No. 23-1197

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID LITTLEFIELD; MICHELLE LITTLEFIELD; TRACY ACORD; DEBORAH CANARY; FRANCIS CANARY, JR.; VERONICA CASEY; PATRICIA COLBERT; VIVIAN COURCY; WILL COURCY; DONNA DEFARIA; ANTONIO DEFARIA; KIM DORSEY; KELLY DORSEY; FRANCIS LAGACE; JILL LAGACE; DAVID LEWRY; KATHLEEN LEWRY; MICHELE LEWRY; RICHARD LEWRY; ROBERT LINCOLN; CHRISTINA ALMEIDA; CAROL MURPHY; DOROTHY PEIRCE; DAVID PURDY,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; BRYAN NEWLAND, in his official capacity as Assistant Secretary for Indian Affairs; MASHPEE WAMPANOAG INDIAN TRIBE

Defendants-Appellees.

Appeal from the United States District Court for the District of Massachusetts,
No. 1:22-cv-10273 (Hon. Angel Kelley)

RESPONSE BRIEF FOR FEDERAL APPELLEES

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INTRODUCTION

The Mashpee Wampanoag Indian Tribe is a federally recognized Indian tribe that has lived in present-day Massachusetts since time immemorial. Members of the Wampanoag Tribe helped the Pilgrims survive their first winter after landing at Plymouth Rock, and celebrated the first Thanksgiving with them. *See* ADD2-3. Recognizing the Mashpee Tribe's continuous existence as an Indian community from historical times, the federal government formally acknowledged the Tribe in 2007 and established a government-to-government relationship.

In 2021, the Department of the Interior issued a Record of Decision ("2021 ROD") affirming its 2015 decision to take into trust for the Tribe parcels of land in the Town of Mashpee and in the City of Taunton under Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108, to establish a Mashpee reservation. Among other required findings, the 2021 ROD concluded that the Secretary had authority to acquire the land in trust because the Mashpee Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934. *See* 25 U.S.C. § 5129.

Plaintiffs-Appellants are 24 Taunton residents who oppose locating a part of the Mashpee reservation in their community. They sued Interior in the District of Massachusetts, claiming among other things that *Carcieri v. Salazar*, 555 U.S. 379 (2009), bars the trust acquisition as a matter of law and that the administrative record does not support Interior's conclusion that the Mashpee Tribe was under

federal jurisdiction in 1934. The district court rejected those arguments, holding that the 2021 ROD correctly applied the IRA and that Plaintiffs' "alternate interpretations of the record do not suffice to render the Secretary's interpretation arbitrary and capricious." ADD28.

On appeal, Plaintiffs repeat the arguments rejected below. But their threshold arguments are inconsistent with precedent, and even if their view of the administrative record were supportable, that would not suffice to show that Interior's interpretation—grounded in Interior's expert understanding of federal Indian policy and historical context—is arbitrary. The district court's judgment should be affirmed.

ISSUES PRESENTED

Whether Interior permissibly decided that it had authority to take land into trust for the Mashpee Tribe under Section 5 of the IRA, 25 U.S.C. § 5108, because (1) that decision is not barred as a matter of law, and (2) Interior's conclusion—based on the administrative record—that the Tribe was under federal jurisdiction in 1934 is not arbitrary or capricious.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Indian Reorganization Act of 1934

Congress enacted the IRA in 1934 to support "principles of tribal self-determination and self-governance[.]" *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton v. Mancari*, 417 U.S. 535, 542 (1974), including by fostering communal land ownership and reacquisition of tribal homelands.

The IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108 (formerly codified at 25 U.S.C. § 465). The statute defines "Indians" as including (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" ("First Definition"); (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" ("Second Definition"); and (3) "all other persons of one-half or more Indian blood." *Id.* § 5129 (formerly codified at 25 U.S.C. § 479).

2. *Carcieri v. Salazar*

The Supreme Court addressed the IRA's First Definition of Indian in *Carcieri v. Salazar*, in which it examined the meaning of "now" in the phrase "now under Federal jurisdiction" and held that "now" means "as of 1934," when the IRA was enacted. *Carcieri*, 555 U.S. at 395. The majority opinion did not address what it means for a tribe to be "under Federal jurisdiction" nor did it address the immediately preceding phrase "any recognized Indian tribe." *Id.* at 395-96.

In a concurring opinion, Justice Breyer examined the relationship between those two phrases. He explained that a tribe did not have to be "recognized" in 1934 because the word "now" modifies only "under Federal jurisdiction" and not "recognized Indian tribe." *Id.* at 398. Although Justice Breyer similarly did not expound on the meaning of "under Federal jurisdiction," he observed that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time," *id.* at 397, pointing to acknowledged errors Interior made in implementing the IRA just after its passage, *id.* at 397-99.

Consistent with *Carcieri*, when a "recognized Indian tribe" asks the Secretary to take land into trust under the IRA, Interior must determine whether the tribe was "under Federal jurisdiction" in 1934.

3. Interior's Interpretation of the First Definition of "Indian" in the IRA

Because the *Carcieri* decision did not address what it means for a tribe to be "under Federal jurisdiction," it fell to Interior to determine the phrase's meaning in the first instance. In 2014, the Solicitor of the Department of the Interior interpreted that phrase in an "M-Opinion." M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) ("M-Opinion"). JA869-94. M-Opinions set out Interior's formal legal analysis which must be applied in subsequent agency decisions unless withdrawn by the Secretary or the Solicitor. *See Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 208 (D.D.C. 2020). The M-Opinion incorporated much of Interior's reasoning in a 2010 decision to take land into trust for the Cowlitz Tribe, which was upheld by the D.C. Circuit in *Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552, 559-64 (D.C. Cir. 2016). For nearly ten years, Interior has applied the M-Opinion's analytical framework to determine whether a tribe was "under Federal jurisdiction" in 1934.[1] JA53 n.53.

[1] In March 2020, Interior withdrew the M-Opinion. The Solicitor then issued a memorandum outlining a new "Procedure for Determining Eligibility for Land-into-Trust under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act," but did not issue a new M-Opinion. That memorandum was withdrawn, and the M-Opinion reinstated in April 2021. JA54-55.

With respect to the phrase "recognized Indian tribe," the M-Opinion concludes that if a tribe is federally recognized when it files a trust application with Interior, then "by definition [the tribe] satisfies the IRA's term 'recognized Indian tribe.'" M-Op. 26 (JA894). The M-Opinion notes that this interpretation is consistent with Justice Breyer's concurrence in *Carcieri*. *Id*. n.9. This aspect of the M-Opinion has been upheld by two courts of appeals. *Cnty. of Amador v. Dep't of the Interior*, 872 F.3d 1012, 1022-24 (9th Cir. 2017); *Grande Ronde*, 830 F.3d at 559-63.

Regarding the phrase "under Federal jurisdiction," the Solicitor found no clear meaning in the IRA's text, contemporaneous dictionary definitions of "jurisdiction," or legislative history. M-Op. 4-16 (JA872-84). Construing the phrase against the backdrop of evolving federal Indian policy, the remedial purposes of the IRA, and the Indian canons of construction, *id*. at 16-20 (JA884-88), the M-Opinion concludes that a tribe was under federal jurisdiction in 1934 if there is a "sufficient showing in the tribe's history," that the United States had, in or before 1934, "taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government," *id*. at 19 (JA887).

The concept of "under Federal jurisdiction" is thus different from the modern concept of federal recognition or federal acknowledgment, which concerns whether a tribal entity has a government-to-government relationship with the United States. The "under Federal jurisdiction" inquiry by contrast considers federal actions taken toward a tribe, and a tribe may have been under federal jurisdiction in 1934 even if there was no government-to-government relationship at that time. *Id*. at 23-26 (JA891-94).

The M-Opinion states that "[s]ome federal actions may in and of themselves demonstrate that a tribe was ... under federal jurisdiction," but "[i]n other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction." *Id*. at 19 (JA887). The M-Opinion does not attempt to set out an exhaustive list of the kinds of acts that may be evidence of federal jurisdiction, but it provides some examples, including the education of Indian students at federal Indian boarding schools. *Id*.

The M-Opinion sets out a two-part inquiry for determining whether a tribe was under federal jurisdiction in 1934. First, Interior determines whether a tribe came under federal jurisdiction at some point "prior to 1934." *Id*. Second, Interior determines "whether the tribe's jurisdictional status remained intact in 1934." *Id.* Regarding the latter inquiry, the M-Opinion explains that once a tribe comes under federal jurisdiction, that status can usually only be terminated by Congress. *Id*. at

20 (JA888). For that reason, "the absence of any probative evidence that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that such status was retained in 1934." *Id.*

Interior's interpretation of the phrase "under Federal jurisdiction," and the M-Opinion's two-part analytical framework have been upheld by the Ninth and D.C. Circuits. *Cnty. of Amador*, 872 F.3d at 1026-27 ("Interior's reading of the ambiguous phrase 'under Federal jurisdiction' is the best interpretation."); *Grand Ronde*, 830 F.3d at 564-65.

B. Factual Background

1. Federal Acknowledgment of the Mashpee Tribe in 2007

The federal government formally recognized the Mashpee Tribe as an Indian Tribe in 2007. 72 Fed. Reg. 8,007 (Feb. 22, 2007). In recognizing the Mashpee Tribe, Interior applied its regulations at 25 C.F.R. part 83, which have governed federal recognition decisions since 1978. Among the findings required by part 83, Interior had to determine that the Mashpee Tribe "has been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. § 83.7(a) (2007), that "a predominant portion" of the Tribe "comprise[d] a distinct community and has existed as a community from historical times until the present," *id.* § 83.7(b), and that the Tribe "has maintained political influence or

authority over its members as an autonomous entity from historical times until the present," *id*. § 83.7(c).

In its proposed finding on federal acknowledgment, Interior made extensive findings about the Mashpee Tribe's history. JA778-87. Interior found that the Tribe has resided in and around the present-day Town of Mashpee, Massachusetts since before first contact. JA778. In the 1650s, colonists established several "praying towns" on Cape Cod to convert the Wampanoag and other local tribes to Christianity. *Id*. Mashpee became the largest of those praying towns. *Id*.

Within the Town, the Mashpee governed themselves and held shared title to land. In 1746, the colonial legislature limited self-rule by appointing non-Indian guardians. JA779. Following Mashpee complaints about the guardians, the colony made the town a self-governing "Indian district," with five elected overseers, three of whom were Mashpee. *Id*. In 1834, Massachusetts removed the overseers, after which the Tribe completely controlled the social, economic, and political affairs of the district, although without the right to vote in state elections or to send representatives to the legislature. *Id*.

In 1870, despite substantial resistance by the Tribe, Massachusetts dissolved the Indian district and incorporated Mashpee as a town. *Id*. At the same time, the commonwealth granted members of the Tribe full state citizenship. *Id*. Despite those changes, and the loss of much land from Indian ownership, the Town

continued to be overwhelmingly comprised of Mashpee Indians and their spouses, and the Mashpee continued to dominate the Town's government for the next hundred years. *Id*.

In the 1920s, the Tribe reinvigorated its community institutions by rededicating its Old Indian Meeting House, establishing a "traditional" council to handle social, cultural, and ceremonial affairs, and holding annual powwows. JA780. Beginning in the 1960s, an increasing number of non-Indian residents located to the Town. *Id*. In 1974, the Mashpee lost control of the local government but established the Mashpee Wampanoag Tribal Council. *Id*.

Based on this history, Interior recognized the Mashpee Tribe as a sovereign Indian tribe and established a formal government-to-government relationship.

2. The 2015 Record of Decision

Following the acknowledgment decision, the Tribe asked Interior to take into trust a total of about 321 acres of land in Mashpee and Taunton and to proclaim those lands the Tribe's reservation. JA110.

On September 18, 2015, Interior issued a Record of Decision ("2015 ROD") approving the Tribe's request. JA103-243. Interior concluded that the Tribe was eligible for trust acquisitions under the IRA's Second Definition of "Indian." The 2015 ROD did not consider whether the Tribe was "under Federal jurisdiction" in

1934 because Interior did not interpret the Second Definition to require that finding. JA199-201.

The City of Taunton has strongly supported the trust acquisition and the Mashpee Tribe's plans for economic development of that land. *See* Amicus Brief of Taunton, Massachusetts, *Littlefield v. Dep't of the Interior*, No. 16-cv-10184, ECF No. 69 (D. Mass. July 14, 2016). But a group of Taunton residents (Plaintiffs herein and one other individual) challenged the 2015 ROD on several grounds, including Interior's interpretation of the Second Definition. *See Littlefield v. Dep't of the Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016). The district court concluded that the Second Definition unambiguously incorporates the "now under Federal jurisdiction" requirement from the First Definition and vacated the 2015 ROD. *Id*. at 399-400. It clarified, however, that on remand Interior could evaluate whether the Tribe was eligible for a trust acquisition under the IRA's First Definition. JA50. Interior did not appeal, but the Tribe intervened and appealed. This Court affirmed. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 41 (1st Cir. 2020).

3. The 2018 Record of Decision

On remand, the Tribe and Plaintiffs submitted additional evidence and argument on the question whether the Tribe was under federal jurisdiction in 1934. Interior issued a draft remand decision on June 19, 2017, JA935-67, but then

requested supplemental briefing on whether Massachusetts' exercise of authority over the Tribe could be deemed actions taken on behalf of the federal government for purposes of the "under Federal jurisdiction" inquiry, JA977.

