IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR et al.,

Defendants, and

MASHPEE WAMPANOAG TRIBE,

Intervenor-Defendant.

Case No. 1:22-cv-10273-AK

UNITED STATES' CONSOLIDATED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs[1] challenge the U.S. Department of the Interior's 2021 Record of Decision ("2021 ROD") affirming an earlier agency decision ("2015 ROD") to acquire land located in Mashpee and Taunton, Massachusetts ("Property"), into trust for the benefit of the Mashpee Wampanoag Tribe ("Mashpee Tribe," "Mashpee," or "Tribe") pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. §§ 5101-5129 ("IRA"). The 2021 ROD further affirms the determination that the Property is eligible for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 ("IGRA"). ECF 1-3 at 2-56. Interior has held the Property in trust since 2016; the trust status of the Property allows the Tribe to reestablish its self-governance authority over part of its ancestral homeland and further its self-determination goals through economic development and other uses. ECF 1-3; ECF 1-4. Defendants U.S. Department of the Interior ("Interior"), Debra A. Haaland in her official capacity as Secretary of the Interior ("Secretary"), the Bureau of Indian Affairs, and Bryan Newland, in his official capacity as Assistant Secretary–Indian Affairs ("Assistant Secretary") (collectively, "United States"), through undersigned counsel, hereby respond to Plaintiffs' Motion for Summary Judgment and argue in favor of the United States' Cross-Motion for Summary Judgment.

Interior's path to issuing the 2021 ROD was circuitous. In 2018, as part of a separate agency decision, Interior had concluded that the Tribe was *not* under federal jurisdiction ("2018 ROD"), and therefore, ineligible for trust acquisitions under the IRA. The Tribe sued Interior challenging the 2018 ROD and Plaintiffs intervened as defendants. *See Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 206 (D.D.C. 2020) ("*Mashpee*"). After an exhaustive

[1] David Littlefield, Michelle Littlefield, Tracy Acord, Deborah Canary, Francis Canary, Jr. Veronica Casey, Patricia Colbert, Vivian Courcy, Will Courcy, Donna DeFaria, Antonio DeFaria, Kim Dorsey, Kelly Dorsey, Francis Lagace, Jill Lagace, David Lewry, Kathleen Lewry, Michele Lewry, Richard Lewry, Robert Lincoln, Christina Almeida, Carol Murphy, Dorothy Peirce, and David Purdy.

and detailed review of the Tribe's historical evidence, the D.D.C. rejected Plaintiffs' and Interior's arguments defending that decision, and found that Interior's 2018 ROD was arbitrary and capricious because Interior failed to properly consider the evidence consistent with the agency's governing standards and precedent. *Id.* at 217-36. The D.D.C. vacated the 2018 ROD and remanded to Interior "for a thorough reconsideration and re-evaluation of the evidence" consistent with the D.D.C.'s opinion—which made specific, binding determinations that a 2014 Interior Solicitor Opinion ("M-Opinion")[2] governed the remand and that certain historical evidence must be considered probative and weighed in concert. *Id.* at 236. The 2021 ROD reflects Interior's diligent compliance with the remand the D.D.C. ordered.

Plaintiffs' central argument is that the United States lacks authority to acquire the Property in trust for the Tribe because it was not "under Federal jurisdiction" in 1934, as required by the IRA. As detailed in the 2021 ROD and below, the United States took a series of actions, beginning no later than 1820, demonstrating that the United States regarded the Tribe as under federal jurisdiction, and that this status remained intact in 1934. The 2021 ROD further discusses how the Tribe has resided in what is now southeastern Massachusetts since time immemorial, and despite facing external pressures from English colonists and, later, the Commonwealth of Massachusetts, the Tribe remained a distinct, self-governing tribal community. Consistent with *Mashpee*, Interior evaluated the evidence and properly found that the Tribe's historical evidence, considered holistically, demonstrated that the Secretary possessed the requisite IRA authority to hold the Property in trust.

[2] M-Opinion M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("M-Opinion"). M-Opinions set out Interior's formal legal views and are binding on the agency. *See* Interior 209 Departmental Manual 3.2A(11), https://www.doi.gov/elips/browse.

Following issuance of the 2021 ROD, the D.D.C. closed the *Mashpee* case. The next day, Plaintiffs filed suit in this Court challenging the 2021 ROD, arguing, in effect, that Interior's compliance with the express dictates of the D.D.C.'s remand was arbitrary and capricious. *See* ECF 11 at 5-10. Plaintiffs' claims that Interior lacks authority under the IRA to acquire the Property in trust and that it improperly proclaimed the lands the Tribe's "initial reservation" under IGRA lack merit and should be rejected. As discussed below, Plaintiffs fail to grapple with the substance of the 2021 ROD, ignore or misstate controlling legal standards—including the D.D.C.'s remand decision in *Mashpee*, which Interior was bound to follow—and reargue matters upon which they lost before that court. In addition to attempting to relitigate *Mashpee*, Plaintiffs rely on inapposite case law, misinterpretation, conjecture, and spurious comparisons to differently-situated tribes to challenge the 2021 ROD and indirectly attack the M-Opinion. Plaintiffs fail to show that the 2021 ROD was arbitrary, capricious, or contrary to law under the APA. Thus, United States respectfully requests that the Court reject Plaintiffs' Motion, grant the United States' Cross-Motion for Summary Judgment, and uphold the 2021 ROD.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Indian Reorganization Act and Its Implementation

i. The Indian Reorganization Act of 1934

Congress enacted the IRA in 1934 as part of the Federal Government's return to supporting "principles of tribal self-determination and self-governance[.]" *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). This sweeping legislation charted a new course in federal policy that reversed the disastrous assimilationist policy of the nineteenth century, aimed at "extinguish[ing] tribal sovereignty,

eras[ing] reservation boundaries, and forc[ing] the assimilation of Indians into the society at large." *Id.* at 254.

The "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Congress sought "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S 145, 152 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)). To that end, the IRA fostered tribal self-governance through a return to communal land ownership and reacquisition of tribal homelands.[3]

The IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." *Id.* § 5108. The statute, in turn, defines "Indians" as including (1) "all persons of Indian descent who are members of any ***recognized Indian tribe*** now ***under Federal jurisdiction***") ("First Definition"); 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" ("Second Definition"). *Id.* § 5129 (emphasis added).[4]

ii. *Carcieri v. Salazar*

In 2009, the Supreme Court issued *Carcieri v. Salazar*, which involved a challenge to Interior's decision to accept land into trust for the benefit of the Narragansett Indian Tribe ("Narragansett" or "Narragansett Tribe"). 555 U.S. 379, 384-85 (2009). The Court examined the statutory meaning of the word "now" in the phrase "now under Federal jurisdiction" in the First

[3] *See*, *e.g.*, 25 U.S.C. § 5101 (prohibiting further allotment of land); *id.* § 5102 (extending indefinitely the periods of trust or restrictions on alienation of Indian lands); *id.* § 5110 (authorizing the Secretary to proclaim new Indian reservations on lands acquired pursuant to the IRA); *id.* § 5123 (creating a federal process for Indian tribes to adopt their own constitution or bylaws).

[4] A third definition, not at issue here, includes "persons of one-half or more Indian blood." 25 U.S.C. § 5129.

Definition. *Id.* at 388. The Court ultimately held that "now" means 1934, when the IRA was enacted. *Id.* at 395. The majority opinion neither elaborated on how a tribe might demonstrate that it was "under Federal jurisdiction, nor addressed the preceding phrase, "any recognized Indian tribe," in the First Definition. *Id.* at 395-96.

In a concurring opinion, Justice Breyer addressed the relationship between these two phrases, noting that the IRA "imposes no time limit on recognition," *i.e.*, the word "now" only modifies "under Federal jurisdiction" and not "recognized Indian tribe." *Id.* at 398. Justice Breyer noted that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time," *id.* at 397, pointing to errors Interior made in implementing the IRA immediately after its passage but later corrected, *id.* at 397-99.

Consistent with *Carcieri*, Interior must determine whether a tribe was "under Federal jurisdiction" in 1934 when a "recognized Indian tribe" seeks land to be taken into trust by the Secretary pursuant to the IRA. But as noted by Justice Breyer in his concurring opinion, the IRA does not require that a tribe was "recognized" in 1934.

iii. Interior's Interpretation of the First Definition of "Indian" in the IRA

In the wake of the *Carcieri* decision, Interior examined the IRA's First Definition. In an analysis first issued as part of a 2010 decision for the Cowlitz Tribe, Interior construed the phrases "recognized Indian tribe" and "under Federal jurisdiction" in the First Definition of "Indian." *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 559-64 (D.C. Cir. 2016) ("*Grand Ronde*"). In 2014, Interior incorporated this analysis into the M-Opinion.[5]

[5] In 2020 then-Interior Solicitor Daniel Jorjani withdrew the M-Opinion and issued a new framework for evaluating whether an Indian tribe satisfies the requirements of the First Definition. *Mashpee*, 466 F. Supp. 3d at 217. Interior Solicitor Robert Anderson reinstated the M-Opinion in 2021 as Interior's controlling framework for the "under Federal jurisdiction" inquiry. *See* M-37070, *Withdrawal of Certain Solicitor M-Opinions, Reinstatement of Sol. Op. M-37029*, The Meaning of 'Under Federal Jurisdiction' for Purposes of

See AR000663-88;[6] *Mashpee*, 466 F. Supp. 3d at 220.

1. *"Recognized Indian Tribe"*

With respect to the phrase "recognized Indian tribe" in the First Definition, Interior concluded—noting Justice Breyer's statement that the IRA imposes "no time limit upon recognition," *Carcieri*, 555 U.S. at 397—that the word "now" in the phrase "now under Federal jurisdiction" does not modify the preceding phrase "recognized Indian tribe." AR000664 n.9. Interior explained that the concept of "recognition" evolved from the time of the IRA's enactment into the modern term "federal recognition" used today. AR000686-88.[7] Interior ultimately concluded that if a tribe is federally recognized at the time the IRA authority is invoked, "by definition [the tribe] satisfies the IRA's term 'recognized Indian tribe' in both the cognitive and legal senses of that term." AR000688.

2. *"Under Federal Jurisdiction"*

Regarding the phrase "under Federal jurisdiction," Interior considered whether the IRA's text, its structure, contemporaneous understanding of the term "jurisdiction," or legislative

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the Indian Reorganization Act*, and Announcement Regarding Consultation on "Under Federal Jurisdiction" Determinations* (Apr. 27, 2021), https://www.doi.gov/sites/doi.gov/files/m-37070.pdf.

