

No. 24-2081

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**United States Court of Appeals**  
**FOR THE FOURTH CIRCUIT**

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**WINNEBAGO TRIBE OF NEBRASKA,**  
Plaintiff-Appellant,

v.

**UNITED STATES DEPARTMENT OF THE ARMY, ET AL.,**  
Defendants-Appellees.

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

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**BRIEF OF SISSETON WAHPETON OYATE**  
**AND SPIRIT LAKE TRIBE AS AMICI CURIAE**  
**SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL**

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January 29, 2025

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-2081 Caption: Winnebago Tribe fo Nebraska v. U.S. Department of the Army, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sisseon Wahpeton Oyate  
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES ☒ NO
2. Does party/amicus have any parent corporations? YES ☒ NO  
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES ☒ NO  
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  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES ☒ NO  
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
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/ Steven J. Alagna

Date: January 29, 2025

Counsel for: Amicus Sisseton Wahpeton Oyate

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 24-2081 Caption: Winnebago Tribe fo Nebraska v. U.S. Department of the Army, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Spirit Lake Tribe

(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES ☒ NO
2. Does party/amicus have any parent corporations? YES ☒ NO  
If yes, identify all parent corporations, including all generations of parent corporations:
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Signature: /s/ Steven J. Alagna

Date: January 29, 2025

Counsel for: Amicus Spirit Lake Tribe

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici Curiae are federally recognized American Indian Tribes that have successfully repatriated the remains of their children who died and were buried at Carlisle Indian Industrial School. Sisseton Wahpeton Oyate’s Amos LaFromboise and Spirit Lake Tribe’s Edward Upright passed away as children while attending the Carlisle School over 140 years ago, and Amici spent generations trying to bring their remains home. Since 2016, Amici struggled mightily to navigate the Office of Army Cemeteries’ disinterment procedure, which proved to be an unworkable morass of moving targets, delay, and cultural insensitivity. It was only once Amici invoked the Native American Grave Protection and Repatriation Act (“NAGPRA”) that the Army finally signed a Plan of Action that facilitated Amos and Edward’s return—and Amici’s healing.

Below, the district court cited the Army’s procedure in its decision dismissing the Winnebago Tribe of Nebraska’s suit under NAGPRA. J.A.

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<sup>1</sup> No party’s counsel authored this brief in whole or in part and no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to its filing.

208. To the extent the court was suggesting that the Army's procedure would govern the repatriation of Native children's remains from Carlisle, Amici's first-hand experience shows why that is deeply problematic. Amici therefore offer their story to aid this Court as an illustration of why and how NAGPRA, and not the Army's internal disinterment procedure, is the appropriate mechanism for Tribes to bring their children home from Carlisle.

## INTRODUCTION

This story begins within the context of a dark chapter of American history. Historian Ned Blackhawk put it bluntly:

With new reservation land policies and a continental-wide system of boarding schools, the United States entered the twentieth century committed to eradicating Native Americans. Officials targeted Indian lands and children in a campaign designed not to exterminate Native peoples but to eliminate their culture. The goal, as [Army Captain Richard Henry] Pratt famously quipped, was to “kill the Indian, and save the man.”<sup>2</sup>

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<sup>2</sup> Ned Blackhawk, *The Rediscovery of America: Native Peoples and the Unmaking of U.S. History* 353 (2023); see also *id.* at 336 (“At Carlisle, [Pratt] professed, the Indian child ‘could learn to march in line with America as a very part of it, head up, eyes front, where he could see his glorious future of manly competition in citizenship.’ Such efforts aimed

The federal government has since recognized that Pratt’s Carlisle Indian Industrial School and the larger Indian boarding-school system were part of a “broader goal of Indian territorial dispossession for the expansion of the United States.”<sup>3</sup> When Native communities resisted having their children sent to boarding schools like Carlisle, the federal government withheld food and other resources owed to the Tribes, and even resorted to child abduction.<sup>4</sup>

Upon their arrival, Carlisle stripped the Native children of their names, gave them English ones, and prohibited them from speaking their

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to ensure that there was no ‘Indian in [children] when they are grown.’”); *see also Haaland v. Brackeen*, 599 U.S. 255, 299 (2023) (Gorsuch, J., concurring) (“By the late 1870s, [the federal government’s] goals turned toward destroying tribal identity and assimilating Indians into broader society. . . . Thus began Indian boarding schools. In 1879, the Carlisle Indian Industrial School opened its doors at the site of an old military base in central Pennsylvania. Carlisle’s head, then-Captain Richard Henry Pratt, summarized the school’s mission this way: ‘All the Indian there is in the race should be dead. Kill the Indian in him, and save the man.’” (cleaned up)).

