# United States Court of Appeals

*for the*

# First Circuit

Case No. 23-1197

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; DAVID PURDY,

*Plaintiffs-Appellants,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior; BRYAN NEWLAND, in his official capacity as Assistant Secretary - Indian Affairs, U.S. Department of the Interior; MASHPEE WAMPANOAG INDIAN TRIBE,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, CASE NO. 1:22-CV-10273-AK, ANGEL KELLEY, U.S. DISTRICT JUDGE

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## REPLY ARGUMENT

### I. *Carcieri* controls and dictates the Mashpees are not UFJ.

Actions speak louder than words. What matters is what Interior *did* to avoid *Carcieri* in 2015 by employing a novel and ungrammatical reading of the second definition of Indian (Appellants' Br. 23-24) and what the Tribe *did* to try to avoid *Carcieri* in 2017 through its restricted fee proposal (admittedly conceived as a plan "to avoid *Carcieri* related issues"). JA971-973; App.Br. 24. Those actions reveal both Interior's and the Tribe's long-standing recognition that *Carcieri's* UFJ requirement stands as a barrier to federal recognition for the Mashpees. Interior never explains why it exclusively used the second definition for the Mashpees, the only time it has done so for any applicant tribe. U.S.Br. 23 n.6 (disclaiming any need to explain its actions). The Tribe never addresses its proposed explicit *Carcieri* work-around, which speaks volumes about its own perception that it would not meet the UFJ requirement. These actions also show the 2021 ROD's revisionist treatment of *Carcieri* and the administrative record—in which Interior twice rejected its own earlier conclusions that the Mashpees were not UFJ—is nothing short of an administrative agency's attempt to

circumvent a Supreme Court case that restricts its authority to act and that it wants overturned.

Interior and the Tribe have tried to portray *Carcieri* as no barrier; indeed, they portray it as a decision that did not find the Narragansetts ineligible under the IRA based on their history. TribeBr. at 32; *see* U.S.Br. at 20-22. But the record in *Carcieri* shows—and Interior represented by new counsel on appeal now admits (U.S.Br. 20-21)—that the majority reached the Narragansett's history and decided the issue before it as a matter of historical fact (i.e., that the Narragansetts were not UFJ in 1934). *See* App.Br. 17-20; *Carcieri v. Salazar*, 555 U.S. 379, 382-385, 395 (2009). And that it did so based on that tribe's documented history, without any need to remand the case for Interior to further develop the record. The majority in *Carcieri* necessarily concluded it had *sufficient facts* before it to answer the UFJ question for the Narragansetts without resort to remand—in contrast to the two dissenters who supported remand. 555 U.S. at 400-401.

For its part, Interior was intimately familiar with the Narragansetts' history through the federal acknowledgment process which culminated in federal recognition in 1997. Indeed, both Interior

and the Mashpees refer to the Mashpees' federal acknowledgement record—which they call "extensive" and "document-intensive"—for evidence of its history as a tribal entity. U.S.Br. 9; TribeBr. 2. A similar "extensive / document-intensive" historical record was assembled for the Narragansetts' federal acknowledgment, which then was summarized in the federal register, with the key highlights all demonstrating centuries-long status under state and not federal jurisdiction.

Had Interior thought the Narragansetts had any basis to argue that they met the UFJ requirement, Interior certainly would have pressed that position before the Supreme Court. It would have done so during oral argument when the court asked each counsel about their position on remand. Counsel for Governor Carcieri, in response to Justice Breyer's question "Then should we send this back?" stated, "No . . . There's no question that this tribe would not qualify . . . and there's no contention that it would."[1] Interior's lawyer, when presented with the same question about remand agreed there was no reason to

[1] *Carcieri v. Salazar*, Oyez, https://www.oyez.org/cases/2008/07-526 (last visited Aug 8, 2023). The exchange occurs at 21:31 to 22:06.

remand.[2] If Interior had any thought that the Narragansetts could have been found eligible on remand, its counsel would have answered "yes." And, missing that opportunity, surely would have filed a motion for rehearing under Supreme Court Rule 44 after the court issued its decision with two justices specifically dissenting because they thought remand was necessary to develop the factual record of the Narragansetts UFJ status—an invitation to Interior to seek a remand through a rehearing motion. The record thus shows that when the issue was primed for Interior to step in and say the Narragansetts were UFJ in 1934, it chose not to assert that position. This was not some waiver for strategic reasons or legal strategy or unfamiliarity with the Narragansetts' history. It was a frank assessment of the well-documented history of the Narragansetts under state and not federal jurisdiction.

What was true for the Narragansetts is true for the Mashpees. The two tribes occupied different sides of Narragansett Bay but shared identical histories. Neither Interior nor the Tribe have come forward with any record evidence that shows any material difference in the two

[2] *Id.* The exchange occurs at 44:56 to 45:40.

tribes' histories under colonial, British and then State rule. Unable to show meaningful federal contacts in effect in 1934—and with only the thinnest reeds of past federal jurisdictional "acts" that were previously found wanting—Interior now reverses the position it *twice* previously staked out finding the Mashpees ineligible under the IRA.[3] The proof that the Mashpees were not UFJ in 1934 is established by none other than Indian Commissioner John Collier, an "unusually persuasive source" as to a tribe's status under the IRA, according to the Supreme Court. 555 U.S. at 390 n. 5. In contrast, a paucity of evidence supports Interior's UFJ contrary conclusion. This evidentiary failing was addressed in Appellants' Brief at 35-54; it is further explained, *infra*, at 34-43.

[3] Two different senior agency decisionmakers issued the 2017 ROD (Associate Deputy Secretary James Cason) and the 2018 ROD (Assistant Secretary – Indian Affairs Tara Sweeney). The 2017 ROD was complete in all respects and was adopted almost verbatim in 2018—with 100% concurrence that the meager evidence of federal contacts presented by the Mashpees failed to show they were under federal jurisdiction in 1934. The only thing "not final" about the 2017 ROD (U.S.Br. 12) was a legal question on an obscure issue (for which additional briefing was requested) that had no impact on Interior's UFJ analysis and conclusions. The 2017 ROD and 2018 ROD are identical in concluding that the Mashpees were not eligible under the UFJ requirement, using the same agency "expertise." U.S.Br. 2.

The identical histories of the Mashpees and Narragansetts are ignored by Interior, which incorrectly claims that *Carcieri* never reached the Narragansetts' history. Thus Interior fails to address an important part of the *Carcieri* analysis—altogether avoiding any comparison of the tribes' parallel histories—in violation of *Motor Vehicle Mfrs Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (agency violates APA by failing to consider important aspect of the problem before it).