[6] The Administrative Record for this case was lodged on June 14, 2022, ECF 34, and was distributed by DVD containing six subfolders labeled "Admin Record Part 1," Admin Record Part 2," etc. Admin Record Parts 1-4 reflect the administrative record lodged with the Court in 2016 in *Littlefield v. U.S. Dep't of interior*, No. 16-CV-10184 (D. Mass.) and are Bates-stamped AR000001-57509. Admin Record Parts 5-6 reflect the administrative record lodged with the D.D.C. in *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-CV-2242 (D.D.C.), and are Bates-stamped AR0004250-10193. Due to overlapping Bates-numbers, citations to the D.D.C. record herein include a parenthetical identifying them as such (e.g., "(AR Part 5)"). The Supplements to the Administrative Record lodged with the Court on July 27, 2022 (ECF 41) and July 29, 2002 (ECF 43), are Bates-stamped AR_Supp_0000001-684.

[7] The M-Opinion explains that "recognized Indian tribe" had been used historically in two distinct senses: either (1) "'cognitive' or quasi-anthropological," *i.e.*, an official "simply 'knew' or 'realized' that an Indian tribe existed," and (2) "a more formal, legal sense to connote that a tribe is a governmental entity comprised of Indians and that the entity has a unique relationship with the United States." AR000686. Interior explained that the formal, "jurisdictional" sense of "recognition" "evolved into the modern notion of 'federal recognition' or 'federal acknowledgment' in the 1970s, and eventually [Interior] regulations established procedures pursuant to which an entity could demonstrate its status as an Indian tribe." AR000686-87.

history revealed its meaning. AR000666-78. Concluding that they provided no clear guidance, AR000678-82, Interior—against the backdrop of evolving Federal Indian policy, the remedial purposes of the IRA, and the Indian canon of construction[8]—construed "under Federal jurisdiction" as entailing a two-part inquiry. AR000681. The first part of the inquiry considers whether there is a "sufficient showing in the tribe's history," in or before 1934, "that it was under federal jurisdiction, *i.e.*, whether the United States had," in or before 1934, "taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." *Id.* The second part examines whether the tribe's jurisdictional status remained intact in 1934. *Id.* Interior concluded that the failure of the Federal Government to take actions with respect to the tribe in 1934 does not necessarily reflect a termination or loss of the tribe's jurisdictional status. AR000682.

B. Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 809-13 (2014) (Sotomayor, J., concurring) (gaming allows tribes to generate revenue to fund services for their citizens free from state taxation); *Grand Ronde*, 830 F.3d at 557.

IGRA provides that gaming regulated by the statute shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless certain exceptions in the statute apply. *See* 25 U.S.C. § 2719(a)-(b). These exceptions apply

[8] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (ambiguous statutes enacted for Indians are to be construed in their favor); *Grand Ronde*, 830 F.3d at 558.

when "lands are taken into trust as part of—(i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process, or (iii) the restoration of lands for an Indian tribe that is restored to federal recognition." *Id.* § 2719(b)(1)(B). These exceptions "ensur[e] that tribes lacking reservations when IGRA was enacted are not disadvantaged to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003).

In 2008 Interior issued regulations implementing these exceptions. *See* Gaming on Trust Lands Acquired After October 17, 1988, Correction, 73 Fed. Reg. 35,579, 35,579-602 (June 24, 2008). These regulations require Indian tribes seeking to utilize IGRA's "initial reservation" exception to demonstrate, *inter alia*, that the subject lands are "located within the State or States where the Indian tribe is now located" and that the tribe has both a significant historical and modern connection to the lands. 25 C.F.R. § 292.6.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Brief History of the Mashpee Wampanoag Tribe

The Mashpee Tribe descends from the larger Wampanoag Nation, also known as the Pokanoket, whose presence and experience in southeastern Massachusetts has been extensively documented for four centuries. ECF 1-3 at 40. At the time of European contact the Wampanoag "were organized into a coalition of loosely confederated chiefdoms, or 'sachemdoms,' each with its own subordinate leader, or 'sachem,'" who recognized and respected a "wider allegiance to the supreme or paramount sachem, the massasoit." *Id.* at 40-41. Wampanoag ancestral territory spanned from what is now eastern Rhode Island to what is now southeastern Massachusetts, encompassing the lands where the Property is situated. *Id.* at 42. The Tribe "always fiercely defended its status as a distinct, self-governing Indian entity" despite pressures from the English,

missionaries, and later the Commonwealth affecting the Tribe's political autonomy and control over its ancestral territory. AR000462. The Tribe's resilience in response to such pressure ensured their survival as a distinct tribal community for centuries. *Id. See also* AR000985-1046.

In 2007, Interior issued a final administrative decision to federally recognize the Mashpee Tribe. *See* Final Determination for Federal Acknowledgment of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8,007, 8,007-09 (Feb. 22, 2007). To obtain federal recognition under Interior's regulatory criteria, the Tribe successfully demonstrated, *inter alia*, that it "had been identified as an American Indian entity on a substantially continuous basis since 1900," and that a "predominant portion" of that entity "comprises a distinct community [that] has existed as a community from historical times to the present." 25 C.F.R. § 83.7(a)-(b) (2007). Once recognized, the Tribe became eligible for the same privileges and immunities enjoyed by other federally recognized tribes, and its status cannot be terminated absent an act of Congress. *See Federally Recognized Indian Tribe List Act of 1994*, 108 Stat. 4791, §§ 103, 202.

As the 2021 ROD details, the Federal Government engaged in a course of dealing with the Mashpee Tribe evidencing that it was brought under federal jurisdiction no later than 1820. ECF 1-3 at 9-32. At that time, the Federal Government directed and funded an investigation of the status of Indian tribes within its territory, including Mashpee, to determine whether such tribes should be removed from their ancestral lands. *Id.* at 14-15. The resulting reports in the 1820s recommended against removing the Tribe, based on its "condition" and connection to its homeland. *Id.* at 14-17. After the establishment of the "Department of Indian Affairs" (now known as the Bureau of Indian Affairs) in 1847, the Federal Government undertook a subsequent report on the "condition" of Indian tribes across the country, so as to provide for their "future prospects." Once again, through the report, the Federal Government considered the prospects of

the Tribe. *Id.* at 21-22. Additional federal reports and censuses prepared between the late 1800s and the 1930s further recorded and examined the needs of the Tribe in the context of shifting Federal Indian policy. *Id.* at 22-24.

The 2021 ROD also details federal efforts to educate and house the Tribe's children at Carlisle Indian School in the early twentieth century. *Id.* at 17-20. Carlisle was one of many federal or federally-funded boarding schools that housed Indian children away from their tribal community as part of implementing the Federal Government's assimilationist policy applied to Indian tribes at the time. *Id.* At Carlisle, the Federal Government exerted significant control over the education, finances, physical health, and freedom of movement of such tribal children and youth. *Id.* at 19. Interior concluded that the Tribe was under federal jurisdiction up to 1934 based on these assertions of federal jurisdiction, as well as on the Tribe's inclusion on federal censuses—including those prepared for the specific purpose of tallying tribal citizens for federal jurisdiction purposes in the early twentieth century. *Id.* at 17-20, 24-26.

Interior also concluded that the Tribe's jurisdictional status remained intact in 1934, despite statements by federal officials disclaiming jurisdiction over the Tribe at the time. *Id.* at 26-30. Interior explained, consistent with *Carcieri* and the M-Opinion, that such statements are not conclusive, as only Congress has the authority to terminate a tribe's jurisdictional status. Such statements, therefore, do not overcome probative evidence that a tribe came under federal jurisdiction. *Id.* at 30. Interior considered those statements in concert with the Tribe's other historical evidence, and concluded that, on balance, the record demonstrated that the Tribe came under federal jurisdiction prior to 1934, and that status remained intact in 1934. *Id.* at 31-32.

B. The 2015 Record of Decision

On September 18, 2015, Interior issued the 2015 ROD approving a request by the Tribe to accept the Property in trust. ECF 1-4. Interior concluded that the Tribe was eligible for trust acquisitions under the IRA's Second Definition of "Indian." *Id.* at 83-124; *supra* p. 4. That ROD did not consider whether the Tribe was "under Federal jurisdiction" because Interior concluded at the time that reliance on the Second Definition did not require it to do so. ECF 1-4 at 83-84 ("We have not determined whether the Mashpee could also qualify under the first definition of 'Indian' [because] it is not necessary to make that legal determination today."). While Plaintiffs challenged the 2015 ROD on several grounds, the parties agreed to expedited briefing on one claim: whether Interior's interpretation of the Second Definition of "Indian" should be upheld. *See Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016). The Court ruled against Interior, concluding that the Second Definition unambiguously incorporates the "now under Federal jurisdiction" requirement from the First Definition. *Id.* at 399-400. This Court's decision suggested that Mashpee was not under federal jurisdiction in 1934, an issue the 2015 ROD did not reach. ECF 1-4 at 83-84. After the United States moved for reconsideration, the Court clarified that Interior could, on remand, evaluate the Tribe's 1934 jurisdictional status. *See* Order at 3, Doc. 121, *Littlefield*, No. 16-CV-10184 (D. Mass. Oct. 12, 2016).[9]

Following this Court's ruling, Interior commenced an evaluation of the Tribe's eligibility under the IRA's First Definition, *see Mashpee*, 466 F. Supp. 3d at 211, while the Tribe pursued an appeal of this Court's ruling on the Second Definition, *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30 (1st Cir. 2020). The appeal concluded in 2020 when the First Circuit affirmed this Court's decision on the Second Definition. *Id.* at 41.

[9] Plaintiffs claim that Interior "abandoned" the First Definition in the 2015 ROD. ECF 45 at 8, 10. This Court disagreed, finding that Interior could evaluate the Tribe's jurisdictional status in 1934 on remand.

C. The 2018 Record of Decision

In 2018, while the Tribe's First Circuit appeal was pending, Interior issued the 2018 ROD, concluding that the Tribe was not "under Federal jurisdiction" in 1934 for the purposes of the First Definition and thus the Secretary lacked authority to acquire the Property in trust. *See Mashpee*, 466 F. Supp. 3d at 205, 212; *see also* AR0005088 (AR Part 5). The Tribe challenged the 2018 ROD in the D.D.C. *Mashpee*, 466 F. Supp. 3d at 214-15, 217, and that court agreed with the Tribe that Interior misapplied the M-Opinion in the 2018 ROD by evaluating each piece of the Tribe's evidence in isolation rather than "in concert" and that Interior's analysis contradicted the M-Opinion and other precedent. *Id.* at 217-35.

In rejecting Interior's and Plaintiffs' arguments defending the 2018 ROD, the D.D.C. thoroughly reviewed how Interior considered each category of evidence. *Id.* In a detailed and exhaustive opinion, the D.D.C. reviewed how Interior considered evidence pertaining to the education of Mashpee children at Carlisle Indian School, the enumeration of Mashpee tribal members on federal censuses, and inclusion of the Mashpee in federal reports and surveys in which officials considered whether federal programs or policies should apply to them. *Id.* The D.D.C. found that, for each category of evidence, Interior either failed to consider it probative at all, or failed to consider the evidence in concert, so as to conduct a holistic review of the historical record as the M-Opinion requires. *Id.* Accordingly, the D.D.C. held that the 2018 ROD was "arbitrary, capricious, an abuse of discretion, and contrary to law," and remanded the matter to Interior "for a thorough reconsideration and re-evaluation of the evidence" consistent with the D.D.C.'s opinion, the "M-Opinion['s] standard and the evidence permitted therein," and prior agency decisions applying the M-Opinion. *Id.* at 236.

