UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID LITTLEFIELD et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 1:22-cv-10273-AK

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION AND PRELIMINARY ARGUMENT

A. General overview: Trust land acquisitions under the authority of the Indian Reorganization Act and its limits under *Carcieri v. Salazar*

This case involves the federal government's decision on December 21, 2021 to take land into trust for the Mashpee Wampanoag Tribe under the Indian Reorganization Act of 1934 (IRA). The lands are located in the Town of Mashpee, on the Cape, and a distinct parcel 50 miles away in East Taunton. Plaintiffs David Littlefield *et al*. are residents of East Taunton and challenge the federal government's decision under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA").

A tribe is eligible for trust lands under the IRA only if it meets the statutory definition of "Indians," which is a defined term. Section 19 of the IRA defines those "Indians"" eligible for its benefits as including:

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

25 U.S.C. § 5129.

The Supreme Court of the United States in *Carcieri v. Salazar*, 555 U.S. 379 (2009) interpreted the first definition of "Indian" and concluded that a tribe meets that definition (and thus is eligible for trust lands) only if its members were under federal jurisdiction in 1934 (reading "now" to mean the date of the

IRA's enactment). This is commonly referred to as the *Carcieri* "under federal jurisdiction" *or* "UFJ" requirement. *Carcieri*'s holding proved disastrous to the tribe involved, the Narragansett Tribe in Rhode Island, who the Supreme Court held was ineligible under the IRA because it was not under federal jurisdiction in 1934, and thus could not have trust lands under the statute.

The first definition of Indian—the *Carcieri* UFJ requirement—is at issue in the government's decision in the case at bar.

B. Interior and the Tribe try to escape the reach of Carcieri.

The Mashpee Wampanoag Tribe and the Department of Interior have been trying to avoid the ruling in *Carcieri* for the better part of ten years. Since 2012, the Tribe has lobbied interior to find them eligible under the IRA notwithstanding *Carcieri*. After three years of studying the Mashpee's historical information (2012-2015), and realizing it was indistinguishable from the Narragansett Tribe's history on the other side of Narragansett Bay, the Secretary tried to avoid the *Carcieri* UFJ requirement altogether. The Secretary for the first time ever—*and only for the Mashpee Tribe*— abandoned the first definition of Indian and advanced alone the second definition, which reads "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." Interior argued that the second definition was not subject to the UFJ requirement in the first definition. This Court (Judge William Young) rejected that reading, finding it ungrammatical and not a close question. *Littlefield v. U.S. Dep't of the*

Interior, 199 F. Supp. 3d 391, 396 (D. Mass. 2016). The First Circuit affirmed that plain reading of the statutory text which made the UFJ requirement equally applicable to the second definition. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 37-41 (1st Cir. 2020). Interior's novel linguistic gambit to free the Mashpees from the *Carcieri* UFJ failed. The matter was remanded to Interior to consider whether the Mashpees could satisfy the UFJ requirement.

The Tribe understood the problems it faced in qualifying for land under the first definition. In another novel strategy to avoid the UFJ requirement, the Tribe sought to avoid the trust land acquisition process altogether, openly stating its purpose was to "avoid *Carcieri*-related issues." *See* Tribe's Restricted Fee Proposal (6/26/17) AR00004614. The Tribe proposed to convey its fee lands to a "Section 17 Corporation" (organized under the IRA) and for that Corporation to hold the lands in "restricted fee." *Id*. This proposed UFJ workaround would, if accepted, give the Tribe lands which could then be declared an initial reservation and eligible for gaming, all without having to satisfy the UFJ requirement. *Id*. The restricted fee proposal did not come to fruition. The Tribe had no choice then but to resubmit its historical evidence and try to qualify under the first definition's UFJ requirement.

The Tribe's evidence was thoroughly reassessed by Interior from December 2016 to June 2017, when Interior issued a decision finding the Tribe was not under federal jurisdiction in 1934, consistent with *Carcieri*. AR0004667-

4699, AR0004601. When the Tribe vehemently protested the decision, Interior quickly withdrew its decision, marking it a "draft." AR0004667. Interior directed the parties to brief additional historical information which was completed in late 2017. Interior took the better part of another year to re-review, reconsider and redetermine that the Tribe was not under federal jurisdiction in 1934. The Decision in September 2018 (Exhibit B to Complaint, 1:22-cv-10273-AK; *see* AR005088) was entirely consistent with the "draft" decision in June 2017. In other words, from 2012 to 2018—spanning across two Obama Administrations and one Trump Administration—the answer was consistent: the Tribe does not qualify under the first definition of Indian. No other tribe has qualified for trust lands with such a paucity of historical evidence. *See* Citizen Group Chart on Remand and endnotes comparing Mashpees to Narraganset, Cowlitz, Tunica-Biloxi, Stillaguamish and Oneida.[1] Like the Narragansett Tribe, the Mashpees were always under the rule of the colony, British rule and the states, with no meaningful contacts with the federal government. That conclusion is bolstered by contemporary (in 1930s) pronouncements by senior Interior officials (including Indian Commissioner John Collier, the principal drafter of the IRA and originator of the UFJ requirement) who stated the Mashpees were never wards of the federal government and thus were not under its jurisdiction. *See*

[1] For convenience, a copy of the Chart is attached to this memorandum. The 2018 ROD correctly distinguished the Tunica-Biloxi trust decision which involved "treaty-like" rights. 2018 ROD at 14. as well as the Cowlitz decision which involved extensive federal contacts. 2018 ROD at 27 and n. 225.

2021 ROD at 27-28 ("Letters Disclaiming Jurisdiction") including footnotes 194 to 196 identifying six such contemporaneous letters) and discussion of same, Section III, *infra*.

C. 2020 judicial decision overturning 2018 Record of Decision (ROD)

The Tribe challenged Interior's September 7, 2018 decision in the District of Columbia, to avoid a slew of adverse decisions in the District of Massachusetts and First Circuit. *See* Section II, *infra*. The Tribe convinced a D.C. District Judge to reverse the decision on the main basis that Interior had considered the evidence in isolation and should have considered it "in concert." *See Mashpee v. Bernhardt*, 466 F. Supp. 3d 199, 218 (D.D.C. 2020).

D. The 2021 ROD now before the Court

On remand in 2021, the new Biden administration—considering the very same evidence found wanting in June 2017 and again in September 2018 and without any new or additional historical evidence before it—declared the tribe was under federal jurisdiction in 1934. This change of position is transparently political. It is arbitrary, capricious and contrary to law. While the Secretary claims it was just following the direction of the D.C. District Court on remand to consider the evidence "in concert," no court has the ability to direct the decision of Interior to reach any pre-ordained outcome, and Interior's sudden 180 degree flip-flop is intrinsically arbitrary and capricious. More to the point, it is contrary to law: *Carcieri* forbids this result for the Mashpees when it held the identically-situated Narraganset Tribe was ineligible for trust land under the IRA.

APA LEGAL STANDARDS

"'In APA cases such as this one, involving cross-motions for summary judgment, 'the district judge sits as an appellate tribunal. The entire case on review is a question of law.'" *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 244 (D.D.C. 2016) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal citations omitted)); *see also Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). The standard for granting summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure—whether there are genuine issues of material fact that preclude judgment for one side or the other—therefore does not apply to a review of agency action. *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 213; *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006). Summary judgment nonetheless "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 49 F. Supp. 2d at 90 (citing *Richards v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C. Cir. 1977)).

Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While "[t]his is a 'deferential standard' that 'presume[s] the validity of agency action'"(*WorldCom, Inc. v. FCC*, 238 F.3d 449, 457 (D.C. Cir. 2001)

(quoting *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999)), APA review is not a rubber stamp. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (stressing "the importance of not simply rubber-stamping agency factfinding" and requiring instead "meaningful review" (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)); *see also Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n.*, 59 F.3d 284, 290 (1st Cir. 1995) (APA standard "is not a rubber stamp"). This standard "obligates the agency to examine all relevant factors and record evidence, and to articulate a reasoned explanation for its decision." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)); *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 892 F. Supp. 2d 285, 290 (D.D.C. 2012) (stating that "the court must be satisfied that the agency has "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made'"(citation omitted)).

