UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| DAVID LITTLEFIELD et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants. | Case No. 1:16-CV-10184-WGY |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs challenge a decision by the Secretary of the Interior to acquire land into trust for the Mashpee Tribe. The Secretary's decision is contrary to clear statutory limitations and applicable Supreme Court precedent, which require the Secretary to determine that the Mashpee Tribe was under federal jurisdiction in 1934 before taking land into trust.

Under Section 465 of the Indian Reorganization Act, the Secretary of the Interior has the authority to acquire land in trust for Indians. Section 479 of the Act provides three definitions of the term "Indian":

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

Interpreting § 479 as a limitation on the Secretary's authority to acquire land for Indians, the Supreme Court held in *Carcieri v. Salazar* that the word "now" in the first definition means at the time of the Act's passage in 1934 rather than when the Secretary seeks to acquire the land. Thus, the Secretary may acquire land in trust for a tribe only if the tribe was under federal jurisdiction in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009).

The Mashpee Tribe was not under federal jurisdiction in 1934, and therefore the Secretary lacks authority to acquire land into trust for the Tribe under the first definition. Instead of applying the *Carcieri* rule, however, the Secretary made the decision to acquire the land under the second definition of Indian in § 479. This decision is not only unprecedented but also contrary to the plain language of the statute, which contains the same temporal and jurisdictional restriction. Under the proper interpretation, the Secretary cannot escape *Carcieri's* holding by

ignoring the first definition of Indian in favor of the second. And even if the second definition does not require the Tribe to have been under federal jurisdiction in 1934, there has never existed a Mashpee "reservation" within the meaning of § 479. And as a final and further restriction on the Secretary's trust authority that both as a matter of judicially determined fact and law in this Court, the Mashpees Indians were not organized and functioning as a tribe in 1934.

For these reasons, the Court should find that the decision was arbitrary and capricious, vacate the Secretary's decision and order the land removed from trust.

## STATEMENT OF THE CASE / FACTS

### I. *Carcieri II*: The Sequel -- "Nine Years in the Making"

As counsel for the government stated at the June 20, 2016 hearing, the Record of Decision in this case has been "nine years in the making." For the better part of the last seven of those years, the Department of the Interior ("Interior" or "Department") has been devoted to fashioning an end-run around the U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). As the discussion below establishes, however, the Department simply cannot avoid *Carcieri*, which controls here and requires reversal of the Secretary's decision taking land into trust for the Mashpees.

The Mashpees received federal recognition as a tribe in 2007 and immediately applied to have lands taken into trust under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C § 465. (Department of Interior's September 15, 2015 Record of Decision, ("ROD") AR at 000050.[1] Two years later, the Supreme Court decided *Carcieri,* in which the Court rejected the Secretary's expansive reading of its trust authority under the IRA and held the Secretary lacks authority to

[1] An incomplete Administrative Record was provided to counsel on or about July 1, 2016, and a certification was filed with the Court on June 30, 2016. [Dkt 51.] Consistent with the Bates numbering employed by the DOI, citations herein to the Administrative Record will use the following format: "at AR _____."

take land into trust for any Indian tribe that was not under federal jurisdiction at the time of the IRA's enactment in 1934.

*A. The 2009 Decision in Carcieri*

The Supreme Court in *Carcieri* voted 8-1 to reject the Secretary's broad reading of the IRA, specifically repudiating the Secretary's interpretation of the word "now" in § 479, which defines who is an eligible "Indian" under the IRA:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction, and 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 all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (emphasis added).[2]

The Secretary read "now" to mean "now *or hereafter*," *i.e., at the time the land was taken into trust*. 555 U.S. at 382, 386, 391. Only Justice Stevens accepted this reading, which would have significantly expanded the Secretary's trust authority under § 465. *Id.* at 409 (Stevens, J., dissenting). For the other eight members of the high court, "now" clearly meant "1934," the date of the IRA's enactment. *Id.*at 381-383 (majority opinion), 396-97 (Breyer, J., concurring), 400 (Souter and Ginsburg, JJ., concurring in part). The *Carcieri* majority and concurring opinions recognized that Congress had imposed significant restrictions on tribal eligibility, and, thus, Secretarial authority, under the IRA. *See Id.*

[2] Section 479's sentence does not contain any subheadings or numbering within the single sentence that makes up the statutory definition of who is an eligible "Indian" under the IRA. A common convention is to add corresponding numbered brackets [1], [2] and [3] to help designate the different classes of eligible Indians in 479, as follows:

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

As explained below, class 1 and class 2 are closely related categories of eligible Indians, and are sometimes grouped together and called the "membership class" and the "descendant class," respectively. The two classes substantially overlap as the principal drafter of the IRA explained and readers both inside and outside the Department have understood, but they are not the same. The third class, referred to as the one-half blood class, is entirely separate with no tribal affiliation necessary. See, infra, Point II.A.

The majority reasoned that the plain language of § 479 compelled reading "now" as the date of the IRA's enactment, without any need to resort to the interpretative aid of legislative history – much less any need to consider the Department's reading of the statute. *Id.*at 389-90. The majority said the definitions of "Indian" in § 479 established "plain and unambiguous restrictions on the Secretary's trust authority," and specifically held that "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." *Id*. at 395. Moreover, the high court observed that "when Congress has enacted a definition with detailed and unyielding provisions, as it has in § 479, the Court must give effect to that definition even when it could be argued that the line should have been drawn at a different point." *Id*. at 393 n. 8. In other words, the plain meaning controls, period.

