UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 1:16-CV-10184-WGY LEAVE TO FILE GRANTED ON JULY 21, 2016

PLAINTIFFS' POST-HEARING MEMORANDUM OF LAW

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I. The Plain Meaning of § 479 Controls

The "detailed and unyielding" definitions for IRA eligibility (*Carcieri*, 555 U.S. at 393 n.8) are unambiguous on their face. The natural reading of § 479—giving the words their common, ordinary meaning—substantiates how the sentence is to be read: "such members" refers to "members of any recognized Indian tribe now under Federal jurisdiction." Defendants have not and cannot allege that the pertinent language in § 479 is intrinsically ambiguous. The sentence structure, syntax and word usage are perfectly clear. Instead, the federal defendants say the language used by Congress in § 479 inaccurately expresses the lawmakers' intentions, erroneously relying on legislative history and other interpretative aids.

The Defendants' approach to statutory interpretation is flipped back to front. It violates basic principles of statutory interpretation and the Supreme Court's specific command to give effect to unambiguous language selected by Congress, unless the plain reading results in an absurd outcome. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); Plaintiffs' Memorandum of Law in Support of Motion for Summary (Dkt #64-1) ("Pl. MOL") at 17, 23. Courts must apply the plain meaning rule even where the text of the statute "is awkward, and even ungrammatical" and the natural reading renders text "surplusage." *Lamie,* 540 U.S. at 534, 536.

As Defendants' counsel conceded during argument, the natural reading of § 479 does not produce an absurd result.[1] It just defines more narrowly the group of Indians from whom the descendant class (Class 2) can be derived. (Pl. MOL at 15-16). While the two classes necessarily overlap to some degree, they provide, on their face, two distinct paths to eligibility. The "members class" (Class 1) qualifies based on enrollment in a tribe under federal jurisdiction in 1934. The "descendant class" (Class 2) separately qualifies by satisfying two distinct

[1] Indeed, in July 2004, the Department advanced the same position that Plaintiffs assert here. Pl. MOL at 20-21. Ironically, it is Defendants' reading of § 479 that produces absurd results. Pl. MOL at 16.

requirements: the Indians in this category must be descended from a Class 1 tribal member and be resident on an Indian reservation on June 1, 1934. There is nothing absurd about reading the statute as written. To the extent courts are permitted to look to legislative history to confirm the plain meaning of an unambiguous statute (see, *infra*, at 8-9), that confirmatory check here reinforces the ordinary meaning that results from a plain reading of the text. Specifically, Senator Wheeler/Commissioner Collier's hearing colloquy and subsequent Collier circular corroborate the limited, supporting role Class 2 was intended to serve. Pl. MOL at 18-20. As Collier stated in his circular, "[t]here 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." March 7, 1936 Circular No. 3134 AR000409.

As previously argued, the natural reading of § 479 gives every word the meaning intended by Congress—fully consonant with the legislators' stated intent to *narrow* IRA eligibility by including the words "now under Federal jurisdiction." *See* Karl A. Funke, Educational Assistance and Employment Preference: Who is An Indian?, 4 American Indian L. Rev. 1, 18 (1976), RNJ Ex. 2, at 22-25.[2] By inserting "now under Federal jurisdiction" Congress expressly limited eligibility for *both* Class 1 *and* Class 2. *Id.*, Funke, at 25.

Nevertheless Defendants (and their partisan "amicus") continue to eschew the plain reading of § 479 even though their claim of surplusage is demonstrably false. As Collier's circular explained, Class 2 covers not only unenrolled children, but all "unenrolled descendants" of Class 1 tribal members, provided the descendants were living on an Indian reservation on

[2] The Secretary's reading excises language from the statute and rewrites it. See Plaintiffs' Amended Complaint ¶ 16. This is prohibited in statutory construction. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) (We are not "to add nor to subtract, neither to delete nor to distort [the words]" Congress has used.); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); *Santana v. Holder*, 731 F.3d 50, 56 (1st Cir. 2013).

June 1, 1934. AR000409.[3] Collier's circular refutes the Secretary's current reading of "such members" just as it conclusively refuted the Secretary's reading of "now" in *Carcieri*.[4]

II. The Secretary's Contorted Reading of § 479 Is Not Entitled to Any Deference.

A. *Carcieri* Bars Deference

Inasmuch as Defendants (and the amicus) devote the majority of their arguments to invoking *Chevron* deference, it bears noting again that *Carcieri* defeats any claim by the Secretary that her interpretation of § 479 is entitled to such deference. Pl. MOL at 17-18. The *Carcieri* court's rejection of the Secretary's reading of "now" in the Class 1 definition applies equally to the Secretary's interpretation of the equally non-technical language "such members" in the Class 2 definition. Congress did not delegate interpretative authority to the Secretary over the "detailed and unyielding" statutory eligibility criteria, much less intend the Secretary to expand her own authority under § 479 by misreading common words and phrases as to which the Secretary has no expertise. *Id.* The government and amicus arguments in support of agency deference ignore the *Carcieri* majority and dissenting opinions in which eight justices teamed up

[3] Defendants are fully aware of the fact that tribal rolls were often incomplete, and that it was common for Indians to leave the reservation to look for work, including in 1934. *See, e.g.*, AR000297. The descendants class (Class 2) consists of all unenrolled members of Class 1 tribes, both adults and children, who were living on an Indian reservation as of June 1, 1934.

