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 25, 2016**

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO USET'S AMICUS BRIEF

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Introduction

The amicus brief from the United South and East Tribe Sovereignty Protection Fund, Inc. (USET) misstates the holding in *Carcieri*, while proffering its own brand of *ipse dixit* statutory construction that is unsupported by grammar or logic. USET's analysis of the Class 1 definition in § 479 is premised on its misreading of *Carcieri,* and constitutes partisan "piling on" by another amicus doing the bidding for the tribe and DOI while offering nothing of substance or assistance to the Court.

The USET amicus brief repeats the Department's inaccurate contention that Plaintiffs "seek to incorporate the entire first definition in the second definition through the phrase 'such members.'" (Amicus Br. at 2-3). Giving the natural and grammatical meaning to "such members," so as to capture the natural referent for "such members"—i.e., the single phrase "any recognized tribe now under Federal jurisdiction"—does not incorporate "the entire first definition." Saying it thrice (Department, City of Taunton and USET) does not make it so.[1] The Class 2 definition establishes IRA eligibility without the need to demonstrate enrollment in a tribe; the Class 1 definition establishes eligibility without the need to demonstrate residency on a reservation. As established by Congress, these eligibility definitions serve different purposes and somewhat different populations, even though the two groups necessarily overlap to a substantial degree, as the principal drafter of the IRA explained. AR000409.

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[1] The Hunting of the Snark (An Agony, in Eight Fits) (1874) by Lewis Carroll

> Just the place for a Snark! I have said it twice:
> That alone should encourage the crew.
> Just the place for a Snark! **I have said it thrice:**
> **What I tell you three times is true.**

The USET's contribution to statutory interpretation is expressly limited to construing the Class 1 definition. USET appears to contend that *Carcieri* separated the concepts of "recognition as a tribe" from "under federal jurisdiction" (which is not true), and then irrelevantly argues—in a complete nonsequitur—that because the Supreme Court treated these concepts separately, the Department properly read the phrase "any recognized tribe now under federal jurisdiction" as having two parts. USET further argues, based on its own say-so, that the Department correctly jettisoned the "now under federal jurisdiction" portion from the "any recognized tribe" portion for purposes of what gets incorporated into the Class 2 definition. Whether offered by the Department or its amici/allies, these result-orient readings defy the natural reading of § 479's unambiguous text and ask the Court to ignore the language chosen by Congress and rewrite the statute to establish more liberal eligibility criteria for "Indians" under the IRA. That is not the function of statutory interpretation and is expressly barred by the Supreme Court's decision in *Carcieri* which prevents the Secretary (and this Court) from redrawing the detailed and unyielding eligibility provisions in § 479.

Point I

The Court Should Decline USET's Implicit Invitation to Determine Whether The Class 1 Definition Requires Federal Recognition in 1934.

USET's thesis for splitting apart a single unitary antecedent phrase makes no sense. Even if the Supreme Court's decision in *Carcieri* could be interpreted in the fashion suggested (it is not properly parsed that way), it has no logical carry-over to statutory construction. The task of this Court is to construe the words chosen by Congress, to give effect to the plain meaning of the language of the statute unless it would produce an absurd result–as *Carcieri* expressly directs. It is not to allow USET or the Department to evade the plain meaning of § 479 by going outside the statutory text and certainly not by invoking the *Carcieri* decision itself to redraw the "explicitly

and comprehensively defined" eligibility criteria established by Congress. 555 U.S. at 391. USET's proposed use of *Carcieri* to un-do *Carcieri* in violation of *Carcieri* is beyond a "peculiar approach" to statutory interpretation (Plaintiffs' Post-Hearing Memorandum of Law) (Dkt. # 81); *see Santana v. Holder*, 731 F.3d 50, 58 (1st Cir. 2013)); it is a deeply flawed, cynical attempt to avoid the plain meaning of § 479 and should be rejected.

USET's arguments regarding the Class 1 definition take the Court into an area—the claimed separation between federal recognition and federal jurisdiction—that is unnecessary to explore and not easily traversed given the fact that:

(a) None of the parties in *Carcieri* drew this distinction (the Department had always considered federal jurisdiction and federal recognition to be one and the same thing) [2];

(b) The majority opinion is fairly read to have assumed the two statuses were synonymous with each other, given the question presented and the parties' presentation of argument, and accordingly, the Court's majority opinion is reasonably read to make the 1934 temporal limitation apply equally to federal recognition as well as to federal jurisdiction as of June 18, 1934. *Carcieri*, 555 U.S. at 386 (noting district court equated