Justice Breyer (joined by Justices Ginsburg and Souter) was not convinced that "now" in § 479 was free of ambiguity but agreed with the majority that § 479 imposed clear limitations on IRA eligibility, with the legislative history, including the Secretary's contemporaneous statements, favoring the reading given by the majority. *Id*. at 396-97. The critical historical document cited and quoted by Justice Breyer and referenced approvingly by Justice Thomas' majority opinion, is a contemporaneous letter written by Indian Commissioner John Collier in 1936. As the Supreme Court has stated, that letter shows the Department understood the language of § 479 to impose a temporal limitation to 1934. *Id*. at 397. Justice Breyer's concurring opinion expressly rejected the Secretary's argument that the Court should defer to the Department's contrary reading of the statute, finding such deference was not warranted under either *Skidmore v. Swift & Co.*, or *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*. *Id.* at 396. Indeed, Justice Breyer's concurring opinion concluded that the IRA's history showed

that "Congress did not intend to delegate interpretative authority to the Department." *Id.* at 397. In other words, eight members of the Supreme Court held that Congress did not intend the Secretary to construe, much less alter, the "detailed and unyielding" definitions of eligibility contained in in § 479.[3]

### *B. The Secretary Supports Failed Legislative Efforts to Overturn the Supreme Court's Carcieri Decision*

The Secretary has made no secret that she is critical of the holding in *Carcieri*, working in Congress since 2009 to overturn the decision, including directly supporting a flurry of so-called "*Carcieri*-fix" bills. These bills would expressly remove the "now under Federal jurisdiction" requirement from § 479 and thereby reinstate the broader authority that the Secretary exercised before *Carcieri.* None of the *Carcieri*-fix bills have become law.[4]

### *C. The Secretary Seeks to Script A Different Ending in 2015*

In light of the failure of these bills, the Secretary now seeks to manufacture by administrative fiat a different outcome for the Mashpees in Massachusetts than that faced the Narragansetts in *Carcieri.* Indeed, the Secretary effectively seeks to reestablish her authority to take land into trust for all tribes without regard to their federal jurisdictional status in 1934. The Mashpee Indians, like the Narragansett Indians and many other Eastern tribes, were subject to the jurisdiction of colonial and state governments—not the federal government—throughout

[3] Justices Souter and Ginsburg joined in Breyer's interpretation of § 479, although ultimately they put themselves in the dissenting category for reasons unrelated to the statute's interpretation. They argued that the case should be remanded to the Department to determine whether the Narragansetts were "under federal jurisdiction" in 1934, despite that there was no evidence in the record to support such a finding, and no attempt to press such an argument by the Department or otherwise. *Carcieri*, 555 U.S. at 400-01.

[4] Request for Judicial Notice, or in the Alternative to Supplement the Record ("RJN") ¶ 3. The Department has regularly if unsuccessfully supported so-called "*Carcieri* fix" legislation. *See id*., Senate Report on S. 1879 (Interior Improvement Act which would amend the IRA regarding the authority of the Secretary of the Interior to take land into trust for Indians by, among other things, deleting "any federally recognized Indian tribe now under federal jurisdiction" and substituting "any federally recognized Indian tribe").

their long history.[5] The Mashpees were not under federal jurisdiction in 1934, as required to receive benefits under the IRA. The Secretary concedes as much by disclaiming reliance on the Class 1 definition of "Indian" under the IRA. [6]

*D. The Flawed Mashpee ROD*

The Secretary devotes a remarkable 41 pages in the ROD to the *Carcieri* issue. The Secretary's analysis of § 479 is as wrong as it is long. Most significantly, the Secretary fails to apply the "now under federal jurisdiction" requirement to the second definition of Indian in violation of the plain meaning rule (and basic grammar), as dictated by the *Carcieri* majority. The plain language of the statute admits of only one grammatical reading, where "such members" can mean only one thing: "members of any recognized tribe now under Federal jurisdiction." That antecedent phrase is a single, uniform, mechanically undivided block phrase. The Secretary in the ROD (and in briefing in this Court) has yet to identify any rule of grammar—anything by way of syntax or punctuation—that would warrant splitting that single antecedent phrase into "portions," much less would intelligently direct the reader to incorporate some portions and not others into the second definition of "Indian." The Secretary's reading is entirely arbitrary, untethered as it is to any rule of grammar. For this reason alone the Secretary's claim to exercise lawful statutory authority under the IRA must be rejected. See, infra Point I.A.

In addition, a review of the IRA's legislative history, contemporaneous Department records as referenced in and relied on in *Carcieri*, and the Department's more interpretations of

[5] *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 945-946 (D. Mass 1978); Plaintiffs' Request to Take Judicial Notice, dated July 7, 2016 ("RJN"), Ex. 3 (U.S. Department of Interior's Final Determination, dated February 15, 2007); Ex. 5 (U.S. Department of Interior's Final Determination and Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgement of the Narragansett Indian Tribe of Rhode Island dated Feb. 10, 1983).

[6] ROD at 79, n.151. In light of the extensive historical record showing the Mashpee Indians under state jurisdiction throughout their history and specifically in 1934, the Secretary abandoned any reliance on the first definition of "Indian" in the IRA and sought to justify the Secretary's land acquisition for the Mashpee only under the second definition. ROD at 79 & n. 153.

the second definition, all support reading the statute according to its plain language. See, infra Point II.

The Secretary's exercise of her trust authority for the Mashpees is further precluded by the fact that the Mashpees were not a "tribe" in 1934 and did not have a "reservation" in 1934 within the meaning of the IRA.

Accordingly, The ROD must be vacated, the lands in East Taunton taken out of trust, and all related federal designations of the land in East Taunton (including designation as the Mashpees' "reservation" under 25 USC 467, "initial reservation" under IGRA, and eligibility for gaming) declared null and void *ab initio*.

## ARGUMENT

### I. THE SECRETARY'S READING OF SECTION 479 IS UNGRAMMATICAL, UNPRINCIPLED AND UNTENABLE AS A MATTER OF LAW.

#### A. The Plain Meaning Rule Dictates Reading "Such Members" to Incorporate "now under Federal jurisdiction" into the Class 2 Definition of Indian in § 479.

The issue before the Court is whether Class 2 definition of Indian in § 479 requires the Secretary to determine that the Indians for whom the land is being acquired are descendants of a recognized Indian tribe that was under federal jurisdiction in 1934. The Secretary contends that the jurisdictional and temporal limitations imposed in the Class 1 definition do not limit her authority to take the land into trust under the Class 2 definition. This interpretation abandons basic rules of grammar and the fundamental principle that statues should be interpreted according to their plain meaning.

In the ROD, the Secretary interprets the phrase "such members" in the Class 2 definition of Indian as referring back to "members" in the Class 1definition in the following way: "members of any recognized Indian tribe ~~now under Federal jurisdiction~~." According to the

Secretary, then, the second definition of Indian should more accurately read: "all persons who are descendants of members of any recognized tribe . . ." In fact, in the ROD, the Secretary offers a re-writing of the Class 2 definition:

> The IRA applies to "Indians," including "descendants of *[members of any recognized Indian tribe]* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation. ROD at 120.