Appellants' use of the actual record material to demonstrate error in the 2021 ROD is permissible advocacy. Indeed, the entire administrative record is before this Court. Appellants are not seeking to incorporate by reference filings in the district court as to arguments not fully briefed on appeal, which is the practice prohibited by the decisions cited by Interior and the Tribe. U.S.Br. at 22 n.5, 56; TribeBr. at 34 n. 36, 41 n. 43. There simply is no barrier to this Court reviewing the Narragansetts' history to make the comparison to the Mashpees' history—also devoid of any federal contacts—which is laid out in the Mashpees Federal Acknowledgment. *See* JA788-801 at JA792-93, JA800-01; *see also* 72 Fed. Reg. 8007-08 (2007). The Narragansetts'

history is published in the Federal Register at 48 Fed. Reg. 6177 (February 10, 1983), available on line at FR 6177-05 1983 WL 124536, and is part of the record in *Carcieri* before this Court. *Carcieri v. Kempthorne*, 497 F.3d 15, 23 (1st Cir. 2007) (en banc), *rev'd*, 555 U.S. 379 (2009).

The Tribe correctly points out that the 2018 ROD rejected the Littlefields' reading of *Carcieri* as controlling the UFJ analysis for the Mashpees. So did the 2017 ROD. Interior has *never* wanted to be restricted by *Carcieri* and has always refused to compare the histories of the Mashpees and Narragansetts under the theory that UFJ status is tribe specific. But when two tribes are identically situated in all material respects, comparison is not just appropriate it is mandatory to avoid arbitrary outcomes.[4] Interior's studied resistance to comparing the Mashpees to the Narragansetts is a failure to address a major

[4]Interior as a matter of course relies on its prior agency determinations as a basis for making UFJ decisions. *See* U.S.Br. 47 (citing to *Confederated Tribes of the Grande Ronde*). Yet it refuses to look at the Narragansett Tribe as a comparison because it does not like its logical outcome—that the Mashpees, like the Narragansetts, lack sufficient federal contacts to be found UFJ.

aspect of the problem before it in violation of *State Farm*. *See* 463 U.S. at 43.

## II. The Mashpees did not exist as a common-law defined tribe in 1934 and thus do not qualify within the meaning of the IRA as an "Indian tribe" that was under federal jurisdiction in 1934.

### A. The IRA requires the "tribe" to be in existence in 1934.

The plain reading of the first definition of "Indian," i.e., "members of any recognized Indian tribe now under federal jurisdiction," means the tribe must have been in existence in 1934. Logically speaking, a "tribe" could be under federal jurisdiction in 1934 only if it existed as a tribe at that time. The plain reading of the text of 25 U.S.C. § 5129 (formerly Section 479) comports with that logic. *See Carcieri*, 555 U.S. at 386 ("As relevant here, the District Court determined that the plain language of 25 U.S.C. § 479 defines 'Indian' to include members of all tribes *in existence in 1934*, but does not require a tribe to have been federally recognized on that date.") (emphasis added); *Carcieri v. Norton*, 290 F. Supp. 2d 167, 179–181 (D.R.I. 2003) ("The statute includes within the definition of 'Indian,' members of tribes *in existence*

*in 1934*.") (emphasis added).[5] The district court in *Carcieri* continued: "When, as in the Narragansetts' case, a tribe existed in June 1934, and that tribe subsequently attained federal recognition, the fact that such acknowledgment occurred subsequent to the IRA's enactment date does not preclude trust acquisition for the benefit of the tribe pursuant to § 465." *Carcieri*, 290 F. Supp. 2d at 179; *see* 555 U.S. at 386 (citing District Court opinion); *see* M-Opinion JA8679 (11 n. 68 ) (first definition addresses "members of existing tribes"); JA890 (noting "no established list of "recognized tribe under federal jurisdiction in existence in 1934").

When the Supreme Court announced its holding in *Carcieri* it expressly understood that Congress had unambiguously identified *existing* tribes *then* under federal jurisdiction: "We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that *were* under the federal jurisdiction of the United States when the IRA was enacted in 1934." 555 U.S. at 395 (emphasis added).

[5] *aff'd,* 398 F.3d 22 (1st Cir. 2005), panel opinion withdrawn, 423 F.3d 45 (1st Cir. 2005), *reh'g en banc granted* (Dec. 5, 2006*), on reh'g en banc sub nom. Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009).

The Court's use of the past tense "were" leaves its meaning unmistakable. A tribe must have been in existence in 1934 even if the federal government's *recognition* of that tribe comes later. *Id.* The *sine qua non* is that an "Indian tribe"—*what Congress intended in 1934 by using the term "tribe*"—must have existed at the time of the IRA's enactment. That is the only way to read the IRA's definition. 555 U.S. at 395.

The judicial treatment of the Mississippi Chocktaws by the Fifth Circuit in *United States v. State Tax Comm'n of State of Miss.*, 505 F.2d 633 (5th Cir. 1974) and the Supreme Court in *United States v. John*, 437 U.S. 634 (1978), further supports the plain reading of the IRA's first definition with its UFJ requirement. Both confirm the tribe must have been in existence in 1934 to qualify under the first definition. The Fifth Circuit concluded, based on a substantial historical record, that the Choctaws did not exist as a tribe in 1934, and hence were ineligible for land acquisition under the first definition. 505 F.2d at 638-642. The Fifth Circuit noted that a legal proclamation by Interior in 1944 did not change the historical *fact* they were not tribally organized at the time of

the IRA's enactment and therefore were ineligible under the first definition. *Id.* at 642-643.

Four years later, the Supreme Court in *John* reviewed another Fifth Circuit decision involving the Choctaws.[6] The issue in *John* was whether the state could criminally prosecute certain individual Choctaw Indians for assault. 437 U.S. at 635-636. The State could do so only if the land on which the crime occurred did not qualify as "Indian country." *Id.* at 636-637. If the land was Indian country, only the federal government could prosecute the crime. *Id.* The determination of Indian country status depended in part on whether the Secretary of Interior had authority under the IRA to proclaim a federal reservation over certain Choctaw "Reservation" lands that had not been taken into trust under the IRA. *Id.* at 650; 560 F.2d at 1211-1213.[7]

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[6] *United States v. John*, 560 F.2d 1202, 1207-1212 (5th Cir. 1977) (detailing history of termination of Chocktaw Tribe in Mississippi).

[7] The land in question consisted of federally-owned tracts acquired pursuant to a Congressional act limited to Choctaws of one-half or more Indian blood. 560 F.2d at 1211. The Fifth Circuit held that Congress did not intend, by acquiring those lands, to recognize the "emancipated" Choctaws as a tribe. *Id.*

The Fifth Circuit in *John* concluded that the lands were not Indian country. It determined that a federal treaty had terminated the tribal status of the Chocktaws who remained in Mississippi and broadly determined that the IRA was not intended to apply to the Choctaws. 560 F.2d at 1212. The Supreme Court reversed. The high court concluded that the Choctaws were not precluded from the general operation of the IRA, contrary to the conclusion of the Fifth Circuit. 437 U.S. at 650. But the Supreme Court did *not* disagree with the Fifth Circuit's conclusion in *State Tax Comm'n* that the Choctaws did not exist as a tribe in 1934 and were therefore ineligible under the first definition. Rather, the Supreme Court concluded that the Choctaws qualified under the IRA's *third* definition because the Choctaws widely possessed a blood-quantum in excess of 50 percent Indian blood. 437 U.S. at 650 & ns. 19 and 20; *id.* at 644 n. 12.[8] By explicitly looking to the third definition and surveying reports of Choctaw blood quantum levels before and around 1934 (*id.* at 650 & n. 19)—and foregoing reliance on the most commonly-used first definition—the Supreme

[8] The third definition of Indian covers "all persons of one-half or more Indian blood."

