No. __-____

IN THE

Supreme Court of the United States

DAVID LITTLEFIELD, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 26, 2024

QUESTION PRESENTED

In *Carcieri v. Salazar,* 555 U.S. 379 (2009) ("*Carcieri*"), this Court held that Congress, when enacting the Indian Reorganization Act of 1934, narrowed the Interior Secretary's authority to take land into trust for "Indians" by limiting that term to mean members of tribes that were recognized and under federal jurisdiction in 1934. In this case, the court of appeals concluded that the Secretary had authority to take land into trust for a group of Indians that Interior said in 1934 consisted of tribal remnants never under federal jurisdiction; that a federal court determined in 1978 did not exist as a tribe after 1869; and that the Secretary did not recognize as a tribe until 2007.

The questions presented is: Whether the decision of the court of appeals conflicts with *Carcieri*?

LIST OF PARTIES

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,

Petitioners,

United States Department of The Interior; Debra Haaland, in her official capacity as Secretary of the Interior; Bureau of Indian Affairs, U.S. Department of the Interior; Bryan Newland, in his official capacity as Assistant Secretary – Indian Affairs, U.S. Department of the Interior; Mashpee Wampanoag Indian Tribe,

Respondents.

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Petitioners David Littlefield et al. respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the court of appeals appears in the Appendix, App. la to 33a and is reported at 85 F.4th 635. The opinion of the district court (and judgment) appears at App. 36a to 76a and is reported at 656 F. Supp. 3d 280.

JURISDICTION

The judgment was entered in the court of appeals on October 31, 2023. App. 34a-35a. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the court of first instance (i.e., the district court) was invoked under 28 U.S.C. § 1331.

STATEMENT OF THE CASE

This case concerns the December 22, 2021 Record of Decision ("2021 ROD") by the Department of the Interior ("the Department") which found the Mashpee Wampanoag Tribe was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust under the Indian Reorganization Act of 1934 ("IRA"). The lands are located in the Town of Mashpee on Cape Cod, and a

distinct parcel 50 miles away in East Taunton, Massachusetts. Petitioners (Plaintiffs-Appellants) David Littlefield et al. are residents of East Taunton and challenged the federal government's decision under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA").

Taking land into trust for a tribe profoundly affects the jurisdictional status of the land especially when, as here, the land is declared by the Department to be the tribe's initial reservation. That federal reservation status all but ends state and local taxation and regulation, including zoning and land use laws. It permits the resident tribe to engage in gaming under the Indian Gaming Regulatory Act—for example by building a 17-story tall Las Vegas style casino in 24-hour operation, in a quiet semi-rural community. Such an Indian casino operates insulated from local concerns. In the case of a commercial casino, in contrast, citizens who are impacted by the development are able to voice their concerns through elected officials. They can address light pollution, noise, traffic congestion, and crime through their local and state governments. If they fail to effect change through such recognized political channels, the citizens can resort to the courts to seek to scale back the intrusion into their community. The Department's declaration of the fee lands as a federal reservation does not just foreclose such political and legal challenges by citizens but more broadly carves out the land from state and local regulation. It leaves the resident tribe as a sovereign over its lands, often in opposi-

tional defiance to state and local governments, and one that is insulated by its sovereign immunity from suit even when it actions have detrimental impacts off the reservation.

A. Legal Background

1. A tribe is eligible for trust lands under the IRA if it meets the statutory definition of "Indian," which only includes:

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

25 U.S.C. § 5129 (formerly 25 U.S.C. § 479) reproduced at Appendix 77a.

2. *Carcieri v. Salazar,* 555 U.S. 379 (2009), determined that Congress substantially restricted the Secretary's authority to take land into trust for Indian tribes. Specifically the Court addressed the first definition of "Indian" and whether "now" in the phrase "now under federal jurisdiction" meant at the time of the IRA's enactment (i.e., 1934) or—as the Secretary urged—at the time the Secretary acts to take the land into trust. Finding the answer in the statute's plain text, this Court concluded "now" meant "in 1934." *Carcieri*, 555 U.S. at 395,

382 (holding that Congress in using the word "now" meant to restrict eligibility to Indians under Federal jurisdiction at the time of enactment in 1934). The "under federal jurisdiction [in 1934]" requirement represents an important jurisdictional limitation on eligibility. It necessarily excluded Indians who were assimilated and living under the jurisdiction of the States. *See id.* at 382-383; *see generally* Cohen's Handbook of Federal Indian Law § 3.02[9] (2015) (documenting stark difference between a state recognized tribe and a federally recognized tribe: "State-recognized tribes are, by definition, not considered federally recognized tribes, and the legal status of their reservations and the scope of their governmental authority, if any, is a matter of state, not federal, law."). Indeed, the difference between tribes under federal jurisdiction, and state recognized tribes and Indians assimilated under the jurisdiction of the States, was central to the "under federal jurisdiction" limitation adopted by Congress in 1934. Wards of the state were expressly carved out from the IRA's reach, as its legislative history shows. *See* JA899, 906-911.

The majority and concurring opinions in *Carcieri* agreed that the Narragansetts' history under colonial, British, and then state jurisdiction rendered them ineligible under the IRA's "under federal jurisdiction [in 1934]" requirement. *See Carcieri*, 555 U.S. at 395; *see id.* at 383-384; *id.* at 399-400 (Breyer, J., concurring) (noting "little Federal contact with the Narragansetts as a group"). The majority also noted that the parties had not contended

the Narragansetts were under federal jurisdiction in 1934 and such silence would be enough to resolve the issue. *Id.* at 395-396. But the majority specifically stated "the evidence in the record is to the contrary," reciting the historical evidence published in the Federal Register. *Id.* at 395. Justice Breyer in his concurring decision, likewise concluded the Narragansetts' history proved they were not under federal jurisdiction in 1934, also citing the published history in the Federal Register. *Id.* at 399.

The majority did not expressly address the related requirement of federal recognition in 1934, but Justice Thomas, writing for the majority, did not say anything to suggest that recognition of a tribe could come after 1934. The two requirements under the IRA—that is, recognition as a tribe and being under federal jurisdiction—were thought to always coincide, as articulated by the federal defendants in their briefing in *Carcier*i. *See* Brief for the Respondents, *Carcieri v. Salazar*, No. 07-526 (Merits Brief filed August 2008) at 9, 11, 14, 17 n.2, 20, 22, 24, 33. Under the plain text of the IRA, federal recognition is a necessary but not sufficient condition for statutory eligibility. The federal government must also exercise jurisdiction over the recognized tribe in 1934. Thus both federal recognition and federal jurisdiction are determined in 1934 according to the plain meaning of the IRA.

3. Interior's administrative guidance on *Carcieri* articulates a standard that any tribe can meet. Interior has continuously fought *Carcieri* through

so-called "*Carcieri*-fix" bills in Congress[1] and then by adopting an agency guidance[2] so fluid and imprecise that any tribe can meet it. The Department's administrative work-around to *Carcieri* nominally embraces Justice Breyer's concurring opinion which identifies three principal indicia of federal jurisdiction over a tribe, each of which must be effective as of 1934: "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." 555 U.S. at 399. For each jurisdictional act identified in Justice Breyer's concurring opinion, the act must impart federal obligations that existed in 1934. In Justice Breyer's view (and in the view of the majority), whatever jurisdictional act that brings a tribe under federal jurisdiction in 1934, it must carry with it federal obligations that are present in 1934.

But as soon as the Secretary cites in the M-Opinion Justice Breyer's limiting indicia of federal jurisdiction, the Secretary departs from them, most significantly by removing the clarion call for

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[1] *See*, *e.g.*, Statement of Kevin K. Washburn Assistant Secretary—Indian Affairs United States Department of the Interior Before the Senate Committee on Indian Affairs On S. 2188, a Bill to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for Indian Tribes May 7, 2014 (available at https://www.doi.gov/ocl/hearings/113/s2188_050714, last visited January 18, 2024).

[2] Solicitor's Op. M-37029 (Mar. 12, 2014) (hereafter "M-Opinion").

evidence that the jurisdictional act be "in effect in 1934." Instead the Secretary creates a jurisdictional anomaly whereby the slightest contact with the federal government before 1934 (decades or centuries before the IRA's enactment) is enough to confer federal jurisdiction, but that status can be lost only through a Congressional act. JA76. This easy to acquire and impossible to lose view of federal jurisdiction maximizes the Secretary's authority to take land into trust for all 538 federally recognized tribes, all but eliminating the "in effect in 1934" requirement. The Secretary's self-aggrandizement has no basis in *Carcieri*. The Secretary's maximally expansive view of her own powers allows her to take land into trust for tribes that Congress excluded, in contravention of the IRA's intent and *Carcieri*.

With respect to federal recognition, Justice Breyer believed recognition might occur later; that it was possible for a tribe to have been under federal jurisdiction without the Department knowing it at the time—citing three examples of such tribes. 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time"). In those limited circumstances "recognition" might catch up to a prior act conferring federal jurisdiction—such as a federal treaty, congressional appropriation or enrollment in the Indian office "in effect in 1934,"as explained by Justice Breyer. *Id*. at 399. But the Secretary in her M-Opinion took the limited examples of the De-

partment losing track of three tribes—and recognizing them afterwards—as an invitation to altogether jettison the requirement that the tribe be "recognized" in 1934. This narrow exception for a handful of overlooked tribes swallows the recognition rule for all tribes. Under the M-Opinion, recognition has no temporal limitation at all. It simply must exist when the Secretary acts to take land into trust. To be sure, the D.C. Circuit and Ninth Circuit have concluded that recognition need not be established in 1934, deferring to the Department's interpretation of Justice Breyer's concurring opinion in *Carcieri*.[3] But the *Carcieri* majority drew no such distinction; the IRA's legislative history does not support drawing that distinction; and as a matter of grammar and plain text reading, Congress made no such distinction. The IRA is properly read to require a tribe to establish *both* recognition *and* federal jurisdiction status in 1934.

B. Administrative and Judicial Proceedings Below

1. Recognizing that it lacks authority under *Carcieri* to take land into trust for the Mashpees, the Department initially tried to avoid subjecting the Mashpees to the "under federal jurisdiction"

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[3] *Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 559–563 (D.C. Cir. 2016); *Cnty. of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1020–1024 (9th Cir. 2017).

requirement when acting on their fee-to-trust application in 2015. Rather than use the commonly-employed first definition of "Indian" with its express "under federal jurisdiction [in 1934]" requirement, the Department employed the rarely used second definition of "Indian"—"all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"—and read it to be shorn of the jurisdictional requirement. JA186. Based on the Department's determination that the Mashpees met that second definition, it took into trust 170 acres in the Town of Mashpee on Cape Cod (the Tribe's historic homelands) and 151 acres of land located in the City of Taunton, Bristol County, 50 miles distant, as a site for a tribal casino. JA104-105, JA40, JA48.

The Department's interpretation of the second definition was ungrammatical and was rejected by the district court, which found the reading contrary to the statute's plain text. *See Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 396-400 (D. Mass. 2016) (holding that "such members" in the second definition refers to "members of any recognized Indian tribe now under Federal jurisdiction" in the first definition, thus making the "under federal jurisdiction [in 1934]" requirement apply equally to the second definition). The court of appeals affirmed the district court's analysis in all respects. *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 40-41 (1st Cir. 2020).

The Department never would have sought to avoid the "under federal jurisdiction" requirement if the Secretary thought the Mashpees could meet it. The Department had never advanced that ungrammatical reading of the second definition for any other tribe.

2. The Mashpees likewise sought to avoid *Carcieri* by proposing an elaborate land transaction outside the IRA land-into-trust process. JA971-973. The Mashpees never would have undertaken that effort if they believed they satisfied *Carcieri*'s requirement of being under federal jurisdiction in 1934.

3. On remand from *Littlefield*, and in keeping with the Department's long understanding that the Mashpees could not satisfy the "under federal jurisdiction [in 1934]" requirement, the Secretary determined in Records of Decision issued in 2017 and 2018 that the Mashpees were not under federal jurisdiction in 1934 and thus were ineligible under the IRA for land into trust benefits. In the 2017 ROD, the Secretary determined that the Mashpees (recognized as a tribe in 2007) could not demonstrate that they were under federal jurisdiction in 1934 based on the historical evidence assembled and supplied by them beginning in 2012. JA976, JA935-967. In the 2018 ROD, the Secretary again determined that the Mashpees were not under federal jurisdiction in 1934. JA1061. Indeed, no material change in Interior's analysis of the Mashpees' historical evidence occurred between the 2017 ROD

and the 2018 ROD.[4] The historical record shows the Mashpees were neither recognized nor under federal jurisdiction in 1934.

4. The Tribe challenged the 2018 ROD by bringing an APA action in the D.C. District Court, rather than in the District of Massachusetts where the Tribe is resident, the Plaintiffs reside and the land at issue is located. The District Court for the District of Columbia in *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (D.D.C. 2020) (hereafter "D.D.C.") found the Secretary in the 2018 ROD had not properly applied the Department's two-part test for "under federal jurisdiction" as stated in the M-Opinion. The D.D.C. concluded that the Secretary had weighed the discrete pieces of historical evidence in isolation when it needed to consider the evidence in "concert." *Id.* at 217-218. In a footnote, the D.D.C. rejected Petitioners' argument that *Carcieri* stood as a barrier, concluding this Court never reached the Narragansetts' history, but rather, held that tribe was not under

[4] Interior provided the 2017 Record of Decision to the Mashpee Tribe on June 19, 2017. JA976. The Tribe objected to it, and Interior responded by "withdrawing" it and marking it a "draft." *See* JA976, JA935. The June 19, 2017 ROD (JA935-967) is fully developed and complete when compared to the ROD ultimately issued September 7, 2018 (JA1061-1088). Interior proceeded to ask for additional briefing on an obscure legal issue that has no impact here (JA976-977) which the parties completed in late 2017. Interior took until September 7, 2018 to issue its decision finding (again) that the Mashpees were not under federal jurisdiction in 1934. JA1061.

federal jurisdiction based on the parties' concession. *Id.* at 215 n. 9.

5. On remand from the D.D.C. *Mashpee* decision, the Secretary pivoted 180 degrees in issuing her new ROD on December 22, 2021 (JA48-102). The Secretary reversed course from the Department's two previous findings, citing the very same evidence found wanting in 2017 and 2018. Not one iota of relevant historical evidence changed between 2017 and 2021. The Tribe did not produce any new evidence. And the Secretary in 2021 cited none. What did change was the identity of the decision-maker: the new administration in 2020 included a new Secretary of the Interior, Deb Haaland. She looked at the very same evidence found wanting twice before and called it sufficient.

Interior credited a series of federal reports and censuses as showing the exercise of federal jurisdiction when this same evidence was twice rejected because it showed no affirmative actions by the federal government but rather passive study or simple headcount without jurisdictional significance. Interior also credited the attendance of a handful of Mashpee children at a federal boarding school, which closed 16 years before the IRA was enacted.