But the surgical removal of "now under Federal jurisdiction" as part of the referent for "such members" is arbitrary because there is no cue for the reader—no rule of grammar, usage, syntax or punctuation mechanics—to signal that the temporal and jurisdictional limitation on the meaning of "now any recognized Indian tribe," stated in the Class 1 definition of "Indian," does not also apply in the Class 2 definition of "Indian." There is only one referent, one antecedent phrase that "such members" refers to. Moreover, that sole antecedent phrase is a single compound phrase undivided by punctuation. "Such members" can refer only to whole referent as a matter of basic English grammar and usage. The entire antecedent phrase is italicized in *Carcieri*, 555 U.S. at 388, where the Court quotes the definition of "Indian." The statute's text is plain and unambiguous and there is no ambiguity in construing the meaning of "such members" under settled rules of grammar and statutory construction.

In other words, there is no reasonable basis upon which the Secretary can divorce the Class 2 definition of Indian from the "under Federal jurisdiction" requirement. As written by Congress, the descendants in Class 2 are necessarily—grammatically and syntactically—the descendants of members of any recognized tribe that was under Federal jurisdiction in 1934. That grammatical reading of the plain language of the statute is both the starting point and ending point for the statutory interpretation of the second definition of Indian. See, infra Point II.C., p. 17. Nothing more is required or permitted.

The Secretary gives lip service to the plain meaning rule but never explains in the ROD what rule of grammar or usage—anything beyond the Secretary's own desire to read the text without the "under Federal jurisdiction" restriction—supports the Secretary's reading. Instead of looking to the statute's language and applying the rules of grammar to divine the meaning of the plain language, the Secretary in *ipse dixit* fashion declares the text ambiguous, leaps into applying a series of interpretative aids, and then declares her version more reasonable. (ROD at 94). This stands the plain meaning rule on its head.

Such interpretive canons are properly used to resolve ambiguity where the plain language makes the text susceptible to more than one reasonable interpretation. They are not properly used in the reverse, as the Secretary does here, to try to create ambiguity. Untethered to any grammatical reason for severing the phrase "now under Federal jurisdiction," these traditional canons of statutory construction do not so much illuminate or clarify Congress' intended meaning as they serve to create the meaning the Secretary desires. The Secretary lacks any authority to create a new statute.

B. The Secretary's Proffered Reasons for Abandoning The Plain Meaning Are Legally Invalid.

The Secretary offers two reasons for rejecting the plain meaning: (1) surplusage and (2) redundancy. Neither reason is valid.

1. No Surplusage Is Created By Incorporating the Complete Antecedent Phrase Including "now under Federal jurisdiction"

The Secretary does not explain how "fully incorporating the 'under Federal jurisdiction' requirement" of the Class 1 definition into the Class 2 definition (through "such members") would create any surplusage, much less render meaningless the requirement in the Class 2 definition that the descendants must reside on an Indian reservation as of June 1, 1934. All the

incorporation does is make clear that the descendant class—Indians who qualify as an "Indian" under the second definition—must be descended from members of any recognized tribe that was under Federal jurisdiction in 1934. In other words, the genealogy root stock for the descendant class is the universe of tribal members who belonged to a federally recognized tribe that was under federal jurisdiction in 1934. This is what Congress proscribed in 1934 to limit the pool of eligible Indians. *See* Karl A. Funke, Educational Assistance and Employment Preference: Who is An Indian?, 4 American Indian L. Rev. 1, 18 (1976), RNJ Ex. 2, (hereafter "Funke" at __).

The Secretary ignores both the text and context of the Class 2 definition in arguing most recently that the plain reading would render the Class 2 definition surplusage "because if a person could establish they were "Indian" under the First Definition [i.e., "all persons of Indian descent who are members of any recognized Indian tribe now [in 1934] under Federal jurisdiction"] , there would be no need whatsoever for that person to further demonstrate residence on a reservation on June 1, 1934, as required by the Second Definition." (Dkt. 38, p. 12). This argument is nonsensical. Any persons who qualify under the Class 1 definition are eligible for IRA benefits under that definition. They need not resort to the Class 2 definition to qualify. Congress created the descendant class as an alternative to the membership class, to enable unenrolled tribal members (minor children and others) to come under the IRA, provided those descendants were living the tribal life on a reservation as of June 1, 1934, and those persons descended from a member of a tribe that was under federal jurisdiction in 1934. As Commissioner Collier noted, the descendants class (Class 2) is small and largely overlap with the membership class (Class 1):

> There will not be many applicants under Class 2, because most persons in this category will themselves be enrolled members of the tribe . . . and hence included under Class 1.

Interior's re-writing of § 479 to free the descendant class from the "under Federal jurisdiction" requirement comes down to a policy choice about the operative genealogical root stock for Class 2, that is, what the universe of qualifying ancestors would be for Indians claiming descendant status under the Class 2 definition. By writing § 479 as it did, Congress necessarily chose the narrower universe of ancestors who were members of a recognized tribe that was under federal jurisdiction in 1934, rather than the broader universe of any recognized tribe, including "state recognized" tribes and other groups of Indians who were under state jurisdiction. Funke, at 22-25. The Secretary's ungrammatical reading—which de-links the Class 2 definition from the "now under Federal jurisdiction" requirement—erases the lines drawn by Congress and re-writes the statutory eligibility criteria the way the Secretary wants. In doing so Interior unlawfully oversteps its authority just as it did in *Carcieri*.

2. Even If Some Language Were Rendered Surplusage (It Is Not), The Plain Meaning Controls.

No language is rendered surplusage by reading § 479 according to its plain language, but even if that were the case, the plain meaning controls. *See Lamie v. U.S. Tr*., 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (where the plain meaning of the statute produces the surplusage, it is to be preferred over a construction which creates ambiguity, as the plain construction best "respects the words of Congress"). The only time the court has the power to reject an unambiguous plain meaning is if it produces a truly absurd result – something that is morally indefensible and clearly contrary to Congressional intent. *See In re Sunterra Corp*., 361 F.3d 257, 265 (4th Cir. 2004). That type of finding occurs only in "rare instances." *Cook v. Food & Drug Admin*., 733 F.3d 1, 9 (D.C. Cir. 2013). The notion that eligibility under the second definition would be narrowed if given a grammatical reading does not rise to the level of an "absurd" result. *See In re Sunterra Corp*., 361 F.3d at 265; *Mylan Pharm., Inc. v. U.S. Food &*

*Drug Admin.*, 454 F.3d 270, 275 (4th Cir. 2006) ("The statute's tolerance of the sale of authorized generics during the exclusivity period is not an outcome that 'shock[s] the general moral or common sense,' and therefore it does not count as the sort of 'absurd' result that courts seek to avoid in construing statutes.").