Interior issued its Record of Decision in September 2018 ("2018 ROD").[2] JA1061-88. Interior first reaffirmed that the M-Opinion was the proper framework for evaluating whether a tribe was under federal jurisdiction in 1934, JA1073, and concluded that actions taken by Massachusetts toward the Tribe were not on behalf of the federal government, JA1076-80.

Interior then reviewed the evidence submitted by the Mashpee Tribe. JA1080-88. Interior separately considered five categories of evidence and concluded that none of them "in and of themselves" were sufficient evidence that the Tribe was under federal jurisdiction in or before 1934. *E.g.*, JA1082, 1087, 1088. For that reason, Interior determined that the Tribe met neither the First Definition nor the Second Definition as interpreted by the district court. JA1088.

The Tribe challenged the 2018 ROD in the District Court for the District of Columbia ("D.D.C."), arguing that Interior had misapplied the M-Opinion by focusing on whether any individual piece of evidence demonstrated that the Tribe

[2] Plaintiffs incorrectly assert that the 2017 draft Record of Decision was a separate decision that was withdrawn by Interior. Br. 9. That document is marked "Draft" and Interior's request for additional briefing shortly after its release indicates that Interior had not yet reached firm conclusions.

was under federal jurisdiction rather than evaluating the totality of the evidence "in concert," and by failing to credit certain types of evidence similar to evidence Interior relied on when finding that other tribes were under federal jurisdiction. *See Bernhardt*, 466 F. Supp. 3d at 214-17.

The D.D.C. agreed that Interior misapplied the M-Opinion and held that Interior "could find that a tribe was under federal jurisdiction before 1934 after viewing all the probative evidence 'in concert,' without the tribe having any unambiguous evidence." *Id.* at 218. The court also held that Interior's treatment of certain evidence diverged from the M-Opinion or from Interior's treatment of similar evidence in earlier decisions, and that Interior did not offer a reasoned explanation for the departure. *E.g.*, *id*. at 222. Accordingly, the court vacated the 2018 ROD and remanded to Interior "for a thorough reconsideration and re-evaluation of the evidence ... consistent with this Opinion, the 2014 M-Opinion, ... and the Department's prior decisions." *Id.* at 236.

4. The 2021 Record of Decision

On remand, Interior reexamined the historical evidence in accordance with the D.D.C.'s opinion and the M-Opinion. In doing so, Interior analyzed the evidence in four categories: (1) evidence that the federal government had considered removing the Mashpee Tribe to the West in the 1820s but ultimately declined to do so, JA59-62; (2) the attendance of Mashpee children at the federally

operated Carlisle Indian School, JA63-66; (3) federal reports and surveys that addressed the condition of the Mashpee Tribe, JA67-70; and (4) the classification of the Mashpee on federal censuses, JA70-72. Interior concluded, consistent with the M-Opinion, that each line of evidence tended to support a finding of jurisdiction and that, when viewed in concert, the evidence was sufficient to show that the Mashpee Tribe was under federal jurisdiction prior to 1934. JA72.

Interior then moved to the second step of the M-Opinion analysis—whether the Tribe remained under federal jurisdiction in 1934 and reviewed the available evidence, including correspondence in the 1930s by Commissioner of Indian Affairs John Collier and other federal officials, in which they disclaimed federal responsibility for the Mashpee Tribe. JA74-75. Interior concluded that the evidence did not suffice to show that federal jurisdiction had been terminated and that therefore the Tribe remained under federal jurisdiction in 1934. JA76. Accordingly, Interior determined that it has authority under the IRA to take land into trust for the Mashpee Tribe. JA78.

In the final sections of the 2021 ROD, which are not challenged in this appeal, Interior concluded that the Tribe could engage in gaming activities on the land taken into trust because it qualifies as the Tribe's "initial reservation" under

IGRA, an exception to IGRA's prohibition against gaming on lands acquired after 1988, 25 U.S.C. § 2719.[3] JA78-102.

C. Procedural History

Plaintiffs' Complaint challenged the 2021 ROD on three grounds. In Count I, Plaintiffs claimed that Interior lacks authority to take land into trust for the Mashpee Tribe because it was not a "tribe" in 1934 and was not "under Federal jurisdiction" in 1934. JA38-40. In Counts II and III, Plaintiffs claimed that the Taunton parcel is not eligible for gaming under IGRA. JA40-43.

The district court granted summary judgment in favor of Interior and the Tribe. First, the court addressed four preclusion arguments advanced by the Tribe and rejected three of them. ADD13, 15. The court agreed, however, that Plaintiffs were barred from arguing that the *Carcieri* decision required Interior to conclude that the Tribe was not under federal jurisdiction in 1934 because that issue was actually litigated in the D.D.C. proceeding. ADD14-15. But the court also ruled on the merits that the D.D.C.'s analysis was correct. ADD15 n.6.

The court then addressed and rejected Plaintiffs' arguments that the M-Opinion incorrectly interprets the phrase "under Federal jurisdiction." Relying

[3] Interior concluded that the Tribe had significant historical connections, as well as modern connections, to both the Mashpee and Taunton areas. JA86-100. Plaintiffs' bald assertion that the "Tribe had next to no historical ties" to Taunton, Br. 8 n.2., is insufficient to challenge the "initial reservation" conclusion.

on the D.C. Circuit's opinion in *Grand Ronde*, the court held that the term "jurisdiction" is broad and that the "conjunctive, holistic, and tribe-specific inquiry" prescribed by the M-Opinion is consistent with the *Carcieri* holding and is a reasonable approach for determining whether a tribe was under federal jurisdiction. ADD17-18.

The court next reviewed the substance of Interior's decision under the APA's arbitrary and capricious standard and held that the 2021 ROD was supported by the administrative record. First, the court examined the evidence regarding the attendance of Mashpee children at the Carlisle Indian School and concluded that it constitutes "overwhelming evidence in support of the Secretary's conclusion that the federal government subjected the Mashpee to its jurisdiction prior to 1934." ADD23. The district court then reviewed the reports, surveys, and census materials relied on by Interior and held that they all supported Interior's finding that the Mashpee Tribe was under federal jurisdiction in 1934. ADD29. Finally, the district court concluded that Interior's decision to proclaim an "initial reservation" consisting of the Mashpee and Taunton parcels within the Mashpee's traditional territory complied with Interior's regulations. ADD30.

Plaintiffs then brought this appeal. In their Opening Brief, Plaintiffs challenge only Interior's determination that the Mashpee Tribe is a "recognized

Indian tribe" that was "under Federal jurisdiction" in 1934. Plaintiffs have thus abandoned their other challenges to the 2021 ROD.

SUMMARY OF ARGUMENT

Interior reasonably determined that the Mashpee Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934, and none of Plaintiffs' arguments show that the conclusion was arbitrary, capricious, or contrary to law.

(I) Plaintiffs' threshold legal arguments lack merit. (A) The only generally applicable holding in *Carcieri* is that the word "now" in the phrase "now under Federal jurisdiction" means "as of 1934." Because Interior had understood "now" to mean the time of the trust application, it had not developed a record on whether the Narragansett Tribe was under federal jurisdiction in 1934. *Carcieri* does not bar Interior from deciding whether *any other tribe* was under federal jurisdiction in 1934 based on an administrative record specifically addressing that tribe's history.

(B) Massachusetts' exercise of jurisdiction over the Mashpee Tribe does not, as a matter of law, preclude a finding that the Mashpee Tribe was also under federal jurisdiction in 1934. Plaintiffs' arguments at best establish that Massachusetts and the federal government exercised concurrent jurisdiction and do not undermine Interior's record-based conclusion that the Tribe was under federal jurisdiction.

(C) Plaintiffs' argument that Mashpee Indians ceased to exist as a tribe by 1869 is without foundation. Interior's 2007 acknowledgment decision established that the Tribe has existed continuously since historical times. A 1978 jury verdict finding that the Mashpee did not constitute a tribe on certain dates rested on a 1901 common-law definition of "tribe" that differs materially from Interior's criteria for federal acknowledgment and does not preclude Interior's under-federal-jurisdiction determination in the 2021 ROD.

(II) Interior's determination that the Mashpee Tribe was under federal jurisdiction in 1934 is based on a well-reasoned analysis of the administrative record and should be upheld.

(A) Interior examined four lines of evidence in the historical context of federal policy toward Indians. Interior reasonably determined that those lines of evidence, viewed in concert, demonstrate that the Mashpee Tribe came under federal jurisdiction prior to 1934. This Court should reject Plaintiffs' invitation to reweigh the evidence and construct an alternate narrative.

(B) Interior's conclusion that the Mashpee Tribe remained under federal jurisdiction in 1934 was also reasonable and consistent with the M-Opinion. Interior scrutinized statements by Interior officials made in the 1930s suggesting that the Mashpee Tribe was not under federal jurisdiction and reasonably

concluded that those statements were likely in error and did not suffice to show that federal jurisdiction had been terminated.

(C) Interior adequately explained why its conclusion in the 2021 ROD that the Mashpee Tribe was under federal jurisdiction differed from its conclusion in the 2018 ROD. The D.D.C.'s remand order required Interior to reassess multiple pieces of evidence, and to examine the totality of the evidence "in concert." When Interior did so in light of historical federal Indian policy, it reasonably concluded the Mashpee Tribe was under federal jurisdiction.

(D) Interior properly evaluated the categories of evidence that were found probative in determining whether other tribes were under federal jurisdiction. The under-federal-jurisdiction determination requires a tribe-specific evaluation, not a tally of the number of federal actions directed toward each tribe.

STANDARD OF REVIEW

This Court reviews a district court's entry of summary judgment de novo, applying the APA's deferential standard to review the challenged decision. *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 601 (1st Cir. 2016). Under the APA, courts set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under that "'highly deferential' standard of review, courts should uphold an agency

determination if it is 'supported by any rational view of the record.'" *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 172 (1st Cir. 2021) (quoting *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015)).

ARGUMENT

I. Plaintiffs' Arguments that an Under-Federal-Jurisdiction Conclusion Is Barred as a Matter of Law Lack Merit

A. The Supreme Court Did Not Hold in *Carcieri* that the Mashpee Tribe Was Not Under Federal Jurisdiction in 1934

Plaintiffs argue that the Supreme Court's 2009 *Carcieri* decision precludes Interior from finding that the Mashpee Tribe (and other unspecified eastern tribes) was under federal jurisdiction in 1934 because the Narragansett and Mashpee Tribes are "identically situated." *E.g.*, Br. 17. But the Supreme Court's opinion never mentions any tribe other than the Narragansett, and nothing in its opinion suggests that—without the benefit of a factual record or briefing—it was deciding the status of other tribes not before it.

Interior did not develop an administrative record on the question whether the Narragansett Tribe was under federal jurisdiction in 1934 because Interior had understood "now" to mean the time of the trust application, and therefore Interior did not think it needed to find that the Narragansett Tribe was under federal jurisdiction in 1934. JA871 n.15. Instead, the facts recounted in *Carcieri* were

drawn from the Federal Register summary of Interior's 1983 decision acknowledging the Narragansett Tribe, *Carcieri*, 555 U.S. at 395, and Interior's Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment, *id*. at 400 (Breyer, J., concurring). That record was developed for a different purpose that did not require a comprehensive account of the federal government's actions toward the Tribe. Given the lack of a fully developed evidentiary record, *Carcieri* is better read as resting primarily on Interior's failure to contest the question rather than a definitive factual conclusion. *Id.* at 396 (noting that Interior "declined to contest" the petitioner's assertion that the Tribe was not under federal jurisdiction in 1934). That is how both the district court and the D.D.C. read the case, and both courts rejected the argument that *Carcieri* decided whether any other tribe was under federal jurisdiction.[4] ADD15 n.6; *Bernhardt*, 466 F. Supp. 3d at 215 n.9.

Even if *Carcieri* were grounded in the evidence, its conclusions about the Narragansett would not control this case. Whether a tribe was under federal jurisdiction in 1934 is a fact-specific inquiry that must examine each tribe's unique history. M-Op. 19 (JA887). While there are similarities in the histories of the Narragansett and Mashpee Tribes, Plaintiffs' eight bullets, Br. 19-20—none of

[4] The Court need not decide whether the D.D.C's rejection of Plaintiffs' *Carcieri* argument precludes them from raising it in this litigation because the D.D.C.'s analysis was correct in any event.

which are supported by record citations and some of which are legal conclusions rather than facts—hardly demonstrate that their histories are indistinguishable in all relevant respects.[5] Notably, Plaintiffs' bullets do not address the Mashpee Tribe's interactions with the federal government in the 19th and early 20th centuries—the federal actions Interior relied on in determining that the Mashpee Tribe was under federal jurisdiction in 1934. JA59-72.