<sup>3</sup> Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report*, Vol. II at 94 (July 2024) [https://www.bia.gov/sites/default/files/media\\_document/doi\\_federal\\_indian\\_boarding\\_school\\_initiative\\_investigative\\_report\\_vii\\_final\\_508\\_compliant.pdf](https://www.bia.gov/sites/default/files/media_document/doi_federal_indian_boarding_school_initiative_investigative_report_vii_final_508_compliant.pdf) [hereinafter “Newland Report”].

<sup>4</sup> *Brackeen*, 599 U.S. at 299–300 (Gorsuch, J., concurring); Blackhawk, *The Rediscovery of America* at 353–54.

Native languages.<sup>5</sup> At Carlisle, children were deprived of essential nutrition and even abused physically, emotionally, and sexually.<sup>6</sup> Many children ran away, or tried to.<sup>7</sup> Disease was rampant. According to an attorney for the Office of Army Cemeteries, “the vast majority” of the Native children buried at Carlisle died from tuberculosis, as they were “used to being outdoors” and, at Carlisle, “were now being put essentially in barracks,” inside, “in close confines.”<sup>8</sup>

Carlisle was eventually shut down in 1918 after Senate hearings revealed widespread malnutrition, alarmingly unsanitary conditions,

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<sup>5</sup> Proclamation No. 10870, 89 Fed. Reg. 100,289 at 100,289–90 (Dec. 9, 2024).

<sup>6</sup> Proclamation No. 10870, 89 Fed. Reg. at 100,289; *see also* E.B. Linen, *Report on the Carlisle Indian School* (Feb. 24, 1914), <https://carlisleindian.dickinson.edu/documents/main-report-inspector-e-b-linnen-1914-investigation>.

<sup>7</sup> Proclamation No. 10870, 89 Fed. Reg. at 100,289; *Brackeen*, 599 U.S. at 300 (Gorsuch, J., concurring).

<sup>8</sup> *Return of our Sisseton-Wahpeton Children: A Historic Meeting*, YouTube (Sept. 15, 2021) <https://www.youtube.com/watch?v=yR6uenyfC1s> (video of the bulk of a meeting between Sisseton Wahpeton Oyate and Spirit Lake Tribe and Office of Army Cemeteries), [hereinafter “SWO-Army Meeting Video”] at 1:21:00–1:21:27 (comments by Army attorney Jason Buller). The SWO-Army Meeting Video picks up partway through the meeting; a recording of the beginning of the same meeting can be found at <https://www.youtube.com/watch?v=GJPQA4es13Q>.

and extreme corporal punishment and other abuses.<sup>9</sup> But by that time, thousands of children had been forced to attend the boarding school. Out of those thousands, less than 8% graduated from Carlisle.<sup>10</sup> More than 180 children died.<sup>11</sup> Many of those Native children's remains were buried on-site.<sup>12</sup> The trauma from Carlisle and other Indian boarding schools continues to this day.<sup>13</sup>

Amici and its children were not spared from the boarding-school era, or even from Carlisle, although it was over a thousand miles away.

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<sup>9</sup> Roberta Estes, *Carlisle Indian School Records*, Native Heritage Project (May 14, 2012), <https://nativeheritageproject.com/2012/05/14/carlisle-indian-school-records/>; Proclamation No. 10870, 89 Fed. Reg. at 100,292.

<sup>10</sup> Estes, *Carlisle Indian School Records*.

<sup>11</sup> *Id.*; Proclamation No. 10870, 89 Fed. Reg. at 100,292; *see also* J.W. Joseph, et al., *Archival Research of the Carlisle Indian School Cemetery* 28–30 (2017), <https://carlisleindian.dickinson.edu/sites/default/files/docs-pages/Archival%20Research%20Report%20-%20July%202017.pdf> [hereinafter “Joseph, *Archival Research*”].

<sup>12</sup> Proclamation No. 10870, 89 Fed. Reg. at 100,292. Carlisle is currently “the only cemetery that has Native American children from a boarding school in it that is operated by the Army.” SWO-Army Meeting Video at 1:14:00.

<sup>13</sup> *Brackeen*, 599 U.S. at 305 (Gorsuch, J., concurring) (“All that often translated into long-lasting adverse health and emotional effects.”); Newland Report at 56, 63–66, 80, 87, 94–95 (describing intergenerational trauma from Indian boarding schools and efforts to eradicate Native culture).