6. The Littlefield Plaintiffs commenced a new APA action in the District of Massachusetts challenging the 2021 ROD. The district court held a hearing on cross-motions for summary judgment and then issued its decision. App. 37a. In affirming

the 2021 ROD in all respects, the district court concluded that Petitioners were barred under principles of issue preclusion from "relitigating" the issue of whether *Carcieri* stands as a legal barrier to finding the Mashpees were under federal jurisdiction since the Narragansetts were not. App. 53a. The district court treated the D.D.C.'s footnote as dispositive and agreed with the D.D.C. that the Supreme Court assumed the Narragansett Tribe was not under federal jurisdiction in 1934 owing to the parties' concessions and did not decide the issue as a matter of historical fact. *Id*. The court of appeals affirmed the district court, including agreeing that this Court did not reach the historical record of the Narragansetts, and thus did control the outcome for the Mashpees, despite their similar histories. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

A. The court of appeals decided an important question of federal law that conflicts with the decision of this Court in *Carcieri*.

1. The court of appeals endorsed the Secretary's broadening of the narrow grant of authority to her under the IRA, ignoring Congress' statutory limitations that require a tribe to be *both* recognized *and* under federal jurisdiction in 1934—in conflict with the holding of this Court in *Carcieri*. It is undisputed that the Mashpees were not recognized in 1934; federal recognition came in 2007. Thus, if federal recognition is required in 1934—consistent

with the text of the IRA and the plain meaning given to it by the *Carcieri* majority—the Mashpees are without question ineligible under the statute for trust lands. This basic eligibility question impacts all tribes and warrants a definitive answer from this Court.

2. Even if recognition is not required in 1934, the court of appeals' decision conflicts with *Carcieri,* which held that the Narragansetts were not under federal jurisdiction in 1934, and thus were ineligible for trust land under the IRA. The historical records for the Narragansetts and the Mashpees are identical in all material respects and show why *Carcieri* is dispositive of the IRA eligibility of both tribes. Like the Narragansetts in *Carcieri*, the Mashpees were treated as assimilated wards of the state and were never under federal jurisdiction. The absence of federal contacts for the Mashpees is the same as for the Narragansetts, proven by the fact that they were "tribal remnants" under colonial, British, and then state jurisdiction just like the Narragansetts—with the Mashpees living as fully assimilated citizens of Massachusetts since 1869. JA914-916. The tribes indisputably share the same history as summarized in their respective submissions in support of federal acknowledgement as a tribe. *Compare* Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (1983) [cited in *Carcieri*, 555 U.S. at 395][5] *with*

[5] *See also* Memorandum from Deputy Assistant Secretary —Indian Affairs (Operations) to Assistant Secretary—Indian

Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007-01 (Feb. 22, 2007) [cited by the court of appeals, App. 5a-6a]. The similarity is striking:

- Each tribe's historic territory is on Narragansett Bay.
- Each tribe has early 17th century contact with English colonists.
- Each tribe befriends Rogers Williams.
- Each tribe voluntarily cedes Indian lands to English colonists.
- Both tribes align to fight against colonial expansion in the large regional conflict known as King Philip's War; both tribes are decimated during the war.
- Each tribe in the early 18th century is placed under a form of guardianship under colonial authority.
- Each tribe remains a ward of the colonial government, and later the state government, until the late 19th century when both Rhode Island and

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Affairs, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island Pursuant to 25 CFR 83, p. 8 (July 29, 1982) [cited by Justice Breyer in his concurring opinion in *Carcieri*, 555 U.S. at 399].

Massachusetts enact assimilation/ citizenship/detribalization laws that make the tribal members citizens of the state.

- Each tribe remains under state jurisdiction in all respects through 1934, treated at all times as a ward of the state and not of the Federal Government.
- Each tribe commences land claim litigation against their home state in the 1970s, represented by the same lawyer. In each case, the Federal Government declined the tribe's request, prior to filing suit, to join the lawsuit.

The court of appeals wrongly dismissed the identical histories on the false premise that the Narragansett history was not before this Court in *Carcieri*. App. 12a-13a. It was sufficiently before this Court to support the finding that the Narragansetts were not under federal jurisdiction as a matter of historical fact. *See*, *supra*, at 4-5.

a. In keeping with the long-standing and complete estrangement of the Mashpees (and Narragansetts) from the federal government, this Court observed in *Elk v. Wilkins*, 112 U.S. 94, 108 (1884) that the Massachusetts Indians were "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities" (citing *Danzell v. Webquish*, 108 Mass. 133 (1871); *Pells v. Webquish*,

129 Mass. 469 (1880); Mass. Stat. 1862, ch. 184; and 1869, ch. 463).[6] Indeed, the federal government never had an Office of Indian Affairs in New England[7]; the whole of New England was carved out from the federal government's Indian Department since its organization in 1786. *See* John M.R. Paterson & David Roseman, A Reexamination of *Passamaquoddy v. Morton*, 31 ME. L. REV 115, 128-129 (1979) ("*the definite exclusion of New England Indians from the coverage of the Ordinance constitutes a clear expression of congressional intent that the small, fragmentary bands of Indians in New England were considered "members" of the New England states and subject to their jurisdiction alone.*") (emphasis added). ADD34-36; *see* JA994-997 (Citizens' Group Supplemental Submission on Remand providing historical context for 1786 Ordinance and evidence of exclusive state jurisdiction over New England remnant tribes).

b. The absence of federal contact with Massachusetts Indians, including the Mashpees, is docu-

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

[7] The absence of an Indian agency in Massachusetts is documented in the Meriam Report: The Problem of Indian Administration (1928), Ch. 3, at 64–65 (available at https://narf.org/nill/resources/meriam.html last visited January 18, 2024).

mented in decisions in the First Circuit in which these Indians sought through litigation to be recognized as a federal tribe. For example in *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 483 (1st Cir. 1987) the court of appeals, citing *Elk,* concluded that the Mashpees and four other tribal remnants in Massachusetts were never recognized by the Federal Government. The court of appeals observed that certain federal reports prepared about Massachusetts Indians (reports credited by the Secertary in the 2021 ROD finding the Mashpees were under federal jurisdiction) "cannot rationally be viewed as actively extending federal jurisdiction over the Mashpees." *Id*.

c. Of particular historical significance, the Department consistently disclaimed any responsibility for the Mashpees in and around 1934, expressly stating they were not under federal jurisdiction in 1934 and thus were ineligible for services under the IRA. JA74-75 (2021 ROD at 27-28); JA726, JA729. The contemporaneous statements by Department officials include those of Indian Commissioner John Collier (JA729) described by this Court as an "unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it." *Carcieri,* 555 U.S. at 390 n.5.

d. Federal court determinations in Massachusetts establish the Mashpees did not exist as a tribe after 1869 and thus could not have been recognized and under federal jurisdiction in 1934. Specifically, a federal court jury determined that

the Mashpees gave up their tribal organization and became citizens of Massachusetts in 1869, and were not thereafter a tribe in Massachusetts. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978). As a result, the tribe lacked standing to bring a land claim action against the state defendants. *Id.* at 942-943; 949-950.[8] That verdict came after 40 days of trial with expert testimony presented by both sides. *Id.* at 943. The proof elements for tribal identity were taken directly from *Montoya v. United States*, 180 U.S. 261, 266 (1901) and set out on a special verdict form with interrogatories. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 579-580, 582 (1st Cir. 1979). The jury's verdict expressly found that the extension of state citizenship in 1869 ended the Mashpees' tribal identity and existence. 447 F. Supp at 943-946. The jury's verdict was affirmed on appeal. *Mashpee Tribe*, 592 F.2d at 582-585. *See also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d at 482 ("the jury decided that the Mashpees failed to prove their tribal existence *as a matter of fact*") (emphasis original).[9]

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[8] The Mashpees pursued land claim litigation without the support or participation of the United States—despite requesting the Federal Government's assistance prior to the case being filed. JA217-218 (2015 ROD at 111-112). To establish standing to assert their land claim, the Mashpees had to prove that they were organized as a tribe on the date the lands were unlawfully taken from them, and on the date they sued to recover possession. They could not prove either.

[9] Interior dismisses in a footnote the federal court jury verdict that determined the Mashpees were not tribally

The federal court jury finding that the Mashpees were not organized as a tribe as of 1869 means the Mashpees did not exist as a tribe within the meaning of the IRA's first definition of "Indian" on the date of the IRA's enactment in 1934. When Congress referred to "members of any recognized tribe now under Federal jurisdiction," it necessarily incorporated the then-prevailing legal definition of a "tribe" as stated by this Court in *Montoya*, 180 U.S. at 266, and reaffirmed 25 years later in *United States v. Candelaria*, 271 U.S. 432, 442 (1926): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory." *Candelaria*, 271 U.S. at 442 (quoting *Montoya*, 180 U.S. at 266). Congress is presumed to have incorporated that common law definition into the IRA. *See United States v. Merriam*, 263 U.S. 179, 187 (1923) (finding that the word "bequest" had "a judicially settled meaning" that Congress is presumed to have used); *see Bradley v. United States*, 410 U.S. 605, 609 (1973) (Courts presume, in interpreting statutes, that " '[t]he law uses familiar legal expressions in their familiar legal sense' ") (quoting *Henry v. United States*, 251 U.S. 393, 395 (1920)). Moreover, Congress is presumed to know and follow this

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organized after 1869. 2021 ROD at 9 n. 71. Interior understates the years covered by the jury's verdict—altogether avoiding the jury's findings that the tribe did not exist after 1869—while stressing the jury applied different standards than Interior when it recognized the tribe in 2007. *Id*.

Court's precedent. *Bartenwerfer v. Buckley*, 598 U.S. 69, 80-91 (2023) ("This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents.") (quoting *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. ___, ___,142 S.Ct. 1929, 1940 (2022)); *Woodford v. NGO*, 548 U.S. 81, 107 (2006) ("We presume, of course, that Congress is familiar with this Court's precedents and expects its legislation to be interpreted in conformity with those precedents."). Thus, Congress in 1934 necessarily embraced the federal common law definition of "tribe" rather than the modern multivariant definition adopted by the Department through regulations promulgated more than 40 years later in 1978. 25 C.F.R. 83.2; *see* 43 Fed. Reg. 39, 361 (1978). Those regulations establish "mandatory criteria for federal acknowledgment" that consider numerous factors beyond the straightforward federal common law standard. 25 C.F.R. 83.7.[10]

Accordingly, as a matter of adjudicated fact and binding legal precedent, the Mashpees did not meet the common law definition of a "tribe," as incorporated in the IRA, as of 1934.[11] Indeed, such frag-

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[10] Among the mandatory criteria there is no requirement that the tribe be under federal jurisdiction in 1934.

[11] The court of appeals concluded that the *Montoya* common law definition of "tribe," as adjudicated against the Mashpee in federal court in Massachusetts, did not control the definition of "tribe" in the IRA. App. 16a-17a. In doing so, the court of appeals observed that Congress did not unambiguously adopt the *Montoya/Candelaria* common law definition in-

mentary tribal remnants were always deemed under the jurisdiction of the States. *See Elk* and discussion, *supra*, at 16-17.

e. The Department long understood that it lacks authority under *Carcieri* to take land into trust for the Mashpees. The Secretary's first recognition of the *Carcieri* impediment for the Mashpees came in its original fee-to-trust record of decision in 2015, when it tried unsuccessfully to free the Mashpees from ever having to satisfy the federal jurisdiction requirement. *See*, *supra*, at 8-10. JA104-105, JA40, JA48. The Secretary never would have jettisoned the "under federal jurisdiction" requirement for the Mashpees if the Secretary thought they could meet that test. The Department had never advanced its ungrammatical reading of the second definition for any other tribe.

In twice finding the Mashpees did not qualify under the IRA's statutory definition (2017 ROD and 2018 ROD), the Secretary unequivocally concluded that the Mashpee Tribe was not under federal jurisdiction in 1934:

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to the IRA, but never explained what else Congress could have intended when it limited the Secretary's authority to "members of any recognized Indian *tribe* now under federal jurisdiction." No basis exists to say Congress in 1934 intended to allow Interior to adopt a different and more expansive definition articulated 44 years later. Any possible conception of a tribe in 1934 was that it was a group of Indians tribally organized and *existing* in 1934, which the federal courts in Massachusetts determined was not the case as a matter of fact and law.

> [T]he evidence does not show that the Tribe was under federal jurisdiction in 1934. Nor does it qualify under the second definition, as that definition has been interpreted by the United States District Court for the District of Massachusetts.

JA1088 2018 ROD (signed by Assistant Secretary—Indian Affairs Tara Sweeney).

The Secretary reached the identical conclusion in the 2017 ROD:

> [T]he evidence submitted by the Tribe on remand provides insufficient indicia of federal jurisdiction beyond the general principle of plenary authority. The evidence does not demonstrate that the United States had, at or before 1934, taken an action or series of actions that sufficiently establish or reflect federal obligations duties, responsibilities for or authority over the Tribe. As a result I conclude that the evidence does not show that the Tribe was under federal jurisdiction in 1934 for purposes of the IRA.

JA966 2017 ROD (as prepared and distributed to the Tribe by Associate Deputy Secretary James E. Cason).

Accordingly, the record evidence shows the Mashpees were neither recognized as a tribe, nor under federal jurisdiction, in 1934. They are therefore not eligible for trust lands under the IRA just as the Narragansetts were found not eligible.

B. Review is warranted because of the importance of trust land acquisitions under the IRA for all stakeholders: tribes, state and local governments, and citizens impacted by Indian Gaming on tribal trust land.

The Secretary's decision has national importance given the nationwide fee-to-trust authority wielded by the Secretary and the seismic jurisdictional displacement that occurs when the Secretary takes into trust fee lands that are under state and local governance, and declares them the tribe's reservation. All stakeholders are impacted by the Secretary's application of the IRA's eligibility criteria. Moreover, the Secretary has fashioned an administrative work-around to *Carcieri*, contained in the M-Opinion and implemented to maximum effect in the Mashpee 2021 Record of Decision. The 2021 ROD provides a template for the Secretary to use for *all* tribal applicants seeking to have fee lands taken into trust without regard to their actual histories and status in 1934. The Secretary's elimination of the twin requirements of recognition and federal jurisdiction status in 1934 effectively removes from the IRA the central temporal limitation provided by Congress and recognized in *Carcieri*, opening the eligibility door to all tribes.

While policy reasons might suggest it is appropriate for Congress to revisit the subject of IRA eligibility, it is for Congress—not the Secretary—to establish statutory eligibility criteria for tribes.

Carcieri, 555 U.S. at 391 ("Congress left no gap in 25 U.S.C. § 479 for the agency to fill"). Those statutory criteria necessarily circumscribe the Secretary's authority to take land into trust for scores of "*Carcieri*-impacted" tribes, with the number of such tribes estimated in 2009 to run between 50 and 100, but could be substantially more since there are 538 federally recognized tribes with many tribal histories that have not been tested under the IRA—and with many more tribes seeking federal recognition. The Secretary's 2021 ROD finding for the Mashpees under its expansive and imprecise M-Opinion achieved a specific result for one tribe. While an extreme example of the Department's lengthy campaign to be free of *Carcieri*, the Secretary's decision for this one tribe signals to all tribes that each is eligible for land into trust under the IRA notwithstanding the express statutory limitation on the Secretary's ability to act.

The Secretary is not just chaffing at the Congressional yoke recognized by this Court in *Carcieri*, but actively throwing it off in open defiance of this Court and ultimately Congress. The Secretary's rejection of the prior federal court determinations pertaining to the Mashpees' nontribal status also raises a serious Separation of Powers concern. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (citing *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Hayburn's Case*, (2 Dall.) 409, 410 n*, 2 U.S. 408 (1792) ("[B]y

the Constitution, neither the secretary ... nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court").