Finally, as a matter of due process and fundamental fairness, *see Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996), the holding in *Carcieri* cannot bind the Mashpee Tribe or bar Interior from gathering and evaluating evidence relevant to the Tribe's request. The Mashpee Tribe was not a party to the *Carcieri* litigation and had no opportunity to present evidence about its own history. Similarly, Interior had no reason to develop a record for the Mashpee Tribe as part of its decision to take land into trust for the Narragansett. The *Carcieri* judgment

[5] Plaintiffs improperly seek to incorporate factual and legal arguments from their February 13, 2017, Remand Submission to Interior. Br. 18. This Court only considers arguments fairly presented in the Opening Brief itself. An argument is "waived for lack of development" when it is presented only by reference to prior filings. *United States v. Stepanets*, 989 F.3d 88, 112 n.7 (1st Cir. 2021). "[A]ttorneys cannot circumvent the page limit ... by incorporating by reference a brief filed in another forum." *Exec. Leasing Corp. v. Banco Popular de Puerto Rico*, 48 F.3d 66, 67 (1st Cir. 1995). Plaintiffs may not avoid this obligation by presenting these arguments in their Reply Brief.

therefore does not preclude Interior from determining on the record compiled that the Mashpee Tribe was under federal jurisdiction in 1934.[6]

B. Massachusetts' Exercise of Authority Over the Mashpee Tribe Did Not Preclude the Concurrent Exercise of Federal Jurisdiction

Plaintiffs incorrectly argue that the Mashpee Tribe cannot have been under federal jurisdiction in 1934 because Massachusetts exercised authority over the Tribe in various ways since before the founding. Br. 17-18, 24-25. No one disputes the long history of dealings between the Tribe and Massachusetts, but as Interior explained, the exercise of authority by a state cannot oust federal jurisdiction over Indian affairs. JA76-77. Thus, any such exercise by Massachusetts was concurrent with federal authority and does not undercut Interior's conclusion that the Tribe was also under federal jurisdiction.

Federal power over Indian affairs is "plenary and exclusive," and "supersede[s] both tribal and state authority." *Haaland v. Brackeen*, 143 S. Ct.

[6] Plaintiffs' argument, Br. 23-24, that post-*Carcieri* federal legislative proposals to amend the IRA, the 2015 ROD's reliance on the Second Definition of Indian, and the Tribe's June 2017 restricted fee proposal (JA971) show that Interior and the Tribe knew that the Tribe was not "under Federal jurisdiction" within the meaning of the First Definition is misguided. Interior's action must be judged based on the reasoning in the 2021 ROD, not on speculation about the subjective views of Interior officials or the Tribe. *See Makieh v. Holder*, 572 F.3d 37, 41 (1st Cir. 2009); *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1280 (D.C. Cir. 1998) ("[T]he actual subjective motivation of agency decisionmakers is immaterial as a matter of law.").

1609, 1627 (2023). There is no exception for states that had established relationships with tribes before ratification of the Constitution. *See Oneida Indian Nation of N.Y. v. Oneida Cnty.*, 414 U.S. 661, 669-70 (1974) (holding that tribes are "entitled to the protection of federal law," including in the original 13 states). Accordingly, federal authority over Indian affairs cannot be constrained or supplanted by state actions. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 378 (1st Cir. 1975) ("Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed. Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection."). Nor can federal authority over Indians be surrendered through acquiescence to a state's exercise of jurisdiction. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2471-74 (2020) (holding that federal acquiescence to Oklahoma's exercise of criminal jurisdiction over Indians did not render that exercise legitimate); *United States v. John*, 437 U.S. 634, 652-53 (1978) (holding that the federal government retained authority over the Mississippi Choctaw even though "federal supervision over them has not been continuous"). Thus, the federal government's authority over Indian affairs has extended since the founding to the Mashpee Tribe, despite Massachusetts' concurrent exercise of jurisdiction.

Plaintiffs nonetheless insist that Massachusetts' exercise of authority necessarily means the Mashpee Tribe was not under federal jurisdiction. Plaintiffs

misplace reliance on *Cohen's Handbook of Federal Indian Law* § 3.02[9] (2015), Br. 17-18, which addresses federal recognition, not the IRA's distinct concept of "Federal jurisdiction," and considers neither the situation of tribes like the Mashpee that have been the subject of both state and federal authority nor the specific evidence Interior relied on in this case. *Id*. Plaintiffs also misplace reliance on *Carcieri*, Br. 18, which only decided the meaning of "now" in the IRA and never suggested that an exercise of jurisdiction by a state could displace federal authority over Indian affairs.

Plaintiffs are similarly incorrect in arguing, Br. 24-25, that the Mashpee Tribe was never under federal jurisdiction because the New England states were "carved out" from the Indian Department established under the Articles of Confederation by an ordinance adopted on August 7, 1786 ("Ordinance"), Statutory Addendum 25. The Ordinance administratively organized the confederal Indian Department into a Northern District and a Southern District, neither of which included the New England states, *id*. at 24, but it did not otherwise exclude the New England tribes from the central government's authority. Moreover, an ordinance enacted before the Constitution's ratification cannot demonstrate the absence of federal authority over the ensuing 150 years, particularly given that the Constitution shifted the balance of authority over Indian affairs to the federal government and away from the states. *See Oneida Cnty. v. Oneida Nation of N.Y.*

State, 470 U.S. 226, 234 & n.4 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). Specifically, the Ordinance cannot negate the evidence of specific federal actions toward the Mashpee Tribe that underlies the 2021 ROD's conclusion that the Tribe was under federal jurisdiction before 1934.

Plaintiffs quote a law review article arguing that the Ordinance excluded the New England states from federal authority over Indian affairs. Br. 25. But that article was written by attorneys representing the State of Maine in litigation brought by the Passamaquoddy and Penobscot Nations, and it acknowledges that the analysis is advocacy, not scholarship. Paterson & Roseman, *A Reexamination of* Passamaquoddy v. Morton, 31 Me. L. Rev. 115, 118 n.14 (1979) ("[T]he substance of this article is a synopsis of legal analysis contained in briefs filed by the state in Mohegan Tribe v. Connecticut."). Moreover, the Second Circuit later rejected many of the article's arguments. *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 615-18 (2d Cir. 1980).

Massachusetts' historical exercise of jurisdiction over the Mashpee Tribe is not disputed. Indeed, it provides important context for understanding why federal interactions with the Mashpee Tribe were more limited than they were with some other tribes. But, as a matter of law, state actions cannot displace federal authority

over Indian affairs, and Massachusetts' actions do not answer the question whether the Mashpee Tribe was under federal jurisdiction in 1934. *See* JA76-77.

C. A 1978 Jury Verdict Does Not Preclude the Conclusion that the Mashpee Tribe Is a "Tribe" Under the IRA

Under the IRA's First Definition of "Indian," Interior may take land into trust for any "recognized Indian tribe" that was under federal jurisdiction in 1934. 25 U.S.C. § 5129. The M-Opinion interprets the quoted text to require formal federal acknowledgment at the time of the land-into-trust decision, not as of 1934. M-Op. 23-25 (JA891-93). Plaintiffs do not dispute that Interior acknowledged the Mashpee Tribe in 2007. That satisfies the "recognized Indian tribe" requirement, and Plaintiffs' argument that the Mashpee Tribe nonetheless ceased to be a "tribe" in 1869 for all purposes, Br. 27-30, is incorrect.

At the outset, Plaintiffs do not challenge the M-Opinion's conclusion, based on the text and legislative history of the First Definition of "Indian," that "recognized Indian tribe" and "under Federal jurisdiction" are separate statutory inquiries. M-Op. 23-25 (JA891-93). They do not contend that Justice Breyer was wrong in *Carcieri* to read "now" to modify only "under Federal jurisdiction," "impos[ing] no time limit upon recognition." *Carcieri*, 555 U.S. at 398. Nor do Plaintiffs explain how Interior's interpretation of the IRA's legislative history is incorrect. Their bare references to a discussion of legislative history in their 2017

remand submission, Br. 18, 34 n.11, do not adequately present that argument in this appeal. *See* p. 22 n.5, above.

In any event, even if the First Definition required a finding of tribal status in 1934, Interior's 2007 acknowledgment decision supplies it. Interior's 2007 decision applied the regulatory criteria for federal acknowledgment, 25 C.F.R. § 83.7 (2007), to an extensive historical record. As explained above (pp. 8-10), Interior found that the Mashpee Tribe "has existed as a community from historical times to present" and has "maintained political influence or authority over its members as an autonomous entity from historical times to present." A challenge to those findings is now barred by the statute of limitations. 28 U.S.C. § 2401(a).

Plaintiffs primarily rely, Br. 28-30, on a January 1978 jury verdict in the Mashpee Tribe's suit against the Town of Mashpee and others to recover lands allegedly alienated in violation of the Nonintercourse Act, 25 U.S.C. § 177 (providing that conveyance of land from a "tribe of Indians" is invalid without federal authorization). *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) ("Nonintercourse Litigation"). The jury answered special interrogatories asking whether "the proprietors of Mashpee ... constitute[d] an Indian tribe" on a series of dates. *Id*. at 943. In defining "tribe," the jury instructions relied on the common-law definition of tribe articulated in *Montoya v.*

United States, 180 U.S. 261, 266 (1901). *See New Seabury Corp*., 592 F.2d at 582. The jury answered "yes" for 1834 and 1842 but "no" for 1790, 1869, 1870, and 1976 (when suit was filed). *Id*. at 579-80. The district court acknowledged the lack of evidence "concerning life in Mashpee between 1870 and 1920," *Town of Mashpee*, 447 F. Supp. at 946, and the jury's inconsistent responses, *id*. at 948, but nonetheless dismissed the suit based on the jury's answer that the plaintiff was not a tribe in 1976. The district court emphasized the "extraordinary remedy" plaintiff sought and stated: "Nothing herein, or in the answers of the jury, should be taken as holding or implying that the Mashpee Indians are not a tribe for other purposes, including participation in other federal or state programs, concerning which I express no opinion." *Id*. at 950 n.7.

This Court affirmed, similarly noting that the "resolution" of the Nonintercourse Litigation "will not affect rights of others than the parties," and stating that "we might arrive at a different answer" "once [Interior] has finally approved its [federal acknowledgement] regulations and developed special expertise through applying them." *New Seabury Corp*., 592 F.2d at 581. The D.C. Circuit noted this latter statement in *James v. Department of Health and Human Services*, 824 F.2d 1132, 1138 (D.C. Cir. 1987), and expressed its belief that "the

time for a different conclusion ha[d] come" as of 1987.[7] Contrary to Plaintiffs' assertion, Br. 29, the Nonintercourse Litigation hardly constitutes "historical fact and binding legal precedent" on the question whether Interior is authorized to take land into trust for the Mashpee Tribe under the IRA. And in any event, Interior was not bound by a verdict in litigation to which it was not a party.

Interior nonetheless explained in its 2007 acknowledgment decision why the Nonintercourse Litigation verdict did not undercut its determination that the Tribe has existed continuously as a tribe from historical times. JA798-800. First, the jury was presented much less evidence than was contained in the administrative record on acknowledgment. JA798. Second, defendants' experts used definitions of "tribe" that were different in material respects from the criteria in the acknowledgment regulations. JA798-99. Accordingly, Interior determined that the jury verdict posed no obstacle to Interior's record-based decision to acknowledge the Tribe. JA800-01.

[7] Interior's regulations were originally promulgated in 1978 pursuant to its broad authority over Indian affairs under 25 U.S.C. §§ 2, 9. *James*, 824 F.2d at 1136-37. Previously, courts had been called upon to determine in the first instance whether groups of Indians constituted a "tribe" in various contexts, but after promulgation of Interior's regulations courts have generally required parties to exhaust administrative remedies to allow Interior "to apply its developed expertise in the area of tribal recognition." *Id*. at 1138.

Plaintiffs also misplace reliance on dicta in *Elk v. Wilkins*, 112 U.S. 94 (1884). Br. 26-27. *Elk* addressed the status of an Indian in Nebraska who had severed connections with his tribe and sought to register to vote as a United States citizen. *Id*. at 95. In its lengthy survey of Indian-related laws, the Court briefly noted that tribes in Massachusetts were "never recognized by the treaties or legislative or executive acts of the United States as distinct political communities," citing only state court opinions and statutes. *Id*. at 108. As explained, an Indian community may constitute a "tribe" under federal law—and be "under Federal jurisdiction"—without a treaty or federal statute specifically recognizing it as such, and there is no reason to believe the Court had any record before it of the executive branch's actions toward the Massachusetts tribes. Moreover, the cited state decisions referred to the Mashpee as "wards of the Commonwealth," but did not state that the Mashpee were "not [wards] of the federal government," contrary to Plaintiffs' characterization. Br. 26 n.9.

Lastly, Plaintiffs' reliance on this Court's citation to *Elk* in *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 484 (1st Cir. 1987), is similarly unavailing. Br. 26-27, 31. Following the Nonintercourse Litigation, the Mashpee Tribe and other southeastern Massachusetts Indian groups sought a judicial declaration of their tribal status and aboriginal title to certain lands. In rejecting their claims, this Court cited *Elk* for the proposition that the Tribe was not formally recognized by

the federal government in 1884—a proposition that is undisputed but irrelevant to the question before the Court. Subsequently, the Mashpee Tribe achieved federal recognition through Interior's administrative process. And this Court's 1987 conclusion that the evidence before it was insufficient for a judicial declaration of recognition does not mean that the same evidence, along with other evidence in the administrative record, cannot support Interior's finding in the 2021 ROD that the Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934.

