No. 16-2484

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; 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 the 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; US DEPT OF THE INTERIOR; UNITED STATES,

Defendants.

On Appeal from a Judgment of the United States District Court for the District of Massachusetts, No. 1:16-cv-10184-WGY, Before the Honorable William G. Young

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REPLY BRIEF OF DEFENDANT-APPELLANT MASHPEE WAMPANOAG INDIAN TRIBE

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January 9, 2020

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INTRODUCTION

Appellees' *ipse dixit*, uncited proclamation that their interpretation of the second definition is the only "natural reading" (a claim they recite five times in their brief) does not trump federal case law, the animating intent of the IRA to remediate the massive land theft perpetrated upon Indians, and the applicable canons of construction. Rather, their naked insistence that "such members" refers to the entirety of the first definition only highlights that their categorical declaration lacks any support. Answering Brief of Appellees ("ABOP"), at 15. An invented, self-serving rule is no justification for denying some measure of justice to Appellant, an Indian tribe that has suffered centuries of persecution and land theft.

Appellees are wrong not only with regard to the law concerning the meaning of "such members," but also as to the real-world impact of their brittle rule. The IRA[1] is an ambitious statute, aimed at "***strik[ing] a body blow at the twin evils of economic and social disintegration of the Indians***," including through the "***sinister liquidation of Indian property***." 78 Cong. Rec. 11727 (1934) (emphasis supplied). A cornerstone purpose of the IRA is "***to provide for the acquisition, through purchase, of land for Indians now landless who are anxious and fitted***

[1] All capitalized terms have the same meaning as in Appellant's opening brief.

to make a living on such land." 78 Cong. Rec. 11122, 11123 (1934) (emphasis supplied).

There can be no doubt that Appellant is exactly the sort of Indian tribe on the behalf of which Congress sought to strike a "body blow" against centuries of oppression. Appellant is part of the Indian tribe that met with the Pilgrims at the first Thanksgiving and thereafter suffered hundreds of years of persecution and land theft.[2] It has maintained its tribal identity, community, and culture.[3]

A conclusion that Appellant is not "Indian" is too absurd and darkly ironic even for Franz Kafka and antithetical to the IRA's ambitious mission. Such a ruling would place yet another black mark in the long ledger of the United States' history of failing to treat this Indian Tribe fairly and honorably.

Appellees nevertheless go to great lengths to assemble every justification for doing just that, including by contradicting the relevant body of law and the intent of the IRA.[4] They even make the bizarre suggestion that the Department's

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[2] ADD0104 (explaining that Appellant is part of "the broader Wampanoag Indians"); David J. Silverman, This Land is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving, 167–73 (Bloomsbury Publishing 2019) (describing the first Thanksgiving between the Wampanoag and Pilgrims).

[3] Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 80007-80009 (Feb. 22, 2007).

[4] All capitalized terms have the same meaning as in Appellant's opening brief.

dismissal of its appeal about four months after President Donald Trump assumed office reflects anything about the merits of Appellant's appeal.[5] Document 00117147552. Worse, to facilitate a disingenuous claim that interpreting "such members" not to refer to "under federal jurisdiction" would cause the second definition to "swallow" the first Appellees ignore the requirement of residing on an Indian reservation in the second definition, which is an additional requirement beyond anything the first definition demands. ABOP, at 28.

Happily, Appellees cannot render the phrase "such members" unambiguous through discussions of cases that have nothing to do with the issues here, out-of-context snippets of legislative history, and misleadingly incomplete quotations. Of course, as described in Appellant's opening brief, once "such members" is found ambiguous principles of statutory construction demand that the ambiguity be construed to exclude "under federal jurisdiction."

[5] The day after the Department dismissed its appeal, the President referred to Senator Warren, one of the Senators from Massachusetts, as "Pocahontas" in the context of her potential bid for the Presidency. Catherine Trautwein, *President Trump Called Elizabeth Warren 'Pocahontas' Again*, Time (Apr. 28, 2017). Additionally, when the U.S. House of Representatives was poised to consider federal legislation that would have assisted the Tribe, President Trump tweeted in opposition to the legislation. Danny McDonald, *Democrats pull Mashpee Wampanoag bill after Trump tweets opposition*, Boston Globe, May 8, 2019, available at https://www.bostonglobe.com/news/politics/2019/05/08/dems-pull-mashpee-wampanoag-bill-after-trump-tweets-opposition/ocrvCCQh2NzMYY71lYeTOO/story.html.

I. Appellees Cannot Change the Law that "Such" is Ambiguous as to Whether it Refers to the Entirety of a Prefatory Clause.