[4] Defendants argue that an undated Collier memorandum (AR000916-917) supports their reading. U.S. Br. at 15-16. Not so. The undated Collier memorandum summarizes the IRA but inexplicably omits the "under Federal jurisdiction" requirement. The absence of that critical language leaves the memorandum incomplete and inaccurate. In contrast, the Collier circular accurately recounts the "now under Federal jurisdiction" requirement, and Collier's discussion of Class 2's derivative status to Class 1 necessarily refutes the Department's current expansive reading of Class 2. Had Commissioner Collier intended eligibility under Class 2 to be based on descent from *any* recognized tribe including state-recognized tribes under state jurisdiction, he never would have said "there will not be many applicants under Class 2" or that "most persons in this category will themselves be enrolled members of the tribe . . . and hence included under Class 1," because Class 1 tribes were limited to tribes under federal jurisdiction in 1934. The government has no answer to the Collier circular.

to reject *Chevron* and *Skidmore* deference to the Secretary's interpretation of § 479. *Carcieri* provides no room for agency deference in this case.[5]

B. It is Undisputed that Two Agencies Have Interpreted § 479 Differently--Neither Is Entitled to Deference.

Chevron deference also is unavailable as a matter of law due to the conflicting readings of § 479 by the Secretary of the Department of the Interior (DOI) and the Secretary of the Department of Health and Human Services (DHHS). Both Secretaries are authorized by Congress to apply the Indian hiring preference set forth in the IRA.[6]

Significantly, neither in their Statement of Material Facts, nor in their Memorandum of Law, nor in oral argument before this Court, have Defendants disputed or even explained the competing interpretation of § 479 by the Secretary of DHHS, who reads the statute as Plaintiffs do and understands that Class 2 is subject to Class 1's "now under Federal jurisdiction" requirement. Defendants have effectively conceded this fact through their failure to address it. Pl. MOL at 21-22. Notably, even after *Carcieri* was decided, the Secretary of DHHS continues to read § 479 this way.

The conflict between two Secretaries interpreting the same statute, indeed the very same provision in the same statute, eliminates the possibility of *Chevron* deference being accorded to

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[5] The City of Taunton's amicus brief claims "the BIA has given the statute the required liberal and generous construction and has fulfilled congressional policy," noting the agency's "unique and substantial subject matter experience" and the Indian canon of construction that favors tribes. These vacuous statements ignore *Carcieri*. Unambiguous text is not subject to the Indian canon and no amount of agency "expertise" can ungrammatically divorce "such members" from its natural referent/antecedent.

[6] Both Secretaries are authorized by 25 U.S.C. § 472a (entitled "Indian preference laws applicable to Bureau of Indian Affairs and Indian Health Service positions") to interpret § 479 in discharging their respective statutory obligation to give a hiring preference to Indians for positions within the Bureau of Indian Affairs and the Indian Health Service. 25 U.S.C. § 472a, (a), (b)(1), (b)(2) ("The authority to make any determination under [this provision] is vested in the Secretary of the Interior with respect to the Bureau of Indian Affairs and the Secretary of Health and Human Services with respect to the Indian Health Service . . .").

either agency because it forces this Court to choose between competing executive branch interpretations. *See Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) ("when a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference.") (citing *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986)); *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995) (declining to accord *Chevron* deference to the Office of Thrift Supervision's interpretation of a banking statute "because that agency shares responsibility for the administration of the statute with at least three other agencies.").

These courts recognize "the peculiar and potentially disruptive result that multiple agencies could 'implicitly' each be given controlling authority over a specific area of statutory interpretation with no corresponding duty to harmonize their interpretations." *Navajo Nation v. Department of Health & Human Services*, 285 F.3d 864, 878 (9th Cir. 2002) (Fletcher, J., dissenting) (citing *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996)). "The alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport*, 59 F.3d at 216-17.