II. Interior's Finding that the Mashpee Tribe Was Under Federal Jurisdiction in 1934 Is Reasonable and Should Be Upheld

A. Interior's Conclusion that the Mashpee Tribe Was Under Federal Jurisdiction Before 1934 Is Supported by the Record

Under the M-Opinion's analytical framework, the first step in determining whether a tribe was under federal jurisdiction in 1934 is to ascertain whether "there is a sufficient showing in the tribe's history, at or before 1934, that ... the United States [took] an action or series of actions ... that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe." M-Op. 19 (JA887). Plaintiffs do not challenge the M-Opinion on this point. *See* Br. 35-36. Thus, the only question presented is whether Interior's conclusion that the record evidence meets the M-Opinion's standard is arbitrary.

To determine whether the Mashpee Tribe was under federal jurisdiction in 1934, Interior compiled a voluminous record that included documentation of

multiple federal interactions with the Tribe over the course of the 19th and early 20th centuries. That review found no single action of the federal government toward the Mashpee Tribe that unambiguously demonstrated the exercise of federal jurisdiction. *See* JA72. Interior determined, however, that four separate lines of evidence, when viewed in concert, were sufficient to establish the exercise of federal jurisdiction. *Id*. That conclusion is supported by the administrative record and should be upheld by this Court. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir. 2007) (explaining that an agency's action is not arbitrary or capricious "as long as it correctly explicates the governing law and turns on a plausible rendition of the facts in the record.").

1. The Federal Government's Consideration of Whether to Remove the Mashpee Tribe Supports a Finding of Federal Jurisdiction over the Tribe

Interior began its evaluation by considering the stance of the federal government toward the Mashpee Tribe during the so-called "removal" phase of federal Indian policy from 1815 to 1845. During that period, the government focused on relocating native tribes from eastern states to the less-populated western territories to alleviate conflicts between tribes and states and to make the tribes' land available for non-Indian settlement. JA59. Multiple documents from that era show that the government understood the Mashpee Tribe to be subject to federal

authority and that the government considered removing the Tribe, although it ultimately declined to do so.

Plaintiffs incorrectly argue that the government's decision to allow the Mashpee to stay in Massachusetts was not an exercise of federal authority but was mere "*in*-action.". Br. 40. To the contrary, one of the federal government's first initiatives under the Civilization Fund Act of 1819, Pub. L. No. 15-85, 3 Stat. 516 (Mar. 3, 1819), was to commission a report on the status of the Indian tribes "within the jurisdiction of the United States" so that the government could acquire "a more accurate knowledge of their actual condition [and] devise the most suitable plan to advance their civilization and happiness." JA60; JA246.

The report, known as the Morse Report, included a statistical table providing the name and population of every tribe subject to federal authority, including the Mashpee. JA277. An appendix to the report also included extensive remarks on the circumstances of the Mashpee. JA265-67. On the question of removal, the Morse Report recommended against resettling the Tribe, even "were they in favor of the measure," because of their "public utility" as "expert whalemen and manufacturers of various light articles." JA266. The Morse Report was printed, circulated within Congress and the Executive Branch, and relied on in congressional debates on

legislation to regulate trade with the Indian tribes. JA61; JA278-87.[8] In so doing, the government considered the specific circumstances of the Mashpee Tribe in determining how to apply the removal policy to the Tribe, which is itself evidence that the Tribe was under federal jurisdiction.

Five years later, President Monroe transmitted to Congress his proposal to remove the Indians remaining in the East. JA62; JA288-89. Accompanying that letter was a report from Secretary of War John C. Calhoun estimating the number of Indians potentially subject to removal, the extent of the lands they occupied, and the cost of removing them. JA61; JA289-291. That report referenced Indians living in Massachusetts, including the Mashpee, and appended a statistical table that appears to have come from the Morse Report. JA62. Although included in President Monroe's proposal, the Mashpee Tribe was ultimately spared removal.[9]

[8] The situation of the Mashpee Tribe is specifically mentioned in the Congressional Record, JA283, apparently to illustrate the futility of efforts to improve the situation of Indians living in the original states, JA286-87.

[9] The 2018 ROD suggested that the Massachusetts tribes were excluded from the removal proposal, JA1082, but the passage relied on is taken out of context. The full statement reads: "The arrangement for the removal, it is presumed, is not intended to comprehend the small remnants of tribes in Maine, Massachusetts, Connecticut ... as they are each of them so few in number that it is believed very little expense or difficulty will be found in their removal." JA289. "[A]rrangement for the removal" appears to refer to the federal appropriations necessary to carry out the removal policy, not the policy itself.

Plaintiffs acknowledge that the 2021 ROD, unlike the 2018 ROD, evaluates those facts about Congress's specific consideration of the Mashpee Tribe's situation, but they still take the unduly narrow view that only a decision to remove a tribe counts as "affirmative federal action." Br. 40 n.13. The 2018 ROD had downplayed the value of the Morse report as merely demonstrating a passive awareness of federal authority,[10] JA1081-82, but the D.D.C. found that view to be arbitrary because "[t]he making of a recommendation is, in and of itself, an action." 466 F. Supp. 3d at 229. The D.D.C. also held that Interior's treatment of the Morse Report conflicted with its treatment of similar surveys of Indian groups by federal officials in other jurisdictional determinations. *Id*. at 229-30. On remand, Interior reconsidered the Morse Report and concluded that it suggested the Mashpee Tribe was under federal jurisdiction because it reflected the extension of federal removal policy to the Tribe (including making recommendations about the Tribe's removal) and because the President and Congress appear to have relied on the Report in applying the removal policy. JA62.

As to the removal policy itself, the inclusion of the Mashpee Tribe in President Monroe's proposal shows that the Executive Branch understood the

[10] Plaintiffs assert that the 2021 ROD "also conflicts with the 2015 ROD's treatment of the Morse Report," Br. 39 n.12, without explaining the asserted conflict. The 2015 ROD addressed the IRA's Second Definition of "Indian," not the First Definition, but there is no material difference in its discussion of the Report. *See* JA210-11.

Tribe to be subject to federal jurisdiction in 1825. Although the Tribe was not removed, Interior found that the evidence indicates that they were treated as under federal jurisdiction and that the government considered their removal, pursuant to contemporaneous federal Indian policy, over a period of years. *See* JA62. Such consideration "generally reflect[s] ... authority over the tribe by the Federal government." M-Opinion at 19 (JA887). And Interior reasonably concluded that the decision to allow the Tribe to remain in Massachusetts—after their removal was proposed—was itself an affirmative exercise of authority over the Tribe. JA62-63.

To be clear, Interior did not conclude that this evidence, standing alone, sufficed to show that the Tribe was under federal jurisdiction. It considered these events as the first part of a series of federal actions that collectively demonstrate the Tribe was under federal jurisdiction in 1934. Taken for that purpose, Interior's conclusions about the implications of the Morse Report and their significance for the exercise of federal authority over the Tribe are amply supported by the record.

2. Mashpee Attendance at Carlisle Indian School Demonstrates Federal Jurisdiction Over the Tribe

The second line of evidence considered by Interior concerns the attendance of Mashpee children at the Carlisle Indian School in Pennsylvania. The D.D.C. held that the Mashpee children's attendance at Carlisle "is strong probative evidence that the Mashpee Tribe was under federal jurisdiction." 466 F. Supp. 3d

at 220. The court also directed Interior to consider whether the "management of student funds, vocational training, and the health-care services provided to the Mashpee students at the Carlisle School" supported a finding of federal jurisdiction. *Id*. at 223-24. Interior complied with those instructions and persuasively explained in the 2021 ROD why the education of and control over Mashpee students at Carlisle Indian School, in the context of the federal boarding school policy, constituted "a clear assertion of federal authority over the Tribe and its members." JA66.

Plaintiffs want to divorce the Mashpee children's attendance at Carlisle from its context, but Interior properly considered this evidence in light of the broader assimilationist federal Indian policy goals in place at the time. Beginning in 1871, the federal government pursued a policy of forced assimilation of Indian tribes. JA63. As Justice Gorsuch recently explained, Indian boarding schools, including Carlisle, were an integral part of the government's program to "destroy[] tribal identity and assimilate[] Indians into broader society." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1642 (2023) (Gorsuch, J., concurring). Indian boarding schools furthered that purpose by separating Indian children from their families and cultures so that they would adopt the cultural norms of "white" society. *Id*. at 1642-43. Children at Indian schools were given Christian names, prohibited from speaking their native languages or engaging in traditional cultural practices, and

made to dress in Western clothing. *Id*. at 1643. Although attendance at Indian schools was nominally voluntary, Congress authorized federal officers to use coercive means to secure parents' assent, and attendance was often compelled as a matter of fact. *Id.* at 1642-43; *see also* JA63-64. By applying this policy to members of the Mashpee Tribe, the federal government treated the Tribe as under federal jurisdiction.

Mashpee children attended Carlisle every year between 1905 and 1918, the year the school closed. JA65; JA582-91. The Mashpee children's identity as Indians was essential to their admission, and records show that the school examined each Mashpee student's tribe and "blood quantum" prior to admission and verified that the student lived in "Indian fashion." JA65.[11] Once enrolled, the Mashpee students were subjected to the same federal assimilation policies as all other students. JA63.

While at Carlisle, federal officials exercised significant control over the Mashpee students' lives. JA65. For example, school officials held funds earned by the students during work placements and controlled the use of those funds. *Id*.; JA375-78; JA389-92; JA497. The school supervised medical care for students, effectively displacing parental authority. *Id*. The government also constrained

[11] The available applications are at JA385-88; JA403-06; JA443-46; JA463-66; JA483-87; JA510-12; JA526-29, and JA552-55.

students' freedom to leave. In one case, a Mashpee student had to seek permission from the Commissioner of Indian Affairs to leave the school to care for his aging parents, even though he was twenty-one years old. JA65-66.

Interior concluded that the attendance of Mashpee children at Carlisle, in the context of federal assimilation policies, constituted clear evidence that the government considered the Mashpee to be under federal jurisdiction, JA66, and the district court agreed with that assessment. ADD23 (finding the facts surrounding the attendance of Mashpee children at Carlisle to be "overwhelming evidence in support of the Secretary's conclusion").

Plaintiffs' arguments that the Mashpee children's attendance at Carlisle should be discounted are unconvincing. Br. 54-60. Plaintiffs acknowledge that "forced assimilation was in fact a national policy," but they deny that it played any role in the case of the Mashpee Tribe. Br. 59. They paint a benign picture of the Mashpee children's attendance at Carlisle, Br. 60, but the record is not as clear as Plaintiffs suggest. Although there are some documents in which the Mashpee students express positive views about their experience at Carlisle, *e.g.*, JA412, JA453, the record is fragmentary, and the evidence needs to be viewed in the larger context of the coercive practices used to further assimilationist policies.

And even if the Mashpee children did attend Carlisle voluntarily, their enrollment would still support a finding that the Tribe was under federal

jurisdiction. Indian boarding schools were funded by the federal government to further its assimilationist policies, JA64, and the Mashpee children's applications show that they were admitted because they were viewed as Indians subject to federal policy, *e.g.*, JA387. Moreover, documentary evidence shows that federal officials exercised a significant degree of control over the students' lives, well beyond a typical boarding school. *Contra* Br. 55. Plaintiffs say that treating the supervision of students as evidence of federal jurisdiction is double counting, Br. 54-55, but Interior did not address this evidence separately. Instead, the 2021 ROD evaluates the totality of the Carlisle evidence, including the student's experience at the school, and concludes that the evidence as a whole supports finding that the Tribe was under federal jurisdiction. JA66.

Plaintiffs' other attempts to relitigate Interior's evaluation of the Carlisle evidence do not show that Interior's findings were arbitrary. Plaintiffs point to three letters in the administrative record suggesting that the Indian Department was discouraging Indian children with access to public schools from enrolling at Carlisle. Br. 57-58 & n.23. All three were written in 1915, just three years before Congress closed the Indian boarding schools entirely. JA432. And the federal

government was discouraging enrollment of all Indian children with access to public schools "even on Indian reservations in the West."[12] *Id*.

Nor do Plaintiffs show that the Mashpee children's attendance was funded by Massachusetts and not the federal government. Br. 57. The state statutes they cite do not appear to have appropriated funds for attendance at out-of-state schools, and even if funds were available, Plaintiffs offer no evidence that Massachusetts in fact paid for the Mashpee student's attendance.[13]

Plaintiffs next argue that attendance of individual students at Carlisle is indicative only of federal jurisdiction over those students, and not over the Tribe. Br. 60. But a similar argument in the 2018 ROD was rejected by the D.D.C., 466 F. Supp. 3d at 223-24. It is also inconsistent with the M-Opinion, M-Op. 19 (JA887), and Interior's approach in other cases, *see* JA852-53 (finding that the provision of

[12] Plaintiffs attempt to buttress this argument with additional evidence outside the record regarding the discharge of "assimilated" students from Carlisle. Br. 58 n.23. Plaintiffs did not put that evidence before Interior, however, and they may not rely on it now. *City of Taunton v. EPA*¸895 F.3d 120, 128 n.7 (1st Cir. 2018).