Though Appellees spend much of their brief arguing that their interpretation is "correct" and the Department's was "wrong," "[a] statute is ambiguous if it reasonably can be read in more than one way." United States v. Gibbens, 25 F.3d 28, 34 (1st Cir. 1994). Indeed, as this Court put it in Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina, ambiguity exists if a contrary interpretation of statutory language is "***is at least plausible***." 36 F.3d 177, 185–86 (1st Cir. 1994) ("Hogar Agua") (emphasis supplied). Where a provision can "support two plausible interpretations," even if one is the "more natural reading, such language is ambiguous." Am. Fed'n of Labor and Cong. Of Indus.Orgs. v. FEC, 333 F.3d 168, 174 (D.C. Cir. 2003).

Appellees cannot elide the reality that Appellant's interpretation is far more than "at least plausible." Hogar Agua, 36 F.3d at 185-86. On its face, Section 5129 describes three common sense categories for defining Indian—based on federal jurisdiction, residence on a reservation, or blood—that effectuate the IRA's purpose of providing for Indians while excluding people who are effectively "white." See, *infra*, Part IV. It is thus reasonable that the second definition regarding reservations does not include a federal jurisdiction requirement. In the absence of any actual rule that "such" must refer to the entirety of an antecedent

clause, that alone is a sufficient basis to conclude that Appellant's interpretation is plausible, such that "such members" is ambiguous.

The sole grammatical rationale upon which Appellees rest their claim that it is "natural" for "such members" to refer to the entirety of the prefatory clause is that the first definition is an "antecedent phrase [] written as an undivided whole without any commas, semi-colons, or other punctuation." ABOP at 15. But Hogar Agua demonstrates that Appellees' categorical rule is wrong: this Court held that "such" contained "latent ambiguity" where it referred to exactly such an "antecedent phrase [] written as an undivided whole without any commas, semi-colons, or other punctuation," ABOP, at 5, there "single-family house sold or rented by an owner." 36 F.3d at 185–86. Indeed, in order to advance the remedial nature of the at-issue statute, this Court held that the statute should be interpreted to refer to only a portion of the unbroken antecedent clause. Id.

Appellants' attempt to avoid the holding in Hogar Agua gets them nowhere. Their protest that the text of the FHA at issue in Hogar Agua was "poorly drafted," APOB, at 15, proves only that they are unable to meaningfully distinguish this Court's ruling that "such" was ambiguous with regard to whether it referred to the entirety of an undivided prefatory clause. 36 F.3d at 185–86. In fact, the language of the private owner exemption at-issue in Hogar Agua tracks the grammatical construction here. Id. The anti-discrimination provisions of the FHA do not apply

to "any single family house *sold or rented by an owner*," so long as certain provisos are satisfied, including that the private owner "does not own more than three such single-family houses at any one time." Id. at 179 (emphasis is original). Thus, the question for this Court was whether "such single-family house[]" referred to the entirety of an undivided prefatory clause, just as it is with regard to "such members" here. Id. at 185–86.

The Ninth Circuit has been even more clear that there is no rule that "such" must refer to the entirety of an antecedent clause: "[n]o bright-line rule governs this area of the English language." United States v. Kristic, 558 F.3d 1010, 1013 (9th Cir. 2009) (described at length in Appellant's opening brief). See U.S. v. Ashurov, 726 F.3d 395, 396 (3d Cir. 2013) ("such" was "grievously ambiguous" regarding language to which it referred). The D.C. Circuit Court of Appeals has followed this Court in recognizing that "such" is ambiguous with regard to whether it incorporates the entirety of an antecedent clause: "While it often serves the particularizing role [referring to the entirety of an antecedent clause], the word 'such' can also be used simply to refer back to something previously mentioned but not 'particularized.'" N. Broward Hosp. Dist. v. Shalala, 172 F.3d 90, 95–96 (D.C. Cir. 1999) (citing to Hogar Agua, 36 F.3d at 185–86)); see also Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 (1985) (interpreting the phrase "such lands" liberally in favor of Indians).

Appellees, confusingly, highlight cases that say nothing about whether "such" is ambiguous with regard to whether it refers to the entirety of the prefatory language.[6,7] Though Appellees lead their argument that "such" is unambiguous with Takeda Pharm., U.S.A., Inc. v. Burwell, the sole conclusion about the meaning of the word "such" in that case is not in dispute here: "'such' nearly always operates as a reference back to *something* previously discussed." 78 F.Supp. 3d 65, 99 (D.D.C. 2015) (emphasis supplied). Appellant agrees that "such members" refers to "something" in the first definition, just not the "something" that Appellees prefer.

In the same way, Appellees devote about two pages to a decision in which there was no question about the word to which "such" referred, Gates & Fox Co, Inc. v. Occupational Safety and Health Review Commission, 790 F.2d 154 (D.C.

[6] Appellees are wrong that Appellant contends that "such" is always ambiguous. Appellant agrees that in many, if not most, circumstances the term "such" is unambiguous, including where the antecedent clause includes just one phrase.