Amos LaFromboise was the son of Joseph LaFromboise, one of Sisseton Wahpeton Oyate's most prominent and celebrated chiefs, who negotiated the Lake Traverse Reservation where Sisseton Wahpeton Oyate resides today.<sup>14</sup> When Amos grew up, he planned to follow in his father's footsteps and become a leader of his Tribe.<sup>15</sup>

Amos was part of a cohort of six Dakota children who were forcibly sent to Carlisle Indian Industrial School against their families' wishes.<sup>16</sup>

On November 6, 1879, Amos stepped off the train in Carlisle, Pennsylvania to begin a three-year term at the boarding school. School officials assigned him a number (116), measured his height (four feet, eight inches), and recorded his age (thirteen).<sup>17</sup>

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<sup>14</sup> SWO-Army Meeting Video at 5:00–5:45 (comments of Tamara St. John); Letter from Beth Margaret Wright, Native American Rights Fund Attorney, to Karen Durham-Aguilera, Executive Director of Office of Army Cemeteries (Mar. 20, 2023), <https://narf.org/nill/documents/20230322swo-repatriation-letter.pdf>. [hereinafter "NAGPRA Request Letter"] at 2.

<sup>15</sup> NAGPRA Request Letter at 2.

<sup>16</sup> SWO-Army Meeting Video at 1:59:24 (comments of Tamara St. John).

<sup>17</sup> Carlisle Indian School Digital Resource Center, *Amos LaFromboise Student Information Card*, [https://carlisleindian.dickinson.edu/student\\_files/amos-lafromboise-student-information-card](https://carlisleindian.dickinson.edu/student_files/amos-lafromboise-student-information-card).



Tragically, less than three weeks later, Amos LaFromboise was dead: the first child to die at Carlisle.<sup>18</sup> No one asked his family how they wanted him to be buried.<sup>19</sup> No one even told his family or his Tribe that he had died.<sup>20</sup> Instead, school officials buried Amos in a nearby cemetery—until they later dug up his remains because the plot was reserved for “White persons only.”<sup>21</sup>

Another Dakota child who arrived at Carlisle with Amos on November 6, 1879, was Edward Upright, age 12; Carlisle documented him without an “Indian Name,” and noted “Sisseton” on his record:<sup>22</sup>

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<sup>18</sup> *Id.*; SWO-Army Meeting Video at 2:02:00–2:02:46 (St. John).

<sup>19</sup> NAGPRA Request Letter at 2.

<sup>20</sup> *Id.*

<sup>21</sup> Jacqueline Fear-Segal, *White Man’s Club: Schools, Race, and the Struggle of Indian Acculturation* 236–37 (2007); *see also* Joseph, *Archival Research* at A-8. Amos was buried, exhumed, and reburied at least three times, in three different locations, at Carlisle. NAGPRA Request Letter at 2.

<sup>22</sup> Carlisle Indian School Digital Resource Center, *Edward Upright Student Information Card*, [https://carlisleindian.dickinson.edu/student\\_files/edward-upright-student-information-card](https://carlisleindian.dickinson.edu/student_files/edward-upright-student-information-card).

CARLISLE INDIAN INDUSTRIAL SCHOOL. DESCRIPTIVE AND HISTORICAL RECORD OF STUDENT.									
NUMBER 115	ENGLISH NAME Edward Mfright		AGENCY Sisseton		NATION Sioux				
BAND Sisseton	INDIAN NAME		HOME ADDRESS Hanatah						
PARENTS LIVING OR DEAD			BLOOD	AGE 12	HEIGHT 5 <sup>2</sup>	WEIGHT	FORCED INSP.	FORCED EXPR.	SEX. m.
FATHER,		MOTHER,							
ARRIVED AT SCHOOL Nov. 6, 1879		FOR WHAT PERIOD 3 years.		DATE DISCHARGED May 5, 1881		CAUSE OF DISCHARGE Died.			
TO COUNTRY		PATRONS NAME AND ADDRESS						FROM COUNTRY	

On May 5, 1881, about 18 months after arriving at Carlisle, Edward died; he had been sick with pneumonia, and before that with measles, for over three weeks.<sup>23</sup> Like Amos, Edward was buried on-site at Carlisle.<sup>24</sup>

After years—indeed, generations—of efforts and working together, Amici were finally able to repatriate Amos and Edward from Carlisle. On September 17, 2023, Amici's citizens came to Carlisle some 60 strong, bringing their ceremonies, honor songs, and spiritual and tribal leaders

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<sup>23</sup> Letter from C.H. Hepburn, Carlisle Industrial School Physician, to R. H. Pratt, Carlisle Industrial School Superintendent, (May 6, 1881), [https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA\\_RG75\\_91\\_b0018\\_07859.pdf](https://carlisleindian.dickinson.edu/sites/default/files/docs-documents/NARA_RG75_91_b0018_07859.pdf).