An agency decision is arbitrary and capricious if it either (1) "relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its decision that runs counter to the evidence before the agency," or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 714 (D.C. Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). Just as the Court may

not "substitute [its] judgment for that of the agency" to set aside an agency action, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), it also may not "affirm an agency decision on a ground other than that relied upon by the agency." *Manin v. Nat'l Transp. Safety Bd.*, 627 F.3d 1239, 1243 (D.C. Cir. 2011); *Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 214 ("If an agency chang[es] its course from its own precedent it must acknowledge that change and provide an adequate explanation for its departure from established precedent[;] an agency that neglects to do so acts arbitrarily and capriciously." (cleaned up) (citation omitted).

ARGUMENT

I. The applicable agency standards under the so-called M-Opinion[2] construing *Carcieri*'s UFJ requirement

Following *Carcieri*, Interior's Solicitor prepared a document that purports to establish the framework for determining whether a tribe satisfies the UFJ requirement of the IRA. Interior heavily relied on Justice Breyer's concurring opinion in *Carcieri*. *See* M-Opinion at 3-4, 17, 23, 24. Justice Breyer observed that the IRA only applies to "tribes in respect to which the Federal Government already had the kinds of obligations that the words 'under Federal jurisdiction' imply," which Justice Breyer described as "jurisdictional" in nature: "for example, a treaty with the United States (in effect in 1934), a (pre-1934)

[2] Sol. Op. M-37029, Solicitor Hilary C. Tompkins, The Meaning of `Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act (Mar. 12, 2014).

congressional appropriation, or enrollment (as of 1934) with the Indian Office." 555 U.S. at 399. For each jurisdictional act identified in Justice Breyer's concurring opinion, the act must impart federal obligations that existed in 1934. In Justice Breyer's view (and in the view of the other justices holding "now" means 1934), whatever jurisdictional act that brings a tribe under federal jurisdiction in 1934, it has to carry with it federal obligations that are present in 1934. *Carcieri* does not support any kind of "tag you're it" UFJ where a tribe can rely on a distant historical federal contact that has lapsed and was not current in 1934. For example, historic enrollment in an Indian Office would not be sufficient; it must be "as of 1934." 555 U.S. at 399.[3]

II. *Carcieri* held the identically situated Narragansetts were not under federal jurisdiction in 1934; the M-Opinion cannot avoid *Carcieri*'s application to the Mashpees.

The Supreme Court held in *Carcieri* that, "[b]cause the record in this case establishes that the Narragansett Tribe was not under federal; jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the

[3] The M-Opinion identifies a range of factors that may be considered probative on the question of UFJ including having tribes accounted for in census statistics, reports and surveys undertaken by the Office of Indian Affairs "[a]s part of the exercise of [its] administrative jurisdiction" over "tribes and Indians under its jurisdiction." M-Opinion at 16. Evidence that the BIA approved tribal contracts or supported a tribe's land claim lawsuit also is probative. (*Id.* at 19). The fact that tribal members attended BIA schools is identified as generally probative (id.) without any discussion of whether attendance at the school was compelled as part of a federal detribalization policy and forced assimilation, or was entirely voluntary for fully assimilated Indians not under the auspices of any Indian agency. *See infra* Section IV. To the extent that the M-Opinion purports to relax the UFJ standard so the Narragansetts or any similarly situated tribe could satisfy it, it violates *Carcieri. See infra* Section VII.

parcel at issue into trust." 555 U.S. at 383. Justice Thomas, writing for the Court, noted that the Tribe's "documented history dating from 1614," rendered them ineligible under the IRA's UFJ requirement. 555 U.S. at 383-384 (citing historical record contained in Final Determination for Federal Acknowledgement of the Narragansett Tribe). In a concurring opinion, Justice Breyer agreed that the record showed no evidence of the Narragansetts being under federal jurisdiction in 1934. Justice Breyer reviewed the historical record and concluded that "both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. And until the 1970s there was 'little Federal contact with the Narragansetts as a group.'" 555 U.S. at 399-400 (emphasis in original). Justice Breyer found no evidence of any act that could be considered "jurisdictional," such as "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. Thus, six justices in *Carcieri* expressly weighed the Narragansett Tribe's historical evidence and agreed the Tribe was not under federal jurisdiction, and thus was ineligible for trust land under the IRA.

The majority opinion in *Carcieri* is binding authority that compels rejection of the Mashpees under the first definition of Indian just as it compelled

the Narragansett Tribe to be ineligible. The two tribes are indistinguishable in their interrelated histories.[4]

III. Contemporaneous pronouncements by federal officials prove the federal government did not consider the Mashpees under federal jurisdiction in 1934.

Indian Commissioner John Collier—the father of the UFJ requirement (*Carcieri*, 555 U.S. at 390 n.5)—was completely convinced that the Mashpees, Narragansetts and other East Coast tribes were not covered by the IRA because they had always been wards of the states and not of the federal government. The majority opinion in *Carcieri* expressly relied on Commissioner Collier's unique perspective, as the principal author of the IRA, to speak to the jurisdictional status of East Coast tribes like the Narragansetts. *See Carcieri*, 555 U.S.390 n.5 (noting that the "the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett

[4] *See* Citizen Group Chart on Remand (Addendum) and endnotes comparing Mashpees to Narraganset. *Compare* Proposed Findings for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 71 Fed. Reg. 17488, 17489-17490 (Apr. 6, 2006) (available at https://www.govinfo.gov/content/pkg/FR-2006-04-06/pdf/E6-5017.pdf) *with* Final Determination for Federal Acknowledgement of the Narragansett Tribe, 48 Fed Reg. 6177, 6178 (February 10, 1983) (available at https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/petition/059_nargst_RI/059_fd_fr.pdf.). Each tribe had the same experience from the 17th century to the 20th century, remaining wards of the colonial government, and later the state government, and not of the Federal Government. In all material respects the histories are the same and demonstrate very little contact with the Federal Government—and nothing that could be considered a jurisdictional act within the meaning of *Carcieri*, including Justice Breyer's concurring opinion that forms the basis for Interior's M-Opinion.

Tribe. [citation omitted]. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language *and the Tribe's status under it*.") (emphasis added).[5] *See generally* AR0006798-7059 [Citizen Group's Remand Submission dated February 13, 2017] at AR0006813-6817. The 2021 ROD (at 27-28) acknowledges a similar letter from Commissioner Collier, after enactment of the IRA, respecting the Mashpees—just like his 1937 letter regarding the Narragansetts—in which he disclaims any Federal responsibility for the Mashpees who were provided for by the state. The 2021 ROD dismisses what is "unusually persuasive" evidence in *Carcieri (*555 U.S. at 390 n. 5) on the palpably incorrect basis that Collier's position rested on a series of false assumptions.[6] Collier was speaking contemporaneously with knowledge of the circumstance of the Narragansett and Mashpees in 1934.

[5] In finding the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Supreme Court in *Carcieri* emphasized not only Commissioner Collier's statements at the time but other contemporary records from the Department "spanning a 10-year period from 1927 to 1937," in which "federal officials declined [the Narragansett's] request [for economic support and other assistance from the Federal Government] noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government." *Id*. at 384; *id*. at 399-400 (Breyer, J. concurring).

[6] The assumptions stated to be false, such as "practical budgetary constraints" during the Depression (2021 ROD at 28), are in fact true and central to the legislative history of the IRA. The historical explanation for the UFJ requirement is that Congress sought to limit the federal government's support obligations given the paucity of resources during the Great Depression. *See* AR0006810-6820.