[7] Appellees, in a parenthetical, cite to just one case that reflects in any respect upon the question at-issue here of the ambiguity of "such," the Ninth Circuit's decision in Univ. Med. Ctr. of S. Nevada v. Thompson. ABOP, at 16–17 (citing Univ. Med. Ctr. of S. Nevada v. Thompson, 380 F.3d 1197, 1200–01 (9th Cir. 2004)). There is a good reason they mention Thompson only in passing, however. While the Ninth Circuit there stated in *dicta*—but did not hold—that in the particular context of the Medicare statute the word "such" absent a modifier like "total" would have referred to the entire antecedent clause at issue, Thompson preceded the Ninth Circuit's decision in Kristic explaining the absence of any rule at all regarding whether "such" refers to the entirety of a prefatory clause. Kristic, 558 F.3d at 1013.

Cir. 1986) ("Gates"); ABOP, at 17–19. The issue in Gates was not the meaning of the word "such," but whether an OSHA mining regulation "require[d] self-rescuers [safety equipment] in the absence of an advancing face." Id. at 155–56. The parties did not dispute the meaning of the word "such," as it related to equipment and there was only *one* type of equipment (self-rescuers) identified in the prefatory clause Id. Thus, the D.C. Circuit remarked in passing that "[s]uch equipment" referred to "self-rescuers." Id. at 156. Here, if there were just one phrase at-issue in the first definition it would similarly be clear to which phrase "such" referred.

No circuit court has held that "such" is unambiguous with regard to whether it refers to the entirety of an antecedent clause containing multiple phrases. Appellant submits that this Court should not be the first, particularly given its ruling to the contrary in Hogar Agua.

II. Appellees' Interpretation is Impermissible Where it is at Odds with the IRA's Purpose.

The plain meaning of a statute is not given effect where it is "manifestly at odds with the statute's intended effect." Parisi by Cooney v. Chater, 69 F.3d 614, 617 (1st Cir.1995) (reading of statute regarding SSA benefits at odds with intent and therefore rejected where it would deprive a dependent child of SSA benefits). Courts interpret a statute's words "'in light of the purposes Congress sought to serve.'" Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)). Even

Appellees concede that that "such members" would ambiguous if reading it to refer to the entirety of the prefatory clause would "defeat the purpose of the statute or otherwise achieve an absurd result." ABOP, at 21.

As discussed in Part IV *infra,* one of the most fundamental purposes of the IRA was to "stop the sinister liquidation of Indian property," 78 Cong. Rec. 11727 (1934), and to acquire into trust "land for Indians now landless," 78 Cong. Rec. 11122, 11123 (1934). It is challenging to conceive of a more "absurd result" that is "at odds with the [IRA]'s intended effect" then placing Appellant—part of the Indian tribe that met with the Pilgrims at the first Thanksgiving and thereafter suffered hundreds of years of persecution and land theft—outside the definition of "Indian."[8] ADD0104 (explaining that the Mashpee is part of "the broader Wampanoag Indians"); David J. Silverman, This Land is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving, 167–73 (Bloomsbury Publishing 2019) (describing the first Thanksgiving between the Wampanoag and Pilgrims). Appellant has maintained its culture, its traditions, and its geographical identity. ADD110–20. The acquisition of the at-issue parcels into trust "will enable the Tribe to meet the needs

[8] Appellees are wrong that the Department conceded that Appellees' reading of the statute would not produce an absurd result. ABOP, at 8. In response to the Court's question of whether the Department was arguing that Appellees' interpretation led to an absurd result, the Department said only that that was not their lead argument but that "we could probably make an argument based from there" on the absurdity of the result of Appellees' interpretation. JA165.

of its members by providing land for self-determination and self-governance, cultural preservation, housing, education, and otherwise providing for its members." ADD010. Appellant is the quintessential tribe for which Congress intended to advocate through the IRA.

Further, Appellees themselves make clear that incorporating "under federal jurisdiction" into the second definition renders that second definition merely theoretical, and thus impermissible surplusage: "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." ABOP, at 27–28. Thus, with the exception of the hypothetical population of unenrolled members who nevertheless lived on Indian reservations—of which there is no evidence in the record—every individual covered by the second definition would already be included under the first definition. TRW Inc. v. Andrews, 534 U.S. 19, 30–31 (2001) (rule against surplusage violated if language rendered "insignificant" or doubtful to occur "outside the realm of theory").

