No. 14-1419

In the Supreme Court of the United States

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

v.

BOROUGH OF JIM THORPE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY, CHURCH OF THE LUKUMI BABALU AYE, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, MUSLIM PUBLIC AFFAIRS COUNCIL, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE USA, AND THE QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to this Court's Rule 37.2(b), *amici* respectfully move this Court for leave to file a brief as *amici curiae* in support of Petitioners. This case presents an issue of considerable importance to religious communities in general and Native American communities in particular. As detailed in the accompanying brief, *amici* are particularly well-suited to provide additional insight into the broad negative implications of the decision below for religious groups across the country.

Pursuant to this Court's Rule 37.2(a), counsel for *amici* timely notified all counsel of record that it intended to submit the accompanying brief. Counsel for Petitioners and for Respondent Borough of Jim Thorpe provided written consent, and their written consents accompany this motion and brief. Counsel for the remaining Respondents has taken the position that they are not a party to this stage of the litigation and have therefore declined to provide consent, necessitating the filing of this motion.

Respectfully submitted.

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QUESTIONS PRESENTED

May civil courts decide that particular religious beliefs are absurd?

May civil courts decide that it is absurd to protect religious exercise in accordance with the plain text of a civil rights statute?

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INTERESTS OF THE *AMICI CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has often advocated both as counsel and as *amicus curiae* for the protection of minority religious beliefs that many might view as peculiar or even absurd. The Becket Fund is concerned that the decision below will open the door to allow civil courts to get in the business of deciding that particular applications of religious accommodation statutes are absurd. Federal, state, and municipal law are laced with thousands of accommodations for beliefs and practices connected with particular religious traditions. Courts could thwart many of those religious accommodation statutes if they are allowed to decide that a particular application of a religious accommodation law is ridiculous.

The Church of the Lukumi Babalu Aye follows the Lukumi religion known as Cuban Santeria. The Church is a minority faith that well understands the

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and consents have been lodged with the Clerk. Counsel for some Respondents withheld consent, necessitating the accompanying motion for leave to file.

sometimes harsh effects of the political process on unpopular and misunderstood religious beliefs. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The Church of the Lukumi Babalu Aye is directly affected by the pivotal issue in this case: whether religious accommodation statutes can be cast aside merely because a court views the religious protections as leading to a strange result. The Church's members practice a 4,000-year-old African religion known variously as Yoba, Yoruba, or Santeria, which is not popular enough to gain meaningful representation in or protection from the political process. An integral part of Yoruba is the sacrifice of animals, which are usually cooked and eaten in a feast following their sacrifice. If the Church's beliefs were subject to a popularity or perceived-strangeness standard, there are many courts or government officials who would not hesitate to remove religious protections for these less familiar practices.

The International Society for Krishna Consciousness, a monotheistic faith within the Hindu tradition, also has a strong interest in this case. Its members adhere to the principles of Gaudiya Vaishnavism, or Krishna Consciousness, which requires followers to regularly venture into public places to distribute religious literature, solicit funds to support the religion, and encourage members of the public to participate in Krishna Consciousness. Bound by this religious duty, known in the Sanskrit language as sankirtan, Krishna followers regularly seek access to public places where the largest numbers of people can be found—including airports and rail stations. In these contexts, their sometimes unpopular religious practices would be far more

vulnerable if protections for such beliefs could be removed based on an assessment of "normalcy."

The Muslim Public Affairs Council ("MPAC") is an American institution that improves public understanding of Islam and shapes policies that impact American Muslims by engaging our government, media and communities. It has worked diligently since 1988 to foster a vibrant American Muslim identity and to represent the interests of American Muslims to decision makers in government agencies, media outlets, interfaith circles, and policy institutions. There are a number of these interests and beliefs that would be jeopardized if the protective application of religious accommodation statutes could be disregarded as absurd. These beliefs include dietary requirements and grooming practices, including the wearing of the hijab or veil by Muslim women in public, among other things, that are often viewed as outside mainstream American religious practices.

The National Council of the Churches of Christ in the USA, also known as the National Council of Churches, is a community of 37 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its Governing Board. The National Council of Churches is an active defender of religious liberty. It is very concerned that religious exercise not be trivialized by the courts as "absurd," as such a rule could have a wide-spread impact on many of the beliefs held by its member faith groups.