[13] The 1870 statute merely provided for the distribution of *federal* funds for the support of schools in Indian areas. Statutory Addendum 14. The 1905 statute appropriated funds to allow children who resided in small communities without a high school to attend high school in another town in Massachusetts. *Id*. 14 (incorporating Massachusetts Revised Laws, ch. 42, § 3 (1901), Statutory Addendum 19, which provides that funds may be paid only to a school "approved by the board of education," i.e., the Board of Education of Massachusetts).

goods and services to individual members of the Cowlitz Tribe supported the conclusion that the Tribe was under federal jurisdiction).

Plaintiffs' last-ditch argument is that the attendance of Mashpee children at Carlisle cannot outweigh other evidence that Plaintiffs believe cuts against finding that the Tribe was under federal jurisdiction. Br. 58-60. But an argument that the evidence should be weighed differently is not an argument that the Secretary's view of the evidence is arbitrary. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (holding that a reviewing court must accept the agency's choice between "two fairly conflicting views" of the evidence). Rather, under the APA's narrow standard of review, a reviewing court "must" uphold the agency's determination if it is "supported by any rational view of the record." *Atieh*, 797 F.3d at 138.

3. Federal Reports and Surveys of the Mashpee Tribe Are Indicative of Federal Jurisdiction Over the Tribe

The third line of evidence Interior examined is a series of federal reports documenting the status of the Mashpee Tribe and in some cases making recommendations for federal actions to improve the Tribe's situation. JA67-70. Interior found that these reports "document federal officials' continuing awareness of federal jurisdiction over and responsibility for the Tribe." JA67.

The first report, the Schoolcraft Report, was prepared by the newly organized Department of Indian Affairs in 1847, at the direction of Congress, "to

collect and digest such statistics and materials as may illustrate the history [and] present condition" of Indian tribes, and provide for the "future prospects of the Indian Tribes of the United States." JA67; JA330-32. The report included a section on the Mashpee Tribe that included proposals for the Tribe's improvement. JA68. Interior found that "the Schoolcraft report makes clear that federal officials ... understood that Mashpee constituted a tribe" and that the government could "exercise federal Indian affairs jurisdiction over the Mashpee by issuing a 'plan for their improvement.'" JA68. As the D.D.C. observed, Interior had found similar reports on other tribes to support a finding that those tribes were under federal jurisdiction. 466 F. Supp. 3d at 232 (comparing the Schoolcraft Report to a report on the Ione Band) (citing *County of Amador v. Dep't of the Interior*, 136 F. Supp. 3d 1193, 1208 (E.D. Cal. 2015)). Plaintiffs point to those aspects of the Schoolcraft report that acknowledge Massachusetts' actions regarding the Mashpee, Br. 43 n.16, but Plaintiffs once again err in arguing that such actions preclude a determination that the Tribe was also under federal jurisdiction.

The second report was the 1890 Annual Report of the Commissioner of Indian Affairs. JA50-65. Under the M-Opinion, inclusion of a tribe in an Annual Report suggests the tribe was under federal jurisdiction, because those reports were prepared in the "exercise of administrative jurisdiction." M-Op. 16 (JA884). The 1890 report addressed the situation of the Mashpee Tribe and observed that the

Mashpee continued to hold tribal relations and to occupy their own tract of land. JA68; JA358-59. By acknowledging those facts and including the Mashpee Tribe in the report, along with other tribes, the Commissioner also implied that the Tribe fell within the ambit of federal authority. Plaintiffs' effort to discount this evidence because the federal government did not see the need to intervene in the Mashpee Tribe's affairs at that time, Br. 44-45, should be rejected for the same reason as their challenge to the Interior's assessment of the Morse Report.

Finally, in 1934, the Office of Indian Affairs commissioned a report on the status of the New England tribes, retaining Gladys Tantaquidgeon as "special investigator." JA724. The report discussed many aspects of life on the Mashpee "reservation," including their subsistence practices, educational facilities, health needs, arts and language, and governance. JA69; JA688-715. The Office of Indian Affairs' Director of Education referenced the report when responding to inquiries seeking federal funding for a new school building for the Mashpee Tribe. JA69; JA716; JA724; JA726. Plaintiffs dismiss the report, Br. 32-33, but the Office of Indian Affairs' commissioning of the report and its continued interest in education at Mashpee are supportive of federal jurisdiction.

Interior found that the preparation of each of the foregoing reports constituted an acknowledgment of federal responsibility and authority over the Mashpee Tribe and that, in some cases, the government relied on those reports in

making decisions regarding whether and how to apply federal Indian policy to the Tribe. JA70. Plaintiffs respond that the reports merely reflect the government's plenary authority over Indian affairs. Br. 44-45. But the research and preparation of reports—for the review and consideration of federal decisionmakers—are exercises of administrative jurisdiction and actions of the federal government. *See* M-Op. 16 (JA884). Although inclusion within a single report might not show that a tribe was under federal jurisdiction, the series of federally commissioned reports over time, along with the government's reliance on those reports, supports a finding that the Mashpee Tribe was under federal jurisdiction before 1934. *See* ADD28-29 (holding that Interior's reliance on these reports, alongside other evidence, was reasonable).

4. Identification of Members of the Mashpee Tribe as Indians on Federal Censuses Suggests that and that the Tribe Was Under Federal Jurisdiction

The fourth and final line of evidence relied on by Interior is the classification of Mashpee individuals as "Indians" on multiple federal censuses. Interior found that between 1860 and 1930, the Mashpee Tribe's members were consistently classified as Indians on the decennial Census. JA70; JA334; JA641-48. In some Census years, separate population schedules were used for the general population and Indians, and in 1910 members of the Mashpee Tribe were included on the Indian population schedule. *Id*; JA366; *see also* JA333.

Some members of the Mashpee Tribe were also included on special censuses of Indians. An 1884 statute required each Indian agent to submit an annual report of the Indians under the agent's charge. JA335. That legislation also applied to Indian agents in charge of BIA schools, and the Indian census reports prepared for Carlisle Indian School included the Mashpee children in attendance there. Although records are incomplete, Mashpee children appear on the 1911 and 1912 reports for Carlisle. JA71; JA367-74.

In multiple cases, federal courts have held that enumeration on federal census rolls suggests that a tribe is under federal jurisdiction. *E.g.*, *Grand Ronde*, 830 F.3d at 566; *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015). Plaintiffs argue that those cases are inapposite because there was other evidence that the tribes at issue were under federal jurisdiction. Br. 50-51. But that argument only goes to the weight that census evidence should be given, not to whether it supports a finding that the Tribe was under federal jurisdiction.

Plaintiffs also assert, without any support, that census evidence can support a finding of federal jurisdiction only if it was prepared by the Office of Indian Affairs. Br. 49. Nothing in the M-Opinion, or the plain language of the IRA, however, suggests that actions by other agencies of the federal government are not exercises of federal jurisdiction. The Bureau of the Census's classification of Mashpee Tribe members as Indians is both an affirmative federal act and an

exercise of administrative authority. And even if Plaintiffs were correct, their argument still would not undercut the value of the 1911 and 1912 Carlisle school censuses because those censuses were prepared by the Office of Indian Affairs. JA71. Thus, even under Plaintiffs' criteria, the 2021 ROD relies on proper evidence to reach its conclusions.

The D.D.C. directed Interior to address all the federal census evidence and assess its probative value. 466 F. Supp. 3d at 224-25. Interior did not rely on census evidence in isolation, but considered it in concert with other evidence, including the Carlisle evidence and the evidence that the federal government considered removing the Mashpee. JA72. Taken in that context, the census evidence helps confirm that the federal government considered the Tribe to be under its jurisdiction, and Interior's reliance on it for that purpose was not arbitrary.

* * *

After considering the foregoing lines of evidence, Interior reasonably concluded that the evidence established a course of dealings by the federal government toward the Mashpee Tribe over more than a century and that those dealings collectively indicate that the Mashpee Tribe was under federal jurisdiction prior to 1934. JA72. That conclusion was well-explained, grounded in the record, and should be upheld by this Court.

B. Interior's Conclusion that the Mashpee Tribe Remained Under Jurisdiction in 1934 Is Supported by the Record

Having determined that the Mashpee Tribe was under federal jurisdiction before 1934, Interior then determined whether that relationship remained intact in 1934. *See* M-Op. 19 (JA887). Once a tribe is under federal jurisdiction, it remains so, even if "there may be periods where federal jurisdiction exists but is dormant." M-Op. 20 (JA888). Normally, federal jurisdiction may be terminated only by Congress, M-Op. 18 (JA886); *see also Passamaquoddy*, 528 F.2d at 380, and "executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction," M-Op. 20 (JA888).

The Plaintiffs deride this aspect of the M-Opinion as a "tag, you're it" form of jurisdiction, Br. 52, but they offer no argument for why an exercise of federal authority in or around 1934 should be required. As Justice Breyer explained, there were many cases in 1934 in which the federal government was mistaken about a tribe's status or its relationship with the federal government. *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring). The reality is that the relationship between the federal government and many tribes changed repeatedly between 1789 and 1934, and the federal government was far from perfect in tracking its relationships with tribes. M-Op. 22-23 (JA890-91). Given those fluctuations, an interpretation of the IRA that required evidence of federal jurisdiction specifically in 1934 would impute a degree of arbitrariness that Congress is unlikely to have intended.

As for the Mashpee Tribe, Interior reviewed the administrative record and determined that federal jurisdiction over the Tribe was not terminated. JA76. Interior noted that Congress never adopted any legislation terminating the federal government's jurisdiction and that the Tribe maintained a continuous existence through the 1930s and beyond. JA76. Interior examined evidence of possible termination, but determined it was insufficient to show that the Tribe had ceased to be under federal jurisdiction.

Interior first briefly considered its own decision not to implement other sections of the IRA with regard to the Mashpee immediately following the Act's passage in 1934. JA73. Interior acknowledged, however, that it had mistakenly excluded many tribes from coverage of the IRA in that period, and that the Department's failure to recognize the Act's applicability to the Mashpee at the time was insufficient to show that jurisdiction had been terminated. *Id*.; *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).

Interior then examined a body of correspondence from the 1930s in which various Interior officials—including Commissioner for Indian Affairs John Collier—state, or appear to state, that the Mashpee Tribe was not under federal jurisdiction. JA74-75; JA716-31. Far from "dismissing" this correspondence, Br. 30, Interior reviewed it thoroughly, but ultimately found it insufficient to show that jurisdiction over the Tribe had been terminated.

Interior determined that the views expressed in the correspondence represented only the views of the individuals involved, and not the considered views of the Indian Department. The correspondence Plaintiffs rely on consists mostly of informal letters between officials of the Indian Department and inquiring members of the public. Interior found that those letters did not rest on a legal analysis of the Department's authority, and that some of them contained demonstrable errors. JA74-75.

Interior also acknowledged that historians and Interior's own investigations have shown that during the 1930s the Department in general, and Chairman Collier in particular, were often mistaken in their beliefs about the status of various tribes. JA75; JA891. For that reason, Interior has consistently held that Interior officials' views about a tribe's status in 1934 are not determinative. *E.g.*, JA26 n.190 ("It is irrelevant," Interior explained in one case, "that the United States was ignorant in 1934 of the rights of the Stillaguamish."). Thus, while those statements are entitled to consideration, they do not by themselves compel a conclusion that federal jurisdiction over a tribe was terminated. *Grande Ronde*, 830 F.3d at 562.

Many of the statements Plaintiffs point to are also ambiguous. For example, in one letter Plaintiffs rely on, Br. 31, Commissioner Collier states that federal assistance cannot be provided to the Mashpee Tribe "[in] the absence ... of any Federal policy at the present time," but later acknowledges the possibility that

federal assistance might be extended in the future, thus leaving his view of the Tribe's status in doubt. JA726. Moreover, as Interior observed, this letter and others can easily be read as reflecting practical constraints on the Department's ability to help, rather than as legal determinations of the Tribe's status vis-à-vis the federal government. JA75.

Plaintiffs quote *Carcieri*'s reference to Commissioner Collier as an "unusually persuasive source," Br. 30 n.5 (quoting *Carcieri*, 555 U.S. at 390 n.5), and on that basis suggest that his statements should be accepted uncritically. Interior explained, however, why the Collier correspondence, though entitled to weight, did not demonstrate that federal jurisdiction over the Mashpee Tribe had been terminated. JA75. Plaintiffs essentially ask this Court to reweigh that evidence, but that is not the Court's role when reviewing administrative determinations under the APA. *Atieh*, 797 F.3d at 138. The 2021 ROD explains how Interior evaluated the Collier correspondence and why it does not establish that the Mashpee Tribe was no longer under federal jurisdiction in 1934. That is all that was required of Interior, and its determination should be upheld.

C. There Was No "Flip-Flop"

Throughout their brief, Plaintiffs argue that the 2021 ROD is arbitrary and capricious because it reached a different conclusion from the 2018 ROD, characterizing the 2021 ROD as a "flip-flop[]" and an "about face." Br. 33, 40.

That argument is without substance, however. As Plaintiffs acknowledge, Br. 47, the D.D.C.'s remand order required Interior to reassess the evidence in accordance with the M-Opinion and to determine whether the evidence "in concert" showed that the Mashpee Tribe was under federal jurisdiction in 1934, an evaluation that the 2018 ROD did not undertake. Interior complied with that mandate and reasonably explained why it reached a different conclusion.