The record for the Mashpees is the same as for Narragansetts with numerous senior officials—in addition to Commissioner Collier—disclaiming the Mashpees were under federal jurisdiction in 1934 and eligible under the IRA. *See* 2021 ROD at 27 & fns. 194-196, 200.[7] While the 2021 ROD acknowledges that these writings show the Mashpees' status as wards of the state and not the federal government—and concedes "this evidence demonstrate[s] that the Federal Government excluded the Mashpees from the scope of its federal programs following passage of the IRA"—it then dismisses this highly probative evidence as "factually mistaken." 2021 ROD at 27. But the 2021 ROD does not explain what was factually incorrect about any of the statements except one minor criticism as to one senior official not knowing about an obscure study in 1935. 2021 ROD at 27.[8] The problem is not that the pronouncements were

[7] Footnote 194 collects the Department's disclaimers which are contained in the Administrative Record as follows:

See AR000278 [Letter from W. Carson Ryan, a BIA official, to James F. Peebles (Nov. 22, 1934) (stating that federal funds were not available for "Indian groups" like the "Mashpee Community" which were under state jurisdiction")] AR0000408 [Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Dec. 21, 1936) (responding to a request for federal aid by stating that the "Indians of the Mashpee Tribe are not under Federal jurisdiction or control")]; AR0000416 [Letter from F.H. Daiker, Assistant to the Commissioner, to Mr. Wild Horse (Oct. 2, 1937) (reiterating Daiker's position that "the Indian Office can offer no assistance to Indians not members of a tribe under Federal jurisdiction," i.e. the Mashpees)];AR0000417 [Letter from John Herrick, Assistant to the Commissioner, to Charles L. Gifford (Oct. 28, 1937) (responding to a request for information on the Mashpees by stating that "the Federal Government does not exercise supervision over any of the eastern Indians," and therefore the Indian Office does not have information on the Mashpees)].

[8] The Tantaquidgeon report (AR000312), released a year after the IRA was enacted, was conducted by a college student and was never published by the BIA. 2015 ROD at 190 & n. 340 (only available in unpublished manuscript). It is no wonder that a senior BIA official (Herrick) was not aware of its existence. 2021 ROD at 28. The report provides

somehow factually erroneous. It is just the inconvenience of their *accuracy* that makes Interior label them "mistaken." The 2021 ROD's dismissive treatment of historical evidence deemed highly probative in *Carcieri* is the definition of arbitrary and capricious.

IV. The 2021 ROD's false narrative about Mashpee attendance at the Carlisle School is arbitrary and capricious and worse, intentionally misrepresents both the historical record and the administrative record before Interior.

The 2021 ROD places great weight—what could be deemed the lynchpin of the 2021 ROD's UFJ analysis—on the fact that several Mashpee children attended the Carlisle boarding school in Pennsylvania between 1905 and 1918, when the school was closed. 2021 ROD 8, 16-17, 19, 25.[9] Setting aside the

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extensive historical information regarding the Mashpees' experience under colonial and British rule, and subsequent to that, the Commonwealth. AR000313-316. By its silence, the report proves the absence of any meaningful federal contacts. Rather it documents the Mashpees' assimilated status as citizens of the Commonwealth who attended public schools. AR000321, 326-327, 333-335, 373-375. The 2018 ROD correctly noted that the report "does not show any formal action by a Federal official determining any rights of the Tribe" and "provides little if any demonstration of the exercise of Federal jurisdictional authority over the Tribe." 2018 ROD at 25. Indeed, there is not a single act of federal jurisdictional authority identified in the report. Interior's 2021 ROD simply flip-flops and attaches probative value to the existence of the report (2021 ROD at 22) when the contents disprove the very point it attempts to make.

[9] The ROD cites the Carlisle School evidence 41 times, saying "the BIA-operated school maintained extensive federal supervision over their education, health and finances." 2021 ROD at 16. Interior also relies on a census taken at the Carlisle School. *Id*. at 24. Interior cites *In re: Carlisle Indian School, Carlisle, Pennsylvania,* GAO (Aug. 24, 1927) (showing Mashpee students enrolled in the years 1905 through 1918). 2021 ROD at 18 n. 135. That GAO Report, and the digital student enrollment records for all Carlisle School students available on line (at http://carlisleindian.dickinson.edu), show that only 12 Mashpee students—a total of 12 students who identified themselves as "Mashpee" "Wampanoag" or "South Seas"—attended the Carlisle School between 1904 and 1918. The GAO Report's pages were distorted in copying so that the reported enrollment figures in the right margin do not line up with the Indian tribe listed in the left margin. For example, in 1917, Interior reads "Mashpee" enrollment as 14 when the correct figure is 1, one line up.

probative value of evidence that predates 1934 by several decades, the 2021 ROD portrays the Mashpee attendance as part of a federal policy of forced assimilation / de-tribalization. The 2021 ROD stresses (without citation to the administrative record) that this evidence constitutes the "plainest" exercise of "federal authority over the Tribe by removing Mashpee children from their families and tribal community and relocating them hundreds of miles away to Carlisle Indian School … part of a broader federal Indian policy aimed at breaking up tribal communities throughout the country and assimilating tribal members into the American Society." 2021 ROD at 8. This novel contention is remarkable for three separate reasons:

First, it represents a sudden 180-degree reversal of Interior's position in 2018, which declared the Carlisle School as probative evidence under the M-Opinion but did not constitute clear federal authority over the Mashpee Tribe as opposed to the exercise of federal responsibilities respecting individual children attending the school. 2021 ROD at 27. Interior takes its new position with a cursory nod to its prior decision, essentially saying "that was then, this is now." It remains an inexplicable flip-flop that is unsupported by the evidence and is therefore arbitrary and capricious.

The Carlisle School's digital archives correctly list the 1917 Mashpee enrollment as "1." *See* AR0007028[Exhibit K (copy of the Carlisle Schools Quarterly Report for December 1917, listing single Mashpee student in attendance, consistent with GAO Report when read correctly].

Second, this contention improperly rests on extra-record information not produced by the parties or previously relied on by Interior. Indeed, at no time has the Tribe argued its children were "removed" from their homes and sent to the Carlisle School, nor could it without violating Rule 11 of the Federal Rules of Civil Procedure. Interior's recently conjured rationalization should be treated the same as an impermissible post hoc rationalization. *See Mashpee v. Bernhardt*, 466 F. Supp. 3d at 222 (Judge Friedman's remand decision stating that the court cannot accept "'post hoc' rationalizations for agency action that the agency did not, itself, give.") (citing *Jicarilla Apache Nation,* 613 F.3d at 1120).

Third, the contention is patently false. It represents a complete and gross misstatement of the historical record regarding the Carlisle School. The evidence that refutes Interior's false narrative of federal removal of Mashpee children from their homes—taken from readily available digital archives—includes the following:

- Under 5 U.S.C. § 287 (June 10, 1896, ch. 398, §1, 29 Stat. 348) entitled "taking child to school in another State without written consent," provides that "No Indian child shall be taken from any school in any State or Territory to a school in any other State against its will or without the written consent of its parents."

- All 12 Mashpee students *voluntarily* attended the Carlisle School with their parents' consent.[10]

[10] Attendance was voluntary at the school, required parental consent, and an application for admission supported by signed vouchers consisting of disinterested persons attesting to the reasons why the student should be admitted to Carlisle. *E.g.* Application of Alfred DeGrasse for Enrollment at the Carlisle Indian School, dated October 7, 1909,

- The Commonwealth of Massachusetts paid for the public school education of Mashpee children and appears to have paid for the education of Mashpee children at the Carlisle School.[11]

- The Carlisle School Supervisor in Charge dissuaded Mashpee students from applying believing they and other Massachusetts Indians had "ample public school facilities at their homes" and openly "doubted whether any other young people from Massachusetts can establish their eligibility for enrolment here." AR000763 [Letter dated January 27, 1915].[12]

AR000701-705; Application of Charles A. Peters dated September 18, 1910, AR000744-749; Application of Alston DeGrasse, September 18, 1911, AR0008935-8952 (applicant wished to study mechanical engineering and no such courses were available in public schools in South Mashpee and Bourne). Each application required the signed consent of a parent. *E.g.* AR000703 (DeGrasse); AR000745 (Peters); AR0008937 (DeGrasse). The completely voluntary nature of attendance at Carlisle is further reflected in Charles Peter's statement in a letter to the School Superintendent, requesting to return home, that he had "been at the school over three years and came with my own free will." AR000758.