D. The 2021 Record of Decision

Following the D.D.C.'s decision, Interior correctly implemented that court's remand order. The 2021 ROD reflects Interior's reexamination of the Tribe's historical evidence consistent with the D.D.C.'s explicit remand directives and applicable legal and agency precedent. ECF 1-3 at 2-32. Interior considered the evidence "in concert" and concluded that the Tribe's historical record, as a whole, demonstrates that it was under federal jurisdiction in 1934, consistent with the IRA and *Carcieri*. *Id.* The 2021 ROD also affirms Interior's determination that the Property is eligible for gaming under IGRA. *Id.* at 32-55. The 2021 ROD incorporated by reference the remainder of the 2015 ROD, *id.* at 3, which is not at issue here.

STANDARD OF REVIEW

Plaintiffs bear the burden of proof in this APA case. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2012). Under the APA, a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The Court does not substitute its judgment for that of the agency, but rather "'determine[s] whether the [agency] has *considered the relevant factors* and *articulated a rational connection* between the facts found and the choice made.'" *Dubois v. USDA*, 102 F.3d 1273, 1284 (1st Cir. 1996) (emphasis original). The reviewing court must uphold the challenged decision unless it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Bos. Redevelopment Auth. v. Nat'l Park Serv.*, 838 F.3d 42, 47 (1st Cir. 2016)).

While APA review is not a "rubber stamp," it is nevertheless highly deferential, *Dubois*, 102 F.3d at 1285, and the challenged decision is entitled to a presumption of regularity, *Citizens*

to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). "Even when an agency explains its decision with 'less than ideal clarity,'" a court "will not upset the decision on that account 'if the agency's path may be reasonably discerned.'" *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Ultimately, the Court's task is to "apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the [administrative] record the agency presents" to it. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (internal citations omitted). Courts, moreover, should also defer to an agency's reasonable interpretation of ambiguous provisions of statutes it is tasked with administering. *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Skidmore v. Swift*, 323 U.S. 134, 139 (1944).

ARGUMENT

In the 2021 ROD, Interior confirmed the 2015 decision to acquire the Property in trust for the Tribe, concluding it had the authority to do so under the IRA and that the Property would be eligible for gaming under IGRA. ECF 1-3 at 2-56. As set forth below, Interior properly interpreted the First Definition of "Indian" in the IRA, correctly applied that interpretation in analyzing the Mashpee Tribe's history, and reasonably concluded that the Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934.

Plaintiffs fail to demonstrate that Interior's conclusion in the 2021 ROD that the Tribe meets the requirements of the First Definition of "Indian" was arbitrary, capricious, or contrary to law. As detailed below, Plaintiffs primarily relitigate the same failed arguments they advanced in *Mashpee*, arguing that Interior should have considered the evidence in ways that would have directly contradicted the D.D.C.'s remand decision in that case. In effect, Plaintiffs are asking the Court to find arbitrary and capricious that which the D.D.C. required Interior to do. The Court

should reject such invitation. On remand, Interior properly found that the Tribe was under federal jurisdiction in 1934, consistent with the D.D.C. remand decision, the M-Opinion, and agency precedent. It did so by considering the Tribe's historical evidence holistically, and the evidence demonstrates that the United States continuously exercised jurisdiction over the Tribe at every major inflection point in Federal Indian policy by considering how or whether to apply that policy to the Tribe. It is inherent that the United States could only consider how to apply Federal Indian policy to the Tribe because it had jurisdiction over them. Plaintiffs' arguments to the contrary lack merit and should be rejected.

As part of their argument challenging the 2021 ROD, Plaintiffs indirectly attack the M-Opinion by misreading *Carcieri*, pointing to irrelevant and inapplicable legal standards, and asking the Court to adopt different "tests" of their own making, in lieu of the M-Opinion. As Plaintiffs know, the D.D.C. directed Interior to apply the M-Opinion to the Tribe on remand to determine whether the Tribe's historical evidence demonstrated it was "under Federal jurisdiction" in 1934 under the IRA. *Mashpee*, 466 F. Supp. 3d at 236. That is exactly what Interior did. Plaintiffs' arguments—including their attempt to distract the Court with inapplicable precedent and irrelevant legal issues—fail to demonstrate that the 2021 ROD is arbitrary, capricious, or otherwise in error.

Lastly, when Interior determined that the Property—which consists of two, non-contiguous parcels—qualifies as the Tribe's "initial reservation" under IGRA, it did so consistent with applicable statutory and regulatory requirements, as well as judicial and agency precedent. Plaintiffs' cursory argument to the contrary—which asserts without support that such determination is "standardless" and "unprecedented"—fails to demonstrate any error in this aspect of the 2021 ROD. And by failing to argue otherwise, Plaintiffs concede that the Tribe

maintains a significant historical connection to the Property under IGRA. The Court should therefore uphold the 2021 ROD as compliant with IGRA as well.

I. AS REQUIRED BY THE D.D.C., INTERIOR PROPERLY APPLIED THE M-OPINION TO THE TRIBE

As set forth above, *supra* pp. 5-7, following *Carcieri*, Interior evaluated the meaning of both "recognized Indian tribe" and "under Federal jurisdiction" in the First Definition in an interpretation set forth in the M-Opinion. AR000663-88. The reasonableness of Interior's interpretation of the First Definition of "Indian" is not at issue in this case. As the D.D.C. explained, the D.C. Circuit "has reviewed and upheld the test set forth in the M-Opinion." *Mashpee*, 466 F. Supp. 3d at 216; *see also Grand Ronde*, 830 F.3d at 559-65. Thus, the D.D.C. ordered Interior to consider the Mashpee Tribe's eligibility under the First Definition of "Indian" consistent with the interpretation set forth in the M-Opinion. *Mashpee*, 466 F. Supp. 3d at 236 ("The Court hereby directs the Department to apply the two-part test in M-37209–correctly this time–on remand.").

Indeed, Interior's sound interpretation of the First Definition has been consistently upheld by every court to consider it. *E.g.*, *County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012, 1024-27 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 64 (2018) ("*Amador Cnty.*") (concluding that "[g]iven the IRA's text, structure, purpose, historical context, and drafting history—and Interior's administration of the statute over the years—the better reading of § 5129 is that recognition can occur at any time" and that Interior's interpretation of "under Federal jurisdiction" "fits the bill" and is the "best interpretation"); *Grand Ronde*, 830 F.3d at 559-65 (concluding that the First Definition could reasonably be construed as not requiring recognition in 1934, and finding Interior's interpretation of "under Federal jurisdiction" as reasonable, especially in light of "evolving agency practice in administering Indian affairs and implementing

the statute" and given "the remedial purposes of the IRA and applicable canons of statutory construction"); *Cent. N.Y. Bus. Ass'n v. Jewell*, No. 6:08-CV-0660, 2015 WL 1400384, at *5-7 (Mar. 26, 2015) (upholding Interior's interpretation of "under Federal jurisdiction" as "well-reasoned"), *aff'd*, 673 Fed. App'x 63, 65-66 (2d Cir. 2016), *cert. denied sub nom. Cent. N.Y. Fair Bus. Ass'n v. Zinke*, 137 S.Ct. 2134 (2017).

Consistent with this precedent, the D.D.C. ordered Interior to assess the Mashpee Tribe's eligibility under the First Definition of "Indian" in accordance with the M-Opinion. Interior did so and, as discussed below, properly concluded that the Mashpee Tribe met the eligibility requirements of the First Definition. There can thus be no question that Interior applied the proper standard—that is, the analysis set forth in the M-Opinion. Plaintiffs do not directly argue that the M-Opinion or the 2021 ROD erred with respect to the interpretation or application of the First Definition in the IRA. ECF 45 at 14-39.[10] Rather, Plaintiffs indirectly attack the M-Opinion in an effort to distract the Court, to which the United States responds below at *infra* Section III.

II. INTERIOR PROPERLY CONCLUDED THAT THE MASHPEE TRIBE IS A "RECOGNIZED INDIAN TRIBE" THAT WAS "UNDER FEDERAL JURISDICTION" IN 1934

Only Interior's determination, in the 2021 ROD, that the Mashpee Tribe was "under Federal jurisdiction" in 1934 is at issue in this case. Because Mashpee had been a federally recognized tribe for more than a decade at the time the 2021 ROD was issued, *see supra* p. 9, the Tribe satisfies the IRA's "recognized Indian tribe" requirement. AR000685-88; ECF 1-3 at 2 n.1. On this point, Plaintiffs agree. *See* ECF 45 at 26 (stating that federal recognition obtained

[10] For instance, in a section entitled "The M-Opinion is deeply flawed and should be rejected," Plaintiffs contend that "[t]o the extent the M-Opinion supports dismissing such highly probative evidence [as statements made by Commissioner Collier and other officials] as stated by the majority in *Carcieri*, the M-Opinion legally errs." ECF 45 at 37. While couched as a challenge to the M-Opinion, the substance of the argument reveals that Plaintiffs instead challenge Interior's conclusions regarding the Tribe's 1934 jurisdictional status. Such arguments are refuted below. *See infra* Section III.

through Interior's administrative process means the tribal entity is a "tribe" under the IRA).

With respect to evaluating the Tribe's 1934 jurisdictional status, the D.D.C. has already confirmed that the M-Opinion's two-part test governs the analysis. *Mashpee*, 466 F. Supp. 3d at 214-15, 217, 236. There, after a careful and thorough review of how Interior weighed and evaluated each category of the Tribe's historical evidence in the 2018 ROD, *id.* at 217-35, the D.D.C. concluded that Interior failed to properly examine the Tribe's evidence consistent with the M-Opinion and agency precedent, and held that the decision was arbitrary and capricious, *id.* at 236. The D.D.C. then remanded to Interior, requiring it to reexamine the Tribe's evidence consistent with the M-Opinion, including considering evidence of Mashpee education at the Carlisle School, and the Tribe's inclusion in federal reports and censuses as probative. *Id*. The 2021 ROD reflects Interior's compliance with the remand the D.D.C. ordered.