As the Supreme Court said in *Carcieri*, Congress established "detailed and unyielding" standards for eligibility, and the Secretary is not free to vary the plain meaning rule and straightforward incorporation of the temporal restriction of the first definition into the second definition because either the Secretary or this Court thinks Congress should have drawn the line elsewhere. *Carcieri*, 55 U.S. at 393, n.8.

3. The Secretary's Redundancy Argument Rests on a False Legal Premise That All Reservations Are Under Federal Authority.

The ROD asserts that "it would have been redundant for Congress to incorporate the phrase 'now under federal jurisdiction' where it was well established at the time of [sic] IRA that residents of a reservation were automatically subject to Federal authority." (94 & n 241 citing *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913)). This statement inaccurately portrays the law then and now with respect to "federal authority" over state-created Indian reservations. Non-federal Indian reservations were established under colonial and state law during the 17th and 18th centuries, before there was a United States and a federal constitution. See generally *Cohen's Handbook of Federal Indian Law*, § 3.02[9] (2005 Ed. ), RJN Ex. 6, at 168-69 (acknowledging long standing "state-recognized reservations" that "developed with English colonies and continued with the states after the American Revolution") [7]; see generally Alexa

[7] During the confederal period (pre-Constitution), the original states exercised sovereign authority with right of preemption over Indian lands, that is, the right to purchase the lands occupied by Indians within the state's territories, upon the Indian occupancy ending. *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823). This power devolved from the British Crown as a result of the Revolutionary War. *Cohen's Handbook of Federal Indian Law*, § 3.02[9]. Pursuant to this sovereign authority, some states entered into treaties with Indians and created state

Koenig and Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes across the United States*, 48 Santa Clara L. Rev. 79, 80-82; 86-87, (2008) ("*State Recognition of Native American Tribes*").[8]

Directly refuting the Secretary's position that all reservations are and were under "federal authority," the Cohen treatise correctly observes that, "[s]tate-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*."' *Cohen's Handbook of Federal Indian Law*, § 3.02[9] at 169 (emphasis added). Even the Bureau of Indian Affairs website draws a critical distinction between Federal reservations and State Reservations:

> ***What is a federal Indian reservation?***
> In the United States there are three types of reserved federal lands: military, public, and Indian. A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.
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> ***
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> **State Indian reservations**, which are lands held in trust by a state for an Indian tribe. With state trust lands title is held by the state on behalf of the tribe and the lands are not subject to state property tax. They are subject to state law, however. State trust lands stem from treaties or other agreements between a tribal group and the state government or the colonial government(s) that preceded it. (U.S. Department of the Interior, Indian Affairs, Frequently Asked Questions, available at http://www.bia.gov/FAQs/ (last visited July 7, 2016).

Thus, the central legal premise upon which the Secretary bases her redundancy argument is flat-out wrong.[9] Accordingly, the redundancy argument is without merit and should be

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reservations. *Id.*

[8] According to the Cohen Treatise, "The term 'state-recognized tribes' refers to tribes that are not federally recognized, *but have been acknowledged by state law and sometimes reside on state-recognized reservations*." Cohen , § 3.02[1] (emphasis added). As of 2008, 62 state-recognized (non-federally recognized) tribes were believed to exist in the United State, located in sixteen states, with state-created reservations located in nine of those states. *State Recognition of Native American Tribes*:, 48 Santa Clara L. Rev at 83-84, 153 *See New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 489, 492-93 (E.D.N.Y 2005) (describing creation of state reservation in 1703).

[9] The Secretary's reliance on *Sandoval*, is misplaced. That case involved the federal status of pueblos in New Mexico following secession from Mexico; it has nothing to do with state-created reservations in the East. The

rejected. Tellingly, the government did not offer the redundancy argument in opposition to plaintiffs' motion for injunctive relief, apparently recognizing it was a non-starter. But with only two justifications offered in support of the ROD's ungrammatical reading of the second definition, the Secretary's abandonment of the redundancy argument exposes the weakness of its position.

C. The Secretary's Reading of § 479 Produces Absurd Results and Defies Congressional Intent

Setting aside the Secretary's palpable abuse of English grammar and demonstrably false claims that incorporating the complete antecedent phrase would render the second definition surplusage or is unnecessary because it introduces redundancy (ROD at 91), the Secretary's surgical removal of the federal jurisdictional requirement for the descendant class, when combined with her suddenly loose understanding of what constitutes an "Indian reservation" under the IRA (ROD at 95-102), would open wide a major back-door to IRA eligibility through which tens of thousands of Indians living under state jurisdiction could walk in, and thereby be entitled to IRA benefits. That outcome, while acceptable to the Secretary in 2015, reduces to shambles the "detailed and unyielding" eligibility criteria established by Congress in 1934, as recognized and respected by the Supreme Court in *Carcieri*. Indeed, the Senate Committee

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opinion says nothing about the federal government's authority over state-recognized tribes and state-recognized reservations, and its general dicta about federal authority fades in the face of the historical record in the East in general and in the case of the Mashpees' history in particular. As the First Circuit observed in *Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 581 (1st Cir. 1979), "the federal government has never actively supported or watched over them."). Final Determination, Ex. 3, at 581. To the extent the Secretary's redundancy argument is based on the federal government's reserved (i.e., unexercised) "Constitutional plenary authority over tribes," (see Department's March 12, 2014 Memorandum, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, AR 000681, at p. 19) such *potential* authority to act is not what Congress was addressing when it drew "detailed and unyielding" lines for IRA eligibility in § 479, including imposing the requirement that any tribe must have been "under federal jurisdiction" in 1934. The Secretary recognized this in her March 12, 2014 Memorandum, in which she concluded "that Congress, by using the "under federal jurisdiction" requirement to limit eligibility under the Act did not mean implicit authority as some had argued, but rather some "action or series of actions" that "reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." (Memo at 19). The federal government took no such actions with respect to the Mashpees.

hearing colloquy that led up to the insertion of "now under Federal jurisdiction" in § 479 makes clear that Congress intended to exclude from the IRA the large number of Indians who were members of state recognized tribes and were being provided for by the states. See Karl A. Funke, Educational Assistance and Employment Preference: Who is An Indian?, 4 American Indian L. Rev. 1, 22 -25 (1976) ("The Senate Committee thought that the unrestricted language, 'members of any recognized tribe,' would be interpreted to include members of nonfederally recognized tribes (i.e., state recognized tribes or Indians merely living in a tribal manner but without any political relationship with the federal government.").