Court at least implicitly accepted the Fifth Circuit's finding that the Chocktaws were not tribally organized in 1934. *John* thus logically supports the conclusion that tribal existence must be shown in 1934 to secure eligibility under the first definition. *John*, 437 U.S. at 649-650.

The District Court in *Carcieri* correctly recognized that *State Tax Comm'n* and *John* meant that tribal existence had to be shown at the time of enactment. *See Carcieri*, 555 U.S. at 386 (citing District Court at 290 F. Supp. 2d at 179-181). The District Court in *Carcieri* properly observed "that tribal status that did not exist at the time of the IRA's enactment could not be 'created' after that date." 290 F. Supp. 2d at 180. Regarding *John* and *State Tax Comm'n*, the District Court in *Carcieri* specifically stated: "in view of the uncontroverted evidence that the Mississippi Choctaws' tribal status had been extinguished prior to the IRA's enactment date, the tribe did not fall within § 479 and any post-enactment attempt to revive that status was of no consequence." *Id.* Similarly, the Mashpees' federal recognition in 2007 does not change the fact that they did not exist as a tribe within the meaning of the IRA in 1934.

The IRA's legislative history shows Congress sought to narrow the class of eligible "Indians" not just by inserting the UFJ requirement for the first and second definitions, but also increasing the blood quantum level from one-quarter Indian blood to "one half or more Indian blood." *See Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n. 10 (D. Haw. 2002) ("the Court notes that the one-fourth Indian blood requirement . . . was subsequently altered in the statute to require a one-half Indian blood quantum"), *aff'd,* 386 F.3d 1271 (9th Cir. 2004); *see* M-Opinion at JA878-879 (recounting legislative history narrowing scope of IRA).

Assimilated Indians like the Mashpees who had adopted "non-Indian religion and culture" (*Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 581 (1st Cir. 1979)); who were long treated as wards of the state without any federal involvement (*see Elk v. Wilkins,* 112 U.S. 94, 108 (1884) and state decisions cited in *Elk)* with the federal government never having "actively supported or watched over them" (*New Seabury Corp.,* 592 F.2d at 581); and who were not, as a matter of adjudicated fact, organized as a tribe after 1869 (and hence not in 1934) (*Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass 1978) *aff'd*

*sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Mashpee Tribe v. Sec'y of Interior*, 820 F.2d 480, 482 (1st Cir. 1987)) were intended to be carved out from the IRA through the UFJ requirement.

The IRA does not extend to remnants of tribes that were not organized as a "tribe" within the meaning of *Montoya* in 1934. The only articulated subset of a tribe in the IRA is an "organized band" (*see* § 5129) which still must be tribally organized and under federal jurisdiction to be eligible under the IRA.[9] The possibility that nontribal remnants could decades later be deemed a tribe under the modern criteria for recognition promulgated by Interior in 1978 (25 C.F.R. pt. 83) does not change the UFJ analysis in 1934. Congress did not amend the IRA to change the definition of "tribe" to the modern Part 83 administrative standards adopted by Interior, much less rewrite the statute to allow this new definition to apply at the time of taking land

[9] Under the IRA, "[t]he term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Section 5129. Neither Interior nor the Tribe have ever contended that the Mashpees qualify under one of these alternatives ("organized band, pueblo or Indians residing on one reservation") for the simple reason that each is inapplicable to the Mashpees.

into trust. The IRA, as written in 1934 and unamended since, requires the Mashpees to meet the definition of a "tribe' in 1934, which they cannot do. They were not as a matter of fact a "tribe" in 1934 within the meaning of the IRA, and hence are ineligible now.[10]

B. The Mashpees did not exist as a tribe in 1934 according to the jury determination in *Mashpee v. Town of Mashpee*.

The Mashpees were last tribally organized in 1869, before the Commonwealth enacted laws making them citizens and the Mashpees (who voted to become citizens) abandoned their tribal ways. This non-tribal status is recorded in the 1978 jury verdict in *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. at 943, 949.

As explained in Appellants' Brief at 27-28, Congress necessarily incorporated the common law meaning of "tribe" in enacting the IRA. Interior and the Tribe have not identified any other definition of "tribe" that Congress could have intended to adopt in 1934. And it is that

[10] Nor can the Mashpees qualify under the 'third definition" of Indian, which includes persons of one-half or more Indian blood. Based on their "long history of intermarriage with non-Indians" (*New Seabury Corp.*, 592 F.2d at 581) the Mashpees lacked Indian "blood quantum" levels sufficient to satisfy the third definition of the IRA. Neither Interior nor the Tribe relies on the third definition.

definition which the federal courts in Massachusetts applied to the Mashpees in finding them ineligible to assert claims under the Indian Trade and Intercourse Act (ITIA), 25 U.S.C. § 177. That finding is disqualifying under the IRA because it is the same common law definition that Congress necessarily adopted in the IRA. It matters not that the holding in *Town of Mashpee* was limited to the ITIA, or the trial judge expressed caution about its application to other federal programs but ultimately "express[ed] no opinion" as to whether the jury's verdict might impact the Mashpees participation in other federal and state programs. 447 F. Supp. at 950 n. 7. What controls is the identical *Montoya* common-law definition that was adopted by Congress in 1934 and the Mashpees failed in 1978.[11] That the Mashpees were

[11] Interior claims the verdict was "inconsistent" (U.S.Br. at 29) but the trial court explained the verdict was "perfectly rational." 447 F. Supp. at 949. The jury rejected the Mashpees' claim to tribal existence on four out of six salient dates, including the "crucial dates" in 1869 and 1870. *Id*. at 947-949. This constituted express findings that the Mashpees did not exist as a tribe in 1869 and 1870 (*id*. at 943), which coincides with the extension of citizenship to the Mashpees. As to the two dates the jury concluded the Mashpee existed as a tribe (i.e., 1834 and 1842) the jury further expressly found that the Mashpees had failed to show a continuous tribal existence up to and including 1976. *Id*. In rejecting the Mashpees' evidence of continuous tribal existence, the jury necessarily found insufficient the same evidence presented now that Mashpee children attended the Carlisle School and other evidence

later "recognized" as a tribe (in 2007) by Interior under its departmental regulations does not change that fact.