III. The Supreme Court's Analysis in Carcieri Confirms the Flaws in Appellees' Analysis.

Appellees' focus on Carcieri v. Salazar is confusing: that case was silent on the meaning of the second definition. 555 U.S. 379, 382 (2009). The sole issue before the Supreme Court was whether "the word 'now' [in the first definition] is an ambiguous term that can reasonably be construed to authorize the Secretary to

take land intro trust for members of tribes that are 'under Federal jurisdiction' at the time that the land is accepted into trust." Id. Carcieri neither addressed nor resolved every ambiguity in the IRA, or in Section 5129. Courts addressing Section 5129's first definition agree that ambiguity exists with regard to the phrases "under Federal jurisdiction" and "recognized Indian Tribe," and have consistently afforded deference to the Department's interpretation of them. See, e.g., Confed. Tribes of Grand Ronde Cmty. of Or. v. Jewell, 75 F. Supp. 3d 387, 397–401 (D.D.C. 2014); Cent. N.Y. Fair Bus. Ass'n v. Jewell, No. 6:08-CV-0660, 2015 WL 1400384, at *10–11 (N.D.N.Y. Mar. 26, 2015); Stand Up for Cal. v. DOI, 919 F. Supp. 2d 51, 69–70 (D.D.C. 2013).

Directly contrary to Appellees' suggestion that Carcieri demands their reading of "such members," Justices Souter and Ginsberg in their opinion concurring in part and dissenting in part recognized that "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." Id. at 400. And since then, the lower courts have so held. See Grand Ronde, 830 F. 3d at 559-563 (finding Interior's interpretation of "recognized Indian tribe" and "under federal jurisdiction" as having separate and distinct meanings to be reasonable).

Carcieri is nevertheless instructive, as it highlights the respects in which Appellees' analysis of the phrase "such members" in the second definition is

untenable. In considering whether "now" was ambiguous, the Supreme Court considered the same tools upon which Appellees rely here, including dictionary definitions, case law definitions, and assessing the "natural meaning" of the word "now," but did so in a manner that reveals the weaknesses of Appellees' reasoning.

In Carcieri, the dictionary definitions of the word "now" were exactly on point for the question of the point in time at which a tribe must be "under federal jurisdiction" to satisfy the first definition, because the definitions included "at the present time" and "at the time of speaking." Id. at 388–89. Here, Appellees have failed to identify any dictionary definition that says anything about whether "such" refers to the entirety of an antecedent clause. The definitions upon which they rely say only that "such" can refer back to *something*, not that it must refer back to *everything*. ABOP, at 17.

The case law regarding the word "now" was also consistent in Carcieri; multiple Supreme Court cases had previously defined "now" in the context of interpreting a statute as at the time of the passage of the statute. Id. (collecting cases). The case law here is aligned in exactly the opposite direction, as described above and in Appellant's opening brief.

With regard to the "natural reading" of "now," the Supreme Court in Carcieri—unlike Appellees here—looked to the context of the IRA. Id. at 389. Among other things, it noted that in other portions of the IRA, Congress made the

decision to use the phrase "now or hereafter" to draw into the ambit of the statute both "contemporaneous and future events," indicating that the use of the word "now" without "hereafter" provided "textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment." Id. That thoughtful consideration of the use of the same word elsewhere in the statute stands in stark contradiction to Appellees' declaration that theirs is the only "natural reading." Appellees' jab at analyzing the IRA is nonsensical: they ignore the second definition's *additional* requirement of residing on an Indian reservation in 1934 to misleadingly claim that interpreting "such members" to exclude the "under federal jurisdiction " requirement would "swallow" definition one. ABOP, at 2. It makes no sense that imposing an additional requirement would somehow subsume the first definition, which lacks any requirement relating to reservations.

IV. Appellant's Misreading of Legislative History and Other Documents Does Not Make the term "Such Members" Unambiguous.

Appellees are wrong that the IRA's legislative history demands that "such members" refers to the entirety of the first definition. The reality is that the legislative history is conspicuously silent on this point, notwithstanding Appellees' misinterpretation of statements of Commissioner Collier and deceptive cherry-picking of legislative history. As a result, the proper interpretation of the ambiguity of "such members" flows from canons of construction, including the Indian canon

and, as described *infra*, Part V, leads to just one result: "such members" does not refer to "under federal jurisdiction."[9]

There is, however, one point on which the legislative history is remarkably clear: a central purpose of the IRA was to remediate the decimation of Indian tribes, including through land theft. As House Rep. Howard said when he brought the bill to the House floor:

> Reduced to its simplest terms, the [IRA] would prevent any further loss of Indian lands, [and] would permit the purchase of additional lands for landless Indians[.] … [The IRA] ***would strike a body blow at the twin evils of economic and social disintegration of the Indians. It would stop the sinister liquidation of Indian property*** and the equally sinister destruction of the Indian character wrought by generations of bureaucratic absolutism. It would give to the Indian at least a modest measure of economic security and economic opportunity. It would take him off the dole, out of the national poorhouse, and set him on the road to earning his own living, on the land, in the sweat of his brow.

