

In The  
**Supreme Court of the United States**

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SAC AND FOX NATION OF OKLAHOMA,  
WILLIAM THORPE, AND RICHARD THORPE,

*Petitioners,*

v.

BOROUGH OF JIM THORPE, ET AL.,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE AND BRIEF OF THE NATIONAL  
CONGRESS OF AMERICAN INDIANS AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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July 1, 2015

**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37.2(b), the National Congress of American Indians (“NCAI”) respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by the Sac and Fox Nation of Oklahoma, William Thorpe, and Richard Thorpe. As required under Rule 37.2(a), amicus provided notice to all parties’ counsel of its intent to file this brief more than 10 days before its due date. Petitioners have consented to the filing of this brief. Counsel of Record for Respondent Borough of Jim Thorpe did not respond to amicus curiae’s requests for consent. Counsel of Record for Respondents Michael Sofranko, Ronald Confer, John McGuire, Joseph Marzen, W. Todd Mason, Jeremy Melber, Justin Yaich, Joseph Krebs, Greg Strubinger, Kyle Sheckler, and Joann Klitsch responded that their consent or non-consent to an amicus brief is not relevant because they were counsel on the Section 1983 issue only and the 1983 issue is not part of the petition for writ of certiorari. Therefore, NCAI is filing this motion.

NCAI seeks leave to file this brief because it is deeply concerned that the Third Circuit’s disregard for the plain meaning of the provisions of the Native American Graves Protection and Repatriation Act (“NAGPRA”) and congressional intent establishes dangerous precedent that could have a substantial impact on tribal cultures. The Third Circuit held that the Borough of Jim Thorpe is exempt from NAGPRA,

despite being included by the statutory language, because applying NAGPRA “is such a clearly absurd result and so contrary to Congress’s intent.” Pet. App. 22a-23a. In justifying its decision to rewrite a congressional statute, the Third Circuit disregarded important procedural and substantive rights provided by Congress. It also created judicial exceptions and requirements found nowhere in the Act, which destroy important policy decisions.

During congressional hearings, NCAI offered extensive testimony in support of NAGPRA. NCAI is well-positioned to provide this Court with critical context on the creation of NAGPRA, the intent of Congress in enacting NAGPRA, and the importance to tribes and individual Indians of the protections that Congress intended the Act to provide. NCAI respectfully requests the Court to grant this motion for leave to file a brief as amicus curiae.

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**INTEREST OF THE AMICUS CURIAE<sup>1</sup>**

Amicus Curiae the National Congress of American Indians (“NCAI”) is the oldest and largest national organization that represents and advocates for the interests of Native Americans. NCAI’s membership is comprised of over two hundred tribal governments and countless individual tribal citizens. NCAI has a long standing interest in matters relating to Indian cultural and religious issues. During congressional hearings, NCAI offered extensive testimony in support of the historic Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170 (2012) (“NAGPRA”); the National Museum of the American Indian Act of 1989 and its historic repatriation provision, 20 U.S.C. §§ 80q-9 to 12 (2012); and, the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2012) (under which the first human remains and cultural items of Native Americans were repatriated).

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, amicus curiae states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. Amicus provided notice to all parties’ counsel of its intent to file this brief more than 10 days before its due date. Petitioners have consented to the filing of this brief. Counsel of Record for Respondent, Borough of Jim Thorpe, did not respond to amicus curiae’s requests for consent. Counsel of Record for Respondents Individual Defendants responded that their consent or non-consent to an amicus brief is not relevant because they were counsel on the Section 1983 issue only and the 1983 issue is not part of the petition for writ of certiorari.

NCAI has an ongoing interest in NAGPRA's proper implementation and has shown continued commitment to its preservation and enforcement. For example, in 2012 NCAI re-established the NCAI Tribal NAGPRA Commission, and NCAI continues to consider and enact resolutions pertaining to the repatriation laws of 1989 and 1990 through the NCAI Human, Religious and Cultural Concerns Subcommittee and the NCAI Litigation and Governance Committee. NCAI also passed a resolution at its 2014 Annual Convention in Atlanta addressing its concern about the Third Circuit's opinion. *See Seeking a Just Result and Final Resting Place for Jim Thorpe, in Accordance with His Express Wishes*, Nat'l Cong. of Am. Indians, <http://www.ncai.org/resources/resolutions/seeking-a-just-result-and-final-resting-place-for-jim-thorpe-in-accordance-with-his-express-wishes> (last visited June 24, 2015).