C. Interior and the Tribe offer meritless reasons to ignore the 1978 jury verdict.

The district court did not address this statutory construction argument having misperceived it. ADD25. The Secretary never addressed in the 2021 ROD the specific legal question, namely, "What did Congress intend in 1934 by using the word "Indian tribe" in the first definition of "Indian," when including "members of any recognized Indian tribe now under federal jurisdiction"? The Secretary's failure to address it is a failure to consider an important aspect of the problem in violation of *State Farm*. 463 U.S. at 43.

1. Interior and the Tribe wrongly contend that the Mashpees are not required to show that they existed as a tribe in 1934.

On appeal, Interior and the Tribe both argue that the IRA does not require the Mashpees to have existed as a tribe in 1934. U.S.Br. at 27-28; TribeBr. at 48 ("the IRA defines 'tribe" as one that is recognized—not one that existed in 1934"). Both Interior and the Tribe

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regarding tribal status before 1934. *Id*. at 946. These special verdict findings rule out any tribal existence by the Mashpees after 1869 and before 1976, thus precluding tribal existence in 1934.

argue that it is sufficient that (a) the Mashpees were recognized in 2007 under Part 83 regulations (adopted in 1978) and (b) that modern-day federal acknowledgement includes a retroactive component that says the Mashpees always maintained a continuous tribal existence including back to 1934—and hence satisfy the first definition. U.S.Br. 30; TribeBr. at 46-47. But Appellees' contention is ungrammatical, circular, and rests on a conflation of "recognition" and "existence." It is also contradicted by the plain language of the statute.

The correct grammatical reading of the first definition is simple to determine by asking: *What* must be under federal jurisdiction in 1934? The answer is an "Indian tribe." The adjective "recognized" which modifies "Indian tribe" is properly included as a matter of grammar as part of "Indian tribe," so as to require the tribe's existence, recognition and UFJ status all to be established in 1934. *See John*, 437 U.S. at 650 (restating first definition as "any recognized [in 1934] tribe now under federal jurisdiction"); *cf. Carcieri v. Kempthorne*, 497 F.3d at 26 (recounting State's position that tribe must be both "recognized" and "under Federal Jurisdiction" in 1934); *id.* at 31 (recounting Secretary's position that tribe would be both recognized and under federal

jurisdiction at same time but contending "now" means at the time of taking land into trust). But Justice Breyer in *Carcieri* thought otherwise. He split off "recognized" from "Indian tribe now under federal jurisdiction." 555 U.S. at 398 ("*any recognized*" Indian tribe now under federal jurisdiction") (emphasis original). He reasoned that federal recognition sometimes followed a period when a *tribe* was under federal jurisdiction "even though the Department did not know it at the time." *Id.*[12] But Justice Breyer did not say—and he did not read the IRA's first definition to mean—tribal existence in 1934 is not required. As a matter of statutory interpretation, and common sense, the applicant tribe must have existed as a tribe in 1934 for it to have been under federal jurisdiction in 1934, and thus for it members to be eligible for IRA benefits under the first definition. While recognition by the federal government need not be shown in 1934 (according to Justice Breyer, case law applying his concurring opinion, and the M-Opinion

[12] A number of courts have followed Justice Breyer's concurrence and similarly broken off "recognized" from the temporal limitation to 1934. *See, e.g., Confederated Tribes of Grande Ronde Cmty. of Oregon v. Jewell,* 830 F.3d 552, 559-563 (D.C. Cir. 2016); *County of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1020-1024 & n 8. (9th Cir. 2017). That is how the M-Opinion analyzes recognition for purposes of the UFJ requirement.

which is rooted in his concurring opinion), the tribe's existence must be established in 1934 under the statute's plain terms.

The Tribe misreads the IRA's first definition by conflating "recognition" and "existence," wrongly contending that "Justice Breyer explicitly rejected the idea that a tribe has to *prove existence* in 1934 to qualify for the IRA." TribeBr. 48 (emphasis original). The cited pages to Justice Breyer's concurring opinion (555 U.S. at 399-400) only address "recognition" occurring after 1934. Nothing in Breyer's concurrence suggests a group of nontribal Indians in 1934—not existing as a tribe at the time of the IRA's enactment under the *Montoya* definition of "tribe"—nonetheless satisfies the statutory definition of a "tribe" for purposes of the first (and second) definition when it is later "recognized." There is no basis in law or logic to ignore the proven non-existence of the tribe in 1934 by the *Town of Mashpee* judicial determination applying *Montoya*, much less set it aside 45 years later when Interior administratively recognized that group as a tribe under modern Part 83 criteria—not pursuant to any congressional amendment to the IRA. Existence and recognition are two separate

things. *Existence* as an Indian tribe in 1934 is required by the IRA's plain text, while *recognition* arguably is not.

Both Interior and the Tribe further err by expressly substituting tribal recognition standards promulgated by Interior under Part 83 in 1978 for the common-law definition of tribe adopted by Congress in 1934, and which has remained unchanged since that date. U.S.Br. at 25[13]; TribeBr. at 46. It is the intention of Congress in 1934 in using "tribe" that controls the analysis, and it is limited to the *Montoya* common law definition. App.Br. 27-28. That Interior promulgated regulations in 1978 regarding tribal recognition does not change that analysis. Because the Mashpees did not meet the common law definition as determined in *Town of Mashpee*, both as a matter of fact

[13] Interior argues that the Mashpee jury verdict rested on definitions of "tribe" that are "different in material respects from the criteria in the acknowledgment regulations." U.S.Br. 20. On that point, Plaintiffs agree: the common law definition of a tribe, at issue in the Mashpee jury verdict, *is* fundamentally different from the Part 83 acknowledgment regulations. Those differences explain why it is wrong to use the modern Part 83 definitions to answer the question of what Congress intended by using the word "tribe" fifty years earlier. That administrative determination under Part 83 does not answer the question in litigation, namely whether the Mashpees met the common law definition of a tribe in 1934. *Town of Mashpee*, 447 F. Supp. at 947-949, provides the answer to that question.

and law they cannot show that they were a tribe in existence in 1934 within the meaning of the IRA and hence cannot meet the first definition, contrary to Interior's incorrect and unsupported determination.[14]

2. The Tribe wrongly contends that judicial review is precluded by a political question.

Unable to come forward with a grammatical (and logical) reading of the first definition, the Tribe (alone) launches a "Hail Mary" plea that the issue of the tribe's status in 1934 raises a political question that is beyond the power of this Court to decide. TribeBr. at 48-49. The infirmities in this position are numerous—which apparently led Interior to avoid adopting it. To begin with, where a federal statute requires tribal existence to be demonstrated as a criterion for eligibility, whether under the IRA or the ITIA, no political question exists. The decision in

[14] In trying to meet Plaintiffs' contention that no tribe would be found ineligible if the Mashpees are not, Interior points out that a tribe could "disappear over time." U.S.Br. at 57 (quoting *Miami Nation of Indians of Ind., Inc. v. Dep't of the Interior*, 255 F.3d 342, 246 (7th Cir. 2001). Interior's statement is revealing in two respects. First it shows Interior fully accepting the capacity of the courts to adjudicate UFJ without implicating a non-justiciable political question. Second, it shows exactly why the IRA's first (and second) definitions required the tribe to exist in 1934—historical existence would not suffice; nor would a status conferred a half-century later by administrative fiat.