78 Cong. Rec. 11727 (1934) (emphasis supplied).[10] As Committee on Indian Affairs Chairman Wheeler explained on the Senate floor when he "move[d] that the Senate proceed to the consideration of the bill (S. 3645)":

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[9] Determining the meaning of a statute requires that the words of the statute be interpreted as a whole, considering the text as well as the statute's design, structure, and underlying purpose. See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston, 184 F.3d 88, 101 (1st Cir. 1999). Therefore, consideration of legislative history is appropriate in determining whether the language of a statute is ambiguous. See Succar v. Ashcroft, 394 F.3d 8, 31-32 (1st Cir. 2005) (legislative history used to check understanding and determine whether there is a clearly expressed intention by Congress which is contrary to the plain language of the statute).

> ***The second purpose [of this bill] is to provide for the acquisition, through purchase, of land for Indians now landless who are anxious and fitted to make a living on such land***. The Committee on Indian Affairs and the Bureau of Indian Affairs have found that there are many Indians who have no lands whatsoever, and are unable to make a living. Consequently, the Government is constantly compelled to furnish money to these Indians; and it is thought by the Government that it would be much cheaper in the long run and would make better citizens of them if we could put them on small tracts of land where they could make their own living.

78 Cong. Rec. 11122, 11123 (1934) (emphasis supplied).

In other words, the result Appellees seek—returning Indians to landlessness—is the polar opposite of what Congress intended.

A. The Legislative History is Devoid of the "State-Recognized Tribe" Distinction Appellees Seek to Draw.

Although the foundation of Appellees' argument is a claim that Congress intended to exclude state-recognized tribes from the IRA, the legislative history lacks any support for that contention. Indeed, it contains ample discussion about state-recognized tribes that were known to be eligible for the IRA, i.e., the several Iroquois tribes in New York,[11] and at least one state-recognized tribe living on a

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[10] Thus, the intent of Congress was not to limit the application of the IRA to address "the senators' concerns about adding to the Government's fiscal woes during the Great Depression," as Appellees claim. ABOP, at 22.

[11] Tribes in New York have long been recognized by the State, as well as considered eligible for acquisition of trust land under the IRA. See, e.g., Central N.Y. Fair Business Ass'n v. Jewell, 2015 WL 1400384 at *8 (N.D.N.Y. 2015) (Oneida Indian Nation of New York met the IRA's first definition of Indian despite the fact that Oneida maintained treaties with the State of New York, (i.e., was recognized by New York). An early version of the IRA included a provision

state reservation (with a fact pattern substantially similar to Appellant's) that was subsequently determined by the Solicitor of the Department of the Interior to be eligible for the IRA, the Catawba Tribe of South Carolina.[12] Apart from this discussion about some particular tribes that happened also to be state-recognized,

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excluding New York Indians from the IRA because "they do not want it and their condition is entirely peculiar." See Hearings Before the Committee on Indian Affairs on H.R. 7902, 73rd Cong. 133 (1934) (statement of John Collier, Comm'r of Indian Affairs). However, the provision was later stricken "as unnecessary and inadvisable." Id. at 198. Therefore, the drafters of the IRA clearly intended that New York Indians be eligible for IRA benefits despite their status as state-recognized tribes. See Upstate Citizens for Equality, Inc. v. United States, 841 F.3d 556, 573-574, 577 (2016) (reviewing the same legislative history and confirming that Oneida is eligible to have land taken in trust under the IRA).

[12] The legislative history makes clear that Congress understood that the Catawba Indians were neither "under federal jurisdiction" nor did they meet the fifty percent Indian ancestry requirement of the third definition. Yet subsequent to passage of the IRA, Interior's Solicitor confirmed that the Tribe, which was a state-recognized tribe living on a state reservation, was eligible for the IRA. See Survey of Conditions of the Indians in the United States: Hearing before the Subcomm. of the Senate Committee on Indian Affairs, 71st Cong., 3d Sess. 7542-44; 7546-49, 7551 (1930) (noting that the Catawba Tribe was resident on land owned by the State of South Carolina and were not living under federal supervision); *To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. On Indian Affairs,* 73d Cong., 2d Sess. 263-265; 266 (1934) (hereinafter 1934 Senate Hearings) (Senator Thomas of Oklahoma noting that the Catawba are living on "500 acres of the poorest land in South Carolina" and "the [Federal] Government has not found out they live yet"); Solicitor Harper Memorandum Regarding Questions of the Catawbas' Identity and Organization as a Tribe and Right to Adopt IRA Constitution (April 11, 1944), *available at* http://thorpe.ou.edu/sol_opinions/p1251-1275.html (permitting the Catawba Tribe to organize under the IRA despite a statement from Commissioner Collier that "[t]he Federal Government has not considered these Indians as Federal wards").

the legislative history never discusses any limitation on "state-recognized tribes;" in fact it never even uses the term "state-recognized." The only support cite for the proposition that Congress intended to exclude state-recognized tribes from the IRA is one law review article, written before Carcieri, that relates to Indian hiring preference rules and not to the question of whether the Department may take a tribe's land into trust. ABOP, at 22–25. The article in turn relies on a snippet of legislative history that Appellees misleadingly argue shows that Commissioner Collier proposed the "under federal jurisdiction" language to exclude state-recognized tribes, but in fact it relates solely to the concern expressed by certain of the IRA framers about people who they felt were "effectively white" and not "Indian" because their "blood quantum" was too low or they no longer lived in a tribal manner. Id.