Plaintiffs wholly ignore the M-Opinion and the D.D.C. remand order; downplay, mischaracterize, and ignore Interior's examination of Mashpee's historical evidence in concert; and cherry-pick facts, painting an incomplete, ahistorical, and unsupportable narrative. As set forth below, the 2021 ROD complies with the D.D.C.'s remand by reexamining the Tribe's evidence consistent with that court's order, the M-Opinion, "the standards and evidence permitted therein," *id.* at 236, and agency precedent, to properly conclude that Mashpee was under federal jurisdiction in 1934. Plaintiffs want to relitigate these issues, asking this Court to reconsider the same arguments the D.D.C. rejected and find arbitrary and capricious that which the D.D.C mandated. Whether barred by issue preclusion[11] or wrong on the merits, Plaintiffs fail to demonstrate Interior erred in the 2021 ROD.

[11] As more fully addressed by the Tribe, issue preclusion bars litigants from contesting or rearguing matters that were resolved by a final judgment in a previous case in which they were a party. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995).

Plaintiffs' mischaracterize aspects of the 2021 ROD as "transparently political," ECF 45 at 11, and confuse required compliance with the D.D.C.'s remand directives with "inexplicable flip-flop[ping]" from the 2018 ROD, *id.* at 21. On remand, however, Interior was required to treat the Tribe's historical evidence in a manner consistent with the D.D.C.'s decision, the M-Opinion, and agency precedent. And for those aspects of the remand where Interior was free to exercise its discretion, the agency was entitled to "start afresh" in its analysis and weigh relevant considerations differently in developing a new decision. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020). Interior was not required to explain why they departed from their previous decision, but rather only had to give reasoned explanations for its conclusions. The 2021 ROD more than meets this standard and Interior properly declined to rely on the same reasoning in the 2018 ROD that the D.D.C. held was arbitrary and capricious.

A. Interior Properly Found that the Mashpee Tribe was Under Federal Jurisdiction for Over a Century Leading Up to 1934

Under the M-Opinion federal jurisdiction is determined by analyzing whether the Federal Government's course of dealing with a tribe provides sufficient indicia that the tribe was under federal jurisdiction in 1934. AR000681. Thus, the first step of the two-part inquiry provides that probative evidence of federal jurisdiction includes "guardian-like action[s]," "engag[ing] in a continuous course of dealings," "educating Indian students at BIA schools," "the provision of health or social services to a tribe," "actions by the Office of Indian Affairs," and broadly "other types of actions not referenced herein . . . that evidence the Federal Government's obligations, duties to, acknowledged responsibility for, or power or authority over a particular tribe." *Id.*

The 2021 ROD properly concludes, that based on these indicia, that the Federal Government treated the Tribe as one over which it had the authority to exercise control and responsibility for over a century prior to 1934. The 2021 ROD found evidence of this assertion

of federal jurisdiction in the education of Mashpee students at Carlisle Indian School in the context of federal assimilationist policy in place at the time, as well as in the inclusion of the Tribe in federal reports, surveys, and censuses that the Federal Government used to recommend actions to take on behalf of tribes. Plaintiffs downplay this history as sparse and inconclusive, flippantly dismissing it as "tag you['re] it" jurisdiction and conflating recognition with jurisdiction by opining that the Tribe was effectively assimilated, ECF 45 at 15, 38, contrary to Interior's 2007 decision to federally recognize the Tribe. The record evidence shows the opposite: the Tribe's resolute survival in their ancestral territory despite sustained efforts to force assimilation upon them. 72 Fed. Reg. 8,007-09; AR014342-14345; AR014350-14422.

i. Mashpee Attendance at Carlisle Indian School Demonstrates Federal Jurisdiction Over the Tribe

As the D.D.C. found in *Mashpee*, "the education of Indian students at BIA schools" is unequivocally probative evidence of federal jurisdiction and Interior was required to consider such evidence in concert with other probative evidence on remand. *Mashpee*, 466 F. Supp. 3d at 221-23 (holding that the only evidence required is that the students were "educated by the federal government," regardless of the application process used by the school). Interior was further required on remand to evaluate whether the "management of student funds, vocational training, and the health-care services provided to the Mashpee students at the Carlisle School" is probative of federal jurisdiction. *Id.* at 223-24. The 2021 ROD complies with these mandates, persuasively explaining why the education of and control over Mashpee students at Carlisle Indian School in the context of the federal boarding school policy is highly probative of federal jurisdiction. ECF 1-3 at 17-20.

Interior explained that the enrollment of Mashpee students at Carlisle was part of the broader federal Indian boarding school system, the goal of which was to "civilize" and assimilate

tribes by separating Indian children from their community, educating them in Christian Anglo-American culture, and punishing them for carrying out the practices of their tribe, such as speaking their tribe's language. *Id.* at 17-18. The Mashpee children were enrolled because they were members of the Tribe and once enrolled were subjected to the same assimilative policies and federal control as all other students. *Id.* The Carlisle Indian School, in turn, exerted control over every aspect of the Mashpee students' lives including their "finances, physical health, and freedom of movement." *Id.* at 19. That the Federal Government applied the then-applicable assimilationist Indian policy to Mashpee children demonstrates that the United States considered the Tribe under its jurisdiction.

Plaintiffs, without support, sweepingly opine that this evidence lacks probative value. ECF 45 at 24-25. However, the D.D.C. already concluded that the education of individual students is probative under the M-Opinion and directed Interior to consider this evidence, despite Plaintiffs' arguments asserting that it only shows the education of a "handful" of students, rather than action toward the Tribe as a whole. *Compare* ECF 17-6 at 11-12 (asserting that the enrollment of a "handful of children in the Indian boarding school in Carlisle, Pennsylvania—two decades before the IRA was enacted—does not change the jurisdictional analysis;" that the students tribal status was only listed because they "self-identified as Mashpee;" and that the government was providing education for children regardless of whether their tribe was under federal jurisdiction) *with* ECF 45 at 24-25 (arguing again that "the time-limited, voluntary attendance of several Mashpee children at the school—two decades before the enactment of the IRA—is not probative of federal jurisdiction over the Tribe" but rather "dealings with individual Indians"). Tribes, however, are comprised of members; thus, programs applied to tribal members serve as evidence of actions taken with respect to tribes. *See Mashpee*, 466 F. Supp. 3d at 209,

219. Accordingly, the D.D.C. expressly rejected Plaintiffs' argument, finding that the M-Opinion *requires* the education of "Indian students" to be considered as probative evidence of "actions . . . for or on behalf of . . . tribal members." *Mashpee*, 466 F. Supp. 3d at 221-23. Interior was bound to find such evidence probative. The only determination left to the discretion of the agency on remand was how to weigh this evidence in concert with the record to determine the Tribe's status. Interior properly did so on remand.

That should be the end of the matter, as Plaintiffs' arguments concerning Interior's discussion of the federal boarding school policy fail to explain how Interior erred with respect to how it weighed this evidence. Plaintiffs also attempt to frame Interior's analysis as unsupported by the Administrative Record, arguing that Interior's decision rests on "extra-record" evidence. ECF 45 at 22. The 2021 ROD, however, cites to legal and authoritative public sources as well as Administrative Record documents when discussing the federal boarding school program and Carlisle Indian School specifically. ECF 1-3 at 17-20. The doctrine upon which Plaintiffs rely relates to post-hoc rationalizations an agency offers *in court* that are not included in the administrative record or challenged decision. *Mashpee*, 466 F. Supp. 3d at 222.[12] By definition, this doctrine does not apply to Interior's reasoning *in the decision itself* nor does it preclude Interior from relying on those sources in the 2021 ROD.

Plaintiffs further assert that the decision rests on the allegedly false reasoning that the Mashpee students were forcibly removed to attend Carlisle when they attended voluntarily. ECF 45 at 22. Plaintiffs' argument mischaracterizes the 2021 ROD, which never asserts that the Mashpee students were forcibly removed from their homes, but analyzes the students' attendance

[12] Plaintiffs improperly rely on extra-record evidence in arguing their case. *See*, *e.g.*, ECF 45 at 22-23. In this APA case the decision must be based on the Administrative Record Interior provided to the Court, not a new record Plaintiffs seek to create in briefing. *Lorion*, 470 U.S. at 743-44.

at Carlisle in the broader context of federal boarding school policy, including forced removal as one of many tools of assimilation.[13] ECF 1-3 at 17-20. Mashpee students' attendance at Carlisle is probative evidence of federal jurisdiction *regardless* of how they came to be enrolled. *Mashpee*, 466 F. Supp. 3d at 221-22. Further, their attendance cannot be separated from its historical context or the fact that the Federal Government applied that policy to the Tribe and its children. Once enrolled, the Mashpee students were subject to the same assimilative policies as their peers. ECF 1-3 at 18-20. For example, students, including adults, had to seek permission to leave the school and return to their homes. *Id.*; *see also* AR000758. Disbursements for their education were made from the "civilization fund." AR9038, AR9081-9084 (AR Part 5). And the school was funded in part through student labor.[14] AR9038 (AR Part 5).

Plaintiffs ask the Court to look selectively at the way they characterize how Mashpee students arrived to Carlisle, ignore Interior's discussion of the control exercised over those students once enrolled, and assume that their experience was detached from overarching federal policy. Plaintiffs' efforts to convince the Court to review the 2021 ROD in a manner inconsistent with APA review should be rejected. Plaintiffs fail to show that Interior mischaracterized the Mashpee students' enrollment at Carlisle. Interior properly concluded, consistent with the D.D.C.'s remand directives, that such evidence is probative of federal jurisdiction.

[13] While parents may have signed consent forms to send their children to Carlisle, often Native Americans were forced into signing such forms under the threat of not obtaining food and other services from the government. *See*, *e.g.*, 25 U.S.C. § 283 (allowing Interior to withhold support from Indian families for a child's failure to attend school). Unlike Plaintiffs' ahistorical framing of the issues, the 2021 ROD provides important and relevant context to explain why this evidence is probative of the Tribe's status.

[14] Plaintiffs point to statements by federal officials questioning whether Mashpee students were eligible to enroll at Carlisle and that students from tribes "like the Mashpee" had been disenrolled from the school. ECF 45 at 23 n.12. However, as the 2021 ROD explains, the evidence demonstrates that Mashpee students successfully enrolled. ECF 1-3 at 19.

ii. Mashpee's Inclusion in Federal Reports and Surveys Demonstrate Federal Jurisdiction Over the Tribe

As the D.D.C. found, federal reports and surveys of Indian populations used to recommend federal policy qualify as "actions" sufficient to establish "federal obligations, duties, responsibility for or authority over the tribe." *Mashpee*, 466 F. Supp. 3d at 228. Thus, Interior was required to consider such evidence probative and weigh it in concert with other probative evidence on remand, *id.*, which it did, ECF 1-3 at 13-17, 21-23. Specifically, the 2021 ROD reasonably found that four federal reports and surveys met this criteria: the Morse Report, McKenney Letters, Schoolcraft Report, and 1890 Commissioner's Report. ECF 1-3 at 13-17, 21-23. The D.D.C. concluded that: (1) the Morse Report was probative evidence of federal jurisdiction because it was used to make recommendations regarding removing tribes from their ancestral homelands, providing evidence that the United States considered Mashpee under its jurisdiction; (2) Interior could not dismiss the McKenney Letters without explanation; (3) Interior could not dismiss the Schoolcraft Report, which was prepared with congressional funds to propose a plan to improve the Mashpee Tribe, without distinguishing past agency decisions finding similar evidence probative; and (4) Interior could not dismiss the 1890 Commissioner's Report without distinguishing past agency decisions finding the very *same* evidence probative. *Mashpee*, 466 F. Supp. 3d at 231-34. The 2021 ROD's consideration of this evidence complies with the D.D.C.'s order and should be upheld. ECF 1-3 at 13-17, 21-23.