*Town of Mashpee*—going to the very existence of the tribe at different points in time—did not raise a political question. 447 F. Supp. at 940. Likewise, no political questions were raised in *Carcieri,* 555 U.S. at 383-385, even though it examined the Narragansetts history as a tribe including being subject to de-tribalization under an 1880 state law. The same holds true for *Carcieri*'s progeny which likewise examine tribal status in 1934 without any claim of a political question,[15] and pre-*Carcieri* case law, including *John* and the Fifth Circuit decision in *State Tax Comm'n*, which addressed claims that the IRA applicant lacked tribal status in 1934 and thus was ineligible to have lands taken into trust—without any party (or court) so much as hinting that the inquiry raises a political question. *See John,* 437 U.S. at 649-650; *State Tax Comm'n*, 505 F.2d at 638-642 (concluding tribe did not exist as of 1934 because of federal 1830 law dissolving it).

The Tribe does not address any of the above authority that makes plain no "political question" is involved in reaching the question of

[15] *E.g., County of Amador*, 872 F.3d at 1015-1018; *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1182-1185 (E.D. Cal. 2015), *rev'd on other grounds,* 698 Fed App'x 531 (9th Cir. 2017); *Stand Up for California! v. U.S. Dept. of Interior*, 879 F.3d 1177, 1182-1184 (9th Cir. 2018).

tribal existence for determining eligibility under the IRA or the ITIA. Whatever general considerations are discussed in the Cohen treatise and cited Supreme Court cases (TribeBr. at 48-49) have no application in the specific context of determining eligibility under federal statutes that require the applicant to demonstrate tribal existence. What the Tribe (and only the Tribe) is arguing is that whether it or any other tribal applicant is eligible under the IRA's first definition (i.e., whether the tribe existed in 1934 and was UFJ) is an unreviewable political question, but only when the court decides that the IRA applicant was not tribally organized in 1934. That clearly is not the law.

3. Interior wrongly contends that it is not bound by the 1978 jury verdict.

Interior alone argues that it is not bound by the jury verdict because it was not a party to the proceeding. U.S.Br. 30. The Mashpees, however, are directly bound by that judicial determination as the losing party-plaintiff. And the Mashpees are the IRA applicants who bear the burden to demonstrate UFJ status in 1934. Moreover, Interior is properly estopped from challenging the application of the jury verdict to the IRA eligibility determination because Interior (Secretary James Watt) expressly invoked the jury verdict to defeat the

Mashpee's lawsuit against the federal government, which similarly sought return of lands in Massachusetts. Interior's successful, defensive invocation of res judicata based on the jury verdict (*see Mashpee Tribe v. Watt*, 707 F.2d 23, 24 (1st Cir. 1983) and *Mashpee Tribe v. Secretary of Interior*, 820 F.2d at 482), meets the two elements for judicial estoppel: (1) "the estopping and the estopped positions must be directly inconsistent, that is mutually exclusive"; and (2) "the responsible party must have succeeded in persuading a court to accept its prior position." *Guay v. Burack*, 677 F.3d 10, 16 (1st Cir. 2012). Here, Secretary Watt *twice* avoided liability by asserting the defense of res judicata premised on the jury verdict's findings that the Mashpees did not exist as a tribe. 707 F.2d at 24; 820 F.2d at 482. That position is directly inconsistent with the position now taken that the Mashpee existed as a tribe in 1934. Judicial estoppel should apply against the Secretary.[16]

[16] Interior is Constitutionally charged with enforcing the law. Its advocacy of a legal result contrary to this Court's adjudication regarding the non-tribal status of the Mashpees, raises a Separation of Powers problem. *See generally Patchak v. Zinke*, 138 S. Ct. 897, 904–905 (2018).

Interior and the Tribe also suggest that the jury verdict is not to be respected because it was rendered by "non-expert" jurors (TribeBr. 46) and this Court (supposedly) would have decided things differently today. (U.S.Br. 29). But this Court noted on direct appeal from that jury trial that "the facts of the case, though developed and interpreted in part with the expert help of historians and anthropologists, are not so technical as to be beyond the understanding of judges or juries." 592 F.2d at 581. Moreover, this Court did not express doubt about the jury's conclusion that the Mashpees as a matter of fact did not exist as a tribe either at the time of bringing the ITIA claim (1976) or during the 19th century when certain challenged land conveyances occurred. *Id.*; *see Mashpee Tribe v. Secretary of the Interior*, 820 F.2d at 482 ("the jury decided that the Mashpees failed to prove their tribal existence *as a matter of fact*") (emphasis original). The verdict is unimpeachable both as a matter of fact *and law*. Neither Interior nor the Tribe has offered a valid reason to reject it on the question of the Mashpees' tribal existence in 1934 for purposes of the UFJ requirement.

### III. Commissioner Collier's contemporaneous statements prove the Mashpee were not UFJ in 1934.

No single piece of historical evidence is as probative on UFJ as the contemporaneous (circa 1934) statements of Indian Commissioner John Collier regarding the status of tribes under the IRA. The Supreme Court said as much in *Carcieri*. 555 U.S. at 390 n. 5 (calling Collier an "unusually persuasive source"); *see Littlefield v. Mashpee Wampanoag Tribe*, 951 F.3d 30, 40 (1st Cir. 2020) (citing Collier as authority on interpretation of second definition of Indian in IRA). As an ardent supporter of Native American rights, principal architect of the IRA—and source of the UFJ limit on eligibility under the IRA (555 U.S. at 390 n. 5)—Commissioner Collier more than anyone wanted to *expand* IRA coverage to bring the greatest number of tribes within its reach. So although the Supreme Court expressly relied on Collier's statements about the Narragansetts, the Secretary rejects similar statements by him about the Mashpees. But Interior (and the Tribe) cannot identify any mistake of fact or law by Collier with respect to his statements about the Mashpees. Because there are none. Instead Interior and the Tribe try to impeach Interior's key historical witness principally by looking to a letter he wrote in 1933 about the Cowlitz Indians. TribeBr.