Review by this Court is warranted to vindicate its own authority as well as that of Congress in restricting the Secretary's authority under the IRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 26, 2024

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 23-1197

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

[Hon. Angel Kelley, U.S. District Judge]

Before

Montecalvo, Lynch, and Rikelman,
Circuit Judges.

David H. Tennant, with whom *Kathy L. Eldredge, Law Office of David Tennant PLLC, David J. Apfel,* and *Goodwin Procter LLP* were on brief, for appellants.

Christopher Anderson, Attorney, Department of Justice, Environment and Natural Resources Division, with whom *Todd Kim,* Assistant Attorney General, and *Mary Gabrielle Sprague,* Attorney, were on brief, for federal appellees.

Tami Lyn Azorsky, with whom *V. Heather Sibbison, Suzanne R. Schaeffer, Samuel F. Daughety, Catelin Aiwohi,* and *Dentons US LLP* were on brief, for appellee Mashpee Wampanoag Indian Tribe.

October 31, 2023

LYNCH, *Circuit Judge.* Appellants David and Michelle Littlefield and twenty-two others assert the district court erred in rejecting their challenge to a decision by the Department of the Interior's Bureau of Indian Affairs ("BIA"), made in 2015 and reaffirmed in 2021, to take two parcels of land in Massachusetts into trust for the Mashpee Wampanoag Indian Tribe ("the Tribe"). The Secretary of the Interior has the power to take land into trust pursuant to the Indian Reorganization Act

("IRA") "for the purpose of providing land for Indians." 25 U.S.C. § 5108. Appellants have abandoned any *Chevron* challenge to the Secretary's legal interpretation of section 19 of that statute, 25 U.S.C. § 5129, defining the term "Indians." Accordingly, we determine only whether the BIA's application of its legal interpretation to the facts was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). We uphold the BIA's determination and affirm on somewhat different reasoning than the district court.

I.

A. Prior relevant legal proceedings

The Secretary of the Interior may, under the IRA, "acquire land and hold it in trust 'for the purpose of providing land for Indians.'" *Carcieri* v. *Salazar,* 555 U.S. 379, 381-82 (2009) (quoting 25 U.S.C. § 5108, then codified at 25 U.S.C. § 465). Section 19 of the statute defines the term "Indian" as:

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

25 U.S.C. § 5129 (numbers in brackets added).

In *Carcieri,* the Supreme Court, interpreting the word "now" in the first definitional phrase in this section, held that it "unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri,* 555 U.S. at 395. As such, the Secretary must first have determined, before acquiring land for a tribe pursuant to the first definition of "Indian," that the tribe was under federal jurisdiction in 1934. *Id.* The *Carcieri* decision did not address the meaning of the phrase "under Federal jurisdiction."

In *Littlefield* v. *Mashpee Wampanoag Indian Tribe,* a decision of this Court concerning the Mashpee Tribe, we held that the clause "under Federal jurisdiction" contained in the first definition of "Indian" also applies to the second definition. 951 F.3d 30, 40-41 (1st Cir. 2020). The term "such members" in that definition refers to the entire antecedent clause "members of any recognized Indian tribe now under Federal jurisdiction." *See id.*

In 2014, the Solicitor of the Department of the Interior issued a legal interpretation of the phrase "under Federal jurisdiction" in a memorandum ("the M-Opinion").[1] U.S. Dep't of Interior, M-37029,

[1] The M-Opinion is binding on the Department and its officials unless withdrawn. *Mashpee Wampanoag Tribe* v. *Bernhardt,* 466 F. Supp. 3d 199, 208 (D.D.C. 2020). Interior withdrew the M-Opinion in March 2020, *id.* at 217, but reinstated it in April 2021. The agency applied the M-Opinion's standards in the decision that is at issue in this case.

The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014). The M-Opinion also addressed whether a tribe must have been "recognized" as of 1934. M-Opinion at 23-24; *see* 25 U.S.C. § 5129 (defining as "Indian," among others, "all persons of Indian descent who are members of any *recognized* Indian tribe now under Federal jurisdiction" (emphasis added)). The M-Opinion, agreeing with Justice Breyer's concurrence in *Carcieri,* found that "the IRA does not require that the agency determine whether a tribe was a 'recognized Indian tribe' in 1934; a tribe need only be 'recognized' at the time the statute is applied." M-Opinion at 25.

The D.C. Circuit and the Ninth Circuit have upheld against *Chevron* challenges the M-Opinion's interpretation of the phrase "under Federal jurisdiction," as well as its conclusion that recognition need only be shown as of the time that the Secretary invokes the statute. *Confederated Tribes of Grand Ronde Cmty. of Or.* v. *Jewell,* 830 F.3d 552, 561, 564-65 (D.C. Cir. 2016); *County of Amador* v. *U.S. Dep't of the Interior,* 872 F.3d 1012, 1024, 1027 (9th Cir. 2017).

B. Prior relevant determinations

In 2007, the BIA granted formal recognition to the Tribe.[2] Final Determination for Federal

[2] The BIA's 2015 Record of Decision provides a summary of the Tribe's history, in a section that is incorporated in the 2021 Record of Decision that is at issue in this case. Bureau of Indian Affairs, *Record of Decision: Trust Acquisition and*

Acknowledgment of the Mashpee Wampanoag Indian Tribal Council Inc. of Massachusetts, 72 Fed. Reg. 8007-01 (Feb. 22, 2007). Shortly after the recognition decision, the Tribe requested that Interior take into trust for its use two parcels of land in Massachusetts, one in Mashpee and the other in Taunton.

In 2015, Interior issued a Record of Decision ("2015 ROD") approving the Tribe's request. The BIA found that the Tribe was eligible to have land taken into trust because it qualified under the second definition of "Indian" in the IRA. *See* 25 U.S.C. § 5129 ("The term 'Indian' as used in this Act shall include . . . [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation. . . ."). The agency did not consider whether the Tribe met the requirement of being "under Federal jurisdiction" in 1934.

In February 2016, a group of Taunton residents (the appellants in this case plus another individual), who opposed the Tribe's plan to develop the land commercially, filed suit against Interior in the U.S. District Court for the District of Massachusetts, challenging the 2015 ROD. *Littlefield* v. *U.S. Dep't of Interior,* 199 F. Supp. 3d 391, 393 (D. Mass. 2016), *aff'd sub nom. Littlefield* v. *Mashpee Wampanoag Indian Tribe,* 951 F.3d 30 (1st Cir.

Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe, at 101-17 (Sept. 18, 2015), https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031724.pdf.

2020). The district court agreed with the plaintiffs that the second definition of "Indian" in the IRA unambiguously incorporates the "now under Federal jurisdiction" requirement from the first definition. *Littlefield,* 951 F.3d at 34. Because BIA had found the Tribe to be eligible under the second definition without considering whether it was under federal jurisdiction in 1934, the court vacated the agency's decision. *Id.* In a subsequent order, the court clarified that Interior was permitted to consider, on remand, whether the Tribe met the "now under Federal jurisdiction" requirement. *Id.* In February 2020, this Court affirmed the district court's ruling. *Id.* at 41.

Meanwhile, in 2018, Interior issued a new Record of Decision ("2018 ROD") finding that the Tribe was not "under Federal jurisdiction" in 1934, and so did not qualify to have lands taken into trust. *Id.* at 34. The Tribe then sued Interior in the U.S. District Court for the District of Columbia ("D.D.C."), arguing that the agency had misapplied the standards in the M-Opinion. *Mashpee Wampanoag Tribe* v. *Bernhardt,* 466 F. Supp. 3d 199, 217 (D.D.C. 2020). The court agreed. *Id.* at 217-18. In a decision issued in June 2020, it found that the "Secretary [had] misapplied the M-Opinion by evaluating each piece of evidence in isolation," *id.,* whereas the M-Opinion had stated that "a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction," *id.* (quoting M-Opinion at 19). The court also found that the Secretary's treatment of several pieces of evidence was inconsistent with the M-Opinion's

standards, *e.g., id.* at 220, and with the agency's treatment of similar types of evidence in prior decisions, and that the agency had not offered a reasoned explanation for those inconsistencies, *e.g., id.* at 227. As such, 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."[3] *Id.* at 236.

Interior revisited the issue in response to the vacate and remand order and, in 2021, issued a new Record of Decision. Bureau of Indian Affairs, *Mashpee Wampanoag Tribe, Trust Acquisition Decision Letter* (Dec. 22, 2021) [hereinafter "2021 ROD"]. The agency reevaluated the evidence in light of the M-Opinion's standards and the D.D.C.'s instructions on remand, concluding that the Tribe met the "under Federal jurisdiction" requirement. 2021 ROD at 25. Interior also found that the Tribe could conduct gaming activities on the land taken into trust because the land qualified as the Tribe's "initial reservation" under the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2719(b)(1)(B)(ii); 2021 ROD at 31-54.

C. Procedural history of the litigation that gives rise to this appeal

The appellants in this action then filed suit in the U.S. District Court for the District of Massachusetts,

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[3] Interior filed a notice of appeal but later moved to dismiss the appeal. *See Mashpee Wampanoag Tribe* v. *Bernhardt,* No. 20-5237, 2021 WL 1049822, at *1 (D.C. Cir. Feb. 19, 2021).

challenging the 2021 ROD as "arbitrary, capricious, . . . or otherwise not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). They argued that the Tribe did not, as of 1934, qualify as a "tribe" within the meaning of the IRA, and that it was not "under Federal jurisdiction." They also claimed that the parcel of land located in Taunton was not eligible for gaming activities under the IGRA.[4]

After considering the parties' motions, the district court granted summary judgment in favor of Interior and the Tribe, finding that the 2021 ROD was not arbitrary or capricious. *Littlefield* v. *U.S. Dep't of the Interior,* No. 22-CV-10273, 2023 WL 1878470, at *15 (D. Mass. Feb. 10, 2023). The plaintiffs appealed.

II.

We review de novo the district court's decision on the parties' cross-motions for summary judgment. *Bos. Redevelopment Auth.* v. *Nat'l Park Serv.,* 838 F.3d 42, 47 (1st Cir. 2016). Under the APA, we "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Because the APA standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid, judicial review, even at the summary judgment stage, is narrow."

[4] The appellants have abandoned this challenge.

Visiting Nurse Ass'n Gregoria Auffant, Inc. v. *Thompson,* 447 F.3d 68, 72 (1st Cir. 2006) (quoting *Associated Fisheries of Maine, Inc.* v. *Daley,* 127 F.3d 104, 109 (1st Cir. 1997)).

We find agency action to be "arbitrary and capricious when the agency 'relie[s] on improper factors, fail[s] to consider pertinent aspects of the problem, offer[s] a rationale contradicting the evidence before it, or reache[s] a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise.'" *Bos. Redevelopment Auth.,* 838 F.3d at 47 (quoting *Daley,* 127 F.3d at 109). Although the standard of review is highly deferential, we must conduct a searching examination to ensure that the agency's decision is reasonably supported by the administrative record. *See, e.g., id.* at 48-49. Still, we "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)).

III.

The appellants' principal argument on appeal is that the 2021 ROD is "not in accordance with law," 5 U.S.C. § 706(2)(A), because the Supreme Court's decision in *Carcieri* precludes a finding that the Mashpee Tribe was "under Federal jurisdiction" in 1934. The appellants also argue that the Secretary's failure to consider this argument makes the 2021 ROD arbitrary or capricious under the APA.

The *Carcieri* case did not involve the Mashpee Tribe, but, rather, the Narragansett Tribe, which is another tribe that has historically resided in southern New England. *See Carcieri,* 555 U.S. at 383. The Court held in *Carcieri* that the Narragansett Tribe was not under federal jurisdiction in 1934. *Id*. at 395-96. The appellants argue that the "Narragansetts' historical record is indistinguishable from the Mashpees[‘] from the 17th century on," and so the Secretary cannot conclude that the Mashpee Tribe was "under Federal jurisdiction" in 1934 "except by conflicting with *Carcieri*."

This argument rests on many faulty premises, starting with the appellants' misreading of *Carcieri*. The Court there held:

> None of the parties or *amici,* including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. . . . Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." Respondents' brief in opposition declined to contest this assertion. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. We therefore reverse the judgment of the Court of Appeals.

Carcieri, 555 U.S. at 395–96 (internal citations omitted and alterations and second omission in original). The Court "accept[ed] . . . as fact" that

the Narragansett Tribe was not under federal jurisdiction in 1934 because Interior had failed to contest petitioners' assertion to that effect. *Id.* Although the Court did suggest that the extremely limited evidence in the record before it was not indicative of federal jurisdiction in 1934, *see id.* at 395, its conclusion rested on the parties' concessions rather than on an analysis of the Narragansett Tribe's history, *id.* at 395-96. Indeed, given the Secretary's pre-*Carcieri* interpretation of the statute, which did not consider a tribe's jurisdictional status in 1934, "it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present." *Carcieri,* 555 U.S. at 401 (Souter, J., concurring).

The *Carcieri* holding with respect to the Narragansett Tribe does not compel the Department as a matter of law, then, to find that the Mashpee Tribe was also not "under Federal jurisdiction" in 1934. The appellants point to some surface similarities between the Mashpees and the Narragansetts, such as the fact that they both had contact with 17th-century colonists and were both subject to "assimilation/citizenship/detribalization laws that ma[de] the[ir] tribal members citizens of the[ir respective] state[s]." But those alleged similarities do not require Interior to conclude that the Narragansetts' history is indistinguishable from the Mashpees' in all relevant respects, and much less that the two tribes' administrative records are

identical. As explained, Interior had no reason to compile evidence that the Narragansetts were under federal jurisdiction in 1934 because its pre-*Carcieri* interpretation of the statute obviated that requirement. *See* M-Opinion at 3 n.15 ("The issue of whether the Narragansett Tribe was 'under federal jurisdiction in 1934' was not considered by the BIA in its decision [that led to *Carcieri*], nor was evidence concerning that issue included in the administrative record before the courts.").

For the same reasons, we reject the argument that the Secretary failed, arbitrarily, to compare the Mashpee Tribe's history to the Narragansett's.[5]

IV.

The appellants also argue that the 2021 ROD is "not in accordance with law" under the APA because, at the time the IRA was enacted, the Mashpee Tribe was not a "tribe" within the meaning of the first definition of "Indian" in the IRA. That definition comprises "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. The appellants claim that, because a "tribe" must have been "under Federal jurisdiction" in 1934, it must, as a matter of logic, have been in

[5] Because we dispose of the appellants' argument on the merits, we do not consider whether the D.D.C.'s rejection of the same argument in prior litigation between the parties, *see Bernhardt,* 466 F. Supp. 3d at 215 n.9, would preclude the appellants from raising it again here.

existence at that time.[6] We do not express a view on this question of statutory interpretation because appellants have not shown, as a matter of law, that the Mashpee Tribe did not qualify as a "tribe" in 1934.