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[2] The Department, the petitioners, and amici tribes all treated federal recognition and jurisdiction as synonymous and expressly understood that the Narragansett had to be "federally recognized" in 1934 (if "now" meant 1934) but such "federal recognition" would be ambulatory and determined when the Secretary takes land into trust if "now" means "now or hereafter." The synonymous treatment is captured in the Petitioner's questions presented as reflected in *Carcieri,* 555 U.S. at 396 ("[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government. Pet. for Cert. 6."). This framing of the issue was carried over into the Department's re-formulation of the questions presented, and in the merits briefs filed by the parties and tribal amici. *See* Brief for Petitioner Donald L. Carcieri, Question Presented, 2, 13, 14-23; Department's Opposition to Writ of Certiorari (Question Presented) and Merits Brief at 7, 8, 17 n.2, 19, 20; and Brief of Amicus Curiae Rock Sioux Tribe, Nottawasepeppi Huron Band of the Potawatomi in Support of Respondents at 3, 4, 5, 9, 11, 17. All *Carcieri* briefs are available on the Scotusblog website, http://www.scotusblog.com/case-files/cases/carcieri-v-kempthorne.

federal recognition to federal jurisdiction); *id.* at 388 (italicizing "any recognized tribe under federal jurisdiction" in determining 1934 temporal limitation).

(c) Justice Breyer's concurrence explicitly unbundled the two statuses, such that, in his view, a tribe that was under federal jurisdiction in 1934 could benefit from the IRA even if federal recognition came years later. 555 U.S. at 397. This novel reading of the IRA did not capture a majority of the members of the high court and was prompted by a series of mistakes and omissions by the Department post-enactment of the IRA, where certain tribes were overlooked that should have been listed as federally recognized as of 1934, and were later recognized. 555 U.S. at 397-99 (Breyer); at 400 (Souter J., partial concurrence).[3]

(d). The Secretary saw in the Breyer concurrence a way to salvage some of her land-into-trust authority and changed the Department's position on the synonymous nature of federal recognition and jurisdiction, now viewing them as separate statuses.[4]

If this Court had to decide whether a tribe, to be eligible under the IRA, had to be both federally recognized and under federal jurisdiction in 1934, or just under federal jurisdiction, the Court would have to consider the language of the statute as well as the broad range of material

[3] The Breyer concurrence (and Souter partial concurrence) principally focus on well-documented mistakes by the Department that were corrected through post-1934 "true-ups." That record does not logically support the conclusion that Congress, in drafting and adopting § 479, anticipated mistakes about tribal recognition, or need for corrections, after 1934, much less intended to create a permanent uncoupling of federal "recognition" from the requirement of being "under federal jurisdiction." Those two concepts have always been synonymous. To be sure, § 479 would have expressed the unified concept of federal recognition and jurisdiction more clearly if the limitation to federally recognized tribes was included in the original IRA bill It was not. When Congress required that limitation to be added, the specific language proposed by Collier and accepted by Congress was simple—it kept the immediately preceding language ("any recognized tribe") and added "under Federal jurisdiction" after it. Had the IRA bill been drafted at the outset with that limitation, the Class 1 limitation likely would have read, "members of any tribe federally recognized in 1934."

[4] Department's March 12, 2014 "Under Federal Jurisdiction" Memorandum (AR000663) at 3.

identified above in items (a) through (d), as well as the significance of the plain reading of § 479 by all nine justices in *United States v. John*, who understood the temporal limitation Congress intended: "The 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *United States v. John*, 437 U.S. 634, 650 (1978) (quoting 25 U.S.C. § 479) (brackets in original).[5]

While the Class 2 definition imports this unresolved issue the about Class 1 definition through "such members," there is no need to resolve this particular issue because (a) the Mashpees fail the temporal limitation under either variant of Class 1 because the Mashpees were neither federally recognized nor under federal jurisdiction in 1934; and (b) the Department has rejected any reliance on the Class 1 definition to justify taking lands into trust for the Mashpees, knowing their history.

USET's amicus brief, however, regrettably invites the Court to wade into the competing views of what "now" modifies in the Class 1 definition, as a predicate to construing the Class 2 definition. The Court should decline that invitation. Of course, even if USET were correct that

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[5] USET argues that the word "'now' limit[s] only 'under Federal jurisdiction' and not 'any recognized Indian tribe.'" (Amicus Br. at 3). But this just begs the question of what object is modified by the phrase "now under Federal jurisdiction"—i.e., what "thing" had to exist with that status in 1934? The answer, provided by a natural reading of the statute, is necessarily "any recognized tribe." USET, like the Department, cannot identify any principled basis—any rule of grammar, syntax, or word usage—that would permit the single unitary antecedent to be divided into sub-phrases or portions and thereby separate "any recognized tribe" from "now under federal jurisdiction." In other words, as a matter of plain reading, to establish eligibility under the Class 1 definition, a person of Indian descent must establish that they are an enrolled member of a tribe that was both federally recognized and under federal jurisdiction in 1934. Consider the following hypothetical statute that includes the antecedent phrase "*all federal district court judges now on senior status*" and is followed by the phrase, "*law clerks to such judges*." As a matter of plain vanilla statutory construction, "*such judges*" would refer not to "*all federal district court judges*" but only to those judges "*now on senior status*." In both cases the limiting modifier "now on senior status" [now under federal jurisdiction] applies to the entire natural object of the modifier "all federal district court judges" [any recognized tribe]. There is no basis in grammar to apportion, divide, or segregate the single referent "any recognized tribe now under federal jurisdiction" into two parts, much less read out half of it. *But see Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 397-401 (D.D.C. 2014).