33. That letter stated that the Cowlitz tribe was "no longer in existence as a communal entity," a position Collier acknowledged a year later was not correct. *See Confederated Tribes*, 830 F.2d at 555; *id*. at 565. The problem for Interior in keeping track of the Cowlitz was the unusual fact that the Cowlitz were "landless and scattered" for decades, with some members embedded on the reservation of another tribe. *Id*. at 555; *id*. at 561. The local Indian Office was directed in 1934 to place the Cowlitz Indians on the census roll for the other tribe's reservation. *Confederated Tribes Confederated Tribes of Grande Ronde Cmty. of Oregon v. Jewell,* 75 F. Supp. 3d 387, 408 (D.D.C. 2014). No similar "mistake' was made with respect to the Mashpees (and other Massachusetts Indians), who were well documented as wards of the Commonwealth, which made all provisions for them without any involvement of the federal government. *See Elk,* 112 U.S. at 108; *New Seabury*, 592 F.2d at 581; Tantaquidgeon report JA687-715.[17]

[17] The Tribe cites one other case *Upstate Citizens*, and a series of agency decisions ostensibly to show Interior and the courts have rejected "similar erroneous disclaimers from federal officials" including for "East Coast Indians." But *none of the authority involves statements by Collier;* none involved *East Coast Indians;* and all of them involve tribes with very different histories including those with federal treaty rights and rights to ITIA land claims, such as the Oneidas. The jurisdictional

Absolutely nothing in the record supports the Secretary's conclusion that Collier was mistaken about the Mashpees. All Massachusetts Indians were strangers to the federal government, never having been the subject of a federal treaty, congressional appropriation or enrollment in the Office of Indian Affairs, much less in effect in 1934. Indeed, there was no Indian Office in the New England states because the entire region was broken off from the jurisdiction of the Indian Office from its very inception in 1786. ADD35-36 (John M.R. Peterson & David Roseman, A Reexamination of *Passamaquoddy v. Morton*, 31 ME L. REV. 115, 128-129 (1979));[18] *Mashpee Tribe v. New Seabury*

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status of the Oneida Indian Nation of New York, located in central New York—not an East Coast Indian tribe—was confusing due to state treaties made before ratification of the U.S. Constitution, and the long acquiescence of the federal government to New York, despite the existence of a federal treaty with the Oneidas. *See Upstate Citizens for Equality, Inc. v. Jewell*, 2015 WL 1399366, *5-6 (N.D.N.Y. Mar. 26, 2015), *aff'd* 841 F.3d 556 (2d Cir. 2016). None of the authority supports discounting the statements of Collier, who stated that Mashpees were under state and not federal jurisdiction in 1934.

[18] Interior criticizes the Maine Law Review article as not scholarly, and takes exception to its conclusion that the New England States were carved out from the jurisdiction of the Indian Office. U.S.Br. 25-26; *see* TribeBr. 41-43. But the 1786 Ordinance is clear on its face as a confederal document. And the adoption of the Constitution in 1789 did not change the federal government's self-imposed "hands off" jurisdictional approach to New England. To prove the point, the Indian

*Corp.*, 592 F.2d at 581 ("federal government has never . . . actively supported or watched over them"). The Secretary offers no sound reason for treating Collier's statements with respect to the Mashpees any differently from how the Supreme Court treated his statements in *Carcieri* with respect to the Narragansetts. The dismissal of Collier's statements is arbitrary and capricious.

The same holds true for the Secretary's rejection of other contemporary departmental statements explicitly stating the Mashpees were under the jurisdiction of the state and not wards of the federal government. *See* JA74. The statements are unambiguous. *See* JA716 [Letter from W. Carson Ryan, a BIA official, to James F. Peebles (Nov. 22, 1934) (stating that federal funds were not available for "Indian groups like the 'Mashpee Community' which were under state jurisdiction")]; JA738 [Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Dec. 21, 1936) (responding to a request for federal aid by stating that the "Indians of the Mashpee Tribe are not under Federal jurisdiction or control. They have never

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Office *never* opened an office in New England. This left the federal government only with unexercised plenary power in Massachusetts; it continued to leave untouched the Indians in that state.

been regarded as wards of the United States.")]; JA730 [Letter from F.H. Daiker to Mr. Wild Horse (Oct. 2, 1937) (reiterating Daiker's position that "the Indian Office can offer no assistance to Indians not members of a tribe under Federal jurisdiction," i.e. the Mashpees)]; JA731 [Letter from John Herrick, Assistant to the Commissioner, to Charles L. Gifford (Oct. 28, 1937) (responding to a request for information on the Mashpees and disclaiming knowledge of them, stating that "the Federal Government does not exercise supervision over any of the eastern Indians [. . . who] have had no recognition or assistance from the Federal Government.")].

The alleged "mistakes" by Interior officials are objectively trivial matters that upon examination show no reason to discount the highly probative value of the contemporaneous department statements. For example, a senior official (Herrick) in 1937 (JA731) did not know about the Tantaquidgeon study (TribeBr. 35) which Plaintiffs previously pointed out was an obscure document that was never published or even copied. App.Br. 32-33. The Tribe criticizes another senior official (Ryan) for purportedly not mentioning the Carlisle School. (TribeBr. 34-35). But the context of the 1934 letter shows this to be a non-issue.

The letter (JA716-17) discusses the federal government undertaking 100% construction of schoolhouses in limited federal areas, with the author holding out no hope that such funding would be available in the Town of Mashpee. Nothing in the letter bears on the Carlisle School which closed 16 years *before* the letter was written. Thus, the official had no reason to mention it.

The Tribe also points out that this same official in 1935 began to explore funding from the Public Works Administration—not through the IRA—for a new school building in the Town of Mashpee. TribeBr. 36. Nothing in that post-IRA episode casts any doubt on the 1934 letter (JA716) that disclaimed any federal jurisdiction over the Mashpees under the IRA, and which enclosed a copy of the Act. JA717. Helping to secure funding through the Public Work Administration is not a jurisdiction-conferring act under the IRA even if it had happened as of 1934, which it did not.

None of the cited "mistakes" are like the Department's mistaken belief as to the scattered, landless Cowlitz no longer being a distinct community—an error going to the very existence of the tribal group. No similar confusion about the historical facts existed here for the

Mashpees at any time. The Commonwealth of Massachusetts had always treated the Mashpees as wards of the State and the federal government had never treated them as wards of the federal government. With that history known to Interior officials, there was no mistake in concluding the Mashpees were ineligible under the IRA. For the same reason these statements were credited in *Carcieri* they should be deemed reliable, indeed highly probative, evidence of the Mashpees ineligibility under the IRA. Interior's outright rejection of these statements is arbitrary and capricious.

In order to blunt the persuasive power of the departmental statements disclaiming any and all jurisdiction over the Mashpees, Interior argues only Congress can end federal jurisdiction over a tribe. But the Mashpees were never under federal jurisdiction at any time so termination is not legitimately an issue. This is where Interior (and the Tribe) embrace the "tag, you're it" theory of federal jurisdiction, where conferral of federal jurisdiction can rest on the slimmest evidence at great temporal distance from 1934, but only an act of Congress can undo it. This easy-to-acquire-but-impossible-to-lose interpretation of federal jurisdiction is articulated in the M-Opinion. JA888. It is

patently illogical and result-oriented. It has no basis in the Breyer concurring opinion which is supposedly its source.