The Queens Federation of Churches, Inc. was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Federation and its 390 member congregations are vitally concerned with protecting religious liberty, and have repeatedly appeared as amicus curiae for that purpose. The Federation supports faithful application of religious accommodation statutes to ensure religious organizations receive the full measure of protection Congress intended, even if judges may view the outcome as peculiar.

SUMMARY OF THE ARGUMENT

This country is one of the most religiously diverse countries in the world, and is becoming more so. In a pluralistic religious environment, it is inevitable that different religious traditions will come into contact with one another. It is also inevitable that Americans will disagree about their beliefs, and sometimes one American will find another's beliefs implausible. Indeed, the ability to disagree over religious matters is at the very heart of the American concept of religious freedom.

In this increasingly pluralistic context, civil courts must strive to remain strictly neutral. Courts have neither the "function" nor the "competence" to adjudicate religious disputes. *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). "Courts are not arbiters of scriptural interpretation." *Ibid.* And that limited role does not allow civil courts to pass judgment on whether religious beliefs and practices are reasonable or absurd.

Similarly, civil courts should not be in the business of deciding that particular applications of

religious accommodation statutes are absurd. Federal, state, and municipal law are laced with thousands of accommodations for beliefs and practices connected with particular religious traditions. Courts could thwart many of those religious accommodation statutes if they are allowed to decide that a particular application of a religious accommodation law seems strange.

Yet that is just what the Third Circuit did. Instead of applying what it conceded was the plain text of a civil rights statute—NAGPRA—specifically designed to accommodate Native American religious exercise related to burial, the Third Circuit said that the specific accommodation could not have been what Congress really wanted.

It is not hard to foresee absurd results following from the Third Circuit's absurdity decision. Prisoner religious rights would soon come under fire, as prison systems often claim—and lower courts have often been willing to find—prisoner religious beliefs to be unreasonable.[2]

Religious land use would also be vulnerable, as courts can be quite hostile towards religious land

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[2] See, *e.g.*, *Moussazadeh* v. *Tex. Dept. of Criminal Justice*, 709 F.3d 487, 489 & n.1, 491, 492 (2015) (Jolly, J., dissenting from denial of rehearing en banc) (repeatedly suggesting that Jewish prisoner seeking kosher dietary accommodation should have been satisfied with "non-pork" option instead); *Haight* v. *Thompson*, 763 F.3d 554, 566 (6th Cir. 2014) (Sutton, J.) (rejecting government's argument that inmates' request to purchase meat for Native American ceremony "falls outside the 'rough outlines of reasonable religious expression'" and reversing district court's judgment of no substantial burden).

users from disfavored or unfamiliar religious groups, viewing their beliefs as too strange to warrant full protection.[3] And specific burial-related accommodations for Jews, Muslims, and Hmong, among others, would also be put in danger.[4]

These results can be avoided if the Court takes the opportunity presented by this case to explain that religious liberty in a diverse society presupposes that some Americans will find other Americans' beliefs to be absurd. But only private citizens may reach that conclusion. Courts must abstain. Doing so will do justice to both Native Americans and the

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[3] See, *e.g.*, *Albanian Associated Fund* v. *Township of Wayne*, CIVA 06-CV-3217 PGS, 2007 WL 4232966, at *1 (D.N.J. 2007) (Muslim mosque); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (city attempted to seize church land and give it to Costco); *Guru Nanak Sikh Soc. of Yuba City* v. *Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (Sikh temple denied permission to build); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urban L.J. 1021 (2012) (collecting cases); 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (noting "massive evidence" of widespread discrimination against churches)).

[4] See, *e.g.*, *Montgomery* v. *County of Clinton*, 743 F. Supp. 1253 (W. D. Mich. 1990) (generally applicable law requiring autopsies was applied to Jewish decedent); *You Vang Yang* v. *Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990) (government not required to accommodate the religious objection of Vietnamese Hmong to autopsies). Some states have enacted statutes which require consideration of the religious beliefs of the deceased in determining the necessity of an autopsy. See, *e.g.*, Cal. Gov't Code § 27491.43 (West 1988); N.Y. Pub. Health Law § 4210–c (McKinney 1985).

many other disfavored religious minorities in this country.

REASONS FOR GRANTING THE WRIT

I. The decision below warrants review because it invites courts to decide that it is absurd to protect religious exercise in accordance with the plain text of a federal civil rights statute.

A. The Third Circuit's application of the absurdity doctrine ignores NAGPRA's purpose of accommodating religious practices and invites courts to decide whether religious beliefs are absurd.