NCAI is thus well-positioned, pursuant to Sup. Ct. R. 37, to provide this Court with critical context on the creation of NAGPRA, the intent of Congress in enacting NAGPRA, and the importance to tribes and individual Indians of the protections that Congress intended the Act to provide.



## **SUMMARY OF THE ARGUMENT**

Throughout history, cultures have adopted varying customs and traditions in caring for the deceased. Some communities bury them in the ground, others choose cremation, others seal them away in elaborate mausoleums, and so on. Likewise, Indian tribes have developed their own unique customs, responsibilities, and ceremonies that are to be followed after a death. These customs may place certain responsibilities on individuals or certain obligations on the tribe as a whole. NAGPRA is a culturally sensitive human rights law that is the product of years of effort by American Indians, Alaska Natives, Native Hawaiians, Congress, and the Administration. Its provisions were carefully crafted to take into consideration unique cultural values and were the result of Congress' willingness and ability to consider countless unique beliefs.

The proper implementation of the protections provided by NAGPRA is of exceptional importance to the 566 federally-recognized Indian tribes, the 5.2 million individual Native Americans and Alaska Natives, and the 1.2 million Native Hawaiians across the nation. The Third Circuit ignored and rewrote key provisions of NAGPRA, and also created new exceptions and requirements not found in the Act. The Third Circuit establishes dangerous precedent that could have substantial impacts on tribal cultures throughout the nation.

Specifically, the Third Circuit disregarded NAGPRA's procedural protections for resolving competing claims such as those present in this case, and substituted its judgment for the process established by Congress and the Department of the Interior, the agency tasked by Congress with NAGPRA's implementation. Additionally, to reach its conclusion, the Third Circuit disregarded the congressionally-enacted definition of museum and replaced it with the common definition, which Congress found to be inadequate. The court likewise misconstrued NAGPRA's criminal trafficking provision. The criminal trafficking provision exempts from criminal prosecution anyone with the right of possession to human remains. Congress, however, did not include a provision exempting museums with the right of possession to human remains from NAGPRA's repatriation process. Contrary to the Third Circuit's conclusion, Congress intended for NAGPRA to apply to museums with human remains. Based on a misunderstanding of the Act, the Third Circuit also found that applying NAGPRA would ignore the wishes of the deceased. The Department of the Interior's regulatory definition of human remains makes clear, however, that the wishes of the deceased are honored.

In addition to ignoring provisions of NAGPRA, the Third Circuit judicially-created new requirements and exceptions that limit the scope of the protections Congress intended the Act to provide. First, the court found that NAGPRA implies remains were removed from an intended final resting place, and only applies

if that is the case. Second, the court found that NAGPRA only applies if remains are collected and studied for archeological or historical purposes. Finally, the court found that NAGPRA does not apply unless remains are being held or collected for display or study. These exceptions and requirements are found nowhere in NAGPRA's text and drastically limit the protections Congress provided in the Act.

In substituting its own views and judicially creating exceptions and requirements, the Third Circuit threatens Native American culture by limiting the process Native Americans utilized to regain sacred cultural items. This Court should grant certiorari to review and reverse that decision.



**ARGUMENT<sup>2</sup>****I. The Third Circuit Eviscerated Important Procedural and Substantive Rights Provided by Congress to Govern the Disposition of Native American Human Remains.<sup>3</sup>**

To reach its decision, the Third Circuit disregarded or misunderstood a variety of NAGPRA's

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<sup>2</sup> NCAI fully agrees with the Petition for a Writ of Certiorari, and expounds on its discussion of the importance of the repatriation process and correcting the Third Circuit's rewriting of NAGPRA.

<sup>3</sup> The Third Circuit's rewriting of NAGPRA's provisions is also inconsistent with international legal standards on indigenous rights as it removes the fair, transparent, and effective mechanism the United States developed in conjunction with Native Americans to enable repatriation of their human remains. See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) ("Indigenous peoples have the right to . . . the repatriation of their human remains. States shall seek to enable . . . repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous people concerned."). The United States affirmed its support of the Declaration in 2010, and did not condition or limit its support of Article 12, but rather noted the thousands of human remains that had been or were soon to be repatriated to indigenous communities in the United States. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, at 14, U.S. Dep't of State, <http://www.state.gov/documents/organization/184099.pdf> (last visited June 24, 2015); see *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (considering the Convention on the Rights of the Child, to which the United States was not signatory, as not controlling the outcome, but providing respected and significant confirmation for the Court's conclusions).