## IV. The Secretary's application of the M-Opinion in the 2021 ROD grounds UFJ in meager federal contacts that have failed to establish a meaningful federal relationship in two other contexts.

### A. *Carcieri* requires a *significant* relationship with the federal government as of 1934.

As the Ninth Circuit observed in *County of Amador*, 872 F.3d at 1026, the phrase "under Federal jurisdiction" "should be read to limit the set of 'recognized Indian tribes' to those tribes that already had some sort of *significant relationship* with the federal government as of 1934, even if those tribes were not yet 'recognized.'" (Emphasis added.) *See Carcieri*, 555 U.S. at 399-400 (Breyer, J. concurring) (indicating kind of acts that would be indicative of federal jurisdiction, listing federal treaty, congressional appropriation or enrollment in Office of Indian Affairs "*in effect in 1934*" and noting record showed "little federal contact with Narragansetts as a group" until the 1970s) (emphasis

added).[19] The same "little federal contact" characterizes the Mashpees' history. *See New Seabury Corp.*, 592 F.2d at 581 ("The federal government [had as of 1979] never officially recognized the Mashpees as a tribe or actively supported or watched over them.").

B. Interior's 2021 ROD grounds UFJ in objectively thin evidence twice found wanting—effectively eliminating the requirement of a significant relationship as of 1934.

Interior chastises Plaintiffs for contending that an exercise of federal authority in or around 1934 is required (U.S.Br. at 49), but the authority for that proposition is none other than Justice Breyer and his clear embrace of significant federal jurisdiction-conferring acts "in effect in 1934." Interior's 2021 ROD instead applies the M-Opinion to achieve a preferred result without any grounding in a *significant* relationship with the federal government as of 1934.

[19] The Tribe argues that because Breyer did not use "in effect" in discussing congressional appropriations, that opens the door to consideration of other evidence long before 1934. The better view is that Justice Breyer contemplated that a pre-1934 congressional appropriation would still be the law in 1934 unless some affirmative step was taken to rescind it. But no matter what the temporal connection is for congressional appropriations, it is undisputed that the Mashpees had none. And using the absence of "in effect" for such appropriations to justify all manner of historically distant federal "touches" is antithetical to the Breyer concurring opinion.

1. Insignificant federal reports and studies left the Mashpees where they always had been: under exclusive state jurisdiction.

Freed of any requirement to show a jurisdictional act in effect in 1934, Interior is able to cobble together insubstantial federal reports over the years that had no associated federal *actions*, and declare them evidence of UFJ—and hide behind the M-Opinion's fluid criteria and associated deferential APA review. But this Court has long known of the Mashpees' status as wards of the Commonwealth, with no significant relationship with the federal government at any time—much less as of 1934. The specific reports (Morse, Schoolcraft etc.) do not show even "a continuing relationship with the federal government" (*Mashpee Tribe v. Secretary of the Interior*, 820 F.2d at 483), and thus cannot rationally be viewed as *actively extending federal jurisdiction* over the Mashpees. App.Br. 43-44. The Morse Report purports to enumerate "all Indians within the limits of the United States." JA253. It does *not* show any action taken directly for the Mashpees. *See Mashpee Trib*e, 592 F.2d at 581. Rather, it treats the New England Indians as a whole, noting they are "provided for, both in education and comfort, by the government and religious associations, of the several

states in which they reside." JA75, 2021 ROD at 28 n.200. Interior nonetheless processes through the M-Opinion framework its counter-factual and a-historical treatment of the 18th and 19th century reports. Such manipulation of the administrative record will escape meaningful judicial review unless a court takes seriously the language of Justice Breyer's concurring opinion and requires meaningful jurisdictional acts *in effect in 1934*.

The cited federal reports and studies left the Mashpees squarely as wards of the Commonwealth, who provided all manner of services to their Indian citizens, as the federal government knew at the time and Interior twice concluded before.

2. Federal censuses carried with them no jurisdictional exercise.

The general federal census reports are objectively probative of nothing because they document all Indians in the United States without any effort to identify those who were members of a tribe under federal jurisdiction in 1934. Such an overbroad catchment defeats its probative value. The same holds true for the 1884 Indian Census. Interior's reliance on censuses undertaken by the federal government's Census Bureau—and not by the Indian Office—is indistinguishable from

federal plenary power, which is never sufficient to show UFJ under the M-Opinion. JA886. In contrast, a tribe-specific census by the Indian Office is highly probative evidence. *See Confederated Tribes*, 830 F.3d at 566 (*see also* JA71, 2021 ROD at 24 n. 182) (Indian Office [Taholah Agency] enumerated Cowlitz living on the Quinault reservation); *No Casino in Plymouth*, 136 F. Supp. 3d at 1174 (BIA special agent conducted survey of band). Those census reports, which were then coupled with jurisdiction-conferring acts, reflect *the exercise of Interior's administrative jurisdiction* over the tribe. Such exercises of administrative jurisdiction is what Justice Breyer meant by enrollment in the Indian Office *in effect in 1934* and what the M-Opinion itself describes. JA884. But the census reports for the Mashpees are little more than an enumeration. They were undertaken without any exercise of federal jurisdiction-conferring "*acts or series of acts*" as required by the M-Opinion, with the exception of Carlisle School head counts, which are addressed below. Without the provision of federal services, a census head count is indistinguishable from the federal government's plenary power. It does not logically support the existence of a significant relationship with the federal government as of 1934, in

particular censuses like the 1884 Indian Census taken 50 years earlier. Likewise, the 1890 Annual Report of the Commissioner of Indian Affairs documents the state of the "Marshpee" under state (not federal) jurisdiction, reporting that these Indians "occupy a tract of land in Barnstable County, Mass., have a board of overseers appointed by the State, who by acts of 1789, 1808, and 1819, govern all their internal affairs and hold their tract of lands in trust." JA358. Congress in limiting eligibility in 1934 did not intend to throw open the legislation to each and every Indian identified and enumerated by the federal government.

3. The Secretary improperly and unfairly places her thumb on the scale when evaluating Carlisle School evidence, which is 16 years out of date in any event.