The 2021 ROD finds the Morse report probative, explaining that it was prepared as a part of the Federal Government's first initiatives to "civilize" Indians through the removal of tribes from their homelands. *Id.* at 13-15. Consequently, the Mashpee's inclusion in the Morse Report demonstrates that federal officials believed that the Tribe was under federal jurisdiction such that the Federal Government possessed the authority to remove the Tribe from its ancestral territory,

even though the Report ultimately recommended against removal. *Id.* The McKenney Letters provide similar evidence in that they discussed the Tribe in the same removal context and were used for congressional recommendations. *Id.* at 15-16. The Schoolcraft Report, prepared by the Office of Indian Affairs and funded by Congress, proposed plans to merge the Mashpee with other tribal communities to improve federal supervision. *Id.* at 21-22. Finally, the 1890 Report, prepared by the Commissioner of Indian Affairs, acknowledges the Tribe as falling under the continuing jurisdiction of that office. *Id.* at 22-23. These conclusions are consistent with past agency decisions treating similar reports and surveys as probative. *See*, *e.g.*, *County of Amador v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1193, 1208 (E.D. Cal. 2015) (finding probative a report analogous to the Morse and Schoolcraft Reports); *Village of Hobart v. Acting Midwest Reg'l Dir.*, 2013 WL 3054077, at *11, 57 IBIA 4, 20 (IBIA May 9, 2013) (finding probative inclusion of a tribe in the Commissioner's annual report).

Plaintiffs once again seek to relitigate *Mashpee*, claiming that the aforementioned evidence constitutes merely "reports without consequences that are not probative evidence of [under federal jurisdiction]," and assert that the studies show only a tabulation of all Indians rather than jurisdiction over a tribe. *Compare* ECF 45 at 30-31 *with Mashpee*, 466 F. Supp. 3d at 229 (discussing the argument that the Morse report was merely a "passive compilation of general information about tribes").[15] The D.D.C. expressly rejected this argument, holding that such reports must be considered consequential and probative if used for recommendations evincing federal jurisdiction, *Mashpee*, 466 F. Supp. 3d at 229-30, as Interior has demonstrated here, ECF 1-3 at 13-17, 21-24.

[15] Plaintiffs' statements that the evidence shows Mashpee was not "organized as a tribe" or "recognized," ECF 45 at 30-31, conflates the Tribe's federal recognition with jurisdiction, a legal argument refuted in detail *infra* Section III.

Plaintiffs also incorrectly rely on cases that predate the Tribe's 2007 federal recognition, which evaluated the Tribe's status in the context of other statutes. ECF 45 at 30-32. These arguments conflate tribal recognition with federal jurisdiction, but the Tribe's federal jurisdictional status was the sole issue Interior had to evaluate on remand. *Mashpee*, 466 F. Supp. 3d at 236. As explained *supra* pp. 4-7, the M-Opinion and Justice Breyer's concurrence in *Carcieri* make clear that a tribe need not be recognized in 1934 in order to be under federal jurisdiction at that time. AR000685-88; *Carcieri*, 555 U.S. at 398-99. As discussed below, *infra* Section III, cases evaluating the tribal status of Mashpee for the purposes of the Indian Nonintercourse Act or other statutes have no bearing on the question of whether the Tribe was under federal jurisdiction in 1934 under the IRA. And again, Plaintiffs seek to relitigate the issues they argued before the D.D.C. ECF 17-6 at 7 n.2. Their arguments failed there and likewise should gain no traction here.

Plaintiffs finally assert that the 2021 ROD is arbitrary and capricious because the 1890 Commissioner's Report shows clear evidence of state jurisdiction, rather than federal jurisdiction.[16] ECF 45 at 32-34. The 2021 ROD explains why this argument is unavailing. Though state jurisdiction was asserted, the 1890 Report demonstrates a clear federal-tribal relationship as well as federal authority over the Tribe and its land. ECF 1-3 at 22-23. Moreover, the assertion of state jurisdiction in no way ousts federal jurisdiction. *Id.* at 30-31. Importantly, Interior explains that such "[f]ederal authority over Indians affairs [could not] be constrained or supplanted by state activity or policy" . . . or "surrendered by acquiescence." *Id.* at 31; *see also United States v. John*, 437 U.S. 634, 653 (1978) ("[T]he fact that federal supervision over [an

[16] This argument too was raised and found unpersuasive by the D.D.C. However, the Court's holding in regard to the 1890 Report focused only on the 2018 ROD's failure to acknowledge conflicting agency precedent. *Mashpee*, 466 F. Supp. 3d at 231-32.

Indian tribe] has not been continuous [does not] destroy[] the federal power to deal with them."); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (the Federal Government can maintain a relationship with Indians on the basis of protecting land even where in all other respects it has not dealt with them). Plaintiffs, therefore, focus on state jurisdiction in a vacuum, failing to establish that the Commissioner's Report terminated federal authority. Interior sufficiently addresses the significance of the Commonwealth's assertion of jurisdiction over the Tribe and explains the Reports' probative value in spite of it. ECF 1-3 at 22-23; *id.* at 30-31. Plaintiffs' arguments to the contrary fail to demonstrate that the 2021 ROD is arbitrary, capricious, or otherwise in error.[17]

iii. Mashpee's Enumeration in Federal Censuses Demonstrates Federal Jurisdiction over the Tribe

Interior has consistently treated enumeration on federal censuses as probative evidence of federal jurisdiction, and courts have upheld such treatment. *See Grand Ronde*, 830 F.3d at 566; *No Casino in Plymouth*, 136 F. Supp. 3d at 1184; *County of Amador*, 136 F. Supp. 3d at 1208, 1210; *Village of Hobart*, 2013 WL 3054077, at *24-25; AR0005527-28 (AR Part 5). For that reason the D.D.C. vacated the 2018 ROD after Interior improperly dismissed such evidence in that decision as not probative, failed to analyze certain censuses entirely, distinguished others from past Interior decisions without sufficient reasoning, and rejected boarding school censuses with the same inaccurate arguments used to dismiss the education of Mashpee students. *Mashpee*, 466 F. Supp. 3d at 225-28. Finding that approach arbitrary and capricious, the D.D.C. required Interior to analyze *all* census evidence and explain its conformity with or departure

[17] In *Village of Hobart*, the tribe's inclusion in these same reports was found probative. 2013 WL 3054077, at *10. Plaintiffs assert that case is distinguishable because the tribe was assigned "to the jurisdiction of a BIA agency," while the Mashpee were not, suggesting that the evidence was relevant only due to its connection to a BIA agency. ECF 45 at 33 n.19. Plaintiffs ignore, however, that the tribe's inclusion in the report demonstrated it was under federal jurisdiction, independent of the tribe's connection to the BIA agency at the time.

from past precedent on remand. *Id.* at 225, 227 (rejecting conclusory dismissals and unreasoned distinctions between the Mashpee censuses and others).

Interior's reasoning in the 2021 ROD brings the decision in line with the agency's historical treatment of census evidence. The 2021 ROD accurately finds probative the Mashpee-specific census counts that were carried out by federal agents with congressional authorization, including authorization by the 1884 Act, which required a count of Indians under the charge of federal agencies. ECF 1-3 at 24-25. Considered in concert with the annual reports, the census evidence shows that the government viewed the Tribe as under its jurisdiction and maintained a clear obligation to report on the Tribe's status to recommend actions on its behalf. *Id.* at 25.

Plaintiffs again raise arguments that were rejected by the D.D.C., hoping to obtain a contrary ruling from this Court. As in *Mashpee*, Plaintiffs assert that the censuses are not probative because they were not conducted by the Office of Indian Affairs pursuant to the 1884 Act, but were merely enumerated in general censuses of all Indians. ECF 45 at 34. And just as in the D.D.C., Plaintiffs fail to state why these distinctions matter. Moreover, Plaintiffs ignore that the Carlisle censuses were carried out pursuant to the 1884 Act, ECF 1-3 at 25, which they concede is probative, ECF 45 at 35. Plaintiffs once again seek to dismiss the censuses based on their flawed argument that the evidence of enrollment at Carlisle is not probative. Based on this, they argue the Carlisle census rolls cannot be either. *Id.* at 36. The D.D.C. rejected these arguments, *Mashpee*, 466 F. Supp. 3d at 224-27, and this Court should as well.

Plaintiffs' only new argument refers to a single statement in the Office of Indian Affairs survey that "[s]ome tribes, particularly in the East" were not considered under federal jurisdiction and thus not counted. ECF 45 at 35. This statement, however, is inconclusive because it fails to identify which tribes it references and is subject to the caveat that "[t]here is

not a census for every reservation or group of Indians for every year, [because] it was not always possible to take a census on some reservations[] and some rolls were lost over the years." *See* AR0006964 (AR Part 5). Plaintiffs leap from this single inconclusive statement to conclude that all census evidence enumerating the Tribe is insufficient, thus undermining the probative value of the censuses altogether. Interior provided sound reasoning for incorporating census evidence as probative in the 2021 ROD and appropriately read it in concert with other evidence.

B. Interior Properly Found that the Mashpee Tribe's Federal Jurisdiction Remained Intact in 1934

The second step of the M-Opinion inquiry examines whether a tribe's jurisdictional status remained intact in 1934. AR000681. Ambiguity as to a tribe's jurisdictional status in 1934 is not dispositive because the "[government's] failure to take any actions towards or on behalf of a tribe [in or around 1934] does not necessarily reflect a termination or loss of the tribe's jurisdictional status." AR000682. Even "federal officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent congressional action." *Id.* As the M-Opinion explains, "Congress's authority over tribes cannot be divested absent express intent by Congress." AR000680. Thus, the absence of evidence *in 1934* confirming a tribe's jurisdictional status is not a bar to finding that such tribe was under federal jurisdiction in that year. *Id.*; *see also Grand Ronde*, 830 F.3d at 566. This is consistent with Justice Breyer's concurrence. *Carcieri*, 555 U.S. at 397-99 (reasoning that tribes could be under federal jurisdiction despite contrary earlier actions or statements by federal officials to the contrary).