The federal government formally acknowledged the Mashpee Tribe as an Indian tribe in 2007. Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007-01 (Feb. 22, 2007). As part of that process, Interior evaluated the Tribe's historical record and determined, among other things, that the Tribe has been "identified . . . as an American Indian entity on a substantially continuous basis since 1900," *id*. at 8007 (citing 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*. (citing 25 C.F.R. § 83.7(b) (2007)), and that the Tribe "has maintained political influence or authority over its members as an autonomous entity from historical times until the present," *id*. at 8008 (citing 25 C.F.R. § 83.7(c) (2007)). Given those findings, a determination that the Mashpee existed as a tribe in 1934 is supported by a rational view of the record. *See Collins,* 6 F.4th at 172 ("[C]ourts should uphold an agency determination if it is 'supported

[6] The appellants do not contend that the Tribe must have been "recognized" as of 1934. To the extent that they advance this argument in their reply brief, it is waived. *United States* v. *Vanvliet,* 542 F.3d 259, 265 n.3 (1st Cir. 2008) ("Arguments raised for the first time in a reply brief are waived.").

by any rational view of the record.'" (quoting *Riordan,* 797 F.3d at 138)).

The appellants argue that the Secretary was in error because the modern criteria for federal acknowledgment of a tribe are irrelevant, as they postdate passage of the IRA, and the term "tribe" in the statute unambiguously refers to the definition proposed by the Supreme Court in *Montoya* v. *United States,* 180 U.S. 261 (1901). Interpreting a statute not at issue here, the Court noted in that case that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id*. at 266. The Court referenced that definition in a later case, finding that a statute limiting alienation of land "from any Indian nation or tribe of Indians" was "more reasonabl[y] view[ed] . . . in the sense" given in *Montoya,* such that Pueblo Indians were "easily include[d]." *United States* v. *Candelaria,* 271 U.S. 432, 441-42 (1926).

The appellants argue that "Congress in 1934 is presumed to have incorporated that common law definition into the IRA." They claim, then, that the Secretary's failure to test the Mashpee's status as a "tribe" under the *Montoya* definition was arbitrary or capricious. We disagree, because the IRA did not unambiguously incorporate that definition and so the Secretary was not required to consider it.

This Court has noted that "when Congress uses a common law term and does not otherwise define it, it is presumed that Congress intended to adopt the

common law definition." *United States* v. *Gray,* 780 F.3d 458, 466 (1st Cir. 2015) (quoting *United States* v. *Patterson,* 882 F. 2d 595, 603 (1st Cir. 1989)). But, contrary to the appellants' assertion, the term "tribe" is neither a "common law term" of art nor is it "otherwise [un]define[d]" in the statute. *See id.* at 466.

In the IRA, Congress defined both "Indian" and "tribe" in particular ways, without mentioning the *Montoya* definition. *See* 25 U.S.C. § 5129. And, although the *Montoya* Court had provided a definition of "tribe" in the context of interpreting a different statute, the term "tribe" is not a "term[ ] of art in which [is] accumulated the legal tradition and meaning of centuries of practice," such that Congress, in "borrow[ing]" the term, should be presumed to "know[ ] and adopt[ ] the cluster of ideas that were attached . . . and the meaning its use will convey to the judicial mind." *See Morissette* v. *United States,* 342 U.S. 246, 263 (1952); *Carter* v. *United States,* 530 U.S. 255, 264 (2000) ("Th[e] limited scope of the canon on imputing common-law meaning has long been understood."). The cases that appellants cite to are inapposite: the term "tribe" is not, like the term "prosecution," a "familiar legal expression[ ]" used in a "familiar legal sense," *Bradley* v. *United States,* 410 U.S. 605, 609 (1973) (quoting *Henry* v. *United States,* 251 U.S. 393, 395 (1920)), nor is it a term, like "bequest," with a "judicially settled meaning," *United States* v. *Merriam,* 263 U.S. 179, 187 (1923). The *Montoya* definition applied to the statute at issue in that

case, but it was not incorporated as a matter of law into the IRA.

For that reason, we also reject the appellants' argument that Interior acted arbitrarily in failing to consider a 1978 jury verdict determining that the Tribe did not meet the *Montoya* definition at particular times.

V.

The appellants' final challenge is that the 2021 ROD is arbitrary or capricious in its treatment of the evidence, for a number of reasons. The appellants concede that Interior's M-Opinion provides the controlling standards,[7] but they disagree with the Secretary's application of those standards to the Tribe's historical evidence.

We begin by describing the M-Opinion's interpretation of "under Federal jurisdiction." The M-Opinion first determined that the phrase is ambiguous and that the agency's reasonable interpretation of it should be entitled to deference. M-Opinion at 17. The M-Opinion then rejected the view that "Congress' constitutional plenary authority over tribes

[7] At the district court, the appellants contested the validity of the M-Opinion, but they have abandoned this argument on appeal. At oral argument, the appellants emphasized that they challenged the M-Opinion and the 2021 ROD to the extent that they "treat BIA school attendance as a 'tag, you're it' form of federal jurisdiction, where the attendance of a single child at such a school becomes the basis" for "under Federal jurisdiction" status that can then be terminated only through express congressional action. We address that argument below.

is enough to fulfill the 'under federal jurisdiction' requirement." *Id.* at 17-18. Instead, after reviewing "the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, [the M-Opinion] construe[d] the phrase . . . as entailing a two-part inquiry." *Id.* at 19. The Secretary must first "examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction." *Id.* If that is the case, the Secretary then "ascertain[s] whether the tribe's jurisdictional status remained intact in 1934." *Id.*

With respect to the first part of the inquiry, the focus is on "whether the United States had, in 1934 or at some point . . . prior to 1934, taken an action or series of actions . . . for or on behalf of the tribe or in some instance[s] tribal members . . . establish[ing] or . . . reflect[ing] federal obligations, duties, responsibility for or authority over the tribe." *Id.* The M-Opinion noted that while in certain cases particular actions "may in and of themselves demonstrate that a tribe was . . . under federal jurisdiction," in other situations "a variety of actions when viewed in concert may demonstrate" that as well. *Id.*

The M-Opinion listed, as examples of actions demonstrating the exercise of federal jurisdiction, the negotiation or ratification of treaties with the tribe, "the approval of contracts between [the] tribe and non-Indians," "enforcement of the Trade and Intercourse Acts," "education of Indian students at BIA schools," and "provision of health or social

services to [the] tribe." *Id*. But those examples are not exhaustive and other actions may show that a tribe was under federal jurisdiction. *Id*.

If the United States' actions towards a tribe, viewed either individually or "in concert," show that the tribe was under federal jurisdiction before 1934, the Secretary proceeds to examine whether that "jurisdictional status remained intact in 1934." *Id*. Some evidence, such as a tribal vote on "whether to opt out of the IRA in the years following enactment," may be so conclusive that it obviates the need for further inquiry. *Id*. at 19-20. In other cases, "it will be necessary to explore the universe of actions or evidence that might be relevant" to a determination that the tribe's jurisdictional status was retained. *Id*. at 19. And "there may be periods where federal jurisdiction exists but is dormant," such that "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*. at 20. The M-Opinion notes, further, that "evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action." *Id*.

In the 2021 ROD, Interior evaluated four categories of evidence of "federal dealing with the Mashpee Tribe from 1820 to 1934," 2021 ROD at 25: (1) the federal government's consideration in the 1820s of whether to remove the Mashpee Tribe to the western part of the United States and its decision not to do so, *id*. at 12-16; (2) the atten-

dance of Mashpee children at the federally operated Carlisle Indian School, *id.* at 16-19; (3) federal surveys and reports discussing the Tribe, *id.* at 20-23; and (4) the enumeration of the Tribe and its members in federal census records, *id.* at 23-25. "[V]iew[ing] in concert the totality of the evidence," Interior found that the Tribe was under federal jurisdiction prior to 1934. *Id.* at 25.

Proceeding to the second step of the M-Opinion's test, Interior examined whether the Tribe's jurisdictional status remained intact as of 1934. *See id.;* M-Opinion at 19. Interior considered two additional lines of evidence: first, that the federal government "did not seek to implement [the] IRA for the Tribe" in the years following its enactment, 2021 ROD at 26, and second, that some federal officials at the time wrote letters tending to disclaim responsibility over the Tribe, *id.* at 27-28. Viewing the "greater weight of the probative evidence . . . in its entirety," Interior determined that the federal government had not terminated its jurisdictional relationship with the Tribe. *Id.* at 29.

The appellants challenge the Secretary's application of the M-Opinion's standards by asserting that, to satisfy the "under Federal jurisdiction" standard, the Secretary must point to specific actions by the federal government and cannot rely simply on evidence of Congress's and the United States' reserved or unexercised plenary power over Indian affairs. *See Haaland* v. *Brackeen,* 599 U.S. 255, 143 (2023) ("In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as "'plenary and exclu-

sive.'"') (quoting *United States* v. *Lara,* 541 U.S. 193, 200 (2004)). We agree with this general proposition, and so does the M-Opinion. *See* M-Opinion at 17-18. If the Secretary's decision were to rest solely on evidence of Congress's potential, but not actually exercised, power over Indian affairs, that would be in error, as it would thwart Congress's intent in imposing the limitation expressed in the "under Federal jurisdiction" requirement. *See id.* at 9-12 (reviewing the legislative history and concluding that it was inconclusive as to the meaning of the requirement but that it "indicat[ed] a desire to limit the scope of eligibility for IRA benefits"); *see also United States* v. *Flores,* 968 F.2d 1366, 1371 (1st Cir. 1992) ("Courts should not lightly read entire clauses out of statutes, but should, to the exact contrary, attempt to give meaning to each word and phrase.") But, for the reasons elaborated below, we do not view the Secretary as having committed any such error in the 2021 ROD.

We reject at the outset, also, the appellants' general argument that the Secretary was not free in the 2021 ROD to depart from the positions taken in the 2018 ROD. That argument is self-evidently wrong. The 2018 decision was vacated by judicial order and the agency was required to reconsider the evidence in accordance with the remand instructions. *Bernhardt,* 466 F. Supp. 3d at 236. Interior was then allowed to "change its existing position . . . 'as long as [it] provide[d] a reasoned explanation for the change.'" *Housatonic River Initiative* v. *U.S. EPA,* 75 F.4th 248, 270 (1st Cir. 2023) (first alteration in original) (quoting *Encino*

Motorcars, LLC v. *Navarro,* 579 U.S. 211, 221 (2016)). Interior did so. The 2021 ROD specifically addressed why the Secretary evaluated several pieces of evidence differently than in the 2018 ROD. 2021 ROD at 15, 19, 22-23, 25. Generally, in the 2021 ROD, Interior considered all of the evidence "in concert" to determine whether the Tribe was "under Federal jurisdiction." In the 2018 ROD, by contrast, Interior had evaluated only whether each piece of evidence "in and of itself" could unambiguously establish such jurisdiction. *See Bernhardt,* 466 F. Supp. 3d at 218. Interior's revised approach in the 2021 ROD was in accordance with the M-Opinion and the D.D.C.'s remand order. *See* M-Opinion at 19; *Bernhardt,* 466 F. Supp. 3d at 218 ("On remand, the Secretary must follow the directive of the M-Opinion and consider the probative evidence 'in concert' with each piece of other probative evidence.").

We proceed to the appellants' other challenges as they pertain to the Secretary's consideration of each line of evidence in the 2021 ROD.

A. Decision not to remove the Tribe

First, the Secretary considered evidence related to the federal government's decision, in the 1820s, not to remove the Mashpee Tribe from their lands in Massachusetts to the western parts of the United States. 2021 ROD at 12. As the 2021 ROD notes, "[d]uring the almost 30-year period between 1815 and 1845, federal Indian policy focused almost entirely on removal of tribes like the Mashpee from

the east to relatively less populated areas to the west." *Id.*

The Secretary evaluated a report from 1822 (the "Morse Report"), commissioned by the federal government, which, after discussing the conditions of the Mashpee and listing it as a "tribe[] within the jurisdiction of the United States," *id.* at 13 (emphasis removed), recommended against removing the Tribe "due to their industriousness and tenacious ties to their land," *id.* at 15. The full report was "circulated to Congress, as well as within the Executive, and debated in the House of Representatives." *Id.* at 14. "President James Monroe and the executive" also "relied" on the report "when formulating the . . . removal policy and the decision" not to apply it to the Mashpee Tribe. *Id.*

The Secretary determined that "[t]he Morse Report and federal officials' subsequent reliance on it[] provide probative evidence that the Federal Government actively considered the Mashpee within its jurisdiction and subject to the removal policy." *Id.* at 15. While the 2018 ROD had assessed this evidence as "show[ing]" only the "potential[]" and not the "actual[]" "exercise of federal Indian authority," the 2021 ROD viewed it as demonstrating that "the United States took specific action" by "consider[ing] and ultimately reject[ing] application of the removal policy to the Mashpee." *Id.* (emphasis removed).

The appellants argue that, under the M-Opinion's standards, only "affirmative actions" can show federal jurisdiction, and the government's decision not to remove the Tribe was "*in*-action[]

. . . that left the Mashpees exactly where they had always been." We agree with the appellants that mere passivity or neglect towards a tribe would not demonstrate the exercise of federal jurisdiction under the M-Opinion's standards, which require evidence of "actions . . . reflect[ing] federal obligations, duties, responsibility for or authority over the tribe." M-Opinion at 19. But we view the Secretary's determination that the federal government took "specific action" in this case as not arbitrary or capricious. The federal government commissioned a report that examined, among other things, the condition of the Mashpee Tribe and its susceptibility to removal; it issued a specific recommendation not to remove the Tribe; the recommendation was adopted by the Executive Branch and transmitted to Congress; and the Mashpee were exempted from the removal policy. 2021 ROD at 13-15. The decision not to remove the Tribe was the culmination of a process, or a "series of actions," conducted by the federal government and "reflect[ing] . . . responsibility for or authority over the tribe." M-Opinion at 19; *see Bernhardt,* 466 F. Supp. 3d at 229-30 (finding "the 2018 ROD's treatment of the Morse Report [to be] arbitrary and capricious" partly because "[t]he making of a recommendation is, in and of itself, an action").[8]

[8] At oral argument, counsel for the appellants advanced, for the first time, the somewhat different argument that, because the federal government's decision supposedly encompassed all of the Indian tribes in Massachusetts, and not just the Mashpee Tribe, it should be viewed as unexercised plenary power rather than as an action showing federal jurisdiction

As such, the Morse Report constitutes probative evidence of federal jurisdiction over the Tribe, "[w]hen viewed in concert [with] the totality of the evidence." 2021 ROD at 25. Indeed, the Secretary does not rest the finding that the Tribe was "under Federal jurisdiction" solely on this or on any other single factor in and of itself, but, rather, views all of the evidence "in concert" as establishing that conclusion. *Id*. That approach accords with the M-Opinion's standards, *see* M-Opinion at 19, and so we hold that the Secretary's treatment of this evidence was not arbitrary or capricious.

B. Attendance at the Carlisle School

The Secretary also considered evidence related to the attendance of Mashpee children at the Carlisle Indian School, a federally operated institution, "every year between 1905 and 1918." 2021 ROD at 16, 18.