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

The Secretary's current reading of the second definition erases that Congressional line-drawing with respect to the descendant class, requiring no federal tribal affiliation in 1934 and

[10] The author treats "federally recognized" and "under Federal jurisdiction" as the same thing, in keeping with prevailing views within the Department and elsewhere before *Carcieri* was decided – indeed that was still the Department's view in the *Carcieri* case. Justice Breyer's concurring opinion in *Carcieri* introduced the concept of dividing those two statuses, so that a tribe could have been "under Federal jurisdiction" in 1934 but the federal government did not know it, and could later remedy its omission and federally recognize the tribe after 1934. For purposes of evaluating the 1976 "Who is an Indian" article, it is written from the pre-*Carcieri* perspective that if a tribe is federally-recognized it is necessarily under federal jurisdictions and vice versa. The author ultimately believed federal recognition/jurisdiction should be "ambulatory" and measured at the time of applying for employment, based on the policy to give employment preference to Indians, but understood the legislative history could be read to make the recognition/jurisdiction attach to the date of enactment (*id*. at 31) as *Carcieri* ultimately held.

allowing massive influx of unrestricted members of state-recognized tribes to receive IRA benefits if they otherwise can demonstrate residency on a "reservation" (which the Secretary apparently believes can be just about any parcel of land) in 1934.

The Secretary's current expansive reading of § 479 not only violates the spirit and holding of *Carcieri* but also creates absurd distinctions among the eligible classes. By de-linking the descendant class from the "now under Federal jurisdiction" requirement that applies to the "member class" in the Class 1 definition, the Secretary elevates descendants above the members themselves, purportedly making the descendants eligible to obtain IRA benefits where the members are not (provided the descendants otherwise qualify, i.e., were residing on an Indian reservation as of June 1, 1934 but not enrolled). It is hard to fathom a justification that would give descendants of members (who are not enrolled members of the tribe) more rights than the members of the tribe who are actually enrolled. This makes no sense other than as a means-justify-ends approach by the Secretary to obtaining trust lands for the Mashpees so that they can open a casino.[11]

The Supreme Court's decision in *Carcieri* precludes the Secretary's absurd, result-oriented reading. There is no principled, textually-sound reading of the IRA that can provide a different outcome for the Mashpees compared to the Narragansetts.

D. *Carcieri's* Teachings on Statutory Construction Control Here and Preclude *Chevron* and *Skidmore* Deference.

Consistent with the Supreme Court's interpretation of the IRA in *Carcieri* (555 U.S. at 387), the court begins with the language of the IRA itself. *Barnhart v. Sigmon Coal Co., Inc.*,

[11] Indeed, drawing such distinctions would seem to create perverse incentives for the enrolled adult members of any recognized tribe to drop their names from the official tribal rolls and apply for land into trust as a "descendant" of such a tribal member. The Secretary nonetheless ignores the irrational and morally indefensible disparate treatment of the "membership class" and "descendant class," and instead gives unenrolled children greater rights than their enrolled parents.

534 U.S. 438, 450 (2002) (in all statutory construction cases, the court begins with the language of the statute); *Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009); *Seahorse Marine Supplies, Inc. v. P.R. Sun Oil Co.*, 295 F.3d 68, 74 (1st Cir. 2002) (the "starting point for interpretation of a statue is the language of the statute itself") (internal citation omitted). "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart*, 534 U.S. at 450 (omitting internal quotation marks); *Saysana v. Gillen*, 590 F.3d at 13; *Seahorse Marine*, 295 F.3d at 74 (quoting *Parisi by Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995) (the court is to "give effect to the statute's plain meaning 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect'")). *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (absurdity exists "when literal application of the statutory language at issue results in an outcome that can truly be characterized as absurd, i.e., that is so gross as to shock the general moral or common sense . . .").

As *Carcieri* further teaches, 555 U.S. at 395, if a federal statute is unambiguous, no deference is owed to the federal agency which administers. *Barnhart*, 534 U.S. at 462, 122 S. Ct. at 956 ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."); *Neang Chea Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (plain meaning of "immediate relative" is clear under 8 U.S.C. § 1151(b)(2)(A)(i), such that court did not need to defer to agency).

As Justice Breyer explained in his *Carcieri* concurrence, 555 U.S. at 396, where a statute is ambiguous, the court must resort to "the normal devices of judicial construction"— examining the "text, structure, purpose, and history of the [statute], along with its relationship to other

federal statutes" —to resolve the ambiguity. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998). If the legislative history reveals "an unequivocal answer," the inquiry ends. *Arnold*, 136 F.3d at 858 ("If that history reveals an unequivocal answer, [this Court does] not look to the interpretation that may be given to the statute by the agency charged with its enforcement.").

*Chevron* deference to an agency's interpretation of a statute exists as a last resort that is "called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys*., 540 U.S. at 600; *Saysana v. Gillen*, 590 F.3d at 13 (internal citations omitted).

As noted above, the Supreme Court in *Carcieri* rejected applying *Chevron* and *Skidmore* deference to the interpretation of § 479 of the IRA (555 U.S. at 395 (majority), 396 (Breyer (concurring)), and this Court should reject it here for the same reasons. Congress did not intend to delegate to the Secretary its interpretative authority regarding IRA eligibility criteria and thereby allow Secretary to define the scope of her own authority.

E. Even If Resort to Interpretative Aids Were Warranted (It Is Not), Those Aids Uniformly Confirm The Plain Meaning of, and Refute The Secretary's Ungrammatical Reading of, the Class 2 Definition.