[11] *See* Tantaquidgeon report, AR000321, 326-327, 333-335, 373-375 (describing state-funded Mashpee schools). State laws provided for funding for Mashpee students (s*ee* "An Act in Relation to the Distribution of the School Fund for Indians – 1870, chapter 350," providing funding to the Town of Mashpee for education "of their inhabitants formally called Indians"). State funds also appear to have been available to cover the costs of tuition and transportation for Mashpee students attending the Carlisle School (*see* "An Act Making an Appropriation for the Tuition and Transportation of Children Attending School Outside of the Town in Which They Live," Ch 23 (February 2, 1905)).

[12] •The Carlisle School said that it disenrolled 100 students in 1916 who were assimilated, living in towns, with access to public schools (like the Mashpees) and were therefore deemed "ineligible," for education at the Carlisle School, which should only educate "real Indians," i.e., children of Tribes under the care of the federal government. Letter from Carlisle Superintendent O.H. Lipp, dated Feb 12, 1916 (file NARA_RG75_CCF_b029_f013_16293.pdf) at p. 3. Superintendent Lipp stated that:

> large non-reservation schools [enroll] at least five or six hundred children who have no business being in Government schools. What we should do is . . . cease enrolling Indian students at Government schools who have the privileges of public schools . . . .

See also Inspection Report dated May 20, 1911 dismissing 69 Carlisle students as ineligible because of assimilation and access to public schools, including one Mashpee student Alonzo Brown [NARA_RG75_CCF_b024_144_34461.pdf] at p. 1, 32 (supporting letter identifying Brown as an "ineligible pupil") at 36 (supporting letter describing Brown's ineligibility).

The 2021 ROD's heavy emphasis on this false narrative is not just arbitrary and capricious but smacks of intentional misrepresentation of the historical record. If Interior's representative swore to this contention under oath, it would cast in doubt the integrity of the ROD's entire UFJ analysis under the expression, "Falsus in uno falsus in omnibus." "This Latin expression "roughly translates to mean 'false in one thing, false in everything' (*see e.g. Washington Mutual Bank v. Holt III*, 113 A.D.3d 755, 979 N.Y.S.2d 612, 614 (2nd Dept. 2014)) '[w]here a witness has given testimony that is demonstrably false [the court] may, in accordance with the maxim falsus in uno falsus in omnibus, choose to discredit or disbelieve other testimony given by that witness.'" *Matter of Morataya*, 53 Misc. 3d 242, 253 n.45 (N.Y. Civ. Ct. 2016); *see generally U.S. v. Connolly*, 504 F.3d 206, 216 n.5 (1st Cir. 2007) (doctrine "retains validity as a basis for a permissive inference").

When the Carlisle School evidence is viewed "in concert" together with

- contemporaneous (1930's) statements of Interior officials disclaiming any federal authority over the Mashpees;
- pronouncements by the Supreme Court and other courts documenting the tribal fragments in Massachusetts without any federal recognition or relationship (*see* Section V below); and
- the history and laws of Massachusetts regarding the Indians since early colonial times exercising state authority over the Mashpees, including providing public education to their children;

it is clear that the time-limited, voluntary attendance of several Mashpee children at that school—two decades before enactment of the IRA— is not

probative evidence of federal jurisdiction over the Tribe. Rather it reflects dealings with individual Indians, just as Interior previously found in its 2018 ROD. By allowing (not forcing) the Mashpees to send a handful of children to the Carlisle School, the Federal Government cannot rationally or logically be said to have subjected the entire Mashpee community in Massachusetts, 445 miles away, to federal jurisdiction. This is particularly true since the Mashpees were outside the jurisdiction of any Indian Agency and always viewed as among the Massachusetts' "tribal remnants" over which the Federal Government had never exercised jurisdiction.[13]

V. The judicial treatment of Massachusetts Indians and the Mashpees compels the conclusion that the Mashpees were not under federal jurisdiction in 1934.

A. Long-established federal and state precedent establishes that Massachusetts Indians were not wards of the federal government.

In 1884 the Supreme Court noted the well-known historical fact that the "Indians in Massachusetts" were "remnants of tribes never recognized by treaties or legislative or executive acts of the United States as distinct political communities." *Elk v. Wilkins, 112 U.S.* 94, 108 (1884) (citing Danzell v.

[13] The absence of an Indian agency in Massachusetts is documented in the Meriam Report, which lists jurisdictions covered by each Indian Agency. *See* Meriam Report, Ch. 3, at 64–65 (listing "jurisdictions" visited by survey staff and "jurisdictions" not visited by survey staff, with Massachusetts showing up on neither list). The absence of an Indian Agency in Massachusetts is no accident. The Indian Department, when created by Congress in 1786, carved out New England from its jurisdiction. *See* Ordinance for the Regulation of Indian Affairs (August 7, 1786) (establishing two separate "districts" within the Indian Department, "northern" and "southern," with an express geographical boundary—"westward of the Hudson River"—that excluded all of New England).

Webquish, 108 Mass. 133 (1871), Pells v. Webquish, 129 Mass. 469 (1880), Mass. Stat. 1862, ch. 184; 1869, ch. 463).[14] *See Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 483 (1st Cir. 1987) (citing *Elk* and concluding Mashpees and four other tribal remnants in Massachusetts were never recognized by the Federal Government).

B. The federal court jury finding that the Mashpees were not organized as a tribe as of 1869 means the Mashpees did not exist as a tribe within the meaning of the IRA on June 1, 1934.

1. The different definitions of "Indian Tribe"

A tribe for purposes of the IRA is one that is recognized by statute (by act of Congress), administratively (by the Department's Office of Federal Acknowledgment applying 25 C.F.R. §83.2, since 1978)[15] or by judicial determination (federal courts applying common law principles). *See Richmond v. Wampanoag Tribal Court Cases*, 431 F. Supp. 2d 1159, 1163 (D. Utah 2006);*see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-48 (10th Cir. 2001). A recognized tribe is placed on the DOI's "list of recognized

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

[15] In 1978, the Department of Interior promulgated the Federal Acknowledgement Procedures ("FAP"), which now govern the acknowledgement of Indian tribes. 43 Fed. Reg. 39,361 (Sept 5, 1978); 25 C.F.R. §§ 83.1-83.11 (1978). The OFA applies a mandatory seven criteria test that represents modern concepts of tribal identity and organization.

tribes[.]" 25 U.S.C. §§ 5130-5131, formerly cited as §§ 479a(3), 479a-1; 25 C.F.R. § 83.5(a). *See Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1076 (10th Cir. 2004), *as amended* (10th Cir. Feb. 16, 2005).

Each of the three different avenues for federal recognition entails a different legal standard for determining what constitutes a "tribe." The federal common law definition of "tribe" that is applied by federal courts was first articulated by the Supreme Court in *Montoya v. United States.* 180 U.S. 261, 266 (1901) and reaffirmed 25 years later in *United States v. Candelaria*, 271 U.S. 432, 442 (1926): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Candelaria*, 271 U.S. at 442 (quoting *Montoya,*180 U.S. at 266); *see Mashpee Tribe v. New Seabury Corp*., 592 F.2d 575, 582-585 (1st Cir. 1979) (applying common law *Montoya* test to Mashpees for determining standing as "Indian tribe" under the Indian Trade and Intercourse Act of 1834, 25 U.S.C. § 177); *Joint Trib. Coun. of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 n.8 (1st Cir. 1975) (same).