As required by the remand order, 466 F. Supp. 3d at 218, the 2021 ROD examines each piece of evidence and assesses its probative value in a manner consistent with the M-Opinion and Interior's past practice. The ROD thoroughly documents that evaluation, JA59-71, and at several points specifically addresses why the 2021 ROD evaluates the evidence differently from the 2018 ROD. *E.g.*, JA62 (Morse Report and McKenney Letters), JA66 (Mashpee children's attendance at Carlisle), JA69-70 (federal reports and surveys), JA72 (census evidence). That analysis both explains Interior's change in view and refutes the Plaintiffs' assertion that Interior improperly credited evidence simply because it believed the D.D.C. required it to do so. Br. 47.

Among other reasons, the 2021 ROD's evaluation of the evidence differs from the 2018 ROD because the 2021 analysis accounts for the historical contexts in which certain actions took place. With respect to the Morse Report, for example, the 2021 ROD explains that it was undertaken as part the federal government's

removal policy and used in part to further that policy. For that reason, Interior concluded it could not be considered a passive or disinterested action. JA59-62. Similarly, the 2021 ROD situates the evidence of Mashpee children attending Carlisle within the context of federal assimilation policy and the role of Indian boarding schools in furthering that policy. JA63-66. Although those contexts were mentioned in the 2018 ROD, they were not considered when assessing the evidence's probative value, and that difference alone is sufficient to explain Interior's revised view.

The 2021 ROD also considered whether all the evidence, when viewed in concert, sufficed to demonstrate the Tribe was under federal jurisdiction. That analytical approach was entirely different from the approach taken in the 2018 ROD, which only viewed each line of evidence in isolation. *See Bernhardt*, 466 F. Supp. 3d at 218 (faulting Interior for that approach). Given the fundamental difference in analytical frameworks, it is hardly surprising that Interior reached a different conclusion.

Plaintiffs discount Interior's methodical analysis and suggest that Interior's change in position is best explained by the change of administrations. Br. 12. But a different administration is entitled to take a different view of the evidence, so long as it provides a reasoned explanation for its position, as Interior did in the 2021 ROD. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). The change

in administration is therefore beside the point. Similarly, Plaintiffs' insinuation that Interior changed position because the current Secretary is Native American, Br. 12, should be dismissed out of hand.

Further seeking to portray the 2021 ROD as an outlier, Plaintiffs repeatedly refer to the 2017 draft and 2018 ROD as two separate decisions, when there was just one decision rejecting the Tribe's land-into-trust application (which was vacated by the D.D.C.). *See, e.g.*, Br. 2 ("Interior failed to provide an adequate explanation of why the 2021 ROD had changed from two prior decisions"); Br. 4 (similar); Br. 12 (the evidence cited in the 2021 ROD was "found wanting by two different Secretaries of the Interior: Secretary Dirk Kempthorne in 2017 and Secretary Ryan Zinke in 2018").[14] In support of this mischaracterization, Plaintiffs sometimes cite the 2017 draft and sometimes cite the 2018 ROD even though they acknowledge that there was "no material change in Interior's analysis of the Mashpees' historical evidence" between the 2017 draft and the 2018 ROD. Br. 9. In sum, Plaintiffs' "flip-flop" argument is without merit.

D. Interior's Decision Is Not Inconsistent with Its Treatment of Other Tribes

Plaintiffs' contention that Interior should have based its determination of whether the Mashpee Tribe was under federal jurisdiction in 1934 on a quantitative

[14] Ryan Zinke was Secretary at the time of both the 2017 draft and 2018 ROD.

comparison of the number of federal actions taken toward the Mashpee Tribe with the number of such actions taken toward other tribes, Br. 61-62, is not properly presented in this appeal. Plaintiffs once again seek to incorporate an argument (this time one summarized in a chart) by bare reference to their 2017 remand submission. *See* p. 22 n.5, above.

Nor does the argument have any basis in law. Interior properly evaluated the categories of evidence that were found probative in determining whether other tribes were under federal jurisdiction. Under the M-Opinion, however, the question is "whether there is a sufficient showing in the *tribe's* history" to establish that the tribe was under federal jurisdiction. M-Op. 19 (JA887) (emphasis supplied). Simply comparing the volume of evidence does not answer that question. *See Bernhardt*, 466 F. Supp. 3d at 221 (rejecting the 2018 ROD's comparison of the "totality of the Cowlitz Tribe's evidence with the totality of the Mashpee Tribe's evidence" as inconsistent with the M-Opinion and precedent and describing that approach as a "non-sequitur"). Instead, Interior appropriately focused on historical exercises of federal authority over the Mashpee Tribe and determined that those exercises, taken together, demonstrated that the Tribe was under federal jurisdiction in 1934. For the reasons discussed, that conclusion was reasonable and should be upheld.

Finally, Plaintiffs wrongly suggest that that if the Mashpee Tribe is not excluded from coverage of the IRA, then no tribe would be excluded by the "under Federal jurisdiction" requirement. Br. 62. But whether a tribe was under federal jurisdiction is a tribe-specific inquiry. For example, Congress may have thought that tribes that had been recognized in the 1700s or 1800s through treaties but had ceased to exist as communities by 1934 might not be "under Federal jurisdiction." *See* M-Op. 12 (JA880) (reading the legislative history to express a desire to include tribes that "maintained tribal identity" in 1934 but to exclude those that had "abandoned tribal relations"); *see also Miami Nation of Indians of Ind., Inc. v. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001) ("Indian nations, like foreign nations, can disappear over time"). Such cases are not before the Court, however, and there is no reason to speculate. Interior reasonably concluded on the basis of the record before it that the Mashpee Tribe was under federal jurisdiction in 1934, and that conclusion should be upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court that Interior's decision to take land into trust for the Mashpee Wampanoag Tribe was not arbitrary or capricious.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1) because it contains 13,000 words, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Cir. R. 32(e).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), as required by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface (14-point Times New Roman font) using Microsoft Word.

s/ Christopher Anderson
CHRISTOPHER ANDERSON

Counsel for Federal Appellees

CERTIFICATE OF SERVICE

I, Christopher Anderson, certify that on July 28, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, which will send notification of such filing to counsel of record.

s/ Christopher Anderson
CHRISTOPHER ANDERSON

Counsel for Federal Appellees

Statutory and Regulatory Addendum

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5 U.S.C. § 706

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

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

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

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

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

25 U.S.C. § 2

Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9

Regulations by President

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

25 U.S.C. § 177

Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 2719

Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) [Omitted.]

(b) Exceptions

(1) Subsection (a) will not apply when—

(A) [Omitted.]; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) [Omitted.]

(3) [Omitted.]

(c) [Omitted.]

(d) [Omitted.]

25 U.S.C. § 5108 (formerly codified at 25 USCA § 465)

Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

[Omitted.]

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5129 (formerly codified at 25 U.S.C. § 479)

Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

28 U.S.C. § 2401

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) [Omitted.]

STATUTE II.

March 3, 1819.

[Obsolete.] Act of April 19, 1816, ch. 57.

Instead of four sections, &c., any contiguous quarter sections, fractions, &c., may be located under direction of the legislature.

CHAP. LXXXIII.—*An Act respecting the location of certain sections of lands to be granted for the seat of government in the state of Indiana.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That instead of four sections, provided to be located under the direction of the legislature of the state of Indiana, and to be granted for the purpose of fixing thereon the seat of government for that state, it shall be lawful to locate, for that purpose, under the direction of the legislature aforesaid, any contiguous quarter sections, fractions, or parts of sections, not to exceed, in the whole, the quantity contained in four entire sections: Such locations shall be made before the commencement of the public sales of the adjoining and surrounding lands, belonging to the United States.

APPROVED, March 3, 1819.

STATUTE II.

March 3, 1819.

[Obsolete.]

CHAP. LXXXIV.—*An Act making appropriations for the public buildings, for the purchase of a lot of land, and furnishing a supply of water for the use of certain public buildings.*

Appropriations for finishing the wings of the Capitol.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there be appropriated for finishing the wings of the Capitol, in addition to the sums already appropriated, the further sum of fifty-one thousand three hundred and thirty-two dollars.

Centre building.

For erecting the centre building of the Capitol, one hundred and thirty-six thousand six hundred and forty-four dollars.

Gates, iron railing, &c.,

For finishing the gates, the iron railing, and the enclosure north of the President's house, five thousand three hundred and forty-four dollars.

Enlarging offices west of President's house.

For enlarging the offices west of the President's house, eight thousand one hundred and thirty-seven dollars.

Purchasing a lot of land, and supplying the executive offices with water.

For purchasing a lot of land, and for constructing pipes, for supplying the executive offices and President's house with water, nine thousand one hundred and twenty-five dollars.

To be paid out of money in the treasury.

Which said several sums of money, hereby appropriated, shall be paid out of any money in the treasury not otherwise appropriated.

SEC. 2. *And be it further enacted*, That the several sums hereby appropriated, shall be expended under the direction of the President of the United States.

APPROVED, March 3, 1819.

STATUTE II.

March 3, 1819.

CHAP. LXXXV.—*An Act making provision for the civilization of the Indian tribes adjoining the frontier settlements.*

The President authorized to employ capable persons to instruct Indians in agriculture, and to teach Indian children reading, writing and arithmetic, &c.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of providing against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined, according to such in-

structions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties.

SEC. 2. *And be it further enacted*, That the annual sum of ten thousand dollars be, and the same is hereby appropriated, for the purpose of carrying into effect the provisions of this act; and an account of the expenditure of the money, and proceedings in execution of the foregoing provisions, shall be laid annually before Congress.

Account of expenditure and proceedings to be laid before Congress.

APPROVED, March 3, 1819.

STATUTE II.

CHAP. LXXXVI.—*An Act explanatory of the act entitled "An act for the final adjustment of land titles in the state of Louisiana and territory of Missouri."*

March 3, 1819.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the provisions of the fifth section of the act of Congress, entitled "An act for the final adjustment of land titles in the state of Louisiana and territory of Missouri," passed the twelfth day of April, one thousand eight hundred and fourteen, shall be so construed as to extend to the citizens of the county of Howard, in the Missouri territory, as established by the act of the legislature of the territory, passed the twenty-third day of January, one thousand eight hundred and sixteen, any construction to the contrary notwithstanding.

Act of April 12, 1814, ch. 52. The provisions of the 5th section of the act of 12th April, 1814, to be construed to extend to citizens of Howard county.

SEC. 2. *And be it further enacted*, That the right of pre-emption given by the aforesaid provisions, as explained and extended by this act, shall not be so construed as to affect any right derived from the United States, by purchase, at public or private sale, of the lands claimed under the aforesaid act.

The right of pre-emption.

SEC. 3. *And be it further enacted*, That any person or persons who have settled on, and improved, any of the lands in the said territory, reserved for the use of schools, before the survey of such lands were actually made, and who would have had the right of pre-emption thereto by the existing laws had not the same been so reserved, shall have the right of pre-emption thereto, under the same terms and conditions, and subject to the same restrictions provided for other cases of a right of pre-emption in said territory and the register of the land office, and receiver of public moneys for the district, shall have power to select any other vacant and unappropriated lands, in the same township, and as near adjacent as lands of equal quantity and like quality can be obtained, in lieu of the section, or parts of a section, which shall have been entered in right of pre-emption, according to the provision of this section.

Persons who would have had the right of pre-emption had not the lands been reserved for schools, to have the right of pre-emption, &c.

APPROVED, March 3, 1819.

STATUTE II.

CHAP. LXXXVII.—*An Act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned.*

March 3, 1819.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of carrying into effect a treaty between the United States and the Wyandot, Seneca, Delaware, Shawanee, Pattawatima, Ottawa, and Chippewa tribes of Indians, concluded at the foot of the rapids of the Miami of Lake Erie, on the twenty-ninth day of September, eighteen hundred and seventeen, and the supplementary treaty concluded with said tribes, at St. Mary's, in the state of Ohio, on the seventeenth of September, eighteen hundred and eighteen, the following sums be, and the same are hereby appropriated, in conformity with the stipulations contained in said treaty and supplement, to wit:

Appropriations for carrying into effect treaties with the Wyandots, Senecas, Delawares, Shawanees, Pattawatimas, Ottawas, and Chippewas.

The sum of thirteen thousand three hundred dollars, for the payment

Annuities.

25 C.F.R. § 83.7 (2007)

Mandatory criteria for Federal acknowledgment.

The mandatory criteria are:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification by other than the petitioner itself or its members.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.

(1) This criterion may be demonstrated by some combination of the following evidence and/or other evidence that the petitioner meets the definition of community set forth in § 83.1:

(i) Significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) Significant social relationships connecting individual members.

(iii) Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) Evidence of strong patterns of discrimination or other social distinctions by non-members.

(vi) Shared sacred or secular ritual activity encompassing most of the group.

(vii) Cultural patterns shared among a significant portion of the group that are different from those of the non-Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization, or religious beliefs and practices.

(viii) The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) A demonstration of historical political influence under the criterion in § 83.7(c) shall be evidence for demonstrating historical community.