The Carlisle School was established in 1882 through congressional appropriations for the pur-

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over the Tribe specifically. Setting aside the factual issue of whether all tribes in Massachusetts were exempted from removal, which appellants have not proven to be the case, the argument is waived, as it was not raised in the briefs. *United States* v. *Leoner-Aguirre,* 939 F.3d 310, 319 (1st Cir. 2019). We note, too, that the Morse Report—as quoted in the 2021 ROD—recommends against removal of the Mashpee Tribe *in particular,* and contains a rationale for exempting the Tribe that is specific to it: "They are [of] public utility here as expert whalemen and manufacturers of various light articles; have lost their sympathy with their brethren of the forest; are in possession of many privileges, peculiar to a coast, indented by the sea; their local attachments are strong; they are tenacious of their lands." 2021 ROD at 13-14.

pose of educating Indian children. *Id.* at 17. To ensure compliance with the "regulations regarding admission," the school would evaluate each "student's tribe, blood quantum," and whether he or she had been "living in 'Indian fashion.'" *Id.* at 18. The overarching goal, the Secretary noted, was to advance the federal government's prevailing "'civilization' policy," *id.* at 16, which involved promoting the assimilation of Indians "into a Western, capitalist way of life," as a scholar quoted in the ROD explained, *id.* (quoting Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention,* 11 Colum. J. Race & L. 811, 826-27 (2021)). To that end, the Carlisle students were "subject to significant federal control" over their "education, finances, physical health, and freedom of movement." 2021 ROD at 17-18. They were essentially "treat[ed] . . . as wards of the federal government." *Id.* at 18.

Citing the M-Opinion, the Secretary noted that the federal government's actions toward individual "tribal members" may "in some instances" constitute probative evidence that the tribe was "under Federal jurisdiction." *Id.* at 19 (citing M-Opinion at 19). In this case, the "extraordinary control" exercised by "federal Indian agents" over Mashpee students' "education, finances and health," as well as the "provision of health and social services" to those students, "constitute[d] a clear assertion of federal authority over the Tribe and its members." *Id.; see also* M-Opinion at 19 (listing, as examples of probative evidence, the "education of Indian stu-

dents at BIA schools" and "provision of health or social services to [the] tribe").

The appellants counter with three arguments. First, they claim that Interior "multipli[ed]" the significance of the school-related evidence by considering, as though they were "separate categories" of evidence, different types of actions undertaken by federal officials at the school—like control over the students' finances, health care, and education —that should all "logically collapse into one" category of evidence. But Interior merely examined the multiple "actions," within the meaning of the M-Opinion, that the federal government took in connection with the Carlisle School. We do not see a reason why Interior should be precluded from considering different ways in which certain evidence may be probative.

Second, the appellants argue that the Mashpee children who attended Carlisle School did so voluntarily, which contradicts the Secretary's "rhetoric-filled narrative" that they were forced to attend the school. But, contrary to the appellants' representation, nowhere did the Secretary claim that the Mashpee children were educated at Carlisle without their parents' ostensible consent. *See* 2021 ROD at 8, 17-19. Setting aside this dispute, the Secretary's reasoning as to why the school-related evidence is probative did not rely on whether the Mashpee children attended the school voluntarily or not. The key factor, uncontested by the appellants, was the degree of control exercised by federal officials over all aspects of those students' lives. Only by way of context did the Secretary explain

that such control served a broader policy of assimilation.

The appellants argue that the M-Opinion and the 2021 ROD "irrationally" treat "attendance of a single child" at a BIA school like Carlisle as "the basis for a tribe being under federal jurisdiction in 1934 even when the attendance" ended in 1918, when the Carlisle School closed. But that proposition misrepresents the M-Opinion and the 2021 ROD, under which "BIA school attendance" is a probative piece of evidence supporting the existence of federal jurisdiction but not necessarily the entire basis for such a finding.

Having rejected the appellants' arguments, we find that the Secretary's treatment of the Carlisle School evidence was not arbitrary or capricious.

C. Federal reports

Next, the Secretary evaluated evidence related to three reports commissioned or produced by federal officials that documented, among other things, the Mashpee Tribe's conditions at the time of the reports. *Id.* at 20-23. Because the reports "provided detailed information regarding the Tribe's status and set forth plans for exercising federal authority over the Tribe," and the government "relied on these reports in making significant decisions regarding the Tribe," they "constitute probative evidence of ['under Federal jurisdiction' status]." *Id.* at 23.

Appellants argue these reports "resulted in no actions" toward the Tribe. But, again, the Secre-

tary found that the federal government's collecting information about the Tribe, setting it out in a report that makes recommendations, and subsequently relying on that report to make decisions regarding the Tribe (even the decision not to interfere with it) all constituted "federal actions" under the M-Opinion. *Id.* at 22-23. The appellants assert those actions should be viewed as "inactions", but they do not explain why, aside from suggesting that they are not "affirmative" or "major" actions. That argument goes to the weight that the Secretary should accord the evidence, and not to whether it constitutes acceptable evidence under the M-Opinion's standards. But the Secretary did not view any individual report or even all of the reports considered together as establishing the existence of federal jurisdiction "in and of [themselves]," but only when they were viewed "in concert" with the totality of the evidence. *Id.* at 23. We cannot conclude that the reports were given undue weight.

D. Federal census records

Interior considered evidence that the federal government had classified Mashpee tribal members as "Indians" on multiple general censuses and had also included them in specially prepared censuses covering BIA schools such as the Carlisle School. *Id.* at 23-24. The agency found that those "consistent efforts to enumerate the Tribe and its members in federal reports and census records . . . are probative of and demonstrate the Tribe's jurisdictional relationship with the Federal Government[,]

[w]hen viewed in concert with other probative evidence." *Id.* at 25.

The appellants claim that enumeration of tribal members in the general censuses "is no different from the principle of plenary power," and only censuses conducted by the Office of Indian Affairs constitute evidence of a tribe's being "under Federal jurisdiction." But this rule is not supported by the M-Opinion, and the appellants do not provide any other authority for it. We uphold, then, the Secretary's determination that inclusion of Mashpee tribal members in federal census rolls is probative of the Tribe's being "under Federal jurisdiction."

E. Determination that the Tribe continued to be "under Federal jurisdiction" as of 1934

After determining that the Tribe had been under federal jurisdiction prior to 1934, when the IRA was enacted, the ROD proceeded to examine whether the relationship remained intact as of that year. *See id.* at 25; M-Opinion at 19. The Secretary evaluated two lines of evidence and found that they did not show the Tribe had lost its jurisdictional status. 2021 ROD at 26-28.

First, the Secretary considered the fact that, following the IRA's enactment, the federal government "did not seek to implement [the statute] for the Tribe." *Id.* at 26. The IRA "directed the Secretary to conduct elections for Indians residing on a reservation to vote to accept or reject application of the Act," but no such election was organized for the Mashpee Tribe. *Id.* But, the Secretary noted, "fed-

eral officials made several errors in their effort to implement the IRA," and "certain tribes were later recognized as eligible" under the statute even though they had not held an IRA election. *Id.* As such, "the failure to implement the IRA for the Tribe is not an indication that the Tribe's jurisdictional status was terminated." *Id.*

Second, the Secretary reviewed a body of correspondence from the 1930s in which BIA officials "generally disclaim[ed] federal jurisdiction over the Tribe." *Id.* at 27. In particular, Commissioner for Indian Affairs John Collier, denying a Mashpee Tribe member's request for assistance, explained that the Tribe's needs "w[ould] have to be met . . . through local and State channels" until such time as "the Federal Government should undertake further provision for small Eastern groups under the States." *Id.* The Secretary found that "Collier's letter reflect[ed] the contemporaneous federal policy of deferring to state jurisdiction over New England tribes," as well as "[p]ractical budgetary constraints . . . exacerbated by the Great Depression," and that it "did not rest on a legal analysis as to whether the BIA had legal authority over the Tribe." *Id.* at 27-28. Other letters disclaiming responsibility over the Mashpee contained erroneous statements. *Id.* at 28. The Secretary concluded, then, that the letters were "best characterized as reflections of evolving federal policy, practical constraints on implementing the IRA, and factual mistakes, rather than termination of the Tribe's jurisdictional relationship with the Federal Government." *Id.* at 27.

As an additional reason not to view the letters' disclaimers as signifying termination of the Tribe's jurisdictional status, the Secretary observed, quoting the M-Opinion, that "evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction." *Id.* at 29 (quoting M-Opinion at 20). And "Congress never adopted nor considered any termination legislation regarding the Tribe." *Id.* So, considering all the "probative evidence . . . in its entirety," the Secretary determined that "the Tribe's jurisdictional status remained intact through 1934." *Id.*

The appellants argue that BIA officials' failure to apply the IRA to certain tribes that were later found to be eligible does not establish that they committed the same error with respect to the Mashpee Tribe. But the Secretary did not find that the implementation errors proved in and of themselves that the Tribe was under federal jurisdiction, but only that they diminished the weight of the letters' disavowal of responsibility. *Id.* at 26-28. That determination is not arbitrary or capricious.

The appellants also challenge the 2021 ROD and the M-Opinion to the extent that they set up the principle that only Congress, acting expressly, can terminate "under Federal jurisdiction" status once it is established. That principle is indeed doubtful. But we do not understand the Secretary's determination as resting on any such broad proposition. Rather, the 2021 ROD concluded that the Tribe's jurisdictional status still existed in 1934 because, as the Secretary determined, the letters disclaiming jurisdiction had been motivated by error or pre-

vailing policy considerations, and not by Interior's considered termination of its jurisdiction over the Tribe. *Id.* As such, there was little probative evidence showing that jurisdiction had been lost, and "the greater weight of the probative evidence, when viewed in its entirety," showed that it had "remained intact through 1934." *Id.* at 29. The Secretary did not act arbitrarily or capriciously in making that determination.

VI.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 23-1197

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.

JUDGMENT
Entered: October 31, 2023

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: David J. Apfel, David Henry Tennant, Christopher Paul Anderson, Donald Campbell Lockhart, Mary Gabrielle Sprague, Philip Aloysius O'Connell Jr., Tony K. Lu, Tami Lyn Azorsky, Samuel Daughety, Suzanne Schaeffer, V. Heather Sibbison, Catelin Aiwohi

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 22-CV-10273-AK

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, and DAVID PURDY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA A. HAALAND, *in her official capacity as Secretary of the Interior;* BUREAU OF INDIAN AFFAIRS; and BRYAN NEWLAND, *in his official capacity as Assistant Secretary of the Interior for Indian Affairs;*

Defendants,

and

MASHPEE WAMPANOAG TRIBE,

Intervenor-Defendant.

MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

A. KELLEY, D.J.

This is a challenge to a decision of the United States Secretary of the Interior (the "Secretary")[1] brought under the Administrative Procedure Act. In December 2021, the Secretary issued a decision taking into trust, for the benefit of the Mashpee Wampanoag Tribe ("Mashpee" or "Tribe"),[2] 321 acres of land located in southeastern Massachusetts (the "Designated Lands"). Plaintiffs are 23 residents of Taunton, Massachusetts, who live in the vicinity of a portion of the Designated Lands. They allege that the Secretary's decision was arbitrary, capricious, and otherwise not in accordance with law. The Tribe has intervened as a defendant. On the parties' cross-motions for summary judgment, the Court finds that the Secretary's decision was not arbitrary and capricious, and will accordingly **GRANT** Defendants' motions [Dkts. 46, 48] and **DENY** Plaintiffs' motion [Dkt. 45].

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[1] For convenience, this opinion attributes the actions of all federal parties, including the Department of the Interior, the Bureau of Indian Affairs, and the Assistant Secretary of the Interior for Indian Affairs, to Debra A. Haaland, the United States Secretary of the Interior, as she is the party who bears the ultimate responsibility for the decision under review.

[2] The present-day Mashpee Wampanoag Tribe is a legal successor to historic tribes known by many names, including the Pokanoket, the Mashpee, the Wampanoag, and the South Sea Tribe. For convenience, this opinion refers to the present-day Mashpee Wampanoag Tribe and all of its recognized predecessors in interest as either the "Mashpee" or the "Tribe."

I. BACKGROUND

A. The Mashpee and the Designated Lands

The Mashpee are Indigenous people of North America whose historic lands include southeastern Massachusetts and eastern Rhode Island. As the Tribe notes in its briefing on these motions, its "history, government, language and culture . . . predates the founding of the United States." [Dkt. 49 at 1]; *see also Thanksgiving Day 2010,* Proclamation No. 8606, 75 Fed. Reg. 74605 (Dec. 1, 2010) (recognizing that "the Wampanoag tribe . . . had been living and thriving around Plymouth, Massachusetts for thousands of years" prior to European settlement). Annually, millions of Americans celebrate the Tribe's impact on this country's history through the Thanksgiving holiday. *See, e.g., Thanksgiving Day 2018,* Proclamation No. 9827, 83 Fed. Reg. 61109 (Nov. 28, 2018) ("Members of the Wampanoag tribe—who had taught the Pilgrims how to farm in New England and helped them adjust and thrive in that new land—shared in the bounty and celebration"); *Thanksgiving Day 2011,* Proclamation No. 8755, 76 Fed. Reg. 72079 (Nov. 21, 2011) ("The feast honored the Wampanoag for generously extending their knowledge of local game and agriculture to the Pilgrims, and today we renew our gratitude to all American Indians and Alaska Natives."); *Thanksgiving Day 1995,* Proclamation No. 6849, 60 Fed. Reg. 57311 (Nov. 14, 1995) ("In 1621, Massachusetts Bay Governor William Bradford invited members of the neighboring Wampanoag tribe to join the Pilgrims as they

celebrated their first harvest . . . More than 300 years later, the tradition inspired by that gathering continues on Thanksgiving Day across America—a holiday that unites citizens from every culture, race, and background.").

At the time of their first contact with Europeans in the 16th and 17th centuries, the Tribe's territory "comprised a group of allied villages in eastern Rhode Island and in southeastern Massachusetts." [Record of Decision, Dkt. 1-3 ("2021 ROD") at 40 (quoting Bert Salwen, *Indians of S. N.E. and Long Isl.: Early Period* in 15 HANDBOOK OF N. AM. INDIANS 160, 171 (1978))]. This land covered all of present-day Bristol County and Barnstable County, Massachusetts, including the towns of Taunton and Mashpee. [*Id.* at 41]. At that time, present-day Taunton was known as the village of Cohannet. [*Id.* at 41, 49]. The Mashpee were struck by an epidemic between 1617 and 1619 that resulted in extensive loss of life. [*Id.* at 41]. After the English ship *Mayflower* arrived in Plymouth, Massachusetts, in 1620, tribal leadership entered into a peace treaty with the Plymouth Colony, which was the first English political entity established in Massachusetts. [*See id.*]

Between 1621 and 1670, the Mashpee sold or gave large tracts of land to English settlers. [*Id.*] This included the sale of Cohannet, which the Plymouth Colony incorporated as the town of Taunton in 1639. [*Id.* at 49]. In 1675, disputes around land use and land ownership led to a war between the English settlers and New England tribes, including the Mashpee. [*Id.* at 42]. This con-

flict, now known as King Philip's War, resulted in large losses of life among the Mashpee. [*Id.*]

After the war, most of the Mashpee residing in mainland Massachusetts dispersed, with some sold into slavery. [*Id.*] Many of those who remained coalesced into settlements organized by the English, [*id.*], including the town of Mashpee, which was formed from land deeded by individual tribal leaders to the Tribe in 1665 and 1666, [*id.* at 9]. In 1685, the colonial court confirmed these deeds and guaranteed that the land belonged to "said Indians, to be perpetually to them and their children," with a restriction on transfer to non-Mashpee without the assent of the entire Tribe. [*Id.*] The lands were initially governed by a six-person council of Mashpee, but the General Court of Massachusetts diluted tribal control in 1746 by appointing three non-Mashpee overseers. [*Id.*] In 1763, the General Court converted the land into a self-governing "Indian district." [*Id.*] Massachusetts terminated Mashpee control over this district in 1788, but restored it in 1834. [*Id.*] In 1869, Massachusetts eliminated the restriction on transfer of the land to non-Mashpee, and in 1870, the state incorporated the town of Mashpee, coterminous with the borders of the prior Indian district. [*Id.* at 10].