As the District Court of D.C. explained in analyzing the same legislative history upon which Appellees rely, Commissioner Collier suggested the phrase "under federal jurisdiction" in the first definition to address Chairman Wheeler's "concern that some 'so called tribes' were composed of 'white people essentially,'"—none of this had anything to do with state-recognized tribes. See Confederated Tribes of Grand Ronde Cmty. of Oregon, 75 F. Supp. 3d at 403.[13]

[13] On appeal, the D.C. Circuit "easily conclude[d]" that the phrase "under federal jurisdiction" is ambiguous. Grand Ronde, 830 F.3d at 564. The same is true here relating to the second definition. Just as the legislative history of the IRA provides

Chairman Wheeler's expressed concern, which Appellees pointedly exclude but which immediately precedes their preferred sound bite, was as follows:

> The CHAIRMAN [WHEELER]. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are not at the present time--as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. ***They are no more Indians than you or I perhaps. I mean they are white people essentially***. And yet they are under the supervision of the government of the United States, and there is no reason for it at all, in my judgement. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Hearings on S. 2755 and S. 3645 Before the S. Comm. On Indian Affairs, 73 Cong. 2d Sess., 265-266 (1934) (emphasis supplied). It was after Chairman Wheeler expressed these particular concerns that Commissioner Collier suggested the fix: "after the words 'recognized Indian tribe' *in line 1* insert 'now under federal jurisdiction," which thereby altered the first, but not the second, definition. Id. at 266. In sum, the legislative history reveals nothing about whether "such" was intended to refer back to "members of a recognized tribe" or "members of a recognized tribe now under federal jurisdiction."

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no conclusive guidance as to how to define that phrase, it also provides no conclusive answers on whether it was meant to apply to the second definition in addition to the first.

B. The Collier Circular Supports Appellant, not Appellees.

Although Appellees heavily rely upon—and selectively quote from—the March 7, 1936 circular issued by Commissioner Collier, ABOP, at 24–26,[14] when read in full that circular reflects that "such members" does not refer to the phrase "under federal jurisdiction." In describing a form for the purpose of registering Indians to track the individuals entitled to benefits under the IRA, Commissioner Collier defined individuals in "Class 2"—the second definition—without any reference to "under federal jurisdiction" at all. SUPPADD0001. As Commissioner Collier put it, the main use of the registration form would be for "Class 3" individuals, "persons having one-half or more Indian blood who are neither unenrolled members of a tribe (Class 1) nor unenrolled descendants of such members residing on a reservation [sic] June 1, 1934, (Class 2)." Id. In the other portions of the circular referring to the definition of Indian, Commissioner Collier simply repeats the statutory language, thus adding nothing to resolve the ambiguity of the language. Id.

Appellees mostly focus on Commissioner Collier's comments that there will not be many individual Indian applicants under the second definition "because most persons in this category will themselves be enrolled members of the tribe . . .

[14] Appellees cited to this circular, though it is not included in the Joint Appendix. Appellant has therefore included the actual document, which was in the summary judgment record below, in an addendum to this Reply.

and hence included under Class 1 [the first definition]." SUPPADD0001. Appellees assert that Collier's comment regarding the overlap between the first and second definitions "proves the plain reading of the statute", i.e., proves that the first definition must be read as incorporated into the second definition. But there is nothing "plain" about this ambiguous text, as described *supra*, Part I, and Commissioner Collier does not say anywhere that "now under federal jurisdiction" applies to the second definition. As the United States explained in its brief below, Commissioner Collier described the overlap between the two definitions simply "because individuals living as Indians likely both had tribal relations with a tribe under federal jurisdiction (class 1) and land set aside for the tribe (class 2). And where one or the other was lacking, the IRA provided the means for rectifying the situation." United States' Memorandum of Law in Support of United States' Motion for Partial Summary Judgment (ECF No. 56) at 16.