2. The Mashpees are not a tribe under the *Montoya* common law test.

The Mashpees failed to meet the common law test for constituting a tribe in the federal court litigation in the 1970s and 1980s, which the Mashpees undertook without support or participation of the United States—despite requesting the Federal Government's assistance prior to the case being filed.

The Federal Government declined to become a party or otherwise support the Mashpees' land claims. 2015 ROD at 111-112. In that litigation, the Mashpees first sued the Town of Mashpee and the Commonwealth claiming a violation of the Indian Trade and Intercourse Act (ITIA). To have standing, the Mashpees had to establish they were organized as a tribe on the date the lands were unlawfully taken from them, and on the date they sued to recover possession. The Mashpees' lawsuit produced a federal court jury verdict in 1978 that determined the Mashpees gave up their tribal organization and became citizens of Massachusetts in 1869, and were not thereafter a tribe in Massachusetts. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978). As a result, the tribe lacked standing under the ITIA to bring a land claim action against the state defendants. *Id*. at 942-943; 949-950. That verdict came after 40 days of trial with expert testimony produced on both sides. *Id*. at 943. The proof elements for tribal identity were taken directly from *Montoya* and set out on a special verdict form with interrogatories. *Mashpee Tribe v. New Seabury Corp*., 592 F.2d at 582 ("The court below, in its instructions to the jury, relied primarily on *Montoya v. United States* . . . .") The jury's verdict expressly found that the extension of state citizenship in 1869 ended the Mashpees' tribal identity and existence. 447 F. Supp at 943-946. The jury's verdict was affirmed on appeal. *Mashpee Tribe*, 592 F.2d at 582-585 (affirming verdict and jury instructions based on *Montoya* definition of tribe).

VI. The M-Opinion cannot be invoked to salvage the Mashpees' status as being under federal jurisdiction (UFJ) without violating *Carcieri.*

Justice Breyer's concurring opinion, which serves as the central guidepost for the M-Opinion (see M-Opinion at 3-4, 17, 23, 24), identified federal jurisdictional acts (treaties, congressional appropriations and enrollment in the Indian Office) that carried with them federal obligations that are present in 1934. 55 U.S. at 399-400. The Breyer concurrence makes clear that any federal act that could be considered "jurisdictional" cannot be a casual contact with a tribe, but something more substantial, equivalent to a federal treaty, congressional appropriation, or direct supervision through the Indian Office. Under his concurrence, UFJ would never arise through lesser contacts with the tribe, and would never arise through contact with individuals as opposed to exercise of jurisdiction over a tribe. *See* 555 U.S. at 399 (noting "little Federal contact with the Narragansetts as a group"). So even though the Narragansetts had some contact with the Federal Government over its long history, which included sending a handful of children to the Indian Industrial School in Carlisle, Pennsylvania—a facility that closed in 1918—that type of minimal and time-limited contact is irrelevant to *Carcieri*'s UFJ analysis as framed by Justice Breyer. The same would be true of federal removal policies not implemented

with respect to the Mashpees (2021 ROD 12-15)[16] and potential federal actions studied in Congress but never implemented with respect to the Mashpees (2021 ROD at 20-22),[17] who were long citizens of the Commonwealth and remained under state *and not* federal jurisdiction throughout their history.

A. Reports without consequences are not probative evidence of UFJ.

The 2021 ROD relies on the Morse Report, Thomas McKenney Report regarding "Indian Treaties and Laws and Regulations Relating to Indian Affairs," statistical tables included in H.R.Rep. No. 474, 23rd Cong., 1st session (1834), and a statistical table from Henry Schoolcraft's "Historical and Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States (1850)" (collecting and digesting statistics and materials that "may illustrate the history, the present condition, and future prospects of the Indian tribes of the United States"). These reports represent comprehensive studies undertaken of all Indians living within the jurisdictional borders of the United States. These statistical reports do not even show the Mashpees were organized as a tribe, much less one recognized by the Federal

[16] The congressional hearings on the removal policy, conducted in May 1830, demonstrate that Congress viewed the Eastern Indians in Massachusetts and New York as tribal remnants under the sole jurisdiction of the states. AR0006910-6928.

[17] These same records further show that Congress and the Department of the Interior chose to direct their energies elsewhere and took no action to address the conditions of Indians living in Massachusetts, much less took some action that could remotely be considered jurisdictional under *Carcieri*. UFJ is not satisfied by academic studies and informational surveys that resulted in no jurisdictional actions in the 19th Century, much less establish those actions remained effective as of June 1, 1934.

Government or under its jurisdiction. *See Mashpee Tribe v. Secretary of the Interior,* 820 F.2d at 483 ("Regardless of the legal lens through which we view these documents [Morse Report and Schoolcraft Statistical Table], however, we find them inadequate to show tribal status."). The Supreme Court in 1884 reviewed the history of the Massachusetts Indians and described them as "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk*, 112 U.S. at 108 (citations omitted).

The Morse Report documents that the Mashpees were tribal "remnants" who were assimilated and under the exclusive jurisdiction of the state. Indeed, as then First Circuit Chief Judge (now retired Justice) Breyer wrote for the circuit court in *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d at 483, the Morse Report shows the Mashpees "'have altogether adopted the habits of civilized life.' It says that Harvard College and a religious society provide for the Indians' moral and religious instruction while the State takes care of the 'infirm and aged poor' and manages their lands." The First Circuit rejected the Mashpees' argument (advanced by four other groups of Massachusetts Indians) that the Morse Report showed tribal recognition by the Federal Government as of 1820. *Id.* at 482-484. While these Indians "inhabited a particular territory," it could not be said that they were "'united in one community under one leadership or government,' and it is ambivalent on the matter of 'same or similar race.'" *Id.* at 483. The First Circuit concluded that, "'[a] fortiori, it is inadequate to show

the existence of these tribes as a matter of fact at the relevant time of conveyancing…." *Id.*"[18] Accordingly, the Morse Report does not advance in any respect the Mashpees' claim to be under federal jurisdiction. In fact, the Morse Report shows the extensive history of the Mashpees as wards of the Commonwealth of Massachusetts—and not of the Federal Government—with the Federal Government doing nothing more than documenting its lack of involvement in the affairs of the Mashpees and other tribal remnants in Massachusetts only to be followed by another century of leaving the care of these Indians to the Commonwealth.

The 2021 ROD cites to the 1890 Annual Report which again documents the long-standing treatment of the Mashpees as wards of the state and not the Federal Government, including the fact that a board of overseers, appointed under Massachusetts law, managed the affairs of the Mashpees and their lands. The 1890 Annual Report is notable for not being current about the Mashpees'

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[18] Judge Breyer stated that the remaining documents added nothing of factual value. The appendix to "Indian Treaties and Laws and Regulations Relating to Indian Affairs" of 1826 uses the same numbers as the 1820 document, so one could reasonably believe he took the numbers from Reverend Morse. The third document, published in 1834, repeats the Morse numbers and adds nothing to them. The fourth document, an 1850 Bureau of Indian Affairs survey by Henry Schoolcraft, also seems to be based on the 1820 Morse report. Schoolcraft says there were 847 Indians living Massachusetts, 107 more than Morse reported in 1820, but Schoolcraft's tables list several tribes not mentioned in the earlier report. Schoolcraft does not describe the factual circumstances under which the Indians live, but he contrasts their condition to other Indians whom he calls "tribes" by referring to the Massachusetts Indians (and Narragansetts and other East coast Indians) as "fragmentary tribes." *See* Table IV "Fragmentary Tribes still existing within the boundaries of the old States." This treatment is on all fours with the Supreme Court's decision in *Elk* in 1884. *See* AR0006953 [Exh. G (Table IV at G-04].

status in Massachusetts. The Indian Commissioner did not even acknowledge the fact that two decades earlier Massachusetts made the Mashpees citizens of the state, incorporated the Town of Mashpee under state law, and divided the Mashpee lands in severalty. The Commissioner's omissions thus document the degree to which the Federal Government was disconnected from, and unconcerned about, the Mashpees and other tribal remnants in Massachusetts. *See* AR0006946 [Exh. F (F-17) AR0006948 (F-19)](identifying no Indian reservations in Massachusetts as of 1890.) The 2018 ROD accurately concluded that the1890 report's reference to the Mashpees does not "amount to an acknowledgment of Federal responsibility for, or an exercise of Federal authority over, the Tribe" and observed the contents of the report "weigh[ed] heavily against the Tribe's interpretation of the [report] as acknowledging or assuming Federal responsibilities for the Tribe." 2018 ROD at 25.