The Secretary's reading is unprecedented in the truest sense. Not only has the Department never before read § 479 this way, it appears that no one else has either. This includes the drafters, adopters and implementers of the IRA, counsel for the Department of the Interior, and the Department of Health and Human Resources—all readings offered by government employees when litigation was not the purpose or the inspiration for construing the IRA. The collection of contrary interpretations is summarized below; supporting documents are either part of the administrative record or the subject of Plaintiffs' RJN.

a. Senate Committee on Indians Affairs hearing colloquy (1934)

As noted above, the Senate Committee hearing testimony demonstrates the senators' concerns about adding to the Government's support obligations and wanting to clearly define which *limited* groups of Indians the Government would help by this legislation. See Funke, 19-25. Senator Wheeler, Chairman of the Senate Committee and lead sponsor of the IRA (widely known as Wheeler-Howard bill), and Commissioner Collier, specifically discussed the "under Federal jurisdiction" requirement in the context of limiting eligibility by excluding state recognized tribes among others:

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

Funke, at 25 (quoting Senate Hearings, S.3645 Before the Senate Comm. on Indian Affairs, 73d Cong. 2d Sess. (1934) at 266.

b. Commissioner Collier March 7, 1936 Letter

This letter convinced Justice Breyer that the Secretary's reading of the IRA was wrong and warranted no deference to the agency. *Carcieri*, 555 U.S. at 397. Strangely, the Department had not produced the letter in *Carcieri* despite many years of litigation in the district court and First Circuit and only lodged it for the first time in the Supreme Court. This letter carries the same dispositive weight here as in *Carcieri* because Commissioner Collier explained the

subservient role that the descendant class (Class 2) plays in relation to the membership class (Class 1) under § 479 (§ 19 of the IRA). Commissioner Collier noted Class 2 would cover "unenrolled descendants of such members residing on a reservation June 1, 1934." Such unenrolled members would include minor children who are not carried on the tribal roll until they reach majority age. For minor children, and maybe others falling in Class 2, the descendant class status is a temporary condition only.

c. Department's Interpretation of Second Definition March 24, 1976

The Associate Solicitor for Indian Affairs was called upon to construe § 479 in relation to the "descendants category" for purposes of the Indian preference in employment. The particular issue was whether the "members" or the "descendants" mentioned in Class 2 had to be alive and residing on a reservation as of June 1, 1934. The Associate Solicitor's opinion did not address the "under federal jurisdiction" requirement. But the Associate Solicitor concluded that the IRA's legislative history supported giving a narrow construction to Class 2 and formally opined that that the descendants had to be alive and living on a reservation as of June 1, 1934. AR000443; See also Fed. Reg. 27609-27610 (May 31, 1977) (adopting clarification of who is an eligible Indian under the IRA).

d. Department's Position in *Garvais v. Dept. of Interior* July 8, 2004

In an Indian preference administrative proceeding, the Department took a litigation position contrary to its position here. The plaintiff challenged the Department's narrow reading of the descendant class (discussed above in subsection "c") and specifically argued that the Department's interpretation "renders [the descendant class] redundant and mere surplusage." The administrative judge accepted the Department's interpretation of the descendant class and rejected the plaintiff's statutory construction arguments—the very same ones the Department

now makes to justify her unprecedented reading here. *Garvais v. Dept. of the Interior*, 2004 MSPB LEXIS 3395 (July 8, 204).

e. Justice Stevens' Dissent in *Carcieri* in 2009

In his dissent in *Carcieri*, Justice Stevens summarized the Act's eligibility requirements as follows:

> The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of blood quantum or as descendants of members of "any recognized tribe now under Federal jurisdiction."
>
> 555. U.S. at 401-02.

This articulation of § 479 accurately and elegantly connects the "under federal jurisdiction" requirement to the descendant class (Class 2), through the membership class (Class 1), as Congress intended.

f. Indian Health Service Guideline in 2015

The Indian Health Service, within the Department of Health and Humans Services, provides services to eligible Indians and in that role has consistently read § 479—including post-*Carcieri*—in keeping with its plain meaning:

F. Guidelines for Interpretation of Indian.

(1) "Members of any recognized Indian Tribe now under Federal jurisdiction..." are those persons officially enrolled in accordance with such Tribes' constitutional membership criteria.
(2) Applicants applying as "Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" shall meet all three of the following criteria:
   a. Be descended from a member of any recognized Tribe now under Federal jurisdiction; and,
   b. Have been born on or before June 1, 1934; and
   c. Have been residing within the present boundaries of any Indian reservation on June 1, 1934.

Indian Health Manual, Part 7 - Human Resources Administration And Management, Chapter 3 - Indian Preference, Introduction, Part 7-3-1, Introduction (available on Indian Health Service

website https://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p7c3#7-3.1F, last visited July 7, 2016).

G. The Secretary's Reading, By Incorporating Only "a Portion of the Proceeding Phrase" Is Ungrammatical and Unprecedented, And Finds No Support In Any Canon of Construction.

The Secretary's reading of § 479 rests on a trilogy of demonstrably false premises: (1) "such members" is ambiguous; (ROD at 93-95); (2) the IRA should be interpreted in light of its broad remedial purposes (ROD at 93); and (3) the Indian canon of construction requires the court to construe ambiguities for the benefit of Indians. (ROD at 94-95).

1. No Ambiguity Exists

The Secretary's ungrammatical reading of § 479 is rooted in the Secretary's *ipse dixit* pronouncement that "such members" is ambiguous. *Carcieri* rules out this argument. The high court completely repudiated the Secretary's contention that "now" was ambiguous, which is a word whose meaning can reasonably vary in context and was considered to be ambiguous in § 479 by three justices of that court. If "now" was not ambiguous in § 479, "such members"—which is a plain vanilla textual reference—cannot be.[12] The natural reading of "such members" leaves no room for any doubt as to what it references, It must refer to the antecedent phrase that contains the word "members" and that antecedent phrase is written as an undivided whole phrase without any commas, semi-colons or other punctuation that could potentially subdivide the phrase. Without any such punctuation or other indicia of divisibility, the plain reading calls for the incorporation of the entire undivided antecedent phrase. This grammatical, literal reading

[12] The interpretation of this text is not within the Secretary's expertise and warrants no deference. *Carcieri*, (Breyer) 555 U.S. at 396-97; see, *supra*, p. 4, 17-18. In contrast, the phrase "under Federal jurisdiction" is susceptible to differing interpretations and arguably might fall within the Department's interpretative purview. But that does not mean any other language contained in § 479 is ambiguous. The presence of ambiguity in that phrase (or any other part of § 479) in no way supports the Secretary's contention here that "such members" is ambiguous.

avoids altogether the Secretary's problem of interpreting what "portion" of the antecedent phrase, if any, to leave out. The incorporation of the whole antecedent comes naturally, subject only to the fail-safe measure that an absurd result will not be tolerated—with true absurdity required. *See In re Sunterra Corp*., 361 F.3d at 265 (result may be characterized as absurd where it "is so gross as to shock the general moral or common sense"). Giving the descendants class a narrowing but meaningful reading is hardly an absurd result. Indeed, it is fully consonant with the IRA's legislative history. *See*, Section E, *supra*.