provisions, including its competing claims and Review Committee process, definition of “museum,” criminal trafficking provision, and regulatory definition of “human remains.” Had the court fully considered these provisions and their application to the present case, it could not have possibly come to the conclusion that applying NAGPRA to the Borough is a clearly absurd result and contrary to Congress’ intent. Pet. App. 23a; see *King v. Burwell*, No. 14-114, 2015 WL 2473448, at \*24 (U.S. June 25, 2015) (Scalia, J., dissenting) (an absurd result is “a consequence ‘so monstrous, that all mankind would, without hesitation, unite in rejecting the application.’”) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819)). Certiorari is needed to correct these errors.

**A. The Third Circuit Disregarded the Process Established by Congress That Would Have Ensured That All Interests in This Case Were Taken into Consideration.**

This case involves competing claims for repatriation, and NAGPRA contains an administrative process to handle competing claims. The Third Circuit’s opinion disregarded this process, which is intended to protect the rights of the interested parties in this case.

Procedurally, NAGPRA requires local government agencies that receive federal funds and have

possession or control over Native American human remains to compile an inventory (“a simple itemized list”), and to the extent possible, identify their geographical and cultural affiliation. 25 U.S.C. §§ 3003(a), (b), (e).<sup>4</sup> The purpose of the inventory is to facilitate repatriation by providing clear descriptions for notice. *See* 43 C.F.R. §§ 10.9(a), (e). As early as possible during the inventory process, the local government agency must also consult with all lineal descendants and culturally-affiliated tribes. *Id.* § 10.9(b).

After the inventory is completed, NAGPRA requires that a notice summarizing the results of the inventory be sent to all lineal descendants and affiliated tribes and published in the Federal Register. *Id.* § 10.9(e). This publication has been done by thousands of entities including state and local governments, that like the Borough, only possessed one item, and by entities that, unlike the Borough, were not displaying the remains or objects of cultural patrimony.<sup>5</sup> *See, e.g.*, Notice of Inventory Completion: St. Joseph County Sheriff’s Department, Centreville, MI, 78 Fed. Reg. 50,098 (Aug. 16, 2013) (remains of one individual not being displayed); Notice of Inventory

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<sup>4</sup> There are specific procedures for the inventory, which are not particularly difficult to comply with. 43 C.F.R. § 10.9. Thorpe’s records and contemporaneous reports likely make an inventory in this matter very simple.

<sup>5</sup> It cannot be disputed here that Jim Thorpe’s remains are displayed as a tourist attraction. *See* Pet. 15-16, 16 n.13.

Completion: Fremont County Coroner, Riverton, WY, 76 Fed. Reg. 14,058 (Mar. 15, 2011) (same). Repatriation cannot occur until at least thirty days after notice of inventory completion is published. 43 C.F.R. § 10.10(b)(2). The Third Circuit's decision to not apply NAGPRA's process to the Borough in this situation disrupts the standard inventory practice provided by Congress and undertaken by entities like the Borough since NAGPRA's enactment.

After inventory and notice, NAGPRA provides that the local government agency, upon the request of a known lineal descendant or of a culturally-affiliated tribe, shall expeditiously return such remains. 25 U.S.C. § 3005(a). This expeditious return, however, is subject to two exceptions, one of which is applicable to this case. *See id.* §§ 3005(b) (scientific study exception), 3005(e) (competing claims exception). When there are "competing claims" to the remains, the local government agency may retain the remains until the dispute is resolved, which is what the Borough could have done had the process been utilized. *Id.* § 3005(e).

Competing claims, such as this one, are considered before a Review Committee composed of experts with authority to review and facilitate the resolution of disputes. *Id.* §§ 3005(e), 3006(b), (c). To protect interested parties, the Review Committee is tasked to ensure a fair and objective consideration and assessment of all relevant information and evidence, and with facilitating the resolution of disputes among Indian tribes or lineal descendants and federal agencies or museums relating to the return of remains. *Id.*

§§ 3006(c)(2), (4).<sup>6</sup> If the Review Committee's process is inconclusive or unsatisfactory, NAGPRA gives district courts authority to resolve disputes over any action brought by any person and makes the Review Committee's findings admissible in such an action. *Id.* §§ 3005(e), 3006(d), 3013.<sup>7</sup>