(2) A petitioner shall be considered to have provided sufficient evidence of community at a given point in time if evidence is provided to demonstrate any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the balance of the group maintains consistent interaction with some members of the community;

(ii) At least 50 percent of the marriages in the group are between members of the group;

(iii) At least 50 percent of the group members maintain distinct cultural patterns such as, but not limited to, language, kinship organization, or religious beliefs and practices;

(iv) There are distinct community social institutions encompassing most of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The group has met the criterion in § 83.7(c) using evidence described in § 83.7(c)(2).

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(1) This criterion may be demonstrated by some combination of the evidence listed below and/or by other evidence that the petitioner meets the definition of political influence or authority in § 83.1.

(i) The group is able to mobilize significant numbers of members and significant resources from its members for group purposes.

(ii) Most of the membership considers issues acted upon or actions taken by group leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication and involvement in political processes by most of the group's members.

(iv) The group meets the criterion in § 83.7(b) at more than a minimal level.

(v) There are internal conflicts which show controversy over valued group goals, properties, policies, processes and/or decisions.

(2) A petitioning group shall be considered to have provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders and/or other mechanisms exist or existed which:

(i) Allocate group resources such as land, residence rights and the like on a consistent basis.

(ii) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(iii) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior;

(iv) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(3) A group that has met the requirements in paragraph 83.7(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(1) Evidence acceptable to the Secretary which can be used for this purpose includes but is not limited to:

(i) Rolls prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, or other purposes;

(ii) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iii) Church, school, and other similar enrollment records identifying present members or ancestors of present members as being descendants

of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(v) Other records or evidence identifying present members or ancestors of present members as being descendants of a historical tribe or tribes that combined and functioned as a single autonomous political entity.

(2) The petitioner must provide an official membership list, separately certified by the group's governing body, of all known current members of the group. This list must include each member's full name (including maiden name), date of birth, and current residential address. The petitioner must also provide a copy of each available former list of members based on the group's own defined criteria, as well as a statement describing the circumstances surrounding the preparation of the current list and, insofar as possible, the circumstances surrounding the preparation of former lists.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. However, under certain conditions a petitioning group may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, an acknowledged Indian tribe. The conditions are that the group must establish that it has functioned throughout history until the present as a separate and autonomous Indian tribal entity, that its members do not maintain a bilateral political relationship with the acknowledged tribe, and that its members have provided written confirmation of their membership in the petitioning group.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

ACTS

AND

RESOLVES

PASSED BY THE

General Court of Massachusetts,

IN THE YEAR

1870,

TOGETHER WITH

THE CONSTITUTION, THE MESSAGES OF THE GOVERNOR, LIST OF THE CIVIL GOVERNMENT, CHANGES OF NAMES OF PERSONS,

ETC., ETC., ETC.

PUBLISHED BY THE
SECRETARY OF THE COMMONWEALTH.

BOSTON:
WRIGHT & POTTER, STATE PRINTERS,
79 MILK STREET, (CORNER OF FEDERAL.)
1870.

Section 6. Section sixty of chapter fifty-eight of the General Statutes is hereby so amended that the annual dividends therein authorized to be paid to stockholders shall not exceed eight per cent. Amendment to G. S. 58, § 60.

Section 7. All members of mutual life and fire insurance companies, incorporated under the laws of this Commonwealth, shall be notified of the time and place of holding the annual meetings of said companies by a written notice or by an imprint upon the back of each policy, receipt or certificate of renewal, in the following form, to wit: "By virtue of this policy the assured is hereby notified that he is a member of the Insurance Company, and that the annual meetings of said company are holden at its home office on the day of in each year, at o'clock, ." The blanks shall be duly filled in making the aforesaid imprint, and the same shall be deemed a sufficient notice as herein provided. Notice of annual meetings of mutual insurance companies.

Section 8. For each certificate of the valuation of the outstanding policies of any insurance company doing business in this Commonwealth, there shall be paid the sum of two dollars, to be collected by the insurance commissioner and paid into the treasury. Fee for certificate of valuation of policies to be paid into treasury.

Approved June 13, 1870.

An Act in relation to the distribution of the school fund for Indians. *Chap.* 350

Be it enacted, &c., as follows:

Section 1. The distribution of the school fund for Indians derived from the surplus revenue of the United States, is hereby made to the following named towns, to wit: to the town of Mashpee, one thousand dollars; to the town of Gay Head, six hundred dollars; to the town of Edgartown, three hundred dollars; to the town of Tisbury, three hundred dollars; to the town of Sandwich, one hundred and fifty dollars; and to the town of Plymouth, one hundred and fifty dollars; and any undivided income of said fund shall be paid over to said towns in the proportions aforesaid. Distribution of Indian school fund.

Said towns shall severally apply the money so received at their discretion for the benefit of that portion of their inhabitants formerly called Indians.

Section 2. The school-houses heretofore erected by the Commonwealth upon Indian lands shall hereafter belong to, and be held by the towns within the limits of which they are severally situated. School-houses to belong to towns within which they are situated.

Section 3. The fifth and sixth sections of the thirty-sixth chapter of the General Statutes are hereby repealed. Repeal.

Section 4. This act shall take effect upon its passage.

Approved June 13, 1870.

ACTS

AND

RESOLVES

PASSED BY THE

General Court of Massachusetts,

IN THE YEAR

1905,

TOGETHER WITH

THE CONSTITUTION, THE MESSAGES OF THE GOVERNOR, LIST OF THE CIVIL GOVERNMENT, TABLES SHOWING CHANGES IN THE STATUTES, CHANGES OF NAMES OF PERSONS, ETC., ETC.

PUBLISHED BY THE
SECRETARY OF THE COMMONWEALTH.

BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 Post Office Square.
1905.

For incidental and contingent expenses in the treasurer's department, a sum not exceeding four thousand dollars. Expenses.

For such expenses as the treasurer and receiver general may find necessary in carrying out the provisions of the act imposing a tax on collateral legacies and successions, a sum not exceeding one thousand dollars. Tax on collateral legacies, etc.

For the salary of the deputy sealer of weights, measures and balances, fifteen hundred dollars. Deputy sealer of weights, etc.

For travelling and other expenses of the deputy sealer of weights, measures and balances, a sum not exceeding seven hundred dollars; and for furnishing sets of standard weights, measures and balances to towns not heretofore provided therewith, and to each newly incorporated town; also to provide cities and towns with such parts of said sets as may be necessary to make their sets complete, a sum not exceeding four hundred dollars: Expenses.

SECTION 2. This act shall take effect upon its passage.

Approved February 2, 1905.

AN ACT MAKING AN APPROPRIATION FOR THE TUITION AND TRANSPORTATION OF CHILDREN ATTENDING SCHOOL OUTSIDE OF THE TOWN IN WHICH THEY RESIDE. *Chap. 23*

Be it enacted, etc., as follows:

SECTION 1. A sum not exceeding forty-eight thousand five hundred dollars is hereby appropriated, to be paid out of the treasury of the Commonwealth from the ordinary revenue, for the payment of tuition of children in high schools outside of the town in which they reside, in so far as such payment is provided for by section three of chapter forty-two of the Revised Laws, as amended by chapter four hundred and thirty-three of the acts of the year nineteen hundred and two. And there may also be paid from this amount such sums as may be necessary to provide transportation to and from school for such children of school age as may be living upon islands within the Commonwealth which are not provided with schools. Tuition, etc., of certain children.

SECTION 2. This act shall take effect upon its passage.

Approved February 2, 1905.

THE

REVISED LAWS

OF

The Commonwealth of Massachusetts.

ENACTED NOVEMBER 21, 1901,

TO TAKE EFFECT JANUARY 1, 1902.

WITH THE

CONSTITUTION OF THE UNITED STATES, THE CONSTITUTION OF THE COMMONWEALTH, AND TABLES SHOWING THE DISPOSITION OF THE PUBLIC STATUTES AND OF STATUTES PASSED SINCE THE ENACTMENT OF THE PUBLIC STATUTES.

VOL. I.

CHAPTERS 1-108.

BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 POST OFFICE SQUARE.
1902.

CHAPTER 42.

OF THE PUBLIC SCHOOLS.

PUBLIC SCHOOLS.

Public schools. Branches taught.
C. L. 136, 305.
1692-3, 26, § 5.
1789, 19, § 1.
1823, 111.
1826, 143, § 1.
R. S. 23, § 1.
1839, 56, § 1.
1850, 229.
1857, 206, § 1.
1858, 5.
1859, 263.
G. S. 38, § 1.
1862, 7.
1870, 248, § 1.
1876, 3, § 1.
P. S. 44, § 1.
1884, 69.
1885, 332.
1894, 231; 320, § 1.
1898, 496, § 1.
1900, 218.
10 Met. 508.
[1 Op. A. G. 577.]

SECTION 1. Every city and town shall maintain, for at least thirty-two weeks in each year, a sufficient number of schools for the instruction of all the children who may legally attend a public school therein, except that in towns whose assessed valuation is less than two hundred thousand dollars, the required period may, with the consent of the board of education, be reduced to twenty-eight weeks. Such schools shall be taught by teachers of competent ability and good morals, and shall give instruction in orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, the history of the United States, physiology and hygiene, and good behavior. In each of the subjects of physiology and hygiene, special instruction as to the effects of alcoholic drinks and of stimulants and narcotics on the human system shall be taught as a regular branch of study to all pupils in all schools which are supported wholly or partly by public money, except schools which are maintained solely for instruction in particular branches. Book-keeping, algebra, geometry, one or more foreign languages, the elements of the natural sciences, kindergarten training, manual training, agriculture, sewing, cooking, vocal music, physical training, civil government, ethics and such other subjects as the school committee consider expedient may be taught in the public schools.

High schools.
1789, 19, § 1.
1823, 111.
1826, 143, § 1.
R. S. 23, § 5.
1850, 274.
1852, 122.
1857, 206, § 2.
G. S. 38, § 2.
1868, 226.
P. S. 44, § 2.
1898, 496, § 2.
16 Mass. 141.
10 Met. 508.
11 Cush. 178.
98 Mass. 589.

SECTION 2. Every city and every town containing, according to the latest census, state or national, five hundred families or householders, shall, and any other town may, maintain a high school, adequately equipped, which shall be kept by a principal and such assistants as may be needed, of competent ability and good morals, who shall give instruction in such subjects designated in the preceding section as the school committee consider expedient to be taught in the high school, and in such additional subjects as may be required for the general purpose of training and culture, as well as for the purpose of preparing pupils for admission to state normal schools, technical schools and colleges. One or more courses of study, at least four years in length, shall be maintained in each such high school and it shall be kept open for the benefit of all the inhabitants of the city or town for at least forty weeks, exclusive of vacations, in each year. A town may cause instruction to be given in a portion only of the foregoing requirements if it makes adequate provision for instruction in the others in the high school of another city or town.

Provisions for towns having no high schools.
1891, 263.
1894, 436.
1895, 212.
1898, 496, § 3.
164 Mass. 430.
171 Mass. 501.
[1 Op. A. G. 427.]

SECTION 3. A town of less than five hundred families or householders in which a public high school or a public school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who, with the previous approval of the school committee of his town, attends the high school of another town or city. If such town neglects or refuses to pay for such tuition, it shall be liable therefor to the parent or guardian of a child who has been furnished with such tuition if the parent or guardian has paid for the same, and otherwise to the city or town furnishing the same, in an action of contract. If the school committee of a town in which a public high school or public school of corresponding grade is not maintained refuses, upon the completion by a pupil resident therein of the course of study provided by it, to approve his attendance in the high school of some other city or town which he, in the opinion of the superintendent of schools of the town in which he is resident is qualified to enter, the town shall be liable in an action of contract for his tuition. A town whose valuation does not exceed five hundred thousand dollars shall be entitled to receive from the treasury of the commonwealth all necessary amounts which have been actually expended for high school tuition under the provisions of this section, if such expenditure shall be certified under oath to the board of education by its school committee within thirty days after the date of such expenditure, and such high school shall have been approved by the board of education.

High school districts in adjacent towns.

SECTION 4. Two adjacent towns, each having less than five hundred families or householders, may vote to form one high school district for establishing a high school.

1848, 279, § 1. G. S. 38, § 3. P. S. 44, § 3. 103 Mass. 99.

Committee, how chosen. Powers.
1848, 279, § 2.
G. S. 38, § 4.
P. S. 44, § 4.

SECTION 5. The school committees of such towns shall elect one person from each of their respective boards, and the persons so elected shall form the committee for the management and control of such school, with all the powers of school committees.

— to determine location of school house.
1848, 279, § 3.
G. S. 38, § 5.
P. S. 44, § 5.

SECTION 6. Such committee shall determine the location of the school house, if one is authorized, to be built by the towns of such high school district; otherwise, it shall authorize the location of such school alternately in the two towns.

Expenses apportioned.
1848, 279, § 4.
G. S. 38, § 6.
P. S. 44, § 6.

SECTION 7. The proportion to be paid by each town for the erection of a permanent school house for such school, for its support and maintenance and for all incidental expenses attending the same, unless otherwise agreed, shall be according to its proportion of the county tax.

Union schools for two or more towns.
1868, 278.
P. S. 44, §§ 10, 11.
103 Mass. 99.

SECTION 8. Two or more towns may severally vote to establish union schools for the accommodation of such contiguous portions of each as shall be mutually agreed upon. The management and control of such schools, the location of the same or of the school houses therefor, and the apportionment of the expenses of erecting such school houses and of the support and maintenance of said schools, with all expenditures incident to the same, shall be governed by the provisions of the three preceding sections.