<sup>24</sup> Joseph, *Archival Research* at A-35.

to bring Amos and Edward home.<sup>25</sup> While Amici continue the process of mending the intergenerational trauma inflicted by boarding schools like Carlisle, Amos and Edward have finally been laid to rest in proper graves at home and given the ceremony they deserve, surrounded by the kinship of their Tribes.

But getting there was not easy. Not only because the 1,200-plus-mile journey from the Dakotas to Carlisle takes over 24 hours—but also because for years, the Army had subjected Amici to a maze of opaque and conflicting requirements, trying to force them through the Army’s own, internal procedures for the disinterment of Army servicemembers. It quickly became obvious that the Army process was unfit for repatriating Native children’s remains from Carlisle. And it was only once Amici invoked NAGPRA that the Army came to the table and meaningful progress was made.

This brief tells the story, in Amici’s leaders’ and citizens’ own words, of their efforts to bring Amos and Edward home and how the Army’s

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<sup>25</sup> Native American Rights Fund, *Tribes Lead Process to Bring Children Home from Carlisle* (Oct. 11, 2023) <https://narf.org/swo-repatriation-carlisle-cemetery/> [hereinafter “NARF, *Tribes Lead Process*”].

procedures consistently fell short of respecting the Tribes' children, dignity, and sovereignty along the way. The upshot is clear: NAGPRA is the proper mechanism for repatriating Native remains from Carlisle, not the Army's internal procedure for disinterring service members.

## **ARGUMENT**

In the opening paragraph of its opinion dismissing the Winnebago Tribe's case, the district court below cited the Army's internal servicemember-disinterment procedure as an alternative to NAGPRA. J.A. 208. In doing so, it implicitly suggested that the Army's procedure can govern the repatriation of the Winnebago Tribe's children buried at Carlisle. But Amici's firsthand experience tells a different story.

At every step of the way, the Army's procedure proved to be an unworkable framework for repatriating Native children from Carlisle. Worse, at times, it was downright culturally insensitive, adding insult to injury and reopening the very traumas that Carlisle and other boarding schools have inflicted on Native Nations like Amici for generations.

In contrast, Congress provided the mechanism to govern such repatriations: NAGPRA. As illustrated below, NAGPRA reflects Congress's policy of empowering Native Nations and requiring federal

agencies to engage with them on a government-to-government basis in a way that empowers Tribes to be central participants in the repatriation process.

Amici's story ends with the successful repatriation of Edward and Amos, but only after they invoked NAGPRA and negotiated a Plan of Action that approximated what NAGPRA would have required to begin with. Amici therefore urge this Court to reverse the district court's dismissal and hold that NAGPRA is the proper framework for the Winnebago Tribe to repatriate their children buried at Carlisle, just as Amici were able to bring their own children home.

**I. The Army's "closest living relative" requirement nearly foreclosed the possibility of repatriation, while NAGPRA would have saved Amici years of hardship.**

**A. The Army's unworkable "closest living relative" requirement stokes trauma and fails to account for the realities of Native familial structures.**

Amici took a substantial step forward on the long road to repatriating Amos and Edward beginning in 2016, but would not reach the journey's end until September 2023.

In 2016, Sisseton Wahpeton Oyate's ("SWO's") Tribal Historic Preservation Office ("THPO") began hearing about other Tribes seeking

to have the remains of their children repatriated from Carlisle. So SWO's THPO set out to pursue the repatriation of Amos's and Edward's remains with the Office of Army Cemeteries. The Army offered to disinter and repatriate Amici's children, but only via Army Regulation 290-5, which generally governs Army cemeteries and the burial and disinterment of servicemembers. *See generally* 32 C.F.R. pt. 553.<sup>26</sup>

Under the Army's process, SWO quickly encountered a major hurdle: the Army was requiring any disinterment request to be made by the decedent's "closest living relative."<sup>27</sup> That closest living relative must submit a notarized affidavit, testifying that they are, in fact, the "closest living relative" of the Native child, and provide "reason[s] that disinterment is desired."<sup>28</sup> Then, a second affiant must also testify that the first affiant is, in fact, the deceased child's closest living relative.<sup>29</sup>

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<sup>26</sup> *See also Army Cemeteries*, Army Reg. 290-5 (Oct. 21, 2020), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN31366-AR\\_290-5-001-WEB-2.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31366-AR_290-5-001-WEB-2.pdf) [hereinafter "Army Reg. 290-5"].