"now" in the Class 1 definition links the 1934 temporal limitation to federal jurisdictional status and not federal recognition status (as USET claims), that reading of the Class 1 definition just defines the member class more broadly by saying the descendant class can be derived from members of any tribe that was under federal jurisdiction in 1934, no matter when the tribe was federally recognized. Nothing about the interpretation of "now" in the Class 1 definition—i.e., whether it requires both federal recognition and federal jurisdiction in 1934, or just federal jurisdiction with recognition to follow—provides any basis in grammar, law or logic to split the single antecedent phrase ("any recognized tribe now under federal jurisdiction") into sub-phrases or portions, and then only incorporate a part of it. That process is completely divorced from anything recognizable in the body of statutory construction. There is no "canon of partial incorporation" or "canon of *ipse dixit cum nonsequitur*." The Department's and amici's division of the single referent into two parts, and rejection of half of it, is untenable under any canon, and ironically rejects the language closest to "such members" in the opposite of the last antecedent rule, if it applied.[6]

Point II

USET Misrepresents the Carcieri Decision's Findings Concerning The Narragansett Tribe.

Plaintiffs also wish to correct the record with respect to what the Supreme Court decided in *Carcieri*. USET falsely claims that (a) "[The *Carcieri*] holding with respect to the Narragansett Tribe was not based on an application of the Tribe's factual circumstances" and (b) that the Supreme Court "determined, based on a concessions made by the United States, that the

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[6] The last antecedent rule applies when a statute contains a series of antecedents. *See* Plaintiffs' Memorandum of Law in Support of Motion for Injunctive Relief (Dkt. # 26). That is not the case here where "such members" refers to single antecedent phrase. The canon might be re-titled the "only antecedent rule."

Narragansett Indian Tribe was not under federal jurisdiction in 1934." (Amicus Br. at 3 n.2). These statements are untrue and misleading.

The Narragansett Tribe was, just like the Mashpees, always under colonial and state governance and was never under "federal jurisdiction" however that might be reasonably construed, i.e., was not a "treaty tribe" with the United States; its tribal members were not registered with, nor its tribal lands supervised by, the Office of Indian Affairs. *Carcieri*, 555 U.S. at 398-99 (Breyer, J., concurring). Justice Thomas, in writing for the majority, documented the Narragansetts' history in Rhode Island—colonial state supervision and absence of federal jurisdiction—and cited to the Final Determination of Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983).[7] 555 US at 382, 395. Justice Thomas concluded: "because the record in this case established that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue here into trust." *Id*. 382-83, 384. In reversing the Secretary and not remanding to the Secretary for further proceedings, Justice Thomas further observed:

> None of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. **And the evidence in the record is to the contrary. 48 Fed. Reg. 6177**. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." Pet. for Cert. 6. Respondents' brief in opposition declined to contest this assertion. See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court's Rule 15.2. We therefore reverse the judgment of the Court of Appeals
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> *Id*. 395-96 (emphasis added).

[7] The Final Determination of Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island was submitted as Exhibit W to the Omnibus Declaration of David H. Tennant in Support of Motion for Injunctive Relief and in Opposition to Motion to Dismiss (Dkt. # 23).

In his concurring opinion, Justice Breyer agreed that the record showed no evidence of the Narragansetts being under federal jurisdiction in 1934. Specifically the record contained no evidence that the Narragansetts had "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." *Id.* at 399 (Breyer, J., concurring). Justice Breyer correctly noted that "both the State and Federal Government considered the Narragansett Tribe as under *state*, not but not under *federal* jurisdiction in 1934." *Id*. (emphasis original)

Thus, USET's brief misleads the Court in stating that the Supreme Court never ruled on the Narragansetts' status in 1934 as a factual matter. Those facts precluded IRA eligibility for the Narragansetts and the comparable history for the Mashpee does the very same here.

Conclusion

The more DOI and their amici fight the plain meaning of the text—whether by citing cases construing manifestly different statutes, or making up their own statutory construction rules, or mischaracterizing the holding in *Carcieri*—the more evident the correctness of the plain reading.

Dated: July 25, 2016

Respectfully submitted,

s/ David H. Tennant

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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