There is no evidence that Congress terminated its jurisdiction over the Mashpee Tribe either before or after 1934. The record instead demonstrates that some federal officials' contemporaneous statements to the contrary were factually inaccurate and legally insufficient to terminate federal jurisdiction over the Tribe. ECF 1-3 at 26-29. Federal officials at that time

ignored key evidence of federal jurisdiction and incorrectly assumed that the government owed no financial responsibility to the Tribe based on practical budgetary failures rather than a legal termination of jurisdiction.[18] *Id.* at 28-29. Moreover, these statements disregarded Interior's own contemporaneous understanding of the Mashpee Tribe described in a report prepared in 1934 by Bureau of Indian Affairs special investigator Gladys Tantaquidgeon. *Id.* at 23. This report provided a detailed account of the Tribe that was used by the Office of Indian Affairs to secure funding for the education of Mashpee children.[19] *Id.* Termination cannot be inferred from letters from agency officials, especially against the backdrop of contradictory evidence. Neither the IRA, *Carcieri*, nor any other precedent supports such a finding.

Plaintiffs nonetheless assert that Interior "dismiss[ed]" Commissioner Collier's letters, which they seek to elevate as controlling on the question of the Tribe's 1934 status. ECF 45 at 17-18. Principally, Plaintiffs claim that Commissioner Collier's statements are "unusually persuasive" because of his role in drafting the IRA and were considered "highly probative" in *Carcieri*. *Id.* at 17-20. But this argument ignores the legislative history of the IRA and the directives of the M-Opinion and further distorts both the majority and concurrence in *Carcieri*.

Though Commissioner Collier helped draft the IRA, the legislative history of the Act shows that during a Senate hearing considering legislation that would eventually be enacted as the IRA, Collier proposed adding the phrase "now under Federal jurisdiction" to the definition of

[18] Plaintiffs mischaracterize the 2021 ROD's consideration of "practical budgetary constraints," asserting that Interior viewed these constraints as "false." ECF 45 at 18 n.6. The 2021 ROD does not state these practical considerations were false or non-existent, it states that these practical constraints lead Collier to the false belief that the Tribe was outside the purview of federal Indian programs. Interior's reasoning for this determination follows this conclusion.

[19] Plaintiffs dismiss Ms. Tantaquidgeon as a "college student." ECF 45 at 19 n.8. At the time of drafting, she was a college *graduate* employed by the Bureau of Indian Affairs, and the report was funded and prepared for official government purposes in this role. ECF 1-3 at 23. As a member of the Mohegan Tribe, Ms. Tantaquidgeon worked for the Bureau of Indian Affairs as a special investigator from 1934-1947, after which time she joined Interior's Indian Arts and Crafts Board to preserve traditional skills and arts and to revive fading cultural practices. AR006213.

"Indian" in response to competing concerns about the scope of the proposed legislation. AR000671-74. After proposing its addition the "hearings concluded without explanation of the phrase's meaning," and no subsequent hearings took up the meaning of the phrase again. AR000673. *See also Grand Ronde*, 830 F.3d at 561. Further, the majority in *Carcieri* found Collier's statements persuasive only as to the definition of "now," meaning 1934, which has no bearing on the meaning of "under federal jurisdiction." *Carcieri*, 555. U.S. at 390-91, 397. In fact, Justice Breyer's concurrence confirms that Interior wrongly excluded Indian tribes from the IRA's benefits in the years following the statute's enactment when Collier was leading the agency's effort to implement the IRA. *Id.* at 397-98*; see also Grand Ronde*, 830 F.3d at 565-66 (finding Collier's statement that Cowlitz tribe was "no longer in existence as a communal entity" mistaken and did not foreclose finding of under federal jurisdiction in 1934).

Given this context, the 2021 ROD reasonably concluded that statements by federal officials, including Collier, were not definitive proof that the Mashpee Tribe was not under federal jurisdiction in 1934. Plaintiffs urge the Court to review such statements in isolation, contending that they should be dispositive in the analysis. ECF 45 at 17-18. The D.D.C., however, required Interior to not view evidence in isolation, but rather "in concert" with other evidence. *Mashpee*, 466 F. Supp. 3d at 218. Interior followed the dictates of the remand, considering the historical record in its entirety—including Collier's statements—and reasonably concluded that the record, on balance, confirms that the Tribe was under federal jurisdiction prior to and in 1934. As Plaintiffs told the D.D.C., "Interior has the resident expertise necessary to evaluate tribal historical evidence and make informed judgments about whether a tribe was under its jurisdiction in 1934." ECF 17-5 at 8. Plaintiffs have failed to demonstrate otherwise here, and the Court should therefore uphold the 2021 ROD.

III. PLAINTIFFS FAIL TO DEMONSTRATE ANY ERROR WITH THE M-OPINION OR ITS APPLICATION TO THE TRIBE

Plaintiffs do not directly challenge Interior's interpretation of either "recognized Indian tribe" or "under Federal jurisdiction" in the First Definition—that is, they do not allege that the M-Opinion reflects an improper interpretation of the IRA. Plaintiffs, however, level collateral attacks on the M-Opinion rooted in their challenge to Interior's conclusion that the Mashpee Tribe was under federal jurisdiction in 1934.

Whether direct or indirect, Plaintiffs' challenge to the M-Opinion fails. Plaintiffs conceded that the M-Opinion "expressly implements the dictates of *Carcieri*," ECF 17-7 at 9, before the D.D.C., and concede here that the Tribe's status as a federally recognized tribe confirms Mashpee is a "tribe" under the IRA, ECF 45 at 26. Although the D.D.C.'s remand required Interior to apply the M-Opinion to the Tribe, *Mashpee*, 466 F. Supp. 3d at 236, Plaintiffs now contend that a finding that Mashpee satisfies the First Definition's requirements somehow requires a separate finding that the Tribe is a "tribe" within the meaning of irrelevant federal common law tests, ECF 45 at 27-28. Plaintiffs further argue that the M-Opinion is inconsistent with *Carcieri*, *id.* at 15, 37, and that *Carcieri*'s discussion of the Narragansett's status mandates that this Court find that the Mashpee Tribe was not under federal jurisdiction in 1934, *id.* at 15-17. Plaintiffs' arguments are distractions from the issues the Court actually has to examine in this case. Moreover, their arguments fail because, as explained below, Interior's interpretation of "recognized Indian tribe" and "under Federal jurisdiction" in the First Definition of "Indian," as set forth in the M-Opinion, is reasonable as confirmed by the D.C., Ninth, and Second Circuits and Plaintiffs have failed to demonstrate otherwise.

A. Plaintiffs' Resort to Inapposite Case Law Concerning Tribal Status Fails to Demonstrate Error

As set forth above, the Tribe's federally recognized status satisfies the "recognized Indian tribe" requirement of the First Definition. Plaintiffs concede this point. ECF 45 at 26. That should be the end of the matter. Plaintiffs, however, conflate "recognition" and "jurisdiction," arguing—without textual or logical support—that for the Tribe to be under federal jurisdiction in 1934 it must also have been a "tribe" within the meaning of a federal common law test developed long prior to the IRA and in a very different statutory context.[20] Plaintiffs contend, again without authority, that there are "different definitions of 'Indian tribe'" and that "[e]ach of the three different avenues for federal recognition entails a different legal standard for determining what constitutes a 'tribe.'" *Id.* at 26-27. Plaintiffs do not describe those "different legal standards"—but more importantly, they fail to explain their relevance to this case or why the IRA would use the term "under federal jurisdiction" to mean "tribe," a term employed almost immediately prior in the *separate* phrase, "recognized Indian tribe." That counterintuitive suggestion flouts the standard canon of statutory interpretation that Congress means different things when it includes different phrases in the same provision. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016) (courts should presume that use of different words "within the same statutory scheme is deliberate, so the terms ordinarily should be given differing meanings") (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

Whether an entity is an Indian tribe under federal law is confirmed by a tribe's inclusion on Interior's official, annual list of federally recognized tribes. *See*, *e.g.*, Indian Entities

[20] The IRA defines "tribe" as including "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," 25 U.S.C. § 5129, further calling into question Plaintiffs' assertion that to be a "tribe" under the IRA requires compliance with pre-IRA common law tests.

Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4,636 (Jan. 28, 2022).[21] Additionally, Interior's federal recognition regulations have replaced the common law criteria for determining whether an entity is a "tribe" "from historical times to the present," 25 C.F.R. § 83.7(b) (2007), which Plaintiffs do not dispute, ECF 45 at 26 n.15 (stating that Interior regulations "now govern the acknowledgement of Indians"). Plaintiffs also do not dispute that satisfying these regulatory requirements confirms that an entity is a "tribe" under the IRA. *Id.* at 26. Thus, Mashpee's federally recognized status, confirmed in 2007, establishes that it is a "recognized Indian tribe" for the purposes of the First Definition of Indian in the IRA.[22]

Ignoring this context and the relevant requirements under the IRA, Plaintiffs argue, based on their analysis of *Montoya v. United States*, 180 U.S. 261 (1901), that the Mashpee was "not a tribe" in 1934 under the federal common law test articulated in that case.[23] ECF 45 at 27-28, 31-32. It is not clear whether Plaintiffs contend that *Montoya* should have controlled Interior's 2007 decision to federally recognize the Tribe, or should somehow apply now in interpreting the phrases "recognized Indian tribe" or "under Federal jurisdiction." Either way, the *Montoya* test is irrelevant to the disposition of this case. *Montoya* and its progeny address separate questions under different standards—*i.e.*, tribal status determinations under very different statutes, enacted in an earlier era—and thus, Plaintiffs' resort to them here fails to demonstrate any agency error

[21] Congress and Interior, through the modern federal recognition administrative process, have created "measures [that] have largely, but not completely, supplanted the federal judicial role in determining which native groups qualify as Indian tribes or nations for the purposes of federal law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[1] (discussing statute requiring Interior to publish an annual list of federally recognized tribes, and agency regulations governing federal recognition, codified at 25 C.F.R. Part 83).
[22] Plaintiffs cannot challenge the Tribe's federally recognized status, as such claim is barred by the six-year statute of limitations. *See Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998).
[23] Plaintiffs also cite to *Elk v. Wilkins*, 112 U.S. 94, 108 (1884), for the proposition that "Indians in Massachusetts" were "remnants of tribes never recognized . . . as distinct political communities." ECF 45 at 25. As is the case with *Montoya* and its progeny, *Wilkins* is irrelevant to the question of whether the Mashpee are a "recognized Indian tribe" for the purposes of the IRA.

with respect to the interpretation of either "recognized Indian tribe" or "under Federal jurisdiction" in the M-Opinion.

Montoya dealt with a case originally brought in the Court of Claims under the Indian Depredation Act, 26 Stat. 851 (Mar. 3, 1891), which conferred jurisdiction on that court to adjudicate claims for property taken or destroyed by "Indians belonging to any band, tribe, or nation, in amity with the United States." To determine whether the Court of Claims had properly exercised jurisdiction, the Supreme Court evaluated whether the Indians accused of depredations were members of a "tribe." *Montoya*, 180 U.S. at 266. Because the Act contained no definition of "tribe," the Court devised one: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266.