<sup>27</sup> The Office of Army Cemetery's disinterment-request form, which purports to be "Based on Army Regulation 290-5," is available at [https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Disinterment%20Request%20Forms%20\(July%2023\).pdf?ver=WheqserHkX\\_QMSdlO6A5UQ%3d%3d](https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Disinterment%20Request%20Forms%20(July%2023).pdf?ver=WheqserHkX_QMSdlO6A5UQ%3d%3d).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Requirements like these might make sense in the context of the disinterment of adult servicemembers. But Amici’s experience shows that Army Regulation 290-5 simply does not fit the situation of Native children buried at Carlisle.

As a practical matter, the kind of documentation necessary for Tribes to figure out the Army’s closest-living-relative requirement is often prohibitive. For Amici, it nearly was.

Consider that Amos died at Carlisle in 1879, and Edward in 1881—more than 140 years ago. Compounding the problem is the fact that “very little of [Carlisle’s] administrative documentation has survived.”<sup>30</sup> Even the Army’s attorney admitted that “the records are spotty, at best.”<sup>31</sup>

And of course, these are civilian Native children, not servicemembers who died as adults. As Spirit Lake’s then-Chairman Douglas Yankton explained, the children buried at Carlisle “never got to have the chance” to start a family—because they died so young: “At that

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<sup>30</sup> Joseph, *Archival Research* at 28.

<sup>31</sup> SWO-Army Meeting Video at 1:20:37.

time they were boys, but in reality, they really are somebody's grandparents—they should have been.”<sup>32</sup>

On top of that, the closest living relatives of children who died 140 years ago are most likely to be elders. This means that the Army's process places the onus on individual Tribal elders to submit themselves in a certified, under-oath statement to the United States federal government. But Tribal elders are the very people with the closest proximity to the traumas of Carlisle and the boarding-school era. Amici's elders still remember the days when their cultural practices were stripped from them: They had to pray behind covered windows, speak their language only in secret, and forsake their ceremonies.<sup>33</sup> Now, the Army's process was singling them out in a way that picked at the scabs of those traumas, instead of empowering Tribes to work towards repatriation communally.

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<sup>32</sup> *Id.* at 22:25–23:38.

<sup>33</sup> The BIA's report recognizes the medical consensus acknowledging that “efforts to destroy native cultures cause trauma that reverberates across generations.” Newland Report at 66 (quoting Brief for the American Academy of Pediatrics and American Medical Association as Amici Curiae Supporting Secretary of the Interior & Petitioners at 9, *Haaland v. Brackeen*, 599 U.S. 255 (2023)).



Finally, adding perhaps the most insult to injury, recall that Carlisle (like other boarding schools) changed children's names when they arrived, forbidding them from using their Native names and speaking their languages.<sup>34</sup> Amici learned that this is exactly what happened to Edward Upright. And it nearly proved to be prohibitive.

SWO's THPO knew that Edward Upright was buried at Carlisle and that Carlisle had documented him as "Sisseton." But SWO was struggling to figure out who "Edward" was, and his family—necessary information to identify his singular closest living relative. Tamara St. John, a genealogist and officer in SWO's THPO, recounts: "the first order of the day was to give them English names. So, what they were before that or who they were known as, is not there . . . I [was] not able to find [Edward's] family because of that."<sup>35</sup>

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<sup>34</sup> SWO-Army Meeting Video at 1:29:35–1:30:18 (Army's attorney acknowledging, "in an effort to strip away the Native culture from these children, i.e., force them to assimilate to into White culture, they took away their Native name, and they gave them new English names, and made them use those names only in many cases. And so to that end, unfortunately the records often only reflect that [English] name or the amalgamation of a Native name and a English name . . . ").

<sup>35</sup> *Id.* at 2:24:35–2:25:01.

Still, she and others in SWO's THPO scoured every record they could, interviewed elders, and consulted other Tribes, all in hopes of determining Edward's closest living relative so they could bring him home. For years, their painstaking efforts turned up nothing. Five years passed with no breakthrough.

