23-839

No. __-____

FILED
JAN 26 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID LITTLEFIELD, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Carcieri v. Salazar,* 555 U.S. 379 (2009) ("*Carcieri*"), this Court held that Congress, when enacting the Indian Reorganization Act of 1934, narrowed the Interior Secretary's authority to take land into trust for "Indians" by limiting that term to mean members of tribes that were recognized and under federal jurisdiction in 1934. In this case, the court of appeals concluded that the Secretary had authority to take land into trust for a group of Indians that Interior said in 1934 consisted of tribal remnants never under federal jurisdiction; that a federal court determined in 1978 did not exist as a tribe after 1869; and that the Secretary did not recognize as a tribe until 2007.

The questions presented is: Whether the decision of the court of appeals conflicts with *Carcieri*?

LIST OF PARTIES

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,

Petitioners,

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,

Respondents.

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Petitioners David Littlefield et al. respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the court of appeals appears in the Appendix, App. la to 33a and is reported at 85 F.4th 635. The opinion of the district court (and judgment) appears at App. 36a to 76a and is reported at 656 F. Supp. 3d 280.

JURISDICTION

The judgment was entered in the court of appeals on October 31, 2023. App. 34a-35a. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the court of first instance (i.e., the district court) was invoked under 28 U.S.C. § 1331.

STATEMENT OF THE CASE

This case concerns the December 22, 2021 Record of Decision ("2021 ROD") by the Department of the Interior ("the Department") which found the Mashpee Wampanoag Tribe was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust under the Indian Reorganization Act of 1934 ("IRA"). The lands are located in the Town of Mashpee on Cape Cod, and a

distinct parcel 50 miles away in East Taunton, Massachusetts. Petitioners (Plaintiffs-Appellants) David Littlefield et al. are residents of East Taunton and challenged the federal government's decision under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA").

Taking land into trust for a tribe profoundly affects the jurisdictional status of the land especially when, as here, the land is declared by the Department to be the tribe's initial reservation. That federal reservation status all but ends state and local taxation and regulation, including zoning and land use laws. It permits the resident tribe to engage in gaming under the Indian Gaming Regulatory Act—for example by building a 17-story tall Las Vegas style casino in 24-hour operation, in a quiet semi-rural community. Such an Indian casino operates insulated from local concerns. In the case of a commercial casino, in contrast, citizens who are impacted by the development are able to voice their concerns through elected officials. They can address light pollution, noise, traffic congestion, and crime through their local and state governments. If they fail to effect change through such recognized political channels, the citizens can resort to the courts to seek to scale back the intrusion into their community. The Department's declaration of the fee lands as a federal reservation does not just foreclose such political and legal challenges by citizens but more broadly carves out the land from state and local regulation. It leaves the resident tribe as a sovereign over its lands, often in opposi-

tional defiance to state and local governments, and one that is insulated by its sovereign immunity from suit even when it actions have detrimental impacts off the reservation.

A. Legal Background

1. A tribe is eligible for trust lands under the IRA if it meets the statutory definition of "Indian," which only includes:

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

25 U.S.C. § 5129 (formerly 25 U.S.C. § 479) reproduced at Appendix 77a.

2. *Carcieri v. Salazar,* 555 U.S. 379 (2009), determined that Congress substantially restricted the Secretary's authority to take land into trust for Indian tribes. Specifically the Court addressed the first definition of "Indian" and whether "now" in the phrase "now under federal jurisdiction" meant at the time of the IRA's enactment (i.e., 1934) or—as the Secretary urged—at the time the Secretary acts to take the land into trust. Finding the answer in the statute's plain text, this Court concluded "now" meant "in 1934." *Carcieri*, 555 U.S. at 395,