The Review Committee has experience with cases such as the present one, which involve multiple claimants. *See, e.g.*, NAGPRA Review Committee Findings and Recommendations and Minority Opinion Regarding a Dispute Between the Royal Hawaiian Academy of Traditional Arts and the Bernice Pauahi Bishop Museum, 68 Fed. Reg. 50,179 (Aug. 20, 2003) (dispute involving thirteen claimants and lack of notice); NAGPRA Review Committee Advisory Findings, 62 Fed. Reg. 23,794 (May 1, 1997) (dispute

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<sup>6</sup> The Review Committee has also created formal procedures to handle competing claims. *See* Nat'l NAGPRA, *Native American Graves Protection and Repatriation Review Committee Procedures*, Nat'l Park Service, <http://www.nps.gov/nagpra/REVIEW/Procedures.htm> (last visited June 24, 2015).

<sup>7</sup> Following due process concerns raised by non-Native entities, Congress amended the section 3013 enforcement provision. Originally it gave district courts jurisdiction over actions brought by the heir of a Native American or a Native American group. Congress amended it to give district courts jurisdiction over actions brought by any person. *Compare* 25 U.S.C. § 3013, *with* *Native American Grave and Burial Protection Act (Repatriation)*; *Native American Repatriation of Cultural Patrimony Act*; and *Heard Museum Report: Hearing on S. 1021 and S. 1980 Before the S. Comm. on Indian Affairs*, 101st Cong. 12, 102 (1990).

between the City of Providence, RI, and two claimants over a Carved Wooden Figure). Most cases involving multiple claimants will be some form of family dispute, whether it is two generations removed or more, and resolving these disputes is one of the main tasks Congress gave to the Review Committee. Congress recognized that tribes may have cultural responsibilities to the deceased and designed NAGPRA's protections to give a voice to both family members and tribes. While these cultural values may be foreign to the Third Circuit, Congress recognized the importance of these values, as well as the historical persecution of them, when it enacted NAGPRA.

In this case, the Third Circuit's opinion precludes adherence to the administrative review process that protects the rights of interested parties, including tribes and family members. Certiorari is needed to correct the Third Circuit's misunderstanding and to allow NAGPRA's processes to be properly utilized.

**B. By Substituting Its Own Definition of Museum for That Provided in the Statute, the Third Circuit Undermined Carefully-Considered Congressional Policy.**

In NAGPRA, Congress defines museum as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.” 25

U.S.C. § 3001(8). While the Third Circuit recognized that the Borough meets this definition, it nevertheless ignored this definition and implied that NAGPRA's application is based on the common understanding of what a museum is. *See, e.g.*, Pet. App. 22a. This Court has admonished that when a statute includes an explicit definition, the courts "must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (citations omitted).

Rewriting the definition of museum has unintended consequences. For instance, there are many cultural items that are not housed in traditional museums. *See, e.g.*, Notice of Inventory Completion: Kitsap County Coroner's Office, Port Orchard, WA, 70 Fed. Reg. 49,946 (Aug. 25, 2005) (notice of Native American remains housed for seven years at County Coroner's Office); Notice of Intent To Repatriate Cultural Items: County of Titus, Mount Pleasant, TX, 79 Fed. Reg. 35,791 (June 24, 2014) (repatriation of cultural items found by County during road construction project). That is precisely why Congress chose to broadly define "museum." *Cf.* 136 Cong. Rec. H10,988-90 (daily ed. Oct. 22, 1990) (statement of Rep. Ben Nighthorse Campbell) (explaining that thousands of Native American human remains and sacred objects are housed elsewhere instead of in the hands of their descendants); *id.* H10,990 (statement of Rep. Bill Richardson) (explaining the definition of museum to include institutions or state or local government agencies that receive federal grants or

payments). Certiorari is needed to correct this judicial revision of a congressionally-mandated definition.