In yet another inexplicable flip-flop, the 2021 ROD states that "[b]y including the Tribe in the 1890 annual report, the Commissioner explicitly acknowledged that the Tribe fell within its purview" and that "[i]nclusion in the report constitutes probative evidence of the Federal Government's exercise of jurisdiction over and responsibility for the Tribe." 2021 ROD at 22.[19] In this way

[19] Interior cites *Village of Hobart v. Acting Midwest Reg. Dir., 57* IBIA 4, 20, 24-25 (2013) for support, but even Interior's own parenthetical synopsis of the case draws the important distinction that the tribe there was assigned "to the jurisdiction of a BIA agency." 2021 ROD at 22 n. 163. The Mashpees were not assigned to the jurisdiction of any BIA agency, nor could they be because no BIA agency was located in Massachusetts.

Interior attaches probative value to something that has none, without even trying to distinguish its prior treatment of the same evidence in its earlier ROD. That is the definition of arbitrary and capricious.

B. U.S. General Census statistics are not probative evidence of UFJ.

The 2021 ROD relies on a mish-mash of federal census records to support its conclusion that the Mashpee were UFJ in 1934. 2021 ROD at 23-25. But Interior previously found this evidence unpersuasive, and for good reason. Unlike the Cowlitz tribe identified in the ROD at 24 & n. 182, whose members were counted in a census conducted by the local Office of Indian Affairs (*see Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 564-566 (D.C. Cir. 2016) (noting, among a series of federal actions taken with respect to the Cowlitz, an instruction from the Taholah agency on March 16, 1934 to place Cowlitz Indians on the census roll for the Quinault Reservation)), the Mashpees were never counted by the Office of Indian Affairs.[20] Instead, the Mashpees only showed up in general censuses of *all* U.S. residents every ten years. Indians were not included in the 1790–1840 censuses. In 1860, Indians

[20] The Indian Service occasionally surveyed Indians in a specific area under its jurisdiction to determine headcount for congressional appropriations and other federal benefits. This type of census-taking would be probative evidence in documenting a congressional act. *See e.g.*, *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1174 (E. D. Cal. 2015) (BIA special agent took census of dispossessed California Indians as part of federal legislation to acquire land for landless California tribes) *rev'd on other grounds*, 698 Fed.Appx. 531 (9th Cir. 2017); *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) (Secretary took census of tribal members to ensure that the funds appropriated by Congress would be spent for the benefit of those individuals). No such Mashpee-specific census was ever undertaken because Congress never made any appropriations for the Mashpees.

living in the general population were identified for the first time. Beginning with the 1900 census, Indians were enumerated on reservations as well as in the general population.[21] In this way, the federal census counts every Indian in the nation, including state recognized tribes, tribal remnants, and assimilated Indians living as citizens of the states. The census headcount for Indians does not reflect any federal activity targeted at Indians, or conferral of any federal status.

Significantly, the Mashpees were not enumerated on the Indian Census Rolls undertaken between 1885–1940. Federal Indian agents and superintendents in charge of federal Indian reservations were required by an act of Congress (23 Stat. 98 (July 4, 1885)) to conduct annual censuses for Indian tribes living on those reservations. This Indian-specific census by the Office of Indian Affairs produces probative evidence regarding which tribes were under federal jurisdiction. The census rolls note that "[s]ome tribes, particularly in the East, have never been under 'Federal jurisdiction' and thus would not be reflected "on the rolls." Indian Census Rolls 1885–1940. *See* AR0006963 [Exh. I (I-01)]). The Mashpees are not listed. This data provides probative evidence of UFJ in two respects—by showing the tribes listed and undoubtedly meeting

[21] See https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html.

UFJ, and by not showing tribes such as the Mashpees and Narragansetts who were never under Federal jurisdiction.

C. Carlisle School census statistics are not probative of UFJ.

Because these U.S. census figures have no probative value for the Mashpees, Interior relies heavily on the annual census undertaken at the Carlisle School in Pennsylvania, which recorded a handful of Mashpee children in attendance at that school between 1904 and 1916.

The Indian Office's annual enumeration included both reservation schools and non-reservations schools. It is not surprising that Indian children who attended the non-reservation Carlisle School and self-identified as being of a certain descent or heritage (e.g., "Wampanoag" or "Narragansett")[22] would be listed on those rolls. But neither the children's attendance at the school, nor their recordation on the school-based census, supports a finding of UFJ for the reasons set out above in Argument Section IV. The school census establish nothing about tribal affiliation except as self-reported, with no determination as to whether or not the referenced tribes were wards of the federal government. The school records themselves show hundreds of students at Carlisle (including the Mashpees) were assimilated Indians with access to public schools and did not belong to tribes under the federal government's jurisdiction. *See, supra,* p. 17

[22] *See* http://carlisleindian.dickinson.edu/search/site/Narragansett (identifying three Narragansett students who attended between 1898 and 1908. Individual information is available under the student's name (Charles Jones, Harry Jones and Wallace Lewis).

n. 12. The 2018 ROD considered the totality of the census data, weighed its probative value, and rejected it appropriately, stating that:

> While Sol. Op. M-37029 points to "annual reports, surveys, and census reports" produced by the Office of Indian Affairs, it makes clear that such material may provide evidence of Federal authority when produced "as part of the exercise of [the Office of Indian Affairs'] administrative jurisdiction" over a tribe. *None of the reports submitted by the Tribe reflect that they were prepared as an exercise of administrative jurisdiction over the Tribe.* Neither does the Tribe suggest that the reports provide evidence demonstrating a course of dealings over time that, when viewed as a whole, demonstrates a Federal obligation to the Tribe beyond the general principle of plenary authority.

2018 ROD at 24 (emphasis added). But inexplicably, in its 2021 ROD, Interior waives a magic wand and declares *all* of the census information probative, even plenary general census information, purporting to find support for its position in the *Cowlitz* case, which is entirely distinguishable, as discussed above (page 28). The 2021 ROD's about-face reliance on this evidence is arbitrary and capricious.

VII. The M-Opinion is deeply flawed and should be rejected.

As noted above in Argument Section III, Interior wrongly discounts in the 2021 ROD the contemporaneous (in the 1930s) statements by Commissioner Collier and other senior Interior officials that the Mashpees were not wards under federal jurisdiction, calling such statements "mistaken." To the extent the M-Opinion supports dismissing such highly probative evidence as stated by the majority in *Carcieri* (*see* M-Opinion at 20), the M-Opinion legally errs.[23]

[23] The M-Opinion (at 3) purports to find support in Justice Breyer's concurring opinion for dismissing the contemporaneous statements of BIA officials. But the Breyer concurring

While purporting to be guided by Justice Breyer's concurring opinion, Interior deviates from it every time it identifies as potential jurisdiction-conferring acts minor federal contacts that are not akin to a federal treaty, congressional appropriation or enrollment in Office of Indian Affairs. Likewise, Interior's M-Opinion is divorced from Justice Breyer's clear statement that any such significant jurisdiction-conferring event *be in effect in 1934*. The M-opinion creates out of whole cloth the idea that a distant historical contact that has not been repudiated by congress is enough to satisfy the UFJ requirement as of 1934. M-Opinion at 18-20. This "tag your it" concept of federal jurisdiction seriously distorts Justice Breyer concurrence and constitutes legal error. *See* Remand Submission at AR0006823-6825; AR0006834-6839.