382 (holding that Congress in using the word "now" meant to restrict eligibility to Indians under Federal jurisdiction at the time of enactment in 1934). The "under federal jurisdiction [in 1934]" requirement represents an important jurisdictional limitation on eligibility. It necessarily excluded Indians who were assimilated and living under the jurisdiction of the States. *See id.* at 382-383; *see generally* Cohen's Handbook of Federal Indian Law § 3.02[9] (2015) (documenting stark difference between a state recognized tribe and a federally recognized tribe: "State-recognized tribes are, by definition, not considered federally recognized tribes, and the legal status of their reservations and the scope of their governmental authority, if any, is a matter of state, not federal, law."). Indeed, the difference between tribes under federal jurisdiction, and state recognized tribes and Indians assimilated under the jurisdiction of the States, was central to the "under federal jurisdiction" limitation adopted by Congress in 1934. Wards of the state were expressly carved out from the IRA's reach, as its legislative history shows. *See* JA899, 906-911.

The majority and concurring opinions in *Carcieri* agreed that the Narragansetts' history under colonial, British, and then state jurisdiction rendered them ineligible under the IRA's "under federal jurisdiction [in 1934]" requirement. *See Carcieri*, 555 U.S. at 395; *see id.* at 383-384; *id.* at 399-400 (Breyer, J., concurring) (noting "little Federal contact with the Narragansetts as a group"). The majority also noted that the parties had not contended

the Narragansetts were under federal jurisdiction in 1934 and such silence would be enough to resolve the issue. *Id.* at 395-396. But the majority specifically stated "the evidence in the record is to the contrary," reciting the historical evidence published in the Federal Register. *Id.* at 395. Justice Breyer in his concurring decision, likewise concluded the Narragansetts' history proved they were not under federal jurisdiction in 1934, also citing the published history in the Federal Register. *Id.* at 399.

The majority did not expressly address the related requirement of federal recognition in 1934, but Justice Thomas, writing for the majority, did not say anything to suggest that recognition of a tribe could come after 1934. The two requirements under the IRA—that is, recognition as a tribe and being under federal jurisdiction—were thought to always coincide, as articulated by the federal defendants in their briefing in *Carcieri*. *See* Brief for the Respondents, *Carcieri v. Salazar*, No. 07-526 (Merits Brief filed August 2008) at 9, 11, 14, 17 n.2, 20, 22, 24, 33. Under the plain text of the IRA, federal recognition is a necessary but not sufficient condition for statutory eligibility. The federal government must also exercise jurisdiction over the recognized tribe in 1934. Thus both federal recognition and federal jurisdiction are determined in 1934 according to the plain meaning of the IRA.

3. Interior's administrative guidance on *Carcieri* articulates a standard that any tribe can meet. Interior has continuously fought *Carcieri* through

so-called "*Carcieri*-fix" bills in Congress[1] and then by adopting an agency guidance[2] so fluid and imprecise that any tribe can meet it. The Department's administrative work-around to *Carcieri* nominally embraces Justice Breyer's concurring opinion which identifies three principal indicia of federal jurisdiction over a tribe, each of which must be effective as of 1934: "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." 555 U.S. at 399. For each jurisdictional act identified in Justice Breyer's concurring opinion, the act must impart federal obligations that existed in 1934. In Justice Breyer's view (and in the view of the majority), whatever jurisdictional act that brings a tribe under federal jurisdiction in 1934, it must carry with it federal obligations that are present in 1934.

But as soon as the Secretary cites in the M-Opinion Justice Breyer's limiting indicia of federal jurisdiction, the Secretary departs from them, most significantly by removing the clarion call for

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[1] *See, e.g.*, Statement of Kevin K. Washburn Assistant Secretary—Indian Affairs United States Department of the Interior Before the Senate Committee on Indian Affairs On S. 2188, a Bill to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for Indian Tribes May 7, 2014 (available at https://www.doi.gov/ocl/hearings/113/s2188_050714, last visited January 18, 2024).