2. The IRA's "Remedial Purpose" is Irrelevant

Section 479 establishes "detailed and unyielding" standards for eligibility under the IRA that are set by Congress and not meant to be interpreted by the Secretary, much less reinterpreted, relaxed and re-drawn to fit the Secretary's current view of the IRA's broad remedial purpose. The *Carcieri* decision precludes it. 555 U.S. at 393 n. 8 (majority); 391-92 (Breyer, J., concurring).

3. Indian Canon Has No Role to Play

With no ambiguity as to who "such members" refers to, there is no role for the Indian canon to play, just as the canon played no role in *Carcieri*. *See* 555 U.S. at 419 (Stevens, J., dissenting).

## II. THE JUDICIAL DETERMINATION THAT THE MASHPEES WERE NO LONGER A TRIBE BY 1869 PRECLUDES THE SECRETARY FROM TAKING LAND INTO TRUST.

### A. The Secretary Lacks Authority to Take Lands Into Trust for Mashpee Indians Because They Did Not Exist As a Tribe in 1934.

A group claiming to be the "Mashpee Tribe of Indians" filed suit in federal district court in Massachusetts in 1975, seeking to recover possession of tribal lands in Southeastern Massachusetts. The tribal-plaintiff claimed the lands had been taken unlawfully by the

Commonwealth in the 19th Century. After a 40-day jury trial, with extensive testimony and written reports provided by ethno-historians concerning the history of the tribe, the jury determined the Mashpees had ceased to exist as a tribe by 1869. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 942 (D. Mass. 1978) (special interrogatory "d"). The federal court trial record included evidence that the Mashpees desired to become citizens of the Commonwealth, petitioned for the right to secure such status, and in fact voted to become state citizens after passage of an act on June 23, 1869, which granted "citizenship to the Indians, removing their legal disabilities, and released the restraints on alienation . . . .") *Id*.

The District Court judge overseeing the trial, Hon. Walter Jay Skinner, concluded that "from all the evidence, the jury was entitled to find that tribal identity had been abandoned at some time between 1842 and 1869." *Id.* at 946. The district court dismissed the related land claims which required the Mashpees to prove (among other things), that it was a tribe when it filed the lawsuit.

The jury's findings and the district court's dismissal of the land claims were affirmed on appeal. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

These fully-litigated findings by this Court, affirmed on appeal by the First Circuit, deprive the Mashpee of the factual and legal foundation needed to be treated as a tribe within the meaning of the IRA. Both as a matter of fact and law, the Secretary lacks authority to take land into trust for the Mashpee because they were not a tribe in 1934.

B. The Secretary Should Be Judicially Estopped From Arguing That The Mashpees Existed As A Recognizable Tribe in 1934.

The Mashpees (along with other Massachusetts tribes) sued the Secretary and the Department of the Interior in successive actions in this Court, seeking essentially the same relief concerning their dispossessed lands. The claims against the federal defendants were rejected by

both the district court and First Circuit as improper efforts to re-litigate matters resolved against the Mashpees by the federal jury's finding that they were not a tribe. *See Mashpee v. Wolff*, 542 F. Supp. 797 (D. Mass. 1982); aff'd 707 F.2d 23 (1st Cir. 1983) ("this effort to relitigate the tribe's claim is barred by elementary principles of res judicata"); *see also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482-483 (1st Cir. 1987) (affirming dismissal of further lawsuit by Mashpee Tribe on res judicata grounds and holding that the other plaintiff-tribes (Christiantowns, Chappaquiddicks, Herring Ponds and Troys) lost tribal identity in late 1800s just like the Mashpees).

The federal defendants' successful invocation of res judicata as a defense to the Mashpees' federal land claim litigation against them—based on the 1978 jury verdict—creates an impossible conflict for the Secretary and the Department in this matter. On the one hand, the Secretary/Department previously argued in this Court, and on appeal, that the Mashpees lost their tribal identity no later than 1869 and were not a tribe in 1975, but on the other hand are now claiming that the Mashpees never lost tribal status and identity, and in fact existed as a tribe in 1934, and were properly recognized as a tribe in 2007. Under these circumstances, the Court should find the federal defendants are estopped from defending the ROD, because to allow them to do so requires them to take a position here that contradict the position that they took to obtain dismissal of the Mashpees' federal land claims against them. The direct inconsistency in positions taken by the Secretary/Department in each proceeding satisfies the requirements for judicial estoppel, which applies equally against the federal government. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine applies equally against the government as litigant unless the government can show that 'estoppel would compromise a governmental interest in enforcing the law," "the shift on the government's position is the 'result of a change in

public policy,' or 'the result of a change in facts essential to the prior judgment"). *See generally. Perry v. Blum*, 629 F.3d 1, 9 (1st Cir. 2010) *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004): *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72-73 (D.D.C. 2008).

Here the Secretary's prior successful invocation of the res judicata defense against the Mashpees was premised on the historic facts developed in the Mashpees' prior land claim litigation against the Town of Mashpee, which resulted in the jury verdict adverse to the tribe in 1978. Those facts have not changed. The Mashpees were not organized and functioning as a tribe in 1934—indeed any time after 1869. The Secretary's current end-run on *Carcieri* and willingness to take a contrary position in this Court is not explainable or excusable as a sound change in public policy or as necessary governmental action to uphold the law. It is a transparent "that-was-then, this-is-now" two-faced reversal. As such, the federal defendants should be estopped from contradicting their prior sound legal position.

While the Mashpees are now a federally recognized tribe by virtue of the 2007 Final Determination (Ex. 3), and thus are entitled to a broad range of federal benefits that do not depend on tribal status in 1934 (or at any other specific time between 1869 and 2007), the fact remains that the Mashpee Indians were not tribally organized, and did not exist as a tribe in 1934, as a matter of law and fact, having voluntarily abandoned their tribal status as of 1869 as determined by this Court.

## III. THE TOWN OF MASHPEE WAS NOT A RESERVATION IN 1934 WITHIN THE MEANING OF THE IRA

In arguing that the Mashpee Indians satisfy the Class 2 definition, including the requirement of residing on a reservation as of June 1, 1934, the Secretary adopts a definition of

"reservation" that is historically unsound and legally inaccurate, and moreover directly contradicted by the Department's own implementing regulations under the IRA including:

(1) the Department's definition of "reservation" in 25 C.F.R. Part 151.2(f), which defines "reservation" as "the area of land over which the tribe is recognized by the United States as having governmental jurisdiction . . . .";

(2) the Department's definition of who is an eligible Indian under the descendant class in § 479 as provided in 25 CFR 151.2(c)(2), which states that a person "is a descendant of such a member and said descendant was, on June 1, 1934, physically residing *on a federally recognized Indian reservation*."