The Ninth Circuit's split-panel decision in *Navajo Nation* addressed the *potential* for conflicting interpretations between the Secretary of the DOI and Secretary of DHHS with respect to their joint administration of § 504 of the Rehabilitation Act of 1973. 285 F.3d at 872. The dissenting member, applying D.C. Circuit authority, believed Congress' delegation to both agencies precluded *Chevron* deference without having to wait for a conflict to arise, given the inherent difficulties. *Id*. at 878-879. The majority disagreed stating that "we do not believe that the theoretical possibility of such a situation is sufficient grounds to jettison *Chevron*

deference . . .” *Id*. at 875. The majority acknowledged that *Chevron* deference would be jettisoned “where agencies do offer conflicting interpretations.” *Id.* (“[W]e would be forced to employ some form of de novo review, either to choose the most reasonable of the reasonable interpretations offered by the agencies or to fashion our own interpretation of the statute.”) *Id.*

Here, the Secretary of DOI interprets § 479 in a way that directly conflicts with the interpretation offered by the Secretary of DHHS, creating practical and immediate confusion in defining who is eligible for the Indian hiring preference in federal employment. It is bad enough that the Secretary of DOI sacrificed Interior’s own long-standing construction of § 479 for Indian preference, including its decision in the *Garvais* case. That alone should bar *Chevron* deference. It is quite another thing for the Secretary of DOI to offer an unprincipled construction of § 479 that conflicts with and potentially overrides the DHHS’s Indian preference hiring obligations under the same statute. This actual inter-agency conflict precludes *Chevron* deference.

III. Defendants’ Argument That The Language of § 479 Does Not Reflect Congress’ True Intent Misconceives the Court’s Role in Interpreting a Statute.

During oral argument, Defendants’ counsel argued that Congress did not know what it was doing when it inserted the “now under Federal jurisdiction” phrase, never intending it to apply to the Class 2 definition despite the incorporation by reference into Class 2 by “such members.” The Defendants’ argument flouts the “preeminent canon of statutory interpretation [that] requires [courts] to ‘presume that the legislature says in a statute what it means and means in a statute what it says there.’” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)); *Carcieri*, 555 U.S. at 392 (citing *Connecticut Nat’l Bank*, 503 U.S. at 253-254). Where the plain meaning of a statute does not support the government’s interpretation, “we will not allow it in through the back door by presuming that ‘the legislature was ignorant of the meaning of the language it

employed.'" *BedRoc Ltd., LLC,* 541 U.S. at 186-87 (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). "Thus, [the court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC,* 541 U.S. at 183 (citing *Lamie*, 540 U.S. at 534); *Connecticut Nat'l Bank,* 503 U.S. at 253-254.

As Plaintiffs pointed out during argument, *Lamie* requires courts to (a) adhere to the natural reading even when the statute contains drafting errors and awkward grammar, and (b) reject efforts to divine Congress' so-called "true intent":

> If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result. This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.

Lamie, 540 U.S. at 542 (internal citations and quotation marks omitted).

The *Lamie* holding applies with even greater force here because § 479 is without any intrinsic faults or errors; it is facially unambiguous.

IV. Defendants Misstate First Circuit Authority In Arguing That Courts Can Consider Legislative History in *Chevron* Step One Analysis.

In pursuing their inverted approach to statutory interpretation, Defendants rely on *Succar v. Ashcroft*, 394 F.3d 8, 30-31 (1st Cir. 2005), for the proposition that legislative history is appropriate to consider in step one of the *Chevron* analysis, together with the statute's language and overall structure. U.S. Br. at 5. Defendants overstate the First Circuit's acceptance of legislative history in step one analysis, while altogether ignoring the directly controlling contrary authority in *Carcieri* and the other Supreme Court cases applying the plain meaning rule to preclude reliance on legislative history. The strict textualist approach employed by the Supreme Court in *Carcieri* (and in *BedRoc*, *Connecticut Nat'l Bank* and *Lamie*) prohibits consideration of the IRA's legislative history to alter the plain meaning of § 479. To be sure, the

majority opinion in *Carcieri* briefly discussed the Collier circular as fully supporting the plain reading of the statute (555 U.S. at 390), but adhered to the plain meaning rule and rejected the Secretary's (and amicus's) efforts to "go beyond the statutory text." *Id.* at 392-93. In so holding, the Supreme Court in *Carcieri* (and in each of the other cited decisions applying the plain meaning rule) has deemed the statute's legislative history to be irrelevant when the language of the statute is unambiguous. This authority absolutely prohibits the use of legislative history to create ambiguity that is not present in the language of the statute, which is precisely what the Secretary attempts to do here. Indeed, to allow the legislative history to be used in this fashion is to allow legislative history to eviscerate the plain meaning rule and make all statutory language, no matter how clear, subject to revisionist interpretations by litigants and courts.