[2] Solicitor's Op. M-37029 (Mar. 12, 2014) (hereafter "M-Opinion").

evidence that the jurisdictional act be "in effect in 1934." Instead the Secretary creates a jurisdictional anomaly whereby the slightest contact with the federal government before 1934 (decades or centuries before the IRA's enactment) is enough to confer federal jurisdiction, but that status can be lost only through a Congressional act. JA76. This easy to acquire and impossible to lose view of federal jurisdiction maximizes the Secretary's authority to take land into trust for all 538 federally recognized tribes, all but eliminating the "in effect in 1934" requirement. The Secretary's self-aggrandizement has no basis in *Carcieri*. The Secretary's maximally expansive view of her own powers allows her to take land into trust for tribes that Congress excluded, in contravention of the IRA's intent and *Carcieri*.

With respect to federal recognition, Justice Breyer believed recognition might occur later; that it was possible for a tribe to have been under federal jurisdiction without the Department knowing it at the time—citing three examples of such tribes. 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time"). In those limited circumstances "recognition" might catch up to a prior act conferring federal jurisdiction—such as a federal treaty, congressional appropriation or enrollment in the Indian office "in effect in 1934,"as explained by Justice Breyer. *Id.* at 399. But the Secretary in her M-Opinion took the limited examples of the De-

partment losing track of three tribes—and recognizing them afterwards—as an invitation to altogether jettison the requirement that the tribe be "recognized" in 1934. This narrow exception for a handful of overlooked tribes swallows the recognition rule for all tribes. Under the M-Opinion, recognition has no temporal limitation at all. It simply must exist when the Secretary acts to take land into trust. To be sure, the D.C. Circuit and Ninth Circuit have concluded that recognition need not be established in 1934, deferring to the Department's interpretation of Justice Breyer's concurring opinion in *Carcieri*.[3] But the *Carcieri* majority drew no such distinction; the IRA's legislative history does not support drawing that distinction; and as a matter of grammar and plain text reading, Congress made no such distinction. The IRA is properly read to require a tribe to establish *both* recognition *and* federal jurisdiction status in 1934.

B. Administrative and Judicial Proceedings Below

1. Recognizing that it lacks authority under *Carcieri* to take land into trust for the Mashpees, the Department initially tried to avoid subjecting the Mashpees to the "under federal jurisdiction"

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[3] *Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 559–563 (D.C. Cir. 2016); *Cnty. of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1020–1024 (9th Cir. 2017).

requirement when acting on their fee-to-trust application in 2015. Rather than use the commonly-employed first definition of "Indian" with its express "under federal jurisdiction [in 1934]" requirement, the Department employed the rarely used second definition of "Indian"—"all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"—and read it to be shorn of the jurisdictional requirement. JA186. Based on the Department's determination that the Mashpees met that second definition, it took into trust 170 acres in the Town of Mashpee on Cape Cod (the Tribe's historic homelands) and 151 acres of land located in the City of Taunton, Bristol County, 50 miles distant, as a site for a tribal casino. JA104-105, JA40, JA48.

The Department's interpretation of the second definition was ungrammatical and was rejected by the district court, which found the reading contrary to the statute's plain text. *See Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 396-400 (D. Mass. 2016) (holding that "such members" in the second definition refers to "members of any recognized Indian tribe now under Federal jurisdiction" in the first definition, thus making the "under federal jurisdiction [in 1934]" requirement apply equally to the second definition). The court of appeals affirmed the district court's analysis in all respects. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 40-41 (1st Cir. 2020).

The Department never would have sought to avoid the "under federal jurisdiction" requirement if the Secretary thought the Mashpees could meet it. The Department had never advanced that ungrammatical reading of the second definition for any other tribe.

2. The Mashpees likewise sought to avoid *Carcieri* by proposing an elaborate land transaction outside the IRA land-into-trust process. JA971-973. The Mashpees never would have undertaken that effort if they believed they satisfied *Carcieri*'s requirement of being under federal jurisdiction in 1934.