Then, a stroke of luck. Again, in the words of St. John:

I couldn't find anything related to family, nothing that really fit the era of 1879, and bear in mind I tried to do this for years, . . . to just about two months ago, . . . one of the Kit Fox [Society of warriors and veterans] . . . has been working with us, and he came in, looked at what I was doing, . . . saw that I was trying to find information for Edward Upright . . . and so he took that to the Kit Fox meeting and shared it with the other veterans, the other Kit Fox. And as they went through it, one of them works for the BIA . . . he himself also had a contact in another BIA office. So all of this is going on in the background while I am unaware. And one day they come down and they say . . . 'We found him.' . . . So [we] went down to the BIA office, sat down, flipped through the pages [of a probate document], . . . and there it was, and it says 'Waanatan,' and that his son dies at Carlisle at about the age of 12 or 13 many years ago. So that's in testimony and that was the first time I ever saw anything that identified who [Edward] was.<sup>36</sup>

Waanatan II was a chief of what is now called Spirit Lake Tribe, SWO's Dakota neighbors and relatives—and Edward was his son.<sup>37</sup> So

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<sup>36</sup> *Id.* at 2:16:28–2:19:13.

<sup>37</sup> *Id.* at 2:16:25–2:21:40.

St. John knew that she needed to loop Spirit Lake Tribe into the repatriation efforts and research the Waanatan genealogy, and that is what she did.<sup>38</sup>

Amici had never before had access to any documentation that revealed Edward Upright's identity as a Waanatan. And if they had not happened upon that probate document after years of diligent effort and a stroke of luck, they would have forever been unable to track down Edward's closest living relative to satisfy the Army's requirement. Tribes should not have to wish for such a "eureka" moment to bring their children home from Carlisle.

True, the Army's attorney said that the Tribes could just "decide who is the closest living relative," and that the Army "is not going to question" those representations.<sup>39</sup> But he did not explain why, if that was the case, a second affiant also had to testify that the first affiant is, in fact, the child's closest living relative. And in any event, he was essentially inviting Amici to risk perjuring themselves based on a

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1:35:04–34 ("The United States Army is not going to question anybody that submits an affidavit that says 'I would like to disinter this child from Carlisle cemetery and I am their closest living relative.'").

promise that they could just trust the Army not to call them out later. But as the history laid out above should make clear, asking the Tribes to just trust the federal government is a tall order.

**B. In contrast, NAGPRA empowers Tribal communities to pursue repatriation instead of putting the onus on individual relatives, accounting for Amici's traditional kinship structures.**

The Army's practically prohibitive "closest living relative" requirement is especially inappropriate when considering how far it departs from the natural fit that NAGPRA provides.

Unlike the Army's servicemember-disinterment procedure, NAGPRA empowers Tribes as communities, and not just individual relatives, to obtain repatriation whenever a decedent's lineal descendant is not easily identified. *See* 25 U.S.C. §§ 3002(a), 3005(a)(1), (4). This reflects Congress's deference to traditional Native kinship systems and expansive understandings of familial relationships that are common to many indigenous societies.<sup>40</sup> *See* 43 C.F.R. §§ 10.1(a)(3), 10.3.

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<sup>40</sup> That is why the federal government is loath to regulate Tribal domestic relations and generally affords Tribes "the widest possible latitude in regulating the domestic relations of their members." Felix S.

And as Dakota nations, Amici are no strangers to expansive kinship structures. As Dakota scholar Ella Deloria famously explained, Dakota kinship is a traditional system of familial ties that extend well beyond the nuclear family: “By kinship all Dakota people were held together in a great relationship that was theoretically all-inclusive and co-extensive with the Dakota domain.”<sup>41</sup> In traditional Dakota culture, therefore, a Dakota child “was born not into a secluded single family, but into a *tiyospaye*,” an expansive extended-family structure.<sup>42</sup>

The Army’s “closest living relative” requirement simply does not account for the expansive realities of Amici’s familial structures. Instead, as noted above, it singles out individual relatives to bear the burdens of repatriation from Carlisle—the very same relatives who are most closely and directly impacted by the traumas of the federal boarding-school era.

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Cohen, *Cohen’s Handbook of Federal Indian Law* 137 (1942) (cleaned up); see also *Brackeen*, 599 U.S. at 265 (summarizing Congress’s findings and policy of deference to Native familial structures in enacting the Indian Child Welfare Act).