In any event, in the context of analyzing whether particular tribes meet the Carcieri "under federal jurisdiction" requirement of the first definition, federal courts and the Interior Board of Indian Appeals repeatedly have recognized that singular statements by federal administrative officials are not determinative of whether a tribe is under federal jurisdiction.[15] The same principle holds true here:

[15] See Grand Ronde, 75 F. Supp. 3d at 407-408 (finding that a statement by Commissioner Collier noting that the Cowlitz Indian Tribe was not under federal jurisdiction was not determinative given contrary statements by Commissioner

isolated statements by federal officials such as Commissioner Collier cannot be considered to conclusively determine the proper construction of the second definition.

C. None of the Miscellaneous Documents Appellees Have Collected Advance Their Position.

In their zeal to accumulate as much superficial support for their position as they can muster, Appellees collect a hodgepodge of documents that are entirely irrelevant to this appeal. They cite to Interior's 1976 Solicitor Opinion but concede that opinion "did not address the 'under federal jurisdiction' requirement." ABOP, at 31. They turn to an unreported decision of an Administrative Law Judge at the Merit Systems Protection Board, Garvais v. Department of the Interior, which did not remark in any respect upon the issue of whether the phrase "such members" in

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Collier and the breadth of additional evidence); Upstate Citizens for Equal., Inc. v. Jewell, No. 5:08- CV-0633 LEK, 2015 WL 1399366, at *5 (N.D.N.Y. Mar. 26, 2015), aff'd sub nom Upstate Citizens for Equal., Inc. v. United States, 841 E.3d 556 (2nd Cir. 2016) (rejecting multiple statements by federal officials that tribe was under the control of the State of New York and no longer under federal jurisdiction),; Grand Traverse County Board of Comm's v. Acting Midwest Reg'l Dir., 61 IBIA 273, 282-283 (Sept. 25, 2015) (rejecting Departmental statements that tribe was no longer under federal jurisdiction in light of other evidence); Shawano County v. Acting Midwest Reg'l Dir., BIA, 53 IBIA 62, 73-74 (Feb. 28, 2011) (same); Village of Hobart v. Acting Midwest Reg'l Dir., 57 IBIA 4,11-12,16-17 (May 9, 2013) (rejecting 1934 Indian Affairs Commissioner statement that tribe was not under federal jurisdiction given longstanding relationship with the federal government); Franklin County, NY v. Acting Eastern Reg'l Dir., 58 IBIA 323, 333-334 (June 11, 2014) (rejecting statements that tribe was under state jurisdiction not federal jurisdiction due to long period of federal inaction and finding that federal inaction does not destroy the federal government's jurisdiction over a tribe).

the second definition refers to the entirety of the first definition. 2004 WL 1699353 (July 9, 2004). Instead, the issue in that case was whether a Department regulation "should be read to require that descendants, such as appellant, were living on the reservation as or June 1, 1934." Id. They even cite to the 2015 Indian Health Service Guideline ("Guideline"), which of course is a guideline not regulation or law and not propounded by the Department. ABOP, at 32–33. Further, as the Guideline itself reflects, it is intended for the provision of services to individuals, not for determinations of whether a tribe like Appellant may have its land taken into trust. Indian Health Manual, pt. 7-3.1.A. Introduction: Purpose, available at https://www.ihs.gov/ihm/pc/part-1/p1c11/#1-1.1 (explaining that this chapter relates to the "policy and procedures for granting Indian preference to certain persons of Indian descent when appointments are made to vacant positions within the IHS"). If there were any dispute at all about the relevance of the Guideline, however, it is clear that neither the Department nor this Court is bound by prior interpretations of statute made by another agency in a different context. See Grande Ronde, 830 F.3d at 565–66 (rejecting argument that a National Indian Gaming Commission determination regarding the Cowlitz Tribe's jurisdictional status was binding with respect to a determination that the Tribe was eligible to have land taken in trust under IRA Definition 1).

V. Appellees Do Not Dispute the Effect of the Canons of Construction Upon Which Appellant Relies.

Appellees label the interpretative canons upon which Appellant relies—including that regarding remedial statutes and the Indian canon of construction—as "inapposite" based on their incorrect assumption that the meaning of "such members" is plain. On the question of the impact of these canons upon the interpretation of ambiguous language, Appellees have no answer whatsoever. There is a good reason Appellees fail to provide any such answer: the canons of constructions require a decision in Appellant's favor if this Court finds "such members" to be ambiguous. Indeed, the (i) presumption that remedial statutes be interpreted to advance the mission of the statute, Hogar Agua, 36 F.3d at 185–86; (ii) Indian canon of construction demanding that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," Blackfeet Tribe of Indians, 471 U.S. at 766;[16] and (iii) traditional Chevron deference all lead to the same conclusion that "such members" does not refer to

[16] Appellees misconstrue a statement in Carcieri to conclude that the majority found that the Indian canon does not apply to Section5129. ABOP at 26. However, the description of the definition of "Indian" as "detailed and unyielding" was not stated in the context of explaining why the Indian canon should not apply to Section 5129 (the canon is not mentioned), but rather why the definition of Indian in Section 5129 applies to the whole statute and is not made irrelevant by the broader definition of tribe in the same section. Carcieri, 555 U.S. at 394 n.8. Following Carcieri, lower courts have applied the canon to interpret Section 5129. See, e.g., Grand Ronde, 830 F. 3d at 558, 565.