3. On remand from *Littlefield*, and in keeping with the Department's long understanding that the Mashpees could not satisfy the "under federal jurisdiction [in 1934]" requirement, the Secretary determined in Records of Decision issued in 2017 and 2018 that the Mashpees were not under federal jurisdiction in 1934 and thus were ineligible under the IRA for land into trust benefits. In the 2017 ROD, the Secretary determined that the Mashpees (recognized as a tribe in 2007) could not demonstrate that they were under federal jurisdiction in 1934 based on the historical evidence assembled and supplied by them beginning in 2012. JA976, JA935-967. In the 2018 ROD, the Secretary again determined that the Mashpees were not under federal jurisdiction in 1934. JA1061. Indeed, no material change in Interior's analysis of the Mashpees' historical evidence occurred between the 2017 ROD

and the 2018 ROD.[4] The historical record shows the Mashpees were neither recognized nor under federal jurisdiction in 1934.

4. The Tribe challenged the 2018 ROD by bringing an APA action in the D.C. District Court, rather than in the District of Massachusetts where the Tribe is resident, the Plaintiffs reside and the land at issue is located. The District Court for the District of Columbia in *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (D.D.C. 2020) (hereafter "D.D.C.") found the Secretary in the 2018 ROD had not properly applied the Department's two-part test for "under federal jurisdiction" as stated in the M-Opinion. The D.D.C. concluded that the Secretary had weighed the discrete pieces of historical evidence in isolation when it needed to consider the evidence in "concert." *Id.* at 217-218. In a footnote, the D.D.C. rejected Petitioners' argument that *Carcieri* stood as a barrier, concluding this Court never reached the Narragansetts' history, but rather, held that tribe was not under

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[4] Interior provided the 2017 Record of Decision to the Mashpee Tribe on June 19, 2017. JA976. The Tribe objected to it, and Interior responded by "withdrawing" it and marking it a "draft." *See* JA976, JA935. The June 19, 2017 ROD (JA935-967) is fully developed and complete when compared to the ROD ultimately issued September 7, 2018 (JA1061-1088). Interior proceeded to ask for additional briefing on an obscure legal issue that has no impact here (JA976-977) which the parties completed in late 2017. Interior took until September 7, 2018 to issue its decision finding (again) that the Mashpees were not under federal jurisdiction in 1934. JA1061.

federal jurisdiction based on the parties' concession. *Id.* at 215 n. 9.

5. On remand from the D.D.C. *Mashpee* decision, the Secretary pivoted 180 degrees in issuing her new ROD on December 22, 2021 (JA48-102). The Secretary reversed course from the Department's two previous findings, citing the very same evidence found wanting in 2017 and 2018. Not one iota of relevant historical evidence changed between 2017 and 2021. The Tribe did not produce any new evidence. And the Secretary in 2021 cited none. What did change was the identity of the decision-maker: the new administration in 2020 included a new Secretary of the Interior, Deb Haaland. She looked at the very same evidence found wanting twice before and called it sufficient.

Interior credited a series of federal reports and censuses as showing the exercise of federal jurisdiction when this same evidence was twice rejected because it showed no affirmative actions by the federal government but rather passive study or simple headcount without jurisdictional significance. Interior also credited the attendance of a handful of Mashpee children at a federal boarding school, which closed 16 years before the IRA was enacted.

6. The Littlefield Plaintiffs commenced a new APA action in the District of Massachusetts challenging the 2021 ROD. The district court held a hearing on cross-motions for summary judgment and then issued its decision. App. 37a. In affirming

the 2021 ROD in all respects, the district court concluded that Petitioners were barred under principles of issue preclusion from "relitigating" the issue of whether *Carcieri* stands as a legal barrier to finding the Mashpees were under federal jurisdiction since the Narragansetts were not. App. 53a. The district court treated the D.D.C.'s footnote as dispositive and agreed with the D.D.C. that the Supreme Court assumed the Narragansett Tribe was not under federal jurisdiction in 1934 owing to the parties' concessions and did not decide the issue as a matter of historical fact. *Id.* The court of appeals affirmed the district court, including agreeing that this Court did not reach the historical record of the Narragansetts, and thus did control the outcome for the Mashpees, despite their similar histories. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

A. The court of appeals decided an important question of federal law that conflicts with the decision of this Court in *Carcieri*.