These Department regulations alone make clear that the Town of Mashpee (also referred to as the Mashpee "Plantation") does not qualify as a reservation under the IRA. The Town of Mashpee/Plantation was never set aside as a federal reservation or otherwise superintended by the federal government. *See Mashpee Tribe v New Seabury Corp*., 592 F.2d at 581; *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. at 944-947). And because the tribally-owned lands had been divided into separately owned parcels, largely alienated to non-Indians, with title held individually under Massachusetts law, and were subject to the governance of state and municipal governments since 1869 (*see Town of Mashpee*, 447 F. Supp. at 944-947) —the Town of Mashpee/Plantation does not qualify as a "reservation" under the IRA on June 1, 1934. *See, e.g.*, Brief of the U.S. Department of the Interior, *MichGO v. Norton*, No. 1:05-cv-01181-JGP (D.D.C. Jan. 6, 2006) at p. 45 (finding land was not a "reservation" under Indian Gaming Regulatory Act where "the Tribe had not exercised sovereign authority over the land, such as land use, building codes, zoning, law enforcement, fire services, education, or judicial activity."). The Mashpees' lands amounted to, at most, some form of quasi *state-recognized* Indian land but those lands certainly were not recognizable as a reservation to Congress in 1934.

The Secretary makes much of the fact that there is no single definition of an Indian

reservation under federal law (ROD at 95-98) but she is unable to find even one that would support classifying the Town of Mashpee/Plantation as a reservation, much less the federal reservation required by her own Department's regulations. To the contrary, a survey of federal statutes shows that when Congress uses the term "reservation" it means exactly what one would expect it to mean in a federal statute: land that is (1) "under the jurisdiction of the United States Government" [13] which by definition excludes all state reservation; and is (2) an area over which a tribal organization ... exercises governmental jurisdiction."[14]

The Secretary cites *no* authority for reading out of the IRA's use of "Indian reservation" the twin essential requirements of federal set aside/superintended and tribal sovereign authority over the land. The Secretary's inclusion of the Town of Mashpee/Plantation under the IRA's definition of "reservation" brings under the IRA Indians and lands that were under exclusive state jurisdiction in 1934, in direct contravention of Congressional intent in narrowing the class of Indians eligible for IRA benefits and expressly excluding tribes under state jurisdiction through the "now under federal jurisdiction" requirement.

[13] 18 USC § 3103(12) (1994) (" '[R]eservation' includes Indian reservations established pursuant to treaties, Acts of Congress or Executive orders, public domain Indian allotments, and former Indian reservations in Oklahoma"); 33 U.S.C. § 1377(h) (1) (defining "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation"). See 7 U.S.C. § 1985(e)(1)(A)(ii) (Supp. IV 1998) (defining "reservation" to include land "within the limits of any Indian reservation under the jurisdiction of the United States, ... trust or restricted land located within the boundaries of a former reservation of a federally recognized Indian tribe in the State of Oklahoma[,] ... [and] all Indian allotments the Indian titles to which have not been extinguished if such allotments are subject to the jurisdiction of a federally recognized Indian tribe"); 7 USC § 1903(10) (1994) (defining "reservation" to be "Indian country as defined in section 1151 of Title 18" and any trust land not encompassed by § 1151); *id*. § 3103(12) (1994) (" '[R]eservation' includes Indian reservations established pursuant to treaties, Acts of Congress or Executive orders, public domain Indian allotments, and former Indian reservations in Oklahoma"); 33 U.S.C. § 1377(h) (1) (defining "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation"). See generally Arizona Public Service Co. v. E.P.A., 211 F.3d 1280, 1292-1295 (2000) (surveying federal statutes and construing "reservation" in an EPA statute to encompass both "trust lands and formally designated reservations").

[14] See 7 U.S.C. § 2012(j)(1994) (defining "reservation" as "the geographically defined area or areas over which a tribal organization …exercises government jurisdiction.").

## IV. THIS COURT HAS A RANGE OF MEANINGFUL REMEDIES AT ITS DISPOSAL EVEN IF THE MASHPEES ARE NOT A PARTY

Plaintiffs ask this court to vacate the ROD, take the land out of trust, and unwind all of the related declarations about the land being a reservation, an initial reservation, and eligible for gaming, (Amended Complaint, Prayer for Relief). These are all remedies that may be ordered in a judgment against the federal defendants, the only parties before the court. The requested relief in the form of vacatur is commensurate with the actions taken by the Secretary, all of which taken without lawful authority under the IRA, and the relief available as a matter of law under the APA [15] Indeed the Department concedes that it would comply with a final decision by a Court to take land out of trust. Accordingly, this Court should issue an affirmative declaration "unwinding" all of the steps taken by the Defendants to change the status of the lands in East Taunton.

Plaintiffs oppose any remand in light of the undisputed historical record, found in the Final Determination and in numerous pronouncements by federal courts in Massachusetts that Mashpees were not under federal jurisdiction in 1934, even if they existed as a tribe (which they did not). The Department proceeded on the Class 2 definition alone because it knew that historical record precluded application of the Class 1 definition. A remand would waste time and resources and reward the government for splitting its claims and abandoning the Class 1 definition for tactical reasons. Just as in *Carcieri*, it would be futile to remand to further develop a historical record that precludes the Secretary from acting. Carcieri, 555 U.S. 394 (majority);

[15] Pursuant to the Administrative Procedure Act, § 706, entitled "Scope of review":

"The reviewing court shall …

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; .... " (emphasis added).

400 (Breyer concurring) ("Because I see no realistic possibility that the Narragansett Tribe could prevail on a theory alternative to the theories argued here, I would not remand the case.").

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for summary judgment on eth First Cause of Action be granted and the following relief be provided in the judgment and order:

A proposed form of order is being submitted concurrently herewith.

Dated: July 7, 2016

Respectfully submitted,

*s/ Matthew J. Frankel*

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**CERTIFICATE OF SERVICE**

I, Matthew J. Frankel, hereby certify that this document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent via first class mail to those indicated as non-registered participants, if any.

*/s/ Matthew J. Frankel*