Plaintiffs' reliance on subsequent cases applying the *Montoya* test are likewise inapposite. In *United States v. Candelaria*, 271 U.S. 432 (1926), the Court applied the *Montoya* definition in the context of the Indian Nonintercourse Act, 25 U.S.C. § 177, which also did not define "tribe." Thus, *Candelaria* also has no bearing on the issues here. Plaintiffs' discussion of the Mashpees' Indian Nonintercourse Act litigation in the 1970s and 1980s fares no better. *See* ECF 45 at 28 (citing *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979)); *see also* ECF 45 at 31 (citing *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 483 (1987)). Again, at issue in those cases was whether the Mashpee "constitute[d] an Indian tribe" for purposes of the Indian Nonintercourse Act and, consistent with *Candelaria*, the trial court relied on *Montoya* in crafting its jury instructions. Such inquiry is irrelevant to this case.

When evaluating the Tribe's petition for federal recognition Interior expressly considered the findings made in the Tribe's Indian Nonintercourse Act litigation, but ultimately found that the findings were not controlling on the agency, as "the standards and definitions of a tribe used by th[o]se witnesses differ[ed] substantially from the requirements in the seven mandatory criteria of the regulations." 72 Fed. Reg. at 8,008. Interior explained that the measure of what constitutes a "tribe" applied by witnesses in the Nonintercourse Act litigation—the existence of "cultural distinctiveness and economic autonomy from the wider society"—is not required by the Federal acknowledgement regulations, which instead "require the petitioner to be a socially distinct group of people within the wider society." *Id.*; *see also* 25 C.F.R. § 83.7(b).

The Mashpee Tribe is a federally recognized Indian tribe, which Plaintiffs cannot challenge now, and Plaintiffs agree that such status confirms it is a "tribe" under the IRA. ECF 45 at 26. Interior's conclusion on this issue should thus be upheld. *Amador Cnty.*, 872 F.3d at 1024-25; *Grand Ronde*, 830 F.3d at 560-63. Plaintiffs' attempt to import the *Montoya* test into the First Definition has no basis in the IRA, *Carcieri*, or any other precedent.

B. The *Carcieri* Decision Does Not Foreclose Interior's Interpretation of "Under Federal Jurisdiction" or the Two-Part Inquiry it Established

Plaintiffs argue that the M-Opinion and the 2021 ROD violate *Carcieri*, including Justice Breyer's concurrence, ECF 45 at 15-17, 29, 38-39, but Plaintiffs fail to prove up such claims. First, Plaintiffs wrongly contend that "Interior's M-Opinion is divorced from Justice Breyer's clear statement that any such significant jurisdiction-conferring event be in effect in 1934," characterizing the M-Opinion's analysis as a "'tag you['re] it' concept of federal jurisdiction [that] seriously distorts Justice Breyer's concurrence and constitutes legal error." ECF 45 at 38. Justice Breyer, however, never states that there must be affirmative evidence *in 1934* confirming a tribe's status rather than the "absence of any probative evidence that a tribe's jurisdictional

status was terminated" as the M-Opinion contemplates. AR000682. Indeed, one of the three examples of jurisdiction cited by Justice Breyer—a pre-1934 congressional appropriation—is not an action that would be "in effect" in 1934. *Carcieri*, 555 U.S. at 399. It is thus wholly consistent with Justice Breyer's concurrence to consider probative congressional actions taken many years before 1934, after which point the Federal Government's jurisdiction may have been dormant but nevertheless intact. *See* AR000682; *Amador Cnty.*, 872 F.3d at 1027 (citing *John*, 437 U.S. at 653 ("[T]he fact that federal supervision over [a tribe] has not been continuous" does not "destroy[] the federal power to deal with" that tribe.)). Plaintiffs' reading of Justice Breyer's concurrence cannot be squared with its text.

Plaintiffs further contend that the M-Opinion "deviates" from Justice Breyer's concurrence "every time it identifies as potential jurisdiction-conferring acts minor federal contacts that are not akin to a federal treaty, congressional appropriation, or enrollment in Office of Indian Affairs," and that the "concurrence makes clear that any federal act that could be considered 'jurisdictional' cannot be a casual contact with a tribe, but something more substantial." ECF 45 at 29, 38. Plaintiffs improperly read into Justice Breyer's concurrence a binding set of criteria where none exists. Justice Breyer's "examples" of indications of federal jurisdiction, *Carcieri*, 555 U.S. at 399, are not an exhaustive catalogue.

Plaintiffs' attempt to recast Justice Breyer's examples as an exhaustive list is inconsistent with the heart of his concurrence: that some tribes may have been under Federal jurisdiction in 1934 "even though the Department did not know it at the time." *Carcieri*, 555 U.S. at 398. Plaintiffs would turn Justice Breyer's concurrence—explaining why the "under Federal jurisdiction in 1934" requirement is *less* limiting than it might first appear—on its head, mischaracterizing it as establishing a narrow, finite list of evidence necessary to demonstrate a

tribe's "under Federal jurisdiction" status. The Court should reject such a misreading of the case, just as other courts have rejected such arguments. *E.g.*, *Grand Ronde*, 830 F.3d at 564-66.

Plaintiffs further err in suggesting that *Carcieri* precludes or constrains Interior's interpretation of the phrase. *See* ECF 45 at 38 (maintaining that the M-Opinion created a "standardless" test that "violates the majority in *Carcieri*"). Not only did Plaintiffs already concede to the D.D.C. that the M-Opinion "expressly implements the dictates of *Carcieri*," ECF 17-7 at 9, Plaintiffs ignore that numerous courts have upheld the test against similar challenges. *Mashpee*, 466 F. Supp. 3d at 228 (M-Opinion requires that evidence show that the Federal Government actually took one or more actions with respect to the tribe, as opposed to relying on the general, plenary power to act). *See also Amador Cnty.*, 872 F.3d at 1026-27; *Grand Ronde*, 830 F.3d at 563-65; *Cent. N.Y. Bus. Ass'n*, 2015 WL 1400384, at *5-7.

Moreover, Plaintiffs' suggestion that the M-Opinion was only upheld in *Grand Ronde* because the record before the D.C. Circuit was "vastly different" from the one before this Court, ECF 45 at 38-39, represents a critical misunderstanding of that decision and the role of judicial review of an agency's statutory interpretation. The D.C. Circuit properly "employ[ed] the familiar *Chevron* [two-step] analysis" to determine that the phrase "under Federal jurisdiction" in the IRA was ambiguous, and then analyzed Interior's interpretation and concluded that such interpretation was reasonable. *Grand Ronde*, 830 F.3d at 558, 563. Only then did the court evaluate the Cowlitz Tribe's historical record to consider whether to uphold Interior's determination that the Cowlitz Tribe was under federal jurisdiction in 1934. *Id.* at 564-66. Nothing in *Grand Ronde* suggests that the court upheld Interior's interpretation of the *statute* because of the Cowlitz Tribe's *history*.

C. The Court Should Reject Plaintiffs' "Narragansett Comparison Test"

Plaintiffs seek to circumvent the reasoned analysis required by the M-Opinion and the D.D.C.'s remand directives in favor of a test of Plaintiffs' own invention. Under their newly-minted "Narragansett Comparison Test," Plaintiffs ask the Court to find, as a matter of law, that the Tribe was not "under Federal jurisdiction" in 1934 because the Supreme Court held that the Narragansett was not and, in Plaintiffs' opinion, the history of the Mashpee is "indistinguishable" from that of Narragansett. ECF 45 at 15-17. Thus, Plaintiffs conclude, "*Carcieri* forbids" Interior from finding otherwise. *Id.* at 11. Much like their attempt to divert the Court's attention away from Mashpee's IRA eligibility by appealing to the irrelevant *Montoya* test, Plaintiffs ask the Court to veer from the task at hand—determining whether the 2021 ROD was arbitrary and capricious—and embark on an uncharted path unmoored from legal precedent.

First, the D.D.C. already considered Plaintiffs' arguments that *Carcieri*'s determinations regarding Narragansett "compelled" that court to conclude Mashpee was not under federal jurisdiction in 1934 and flatly rejected them. *Mashpee*, 466 F. Supp. 2d at 215 n.9 ("the Supreme Court's decision did not mandate such an outcome"). The Court should find the same here.

Second, whether a tribe was "under Federal jurisdiction" in 1934 is a tribe-specific analysis, not a comparative one. Interior must conduct a "fact and tribe-specific" inquiry to determine whether a tribe was under Federal jurisdiction in 1934. AR000681. In reversing and remanding the 2018 ROD, the D.D.C. expressly rejected Interior's "compari[son of] the totality of the Cowlitz Tribe's evidence with the totality of the Mashpee Tribe's evidence" as "inconsistent with the M-Opinion, the Department's prior decisions that apply the M-Opinion, and judicial precedent." *Mashpee*, 466 F. Supp. 3d at 221. The opportunities for inconsistency and injustice inherent in determining whether one tribe was under Federal jurisdiction based on a

side-by-side comparison to another tribe should be apparent—particularly for Eastern tribes which, due to their unique history, have had a different relationship with the Federal Government than many western tribes, including Cowlitz. This is why Plaintiffs' chart purporting to compare Plaintiffs' unsubstantiated characterizations of the historical evidence of various Indian tribes, ECF 45 at 17 n.4, 43, is beside the point. That Plaintiffs argue Interior should engage in the very type of comparative analysis that the D.D.C. held was error in the 2018 ROD reveals their effort to obscure the relevant questions and relitigate issues the D.D.C. already addressed.

Third, not only is a tribe-to-tribe comparison inappropriate as a general matter, such an approach would be particularly inapt here because the majority in *Carcieri did not engage in a substantive analysis of the Narragansett's jurisdictional status in 1934*.[24] Nor was the issue argued in the lower courts. As Interior explained, "[t]he issue of whether the Narragansett Tribe was 'under Federal jurisdiction in 1934' was not considered by the BIA in its decision, nor was evidence concerning that issue included in the administrative record before the courts" because "the Department's long standing position"—prior to *Carcieri*—was that the IRA applied to all federally recognized tribes." AR000665 n.15. As a result, the Court's finding on Narragansett's "under Federal jurisdiction" status was that "[n]one of the parties or *amici*, including the Narragansett Tribe itself, ha[d] argued that the Tribe was under federal jurisdiction in 1934," and no record evidence was before the Court to support such a finding. *Carcieri*, 555 U.S. at 395-96.