1. The court of appeals endorsed the Secretary's broadening of the narrow grant of authority to her under the IRA, ignoring Congress' statutory limitations that require a tribe to be *both* recognized *and* under federal jurisdiction in 1934—in conflict with the holding of this Court in *Carcieri*. It is undisputed that the Mashpees were not recognized in 1934; federal recognition came in 2007. Thus, if federal recognition is required in 1934—consistent

with the text of the IRA and the plain meaning given to it by the *Carcieri* majority—the Mashpees are without question ineligible under the statute for trust lands. This basic eligibility question impacts all tribes and warrants a definitive answer from this Court.

2. Even if recognition is not required in 1934, the court of appeals' decision conflicts with *Carcieri,* which held that the Narragansetts were not under federal jurisdiction in 1934, and thus were ineligible for trust land under the IRA. The historical records for the Narragansetts and the Mashpees are identical in all material respects and show why *Carcieri* is dispositive of the IRA eligibility of both tribes. Like the Narragansetts in *Carcieri*, the Mashpees were treated as assimilated wards of the state and were never under federal jurisdiction. The absence of federal contacts for the Mashpees is the same as for the Narragansetts, proven by the fact that they were "tribal remnants" under colonial, British, and then state jurisdiction just like the Narragansetts—with the Mashpees living as fully assimilated citizens of Massachusetts since 1869. JA914-916. The tribes indisputably share the same history as summarized in their respective submissions in support of federal acknowledgement as a tribe. *Compare* Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (1983) [cited in *Carcieri*, 555 U.S. at 395][5] *with*

[5] *See also* Memorandum from Deputy Assistant Secretary —Indian Affairs (Operations) to Assistant Secretary—Indian

Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007-01 (Feb. 22, 2007) [cited by the court of appeals, App. 5a-6a]. The similarity is striking:

- Each tribe's historic territory is on Narragansett Bay.
- Each tribe has early 17th century contact with English colonists.
- Each tribe befriends Rogers Williams.
- Each tribe voluntarily cedes Indian lands to English colonists.
- Both tribes align to fight against colonial expansion in the large regional conflict known as King Philip's War; both tribes are decimated during the war.
- Each tribe in the early 18th century is placed under a form of guardianship under colonial authority.
- Each tribe remains a ward of the colonial government, and later the state government, until the late 19th century when both Rhode Island and

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Affairs, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island Pursuant to 25 CFR 83, p. 8 (July 29, 1982) [cited by Justice Breyer in his concurring opinion in *Carcieri*, 555 U.S. at 399].

Massachusetts enact assimilation/citizenship/detribalization laws that make the tribal members citizens of the state.

- Each tribe remains under state jurisdiction in all respects through 1934, treated at all times as a ward of the state and not of the Federal Government.
- Each tribe commences land claim litigation against their home state in the 1970s, represented by the same lawyer. In each case, the Federal Government declined the tribe's request, prior to filing suit, to join the lawsuit.

The court of appeals wrongly dismissed the identical histories on the false premise that the Narragansett history was not before this Court in *Carcieri*. App. 12a-13a. It was sufficiently before this Court to support the finding that the Narragansetts were not under federal jurisdiction as a matter of historical fact. *See*, *supra*, at 4-5.

a. In keeping with the long-standing and complete estrangement of the Mashpees (and Narragansetts) from the federal government, this Court observed in *Elk v. Wilkins*, 112 U.S. 94, 108 (1884) that the Massachusetts Indians were "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities" (citing *Danzell v. Webquish*, 108 Mass. 133 (1871); *Pells v. Webquish*,