ACTS

AND

RESOLVES

PASSED BY THE

General Court of Massachusetts,

IN THE YEAR

1902,

TOGETHER WITH

THE CONSTITUTION, THE MESSAGES OF THE GOVERNOR, LIST OF THE CIVIL GOVERNMENT, TABLES SHOWING CHANGES IN THE STATUTES, CHANGES OF NAMES OF PERSONS, ETC., ETC.

PUBLISHED BY THE
SECRETARY OF THE COMMONWEALTH.

BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 Post Office Square.
1902.

value for railroad or railway purposes of the property of such company. The commissioners and clerk shall be sworn before entering upon the performance of their duties and shall not be in the employ of or own stock in a railroad corporation or street railway company, nor shall they personally, or through a partner or agent, render any professional service or make or perform any business contract with or for a railroad or street railway corporation chartered under the laws of this Commonwealth, except contracts made with them as common carriers, nor shall they, directly or indirectly, receive a commission, bonus, discount, present or reward from any such corporation.

R. L. 111, § 10, amended.

Section 2. Section ten of chapter one hundred and eleven of the Revised Laws is hereby amended by striking out the word "section", in the fourth line, and inserting in place thereof the words: — sections eight and, — so as to read as follows: — *Section 10.* The annual expenses of the board, including the salaries of the commissioners, clerk, assistant clerk, the compensation of the accountant, the expenses incurred under the provisions of sections eight and one hundred and sixty-nine, the incidental expenses of the board and the salaries and expenses of the railroad and railway inspectors shall be apportioned by the tax commissioner among the several railroad and street railway corporations and, on or before the first day of July in each year, he shall assess upon each of said corporations its share of such expenses, in proportion to its gross earnings from the transportation of persons and property for the year last preceding the year in which the assessment is made; and such assessments shall be collected in the same manner as taxes upon corporations.

Railroad commissioners, salaries, expenses, etc.

Section 3. This act shall take effect upon its passage.

Approved June 3, 1902.

An Act to provide for reimbursing certain towns for expenses incurred in furnishing high school instruction.

Chap. 433

Be it enacted, etc., as follows:

R. L. 42, § 3, amended.

Section three of chapter forty-two of the Revised Laws is hereby amended by striking out all after the word "tuition", in the seventeenth line, and inserting in place thereof the following: — A town whose valuation is less than seven hundred and fifty thousand dollars shall be

R. L. 42, § 3, amended.

entitled to receive from the treasury of the Commonwealth all necessary amounts, and a town whose valuation exceeds seven hundred and fifty thousand dollars, but whose number of families is less than five hundred, shall be entitled to receive from the treasury of the Commonwealth half of all necessary amounts which have actually been expended for high school tuition under the provisions of this section: *provided*, that such expenditure shall be certified under oath to the board of education by its school committee within thirty days after the date of such expenditure; but, if a town of less than five hundred families maintains a high school of its own of the character described in section two of this chapter and employs at least two teachers therein, it shall be entitled to receive annually from the treasury of the Commonwealth toward the support of such high school the sum of three hundred dollars. No town the valuation of which averages a larger sum for each pupil in the average membership of its public schools than the corresponding average for the Commonwealth shall receive money from the Commonwealth under the provisions of this section; and no expenditure shall be made by the Commonwealth on account of high school instruction under the provisions of this section unless the high school in which such instruction is furnished has been approved by the board of education, — so as to read as follows: —

Tuition of children in towns having no high school, etc.

Section 3. A town of less than five hundred families or householders in which a public high school or a public school of corresponding grade is not maintained shall pay for the tuition of any child who resides in said town and who, with the previous approval of the school committee of his town, attends the high school of another town or city. If such town neglects or refuses to pay for such tuition, it shall be liable therefor to the parent or guardian of a child who has been furnished with such tuition if the parent or guardian has paid for the same, and otherwise to the city or town furnishing the same, in an action of contract. If the school committee of a town in which a public high school or public school of corresponding grade is not maintained refuses, upon the completion by a pupil resident therein of the course of study provided by it, to approve his attendance in the high school of some other city or town which he, in the opinion of the superintendent of schools of the town in which he is resident is

qualified to enter, the town shall be liable in an action of contract for his tuition. A town whose valuation is less than seven hundred and fifty thousand dollars shall be entitled to receive from the treasury of the Commonwealth all necessary amounts, and a town whose valuation exceeds seven hundred and fifty thousand dollars, but whose number of families is less than five hundred, shall be entitled to receive from the treasury of the Commonwealth half of all necessary amounts which have actually been expended for high school tuition under the provisions of this section: *provided*, that such expenditure shall be certified under oath to the board of education by its school committee within thirty days after the date of such expenditure; but, if a town of less than five hundred families maintains a high school of its own of the character described in section two of this chapter and employs at least two teachers therein, it shall be entitled to receive annually from the treasury of the Commonwealth toward the support of such high school the sum of three hundred dollars. No town the valuation of which averages a larger sum for each pupil in the average membership of its public schools than the corresponding average for the Commonwealth shall receive money from the Commonwealth under the provisions of this section; and no expenditure shall be made by the Commonwealth on account of high school instruction under the provisions of this section unless the high school in which such instruction is furnished has been approved by the board of education. *Approved June 3, 1902.*

Proviso.

AN ACT TO PROVIDE FOR IMPROVEMENTS AND ADDITIONS AT CERTAIN STATE INSTITUTIONS. *Chap.* 434

Be it enacted, etc., as follows:

SECTION 1. To provide funds for the construction and enlargement of certain public buildings hereinafter named, and for the proper keeping of the insane and others committed to the care of the Commonwealth, the treasurer and receiver general is hereby authorized, with the approval of the governor and council, to issue scrip or certificates of indebtedness to an amount not exceeding five hundred and fifty-six thousand eight hundred dollars for a term not exceeding thirty years. Such scrip or certificates of indebtedness shall be issued as registered

Prisons and Hospitals Loan.

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1774-1789

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Volume XXXI. 1786

August 1–December 31

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON
1934

The Ordinance being amended and read a third time; on the question, shall this Ordinance pass? the yeas and nays being required by Mr. [Charles] Pinckney,

New Hampshire,		
Mr. Livermore,	ay	ay
Long,	ay	
Massachusetts,		
Mr. Gorham,	no	no
King,	no	
Sedgwick,	no	
Rhode Island,		
Mr. Manning,	ay	div.
Miller,	no	
Connecticut,		
Mr. Johnson,	ay	ay
Sturges,	ay	
New York,		
Mr. Haring,	no	no
Smith,	no	
New Jersey,		
Mr. Cadwallader,	ay	ay
Symmes,	ay	
Hornblower,	ay	
Pennsylvania,		
Mr. Pettit,	ay	ay
Bayard,	ay	
Maryland,		
Mr. Henry,	ay	ay
Hindman,	ay	
Harrison,	ay	
Ramsay,	ay	
Virginia,		
Mr. Grayson,	ay	ay
Monroe,	ay	
Carrington,	ay	
Lee,	ay	
North Carolina,		
Mr. Bloodworth,	ay	ay
White,	ay	
South Carolina,		
Mr. Bull,	ay	ay
Pinckney,	ay	
Huger,	ay	
Georgia,		
Mr. Houstoun,	ay	ay
Few,	ay	

So it passed as follows:

AN ORDINANCE FOR THE REGULATION OF INDIAN AFFAIRS.

Whereas the safety and tranquillity of the frontiers of the United States, do in some measure, depend on the maintaining a good correspondence between their citizens and the several nations of Indians in Amity with them: And whereas the United States in Congress assembled, under the 9th of the Articles of Confederation and perpetual Union, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any state within its own limits be not infringed or violated.

Be it ordained, by the United States in Congress assembled, That from and after the passing of this Ordinance, the Indian department be divided into two districts, viz. The *Southern*, which shall comprehend within its limits, all the Nations in the territory of the United States, who reside southward of the river Ohio; and the *Northern*, which shall comprehend all the other Indian Nations within the said territory, and westward of Hudson river: Provided that all councils, treaties, communications and official transactions, between the Superintendant hereafter mentioned for the northern district, and the Indian Nations, be held, transacted and done, at the Outpost occupied by the troops of the United States, in the said district. That a Superintendant be appointed [1] for each of the said districts, who shall continue in office for two Years, unless sooner removed by Congress, and shall reside within or as near the district for which he shall be so appointed, as may be convenient for the management of its concerns. The said superintendants shall attend to the execution of such regulations, as Congress shall, from time to time, establish respecting Indian Affairs. The superintendant for the northern district, shall have authority to appoint two deputies, to reside in such places as shall best facilitate the regulations of the Indian trade, and to remove them for misbehaviour. There shall be communications of all matters relative to the business of the Indian department, kept up between the said superintendants, who shall regularly correspond with the Secretary at War, through whom all communications respecting the Indian department, shall be made to Congress; and the superintendants are hereby directed to obey all instructions, which they shall, from time to time, receive from the said Secretary at War. And whenever they shall have reason to suspect any tribe or tribes of Indians, of hostile intentions, they shall communicate the same to the executive of the State or States, whose territories are subject to the effect of such hostilities. All stores, provisions or other property, which Congress may think necessary for presents to the Indians, shall be in the custody and under the care of the said superintendants, who shall render an annual account of the expenditures of the same, to the board of treasury.

And be it further ordained, That none but citizens of the United States, shall be suffered to reside among the Indian nations, or be allowed to trade with any nation of Indians, within the territory of

[1] At this point Roger Alden takes up the entry.

the United States. That no person, citizen or other, under the penalty of five hundred dollars, shall reside among or trade with any Indian or Indian nation, within the territory of the United States, without a license for that purpose first obtained from the Superintendant of the district, or one of the deputies, who are hereby directed to give such license to every person, who shall produce from the supreme executive of any state, a certificate under the seal of the state, that he is of good character and suitably qualified, and provided for that employment, for which license he shall pay the sum of fifty dollars, to the said superintendant for the use of the United States. That no license to trade with the Indians shall be in force for a longer term than one year; nor shall permits or passports be granted to any other persons than citizens of the United States to travel through the Indians nations, without their having previously made their business known to the superintendant of the district, and received his special approbation. That previous to any person or persons obtaining a license to trade as aforesaid, he or they shall give bond in three thousand dollars to the superintendant of the district, for the use of the United States, for his or their strict adherence to, and observance of such rules and regulations as Congress may, from time to time, establish for the government of the Indian trade. All sums to be received by the said Superintendants, either for licenses or fines, shall be annually accounted for by them with the board of treasury.

And be it further ordained, That the said superintendants, and the deputies, shall not be engaged, either directly or indirectly, in trade with the Indians, on pain of forfeiting their Offices, and each of the superintendants shall take the following oath, previous to his entering on the duties of his appointment: "I, A. B. do swear, that I will well and faithfully serve the United States in the office of superintendant of Indian affairs, for the district: That I will carefully attend to all such orders and instructions as I shall, from time to time, receive from the United States in Congress assembled, or the Secretary at War: That I will not be concerned, either directly or indirectly, in trade with the Indians, and that in all things belonging to my said office, during my continuance therein, I will faithfully, justly and truly, according to the best of my skill and Judgment, do equal and impartial Justice, without fraud, favor or affection." And the superintendant for the northern district, shall administer to his depu-

ties, the following oath, before they proceed on the duties of their office: "I, A. B. do swear, that I will well and faithfully serve the United States, in the office of deputy superintendant of Indian Affairs in the northern district, that I will carefully attend to all such orders and instructions as I shall, from time to time, receive from the United States in Congress assembled, the Secretary at War, or the Superintendant of the district aforesaid, and that in all things belonging to my said office, during my continuance therein, I will faithfully, justly and truly, according to the best of my skill and Judgment, do equal and impartial Justice, without fraud, favor or affection." And the said Superintendants and deputy superintendents, shall each of them give bond with surety to the board of treasury, in trust for the United States; the superintendants each in the sum of six thousand dollars, and the deputy superintendents each in the sum of three thousand dollars, for the faithful discharge of the duties of their office.

And be it further ordained, That all fines and forfeitures which may be incurred by contravening this ordinance, shall be sued for and recovered before any court of record within the United States, the one moiety thereof to the use of him or them who may prosecute therefor, and the other moiety to the use of the United States. And the said Superintendants shall have power, and hereby are authorized, by force to restrain therefrom, all persons who shall attempt an intercourse with the said Indians without a license therefor, obtained as aforesaid.

And be it further ordained, That in all cases where transactions with any nation or tribe of Indians shall become necessary to the purposes of this ordinance, which cannot be done without interfering with the legislative rights of a State, the Superintendant in whose district the same shall happen, shall act in conjunction with the authority of such State.[1]

[2] Done by the United States in Congress assembled, this 7 day of August, A. D. 1786, &c.

The Commissioner for settling the accounts of the late army, to whom was referred a petition of John Stevens, late a captain in the Connecticut line, having reported thereon;

[1] This paragraph exists in the writing of Theodore Sedgwick, in No. 56, folio 468. It appears to have been submitted as a motion and duly incorporated in the Ordinance.

[2] At this point Charles Thomson resumes the entries.