When it comes to religious beliefs, "one man's religion will always be another man's heresy," *United States* v. *Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995) *aff'd*, 95 F.3d 1475 (10th Cir. 1996). Yet "[h]eresy trials are foreign to our Constitution. Men may believe what they cannot prove." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). In our pluralistic religious society, therefore, courts must be vigilant to avoid passing judgment on whether religious beliefs and practices are reasonable or absurd. Indeed, courts have neither the "function" nor the "competence" to adjudicate religious disputes "in this sensitive area"; nor are they "arbiters of scriptural interpretation." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). Nor can courts fail to provide protection for religious beliefs even if they find them "idiosyncratic." *Holt* v. *Hobbs*, 135 S. Ct. 853, 857 (2015).

For this reason, while the absurdity doctrine is a limited interpretive tool appropriate under only "rare and exceptional circumstances," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930), this tool is particularly inap-

propriate when used to analyze a statute protecting beliefs that some might find absurd in any context. Yet that is exactly what the Third Circuit did here. Instead of applying the admittedly plain text of NAGPRA to protect Native American religious beliefs, the Third Circuit said that Congress could not have intended that "patently absurd result." Pet. App. 4a. A brief review of NAGPRA's purpose reveals how inappropriate this ruling was in the particularly sensitive context of religious accommodation.

Scholars have noted that "[t]he heart of NAGPRA is its repatriation provision, which is intended to redress the historic imbalance between scientific inquiry and *Native American religious beliefs*."[5] Despite widespread Native American beliefs regarding the necessity of proper burials for tribal members, "[f]or an embarrassing stretch of American history, the possession of Native American bones,

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[5] Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 Colum. J. Envtl. L. 1, 17 (2002) (emphasis added) (citing 136 Cong. Rec. S17474-75 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye)); see also Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. Rev. 145, 202-03 (1996) ("In recognition of the fact that many Native American religions treat caring for the remains of ancestors as a very important obligation, NAGPRA establishes a mandate and a process for the repatriation of the physical remains of ancestors, funerary objects, and other sacred items."); Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 Ariz. St. L.J. 175, 190 (1992) ("[T]he intended purpose of NAGPRA is to return only those crucial objects of religious and patrimonial significance.").

skulls and artifacts was regarded as a sign of wealth, power and cultural superiority." Benjamin Hochberg, *Bringing Jim Thorpe Home: Inconsistencies in the Native American Graves and Repatriation Act*, 13 Rutgers Race & L. Rev. 83, 114 (2012). These Native American "[h]uman remains were obtained by soldiers, government agents, pothunters, private citizens, museum collecting crews, and scientists in the name of profit, entertainment, science, or development." Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 40 (1992). While it is offensive for human remains to be stolen, exploited, or defaced in any context, the desecration of the human body is particularly egregious to the religious beliefs of most Native American tribes. See Robert W. Lannan, Note, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Remains*, 22 Harv. Envtl. L. Rev. 369, 369-70 (1998) ("Many Native Americans believe that reburial of disinterred human remains is essential for the spirits of the deceased to return to rest."). Yet "during its development in this country, the common law failed to take into account unique indigenous burial practices and mortuary traditions," and Native Americans "had little realistic hope of a fair hearing in American courts." Trope & Echo-Hawk, *supra* at 45-46; see also *Kickapoo Traditional Tribe of Texas* v. *Chacon*, 46 F. Supp. 2d 644, 654 (W.D. Tex. 1999) ("[T]he development of our nation's laws regarding the handling and burial of the dead have reflected the Anglican customs and practices imported from England, the source of our common law, and not those of other cultures."). NAGPRA was enacted to

address this imbalanced legal structure that disregarded the religious rights of Native Americans.

Congress enacted NAGPRA against this backdrop, after hearing testimony from Native American leaders about the important role that the burial of the dead played in their spiritual beliefs, as well as testimony from both Native American leaders and other experts regarding the long history of "desecration of countless Native American burial sites." H.R. Rep. No. 101-877, at 9 (1990). During consideration of NAGPRA, Native American representatives testified that "the spirits of their ancestors would not rest until they are returned to their homeland and that these beliefs have been generally ignored by the museums which house the remains and objects." H.R. Rep. No. 101-877, at 13. At these hearings "[m]ost testimony indicated the need for strong legislation to protect burial sites from being looted or desecrated in the future." *Id.* at 13. Additionally, "tribal witnesses felt strongly that [human remains] should be returned for proper burial, which is an important part of the religious and traditional life cycle of Native Americans. S. Rep. No. 101-473, at 1 (1990). The Senate Report thus specifically noted that NAGPRA was being enacted to rectify the long history of "violation of traditional Native American religious practices." *Ibid.*[6]

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[6] See also *ibid.* ("The Committee finds that many Indian tribes and Native Hawaiians have expressed a clear and unequivocal interest in the return of these remains to the Indian tribe or Native Hawaiian organization so that the tribe, family or organization may determine the appropriate disposition of the remains which is consistent with their religious and cultural practices.").

NAGPRA's purpose in protecting Native American religious practices is also demonstrated by provisions, not directly relevant here, that expressly protect "sacred objects," defined as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001. Congress noted "the significance of certain sacred objects to their respective tribes and the need to have those objects returned to the tribe so that important religious ceremonies in which such objects are central could be resumed." S. Rep. 101-473, at 2 (1990).

Despite NAGPRA's clear purpose of protecting the religious practices of Native American tribes, the Third Circuit narrowly defined NAGPRA's purposes to avoid the "literal application of the text of NAGPRA" to provide protections the court viewed as absurd. Pet. App. at 12-13. In reaching this conclusion, the court cast aside carefully crafted legislative accommodations meant to protect religious exercise *precisely because* society has long viewed the Native American beliefs as absurd and unworthy of protection. Allowing this ruling to stand will invite unelected judges to apply their own values and sense of "normal" to many other legal safeguards that—by their very nature—are meant to protect beliefs and practices that are outside the mainstream of American society.

B. The absurdity doctrine has been abused when applied to matters involving religion, particularly for religious minorities.

The religious beliefs of minority groups are particularly vulnerable to the absurdity doctrine's focus on whether a statute would "compel an odd result," *Green* v. *Bock Laundry Mach. Co.,* 490 U.S. 504, 509 (1989). Religious beliefs viewed as "odd" or unpopular are the ones that need specific religious protections the most.[7] Such beliefs are often at best overlooked,[8] and at worst targeted through the political process.[9] Allowing courts to casually disregard the plain text of a religious accommodation statute simply because the outcomes of such protections do not accord with the intuitions of judges would perpetuate the discrimination that created the need for religious accommodations in the first place.

It is not surprising, then, that courts have historically abused interpretive tools similar to the absurdity doctrine in the context of religious accommodations. A notable example of this involved the treat-

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[7] See Senate Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 (noting that "the ability of religious minorities to practice their faiths" was frequently threatened without strict religious protections).

[8] See Douglas Laycock, *The Remnants of Free Exercise*, Sup. Ct. Rev. 1 (1990) ("Proponents of landmarking seem genuinely unable to comprehend why churches object to maintaining their houses of worship as permanent architectural museums, at the expense of those who worship there, for the aesthetic pleasure of those who do not.").

[9] See, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.").

ment of Jehovah's Witness children who refused to stand and recite the Pledge of Allegiance. This Court originally upheld the decision to expel them on the grounds that "[i]t mocks reason and denies our whole history" to disapprove of saluting a flag. *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 598 (1940). This "mocks reason" standard bears a striking resemblance to the legal—or perhaps sociological—analysis used when applying the absurdity doctrine. The Court realized the error of dismissing religious beliefs as nonsensical, reversing course just three years later in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 641-42 (1943) ("We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.").[10]

Similarly, in the prison context, courts have often made the mistake of providing idiosyncratic religious beliefs with little or no protections. One court declined to provide religious protections to an inmate's religious beliefs because it found that the inmate's religion seemed "facially idiosyncratic" and thus "perhaps unworthy of full First Amendment protection." *Abdool-Rashaad* v. *Seiter*, 772 F.2d 905 (6th

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[10] Although *Barnette* is often thought of as a freedom of speech case, it was actually a free exercise case: the sole basis for the decision appealed from was the plaintiffs' free exercise claim. See *Barnette* v. *West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 254 (S.D.W. Va. 1942) *aff'd*, 319 U.S. 624 (1943) (comparing the free exercise claim the court was actually deciding to the different right of free speech); *id.*, Findings of Fact and Conclusions of Law (Oct. 6, 1942), *available at* https://research.archives.gov/id/279138.

Cir. 1985). Similarly, the court in *Saint Claire* v. *Cuyler*, 481 F.Supp. 732, 736 (E.D.Pa.1979), *rev'd on other grounds*, 634 F.2d 109 (3d Cir.1980), indicated that it would only assess sincerity of belief "[s]o long as no idiosyncratic religious claims are made" by a particular inmate.

Minority groups such as Native American practitioners have historically found it particularly difficult to obtain protection for their traditional forms of spiritual expression.[11] For example, Congress has explained that "the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment." 42 U.S.C. § 1996a. As a result, Congress passed several statutes, including NAGPRA, with an eye towards rectifying this political imbalance in power for the minority religious beliefs of Native Americans. Yet the decision below shows that when given the freedom to apply religious accommodation provisions in a manner that is unmoored from their text and history, there is a significant danger that courts will

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[11] See, *e.g.*, *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013) (refusing to accommodate the grooming practices of Native American inmates), *cert. granted, judgment vacated*, 135 S. Ct. 1173 (2015); *A.A. ex rel. Betenbaugh* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (upholding a Native American student's right to wear hear in a long bun on the head); see also *Kickapoo Traditional Tribe of Texas* v. *Chacon*, 46 F. Supp. 2d 644, 654 (W.D. Tex. 1999) ("A history of recognition of and respect for Native American burial traditions sadly does not exist in this country.").

prioritize other, majoritarian values over the minority rights the statute was written to protect.

C. The facts of this case demonstrate the risk of allowing courts to ignore the plain language of statutes meant to protect religious beliefs.

The Third Circuit's decision in this case amply demonstrates the risk of allowing courts to decide that particular applications of religious accommodation statutes are "absurd." That is because absurdity doctrine by its nature focuses on "outcome[s]" and "results" of how a particular law is applied. *Kloeckner* v. *Solis*, 133 S. Ct. 596, 606 (2012). But the results of religious accommodation statutes are religious practices. When a court declares a particular application of such an accommodation statute to be absurd, it is also declaring the religious practice itself to be absurd.

In this case, the Third Circuit held that it would be absurd for Jim Thorpe's remaining living sons to bury their father in the family gravesite on Sac and Fox land. This despite the fact that the relevant religious beliefs are clear. Thorpe spoke of his wishes for a traditional funeral "in his native Oklahoma." See Jack Newcombe, The Best of The Athletic Boys 247-48 (1975). Thorpe made these wishes known to his sons, who testified that Thorpe communicated his wishes to have his body "returned to Sac and Fox country" for his "last rites and burial." Pet. App.at 8.

Thorpe's sons seek to use NAGPRA to repatriate their father's remains, so that Jim Thorpe can finally be put to rest with a proper tribal burial ceremony near where the rest of his family members lie. Pet.

App. 9-12; see also Neely Tucker, *The Battle Over Jim Thorpe's Soul*, SFGate (March 15, 2012), http://www.sfgate.com/news/article/The-battle-over-Jim-Thorpe-s-soul-3410784.php (last visited June 30, 2015). The Third Circuit acknowledged that a ruling in favor of Native Americans was required by the "literal application of the text of NAGPRA," but the court nevertheless held that allowing the Sac and Fox Nation and Thorpe's remaining children to remove Thorpe's remains and complete his burial ceremony on tribal land was "such a clearly absurd result and so contrary to Congress's intent" that the Borough was not covered by NAGPRA "for the purposes of Thorpe's burial." Pet. App. 13. The Third Circuit reached this result in part of its understanding of historical common law legal rights related to the treatment and burial of human remains. But it was *precisely because* "the common law failed to take into account unique indigenous burial practices and mortuary traditions" that Congress enacted NAGPRA to protect Native American religious rights. See Trope & Echo-Hawk, *supra* at 45. Thus, the facts of this case demonstrate how easily it is for a court to use the absurdity doctrine to cast aside religious protections when those protections result in an outcome—a particular religious practice—that is unfamiliar to a judge's values and own world-view.

II. The petition raises an issue of national importance.

The Third Circuit's decision will, if left in place, lead to deleterious effects for religious groups of many sorts, and expose religious minorities in particular to discrimination.