129 Mass. 469 (1880); Mass. Stat. 1862, ch. 184; and 1869, ch. 463).[6] Indeed, the federal government never had an Office of Indian Affairs in New England[7]; the whole of New England was carved out from the federal government's Indian Department since its organization in 1786. *See* John M.R. Paterson & David Roseman, A Reexamination of *Passamaquoddy v. Morton*, 31 ME. L. REV 115, 128-129 (1979) ("*the definite exclusion of New England Indians from the coverage of the Ordinance constitutes a clear expression of congressional intent that the small, fragmentary bands of Indians in New England were considered "members" of the New England states and subject to their jurisdiction alone.*") (emphasis added). ADD34-36; *see* JA994-997 (Citizens' Group Supplemental Submission on Remand providing historical context for 1786 Ordinance and evidence of exclusive state jurisdiction over New England remnant tribes).

b. The absence of federal contact with Massachusetts Indians, including the Mashpees, is docu-

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[6] *Danzell,* 108 Mass. at 133-135, addressed the state statutes including St. of 1869, c. 463, § 1, granting state citizenship, and detailed the history of the "Marshpee" (and other small Indian groups) and determined these Indians were "treated as wards of the Commonwealth" and therefore not of the federal government.

[7] The absence of an Indian agency in Massachusetts is documented in the Meriam Report: The Problem of Indian Administration (1928), Ch. 3, at 64–65 (available at https://narf.org/nill/resources/meriam.html last visited January 18, 2024).

mented in decisions in the First Circuit in which these Indians sought through litigation to be recognized as a federal tribe. For example in *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 483 (1st Cir. 1987) the court of appeals, citing *Elk,* concluded that the Mashpees and four other tribal remnants in Massachusetts were never recognized by the Federal Government. The court of appeals observed that certain federal reports prepared about Massachusetts Indians (reports credited by the Secertary in the 2021 ROD finding the Mashpees were under federal jurisdiction) "cannot rationally be viewed as actively extending federal jurisdiction over the Mashpees." *Id.*

c. Of particular historical significance, the Department consistently disclaimed any responsibility for the Mashpees in and around 1934, expressly stating they were not under federal jurisdiction in 1934 and thus were ineligible for services under the IRA. JA74-75 (2021 ROD at 27-28); JA726, JA729. The contemporaneous statements by Department officials include those of Indian Commissioner John Collier (JA729) described by this Court as an "unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it." *Carcieri,* 555 U.S. at 390 n.5.

d. Federal court determinations in Massachusetts establish the Mashpees did not exist as a tribe after 1869 and thus could not have been recognized and under federal jurisdiction in 1934. Specifically, a federal court jury determined that

the Mashpees gave up their tribal organization and became citizens of Massachusetts in 1869, and were not thereafter a tribe in Massachusetts. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978). As a result, the tribe lacked standing to bring a land claim action against the state defendants. *Id.* at 942-943; 949-950.[8] That verdict came after 40 days of trial with expert testimony presented by both sides. *Id.* at 943. The proof elements for tribal identity were taken directly from *Montoya v. United States*, 180 U.S. 261, 266 (1901) and set out on a special verdict form with interrogatories. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 579-580, 582 (1st Cir. 1979). The jury's verdict expressly found that the extension of state citizenship in 1869 ended the Mashpees' tribal identity and existence. 447 F. Supp at 943-946. The jury's verdict was affirmed on appeal. *Mashpee Tribe*, 592 F.2d at 582-585. *See also 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).[9]

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[8] The Mashpees pursued land claim litigation without the support or participation of the United States—despite requesting the Federal Government's assistance prior to the case being filed. JA217-218 (2015 ROD at 111-112). To establish standing to assert their land claim, the Mashpees had to prove that they were organized as a tribe on the date the lands were unlawfully taken from them, and on the date they sued to recover possession. They could not prove either.