<sup>41</sup> Ella Deloria, *Speaking of Indians* 24–25 (1944); see also *id.* at 41–43 (explaining how “[a]ll the families of a *tiyospaye* operated as a single unit in practically all activities,” such that children had whole societies, and not just their parents, responsible for their care).

<sup>42</sup> *Id.* at 42–43.

NAGPRA, on the other hand, recognizes the realities of Native families and empowers Tribes (and obligates the federal government) accordingly. For one thing, NAGPRA's regulations expressly stop short of requiring the kind of exhaustive genealogical research the Army's procedure forced Amici to undertake. *See* 43 C.F.R. § 10.3 (providing that determining "[c]ultural affiliation does not require exhaustive studies, additional research, or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information available.").

Also, in contrast to the Army's invitation for Amici to just trust that the federal government will do the right thing, NAGPRA removes the uncertainty by making repatriation—and deference to Tribes' familial structures—mandatory. *See* 25 U.S.C. § 3005(a)(1) (providing that once a Tribe or lineal descendants establish cultural affiliation, upon request, "the Federal agency . . . shall expeditiously return such remains and associated funerary objects"); *accord id.* § 3005(a)(4); 43 C.F.R. §§ 10.1, 10.8.

These differences between the Army's procedure and NAGPRA are not merely academic. For Amici, they very nearly made the difference

between the successful repatriation of their children and the heartbreaking possibility of having to leave them at Carlisle.

**II. The Army's procedure allowed it to cut off communication with Amici and unilaterally delay repatriation, while NAGPRA would require regular consultation and expeditious repatriation.**

After Amici had solved the years-long mystery of Edward's identity (and, thus, his closest living relative), they could finally move forward with their request to repatriate him and Amos. In early 2022, Amici held a signing ceremony where Edward and Amos's closest living relatives completed the Army's affidavits, complete with a drum group, traditional prayer, keynote speakers, and posting the colors of the Kit Fox Society. After the signing ceremony, Amici submitted the paperwork to the Army.

In February 2022, Dianne Desrosiers, Program Director of SWO's THPO, followed up with the Army representative who had met with Amici a few months prior. The Army representative told her that the Army had received all the paperwork it needed, and just in time: For a summer 2022 disinterment, the Army needed the paperwork submitted

by March 1, 2022.<sup>43</sup> No one had informed Amici about such a deadline until that point. But no matter, it seemed, as the Army representative had telephonically confirmed Amici's repatriation requests were timely.<sup>44</sup>

Finally. More than five years after beginning the Army's process, and over 140 years since their children passed away at Carlisle, Amici could begin preparing for the return of Edward and Amos during the upcoming summer of 2022.

But days passed, and Amici heard nothing from the Army about the approaching disinterment that was promised for summer 2022. Days turned to weeks, and weeks to months. As summer drew closer, the Army stopped answering Amici's phone calls, and their anticipation turned into concern. After more radio silence, Amici reached out to their U.S. Senators to try to regain the Army's attention.

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<sup>43</sup> The Army schedules disinterment from Carlisle during a small window in the summer, apparently because of budgetary concerns or weather constraints. *See* Letter from Karen Durham-Aguilera, Executive Director of Office of Army Cemeteries, to Kevin Cramer, United States Senator (July 11, 2022) (on file with Counsel for Amici) [hereinafter "Letter to Senator Cramer"].

<sup>44</sup> *See* NARF, *Tribes Lead Process*.



It was not until well into the summer of 2022 that the Army told Amici there would be no repatriation of Edward and Amos that year, after all. According to the Army, Amici had missed the deadline for disinterment in 2022. And despite what the Army representative had told Ms. Desrosiers months before, all the funds for 2022 disinterments had already been accounted for.<sup>45</sup> Adding more insult to injury, despite its insistence on a closest living relative, the Army neglected until 2023 to notify Amos's closest living relative, Robert LaFromboise, that the 2022 repatriation would not be proceeding.

The Army's moving targets were unpredictable, but (sadly) not surprising. Army Regulation 290-5 lays out no deadline to request repatriation. *See generally* 32 C.F.R. pt. 553. Neither does it require the Army to act expeditiously or impose any kind of timeframe on a request for disinterment and repatriation. *Id.* Unmoored from any kind of written or predictable timeline, Amici were forced to navigate the Army's whims.<sup>46</sup>

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<sup>45</sup> Letter to Senator Cramer.

<sup>46</sup> NARF, *Tribes Lead Process* ("Based on the Army's inconsistencies and contradictions, the Tribes feared that the Army might fail yet again to return their children.").