### **C. The Third Circuit Disregarded NAGPRA's Criminal Trafficking Provision.**

The Third Circuit bolstered its decision by examining the definition of “right of possession” and what it considered to be the legal implication of that definition. Pet. App. 22a (citing 25 U.S.C. § 3001(13)). The Third Circuit’s view of the legal implication was erroneous, however, because it disregarded NAGPRA’s criminal trafficking provision, and Congress’ intended application of the right of possession definition. The opinion states, “as noted earlier, § 3001(13) defines ‘right of possession’ to include human remains freely given by the deceased or the deceased’s next of kin. This definition is further evidence of Congress’s intent to exclude situations such as Thorpe’s burial in the Borough.” *Id.*

The statute could have provided that NAGPRA does not apply to those museums with the right of possession, which as defined includes human remains, but it did not.<sup>8</sup> An earlier version of the statute

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<sup>8</sup> A basic principle of statutory construction is that statutes should be construed “so as to avoid rendering superfluous” any statutory language. *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). The Third Circuit’s conclusions would render this definition and the later provision applying it for certain items superfluous since NAGPRA would not apply at all in these instances.

exempted museums from repatriating human remains to which they had a right of possession, while still applying NAGPRA's procedural provisions. *See* S. Rep. No. 101-473, at 12-13, 17 (1990). Congress ultimately chose, however, not to include this exemption in the final statute. *Compare id., with* 25 U.S.C. § 3005(c). NAGPRA has a provision that allows museums to keep unassociated funerary objects, sacred objects, or objects of cultural patrimony that they have a right of possession to, but it does not apply to human remains or associated funerary objects.<sup>9</sup> 25 U.S.C. § 3005(c). This shows that NAGPRA's repatriation process is intended to apply in situations involving human remains. *See id.*

As further support for its conclusion, the Third Circuit incorrectly found there was no legal effect to the right of possession definition with regard to human remains:

The statute does not explain the legal effect of [the right of possession] definition. NAGPRA provides that a museum may keep certain items requested by a descendent or tribe if the museum “prove[s] that it has a right of possession to the objects.” 25 U.S.C.

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<sup>9</sup> The negative inference principle states, *expressio unius est exclusio alterius*, or the inclusion of one is the exclusion of others. “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.” *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)).

§ 3005(c). However, this section by its terms does not apply to human remains, and instead only applies to “unassociated funerary objects, sacred objects or objects of cultural patrimony[.]” *Id.* Even if this section was interpreted to apply to human remains, however, it is not clear that a museum with a right of possession over those remains would be exempt from the procedural and inventory requirements of NAGPRA.

Pet. App. 18a-19a n.16. The Third Circuit was correct that 25 U.S.C. § 3005(c) by its terms does not apply to human remains, but it was wrong that the statute does not explain the legal effect of this definition and this misreading clearly impacts its analysis. NAGPRA included human remains in the right of possession definition as a defense to criminal trafficking charges. 18 U.S.C. § 1170(a) (“Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American *without the right of possession* to those remains as provided in the Native American Graves Protection and Repatriation Act. . . .”) (emphasis added).

In summary, Congress included both human remains and objects within the definition of “right of possession.” Congress made NAGPRA applicable to museums with the right of possession to objects and human remains, but following inventory and notice, allowed museums to retain only certain objects. Congress also exempted from criminal prosecution under 18 U.S.C. § 1170(a), anyone with the right of possession to human remains. Thus, Congress intentionally

decided not to provide an exception to museums in possession of human remains, and the application of NAGPRA to the Borough is not a clearly absurd result so contrary to Congress' intent so as to lead to a departure from the plain language.

**D. By Misunderstanding the Department of the Interior's Regulatory Definition of Human Remains, the Third Circuit Assumed a Parade of Horribles.**

The Third Circuit bolstered its conclusion that applying NAGPRA here would be absurd by finding that the final wishes of an individual are not considered under NAGPRA:

Literal application would even reach situations where the remains of a Native American were disposed of in a manner consistent with the deceased's wishes as appropriately memorialized in a testamentary instrument or communicated to his or her family. There is therefore no limitation that would preserve the final wishes of a given Native American or exempt determination of his or her final resting place from the procedural requirements of NAGPRA.

Pet. App. 18a (footnote omitted). Whether or not an individual Native American's wishes will be overridden by NAGPRA is not before the Supreme Court as Jim Thorpe expressed his wish to be buried in Oklahoma. Pet. 8. Regardless, the Third Circuit's concerns are overstated and should not impact this Court's

application of the plain statutory language. Congress required the Secretary of the Interior to promulgate regulations to carry out NAGPRA's provisions. 25 U.S.C. § 3011. In fulfilling this obligation, the Secretary defined "human remains." 43 C.F.R. § 10.2(d)(1). The definition, however, "does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual. . . ." *Id.* If this definition is not met, then the remains are not subject to NAGPRA and repatriation is not required. *See* 43 C.F.R. §§ 10.1(b), 10.10(b)(1)(i) (stating that a repatriation applies if the remains meet the regulatory definition). Contrary to the Third Circuit's conclusion, had Jim Thorpe freely given his remains in this situation to the Borough in a last will and testament, his remains would not be considered "human remains" under the definition.