The Tribe had 2,633 members in 2021. [*Id.* at 52]. Of these members, 65 percent lived in Massachusetts, 40 percent lived in the town of Mashpee (where the Tribe is headquartered), and over 60 percent lived within 50 miles of the land in Taunton that is the subject of this litigation. [*Id.* at 52].

B. Statutory and Interpretative History

Congress adopted the Indian Reorganization Act ("IRA") in 1934 "to change 'a century of oppression and paternalism' in the relationship between the United States and its native Indian tribes." *Mashpee Wampanoag Tribe v. Bernhardt,* 466 F. Supp. 3d 199, 207 (D.D.C. 2020) (quoting H.R. Rep. No. 73-1804, at 6 (1934)). The statute's purpose is "to create the mechanisms whereby tribal governments could be reorganized and tribal corporate structures could be developed" and to facilitate the acquisition of reservation lands. *Id*. (citations omitted).

The IRA authorizes the Secretary of the Interior "to acquire land and hold it in trust 'for the purpose of providing land for Indians.'" *Carcieri v. Salazar,* 555 U.S. 379, 381–82 (2009) (quoting 25 U.SC. § 5108). The Secretary may only take land into trust for persons or tribes that meet at least one of the statute's definitions of "Indian." *Littlefield v. Mashpee Wampanoag Tribe* (*"Littlefield II*"), 951 F.3d 30 at 34 (1st Cir. 2020). The IRA defines "Indian" as follows:

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

25 U.S.C. § 5129 (bracketed numbers added).

The Supreme Court partially interpreted the IRA's first definition of "Indian"—the definition at issue in this action—in *Carcieri,* a challenge to the Secretary's power to take lands into trust for the Narragansett Tribe, whose traditional lands neighbor the Mashpees'. The Supreme Court defined the term "now" in the phrase "now under Federal jurisdiction" as referring to the date of the IRA's enactment in 1934. *Carcieri,* 555 U.S. at 395. In effect, *Carcieri* set 1934 as the reference date for all future litigation under the IRA's first definition of "Indian," requiring the Secretary to find that a tribe was "under Federal jurisdiction" in that year before exercising her authority under this provision to take land into trust. *See id*.

Left unanswered by the *Carcieri* majority was the proper construction of the term "under Federal jurisdiction." See *Bernhardt,* 466 F. Supp. 3d at 207. In a concurring opinion, Justice Breyer detailed examples of tribes whom the federal government had erroneously concluded were not under its jurisdiction in 1934, but whom the government later recognized. *See Carcieri,* 555 U.S. at 398–99 (Breyer, J., concurring) (citing examples of the Stillaguamish Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and Mole Lake Tribe). Justice Breyer suggested that post-1934 federal recognition of a tribe could reflect pre-1934 "federal jurisdiction" such that the tribe could qualify under the IRA's first definition of "Indian." *Id*. at 399. He further outlined types of evidence that could imply "a 1934 relationship between [a tribe] and [the] Federal Government," including a treaty in effect in 1934, a pre-1934 congressional

appropriation, and enrollment with the Indian Office prior to 1934. *Id*.

After *Carcieri,* the Solicitor of the Department of the Interior ("the Department") published a memorandum ("the M-Opinion") establishing a framework for interpreting the phrase "under Federal jurisdiction."[3] U.S. Dept. of Interior, M-37029, Memorandum on the Meaning of "Under Federal Jurisdiction" for Purposes of the IRA (*"M-Opinion*") (March 12, 2014). The M-Opinion applies the familiar two-step interpretative process the Supreme Court delineated in *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984), first concluding that Congress had "left a gap for the agency to fill" in the statute's meaning, and then proposing an interpretation that is binding on the Secretary and the entire Department, including the Bureau of Indian Affairs ("BIA").[4] *Id*. at 843–44; *see M-Opinion* at 4–5, 17.

The M-Opinion creates a two-part inquiry for determining whether a tribe was "under Federal

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[3] The Solicitor withdrew the M-Opinion in 2020, *see* U.S. Dept. of Interior, M-37055, but reinstated it on April 27, 2021, *see* U.S. Dept. of Interior, M-37070. The M-Opinion was thus in force at the time of the ROD under review, which was published on December 22, 2021.

[4] The D.C. Circuit upheld the M-Opinion's application of *Chevron* on a direct challenge to its validity, concluding that the Department was reasonable in concluding that the term "under Federal jurisdiction" was ambiguous, and that the two-part test it established to interpret the term was likewise reasonable. *Confederated Tribes of Grand Ronde Cmty. v. Jewell,* 830 F.3d 552, 564–65 (D.C. Cir. 2016). Neither the Supreme Court nor the First Circuit has considered the validity of the M-Opinion.

jurisdiction" in 1934. The Secretary first must determine whether there was a "sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction." *Bernhardt,* 466 F. Supp. 3d at 208–09; *M-Opinion* at 19. To make this finding, the Secretary asks "whether the United States had, in 1934 or at some point in the tribe's history prior to 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*. This inquiry is "fact and tribe-specific," *id*., and the Secretary may afford different types of evidence different weight, *Bernhardt,* 466 F. Supp. 3d at 209. The Secretary may consider "guardian-like action[s]" the government took on behalf of a tribe, including, but not limited to, negotiation of treaties, approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws, the education of the tribe's children at BIA schools, and provision of federal health and social services to the tribe. *M-Opinion* at 19. If the Secretary concludes jurisdiction existed prior to 1934, the second step of her inquiry is to determine "whether the tribe's jurisdictional status remained intact in 1934." *Id*.

C. Procedural History

The parties have been litigating the lands in question for 16 years. In 2007, the Secretary recognized the Mashpee as "an Indian tribe within the meaning of Federal law." 72 Fed. Reg. 8007-01

(Feb. 22, 2007). Shortly after, the Tribe submitted a "fee-to-trust" application requesting that the Department acquire and take into trust the Designated Lands for purposes of establishing a reservation. *Littlefield II,* 951 F.3d at 33. At this time, the Tribe owned and operated the portion of the Designated Lands in the town of Mashpee, and planned to acquire the portion in Taunton. *Id*.

In 2015, the Secretary issued a written decision granting the Tribe's application, and shortly thereafter took the Designated Lands into trust and proclaimed them to be the Tribe's reservation. *Id*. at 33–34; *see* 81 Fed. Reg. 948 (Jan. 8, 2016). The Secretary concluded that the Mashpee qualified as "Indians" within the meaning of the *second* definition of that term in the IRA: "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 5129; *Littlefield v. U.S. Dept. of Interior* (*"Littlefield I*"), 199 F. Supp. 3d 391, 393 (D. Mass. 2016) (Young, J.). Plaintiffs, as neighbors to the Taunton parcel of land, filed suit in this district, arguing that the Secretary's decision exceeded statutory authority. *Littlefield I,* 199 F. Supp. 3d at 393. This district granted summary judgment for Plaintiffs, concluding that the Secretary had improperly construed the IRA's second definition of "Indian." *Id*. at 398–400. It remanded the matter to the Secretary for reconsideration of the Tribe's application, suggesting that the agency "analyze the Tribe's eligibility under the first definition of 'Indian.'" *Littlefield II,* 951 F.3d at 34.

In 2018, the Secretary issued a second written decision ("the 2018 ROD") denying the Tribe's application, concluding that the Tribe did not qualify under the IRA's first definition of "Indian" because it was not under federal jurisdiction in 1934. *Id*. The Tribe then sued the Secretary in the U.S. District Court for the District of Columbia ("the D.C. district court"), arguing that the Secretary's interpretation of the first definition of "Indian" was arbitrary, capricious, and contrary to law. *Bernhardt,* 466 F. Supp. 3d at 212. The Plaintiffs to this action intervened in the D.C. district court action as defendants. *See id*. at 205. Simultaneously, the Tribe appealed the *Littlefield I* decision on the second definition of "Indian" to the First Circuit, which affirmed the district court's interpretation of that definition to exclude the Tribe. *Littlefield II,* 951 F.3d at 41.

With the litigation concerning the Tribe's eligibility under the second definition resolved,[5] the D.C. district court considered the Secretary's 2018 decision that the Tribe did not qualify under the first definition. That court vacated the decision, faulting the Secretary for "evaluating the evidence in isolation and failing to view the probative evidence 'in concert,'" as the M-Opinion requires. *See Bernhardt,* 466 F. Supp. 3d at 218. It further held that the Secretary "improperly treated the Mashpee's evidence" by misapplying the M-Opinion's standards to evidence concerning the education of Mashpee children at the federally-operated Carlisle Indian School, the appearance of the Tribe

[5] The Tribe did not appeal the First Circuit's decision to the Supreme Court.

on federal census rolls, and federal reports and surveys regarding the Tribe. *Id.* at 219–35. The D.C. district court remanded the action to the agency with instructions to "apply the two-part test in [the M-Opinion]—correctly this time." *Id.* at 236.

On remand, the Secretary issued a third written decision in December 2021 ("the 2021 ROD"), which is the decision under review here. The 2021 ROD concluded that the Tribe had been under federal jurisdiction in 1934 and thus qualified under the IRA's first definition of "Indian." The Secretary accordingly retook the Designated Lands into trust. Plaintiffs, as they had following the 2015 decision authorizing the Secretary to take the lands into trust, brought suit in this district, again arguing that the Secretary's decision exceeded statutory authority. [Dkt. 1]. The Mashpee timely moved to intervene as defendants. [Dkt. 16]. The Secretary moved to transfer the action to the D.C. district court, which had issued the most recent decision remanding this matter to the agency. [Dkt. 10]. This district denied that motion and further concluded that this matter was not related to *Littlefield I,* the 2016 action between these parties concerning the application of the second definition of "Indian" to the Tribe. [Dkt. 27]. The case was redrawn to this session, and the three parties—Plaintiffs, the Mashpee Wampanoag Tribe, and the Secretary—filed the instant-cross motions for summary judgment. Oral argument was presented on January 13, 2023, and the Court took the matter under advisement.

II. STANDARDS OF LAW

Plaintiffs seek judicial review of the Secretary's decision under Chapter 7 of the Administrative Procedure Act ("APA"). That statute provides that "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." 5 U.S.C. § 706.

Where a party challenges an administrative action under the APA, "summary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Minuteman Health, Inc. v. U.S. Dep't of Health & Human Servs.,* 291 F. Supp. 3d 174, 189–90 (D. Mass. 2018) (citation omitted). Accordingly, the traditional Rule 56 standard does not apply; rather, "a motion for summary judgment is simply a vehicle to tee up a case for judicial review." *Boston Redevel. Auth. v. National Park Serv.,* 838 F.3d 42, 47 (1st Cir. 2016). Courts do not review the administrative record to determine whether a material dispute of fact remains, but rather ask "whether the agency action was arbitrary and capricious." *Id.*; *see* 5 U.S.C. § 706 (directing courts to "hold unlawful and set aside agency action, findings, and conclusions" that they deem "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right").

The scope of judicial review under the arbitrary and capricious standard "is narrow[,] and a court is

not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Rather, the court "must examine the evidence relied on by the agency and the reasons given for its decision," and determine whether it articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Minuteman Health,* 291 F. Supp. 3d at 190 (quoting *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43). This standard is "highly deferential," and accordingly, "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 (1 st Cir. 2021) (quoting *Atieh v. Riordan,* 797 F.3d 135, 138 (1st Cir. 2015)). Conversely, courts should reverse and remand where

> the agency (1) has relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quoting *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43) (numbers added).

III. DISCUSSION

The parties raise several issues in their cross-motions for summary judgment. They first dispute the preclusive effect of prior litigation. They also debate the validity of the M-Opinion. Finally, they

disagree as to whether the 2021 ROD taking the Designated Lands into trust for the Tribe was arbitrary, capricious, or contrary to law.

A. Estoppel

The Court's first task is to determine the degree to which the questions the parties present have been preclusively resolved through their prior litigation. The Tribe argues that the doctrine of judicial estoppel bars Plaintiffs from challenging the validity of the M-Opinion in these proceedings, and that the related doctrine of collateral estoppel, or issue preclusion, bars relitigation of certain discrete lines of argument. The Court addresses each of the Tribe's estoppel-based arguments in turn.

1. Judicial Estoppel

Judicial estoppel provides that "where one succeeds in asserting a certain position in a legal proceeding, one may not assume a contrary position in a subsequent proceeding simply because one's interests have changed." *Berkowitz v. Berkowitz,* 817 F.3d 809, 813 (1st Cir. 2016). The purpose of this doctrine is to prevent parties from "playing fast and loose with the courts." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.,* 374 F.3d 23, 33 (1st Cir. 2004). The party asserting judicial estoppel must show that the opposing party has taken a position that is "mutually exclusive" with its prior position, and that the party succeeded in persuading a court to adopt that prior position. *See id*.

The Tribe argues that Plaintiffs are barred from contesting the validity of the current version of the M-Opinion here because Plaintiffs conceded the

opinion's validity in the D.C. district court proceedings. However, a review of the D.C. district court's opinion indicates that the validity of the M-Opinion was not made an issue in that case. Although Plaintiffs "defend[ed] the Secretary's use of the M-Opinion" in that action, *Bernhardt,* 466 F. Supp. 3d at 216, no party challenged the Secretary's reliance on the opinion, *see id*. Instead, the D.C. district court made clear that its analysis was limited to the Secretary's application of the M-Opinion, and not to the opinion itself. *Id*. at 217 ("This is the question before the Court: whether the Secretary's *application* of its interpretation of the IRA—the M-Opinion—was arbitrary and capricious." (emphasis in original)).

Because the validity of the M-Opinion was not at issue in the D.C. district court action, Plaintiffs cannot be said to have "succeeded" in asserting its validity there. Thus, they are not judicially estopped from contesting its validity here.

2. Collateral Estoppel

Collateral estoppel, or issue preclusion, applies "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment . . . in a subsequent action between the parties, whether on the same or a different claim." *B&B Hardware, Inc. v. Hagris Indus., Inc.,* 575 U.S. 138, 148 (2015). Here, two prior actions between these parties have been litigated to a valid and final judgment: the action in this district concerning the second definition of "Indian" (*Littlefield I*) and the D.C. district court action concerning the first definition of "Indian"

(*Bernhardt*). Accordingly, any issues of fact or law actually litigated and determined in either of these proceedings that was essential to a final judgment may not be relitigated here. The Tribe specifically argues that the D.C. district court resolved a number of arguments that Plaintiffs raise here.

First, they contend, Plaintiffs argued in *Bernhardt* that the Supreme Court's decision in *Carcieri* mandates a finding that the Mashpee were not under federal jurisdiction in 1934. *See Bernhardt,* 466 F. Supp. 3d at 215 n.9. Plaintiffs raise this argument again here; in both actions, their position has been that any lower court decision recognizing the Mashpee under the IRA is fundamentally inconsistent with the Supreme Court's holding in *Carcieri* excluding the Narragansett tribe from recognition under the IRA. *See id*.; [Dkt. 45 at 9]. Plaintiffs' argument proceeds on the theory that the Narragansett and Mashpee, who are neighboring tribes in Southern New England with ancestral lands divided by Narragansett Bay, present functionally identical cases for recognition. They posit that if the Supreme Court held that the Narragansett presented evidence insufficient to establish that they were under federal jurisdiction in 1934, no such evidence could be sufficient for the Mashpee.