"under federal jurisdiction." Opening Brief, at 26–32. Indeed, the Indian canon of construction in particular requires that the federal government act in accord with moral obligations of the highest fiduciary responsibility in its relationship with Indians. See Cobell v. Norton, 240 F.3d 1081, 1199 (D.C. Cir. 2001).

VI. There is No Basis for this Court to Dismiss the Appeal.

To claim that this appeal is both moot and that Appellant lacks standing, Appellees conspicuously ignore Appellant's arguments, thus tacitly conceding they have no response. As to mootness, Appellees have no rejoinder to the reality that this Court can "issue a[] judicial remedy capable of affecting the parties rights." Diffenderfer v. Gomez-Colon, 587 F.3d 445, 451 (1st Cir. 2009). With respect to jurisdiction under Rule 54(b), Appellees say exactly nothing regarding the circuit court law to which Appellant cited that there is no "hard-and-fast rule" setting the bounds of finality, Pit River Tribe v. U.S. Forest Serv., 615 F.3d 1069, 1075–76 (9th Cir.2010), and in particular that the "requirements" of practical finality—including that review would be foreclosed—"are considerations, rather than strict prerequisites." Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1175 (9th Cir. 2011).

Instead, they misleadingly claim that "practical finality" applies solely where a plaintiff would be precluded from "ever challenging the district court decisions," when the case to which they cite did not so hold. ABOP, at 40 (citing

and quoting In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 751 F.3d 629, 633 (D.C. Cir. 2014)). In that case, In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., the D.C. Circuit Court said nothing about the requirements of practical finality, but instead remarked that in the circumstances of that case it was appropriate to allow a private party to appeal a remand because foreclosing such an appeal would effectively prevent review. 751 F.3d at 633.

Respectfully submitted,

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January 9, 2020

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,496 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2020 I electronically filed the foregoing REPLY BRIEF OF DEFENDANT-APPELLANT MASHPEE WAMPANOAG INDIAN TRIBE, with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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SUPPLEMENTAL ADDENDUM

114220

Circular No. 3134

Enrollment under the Indian Reorganization Act.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

March 7, 1936.

To Superintendents:

Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term "Indian" as used therein shall include - (1) all persons of Indian descent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act; (2) descendants of such members residing on an Indian reservation June 1, 1934; and (3) all other persons of one-half or more Indian blood.

The language "as used in this Act" is construed to mean "for the purpose of sharing in the benefits provided by the Act", as distinguished from tribal rights generally. Thus, if a person of Indian descent belongs to a recognized tribe which was under Federal jurisdiction on the date of the Act (Class 1) or is a descendant of such member residing on a reservation June 1, 1934, (Class 2), he is entitled to participate in the benefits of the Act regardless of his degree of Indian blood; and, likewise, a person of one-half or more Indian blood (Class 3) is eligible therefor irrespective of tribal membership or residence on a reservation.

Manifestly, persons coming in Class 1 will be carried on the rolls as members of the tribe, which is all that is necessary to qualify them for benefits under the Act. However, a record will have to be kept of Classes 2 and 3. As a basis for this record, it has been decided to maintain a "register" of such Indians. To this end, a form of application for registration under the Act has been prepared, as per sample copy herewith. A supply of the forms will be sent you upon requisition.

There will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of the tribe, except where a final roll has been made, and hence included under Class 1. The main use of the form, therefore, will be to obtain a register of Class 3, - persons having one-half or more Indian blood who are neither enrolled members of a tribe (Class 1) nor unenrolled descendants of such members residing on a reservation June 1, 1934, (Class 2). However, the form has been so prepared that it is equally applicable to Classes 2 and 3.

In the event that both husband and wife desire to make application for registration under the Act, each should fill out this form. Either the father or mother, regardless of degree of blood or status, can make application for the registration of the minor children. The parent not making application should simply note on the application form that application for the registration of the minor children has been made by the other parent. Application should not be made unless the individual is one-half or more degree of Indian blood.

This form should be prepared in duplicate, and both copies executed before a Notary Public; the original to be sent to this Office immediately upon receipt, and the duplicate to be kept at the agency. You will be notified in due course of the action taken on each case.

This circular does not apply to the tribes which have voted to exclude themselves from the operation of the Indian Reorganization Act. However, any person who is not enrolled and who can trace his degree of blood through members of such a tribe is entitled to make application.

(Sgd) John Collier,

Commissioner.

Enclosure.