As explained in Appellants Brief (at 54-55), Interior counts the Carlisle School evidence in four different ways (school attendance, school census, school financial services, and school medical care) when it is rationally consists of one piece of historical evidence. Its logical probative value does not quadruple by separating its individual components. The Secretary then launches a false narrative about the forced assimilation of Mashpee children removed from their home. That

contention is simply false (App.Br. 54-60), yet both Interior and the Tribe continue to hew to it. U.S.Br. 38-40; TribeBr. 15-18. Ostensibly, Interior must evaluate each tribe by its own tribe-specific evidence (U.S.Br. 21), but Interior does just the opposite in perpetuating the false narrative about forced assimilation of Mashpee children at the Carlisle School, taking it a step further suggesting (without evidence) that their voluntary attendance may have been "coerced." U.S.Br. 39-40.[20] Interior expressly seeks to undermine the Mashpees' entirely voluntary attendance at Carlisle—so voluntary that the Carlisle School superintendent said the Mashpee children did not belong there because they were assimilated and had access to public schools at home (App.Br. 57 n. 23)—with the brush of an admittedly despicable national policy that impacted *other tribes*. U.S.Br. 38-40. This is not reasoned analysis but arbitrary and capricious decision-making that overrides history to achieve a preferred outcome. Interior steps back from it's a-historical account just long enough to argue that UFJ status would be established even if the attendance was purely voluntary. U.S.Br. at 40-41. But

[20] Any boarding school exercises some control over and care of its students, including controlling finances, providing medical care, or giving permission to leave school.

that new factual argument-in-the-alternative was never previously articulated by Interior and is not contained in the 2021 ROD. Accordingly, it cannot be considered here to support the Secretary's position, which must be evaluated in its extreme form as stated in the 2021 ROD and endorsed by Interior and the Tribe. *See Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168-69 (1962) ("appellate counsel's *post hoc* rationalizations" cannot justify agency's decision, which "must be upheld, if at all, on the same basis articulated in the order by the agency itself.").

Moreover, the probative value of the Carlisle School evidence is logically "cabined" to the period of 1905-1918 when the school operated. There was no carry over *effect in 1934* to make this evidence current and relevant to the UFJ analysis. This evidence was 16 years in the past. Congress, in setting the UFJ requirement as the date of enactment, was not looking backward to collect brief and transient historical contacts but specifically looked at the present (June 18, 1934), freezing in place those tribes that had, at the time of the IRA's enactment, a *significant* relationship with the federal government. *County of Amador*, 872 F.2d at 1026. Interior's approach to federal

jurisdiction, in which it finds jurisdiction conferring acts in the slimmest of historical federal contacts while discounting the robust contemporary departmental disclaimers of any such jurisdiction, is not reasoned analysis but arbitrary decision-making. Under this strained interpretation, a single Indian student who voluntarily attended the Carlisle School in 1903, is sufficient to establish UFJ for the entire tribe in 1934. Yet the only way to un-do the UFJ finding is a Congressional Act. Only by applying this asymmetrical, result-oriented thumb-on-the-scale decision-making can Interior qualify a tribe that by every contemporaneous historic measure was not UFJ in 1934, as Interior understood at the time.

## V. "Concurrent jurisdiction" never existed in Massachusetts.

Interior cites (U.S.Br. 23-24) four overarching (not on point) cases to try to show concurrent jurisdiction in Massachusetts. But none involves the history of Massachusetts Indians or a remnant of an assimilated tribe like the Mashpees. *Oneida Indian Nation of N.Y. v. Oneida County, N.Y.*, 414 U.S. 661 (1974) dealt with a federal treaty tribe in Central New York that had standing to bring land claims in violation of the ITIA and which was found UFJ for purposes of the

IRA—with a long history of federal contacts including federal litigation on behalf of Oneida Indians in the 1920s. *See Upstate Citizens for Equality, Inc.,* 2015 WL 1399366, *5-6; *see, supra*, at 30 n.16. *Joint Tribal Council of the Passamaquoddy v. Morton*, 528 F.2d 370 (1st Cir. 1975) held a Maine tribe had standing under the ITIA to bring land claims; the tribe was never evaluated as to whether its federal contacts would satisfy the UFJ requirement for IRA eligibility. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) did not address either ITIA or IRA eligibility for any Indian groups but the larger question of state criminal jurisdiction in "Indian country" based on long standing federal treaties. The decision in *John*, 437 U.S. 634, actually supports the absence of UFJ status for the Mashpees, as set forth above, *supra,* at 10-13. None of these decisions supports the broad claim of federal concurrent jurisdiction over Massachusetts Indians at any time, much less as of 1934.[21]

[21] *Haaland v. Brackeen*, 143 S. Ct. 1609, 1616 (2023) involves the interplay of state adoption laws and the ICWA. The Supreme Court's reference to "plenary and exclusive" refers to Congress's legislative authority in that context.

Interior goes so far as to criticize Plaintiffs' reliance on the Supreme Court's decision in *Elk*, saying that the Supreme Court cited "only state court opinions and statutes." U.S.Br. 31. But this Court in *Mashpee Tribe*, 820 F.2d at 484, cited *Elk* for its accurate account of the status of Massachusetts Indians including the Mashpees. Moreover, Interior's observation that the Supreme Court relied on state law reinforces the fact that the Commonwealth completely occupied the field of Indian services to the Mashpees and other Massachusetts Indians. It was the only sovereign that *in fact* exercised jurisdiction over the Mashpees and the other remnants of tribes in Massachusetts. The Massachusetts cases and statutes cited in *Elk* recount the manner in which the "Marshpees" and other remnants were treated as wards of the state, with title to their lands held in the state, until becoming citizens in 1869. As stated in *Danzell v. Webquish*, 108 Mass. 133, 134 (1871):

> The remnants of the Indian tribes, residing within the limits of the Commonwealth . . . were treated as the wards of the Commonwealth.
>
> * **
>
> By recent legislation, the Indians of the Commonwealth have been fully enfranchised from the subjection in which they had heretofore been kept, and put upon the same footing as other citizens, and

> provision made for the division of their lands among them in severalty as their absolute property.

(Citations omitted.)

The complete and total reliance of the Mashpees on the Commonwealth is detailed in the Tantaquidgeon study. JA688-700. It documents 300 years of Mashpees living under the exclusive guardianship of the Commonwealth (and its predecessor). No federal contact with the Mashpees—much less a jurisdiction conferring act—is identified in the report. As this Court observed, the federal government "never . . . actively supported or watched over them." 592 F.2d at 581. Unable to show the Mashpees received the federal government's "active support," Interior is left to argue that its plenary power remained intact over the remnants of tribes in New England. U.S.Br. 23-24. But the IRA requires the tribal applicant to demonstrate a "significant relationship with the federal government as of 1934," one that rests in affirmative actions by the federal government—not passive inactions that left the Mashpee squarely as wards of the state and not the federal government. The Mashpees have not shown and cannot show the requisite affirmative actions by the federal government for the reasons twice stated by the Secretary in 2017 and 2018.

## CONCLUSION

For each of the foregoing reasons, Plaintiffs-Appellants David Littlefield et al. respectfully request that the Court provide the relief requested in the Conclusion set forth in Appellants' Brief.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 8,333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ David H. Tennant

*Attorney for Appellants David Littlefield at al.*

Dated: August 31, 2023

**CERTIFICATE OF FILING AND SERVICE**

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 31, 2023, the foregoing Reply Brief for Plaintiff Appellant was filed through the CM/ECF system and served electronically.

Upon acceptance by the Court of the e-filed document, nine paper copies will be filed with the Court within the time provided in the Court's rules via Express Mail.

/s/ Robyn Cocho
Robyn Cocho