The D.C. district court rejected this argument, noting that the parties to *Carcieri* did not contest whether the Narragansett had been under federal jurisdiction in 1934. *Bernhardt,* 466 F. Supp. 3d at 215 n.9. Accordingly, the Supreme Court had merely accepted without deciding that the Narragansett were not under jurisdiction at the time the IRA was

exacted, *see Carcieri,* 555 U.S. 395–96, and two Justices wrote separately to state that they would have remanded the matter to the Secretary for factfinding on this question, *id*. at 400–01 (Souter, J., dissenting). Indeed, the argument the Secretary and the Narragansett pursued in *Carcieri* was that the word "now" in the statutory term "now under Federal jurisdiction" referred to the year *1998,* not 1934. *Id*. at 382. The underlying factfinding in *Carcieri* had concerned the Narragansett's status in 1998, not 1934, so that decision is not binding as to the Narragansett's status in 1934.

This Court affords preclusive effect to *Bernhardt's* rejection of the Narragansett comparator argument. Although *Bernhardt* addressed this argument in a footnote, it provided full reasoning for its rejection of Plaintiffs' reading of *Carcieri, see Bernhardt,* 466 F. Supp. 3d at 215 n.9, and the reasoning was essential to its conclusion, as the court could not have ruled in favor of the Mashpee had it concluded that *Carcieri* foreclosed their argument. Thus, the prior litigation on this argument meets all required elements for issue preclusion.[6] The Court considers the Narragansett comparator argument fully litigated and resolved.

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[6] The Court notes that—in addition to being preclusive—*Bernhardt's* reading of *Carcieri's* limited holding is *correct,* and further notes that the voluminous evidence in the *Carcieri* record concerning the Narragansett's history is not in the administrative record in this case. Without access to this evidence, the Court would have had no basis to evaluate Plaintiffs' position that the Narragansett and Mashpee present identical cases for recognition under the IRA. The Court is aware of no opinion holding that the tribes' history and circumstances are identical.

Plaintiffs and the Tribe also disagree over the extent to which *Bernhardt* precludes Plaintiffs' arguments about the Secretary's reliance on evidence concerning Mashpee children's attendance at the Carlisle School and the potential for evidence to demonstrate that the Tribe was under concurrent state and federal jurisdiction. *Bernhardt* held that the M-Opinion requires the Secretary to consider evidence of Mashpee children's attendance at the Carlisle School as probative of "guardian-like action" taken by the federal government on behalf of the Tribe as a whole. 466 F. Supp. 3d at 219–23. To the extent Plaintiffs argue the Secretary erred in considering this evidence (as *Bernhardt* held that the M-Opinion directs her to), they would be precluded. However, Plaintiffs frame their arguments here as challenges only to the Secretary's weighing of this evidence, which are permissible.

Likewise, the Tribe suggests that Plaintiffs are precluded from arguing that the Tribe's status as "under state jurisdiction" forecloses the possibility of it also having been under federal jurisdiction. The D.C. district court's opinion does not, however, suggest that this line of argument was thoroughly litigated in that matter. That court agreed, at the Tribe's request, to consider evidence "that Massachusetts' actions toward the Tribe supplemented the federal government's assertion of jurisdiction and should be considered as part of the federal course of dealings," *id*. at 216, but these considerations do not preclude Plaintiffs from arguing here that the Tribe could not have been under both state and federal jurisdiction.

B. Validity of the M-Opinion

Having concluded that Plaintiffs are not estopped from challenging the validity of the M-Opinion, the Court now turns to that challenge. Courts evaluate agencies' construction of statutes under the two-step *Chevron* framework. The Court first asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron,* 467 U.S. at 842. The agency's conclusion as to the existence of ambiguity in the statute receives no deference. *Littlefield I,* 199 F. Supp. 3d at 395. However, if the Court concludes that there is ambiguity, it "must defer to the agency's interpretation, so long as it is 'rational and consistent with the statute.'" *Id.* (quoting *Sullivan v. Everhart,* 494 U. S. 83, 89 (1990)). The First Circuit has described this standard of scrutiny as "de novo review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within its sphere of authority." *Jianli Chen v. Holder,* 703 F.3d 17, 21 (1st Cir. 2012); *see Littlefield I,* 199 F. Supp. 3d at 394–95 (reconciling First Circuit's concept of "de novo review . . . with some deference" with *Chevron* and broader principles of de novo review).

Plaintiffs argue that the M-Opinion creates "a standardless test that practically any tribe can meet," and that it is irreconcilable with the Supreme Court's decision in *Carcieri.* [Dkt. 45 at 32]. They view the M-Opinion's two-part inquiry into whether the federal government had conferred jurisdiction on a tribe before 1934 and, if so, whether that jurisdiction remained extant in 1934,

as contrary to *Carcieri's* requirement that the jurisdiction-conferring event be in effect in 1934. [*Id*.]

The M-Opinion withstands scrutiny under both *Carcieri* and the *Chevron* framework. Plaintiffs' assertion, [Dkt. 45 at 32], that the M-Opinion disregards *Carcieri's* holding that a tribe must have remained under federal jurisdiction in 1934 is a misreading of both opinions. The second step of the M-Opinion's inquiry requires the Secretary to determine "whether the tribe's jurisdictional status remained intact in 1934." *M-Opinion* at 19. *Carcieri's* holding is limited to interpreting the word "now" in the IRA to refer to the date of the statute's enactment in 1934. 555 U.S. at 395; *see id*. at 396 ("Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case."). The Supreme Court's decision leaves open the question of how the Secretary may determine jurisdiction existed in 1934, and in no way forecloses the M-Opinion's two-part inquiry for evaluating such claims of jurisdiction.

Further, Plaintiffs raise no meaningful challenge to the validity of the M-Opinion under the *Chevron* framework. The first step of this framework is to determine whether there is ambiguity to the term at issue—here, "under Federal jurisdiction." Justice Breyer strongly suggested that this term was ambiguous in his concurrence to *Carcieri, id*. at 398 (Breyer, J., concurring), and each of the three appellate courts to have considered the term have agreed. *County of Amador v. U.S. Dep't of Interior,* 872 F.3d 1012, 1021 (9th Cir. 2017); *Confederated Tribes of Grand Ronde Cmty. v. Jewell,* 830 F.3d

552, 564 (D.C. Cir. 2016); *see Rape v. Poarch Band of Creek Indians,* 250 So.3d 547, 560 n.7 (Ala. 2017). This Court agrees that more than one reasonable construction of the term "under Federal jurisdiction" exists, and the term is thus ambiguous within the meaning of *Chevron.*

Turning to the second *Chevron* step, this Court agrees with the D.C. Circuit's conclusion in *Grand Ronde* that the M-Opinion's construction of "under Federal jurisdiction" is reasonable. 830 F.3d at 564–65. As the term "jurisdiction" is "of extraordinary breadth," *id.* at 564, the M-Opinion's context-driven, tribe-by-tribe interpretation of the term is permissible. *See also County of Amador,* 872 F.3d at 1026 (describing "jurisdiction," as it is used in the IRA, as "a word of many, too many, meanings"). Moreover, the M-Opinion adopts and expands upon Justice Breyer's suggested interpretation of the term in his *Carcieri* concurrence. Justice Breyer suggested that evidence of jurisdiction could include treaties with the United States, congressional appropriations, and enrollment with the federal Indian Office. *Carcieri,* 555 U.S. at 399 (Breyer, J., concurring). To these suggestions, the M-Opinion adds approval of contracts between the tribe and non-Indians, enforcement of federal commerce laws against the tribe, federally funded education of the tribe's children, and provision of federal health and social services to the tribe. *M-Opinion* at 19. The conjunctive, holistic, and tribe-specific inquiry the opinion prescribes to resolve the question of jurisdiction is a reasonable interpretation of the statute's use of that term and is consistent with *Carcieri's* treatment of the statute.

Accordingly, the Court grants deference to the M-Opinion's construction of the phrase "under Federal jurisdiction." Because the M-Opinion is binding on the Secretary, the Court uses the M-Opinion as the benchmark by which it evaluates the decision under review. *See Bernhardt,* 466 F. Supp. 3d at 236 (deeming the Secretary's previous decision "arbitrary, capricious, an abuse of discretion, and contrary to law" because the Secretary had failed to correctly apply M-Opinion's two-part test).

C. APA Review of the 2021 ROD

The Court now turns to the ultimate question at bar, that of whether the 2021 ROD taking the Designated Lands into trust for the Tribe was arbitrary, capricious, or contrary to law. Plaintiffs make four principal challenges to the 2021 ROD. First, they allege that the ROD constructed a "false narrative" about Mashpee children's attendance at the Carlisle school that intentionally misrepresents the historical record. [Dkt. 45 at 14–19]. Second, they allege that prior case law is inconsistent with the ROD's conclusion. [*Id*. at 19–22]. Third, they argue that various record evidence the Secretary considered is not probative. [*Id*. at 23–31]. And fourth, they allege that the Secretary's creation of a reservation comprised of two noncontiguous parcels of land was unlawful. [*Id*. at 33–34]. Each of these arguments is addressed in turn.

1. Carlisle School Evidence

The Carlisle Indian School was a non-reservation boarding school in Carlisle, Pennsylvania, for Indigenous children operated by the BIA. *See*

Bernhardt, 466 F. Supp. 3d at 219. The Secretary made extensive findings of fact concerning this school in the 2021 ROD; the Court briefly summarizes the relevant evidence the Secretary relied upon below.

The Carlisle School was a part of the federal government's longstanding "civilization" policy that "sought to eliminate Indian culture." [2021 ROD at 16]. The federal government ceased making treaties with Indigenous tribes in 1871 and began to instead pursue forcible assimilation. [*Id.*] The government's goal was to "detribalize" Native Americans through "division of communally held tribal land." [*Id.* (quoting Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention,* 11 Colum. J. Race & L. 811, 826–27 (2021))]. An essential component of this policy was the forcible introduction of children to "the American educational, child welfare, and juvenile justice systems." [*Id.*]

The government established a nationwide policy "that Native children should be removed from their homes and placed in church or government-run boarding schools." [*Id.*] Between the late 19th and mid-20th century, thousands of children were separated from their families and institutionalized in government-run boarding schools like the Carlisle School. [*Id.*] These schools' mission was to '"civilize' Native children by forcing them to adopt the norms of Christian Anglo-American culture." [*Id.* at 17]. The schools punished Native children for speaking their languages and engaging in any non-Christian religious or spiritual practices. [*Id.*] In addition to this forced assimilation to the govern-

ment's language and religious norms, some students at the Carlisle School were made to adopt new names, clothing, haircuts, and cultural practices. [*Id.*]

Thus, the purpose of the Carlisle School and similar off-reservation boarding schools was, as the Commissioner of Indian Affairs wrote in 1896, "for the strong arm of the nation to reach out, take [Indian children] in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages." [*Id.* at 16 (citing *Brackeen v. Haaland,* 994 F.3d 249, 282–83 (5th Cir. 2021))]. The administrator in charge of the Carlisle School in 1882, Captain R. H. Pratt, is today infamous for his support of the goal of "'kill[ing] the Indian' to 'save the man.'" [*Id.* at 17 n.127 (quoting *United States v. Erickson,* 436 F. Supp. 3d 1242, 1267 (D.S.D. 2020))].

The Carlisle School was funded through Congressional appropriations of federal funds. [*Id.* (citing Act of May 17, 1882, 22 Stat. 68, ch. 163, p. 85)]. An 1882 funding bill specified that the purpose of the school's appropriation was "educational purposes for the Indian tribes." [*Id.*] An 1892 bill authorized the Commissioner of Indian Affairs to make and enforce regulations to "secure the attendance of Indian children . . . at schools established and maintained for their benefit." [*Id.* (citing Act of July 1, 1892, 27 Stat. 120)]. The Commissioner of Indian Affairs adopted admissions standards tailored to serve the purpose of the government's "civilization" policy by ensuring that the school indoctrinated children whom the government "per-

ceived as being too 'Indian' or too connected to tribal culture." [*Id*.]. These standards excluded from admission children with "one-eighth or less Indian blood," those whose parents did not live on a reservation, and those who were "presumed to have adopted the white man's manners and customs" or were otherwise "to all intents and purposes white people." [*Id*. at 17–18 (quoting *Education Circular No. 85,* Rules for the Collection of Pupils for Non-reservation Schools)].

Mashpee children attended the Carlisle School between 1905 and 1918. [*Id*. at 16]. Records show that the school documented each Mashpee student's compliance with the regulations regarding admission, including specification of the students' tribe, "blood quantum," and verification of living in "Indian fashion." [*Id*. at 18]. The Mashpee students were identified as members of the Mashpee Nation, North Wampanoag Tribe, Pokanoket Tribe, or South Sea Tribe. [*Id*.] Each of these tribal designations refers to a legal predecessor of the modern Mashpee Wampanoag Tribe. Each student that the Carlisle School identified as affiliated with one of these four tribes had been certified by an official as "liv[ing] as an Indian." [*Id*.]

The school maintained "extensive federal supervision over Mashpee students' education, health[,] and finances." [*Id*. at 16 (citing *Erickson,* 436 F. Supp. 3d at 1267)]. The Superintendent and Commissioner of Indian Affairs oversaw the use and disbursement of funds belonging to the students and also supervised health care for the students. [*Id*. at 18]. In one instance, the Superintendent authorized amputation of a Mashpee student's toe,

without the student's mother's knowledge of the procedure until after it was completed. [*Id.*] The school also restricted Mashpee students' ability to leave its premises. [*Id*. at 18–19].

From this evidence, the Secretary concluded that federal agents "exercised extraordinary control over the Mashpee students attending Carlisle School from 1905 through 1918." [*Id*. at 19]. In support of that decision, she cited the school's "integral part" in the government's nationwide "federal Indian policy aimed at breaking up tribal communities," the government's provision of health and social services to the Mashpee students, and the government's control and management of the Mashpee students' funds. [*See id*.] Relying on the M-Opinion's instruction to evaluate the government's "guardian-like action on behalf of the tribe," *M-Opinion* at 19, the Secretary concluded that the Carlisle School records constituted evidence of "a clear assertion of federal authority over the Tribe and its members and, therefore, evidence [of] the United States' assertion of jurisdiction over the Tribe in the decades leading up to passage of the IRA." [2021 ROD at 19].

Plaintiffs argue that the Secretary's analysis of the Carlisle School evidence "represents a complete and gross misstatement of the historical record." [Dkt. 45 at 16]. They cite evidence that the Mashpee students who attended Carlisle did so with their parents' voluntary consent, that state funds were available to cover the cost of Mashpee students' attendance at the school, and that a Carlisle School supervisor had discouraged Mashpee students from applying to the school because there were ample

public school facilities for them in Massachusetts. [*Id*. at 16–17]. Relying on this record evidence, Plaintiffs charge the Secretary with crafting a "false narrative" that "smacks of intentional misrepresentation of the historical record." [*Id*. at 18].