[9] Interior dismisses in a footnote the federal court jury verdict that determined the Mashpees were not tribally

The federal court jury finding that the Mashpees were not organized as a tribe as of 1869 means the Mashpees did not exist as a tribe within the meaning of the IRA's first definition of "Indian" on the date of the IRA's enactment in 1934. When Congress referred to "members of any recognized tribe now under Federal jurisdiction," it necessarily incorporated the then-prevailing legal definition of a "tribe" as stated by this Court in *Montoya*, 180 U.S. at 266, and reaffirmed 25 years later in *United States v. Candelaria*, 271 U.S. 432, 442 (1926): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." *Candelaria*, 271 U.S. at 442 (quoting *Montoya*, 180 U.S. at 266). Congress is presumed to have incorporated that common law definition into the IRA. *See United States v. Merriam*, 263 U.S. 179, 187 (1923) (finding that the word "bequest" had "a judicially settled meaning" that Congress is presumed to have used); *see Bradley v. United States*, 410 U.S. 605, 609 (1973) (Courts presume, in interpreting statutes, that " '[t]he law uses familiar legal expressions in their familiar legal sense' ") (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)). Moreover, Congress is presumed to know and follow this

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organized after 1869. 2021 ROD at 9 n. 71. Interior understates the years covered by the jury's verdict—altogether avoiding the jury's findings that the tribe did not exist after 1869—while stressing the jury applied different standards than Interior when it recognized the tribe in 2007. *Id.*

Court's precedent. *Bartenwerfer v. Buckley*, 598 U.S. 69, 80-91 (2023) ("This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents.") (quoting *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. ___, ___,142 S.Ct. 1929, 1940 (2022)); *Woodford v. NGO*, 548 U.S. 81, 107 (2006) ("We presume, of course, that Congress is familiar with this Court's precedents and expects its legislation to be interpreted in conformity with those precedents."). Thus, Congress in 1934 necessarily embraced the federal common law definition of "tribe" rather than the modern multivariant definition adopted by the Department through regulations promulgated more than 40 years later in 1978. 25 C.F.R. 83.2; *see* 43 Fed. Reg. 39, 361 (1978). Those regulations establish "mandatory criteria for federal acknowledgment" that consider numerous factors beyond the straightforward federal common law standard. 25 C.F.R. 83.7.[10]

Accordingly, as a matter of adjudicated fact and binding legal precedent, the Mashpees did not meet the common law definition of a "tribe," as incorporated in the IRA, as of 1934.[11] Indeed, such frag-

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[10] Among the mandatory criteria there is no requirement that the tribe be under federal jurisdiction in 1934.

[11] The court of appeals concluded that the *Montoya* common law definition of "tribe," as adjudicated against the Mashpee in federal court in Massachusetts, did not control the definition of "tribe" in the IRA. App. 16a-17a. In doing so, the court of appeals observed that Congress did not unambiguously adopt the *Montoya/Candelaria* common law definition in-

mentary tribal remnants were always deemed under the jurisdiction of the States. *See Elk* and discussion, *supra*, at 16-17.

e. The Department long understood that it lacks authority under *Carcieri* to take land into trust for the Mashpees. The Secretary's first recognition of the *Carcieri* impediment for the Mashpees came in its original fee-to-trust record of decision in 2015, when it tried unsuccessfully to free the Mashpees from ever having to satisfy the federal jurisdiction requirement. *See*, *supra*, at 8-10. JA104-105, JA40, JA48. The Secretary never would have jettisoned the "under federal jurisdiction" requirement for the Mashpees if the Secretary thought they could meet that test. The Department had never advanced its ungrammatical reading of the second definition for any other tribe.

In twice finding the Mashpees did not qualify under the IRA's statutory definition (2017 ROD and 2018 ROD), the Secretary unequivocally concluded that the Mashpee Tribe was not under federal jurisdiction in 1934:

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to the IRA, but never explained what else Congress could have intended when it limited the Secretary's authority to "members of any recognized Indian *tribe* now under federal jurisdiction." No basis exists to say Congress in 1934 intended to allow Interior to adopt a different and more expansive definition articulated 44 years later. Any possible conception of a tribe in 1934 was that it was a group of Indians tribally organized and *existing* in 1934, which the federal courts in Massachusetts determined was not the case as a matter of fact and law.