In keeping with the Supreme Court's plain meaning jurisprudence, the First Circuit allows courts to "check" the legislative history in *Chevron* step one when the statute is unambiguous, but only insofar as to confirm the statute's plain meaning. *See Santana v. Holder*, 731 F.3d 50, 58 (1st Cir. 2013). *Santana* is particularly instructive in rejecting the use of legislative history to try to create ambiguity in an otherwise unambiguous statute:

> The government's interpretive approach is a peculiar way to construe a statute. We have repeatedly observed that the *Chevron* analysis begins with the statute's words. Starting instead with an exposition of the legislative and regulatory history is inappropriate in this case. Although history can illuminate ambiguous language in some circumstances, relying so heavily on extra-statutory sources to read silence or ambiguity into seemingly clear text runs counter to well-settled modes of interpretation.
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> *Id*. at 58 (internal citations omitted).[7]

[7] Defendants' reliance on *Succar* is altogether misplaced. That decision recognizes that the Supreme Court permits legislative history to be "used as a check on an understanding obtained from text and structure" and proceeds to do just that. 394 F.3d at 31. To the extent Defendants read *Succar,* or any other circuit authority, as supporting the use of legislative history to derive the meaning of unambiguous statutory text—to thereby manufacture ambiguity that is not present on the face of the statute—that reading is foreclosed by *Carcieri* and the First Circuit's own decision in *Santana*.

The Secretary offers an equally "peculiar way" to construe the IRA here—"manufacturing ambiguity" from the legislative history—that is invalid under both Supreme Court and First Circuit precedent.

V. The Federal Defendants Cannot Show Justice Stevens' Reading is Wrong.

Defendants have no answer to Justice Stevens' plain reading of § 479. Pl. MOL at 21; *see Carcieri*, 555 U.S. at 401-02 (Stevens, J., dissenting). His reading, like that of the Secretary of DHHS, faithfully connects the "under Federal jurisdiction" requirement to the descendant class (Class 2), through the membership class (Class 1), as Congress intended.

VI. The Mashpees Were Not a Tribe in 1934 and Are Not Eligible Under the IRA.

The federal defendants have not explained how the government's administrative recognition of the Mashpees in 2007 overcomes the judicial determination by this Court in 1978, and affirmed on appeal by the First Circuit in 1979, that the Mashpees voluntary abandoned tribal ways as of 1869. As a matter of fact and law, as determined after a 40-day jury trial, the Mashpees did not exist as a tribe in 1934. (Pl. MOL at 24). Contemporaneous with the IRA's enactment, the Department disclaimed any obligation of support or supervision over the non-tribal Mashpee Indians in Massachusetts who were under state jurisdiction and beyond the reach of the IRA. (AR000278-79, AR000414, AR000408, AR000416, AR000417, AR001909). As such, the Mashpees are ineligible under the IRA, just as they were found to be ineligible under the Indian Trade and Intercourse Act. Pl. MOL at 24-25. Moreover, it is undisputed that the government prevailed in this Court by adopting the jury's determination that the Mashpees were not a tribe after 1869. Defendants' position then, and contradictory position now, meet the elements for *judicial* estoppel. Pl. MOL at 25-27. Defendants' reliance on a "*collateral* estoppel" case to defeat *judicial* estoppel (U.S. Br. at 26 n.30) completely misses the mark. The two doctrines are separate and distinct. Compare 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.) with

18-131 Moore's Federal Practice - Civil § 131.13 (2015).[8] *See Global NAPs, Inc. v. Verizon New England Inc.*, 603 F.3d 71 (1st Cir. 2010) (applying judicial estoppel to preclude a party from making a statement that contradicted a statement it made in a previous litigation, and applying collateral estoppel to preclude re-litigation of an issue previously decided by the district court). The United States is subject to judicial estoppel and should be estopped. Pl. MOL at 25-26.

VII. The Mashpees Did Not Reside on a Reservation in 1934 Within the Meaning of the IRA.

The Town of Mashpee was not an Indian reservation in 1934 within any accepted meaning of that term, as further evidenced by the Department's own contemporaneous records cited immediately above. The Department did not view the Town of Mashpee as an Indian reservation but rather a "town" under state jurisdiction subject to governance by local authorities. If the Department did not view the Town of Mashpee as an Indian reservation, it is irrational to presume the 73rd Congress in 1934 held a different view and intended the IRA to reach it.

Dated: July 21, 2016

Respectfully submitted,

s/ David H. Tennant

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[8] "Judicial estoppel is concerned with positions taken in litigation which are such that one of the positions *must* be erroneous or false." 18-131 Moore's Federal Practice - Civil § 131.13.

CERTIFICATE OF SERVICE

I, David H. Tennant, 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/ David H. Tennant