reading of the practical finality rule and have applied it only in 'unique' or 'exceptional' circumstances." (citation and internal quotation marks omitted)). That is particularly true where, as here, the inconvenience is of the Appellant's own making. It is the Tribe that chose to bring its subsequent litigation in the District of Columbia, adding the complication of having another district court (and,

potentially, another court of appeals) review Interior's decisions to date and the soundness of the District Court's determination.

If anything, it would be more inconvenient to find the District Court's ruling reviewable here, given the federal government's acquiescence to that ruling and the subsequent agency proceedings carried out by Interior. The Executive Branch has a right to determine its own course in litigation. The federal government (through the Department of Justice's representation of client agencies) determines when, how, and where to protect its interests through litigation, including whether to appeal an adverse district court decision and risk elevating a "bad" decision to circuit level precedent. *See generally* Paul S. Weiland, *Standing in the Government's Shoes—When Can an Intervenor Appeal a District Court Decision Invalidating a Federal Agency Action?*, 35 Envt'l. L. Rptr. 10373, 10379-80 (Environmental Law Institute 2005) (noting that under the "doctrine of government control of litigation," as asserted by the federal government as amicus curiae in Tenth Circuit and D.C. Circuit cases, the government's decision to terminate the litigation at the district court level bars an intervenor from appealing). When the government abandons an appeal, it does so with an eye on the development of the law and what an adverse appellate ruling would mean to pending and future cases. The federal government's decision to voluntarily withdraw its appeal in this case

reflects a considered judgment balancing numerous factors. No intervenor should be allowed to wrest control of that decision from the government.

Accordingly, this appeal should be dismissed because the District Court's remand order became unreviewable with the Government's departure from this appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court affirm the District Court's decision and order that overturned the Secretary's 2015 Record of Decision.

Respectfully submitted,

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Dated: December 11, 2019

No. 16-2484

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACCORD, DEBORAH CANARY; VERONICA CASEY; PATRICIA COLBERT; VIVIAN COURCY; DONNA DEFARIA; KIM DORSEY; FRANCIS LAGACE; WILL COURCY; ANTONIO DEFARIA; KELLY DORSEY; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; ROBERT LINCOLN; CHRISTINA MCMAHON; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY; LOUISE SILVIA; FRANCIS CANARY, JR.; MICHELLE LEWRY; RICHARD LEWRY,

Plaintiffs-Appellees,

v.

MASHPEE WAMPANOAG INDIAN TRIBE,

Defendant-Appellant,

BUREAU OF INDIAN AFFAIRS, U.S. Department of Interior; RYAN ZINKE, in his official capacity as Secretary – U.S. Department of the Interior; LAWRENCE ROBERTS, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior; U.S. DEPT OF THE INTERIOR; UNITED STATES,

Defendants.

CERTIFICATE OF COMPLIANCE

The undersigned, David H. Tennant, counsel for Plaintiffs-Appellees, hereby certifies pursuant to Fed. R. App. P. 32(g) that the foregoing Answering Brief for Plaintiffs-Appellees complies with the type-volume limitations of Fed. R. App. P.

32(a)(7)(B). This brief was prepared using 14 point, Times New Roman font, and according to the word count of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 10,513 words.

/s/ David H. Tennant
David H. Tennant

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Defendants.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(b)-(c), I hereby certify that on December 11, 2019, a true and correct copy of the foregoing was served on the following counsel of record in this appeal via CM/ECF:

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