The M-Opinion creates a standardless test that practically any tribe can meet and in doing so, violates the majority opinion in *Carcieri* while watering down and distorting Justice Breyer's concurring UFJ analysis. That is legal error. *See* AR0006834-6842.

The D.C. Circuit Court upheld the M-Opinion on a vastly different record concerning the Cowlitz tribe. *See Confederated Tribes of Grand Ronde Cmty.*,

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opinion does not take issue with the majority's express reliance on departmental pronouncements regarding the Narragansetts. *Carcieri,* 555 U.S. at 384 ("But, in correspondence spanning a 10–year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government."); *id* at 390 n.5. Breyer credited Commissioner Collier as a persuasive source for interpreting the IRA (555 U.S. at 399) and in no way suggested his contemporary statements were not to be credited.

830 F.3d at 564-565. The D.C Circuit did not face the paucity of federal contacts that exist for the Mashpees, or how the M-Opinion improperly dilutes Justice Breyer's concurring opinion to qualify the tribe when *Carcieri's* holding with respect to the Narraganset Tribe dictates that the Mashpees likewise be found ineligible.

VIII. The decision to treat two parcels 50 miles apart as the Mashpees' initial reservation is unprecedented, arbitrary and capricious.

In its efforts to secure gaming revenue, the Mashpees engaged in transparent "reservation shopping" in Southeast Massachusetts far from its home based in the Town of Mashpee on the Cape.[24] They first looked in Middleborough, then Fall River and finally settled on East Taunton (2021 ROD at 1 & n.2), not because of meaningful historical ties but proximity to major roads that could support extensive vehicle traffic for a major Las-Vegas style casino.

In no prior case has Interior connected such distant parcels to form a single initial reservation. Interior relies on its general authority under its own regulations to take into trust "noncontiguous parcels" (ROD at 38 & n. 264) and cites as precedent only the Nottawaseppi Indian lands opinion that noncontiguous parcels could qualify as a tribe's initial reservation for purposes

[24] For irrefutable evidence that the Mashpees were rooted on Cape Cod and lived on the fruits of the sea, one has to look no further than the Tantaquidgeon report promoted by Interior and the Tribe. *See* AR000319, 322, 343-351, 365-367.

of IGRA.[25] Unlike the Mashpees, the Nottawaseppi had a historic reservation that encompassed the two parcels, located 19 miles apart. Both fell within the reservation's historic boundaries. No such defining historic reservation exists for the Mashpees, who were rooted on the Cape. Their land grab 50 miles to the east is unsupported by Interior precedent. Interior's position lacks any articulable limits and could support taking into trust any two parcels no matter how far distant from each other. Without any way to circumscribe Interior's authority, the decision is revealed as a standardless "I know when I see it" rule that is arbitrary and capricious on its face. *See Stanojkova v. Holder*, 645 F.3d 943, 949 (7th Cir. 2011) (finding standard of "I know it when I see it" capricious adjudication at both the administrative and judicial level).

CONCLUSION

For the each of the foregoing reasons, Plaintiffs respectfully request the Court to find the 2021 ROD arbitrary and capricious and not in accordance with law, and remand the matter for further consideration of the evidence and law in keeping with *Carcieri*.

DATED: August 1, 2022

[25] Memorandum from Acting Assoc. Solicitor Div. of Indian Affairs, Office of the Solicitor, U.S. Dep't of the Interior, to Reg'l Dir. Midwest Reg'l Office, Bureau of Indian Affairs, U.S. Dep't of the Interior 3 (Dec. 13, 2000).

Respectfully submitted,

/s/ David H. Tennant

David H. Tennant (admitted *pro hac vice*)
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618
(585) 281-6682
david.tennant@appellatezealot.com

David J. Apfel (BBO No. 36073)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Tel. +1 617 570 1895
Fax +1 617 321 4385
DApfel@goodwinlaw.com

Attorneys for Plaintiffs

ADDENDUM

Littlefield v. Dep't of Interior

REMAND

"Under Federal Jurisdiction" Tribe-by-Tribe Comparison

FED JDX BEFORE 1934	**Mashpee**[1]	**Narragansett**[1]	**Cowlitz**[1]	**Tunica-Biloxi**	**Stillaguamish**	**Oneida**[1]
Federal treaty negotiated			X[2]		X[1]	X[2]
Federal treaty executed					X[2]	X[3]
Federal Treaty rights and benefits in 1934					X[3]	X[4]
Federal Government in foreign treaty guarantees existing Indian treaty				X[1]		
Tribe possesses aboriginal title				X		X[5]
Federal land set aside or superintendence				X[2]	X[4]	X[6]
Federal territory or public lands involved			X[3]	X	X[5]	
Federal reservation declared			X	X		X[7]
Tribe removed under Federal removal policy			X			X[8]
Federal Indian Agency with jdx over Tribe			X[4]	X[3]		X[9]
Federal Office Indian Affairs (OIA) enrollment			X[5]			
OIA Manages supervises allotments			X[6]			
OIA Conducts Indian Census within Agency			X[7]			
Congress appropriated funds for tribe				X[4]		
OIA approves Indian contracts	Denied[2]	Denied[2]	X[8]			X[10]
Feds enforce Indian Non-Intercourse Act	Denied[3]	Denied[3]		X[5]		X[11]
Feds enforce fishing rights			X		X[6]	
Indian School attendance—at non-reservation location	X	X				X
Included in General U.S. Census and National Indian Census	X	X				X
Tribe voted on IRA	No[4]	No	No	No	No	YES

COMMENT:

The Department's M-Opinion 2-part test for establishing whether a tribe was under federal jurisdiction in 1934 largely severs the jurisdictional analysis from its critical underpinning, namely, a federal set-aside of land for the tribe (whether by declaration of a federal reservation or otherwise), and the tribe's submission to federal supervision while inhabiting that territory. Historically federal recognition as a tribe and federal jurisdiction occurred at the same time as the result of a territorial set-aside and superintendence. *See Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) ("Historically, the federal government has treated a tribe as 'recognized' if Congress or the President has created a reservation for the group and the United States has a continuing political relationship with the group") (citing Cohen's Handbook of Federal Indian Law 6 (2015); *Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 482 (1st Cir. 1987) (same). Whether a tribe must be residing on federally-supervised lands to satisfy the UFJ requirement is the subject of a pending Petition for a Writ of Certiorari, filed October 27, 2016, in Supreme Court of the United States Case No. 16-572, *Citizens Against Reservation Shopping v. Jewell* (the Cowlitz case).

Mashpee Tribe Footnotes:

[1] Senior Department officials knew the Mashpees and other tribal remnants in Massachusetts had no relationship with the Federal Government, having always been treated as wards of the state and under the exclusive jurisdiction of the state since before the country's founding. *See* AR0000408; AR000416; R000417/AR002084; AR001909; AR000278; AR002083; AR007214 to 007219. This was no mistake of fact.

[2] Commissioner of Indian Affairs on July 10, 1899 stated that the United States has "no authority to approve the contracts in question" because the tribes in question (Mohegan, Shinnecocks and Narragansetts), like other tribal "remnants" in "the thirteen original states" were never the subject of any Federal treaties or "under federal supervision or control." (AR007217-7218).

[3] Not only did the Federal Government not take affirmative action to sue on behalf of the Mashpee Indians to vindicate their rights under the ITIA, the Federal Government declined to participate in the Mashpees' land claim lawsuit against the state defendants. Proposed Finding at 17 ("the Federal government ultimately declined to be a party in the land claim suit."); ROD at 111-112. The Federal Government also secured the dismissal of the Mashpees' subsequent land claims against the Secretary and other federal defendants. *See Mashpee Tribe v. Watt*, 542 F. Supp. 797, 799-800 (D. Mass. 1982) (granting federal defendants' motion to dismiss based on res judicata bar arising from earlier Mashpee litigation that determined "plaintiff was not a "tribe" under the [Indian Trade and Intercourse Act]) *aff'd*, 707 F.2d 23, 24 (1st Cir. 1983).