This case could not be more different. Here, Interior fully considered whether Mashpee was "under Federal jurisdiction in 1934," as that was the entirety of its task on remand from the D.D.C. *Mashpee*, 466 F. Supp. 3d at 236. The 2021 ROD and the Administrative Record before this Court, in stark contrast to the record in *Carcieri*, is fully developed on this issue. This critical

[24] Indeed, Justice Souter, joined by Justice Ginsburg, concurring in part and dissenting in part, opined that the Court should have remanded the case back to Interior to conduct the analysis. *Carcieri*, 555 U.S. at 400-01.

distinction has been confirmed by the D.D.C. and other courts. *See Mashpee*, 466 F. Supp. 3d at 215 n.9 (rejecting that *Carcieri* mandates a finding that the Mashpee were not under federal jurisdiction because the record there "accepted as fact" that the Narragansett were not under federal jurisdiction); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1183-84 (E.D. Cal. 2015), *rev'd on other grounds*, 698 Fed App'x 531 (9th Cir. 2017) (finding that, in contrast to *Carcieri*, Interior had "argue[d] heavily—and the administrative record is replete with documentation . . . in support—that the Ione Band was under federal jurisdiction in 1934.").

The Court's holding in *Carcieri* that the Narragansett were not under federal jurisdiction in 1934 was based on a narrow and undeveloped record and the conclusion was reached without the Court's consideration of the meaning of the phrase "under Federal jurisdiction." The majority opinion in *Carcieri*, therefore, is clearly not as Plaintiffs argue "binding authority that compels rejection of the Mashpees," ECF 45 at 16—or any other Indian tribe—under the First Definition. Plaintiffs' argument asks the Court to exclude Mashpee from the remedial protections of the IRA solely because *Carcieri* found—on *non-substantive grounds*—that another tribe was so excluded. Such a result would be manifestly unjust not only to Mashpee but to countless other tribes seeking to further their self-governance goals pursuant to the IRA. The Court should reject Plaintiffs' efforts at distraction from the real task at hand: to evaluate whether, consistent with the APA standard of review, Interior's determination that the Tribe was under federal jurisdiction in 1934 should be upheld.

IV. INTERIOR'S GAMING DETERMINATION IS REASONABLE, SUPPORTED BY THE ADMINISTRATIVE RECORD, AND SHOULD BE UPHELD

Interior concluded in the 2021 ROD that, *inter alia*, the Property is "within an area where the [T]ribe has significant historical connections," ECF 1-3 at 39, rendering the lands eligible for gaming under IGRA, *id.* at 32-56. Plaintiffs abandoned their claim that the Tribe lacked such

significant historical connections, ECF 1 at 21-23 (¶¶ 126-38), by failing to advance such arguments in their Brief. Plaintiffs' claim would fail on the merits in any event. Additionally, Plaintiffs' argument that the Property cannot constitute an "initial reservation" under IGRA is unsupported by that statute or any other binding authority and should be rejected.

A. Plaintiffs Waived Their Claim that the Mashpee Tribe Lacks a Significant Historical Connection to Taunton

On August 1, 2022, Plaintiffs were required to move for summary judgment "on all claims" in their Complaint. *See* ECF 42 at 2. Plaintiffs' Brief only advances arguments on their First and Third Causes of Action, and not their Second, in which Plaintiffs took issue with Interior's finding that the Tribe has a "significant historical connection" to Taunton, Massachusetts. ECF 1 at 21-23. Having failed to argue such claim, Plaintiffs waived it. *See Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 57 (1st Cir. 2014).

B. Plaintiffs' Claim that the Mashpee Tribe Lacks a Significant Historical Connection to Taunton Lacks Merit in Any Event

Interior, in a thorough analysis consistent with IGRA, agency regulations and precedent, and supported by the Administrative Record, evaluated the Mashpee Tribe's four centuries of documented history to properly conclude that the Tribe has a significant historical connection to the Property. ECF 1-3 at 33-53. To show a significant historical connection Interior regulations require that the Tribe "demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land" to be acquired. 25 C.F.R. § 292.2. Interior's analysis in the 2021 ROD easily meets this standard.

As discussed above, *supra* p. 8, the Tribe descends from the Wampanoag, or Pokanoket Nation, whose ancestral territory spanned across what is now southeastern Massachusetts, including the Taunton parcels comprising the Property. ECF 1-3 at 40-42. In the seventeenth

century the area encompassing present-day Taunton was under the control of the paramount sachem Ousamequin, often referred to simply as "Massasoit." *Id.* Massasoit and other sachems agreed to convey lands to English settlers, including the lands conveyed to Puritan minister Richard Bourne in 1665 that were used as an "Indian praying town" within present-day Mashpee, as well as the lands comprising present-day Taunton. *Id.* at 42, 52.

In the 2021 ROD, Interior discussed the rivers and tributaries situated within Wampanoag territory, including the Taunton River, and found that they were frequently used by the Wampanoag to travel to various Wampanoag villages and English settlements to engage in trade, hunting, fishing, and other subsistence practices near present-day Taunton. *Id.* at 50-51. Interior further discussed the presence of burial grounds and the discovery of Wampanoag cultural items near Taunton, noting that the burial and cultural items were determined to be attributed *specifically* to the Mashpee Tribe and *not* other Indian tribes. *Id.* at 46-49. Interior's determination that this evidence demonstrated a significant historical connection to Taunton is consistent with IGRA, Interior regulations, and agency precedent and should be upheld.

C. Interior's Determination that the Property Constitutes the Mashpee Tribe's Initial Reservation under IGRA Should be Upheld

Interior reasonably determined that the Property, which consists of two non-contiguous parcels of land, should be proclaimed as the Tribe's first reservation for purposes of qualifying for the "initial reservation" exception under IGRA and related Interior regulations. ECF 1-3 at 39. The IRA authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations." 25 U.S.C. § 5110. Interior regulations governing the "initial reservation" exception do not impose any requirement that parcels be contiguous, nor do they require that non-contiguous parcels be located within a specific distance of each other. *See* 25 C.F.R. § 292.6. In addition, the

regulations that implement Interior's land acquisition authority under the IRA specifically contemplate the acquisition of non-contiguous parcels in trust. 25 C.F.R. § 151.11.

Plaintiffs argue that Interior's determination is "unprecedented" and "standardless," but neither assertion demonstrates error in the 2021 ROD.[25] Neither the IRA, IGRA, nor agency regulations restrict Interior's authority to proclaim the Property to be the Tribe's initial reservation. The Court should not read an undefined limitation into these authorities, as both statutes were enacted for the benefit of Indian tribes and thus both are to be construed broadly for their benefit. *E.g.*, *Joint Tribal Council of the Passamaquoddy Tribe*, 528 F.2d at 380 (citing *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975)). Plaintiffs also take issue with the distance between the two parcels, but offer no argument or precedent explaining why the distance limits Interior's authority. Plaintiffs appear to simply object to the distance between the two parcels and on that basis ask the Court to read into IGRA and Interior regulations a geographical limitation that simply is not there. Such an effort, which amounts to a policy rather than a legal objection, fails to meet their burden to demonstrate Interior erred in the 2021 ROD.

Plaintiffs' failure to demonstrate error is further reflected by the fact that they patently ignore that Interior regulations set out several standards governing Interior's application of the "initial reservation" exception by requiring, *inter alia*: (1) that the lands to be acquired are situated in the same state or states as the Indian tribe; (2) that the Indian tribe have a significant historical connection to the lands; and (3) the Indian tribe has modern connections to the lands. 25 C.F.R. § 292.6. When promulgating these regulations Interior considered comments seeking to narrow the statutory criteria in various ways and settled on language that placed geographical

[25] Plaintiffs further take issue with the Tribe's selection of Taunton over Fall River and Middleborough, ECF 45 at 39, but Interior offered sound reasons for why those locations were not selected, *see* ECF 1-4 at 14-15, which Plaintiffs do not challenge in this suit.

limitations on the Interior's authority where appropriate. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,360 (May 20, 2008). Specifically, Interior rejected a proposal that would have limited the "initial reservation" exception to an Indian tribe's "ancestral homelands," in light of the practical reality that such lands "may not be available" for acquisition and development. *Id.* Interior properly concluded that requiring Indian tribes to demonstrate a sufficient modern connection to the lands, as well as a significant historical connection to the area where the lands were located, established workable standards consistent with IGRA's text and purposes. *Id.* at 29,360-61; *see also City of Roseville*, 348 F.3d at 1030. Plaintiffs' assertion that Interior's authority is "standardless," therefore, lacks merit.

Finally, Plaintiffs criticize Interior's reliance, ECF 1-3 at 39 n.263, on an opinion prepared in connection with the contemplated acquisition of non-contiguous parcels of land for the Nottawaseppi Huron Potawatomi Band. *See* ECF 45 at 39-40 (discussing AR012173-77 ("Nottawaseppi Opinion")). Plaintiffs attempt to distinguish the Nottawaseppi Opinion on its historical facts, as if the opinion's rationale turned on such factual information. ECF 45 at 39-40. It did not. Instead, the Nottawaseppi Opinion relied on the language of the IRA, IGRA, and Interior regulations, including regulations governing the acquisition of non-contiguous parcels in trust. AR012173-77. None of these authorities preclude Interior's determination here. *See*, *e.g.*, *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C. Cir. 2007) (finding it appropriate for Interior to look to both the IRA and its implementing regulations[26] to confirm authority to proclaim lands an "initial reservation" under IGRA). The Nottawaseppi Opinion demonstrates that in contrast to Plaintiffs' assertions, the 2021 ROD is entirely

[26] Indeed, Interior examined the appropriateness of acquiring non-contiguous parcels for the Tribe as part of its review under IRA's implementing regulations, codified at 25 C.F.R. § 151.10-11. Interior's analysis on this issue was included in the 2015 ROD and incorporated by reference into the 2021 ROD, and Plaintiffs do not challenge that analysis here.

consistent with agency precedent proclaiming non-contiguous lands to be part of an Indian tribe's reservation. Indeed, proclamations in the context of *non-contiguous* parcels arguably are more necessary to confirm reservation status, as contiguous lands are already considered to be part of the reservation under IRA regulations, 25 C.F.R. § 151.3, and are already considered "Indian lands" eligible for gaming under IGRA, 25 U.S.C. § 2703.

Interior's decision to proclaim the Property as Mashpee's initial reservation under IGRA is thus supported by the IRA, IGRA and related regulations, and consistent with agency precedent. Plaintiffs have failed to demonstrate otherwise and the 2021 ROD should be upheld.

CONCLUSION

For the foregoing reasons, the United States respectfully asks this Court to deny Plaintiffs' Motion and grant the United States' Cross-Motion for Summary Judgment.

DATED: September 2, 2022.

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
/s/ *Rebecca M. Ross*
REBECCA M. ROSS, Senior Attorney
MARISA J. HAZELL, Trial Attorney
CHARMAYNE G. STALOFF, Trial Attorney
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
TEL: (202) 616-3148
Email: rebecca.ross@usdoj.gov

Attorneys for the United States

OF COUNSEL:
Robert Hitchcock, Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior

CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that, on September 2, 2022, the foregoing UNITED STATES' CONSOLIDATED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*
REBECCA M. ROSS, Trial Attorney
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice