

Case No. 24-2081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WINNEBAGO TRIBE OF NEBRASKA,

Appellant,

v.

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

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

OPENING BRIEF OF APPELLANT WINNEBAGO TRIBE OF NEBRASKA

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(name of party/amicus)

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
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7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Beth Margaret Wright

Date: 11/12/24

Counsel for: Winnebago Tribe of Nebraska

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INTRODUCTION

This case arises from the refusal of Appellee-Defendants—the United States Department of the Army (“Army”), the Office of Army Cemeteries, and named officials in their official capacities (collectively, “Defendants”)—to repatriate the remains of Samuel Gilbert and Edward Hensley, two boys from Appellant-Plaintiff Winnebago Tribe of Nebraska (“Winnebago”), under the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001–3013, to Winnebago. The boys’ remains are buried at the Carlisle Barracks Post Cemetery (“Carlisle Cemetery” or “the Cemetery”) and where Defendants withhold them in defiance of federal law. JA25.

On October 16, 2023, Winnebago formally requested repatriation of Samuel’s and Edward’s remains under NAGPRA, pursuant to 25 U.S.C. § 3005(a)(4). JA12. On December 7, 2023, Defendants denied the request, claiming the remains are outside NAGPRA’s scope. JA36-37. While Defendants acknowledge their possession and control over the remains and the remains’ cultural affiliation with Winnebago, they argue that the remains’ burial at Carlisle Cemetery exempts them from NAGPRA’s mandate. JA36-37. This position is inconsistent with NAGPRA’s unambiguous requirement that federal agencies repatriate Native American human remains in their possession or control upon request of culturally affiliated Indian Tribes. *See* 25 U.S.C. § 3005(a).

The placement of the remains at Carlisle Cemetery is rooted in the historical injustices of the Carlisle Indian Industrial School (“Carlisle” or “Carlisle Indian School”), established in 1879 to assimilate Native children forcibly removed from their families. JA20-21. Due to neglect and mistreatment, Samuel and Edward died shortly after arriving at Carlisle. JA21-22. They were buried without notice to or consent from their families or Winnebago. JA21-22. NAGPRA’s clear objective is to restore the dignity of Native American remains and provide for their proper reburial according to Tribal customs. Defendants’ defiance of NAGPRA perpetuates a legacy of disregard for the sanctity of Native remains and Tribal sovereignty and rights.

NAGPRA—enacted to address the wrongful possession of Native American human remains and cultural items—imposes unequivocal obligations on federal agencies to repatriate remains upon request of an Indian Tribe. *See* 25 U.S.C. § 3005(a); H.R. Rep. No. 101-877, at 8–9 (1990). Defendants’ failure to comply undermines the statute, leaving Winnebago without recourse to honor and restore Samuel and Edward to their proper resting places. This Court’s intervention is essential to ensure that NAGPRA’s guarantees are fulfilled. Winnebago respectfully requests this Court reverse the United States District Court for the Eastern District of Virginia’s (“District Court”) dismissal of Winnebago’s action so that Samuel and Edward may finally return home to Winnebago.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as Winnebago appeals a final decision of the District Court, which dismissed Winnebago's action. JA216. The District Court entered its judgment on August 20, 2024. JA216. The District Court has subject matter jurisdiction over this action under 25 U.S.C. § 3013, as Winnebago alleged Defendants violated NAGPRA. Because Defendants are United States agencies and officers or employees sued in their official capacities, Winnebago's notice of appeal was due within sixty days after entry of the District Court's order. *See* Fed. R. App. P. 4(a)(1)(B). Winnebago timely filed its notice of appeal on October 21, 2024. JA240.

ISSUES PRESENTED

1. Does 25 U.S.C. § 3005(a)(4) require Native American human remains to be part of a "holding or collection" to be repatriated, even though such a requirement is absent from NAGPRA's plain language and contradicts its purpose to broadly enable repatriation?

2. If 25 U.S.C. § 3005(a)(4) is interpreted to require Native American human remains to be part of a "holding or collection," do the facts surrounding Samuel's and Edward's remains—controlled and managed collectively at Carlisle Cemetery by Defendants—demonstrate that they this requirement is satisfied?

STANDARD OF REVIEW

This appeal raises questions of statutory interpretation. These are questions of law, which this Court reviews *de novo*. *United States v. Joshua*, 607 F.3d 379 (4th Cir. 2010). The District Court dismissed Winnebago’s complaint under Federal Rule of Civil Procedure 12(b)(6). This Court also reviews such dismissals *de novo*. *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012). In reviewing a Rule 12(b)(6) dismissal, this Court accepts as true all well-pleaded factual allegations in the complaint and draws all reasonable inferences for the plaintiff. *Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018).

STATEMENT OF THE CASE

I. The Carlisle Indian School Was Designed to Erase Native American Culture by Forcibly Removing Children from Their Families and Tribes.

The history of Samuel’s and Edward’s remains traces back to the Carlisle Indian School, where the boys tragically died after being forcibly removed from their families and Winnebago. In 1879, General Richard Henry Pratt, U.S. Army, opened Carlisle as one of the first off-reservation federal Indian boarding schools in the United States. JACQUELINE FEAR-SEGAL & SUSAN D. ROSE, *CARLISLE INDIAN INDUSTRIAL SCHOOL: INDIGENOUS HISTORIES, MEMORIES, AND RECLAMATIONS*, at 91 (2016) (“FEAR-SEGAL & ROSE”). General Pratt openly declared Carlisle’s mission: “All the Indian there is in the race should be dead. Kill the Indian in him,

and save the man.” *Haaland v. Brackeen*, 599 U.S. 255, 299 (2023) (Gorsuch, J., concurring) (cleaned up). This foundational philosophy became the blueprint for over 400 federal Indian boarding schools that sought to obliterate Native American identity and culture. *Id.*

The federal government explicitly designed these boarding schools to facilitate cultural genocide by severing Native children from their families, communities, and traditions. Carlisle’s policy of assimilation was not education—it was cultural erasure, a tool to dispossess Native peoples of their lands and extinguish their existence. FEAR-SEGAL & ROSE, *supra* at 1–2. Justice Gorsuch recently characterized this system as an intentional, government-backed campaign to “destroy tribal identity.” *Brackeen*, 599 U.S. at 298 (Gorsuch, J., concurring).

Native children were sent to Carlisle without consent, and often under duress or outright coercion.¹ Federal agents routinely withheld treaty-guaranteed rations to force parents to surrender their children. ANNUAL REPORT OF THE COMM’R OF INDIAN AFFS. TO THE SEC’Y OF INTERIOR, at 199 (1886). When parents resisted, the Army was often deployed under direct orders: “*Take the children.*”² In many cases,

¹ See U.S. DEP’T OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT VOL. I, at 36 (2022) (“BOARDING SCH. REPT. VOL. I”), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

² See *The Native American Boarding School System*, N.Y. TIMES (Aug. 30, 2023), <https://www.nytimes.com/interactive/2023/08/30/us/native-american-boarding-schools.html> (emphasis added).

abduction was used to forcibly separate Native children from their families.³

Brackeen, 599 U.S. at 299 (Gorsuch, J., concurring).

At Carlisle, children endured horrific conditions. The environment at federal boarding schools was rife with sexual, physical, and emotional abuse, as well as overcrowding, malnutrition, and inadequate healthcare. *Id.* at 300–01; BOARDING SCH. REPT. VOL. I, *supra* at 54–63. Native children were stripped of their names, clothing, languages, and cultural practices, and any expression of Native traditions was strictly prohibited. BOARDING SCH. REPT. VOL. I, *supra* at 53. These policies, combined with abysmal living conditions, led to devastating death tolls: at least 3,100 children died at federal boarding schools, with 179 dying at Carlisle alone.⁴

³ The United States’s literal kidnapping of children into the federal boarding school system is well documented. *See, e.g.,* Wambdi A. Was’tesWinyan, *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision*, 47 MITCHELL HAMLIN L. REV. 640, 660 (2021); Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 63 (2016); Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 891 (2017).

⁴ *See* Dana Hedgpeth et al., *More Than 3,100 Students Died At Schools Built to Crush Native American Cultures*, THE WASH. POST (Dec. 22, 2024), <https://www.washingtonpost.com/investigations/interactive/2024/native-american-deaths-burial-sites-boarding-schools/>; FEAR-SEGAL & ROSE, *supra* at 160; HUGH MATTERNES ET AL., ARCHIVAL RESEARCH OF THE CARLISLE INDIAN SCHOOL CEMETERY, at 1 (2017), <https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Archival%20Research%20Report%20-%20July%202017v2.pdf?ver=2019-06-07-121535-723>.

Carlisle was ultimately closed in 1918 due to overwhelming evidence of financial corruption, rampant physical abuse, and high student death rates. FEAR-SEGAL & ROSE, *supra* at 164.

II. Samuel Gilbert and Edward Hensley Died at Carlisle and Were Buried There Without Consent from Their Families or Winnebago.

On September 7, 1895, Captain W.H. Beck, U.S. Army, Indian Agent of the Omaha and Winnebago Agency, removed Samuel Gilbert and Edward Hensley from their families and sent them to the Carlisle Indian School. JA21. Both boys were expected to remain at Carlisle for five years but died before they could return home. JA21-22. Samuel died forty-seven days after his arrival, on October 24, 1895. JA22. Edward died four years later, on June 29, 1899. JA21.

Carlisle officials never notified Samuel's or Edward's families or Winnebago of their deaths. JA22. They also failed to seek or obtain consent from the boys' families or Winnebago to bury the boys at the original Carlisle Indian burial ground. JA22. This burial was conducted in direct violation of Winnebago beliefs and customs, which hold that spirits cannot rest until their remains are properly buried in their homeland. JA15, JA35. When Indian Tribes requested the return of their children's remains, the United States denied them. FEAR-SEGAL & ROSE, *supra* at 170. Carlisle officials buried 179 children during its operation, without the consent of their families or their Indian Tribes. *Id.* at 160; JA22-24.

In 1927, nearly a decade after Carlisle closed, the Army began expanding the campus into what would become the Army War College. JA24-26. Viewing the original Carlisle Indian burial ground as an impediment to the expansion, the Army disinterred the remains of many children—including Samuel and Edward—and hastily moved them to their current location at Carlisle Cemetery. JA24-25. This transfer was conducted without care or respect: coffins crumbled as they were handled, remains commingled, and grave markers were lost or mislabeled. JA25. As a result, at least fourteen graves in the Carlisle Cemetery are marked “unknown.” JA26. After removing the remains, the Army paved over the original burial ground to construct a parking lot. JA25.

These actions deprived Samuel’s and Edward’s families and Winnebago of the ability to honor the boys with the cultural and religious rites required by their beliefs, not once, but twice. JA21-26. According to Winnebago custom, Samuel’s and Edward’s spirits remain lost and unable to rest until their remains are returned to their homeland and properly reburied. JA35.

A. Defendants Continue to Hold the Remains at Carlisle Cemetery, Exploiting Them for Their Institutional Purposes.

Defendants retain control over the remains buried at Carlisle Cemetery and continue to exploit them for institutional purposes. Defendants treat the Cemetery as a repository for Native American human remains, conducting research, education, and other activities that serve their institutional goals, rather than

respecting the sovereignty and traditions of Indian Tribes. JA49-53. For example, without consulting Indian Tribes, Defendants conducted ground penetrating radar surveys to study the remains and to locate additional remains that may have been left beneath the parking lot, highlighting their ongoing control and use of the Cemetery as a research site. JA25-26.

Defendants also feature the Cemetery in public tours as a remnant of Carlisle, which focus on the site's history as a federal Indian boarding school. JA49-50. These tours whitewash the history of Carlisle, downplaying the suffering and deaths of the children buried there and distorting the historical record. JA50.

Defendants have refused to repatriate the remains of Native children buried at Carlisle Cemetery, citing the Cemetery's historical significance and claiming that repatriation would disrupt its "tranquility." JA43-44. In a 2007 response to a repatriation request from the Northern Arapaho Tribe, Defendants stated that they had "serious concerns" about repatriating remains from the Cemetery and argued that the Cemetery represents "one of the most beautiful tributes to the Native American people." JA44. These claims directly contradict the historical reality of Carlisle.

After Defendants refused to voluntarily repatriate remains from Carlisle Cemetery, Indian Tribes invoked NAGPRA as a means to repatriate their children. JA44. Defendants responded abruptly; however, they did not follow NAGPRA, but

instead imposed their own makeshift “Disinterment and Return Process.” JA35. Defendants’ refusal to repatriate these remains pursuant to NAGPRA and imposition of their own process hinders Indian Tribes’ ability to rebury their ancestors in accordance with Tribal customs, timelines, and cultural standards. JA35-36. This denial also violates Congress’s intent in enacting NAGPRA, which was designed to shift control over Native American human remains from federal agencies to Indian Tribes. JA29-30.

The ongoing retention and exploitation of the remains at Carlisle Cemetery directly harms Indian Tribes and their communities. According to Winnebago beliefs, Samuel’s and Edward’s spirits remain lost and in a state of unrest because their remains have not been returned home for proper burial. JA35. Defendants’ continued detainment of their remains not only harms the boys’ spirits, but it harms living Winnebago Tribal citizens whose responsibility it is to protect the dead, their proper places of internment, and the dignity of the afterlife.

Defendants have furthermore subjected the remains to indignity by using them for research, education, exhibition, and other purposes they deem fit. JA49-53. This conduct exemplifies the exact harm Congress sought to remedy with NAGPRA. Congress enacted NAGPRA to ensure that Native American remains held by federal agencies and museums would be returned to Indian Tribes for proper reburial, thus correcting the historical injustices of misappropriation and

exploitation. JA29-30. Defendants' refusal to comply with NAGPRA in this case is a continuation of those injustices and denies Indian Tribes the respect and sovereignty that NAGPRA was designed to restore.

B. NAGPRA Was Enacted to Remedy Federal Abuses and Ensure Repatriation to Indian Tribes.

NAGPRA, enacted in 1990, is landmark human rights legislation that Congress designed to address the systemic exploitation, desecration, and wrongful possession of Native American human remains and cultural items by federal agencies and museums. *See* 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, 59 (1992). NAGPRA's enactment reflected a fundamental shift in federal policy, recognizing Tribal sovereignty, dignity, and the inherent right of Indian Tribes to reclaim and reinter their ancestors and sacred items.

NAGPRA corrected a history of federal policies that facilitated the desecration and collection of Native American graves and remains. The systematic collection of Native remains began as early as the mid-19th century. In 1868, the Army Surgeon General ordered the collection of Indian skulls and other osteological remains for scientific study and display. *Native American Grave and Burial Protection Act (Repatriation): Hearing on S. 1021 Before the Select Comm. on Indian Affairs*, 101st Cong. 1–2 (1990) [hereinafter *NAGPRA Hearing*]. This

directive spurred widespread looting of Native burial sites, turning human remains into commodities for museums and private collectors. Trope & Echo-Hawk, *supra* at 39–40. Later enacted federal laws, such as the Antiquities Act and the Archaeological Resources Protection Act contributed to, and even encouraged, the robbing, looting, and desecration of Native American human remains and graves on federal lands and their treatment as federal property. *Id.* at 42. By the time NAGPRA was enacted, federal agencies and museums were estimated to hold between 100,000 and 2 million sets of Native American remains. *Id.* at 39.

This exploitation not only violated basic human rights but also inflicted deep spiritual and cultural harm on Tribal communities. Indian Tribes were denied the ability to honor their ancestors according to their beliefs and traditions. NAGPRA ended over a century of federally sanctioned policies that encouraged the plundering of Native graves and sought to redress these harms by restoring control of remains and sacred items to Indian Tribes.

At its core, NAGPRA is about more than just returning human remains. Congress intended NAGPRA to recognize and uphold the sovereign rights of Indian Tribes to decide how their ancestors' remains are honored and buried. NAGPRA explicitly requires federal agencies and museums to consult with culturally affiliated Indian Tribes to ensure remains and cultural items are repatriated in an expeditious and culturally appropriate manner. *See, e.g.*, 25 U.S.C.

§§ 3003(b), 3004(b), 3005. By shifting decision making power away from federal agencies toward Indian Tribes, NAGPRA affirms Tribal sovereignty and ensures that repatriation is conducted according to Tribal customs, timelines, and spiritual practices. JA29-31.

NAGPRA requires robust consultation and transparency. Federal agencies must share records and inventories of Native American remains and cultural items in their possession or control and consult Indian Tribes to establish cultural affiliation of remains and items. 25 U.S.C. §§ 3003(b)(2), 3004(b)(2), 3005(d). These processes ensure that Indian Tribes know what remains and items federal agencies have in their possession or control so they—not federal agencies—can determine how their ancestors and cultural items are treated.

NAGPRA establishes two equally important objectives: (1) protecting Native American burial sites and graves, 18 U.S.C. § 1170; 25 U.S.C. § 3002; and (2) facilitating the repatriation of remains and cultural items to Indian Tribes. 25 U.S.C. § 3005. While the graves protection provisions safeguard rightful burial sites from future desecration, the repatriation provisions address past injustices by mandating the return of remains and items already in federal possession. These objectives work in tandem to ensure both respect for Native burial practices and accountability for the historical wrongs perpetrated by federal agencies and museums.

NAGPRA establishes binding legal obligations on federal agencies to return Native remains to culturally affiliated Indian Tribes. *See id.* § 3005(a). These obligations are not discretionary; they reflect Congress’s clear intent to rectify historical injustices and ensure respect for Tribal sovereignty. Defendants’ refusal to repatriate Samuel’s and Edward’s remains to Winnebago not only violates NAGPRA but also perpetuates the very harm Congress sought to eliminate.

Despite Defendants’ admission that the boys’ remains are in their possession and control and are culturally affiliated with Winnebago, they continue to resist their repatriation to Winnebago, relying on unduly narrow interpretations of NAGPRA that hamper its purposes.

III. Winnebago’s Repatriation Request, Defendants’ Denial and the District Court’s Failure to Correct Defendants’ Defiance of Federal Law.

On October 16, 2023, Winnebago submitted a formal request for repatriation of Samuel’s and Edward’s remains under 25 U.S.C. § 3005(a)(4). JA35. NAGPRA requires federal agencies to “expeditiously” return Native American human remains in their possession or control upon request of an Indian Tribe when the Tribe demonstrates cultural affiliation by a preponderance of the evidence. *Id.* §§ 3005(a), (4).

Yet, on December 7, 2024, Defendant Karen Durham-Aguilera sent a letter denying Winnebago’s request, asserting that the graves at Carlisle Cemetery do not constitute a “holding or collection” under NAGPRA. JA36, JA93. Defendants also

claimed that NAGPRA does not obligate the Army to exhume remains for repatriation. JA36-37, JA93. Defendants did not dispute that Samuel and Edward are Native American or that they are culturally affiliated with Winnebago. JA35-37. Nor did Defendants dispute that the boys' remains are under the Army's possession and control. JA35-37.

On January 17, 2024, Winnebago filed suit in the United States District Court for the Eastern District of Virginia, alleging that Defendants violated NAGPRA by refusing to repatriate Samuel and Edward. JA11.

The District Court granted Defendants' motion to dismiss on August 20, 2024. JA216. The District Court held that NAGPRA's repatriation provisions apply only to Native American human remains that are part of "holdings or collections" and concluded that Carlisle Cemetery does not meet this definition. JA208-215. The District Court's narrow interpretation ignored the plain language of the statute, which broadly requires repatriation of Native American human remains "possessed or controlled" by federal agencies, without limiting repatriation to remains in holdings or collections. *See* 25 U.S.C. §§ 3005(a), (a)(4). The District Court also failed to recognize and fulfill Congress's purpose to ensure the return of Native American remains held under federal control, particularly those obtained without consent. Winnebago timely appealed the District Court's decision. JA240.

Defendants' refusal to repatriate Samuel and Edward to Winnebago violates NAGPRA and perpetuates the cultural and spiritual harm caused by their continued possession of Samuel's and Edward's remains. Congress enacted NAGPRA precisely to rectify the government's wrongful possession and control of Native remains. *See* H.R. Rep. No. 101-877, at 8–9. Allowing Defendants to evade their obligations under NAGPRA would render the statute ineffective and undermine its core objective of restoring control over ancestral remains to Indian Tribes.

Winnebago respectfully requests this Court correct the District Court's misinterpretation of NAGPRA and enforce Congress's intent to provide Indian Tribes with the means to reclaim their ancestors.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Winnebago's action by misinterpreting NAGPRA's repatriation provision at 25 U.S.C. § 3005(a)(4). The plain language of the statute does not require Native American human remains to be part of a "holding or collection" to be subject to repatriation. Imposing such a requirement not only contradicts the statutory text but also undermines NAGPRA's purpose of broadly enabling the return of Native American remains to Indian Tribes, correcting historical injustices, and restoring Indian Tribes' control over their relatives' remains.

Even if Section 3005(a)(4) required Native American human remains to be part of a holding or collection, the facts clearly establish that Samuel's and Edward's remains would be covered. Defendants have managed the remains collectively at Carlisle Cemetery, retained control over their disinterment and reburial, and used the Cemetery for research, education, and interpretive purposes—activities consistent with the ordinary meanings of holding and collection and with the definition of “holding or collection” under NAGPRA's implementing regulations. *See* 43 C.F.R. § 10.2. Thus, even under the District Court's flawed interpretation, Samuel's and Edward's remains qualify for repatriation under NAGPRA.

The District Court further erred in relying on *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), to dismiss Winnebago's complaint. *Thorpe* concerned a fundamentally different legal issue—whether a municipality qualified as a museum under NAGPRA, *see* 25 U.S.C. § 3001(8)—and did not address Section 3005(a)(4) or the applicability of repatriation provisions to Native American human remains buried in the ground. *Thorpe* involved a consensual burial decision made by next of kin, whereas here neither Winnebago nor Samuel's and Edward's families consented to their burials or reburials at Carlisle. The District Court misapplied *Thorpe* and failed to recognize NAGPRA's dual purposes of protecting Native American burial sites *and* facilitating repatriation.

Finally, the Army's equitable defenses hold no water. Repatriation under NAGPRA is not a mere suggestion, but a requirement. NAGPRA is a recognition of Tribal sovereignty, cultural standards, and Congress's intent to restore dignity and justice to Native communities. The District Court's decision undermines these principles and must be reversed.

ARGUMENT

I. Defendants Must Repatriate Samuel's and Edward's Remains Because Winnebago Has Established All Requirements Under 25 U.S.C. § 3005(a)(4), Which Do Not Include that the Remains Be Part of a "Holding or Collection."

Under NAGPRA's plain language, there are two prerequisites for the repatriation of Native American human remains: (1) the remains are in the possession or control of a federal agency; and (2) they are culturally affiliated with the requesting Indian Tribe. 25 U.S.C. § 3005(a). NAGPRA's repatriation provision contains three different repatriation subsections: Sections 3005(a)(1), 3005(a)(2), and 3005(a)(4). Winnebago made its request pursuant to the third subsection, Section 3005(a)(4). The District Court erred by reading a requirement into Section 3005(a)(4) that Native American human remains must also be part of a holding or collection to be eligible for repatriation under this provision. The term "holding or collection" appears nowhere in the text of Section 3005(a)(4), or Section 3005(a) generally. Thus, Sections 3005(a) and 3005(a)(4) contain no text limiting repatriation of Native American human remains to holdings or collections.

However, NAGPRA does not require the repatriation of remains to which an agency has a “right of possession.” *See* 25 U.S.C. § 3001(13). Thus, the District Court’s fear that Winnebago’s plain text interpretation would make Native American human remains in any federal cemeteries or burial sites susceptible to Section 3005(a)(4) is baseless. To the extent there is any ambiguity in whether Section 3005(a)(4) includes a holdings or collections requirement, the Indian canons of construction require such ambiguity to be resolved in favor of Winnebago. The Indian canons support Winnebago’s interpretation as it aligns with NAGPRA’s objective to enable and promote repatriation.

A. Winnebago Has Established All Prerequisites Under 25 U.S.C. § 3005(a)(4), as Samuel’s and Edward’s Remains Are Native American Human Remains in Defendants’ Possession and Control and Are Culturally Affiliated with Winnebago.

Winnebago has fulfilled all the prerequisites for repatriation of Samuel’s and Edward’s remains pursuant to 25 U.S.C. § 3005(a)(4). Section 3005(a) broadly provides for the “[r]epatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums[.]” 25 U.S.C. § 3005(a). Under Section 3005(a), an Indian Tribe may be entitled to repatriation when its cultural affiliation with Native American human remains or cultural items is established. Section 3005(a) includes three repatriation subsections: Sections 3005(a)(1), 3005(a)(2), and 3005(a)(4). These subsections delineate three different ways cultural affiliation can be established before repatriation can occur.

Winnebago made its repatriation request under Section 3005(a)(4). JA35, JA85-86. Pursuant to Section 3005(a)(4), Native American human remains in the possession or control of a federal agency “shall be expeditiously returned” upon request of an Indian Tribe “where the . . . Indian tribe . . . can show cultural affiliation by a preponderance of the evidence.” *Id.* § 3005(a)(4).⁵ Thus, according to the plain language of the statute, an Indian Tribe is entitled to repatriation of Native American human remains in the possession or control of a federal agency so long as the Indian Tribe presents sufficient evidence of its cultural affiliation with the remains. It is undisputed that Samuel’s and Edward’s remains are Native American human remains possessed and controlled by Defendants and that they are culturally affiliated with Winnebago. JA21-22, JA46-47, JA92-92. Therefore, Winnebago has established all prerequisites to repatriate Samuel’s and Edward’s remains pursuant to Section 3005(a)(4).

1. The District Court Erred in Reading a Holdings or Collections Requirement into Section 3005(a)(4).

Despite the plain language of the statute, the District Court found that Winnebago is not entitled to repatriation of Samuel’s and Edward’s remains. The

⁵ The preponderance of the evidence standard may be met “...based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” 25 U.S.C. § 3005(a)(4).

District Court found Section 3005(a)(4) only provides for the repatriation of Native American human remains that are in “holdings or collections,” as opposed to any Native American human remains simply “possessed or controlled” by a federal agency. JA211. The District Court’s interpretation went beyond the plain text, as the term “holdings or collections” appears nowhere in Section 3005(a)(4), nor in Section 3005(a) generally.

The District Court reached this conclusion based on a misunderstanding of Section 3005(a)(4)’s relationship to Sections 3005(a)(1) and 3005(a)(2). The District Court reasoned that Section 3005(a)(4) applies only to holdings or collections because Sections 3005(a)(1) and 3005(a)(2) provide for repatriation of Native American human remains and cultural items that are included in inventories (*see* 25 U.S.C. § 3003) or summaries (*see id.* § 3004) of holdings or collections. JA211. Thus, the District Court inferred that Section 3005(a)(4) “continues to concern” remains originating from holdings or collections. JA211.

The District Court was wrong. First, the District Court’s interpretation is atextual, as neither Section 3005(a)(4) nor Section 3005(a) limit repatriations to holdings or collections. Reading in this limitation violates the basic principle that courts should not “elaborate unprovided-for exceptions to a text.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 93 (2012); *see also Jama v. Immigrations & Customs Enforcement*, 543 U.S. 335, 341

(2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply[.]”); *Children’s Hosp. of the King’s Daughters, Inc. v. Price*, 258 F. Supp. 3d 672, 685 (E.D. Va. 2017) (citing *Jama* and observing Congress’ silence is significant). Rather, “[w]e take the statute as we find it.” *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Reading Section 3005(a)(4) to apply only to holdings or collections imposes a condition not provided by the plain text of the statute. The only plain text prerequisites for repatriation under Section 3005(a)(4) are: (1) the remains are possessed or controlled by a federal agency or museum; and (2) an Indian Tribe establishes its cultural affiliation with the remains by a preponderance of the evidence. The District Court erred in finding otherwise.

2. The District Court Misunderstood the Purpose and Function of NAGPRA’s Repatriation Provisions.

The District Court’s atextual interpretation is also rooted in its misunderstanding of the purpose and function of NAGPRA’s repatriation provisions. The three repatriation provisions—Sections 3005(a)(1), 3005(a)(2), and 3005(a)(4)—are designed to collectively cover the different ways cultural affiliation is determined in order to facilitate repatriation. The procedures in each section differ in terms of how and by whom cultural affiliation is established.

First, Section 3005(a)(1) provides for repatriation of human remains and other cultural items whose cultural affiliation has been established by an inventory

compiled by an agency or museum “pursuant to section 3003[.]” 25 U.S.C. § 3005(a)(1); *id.* § 3003(a). Second, Section 3005(a)(2) provides for repatriation of cultural items, but not human remains, whose cultural affiliation has been established by a summary compiled by an agency or museum “pursuant to 3004[.]” *Id.* § 3005(a)(2); *id.* § 3004(a). Finally, Section 3005(a)(4) provides for repatriation of human remains and cultural items whose cultural affiliation has not been established by, and which are not included in, inventories or summaries, and whose cultural affiliation is, instead, established via evidence presented by the requesting Indian Tribe. *Id.* § 3005(a)(4). Section 3005(a)(4) therefore differs from Sections 3005(a)(1) and 3005(a)(2) in that, rather than having cultural affiliation established by an agency or museum in an inventory or summary, cultural affiliation is established by the Indian Tribe requesting repatriation.

Indeed, Section 3005(a)(4) is explicit that the inventory and summary provisions in Sections 3003 and 3004 relate only to repatriations conducted under Sections 3005(a)(1) and 3005(a)(2). Section 3005(a)(4) applies,

[w]here cultural affiliation of Native American human remains and funerary objects *has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title*, or where Native American human remains and funerary objects are not included upon any such inventory[.]

Id. (emphasis added). The first two clauses make clear that Section 3005(a)(4) does not concern repatriations where cultural affiliation is established pursuant to an

inventory or summary. If cultural affiliation of Native American human remains has been established pursuant to an inventory, Section 3005(a)(1) is the proper procedure for repatriation. *Id.* §§ 3005(a)(1), 3003(a). Likewise, if cultural affiliation of cultural items, not including human remains, has been established pursuant to a summary, Section 3005(a)(2) is the proper procedure. *Id.* §§ 3005(a)(2), 3004(a). Thus, Section 3005(a)(4) provides for the repatriation of human remains which cannot, based on the plain text, be accomplished pursuant to Sections 3005(a)(1) or 3005(a)(2).

Section 3005(a)(4)'s third clause—repatriation “where Native American human remains . . . are not included upon any such inventory”—provides for repatriation when a federal agency or museum did not, for whatever reason, create an inventory of remains in its possession or control, thus making repatriation pursuant to Section 3005(a)(1) unavailable. Section 3005(a)(4) explicitly provides for the repatriation of human remains in any scenario where remains in possession or control of an agency or museum have not had their cultural affiliation established pursuant to an inventory and cannot be repatriated pursuant to Section 3005(a)(1).

The District Court's claim that Section 3005(a)(4) “continues to concern” holdings or collections, like Sections 3005(a)(1) and 3005(a)(2), defeats the function of Section 3005(a)(4). If human remains and cultural items must be part

of holdings or collections to qualify for repatriation, the remains and items must be included in inventories or summaries; and, in turn, they must be repatriated pursuant to Sections 3005(a)(1) and 3005(a)(2), respectively. This, however, would render Section 3005(a)(4) superfluous, given that Section 3005(a)(4) explicitly applies to remains and cultural items not included in inventories and summaries. *See Navy Fed. Credit Union v. LTD Fin. Servs., LP*, 972 F.3d 344, 361 (4th Cir. 2020) (“The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statute.” (alterations, citations omitted)). Winnebago’s construction gives Section 3005(a)(4) independent purpose from Sections 3005(a)(1) and 3005(a)(2). *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1055-56 (D.S.D. 2000) (A statute must be interpreted to give effect, if possible, to every clause and word within it). Thus, the straightforward interpretation of Section 3005(a)(4) is that it does not “continue to concern” only remains in holdings or collections, and instead broadly covers human remains and cultural items generally possessed or controlled by federal agencies or museums.

The District Court asserted that Winnebago’s plain text reading would mean Congress imposed a “far reaching requirement in 3005(a)(4) to return any remains possessed or controlled by a federal agency.” JA211. But that is simply what the text provides. NAGPRA provides for the “[r]epatriation of Native American human

remains and objects possessed or controlled by Federal agencies and museums.” 25 U.S.C. § 3005(a). Section 3005(a) does not once mention holdings or collections, let alone cabin repatriation to remains falling within those terms. “There is no going around or behind the words of a statute.” SCALIA & GARNER, *supra* at 243. As discussed *infra* Section I.B., NAGPRA establishes limits on Section 3005’s mandate. Rather than address those limits, the District Court read in a holdings or collections limitation that is not provided by the plain language of NAGPRA. But a “court cannot assume that Congress has omitted from statutory text a requirement that it intended to apply, particularly where the same statute includes different requirements.” *Price*, 258 F. Supp. 3d at 687 (E.D. Va. 2017). In imposing a holdings or collections limitation, the District Court frustrated the collective purpose of the repatriation provisions, which is to furnish different means to establish cultural affiliation so that remains in possession or control of federal agencies may be appropriately repatriated.

The District Court incorrectly held that Winnebago is not entitled to repatriation of Samuel and Edward under Section 3005(a)(4) based on its conclusion that Section 3005(a)(4) only applies to remains in holdings or collections. There is nothing in the plain text or structure of the statute to support a finding that Section 3005(a)(4) is subject to a holdings or collections limitation.

B. NAGPRA’s Repatriation Provisions Do Not Attach to Native American Human Remains to Which a Federal Agency Has

“Right Of Possession,” Foreclosing Any Fears Raised By the District Court About Adhering To the Plain Text Of Section 3005(a)(4).

The District Court expressed concern that adhering to the plain text of Section 3005(a)(4) would create a “far-reaching requirement” that would result in all Native American human remains in any federal cemetery being subject to repatriation. JA211. However, while all Native American human remains in possession or control of federal agencies are *presumptively* subject to NAGPRA’s repatriation provisions, that presumption can be rebutted if an agency demonstrates that it has “right of possession” to those remains. *See* 25 U.S.C. § 3001(13). The District Court failed to consider the right of possession provision as well as the fact that Defendants undisputedly do not have a right of possession to Samuel’s and Edward’s remains.

The right of possession “means possession obtained with the voluntary consent of an individual or group that had authority of alienation.” 25 U.S.C. § 3001(13). A federal agency has right of possession to Native American human remains if the remains were originally “obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate Indian Tribe[.]” *Id.*⁶ The District Court claimed that Winnebago’s plain text interpretation of

⁶ The National Park Service’s (“NPS”) implementing regulations—both those in effect now and at the time of Winnebago’s request—reflect this understanding by providing that the term “human remains” “does not include human remains to

Section 3005(a)(4) “could compel exhumation of tribal graves anywhere on federal land—including those created according to the decedent’s wishes or tribal custom.”

JA212. But the right of possession provision would prevent this outcome, as it explicitly exempts from repatriation remains that have been buried in federal cemeteries according to the wishes of the next of kin or the Indian Tribe. In those scenarios, an agency could demonstrate that it has right of possession to the remains and would not be *required* to repatriate them.

But that is not the case here. Defendants do not have right of possession to Samuel’s and Edward’s remains, a fact illustrated by Carlisle’s unique history as a federal Indian boarding school and the circumstances regarding Samuel’s and Edward’s arrivals and deaths at the school. The history of how the remains ended up at Carlisle Cemetery easily distinguishes it from other federal cemeteries and burial sites on federal land.

As Winnebago alleged in its complaint, the Army removed Samuel and Edward from their families and sent them to Carlisle. JA21. When they died, the United States never notified their families or Winnebago and never obtained their

which a museum or Federal agency can prove it has a right of possession.” 43 C.F.R. § 10.2 (human remains); *see* 43 C.F.R. § 10.2(d)(1) (2023) (“This term does not include remains or portions of remains that may be reasonably determined to have been freely given[.]”). Since NAGPRA’s repatriation provisions apply only to “Native American human remains,” human remains to which agencies or museums have right of possession or which were freely given are not subject to the repatriation provisions.

consent to bury the boys at the original Carlisle Indian burial ground. JA21-22. The Army subsequently did not notify or obtain the consent of the boys' families or Winnebago when it disinterred them from the original Carlisle Indian burial ground and reburied them in the current Carlisle Cemetery in 1927. JA24-26. These facts clearly establish that Defendants do not have right of possession to Samuel's and Edward's remains. The right of possession provision ensures that remains buried in federal cemeteries with full knowledge and consent of next of kin or Indian Tribes remain undisturbed. By contrast, Samuel's and Edward's remains fall squarely within NAGPRA's scope because they were buried without notice or consent. Defendants' lack of right of possession negates the District Court's concerns and affirms Winnebago's entitlement to repatriation pursuant to Section 3005(a)(4).

C. Repatriating Samuel's and Edward's Remains Fulfills Congress's Intent in Enacting NAGPRA and Addressing the Illicit Possession and Control of Native American Human Remains.

Samuel's and Edward's repatriation to Winnebago fulfills NAGPRA's repatriation objective and overall design. One of NAGPRA's two key objectives is repatriating the (potentially) millions of Native American human remains that have been illicitly obtained and mistreated by federal agencies and museums. Trope & Echo-Hawk, *supra* at 39. The sheer number of human remains to be repatriated reflects the core problem NAGPRA sought to address: the pervasive disregard for

the sanctity of Native American dead and the sacredness of Native American burial practices. *NAGPRA Hearing*, 101st Cong. at 1–2.

The legislative history reveals that Native American human remains were treated as objects strewn in drawers, curiosities stolen for economic and pseudo-scientific gain, and items to be disposed of, all without regard for the fact that these remains were relatives of present-day Indian Tribes and Native people. *See id.* at 278–356; H.R. Rep. No. 101-877, at 9 (“Digging and removing the contents of Native American graves for reason of profit or curiosity ha[d] been common practice.”). Native American human remains were obtained in many horrific ways, such as when federal government “headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado’s Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.” Trope & Echo-Hawk, *supra* at 40–42. NAGPRA was enacted to put a stop to and account for these atrocities through, in part, requiring remains’ repatriation to Indian Tribes. NAGPRA’s design shows Congress aimed to accomplish this objective with strong and unequivocally broad provisions conferring a host of rights on Indian Tribes and a clear enforcement mechanism. *See e.g.*, 25 U.S.C. §§ 3002, 3005, 3013. By imposing a requirement that human remains must be part of a holdings or collections, the District Court failed to vindicate Winnebago’s

right to repatriation and undermined NAGPRA's purpose to facilitate repatriation on a broad scale.

NAGPRA's early implementation supports Winnebago's position that the inventory and summary provisions were not intended to limit Indian Tribes' ability to repatriate human remains and cultural items. NAGPRA required federal agencies and museums to complete their inventories within five years of enactment and their summaries within three years. *See id.* §§ 3003(b)(1)(B), 3004(b)(1)(C). Despite these timelines, NAGPRA repatriations began well before these deadlines. There are many examples of repatriations of human remains and other cultural items from museums and federal agencies prior to the inventory and summary deadlines. *Iwi Kūpuna Repatriations*, OFFICE OF HAWAIIAN AFFS., List of 'ōiwi Repatriation Efforts Starting in 1990, <https://www.oha.org/iwi-repatriation/> (last visited Jan. 21, 2025). For example, in 1991, four years before the inventory deadline, five different museums repatriated 62 sets of Native American human remains, pursuant to NAGPRA. *Id.*; accord *Native American Graves Protection and Repatriation Act: Federal Register Notices*, NAT'L PARK SERV., <https://apps.cr.nps.gov/nagprapublic/Home/Notice> (last visited Jan. 21, 2025) (no inventories were created for the 62 sets of Native American human remains repatriated in 1991 from the University of Alaska Museum, the American Museum of Natural History, the Field Museum of Natural History, the University of

Pennsylvania Museum of Archaeology, and the Brigham Young Museum of Peoples and Cultures). These early cases confirm that Congress intended cultural affiliation—not bureaucratic categorization—to be the decisive factor in repatriation decisions.

The District Court incorrectly concluded that Section 3005(a)(4) only provides for repatriation of Native American human remains and cultural items that are part of holdings or collections. Its atextual reading of Sections 3005(a)(4) and 3005(a) imposes an artificial barrier to repatriation and denies Winnebago its right to bring home its children's remains pursuant to the federal law enacted for that very purpose.

D. To the Extent it is Ambiguous Whether Repatriation Under Section 3005(a)(4) is Limited to Holdings or Collections, the Indian Canons of Construction Require NAGPRA to be Interpreted in Favor of Winnebago.

To the extent it is ambiguous whether Section 3005(a)(4) is limited to Native American human remains and cultural items that are part of holdings or collections, the District Court was required to apply the Indian canons of construction and resolve the ambiguity in Winnebago's favor. Consistent with the Indian canons, the District Court should have interpreted Section 3005(a)(4) liberally to affirm Winnebago's rights and to require the repatriation of Samuel and Edward.

The Indian canons are binding tools of statutory interpretation that are applicable to statutes that implicate Tribal interests and rights, like NAGPRA. *See Montana v. Blackfeet Indian Tribe*, 471 U.S. 759, 766 (1985) (“[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.”). Per the Indian canons, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit.” *Cnty. of Yakima v. Confederated Tribes & Bands of Yakama Indian Nation*, 502 U.S. 251, 269 (1992) (cleaned up) (quoting *Blackfeet*, 471 U.S. at 766); *see also Fox v. Portico Realty Servs. Office*, 739 F. Supp. 2d 912, 922 (E.D. Va. 2010) (“[A]s a general matter, statutes must be construed in favor of Native Americans[.]”). Said another way, the Indian canons require statutes to “be liberally construed in favor or establishing Indian rights[.]” *Confederated Tribes of Chehalis Indian Rsrv. v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (citations omitted).

The Indian canons “are rooted in the unique trust relationship between the United States and the Indians. *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *see Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (“The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government Indian relationship.”). NAGPRA is a direct implementation of this relationship: “This chapter reflects the unique relationship between the Federal

Government and Indian Tribes[.]” 25 U.S.C. § 3010; *see* Trope & Echo-Hawk, *supra* at 76 (“In interpreting NAGPRA, it is critical to remember that it must be liberally construed as remedial legislation to benefit the class for whom it was enacted.”).

The Indian canons require NAGPRA and Section 3005(a)(4) to be interpreted in favor of Winnebago and in establishing Indian Tribes’ rights to repatriate their ancestors. The Indian canons compel that any ambiguity in whether Section 3005(a)(4) applies only to human remains in holdings or collections be resolved in favor of Tribal rights—*i.e.*, that Section 3005(a)(4) does not contain a holdings or collections limitations. Winnebago’s interpretation not only adheres to the plain text of the statute, but it also construes Section 3005(a)(4) to broadly enable and promote repatriation to Indian Tribes.

II. To the Extent Native American Human Remains Must Be Part of Holdings or Collections to Be Repatriated, Samuel’s and Edward’s Remains and Carlisle Cemetery Meet This Standard.

Even if Section 3005(a)(4) required that Native American human remains be part of a “holding or collection” to qualify for repatriation—which it does not—Defendants must still repatriate Samuel’s and Edward’s remains. The remains at Carlisle Cemetery and the Cemetery itself meet the ordinary meanings of both “holding” and “collection.” Defendants’ historical and present-day treatment of the remains as a unified group, based on their shared identity as Native American

students who attended Carlisle, confirms this conclusion. The District Court erroneously found otherwise by narrowly construing the terms holding and collection and ignoring Winnebago's well-pleaded factual allegations. This flawed analysis undermines NAGPRA's purpose and imposes an artificial barrier to repatriation.

A. The Ordinary Meanings of “Holding” and “Collection” Encompass the Remains at Carlisle Cemetery.

The remains at Carlisle Cemetery and the Cemetery itself constitute “holdings or collections” as those terms should be interpreted under NAGPRA. Since NAGPRA does not define the terms “holding” or “collection,” this Court looks to those terms' ordinary meanings. *See DIRECTV Inc. v. Nicholas*, 403 F.3d 223, 225 (4th Cir. 2005). Both the District Court and the parties acknowledged that “holding” can mean “property,” while “collection” is commonly understood as “an accumulation of objects gathered for study, comparison, or exhibition.” JA123-124, JA163-164, JA212-213. Additionally, Winnebago observed the definition of holding applied by the District Court and the parties also defines the term as “something that holds,” and that the definition of collection includes “a group [or] aggregate.” JA163-164. The remains at Carlisle and the Cemetery fall within each of these definitions. Thus, Samuel's and Edward's remains are unmistakably part of a holding or collection.

1. The Remains at Carlisle Cemetery Fall Within the Ordinary Meaning of a Holding as “Property.”

The ordinary meaning of “holding” is “property.” JA123-124, JA163-164, JA212-213. For purposes of NAGPRA, this definition encompasses Native American human remains. NAGPRA includes human remains among its definition of “cultural items,” along with “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “objects of cultural patrimony.” 25 U.S.C. § 3001(3). These cultural items constitute cultural property. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1031-37 (2009). By including Native American human remains with these other items, Congress intended human remains to bear this same characteristic, that they, too, are property. *See Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 346, n.9 (4th Cir. 2008) (“[W]ords grouped in a list should be given related meaning.”). The inclusion of Native American human remains among cultural items subjects them to the same treatment as property in terms determining ownership, disposition, and transfer based on cultural affiliation. *See* 25 U.S.C. §§ 3002(a), 3005(a).

The District Court’s conclusion that the remains at Carlisle do not meet the ordinary definition of holding appears to be based on the suggestion, raised by Defendants below (JA126, JA200), that human remains are not property if they are in the ground. The District Court indicated only remains that had been “previously excavated” would fit the ordinary meaning of the term. JA213. The District Court’s

conclusion is atextual. Nothing in the definition of holding applied by the District Court imposes a limitation based on the remains' physical location. Rather, NAGPRA's plain language makes Native American human remains subject to repatriation, without limitation on their location. *See* 25 U.S.C. § 3005(a). Again, "holding" is defined as simply "property." If Congress meant to impose a limitation on the meanings of holding or collection (or, indeed, on the application of the repatriation provisions) based on physical location, it would have done so. *See Vanda Pharms., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 98 F.4th 483, 495 (4th Cir. 2024).

The District Court defied this Court's direction that courts must apply the term's ordinary meaning, unless the language is ambiguous, meaning "it lends itself to more than one reasonable interpretation." *Joshua*, 607 F.3d at 384 (4th Cir. 2010) (internal citation omitted). If the language is ambiguous, the court must "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and the general purposes that Congress manifested." *Id.* While the District Court ultimately disregarded the ordinary meanings of holding or collection, it did not expressly state that either term (or any language in the statute) was ambiguous to warrant this departure. *See* JA212-213.

Furthermore, the District Court did not interpret the terms in harmony with the statute. Native American human remains are treated as property under NAGPRA regardless of their physical location. NAGPRA specifically sets out procedures for determining “[t]he *ownership* or control of Native American human remains which are excavated or discovered on Federal or tribal lands[.]” 25 U.S.C. § 3002(a) (emphasis added); see *Navajo Nation v. U.S. Dep’t of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016) (recognizing Indian Tribes have property interests in Native American human remains located on federal lands). The District Court failed to address any of NAGPRA’s provisions treating Native American human remains as property.

NAGPRA sought to address federal agencies’ and museums’ illicit possession and control of Native American human remains by reinvesting ownership interests in them with Indian Tribes, regardless of where the remains are held. See, e.g., *NAGPRA Hearing*, 101st Cong. at 5–6 (reprinting S. 1021, 101st Cong. § 2(7), (8)) (acknowledging confusion “over who should rightfully have control or ownership over” Native American human remains “which are located on, or which have been disinterred from, Federal lands; and . . . clarify[ing] ownership interest in” such remains). As NAGPRA is designed to broadly enable and promote, not hinder, repatriation of human remains to culturally affiliated Indian Tribes, the District Court was required to interpret the terms consistent with

that purpose. The District Court's constrained reading of the term defies NAGPRA's plain language and undermines NAGPRA's repatriation objective by erecting an atextual barrier based on location of remains.

2. Carlisle Cemetery Falls Within the Ordinary Meaning of Holding As "Something That Holds."

Carlisle Cemetery meets the additional meaning of holding as "something that holds." *Holding*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/holding>; JA163. Defendants use Carlisle Cemetery as a repository for a unique set of Native American human remains. The Cemetery serves not as a place where loved ones have laid their ancestors to rest, but as a containment of Native American human remains that are awaiting their return to the Indian Tribes to which they belong.

The history and present-day nature of Carlisle Cemetery demonstrates how it functions as a holding of Native American human remains and not as a typical cemetery, as suggested by the District Court and Defendants below. JA124, JA213. Carlisle Cemetery was established after Defendants unceremoniously dug up the remains from the original Carlisle Indian burial ground, haphazardly threw them in small boxes (sometimes adding two sets of remains in one box), and reinterred them at their current location to make way for a parking lot. JA24-26. Defendants continue to hold the remains at Carlisle Cemetery, requiring affidavits from living relatives before disinterring them. JA35-42. In the meantime, they exploit the

remains, based on their historical and contemporary importance and interest. JA25-26, JA47-53. Even Defendants' own studies characterize the cemetery "as a repository for the remains of Indian school students." JA50.

In sum, Carlisle Cemetery is a holding because it is a containment Defendants use to hold a unique set of Native American human remains. Carlisle Cemetery does not hold remains laid to rest with the consent of next of kin; it stores Native American human remains that Defendants exploit for their own purposes. Samuel and Edward were not buried at Carlisle with the consent of their families or Winnebago. Thus, the Cemetery serves only as a place where they are held as they await their return to Winnebago.

3. Remains at Carlisle Cemetery Fall Within the Ordinary Meaning of "Collection."

The remains at Carlisle Cemetery also constitute a collection under its ordinary meaning as "an accumulation of objects gathered for study, comparison, or exhibition." JA123-124, JA164, JA212. Defendants' treatment of the remains as a unified group, tied together by their shared identity as Native American students who attended Carlisle, brings the remains within this definition. Defendants actively manage the remains for education, research, and other purposes, underscoring their status as a collection. JA47-53. For instance, Defendants have conducted ground-penetrating radar surveys to study the remains and identify whether additional remains were left behind during the 1927 transfer to the

Cemetery. JA25-26. Defendants exhibit the Cemetery on public tours highlighting the history of the Carlisle Indian School, using the remains to promote Defendants' slanted history of Carlisle. JA49-51. Defendants thus treat the remains at Carlisle Cemetery as an accumulated group of items to serve their institutional goals.

The District Court ignored these facts and narrowly construed the definition of collection, suggesting that it applies only to items like poetry or baseball cards. JA212. This constrained interpretation belies NAGPRA's purpose to repatriate Native American human remains and cultural items on a broader scale. The remains at Carlisle need not be collectibles, like baseball cards or poetry, to constitute a collection.⁷ Rather, the remains are the type of collection with which NAGPRA is concerned: Native American human remains that have been illicitly acquired and treated as property that federal agencies use for their own purposes. JA27-30.

The District Court also disregarded part of the definition of "collection" highlighted by Winnebago; that is, a collection is a "group [or] aggregate." JA164. Defendants treat the remains at Carlisle as a "body of units" that are "associated with one another," *Aggregate*, MERRIAM-WEBSTER DICTIONARY ONLINE,

⁷ It should be noted that NAGPRA was enacted in part because people and institutions, including the Army, had specifically treated Native American human remains as collectibles and curiosities. *See* H.R. Rep. No. 101-877, at 9; Trope & Echo-Hawk, *supra* at 40–42.

<https://www.merriam-webster.com/dictionary/aggregate>, because of their historical status as remains of Native American students who attended Carlisle. Beyond their treatment of the remains, Defendants have unequivocally demonstrated their understanding of the remains as an aggregate by designating them according to their Native American and historical identity with a plaque titling them “INDIANS WHO DIED WHILE ATTENDING THE CARLISLE INDIAN SCHOOL.” JA49-50. The District Court gave no consideration to these facts, let alone recognize they establish the remains at Carlisle Cemetery constitute a collection.

B. The District Court Failed to Address Winnebago’s Factual Allegations and to Apply the Indian Canons of Construction.

The District Court made two particularly critical interpretive errors in finding that Samuel’s and Edward’s remains are not part of a holding or collection. First, the District Court violated the applicable standard of review by failing to acknowledge Winnebago’s well-pleaded factual allegations regarding the unique circumstances of Carlisle Cemetery that support the conclusion that the remains and the Cemetery constitute a holding or collection. Second, the District Court ignored the Indian canons, despite suggesting that the terms holding and collection may be ambiguous.

1. The District Court Ignored Well-Pleaded Allegations Regarding the Nature of Carlisle Cemetery.

At the motion to dismiss stage, courts are required to assume the truth of factual allegations and draw all reasonable inferences in the plaintiff's favor. *See Walters*, 684 F.3d at 439. Winnebago's complaint detailed how Defendants manage Carlisle Cemetery not as a traditional cemetery but as a repository of Native American human remains. Winnebago's allegations, liberally construed and accepted as true, establish that the Cemetery constitutes both a holding and a collection under the ordinary meanings of those terms.

As the foregoing discussion demonstrates, the remains at Carlisle Cemetery constitute holdings or collections based on their, and the Cemetery's, history and contemporary disposition. Winnebago's complaint detailed the treatment of Native American remains at Carlisle Cemetery, highlighting its function as a repository controlled and exploited by Defendants. JA47-53. The complaint highlighted that the Cemetery was established after Defendants disinterred remains from the original Carlisle burial ground to make way for a parking lot. JA24-26. Today, rather than serving as a resting place, Carlisle Cemetery serves as a Defendants' holding facility where they retain control over the remains for their institutional purposes. JA42-52. Defendants also use the Cemetery as a site for educational and interpretive programs, including tours of the Carlisle Barracks. JA49-50. These facts establish that the Cemetery is not a traditional cemetery, but a repository

where Native American human remains are stored and managed in a manner consistent with both the definitions of a holding and a collection.

The District Court ignored this historical and present-day context in finding the remains at Carlisle do not constitute a holding or collection. Winnebago's well-pled factual allegations, however, are entitled to an assumption of truth at the motion to dismiss stage; the District Court even acknowledged this as an initial matter. JA209. Adhering to the required standard, Winnebago's allegations establish how Carlisle Cemetery is not a typical cemetery and is, instead, a repository of Native American human remains that Defendants have accumulated, disposed of, and exploited. By ignoring Winnebago's allegations, the District Court violated the applicable standard of review.

2. The District Court Failed to Apply the Indian Canons.

The District Court further erred by failing to apply the Indian canons. Since NAGPRA does not define holdings or collections, the District Court referred to their ordinary meanings. JA212. Nevertheless, the District Court also invoked legislative history in support of its interpretations of holdings and collections, even while acknowledging that legislative history is only appropriate to apply when terms are ambiguous. JA213. To the extent the District Court found any ambiguity in the definitions of holdings or collections, it was required to apply the Indian canons and resolve the ambiguity in favor of Winnebago.

The District Court’s interpretive approach and disregard of the Indian canons are particularly problematic because NAGPRA is a remedial statute enacted specifically for the benefit of Indians and unquestionably requires application of the Indian canon to resolve any ambiguity. *See Blackfeet*, 471 U.S. at 766; *Trope & Echo-Hawk*, *supra* at 76. The Indian canons take precedence over other tools of interpretation. *Accord Blackfeet*, 471 U.S. at 766 (“[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.”); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) (giving the Indian canons precedence over the then-intact *Chevron* doctrine); *see also United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976) (stating that Indian canons requires interpretation of doubtful legislative history to be resolved in favor of Indian Tribes).

Similarly, this Court has instructed that “[i]f the language is ambiguous, . . . our obligation is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and the general purposes that Congress manifested.” *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004) (cleaned up). This approach is consistent with the Indian canons. Both lead to the conclusion that Carlisle Cemetery is a holding or collection, as this result supports Winnebago’s

ability to exercise its federally guaranteed right to repatriate Samuel and Edward.

See Chehalis, 96 F.3d at 340.

If the District Court found the terms holdings and collections to be ambiguous, it should have applied the Indian canons and resolved the ambiguity in favor of Indian Tribes' interests, concluding that Carlisle Cemetery and the remains are holdings or collections. This interpretation comports with the fundamental purposes of NAGPRA, fulfilling the United States's trust responsibility, 25 U.S.C. § 3010, and supporting Indian Tribes' rights to repatriate their relatives.

C. NAGPRA's Implementing Regulations and Legislative History Support the Conclusion That Carlisle Cemetery is A Holding or Collection.

Without any analysis, the District Court claimed that both the National Park Service's ("NPS") current implementing regulations as well as NAGPRA's legislative history are consistent with its interpretation of holdings and collections. JA213. This is incorrect. To the contrary, the regulatory definition of holdings or collections and NAGPRA's legislative history align with Winnebago's interpretation that Carlisle Cemetery is a holding or collection.

1. NPS Regulations Confirm That Carlisle Cemetery is a Holding or Collection.

The NPS's regulatory definition of holdings or collections supports Winnebago's interpretation. The regulations define holdings or collections as,

an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including: (1) Academic interest; (2) Accession; (3) Catalog; (4) Comparison; (5) Conservation; (6) Education; (7) Examination; (8) Exhibition; (9) Forensic purposes; (10) Interpretation; (11) Preservation; (12) Public benefit; (13) Research; (14) Scientific interest; or (15) Study.

43 C.F.R. § 10.2 (holding or collection). As discussed above, Defendants actively manage Carlisle Cemetery for the purposes set forth in the regulatory definition.

Additionally, in promulgating the regulations, the NPS emphasized that the term “holdings or collections” is meant to be defined broadly and its listed purposes to be non-exhaustive. 87 Fed. Reg. 63,202, 63,212 (Oct. 18, 2023) (“While the proposed definition includes a wide variety of purposes, a holding or collection under this proposed rule would not be limited to only these purposes.”).

The District Court failed to acknowledge any of Winnebago’s allegations illustrating how the remains at Carlisle Cemetery and the Cemetery itself fit many of the purposes included in the regulatory definition. As discussed above, Defendants use Carlisle Cemetery for education, exhibition, interpretation, preservation, public benefit, and other purposes expressly identified in the regulatory definition. *Supra*, II.A.3. The District Court’s conclusion that the remains at Carlisle Cemetery do not appropriately fall within the regulatory definition of holdings or collections is irreconcilable with the facts.

2. The District Court Misrepresented the Legislative History, Which Supports Winnebago’s Interpretation.

NAGPRA's legislative history likewise supports Winnebago's interpretation. The District Court asserted that the legislative history "reflects that Congress did not envision applying NAGPRA's repatriation provisions to cemeteries." JA213. Nothing in the legislative history expressly or implicitly supports this statement, and certainly not the portion the District Court cited.⁸ Rather, the legislative history shows Congress's broad purpose in enacting NAGPRA was "to correct past abuses to, and guarantee protection for" Native American human remains and cultural items. 173 A.L.R. Fed. 585. As Senator Inouye noted in a Senate hearing, NAGPRA was intended to be "a restoration of rights that have for so long been denied." *NAGPRA Hearing*, 101st Cong. at 2. To this end, NAGPRA was passed with two clear objectives, one of which was to protect Native American burial sites from desecration, and the other of which was to establish nationwide standards and procedures for the repatriation of Native American remains held by agencies and museums. Trope & Echo-Hawk, *supra* at 36–37. The District Court's

⁸ The portion of the legislative history cited by the District Court only demonstrates that repatriation was intended to apply to museum collections. JA213 (citing "See 136 Cong. Rec. S17, 173-02 (daily ed. Oct. 26, 1990), 1990 WL 165443"). It does not indicate that repatriation was intended to apply to museum collections *to the exclusion of* other circumstances of possession or control over Native American human remains by federal agencies or museums. Rather, the repatriation provision plainly applies to all cases where federal agencies and museums possess or control Native American human remains. 25 U.S.C. § 3005(a).

characterization of NAGPRA's legislative history is thus unfounded and misleading.

III. *Thorpe v. Borough of Thorpe* Does Not Support the District Court's Interpretation of Section 3005(a)(4).

The District Court erred in relying on *Thorpe* to dismiss Winnebago's complaint. The facts and legal issue in *Thorpe* make it inapposite to resolving this case. The District Court's reliance on *Thorpe* demonstrates its misunderstanding of the Third Circuit's decision and its failure to comprehend NAGPRA's dual objectives of graves protection and repatriation, as well as the unique factual circumstances regarding Samuel's and Edward's remains.

Thorpe concerned a family dispute over the final resting place of Jim Thorpe, a famous Native American athlete. 770 F.3d at 258-59. After his death, Thorpe's third wife, who was assigned his estate, lawfully buried him in the municipally owned cemetery in the Borough of Jim Thorpe, Pennsylvania ("the Borough"). *Id.* at 257. Even though it was undisputed that Thorpe's third wife had the legal authority to make this decision, Thorpe's second wife and son sought to use NAGPRA to have Thorpe's remains returned to them. *Id.* at 258. The Third Circuit rejected their claim, concluding that NAGPRA could not be used to override the lawful burial decision of Thorpe's next of kin. *Id.* at 257. Specifically, the Third Circuit held that the Borough was not a museum and therefore not subject to NAGPRA. *Id.* at 262.

Winnebago's effort to repatriate Samuel and Edward is unlike *Thorpe* in every material way. Winnebago's case does not involve a family dispute or a challenge to a consensual burial. As Winnebago has pled, neither it nor Samuel's and Edward's families consented to their burials at the original Carlisle Indian burial ground or their reburials at Carlisle Cemetery. JA21-26. Thus, unlike in *Thorpe*, Winnebago is not attempting to use NAGPRA to resolve a family dispute but rather to facilitate the return of Samuel's and Edward's remains to their rightful resting place.

Furthermore, *Thorpe* concerned a completely different legal issue. The Third Circuit did not interpret Section 3005(a)(4), let alone determine whether Native American human remains buried in the ground are subject to NAGPRA's repatriation provisions. Instead, the legal issue in *Thorpe* was whether the Borough was a museum, as defined in NAGPRA, *see* 25 U.S.C. § 3001(8), and therefore subject to NAGPRA's repatriation provision. *See Thorpe*, 770 F.3d at 262–67. The Third Circuit's holding that the Borough was not a museum and thus not subject to NAGPRA was driven by the court's concern with exhuming Thorpe's remains over his wife's lawful decision, a potential result the court described as “clearly absurd” and “contrary to Congress's intent” in enacting NAGPRA. *Id.* at 266.

In focusing on whether the Borough was a museum to avoid the absurd result of requiring Thorpe's exhumation over his third wife's lawful decision, the

Third Circuit strongly suggested it understood NAGPRA's repatriation provisions otherwise applied to Thorpe and remains buried in the ground. At no point during the litigation did the Borough argue that Thorpe's remains were not subject to Section 3005(a) because they were buried. Indeed, the court and the parties agreed that Thorpe's remains were Native American human remains and that the Borough possessed and controlled them. *Id.* at 262.

In relying on *Thorpe*, the District Court strongly implied that it believed ordering Defendants to repatriate Samuel and Edward would be a clearly absurd result. JA214-215. Not so. To rely on the absurdity doctrine to avoid the literal application of a statute, the result must be “so preposterous that it ‘shock[s] the general moral or common sense.’” *Tiscareno-Garcia v. Holder*, 780 F.3d 205, 208 (4th Cir. 2015) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)) (brackets in original). Requiring Defendants—who are in possession of Samuel's and Edward's remains, who took them to Carlisle, and who were responsible for their deaths, and their unconsented to burial, exhumation, and reburial—to return the boys to Winnebago pursuant to the exact law enacted by Congress to facilitate the return of illicitly acquired Native American human remains does not shock the general moral and common sense.

In *Thorpe*, the Third Circuit found it would be absurd to apply NAGPRA to remove Thorpe's remains from his “intended final resting place[.]” chosen by his

wife, who had the legal authority to do so. 770 F.3d at 266. The circumstances in *Thorpe* could not be more fundamentally different than those in this case. Carlisle Cemetery is clearly not Samuel's and Edward's intended final resting place and the boys' families did not consent or choose to have them buried there. Carlisle is thousands of miles away from their home. The boys were buried, exhumed, and reburied without the consent of Winnebago or their families and without the appropriate cultural and religious rites required by Winnebago custom. JA21-26. As such, their spirits remain lost and are unable to rest until they are returned home. JA35. The District Court failed to address these facts at all, let alone take them as true, as is required at the motion to dismiss stage.

Ultimately, the District Court's application of *Thorpe* demonstrates its failure to comprehend NAGPRA's dual purposes: graves protection *and* repatriation. *Thorpe* does not support the District Court's conclusion that NAGPRA does not require the repatriation of human remains held in the ground. The District Court cited *Thorpe* to support its finding that "applying [NAGPRA] to order disinterment would run contrary to Congress's intent to protect Native American burial sites." JA214. Specifically, the District Court claimed that *Thorpe* supported finding that ordering Defendants to repatriate Samuel and Edward would "invert" NAGPRA and run counter to its objective "to protect Native American burial sites and to require excavation of such sites only by permit." JA214-215. The District

Court misunderstood *Thorpe*. Ordering Defendants to repatriate Samuel and Edward would not “invert” the intent of NAGPRA. Rather, it would fulfill one of NAGPRA’s primary objectives by accomplishing the repatriation of Native American human remains in the illicit possession of a federal agency.

The District Court also insinuated that exhuming Samuel and Edward and repatriating them to their homelands would be tantamount to graverobbing or desecration, JA215, the activities Congress was actually concerned about when enacting NAGPRA. *See, e.g., NAGPRA Hearing*, 101st Cong. at 2; JA27. This is a false equivalency. While Winnebago recognizes the significant importance of protecting of Native American burial sites,⁹ requiring Defendants to respectfully disinter Samuel and Edward and repatriate them to Winnebago so they can be buried in their homelands with the proper ceremonies is not the kind of activity Congress sought to protect against in enacting NAGPRA’s grave protections provisions. NAGPRA’s graves protection objectives should not be construed to deny Winnebago its right to seek the repatriation of its children.

Thorpe does not support the District Court’s interpretation of Section 3005(a)(4), and *Thorpe*’s factual and legal differences make it irrelevant to this

⁹ NAGPRA defines “burial site” to mean a place “into which *as part of the death rite or ceremony of a culture*, individual human remains are deposited. 25 U.S.C. § 3001(1) (emphasis added). Carlisle Cemetery cannot meet NAGPRA’s statutory definition of burial site because Samuel and Edward were not buried there in accordance with Winnebago’s requisite death rights and ceremonies.

case. Repatriating Samuel and Edward fulfills NAGPRA's purpose by returning Native American human remains to their Indian Tribes for proper burials.

IV. Defendants' Defiance of NAGPRA and the District Court's Errors Deprive Winnebago of its Right to Repatriate Samuel's and Edward's Remains and Undermines NAGPRA's Purpose and Effectiveness.

NAGPRA was enacted to stop federal agencies, like Defendants, from dictating the handling and disposition of Indian Tribes' relatives. NAGPRA is a firm recognition that Indian Tribes—not federal agencies or museums—have the right and are the proper entities to determine how to care for their dead. Requiring agencies to comply with NAGPRA is not just about compliance with federal law. Rather, it is necessary to fulfill the federal government's explicit trust responsibilities to Indian Tribes and to restore respect for Tribal sovereignty, cultural practices. *See* 25 U.S.C. § 3010. As such, the equitable defenses the Army raised below—that it sympathizes with the historical injustices evident in this case, has successfully returned other children (not in accordance with NAGPRA), and is willing to “return”¹⁰ Samuel and Edward under its own protocols—fail to justify its flouting of the legal requirements plainly manifest in NAGPRA's text, structure, and history. Instead, Defendants' defenses only expose its efforts to engage in the

¹⁰ To be clear, Defendants will not return the remains to Winnebago. Instead, they will only allow a closest living relative to request the return of Samuel and Edward. At all times, the Army maintains complete control over this process. The Army's process is entirely discretionary and lacks any legal enforcement mechanisms to compel it to return the children. JA37-42.

very harm Congress sought to remedy in enacting NAGPRA: federal agencies' and museums' abuse of power by retaining Native American human remains to which they have no right and excluding Indian Tribes from decisions with enormous effects on their ancestors and their communities. *See NAGPRA Hearing*, 101st Cong. at 42–45.¹¹

NAGPRA was enacted “to correct past abuses” and “guarantee the protection” and repatriation of Native American human remains. 173 A.L.R. Fed. 585 (cleaned up). Congress clearly recognized Native American human remains would continue to be abused and withheld from Indian Tribes unless the paternalistic notion that federal agencies and museums were the best to ensure remains' protection was addressed. As long as Defendants maintain absolute control over the remains at Carlisle Cemetery, they remain at liberty to continue to use them for whatever purpose they see fit. There is nothing to stop them from discontinuing any of their unconsented-to research, tourism, and other uses of the remains.

Despite Defendants' representations, the core injustices to Indian Tribes will continue without NAGPRA's enforcement. Winnebago and other Indian Tribes

¹¹ Highlighting the need for NAGPRA, in this Senate hearing, Senator McCain noted that none of the approximately 1,200 Native American human remains held by the Field Museum had been repatriated under the museum's self-imposed repatriation policy. *NAGPRA Hearing*, 101st Cong. at 45.

seeking to bring home their children from Carlisle will be deprived of crucial rights designed to assure that they are able to handle the remains of their relatives with full information, in cooperation and transparency with agencies, and in a way that enables them to reclaim the remains of their relatives and honor them according to Tribal customs and traditions. *See* 25 U.S.C. § 3005(a)(3), (d). For example, NAGPRA mandates consultation with Indian Tribes to ensure that repatriation occurs in accordance with their cultural traditions, pursuant to best scientific practices, and along expeditious timelines. *See id.* § 3005(a)(3); 43 C.F.R. § 10.5.

Return under the Army's makeshift Disinterment and Return process deprives Indian Tribes of their prerogatives in determining how, when, and under what circumstances their ancestors are returned. For instance, the Army requires affidavits from family members to initiate disinterment and has maintained control over the timing and scope of repatriation. JA37-42. Following this practice, Defendants outright denied Winnebago's request to repatriate Samuel and Edward, instead forcing them to find a "closest living relative" (which does not exist) or commit perjury to meet unlawful requirements arbitrarily imposed by the Army. JA33. Defendants' conduct perpetuates the paternalistic framework Congress sought to dismantle through NAGPRA. Repatriation under NAGPRA is the way to meaningfully restore Tribal sovereignty over ancestral remains, a critical corrective to the historical injustices perpetrated by federal agencies like the Army.

The District Court's failure to correct Defendants both deprives Winnebago of statutory rights and threatens to undermine NAGPRA's unequivocal enforcement provision. *See* 25 U.S.C. § 3013. By failing to enforce NAGPRA in this case, the District Court frustrates the remedial purpose of returning Native American human remains to their culturally affiliated Indian Tribes. Congress enacted NAGPRA to address the systemic mistreatment of Native American remains, recognizing that these remains had often been treated as property to be exploited rather than as ancestors deserving respect and dignity. *See Thorpe*, 770 F.3d at 259–60. The District Court revived such injustice by erecting an artificial barrier to repatriation that conflicts with Congress's intent to prioritize Tribal sovereignty and dignity.

Repatriating Samuel and Edward pursuant to NAGPRA will uphold NAGPRA's mandates and fulfill Congress's promise to return to Indian Tribes decision making authority over the sensitive matter of how to handle and lay to rest the remains of their relatives. This case is about more than Winnebago's fight to bring Samuel and Edward home—it is about vindicating Indian Tribes' sovereign rights under NAGPRA.

CONCLUSION

For the forgoing reasons, this Court should reverse the District Court and remand for further proceedings.

ORAL ARGUMENT REQUESTED

Oral argument is requested because this appeal raises significant questions of first impression regarding the interpretation and application of NAGPRA. 25 U.S.C. §§ 3001–3013. Oral argument will aid the Court in addressing the issues that implicate statutory construction, legislative intent, and the broader remedial purpose of NAGPRA.

RESPECTFULLY SUBMITTED this 22nd day of January, 2025.

/s/ Beth Margaret Wright

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