The Third Circuit's conclusion that applying NAGPRA to the Borough is absurd is based on a misunderstanding of the Act, its regulations, and on hypotheticals. *Certiorari* is needed to correct these errors.

## **II. The Third Circuit's Rewriting of NAGPRA to Justify Its Absurdity Ruling Created Judicial Exceptions and Requirements That Destroy Important Policy Decisions by Congress.**

To support its holding that application of NAGPRA in this case would be absurd, the Third

Circuit created a variety of exceptions and requirements for NAGPRA's application in future cases. These exceptions and requirements are found nowhere in the statute or regulations, are wholly unwarranted, and are against congressional intent.

**A. The Judicially-Created “Final Resting Place” Exception Would Prevent NAGPRA from Applying to Situations Congress Specifically Intended to Address.**

Instead of allowing NAGPRA's administrative process to resolve the competing claims in this case, the Third Circuit created a “final resting place” exception to NAGPRA's application – NAGPRA is not to apply to require a return, unless it is to the “final resting place” from which the remains were removed. To support its conclusion, the Third Circuit looked to the word “return.” Pet. App. 17a, 22a. Rather than reading “return” in the context of the statute and its processes as a whole, the Third Circuit read the term as an implied assumption that “human remains were moved from their intended final resting place.”<sup>10</sup> Pet.

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<sup>10</sup> The Third Circuit also ignored the fact that the Borough's possession of Thorpe's remains does not fit neatly into its newly created intended final resting place exception. Thorpe died in 1953 and his remains were returned to his ancestral homeland in Oklahoma for a traditional Sac and Fox two-day funeral as he intended. Pet. 8-9. Before the funeral could be completed, Thorpe's estranged third wife interrupted it with law enforcement officers and removed the casket. *Id.*; Pet. App. 4a-5a. The

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App. 22a. Contrary to the Third Circuit’s reading, the term “return” is located in the repatriation provision of NAGPRA, and it is only upon a “request of a known lineal descendant . . . or of the tribe” that a “return” must be made. 25 U.S.C. § 3005(a)(1). Therefore, the “return” is to the descendant or tribe, not to an original burial location.

The Third Circuit’s “final resting place” exception could have far reaching impacts across Indian Country and could produce its own absurd results. There are many instances of repatriations from repositories and collections that involve no burial at all – where Native remains were taken from massacre sites and battlefields, for example, and later repatriated from state and local tourism centers, state and local historical societies, schools, archives, the National Park Service, and other controlling entities. *See, e.g.*, Notice of Inventory Completion for Native American Human Remains from Sand Creek, CO in the Possession of the Colorado Historical Society, Denver, CO, 63 Fed. Reg. 39,292 (July 22, 1998) (inventory completed by historical society for scalplock removed from Sand Creek Massacre site likely as a trophy by a Colorado Volunteers officer). Likewise, there are

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casket was then in storage at various locations while Patsy negotiated the disposition of his remains with several institutions and municipalities and it wasn’t until four years later that it was placed at its current location. Pet. 9-11, 16; Pet. App. 4a-6a. Thus, Thorpe’s original intended final resting place was actually in Oklahoma.

numerous examples of individuals or communities building museums on top of burial mounds containing Native American remains, some of which were brought to Congress' attention to explain the need for NAGPRA. See *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 109, 113, 118, 122, 136, 275 (1990) (discussing opposition to the Salina burial pits and the Dickson Mounds tourist attractions); *History*, Dickson Mounds Museum, <http://www.museum.state.il.us/ismsites/dickson/history.htm> (last visited June 24, 2015).

A prime example that the “final resting place” exception is ill advised is the death of an Inuit man in New York City discussed during a Senate Committee hearing on NAGPRA:

Neither Mimik's father nor any of [sic] other Inuit, however, were buried but were “processed,” along with a[n] eleven year old Inuit girl from Alaska, in upstate New York and their bones returned to the American Museum of Natural History. When a teenager, Mimik inadvertently discovered that his father had not been buried in the museum ceremony and that his father's bones were on display in the museum. Through several years of severe depression brought on by this knowledge, Mimik tried to reclaim his father's bones for burial but his petitions were denied.

*Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearing on S. 1021 and S. 1980 Before the S. Comm. on Indian Affairs*, 101st Cong. 332 (1990) (citation omitted). In this example, the son sought to reclaim possession of his father's remains for proper burial. *Id.* at 331-32. If the Third Circuit's additional requirement that a "return" be to a final resting place were sound, then NAGPRA would not be applicable to this situation, which was clearly not intended. The "final resting place" exception would thwart Congress' intent, and certiorari is required to correct the Third Circuit's creation of an unwarranted judicial exception to NAGPRA's clear application.

**B. The Judicially-Created "Collected and Studied for Archeological or Historical Purposes" Requirement Has No Statutory Basis and Would Thwart Congress' Intent to Apply NAGPRA to Museums as It Defined Them.**

In support of its assertion that application of NAGPRA in the present case would be absurd, the Third Circuit states: "As we have explained, NAGPRA requires 'repatriation' of human remains from 'museums,' where those remains have been collected and studied for archeological or historical purposes." Pet. App. 17a (citing 25 U.S.C. § 3005). This additional "collected and studied" requirement is not found in the section cited for this proposition or

the rest of NAGPRA. *See* 25 U.S.C. § 3005 (applying the repatriation provisions to federal agencies and museums); 25 U.S.C. § 3001(8) (defining museum broadly). The Third Circuit based its decision on its common understanding of the word museum, which would generally collect and study objects for archeological or historical purposes. As explained earlier, however, Congress explicitly chose to define museum in a different manner, and that is the definition that binds the court’s analysis.<sup>11</sup> It is improper for the Third Circuit to casually add this qualifier without any explanation. There are many instances of remains being taken unjustly that were not for archeological or historical purposes, and adding this judicially-created qualifier would thwart Congress’ intent in enacting this statute to address these injustices.

**C. The Judicially-Created “Holding or Collecting the Remains for the Purposes of Display or Study” Requirement Would Disrupt Years of Proper NAGPRA Implementation.**

To support its absurdity holding, the Third Circuit made another assertion, creating yet another requirement that will have far reaching impacts:

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<sup>11</sup> And there is clear legislative history discussing the broad definition, with Congress in fact choosing to limit it to exclude private collectors. 136 Cong. Rec. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Bill Richardson).

Section 3003 applies to a “museum which has possession or control over holdings or collections of Native American human remains[.]” This implies that the statute assumes that a museum is holding or collecting the remains for the purposes of *display or study*, as opposed to serving as an original burial site.

Pet. App. 22a (emphasis added). There is no support for this implication and the latter statement does not flow from the analysis that precedes it.<sup>12</sup> The requirement that the remains be held or collected for the purposes of display or study does not appear in the statute. This implication is once again based on the Third Circuit’s utilization of its own understanding of museum and is yet another unfounded requirement that courts may follow.

The Third Circuit failed to recognize that Section 3003 also applies to federal agencies. 25 U.S.C. § 3003(a). While the Third Circuit’s “display or study” qualifier may seem plausible to the common definition of museum, it is nonsensical when applied to federal agencies and could eliminate the countless times agencies have repatriated remains that were not being studied or displayed. *See, e.g.*, Notice of Inventory Completion: Marine Corps Base Camp

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<sup>12</sup> As pointed out in the petition, this new qualification is met in this case, as the Borough is undeniably holding the remains of Jim Thorpe for the purposes of display. *See* Pet. App. 15-16, 16 n.13.

Pendleton, U.S. Marine Corps, San Diego County, CA, 77 Fed. Reg. 32,986 (June 4, 2012) (inventory and consultations regarding human remains discovered during construction, kept in individual's home, and turned over to the Marine Corps); Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Tongass National Forest, Craig Ranger District, Craig, AK, 77 Fed. Reg. 39,506 (July 3, 2012) (inventory and consultations regarding human remains removed by individual, seized as part of criminal investigation, and stored by Department of Agriculture).

These additional qualifiers are extremely problematic from a practical standpoint. Entities that are clearly covered by the statute and have been abiding by its inventory and notice provisions for the past twenty-five years may claim exemption based on the Third Circuit's new requirements. If these inventories and notices are never completed, lineal descendants and tribes will likely never know of human remains and other cultural items that are wrongfully possessed in violation of NAGPRA. This Court should grant certiorari to make clear that entities that are covered by NAGPRA cannot claim exemption based on these unfounded judicially-created exemptions and requirements.



**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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