A. The lower court's decision will allow many other types of religious practices to be deemed absurd.

Declaring the core principle of NAGPRA—repatriation of human remains—to be "absurd" can only encourage courts to read language intended to protect spiritual expression out of other religious protection statutes. In fact, Native American religious practitioners are hardly alone in finding themselves compelled to explain and seek protection for beliefs and practices that are treated as unfamiliar or even bizarre by many Americans. Consider this list posed by Professor Laycock, highlighting the potential perceived absurdity of a range of religious beliefs:

> Can a city prohibit believers in Santeria from sacrificing small animals, which is the central ritual of their faith?
>
> Can the federal government punish religious use of a tea that contains a mild hallucinogen and is part of the central ritual of a faith?
>
> Can a city designate a church as a landmark and refuse to permit any expansion of the building, even though the church is regularly turning people away from Mass?
>
> Can a city police department require its officers to be clean shaven, forcing Muslim officers to resign or to violate what they understand to be a religious duty?
>
> Can zoning authorities exclude the Metropolitan Community Church from a city, probably

> because of the city's hostility to the church's mission to gay and lesbian Christians (but of course that motive would be hard to prove)?
>
> * * *
>
> Can the state refuse a driver's license to a Christian woman who wants no graven image (i.e., no photograph) on her license, or to a Muslim woman who is willing to be photographed only while wearing her veil?
>
> Can a school board refuse to allow Muslim girls to wear long sweat pants, instead of shorts, in coed gym classes?
>
> Can prison authorities refuse to provide kosher meals to Jewish prisoners?[12]

The answer to all of these questions would be an unequivocal "Yes" if courts only had to offer protections to religious beliefs that no one thinks are absurd. Yet this Court has made clear that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 716. The decision below, if allowed to stand, legitimizes evaluating any number of religious beliefs on subjective "absurdity" criteria that this Court has already said are out of bounds.

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[12] Douglas Laycock, The Religious Exemption Debate, 11 Rutgers J. L. & Religion 139, 145-47 (2009) (citing cases).

B. Many other religious accommodation statutes could be implicated by the lower court's dismissal of statutory protections for religious practices.

Studies have estimated that there are more than 2,000 state and federal statutes that provide special protections for religious practice. See Michael McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. Rev. 611, 616 (2001) (citing James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 (1992)). Some of these statutes, such as the Religious Land Use and Institutionalized Persons Act, provide protections to members of all religious groups, while other statutes, like NAGPRA, address narrower protections tailored to specific groups and issues. For instance, one statute regulating meat inspection provides "specific protections for kosher slaughterhouses"; the Social Security law includes accommodations "for ministers in churches that do not believe in the compulsory contributions by clergy to social security"; a number of state licensing statutes include protections for religious daycare centers; employment discrimination laws provide protections for the hiring practices of churches and synagogues; and Medicare and Medicaid protect members of religions that "do not believe in medicine so that they may still take some advantage of those programs." *Ibid.* Jewish servicemen have also long relied on similar statutory protections to protect their right to wear a yarmulke

with a military uniform, 10 U.S.C. § 774(a)-(b).[13] But these and other statutory religious protections—including NAGPRA—are effective only so long as the courts are willing to apply and enforce them as written by Congress.

Religious accommodation statutes frequently come into tension with other considerations valued by governments, such as the efficient administration of prisons, *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005), the regulation of drugs, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), or preservation of the public health, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 544 (1993). Thus religious accommodation statutes will be effective only if this Court makes it clear that they must be applied in accordance with their language, not the "the general moral or common sense." *Crooks*, 282 U.S. at 60. As such, the basic standard that "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances," *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991), is an especially important protection for any religious

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[13] This religious accommodation statute was enacted in 1987 after this Court held in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), that a Jewish Air Force officer had no First Amendment right to wear a yarmulke while in uniform, as his faith dictated. Recently Judge Berman Jackson held that a separate religious accommodations statute, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, required the Army to accommodate a Sikh ROTC student who wears a beard and a turban. See *Singh* v. *McHugh*, --- F.Supp.3d ---, 2015 WL 3648682 (D.D.C. June 12, 2005) (applying the Religious Freedom Restoration Act and *Holt* v. *Hobbs*, 135 S.Ct. 853 (2015)).

adherent or group whose statutory rights may conflict with the beliefs and priorities of the judges who are required to enforce them.

If given the freedom to interpret religious accommodation protections in a manner that evaluates whether particular outcomes seem strange, courts can use the absurdity doctrine to essentially cast judgment on the very religious beliefs these statutes were meant to protect. While private citizens can—and often do—have opinions about the reasonableness or absurdity of their fellow Americans' beliefs, courts must abstain from such evaluations. Otherwise, the religious beliefs not just of Native Americans but of many other religious groups in this country will be threatened. This Court should grant certiorari to reaffirm that principle.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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