The Court finds no substance beneath this puffery. Plaintiffs do not contest the legitimacy of any of the facts in the administrative record that form the basis for the Secretary's conclusion: that the Carlisle School was funded via Congressional appropriations for the purpose of educating Indian children [*see* 2021 ROD at 17]; that the school was part of the federal government's policy of forcibly eliminating tribal culture, including tribal languages and religions [*id*. at 16]; that Mashpee students attended the school [*id*. at 18]; that the Mashpee students were subject to the school's enrollment requirements, including a "blood quantum" and verification that they lived in "Indian fashion" [*id*.]; that federal officials at the school managed money on behalf of Mashpee students [*id*.]; and that federal officials at the school made health care decisions and expended federal health care funds on behalf of Mashpee students, [*id*.].

The facts recited herein, uncontested by Plaintiffs, are overwhelming evidence in support of the Secretary's conclusion that the federal government subjected the Mashpee to its jurisdiction prior to 1934. The record in this case reveals the government's systemic, decades-long policy of forcibly dissolving Indigenous tribes and cultures by coercing children to assimilate into what the government defined as "white" society. The Carlisle School, funded by Congress for the purpose of separating

Indigenous children from their families and indoctrinating them in accordance with the government's policy, was an essential component of this system. By recognizing Mashpee students as sufficiently "Indian" to attend the Carlisle School, funding their education, making health care decisions on their behalf, and dictating their cultural practices and beliefs, the government took "guardian-like action[s]" over the Tribe. *See M-Opinion* at 19. The Secretary was thus reasonable in considering the government's inclusion of the Mashpee in federally funded ventures to "kill the Indian," [*see* 2021 ROD at 17 n.127 (quoting *Erickson,* 436 F. Supp. 3d at 1267)], as indicative of jurisdiction. *See Marasco & Nesselbush,* 6 F.4th at 172 (requiring courts to uphold agency's decision if it is "supported by any rational view of the record").

Further, none of the facts Plaintiffs point to are inconsistent with the Secretary's conclusion that the Carlisle School evidence supports a finding that the Mashpee were under federal jurisdiction. The Secretary does not assert, or rely upon an assertion, that Mashpee students attended the school involuntarily. The availability of state funds for Mashpee children's attendance at the school, and the availability of public schooling in Massachusetts, do not disprove the record evidence demonstrating that federal funds were expended for the education, health care, and social support of Mashpee students as part of a nationwide federal program to detribalize children.

Moreover, the Court's task is not to determine which party's narrative description of the evidence in the administrative record is more compelling.

The Secretary's interpretation alone is under review, and the Court must merely determine whether she has provided "a satisfactory explanation" for that interpretation, "including a rational connection between the facts found and the choice made." *Minuteman Health,* 291 F. Supp. 3d at 190. And the Secretary's narrative need not be the only one plausibly supported by the record—it simply must be among those supported by "any rational view of the record." *See Marasco & Nesselbush,* 6 F.4th at 172. The Secretary here has provided a sufficiently rational connection between the facts in the Carlisle School record and her conclusion that this record is indicative of the federal government exercising jurisdiction over the Mashpee through its guardian-type actions toward Mashpee children. This conclusion is a reasonable application of the M-Opinion's test to the record, and thus is not arbitrary or capricious.

2. Historic Case Law

Plaintiffs cite various judicial decisions, spanning a period between the 1880s and 1970s, which suggest that federal courts did not regard the Mashpee as subject to federal jurisdiction. They argue that this case law is irreconcilable with the Secretary's conclusion that the Mashpee were under federal jurisdiction in 1934.

Specifically, Plaintiffs point to an 1884 Supreme Court decision which noted that "Indians in Massachusetts" were "remnants of tribes never recognized by treaties or legislative or executive acts of the United States as distinct political communities," *Elk v. Wilkins,* 112 U. S. 94, 108 (1884). They

also point to the common-law definition of a "tribe," first articulated by the Supreme Court in *Montoya v. United States,* 180 U.S. 261 (1901): "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266. A series of decisions in the 1970s concluded that the Mashpee did not qualify as a "tribe" under the *Montoya* common-law definition. *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, 582–85 (1st Cir. 1979).

This precedent does not foreclose the Secretary's decision to take the Designated Lands into trust for the Mashpee or render that decision arbitrary and capricious. First, Justice Breyer's concurrence in *Carcieri* and the M-Opinion each recognize that the government's disclaimer of jurisdiction over a tribe is not dispositive of the question of whether the Tribe was in fact under federal jurisdiction in 1934. *See Carcieri,* 555 U.S. at 397 (Breyer, J., concurring) ("[A] tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time."); *M-Opinion* at 19 ("[A] tribe may have been under federal jurisdiction in 1934 even though the United States did not believe so at the time."). Indeed, Justice Breyer recognized that, on at least three occasions, the government concluded after 1934 that it had erroneously excluded a tribe from its list of those under federal jurisdiction and thus subject to the IRA. *Carcieri,* 555 U.S. at 398 (Breyer, J., concurring). The government excluded the Stillaguamish

Tribe from recognition despite the fact that this tribe had maintained treaty rights against the United States since 1855. *Id*. It had mistakenly concluded that the Grand Traverse Band of Ottawa and Chippewa Indians—which has continually existed since 1675—had dissolved. *Id*. And it had likewise mistakenly concluded that the Mole Lake Tribe no longer existed. *Id*. at 399. The government later remedied these errors by retroactively concluding that these tribes had each been under federal jurisdiction in 1934. *Id*. at 398–99.

Thus, the Supreme Court's statement in *Elk* that Massachusetts tribes were not recognized by the federal government—which was published 50 years before the IRA's enactment in 1934—is hardly inconsistent with the Secretary's decision. Likewise, the First Circuit's holding that the Mashpee did not meet *Montoya's* common-law definition of a "tribe" is not relevant. The M-Opinion, not *Montoya,* provides the test that the Secretary was required to apply to this record. Further, the Department formally recognized the Mashpee as a tribe in 2007, and that decision is not under review here. The question at bar is whether the Mashpee were under federal jurisdiction in 1934, and *Montoya* does not provide a test for this.

3. Probative Value of Reports and Census Records

Plaintiffs also assert that various reports and census records that the Secretary relied upon are of no probative value, and thus provided legally insufficient support for the Secretary's decision. They specifically challenge five documentary records

the Secretary evaluated: the Morse Report, the McKenney Report, the Schoolcraft Report, Indian Census records, and Carlisle School census records. The Court examines the Secretary's consideration of each of these records in turn.

The Morse Report was an 1820 effort by the federal government to catalogue the Indigenous tribes of the United States. The report was funded by the federal government, and the Secretary recognizes it as one of the government's "first initiatives to 'civilize' Indians." [2021 ROD at 13]. The report's author, the Rev. Jedidiah Morse, traveled as far west as present-day Wisconsin in an effort to provide the government with "as full and correct a view of the numbers and actual situation of the *whole* Indian population *within their jurisdiction.*" [*Id*. (first emphasis in original, second emphasis added)]. Morse included the Mashpee in the report, identifying 320 tribal members as living on the tribe's lands in the town of Mashpee. [*Id*.] He recommended against forcibly removing the Tribe to western lands, citing their strong "local attachments" and their "public utility" as "expert whalemen and manufacturers." [*Id*.] The federal government later relied upon the Morse Report in setting its policy toward forcible Indian removal, and the Secretary credits the Report's description of the Mashpee with influencing the government's decision to protect the Tribe from removal. [*Id*. at 14]. Accordingly, the Secretary construes the Morse Report as evidence that the government actively considered the Mashpee as under its jurisdiction in the 1820's, and thus subject to its removal policies. [*Id*. at 15].

Five years after the Morse Report, Thomas McKenney, who served as Superintendent of Indian Affairs, submitted his own report on the status of various tribes. [*Id*. at 14]. The McKenney Report listed the Mashpee as residing on their reservation in the town of Mashpee. [*Id*.] The Secretary likewise credits the McKenney Report with influencing the government's Indian removal policy, including its decision not to forcibly remove the Mashpee from their lands, and thus construes it as evidence that the Mashpee were sufficiently under federal jurisdiction to be subject to the federal removal policy. [*Id*. at 15].

In 1847, Congress ordered an additional report on the country's tribes, to be prepared by Henry Schoolcraft, an agent in the Office of Indian Affairs. [*Id*. at 20]. Schoolcraft summarized Mashpee history and made policy recommendations as to the Tribe; specifically, he proposed merging all Indian communities in Massachusetts except those at Mashpee, Herring Pond, and Martha's Vineyard into a single community under the supervision of an Indian commissioner. [*Id*. at 20–21]. The Secretary construes the Schoolcraft Report to demonstrate federal recognition of the Mashpee as an extant tribe subject to federal jurisdiction, with the report actively considering whether the federal government ought to merge the Tribe with others according to a central plan. [*Id*.]

The Secretary likewise relied on federal census records compiled between 1860 and 1930. In some years during this period, the government had recorded its count of the Indigenous population according to a separate "Indian population sched-

ule"; one such Indian schedule, in 1910, identified 157 "Mashpee Indians" living in the town of Mashpee. [*Id*. at 23]. Further, incomplete census records from the Carlisle School from 1911 and 1912 list a count of Mashpee students. [*Id*. at 24]. The Secretary construes these school census records as prepared in response to an 1884 law for the purpose of informing Congress' expenditure of federally appropriated funds to "educate, clothe, and provide services to Mashpee students attending the Carlisle School." [*Id*.] Further, the Secretary construes the totality of these Census records as "efforts to enumerate the Tribe and its members" that are "probative of and demonstrate the Tribe's relationship with the Federal Government." [*Id*. at 25].

Plaintiffs propose alternate constructions of each of these records and argue that none are indicative of federal jurisdiction over the Mashpee.[7] Again, however, the Court's task is not to review the Secretary's conclusion de novo, nor is it to consider her weighing of the evidence against alternate propos-

[7] Plaintiffs also suggest that the Secretary was arbitrary and capricious in interpreting these records differently from how the Department interpreted them in prior draft and published decisions concerning the Mashpee. To the extent the Secretary interpreted records differently in the 2021 ROD than in the 2018 ROD, this was appropriate, as the D.C. district court held that the 2018 ROD was arbitrary and capricious, and remanded this matter for the Secretary to re-weigh the evidence in accordance with the M-Opinion. *Bernhardt,* 466 F. Supp. 3d at 236. To the extent the 2021 ROD conflicts with any unpublished draft decision, the Secretary owes the Court no explanation, as a draft opinion carries no legal force, is not subject to judicial review, and—nearly by definition—invites revision.

als. It is simply to ask whether her conclusion was supported by "any rational view of the record." *Marasco & Nesselbush,* 6 F.4th at 172. Accordingly, Plaintiff's alternate interpretations of the record do not suffice to render the Secretary's interpretation arbitrary and capricious. To the contrary, each of the sources the Plaintiffs dispute here is a documentation of an interaction between the Tribe and a federally funded venture prior to 1934. The census records suggest that the federal government expended money on efforts to document membership of the Tribe—a federal action that at least one court has previously held can be probative of jurisdiction. *See No Casino in Plymouth v. Jewell,* 136 F. Supp. 3d 1166, 1184 (E.D. Cal. 2015) (holding that the federal government's efforts to document the Ione Band were evidence the tribe was under federal jurisdiction in 1934). The Morse, McKinney, and Schoolcraft reports each suggest that the federal government may have considered the Mashpee as a candidate for forcible removal or reorganization. Even if Plaintiffs are correct to suggest that none of these sources, taken alone, would establish grounds to conclude that the Mashpee were under federal jurisdiction in 1934, the M-Opinion prescribes a holistic process that requires the Secretary to review each of these forms of documentary evidence. The Secretary was not arbitrary or capricious in reading these sources, in conjunction with other evidence (including the Carlisle School evidence), to collectively establish that the Mashpee were under federal jurisdiction at the time the IRA was enacted.

4. Reservation Boundaries

Plaintiffs' final argument is that the Secretary violated the law by establishing two noncontiguous parcels of land—the Mashpee and Taunton sites—as the Tribe's initial reservation. Plaintiffs cite no authority to support their assertion that an initial reservation may not be comprised of noncontiguous parcels.

The Secretary is authorized by statute to "proclaim new Indian reservations on lands acquired pursuant to any authority conferred" by law. 25 U.S.C. § 5110. Regulations define the term "initial reservation"—the concept at issue here—as land "located within the State or States where the Indian tribe is now located" and "within an area where the tribe has significant historical connections and one or more of the following modern connections to the land: (1) The land is near where a significant number of tribal members reside; or (2) The land is within a 25–mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or (3) The tribe can demonstrate other factors that establish the tribe's current connection to the land." 25 C.F.R. § 292.6(d).

Plaintiffs thus attempt to add to the regulations a requirement of contiguity that does not exist.[8] Under the regulations that do exist, the Secretary's

[8] The Mashpee reservation is not the first noncontiguous initial reservation proclaimed under these provisions; the ROD discusses the Nottawaseppi Tribe's noncontiguous reservation. [2021 ROD at 38 n.263].

decision to proclaim a reservation consisting of both the Taunton and Mashpee parcels is not arbitrary or capricious. The parcels are both located in Massachusetts, the state where the Tribe is headquartered. Likewise, the parcels are both within an area—southeastern Massachusetts—where the Tribe has "significant historical connections"; as detailed above, the Mashpee's traditional territory consists of all of southeastern Massachusetts and eastern Rhode Island. The Tribe has maintained a continuous presence in the town of Mashpee since prior to European settlement and had established the village of Cohannet on the site of present-day Taunton before selling that land to English colonists in 1639. [2021 ROD at 49]. And the Tribe has a modern connection to both parcels, as about 40 percent of its members live in the town of Mashpee, and over 60 percent of its members live within 50 miles of the Taunton parcel. [*Id*. at 52]. The Secretary was thus reasonable in determining that "a significant number" of tribal members live sufficiently "near" both parcels to establish a modern connection to each. [*Id*. at 53].

IV. CONCLUSION

The historical record indicates that the Mashpee have had a robust connection to the Designated Lands for over four centuries. Upon review of the 2021 ROD, the Court concludes that the Secretary was not arbitrary and capricious in determining that the Tribe was under federal jurisdiction in 1934 within the meaning of the IRA, nor was she arbitrary and capricious in proclaiming the Designated Lands as the Tribe's initial reservation.

Accordingly, Defendants' motions for summary judgment [Dkts. 46, 48] will be **GRANTED** and Plaintiffs' motion [Dkt. 45] will be **DENIED.** Judgment for Defendants will enter accordingly.

SO ORDERED.

February 10, 2023 /s/ Angel Kelley
Hon. Angel Kelley
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 22-CV-10273-AK

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, and DAVID PURDY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA A. HAALAND, *in her official capacity as Secretary of the Interior;* BUREAU OF INDIAN AFFAIRS; and BRYAN NEWLAND, *in his official capacity as Assistant Secretary of the Interior for Indian Affairs;*

Defendants,

and

MASHPEE WAMPANOAG TRIBE,

Intervenor-Defendant.

JUDGMENT

A. KELLEY, D.J.

In accordance with the Court's Memorandum and Order (Doc. No. 55) entered on February 10, 2023, granting Defendants' motion for summary judgment and denying Plaintiffs' motion, it is hereby ORDERED:

Judgment entered for Defendants.

Dated: February 10, 2023

By the Court:

/s/ Miguel A. Lara
Deputy Clerk

25 U.S. Code § 5129 – 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.

(June 18, 1934, ch. 576, § 19, *48 Stat. 988*.)