[4] Mashpees were not deemed eligible to vote under the IRA. ROD at 117. ("The Federal Government did not seek to implement the IRA at the Town [of Mashpee]").

Narragansett Tribe footnotes:

[1] The Narragansetts were never treated as wards of the Federal Government; this fact was recognized by both state and federal governments, including in 1934. *Carcieri*, 555 U.S. at 382, 384, 395-96; *id*. at 399-400 (Breyer J., concurring).

[2] *See* Mashpee footnote 1. The Commissioner of Indian Affairs on July 10, 1899 disclaimed authority to approve contracts for Narragansetts and other eastern tribal remnants not under federal supervision. (AR007217-7218).

[3] The Federal Government declined to participate in the Narragansetts' land claim lawsuit against the state. *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp*., 418 F. Supp. 798, 811 (1976.

[4] Senior Department officials stated that Narragansetts were always treated as wards of the State of Rhode Island and never of the Federal Government. *Carcieri*, 555 U.S. at 382/4.

Cowlitz Tribe Footnotes:

[1] The record according to the D.C. Circuit showed a "large and complex record of Interior interactions with Cowlitz for almost a century." *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016). The Court explained:

> the Secretary detailed the government's course of dealings with the Cowlitz dating from failed treaty negotiations at the 1855 Chehalis River Treaty Council, J.A. 263, to acknowledgment and communication with Cowlitz chiefs in the late 19th century, J.A. 264, to government provision of services into the 1900s, J.A. 265, to supervision in the 1920s by the local Taholah Agency, J.A. 265, to organization and claims efforts leading up to the ICC award, J.A. 266, to allotment activities, J.A. 267-68. [**25] Another "important action by the Federal Government evidencing the Tribe was under federal jurisdiction in 1934" was Interior's approval of an attorney contract for the Tribe in 1932, pursuant to a statute that required contracts between Indian tribes and attorneys be approved by the Commissioner of Indian Affairs and Secretary. J.A. 269.
>
> *Id*. at 563.

[2] Id. at 564-565 (The Cowlitz refused to sign an 1855 land cession treaty proposed at the Chehalis River Treaty Council, J.A. 625, whereby Governor Stevens of the Washington Territory and other federal agents sought to move the Cowlitz to a reservation on the Pacific Coast, J.A. 660-68. The Cowlitz resisted relocation and refused the treaty, J.A. 667, but years later the United States offered the Cowlitz's land for sale to settlers without compensation anyway, J.A. 498. As the District Court explained, the fact that the government nevertheless took the Cowlitz land even after the tribe resisted the treaty corroborates that the government treated the Cowlitz as under its jurisdiction.").

[3] *Id*. The Cowlitz resided in Washington Territory—congressionally created in 1853—on lands governed by the Federal Government. Like other Western tribes residing on federal lands, the Cowlitz dealt directly with the Federal Government. The State of Washington was not even created until 1889.

[4] The Cowlitz had substantial contact with the Taholah Indian Agency including in 1934. Id. at 566 ("the Secretary … adequately documented the dealings that evidenced jurisdiction in 1934, *see* J.A. 267 (relying on a March 16, 1934 instruction from the Taholah agency to place Cowlitz Indians on the census roll for the Quinault Reservation); J.A. 269 (citing evidence of the agency granting "allotments [on the Quinault Reservation] to eligible Cowlitz Indians during the period from 1905 to 1930"); J.A. 269 (referencing agency approval of an attorney contract that was in the name of "the Cowlitz Tribe or Band of Indians").

[5] *Id*.

[6] *Id*.

[7] *Id*.

Tunica-Biloxi Tribe Footnotes:

[1] The Tunica-Biloxi tribe held "perfect title" that "predates the Treaty of Paris," and the United States—through the treaty—committed to honoring and protecting the Tribe's title to its land (Exh. D, Tunica-Biloxi Record of Decision at 14) "Congress reaffirmed this commitment by passing the Nonintercourse Act and making it applicable to the Louisiana Territory." *Id*. at 14; see id at 6 (U.S. agreed to guarantee and honor "all the treaties and articles" with the Tribes and Nations of Indians" (*id*. at 6) effectively carving out from the federally-acquired Louisiana Territory these preexisting Indian reservations. *See id*. at 6-12.

[2] U.S. agreed to guarantee and honor "all the treaties and articles" with the Tribes and Nations of Indians" (*id*. at 6) effectively carving out from the federally-acquired Louisiana Territory these preexisting Indian reservations. *Id*. at 6-12

[3] Indian Service actively assisted tribe—provided superintendence over the tribe in Orleans territory including meals and other goods and services through special congressional appropriations, which demonstrated "the Indian agents recognized that the Federal Government had oversight and jurisdiction over the tribe." *Id*. at 12.

[4] The Secretary of War in 1805 appointed Dr. John Sibley the United States Agent for Indian Affairs of the federal Territory of Orleans—federal Indian officer protected tribe's lands from being transferred to two non-Indians. allowing tribe to possess lands that make up its current federal reservation. *Id*. at 10-11.

[5] Evidence is found in the Proposed Finding and Final Determination respecting federal acknowledgment (Tunica Biloxi ROD, MWT Exh. D.at 5)

Stillaguamish Tribe Footnotes:

[1] The Treaty of Point (Ratified Mar. 8, 1859; Proclaimed Apr. 11, 1859) protected the Stillaguamish Tribe's usufructuary rights and recognized the Tribe's right to inhabit banks of the Stillaguamish River—its aboriginal territory. *See United States v. Washington*, 384 F. Supp. 312, 378-379 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), vacated on other grounds sub nom. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc*., 443 U.S. 658 (1979). The district court's factual finding #144 lays out the pertinent history. *See Northwest Sea Farms, Inc. v. United States Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (recognizing Point Elliot Treaty covered Stillaguamish and protected "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory… 12 Stat. 927, Art. V (1855)."). A copy of the Treaty of Point Elliott, 1855 is available on a State of Washington website: http://www.goia.wa.gov/treaties/treaties/pointelliot.htm.

[2] *Washington*, 384 F. Supp. at 378-379; *Northwest Sea Farms,* 931 F. Supp. at 1520.

[3] *Washington*, 384 F. Supp. at 378-379; Northwest Sea Farms, 931 F. Supp. at 1520.

[4] *Washington*, 384 F. Supp. at 378-379; *Northwest Sea Farms,* 931 F. Supp. at 1520.

[5] *Washington*, 384 F. Supp. at 378-379; *Northwest Sea Farms*, 931 F. Supp. at 1520.

[6] *Washington*, 384 F. Supp. at 378-379; *Northwest Sea Farms*, 931 F. Supp. at 1520.

Oneida Indian Nation

[1] The Department concluded the federal jurisdiction existed based on the "IRA vote, the Treaty of Canandaigua, the *Boylan* litigation, and a multitude if federal dealings with the Nation in New York prior to and after 1934." Amendment to the May 20, 2008 Record of Decision dated December 23, 2013 ("Oneida Amended ROD") at 3.

[2] The Federal Government in the 1794 Treaty of Canandaigua guaranteed the Oneidas' possession and occupancy of their state-created reservation. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005); Oneida Amended ROD at 15-26.

[3] *City of Sherrill*, 544 U.S. at 203; Oneida Amended ROD at 15-26.

[4] Oneida Amended ROD at 27.

[5] *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).

[6] *City of Sherrill*, 544 U.S. at 203; Oneida Amended ROD at 3, 15-16, 27.

[7] *City of Sherrill,* 544 U.S. at 203*; Oneida Amended ROD at 3, 15-16, 27.*

[8] *City of Sherrill,* 544 U.S. at 206.

[9] *Id*. at 205-206.

[10] Oneida Amended ROD at 16, 29, 32-33

[11] *City of Sherrill,* 544 U.S. at 210 n. 3; ROD at 3, 17-26.

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