> [T]he evidence does not show that the Tribe was under federal jurisdiction in 1934. Nor does it qualify under the second definition, as that definition has been interpreted by the United States District Court for the District of Massachusetts.

JA1088 2018 ROD (signed by Assistant Secretary—Indian Affairs Tara Sweeney).

The Secretary reached the identical conclusion in the 2017 ROD:

> [T]he evidence submitted by the Tribe on remand provides insufficient indicia of federal jurisdiction beyond the general principle of plenary authority. The evidence does not demonstrate that the United States had, at or before 1934, taken an action or series of actions that sufficiently establish or reflect federal obligations duties, responsibilities for or authority over the Tribe. As a result I conclude that the evidence does not show that the Tribe was under federal jurisdiction in 1934 for purposes of the IRA.

JA966 2017 ROD (as prepared and distributed to the Tribe by Associate Deputy Secretary James E. Cason).

Accordingly, the record evidence shows the Mashpees were neither recognized as a tribe, nor under federal jurisdiction, in 1934. They are therefore not eligible for trust lands under the IRA just as the Narragansetts were found not eligible.

B. Review is warranted because of the importance of trust land acquisitions under the IRA for all stakeholders: tribes, state and local governments, and citizens impacted by Indian Gaming on tribal trust land.

The Secretary's decision has national importance given the nationwide fee-to-trust authority wielded by the Secretary and the seismic jurisdictional displacement that occurs when the Secretary takes into trust fee lands that are under state and local governance, and declares them the tribe's reservation. All stakeholders are impacted by the Secretary's application of the IRA's eligibility criteria. Moreover, the Secretary has fashioned an administrative work-around to *Carcieri*, contained in the M-Opinion and implemented to maximum effect in the Mashpee 2021 Record of Decision. The 2021 ROD provides a template for the Secretary to use for *all* tribal applicants seeking to have fee lands taken into trust without regard to their actual histories and status in 1934. The Secretary's elimination of the twin requirements of recognition and federal jurisdiction status in 1934 effectively removes from the IRA the central temporal limitation provided by Congress and recognized in *Carcieri*, opening the eligibility door to all tribes.

While policy reasons might suggest it is appropriate for Congress to revisit the subject of IRA eligibility, it is for Congress—not the Secretary—to establish statutory eligibility criteria for tribes.

Carcieri, 555 U.S. at 391 ("Congress left no gap in 25 U.S.C. § 479 for the agency to fill"). Those statutory criteria necessarily circumscribe the Secretary's authority to take land into trust for scores of "*Carcieri*-impacted" tribes, with the number of such tribes estimated in 2009 to run between 50 and 100, but could be substantially more since there are 538 federally recognized tribes with many tribal histories that have not been tested under the IRA—and with many more tribes seeking federal recognition. The Secretary's 2021 ROD finding for the Mashpees under its expansive and imprecise M-Opinion achieved a specific result for one tribe. While an extreme example of the Department's lengthy campaign to be free of *Carcieri*, the Secretary's decision for this one tribe signals to all tribes that each is eligible for land into trust under the IRA notwithstanding the express statutory limitation on the Secretary's ability to act.

The Secretary is not just chaffing at the Congressional yoke recognized by this Court in *Carcieri*, but actively throwing it off in open defiance of this Court and ultimately Congress. The Secretary's rejection of the prior federal court determinations pertaining to the Mashpees' nontribal status also raises a serious Separation of Powers concern. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (citing *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Hayburn's Case*, (2 Dall.) 409, 410 n*, 2 U.S. 408 (1792) ("[B]y

the Constitution, neither the secretary ... nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court").

Review by this Court is warranted to vindicate its own authority as well as that of Congress in restricting the Secretary's authority under the IRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 26, 2024

Respectfully submitted,

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