That would not have been the case under NAGPRA. In contrast to the Army's convenient lack of any timetable, NAGPRA requires federal agencies to repatriate Native remains "expeditiously." 25 U.S.C. § 3005(a)(1), (4). NAGPRA's regulations, in turn, provide that whenever there is a valid request for repatriation, the federal agency must respond in writing and relinquish control of the requested human remains within 90 days. 43 C.F.R. § 10.10(g), (h).

After years of good-faith efforts to comply with the Army's ill-fitting procedure, the Army's latest sleight felt like a slap in the face. So on March 20, 2023, Amici, through legal counsel, formally requested repatriation of Amos and Edward under NAGRPA.<sup>47</sup> This appeared to catch the Army's attention, which promptly decided that it would exhume Edward and Amos's remains.<sup>48</sup>

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<sup>47</sup> See NAGPRA Request Letter.

<sup>48</sup> See Notice of Intended Disinterment, 88 Fed. Reg. at 33584–85 (May 24, 2023) (setting a September 2023 date for repatriating Edward, Amos, and three other Native children buried at Carlisle).

**III. The Army’s attempt to sponsor only three to four individuals’ participation at the disinterment would have prevented Amici from repatriating Amos and Edward in a healing and culturally appropriate way, but Amici negotiated a Plan of Action that achieved what NAGPRA requires.**

**A. The Army initially insisted on a limited-invite list that cut off Amici’s families and Tribal communities from the healing potential of repatriation.**

After engaging counsel and invoking NAGPRA, Amici secured from the Army a definite date for Edward and Amos’s disinterment. But even then, the Army continued to make things difficult in ways that NAGPRA would avoid.

For one thing, the Army announced its newfound intent to disinter Amos and Edward not by communicating with the Tribes or the children’s families, but rather by impersonally posting notice in the Federal Register.<sup>49</sup> As SWO pointed out, “[t]he Army issued the notice without providing either the Tribe or the LaFromboise family with adequate

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<sup>49</sup> *Id.*; see also Sisseton Wahpeton Oyate, *A Statement from Sisseton Wahpeton Oyate, in Concurrence with the LaFromboise Family, Regarding the Army’s Federal Register Notice of Intent to Disinter Amos LaFromboise* (June 20, 2023), <https://www.narf.org/nill/documents/20230620swo-statement-repatriation.pdf> [hereinafter “SWO June 2023 Statement”] at 1.

notice or ability to participate. Yet again, the Army is unilaterally making decisions for our child, with no regard for his tribal family's rights and wishes."<sup>50</sup> This, after Amici's years of efforts and correspondence with the Army.

On top of the downright disrespectful nature of its announcement, the Army took the position that only "two family members and one tribal representative or spiritual leader" could be reimbursed—after they front the costs—for traveling to Carlisle to repatriate Edward and Amos.<sup>51</sup>

Spirit Lake Tribe's Chairman Yankton explained why the Army's limitation was problematic:

The United States government puts rules in place that aren't part of our culture. Our *Tiwahe* [family] is bigger than what the government thinks. . . . I would seriously try to look at finding more funds so we can take more people. This is a

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<sup>50</sup> SWO June 2023 Statement at 1.

<sup>51</sup> See Letter to Senator Cramer. Army Regulation 290-5 allowed the Army to disclaim any financial ability to sponsor more than three or four Tribal members to attend the disinterment. See Army Reg. 290-5 § 3-7(c) ("Any disinterment authorized under this paragraph must be accomplished without expense to the Government."). In contrast, NAGPRA provides for grants to cover the costs of repatriation. See 25 U.S.C. § 3008. In fact, the amount estimated available for fiscal year 2024 was nearly \$3.5 million, and individual grantees can receive up to \$25,000. See National Park Service, *FY2024 NAGPRA Repatriation Grants*, Grants.gov, <https://www.grants.gov/search-results-detail/351058>.

historic event here. These are our ancestors. . . . The one that's from Spirit Lake, there's at least a hundred descendants I can think of, from probably just being born a couple days ago to 85, 86 years old. . . . Could you imagine how many Waanatan there are at Spirit Lake? And then we can only take two descendants? So there has to be something looked into to where the government should be accountable to allow for more of our members from each Tribe to go and be a part of this process.”<sup>52</sup>

Another citizen of Amici expressed similar concerns and how the Army's position clashed with Amici's tradition of *tiyospaye*:

[W]hen you say two relatives, we don't have families like that. We don't have any families like that. I don't know any Lakota, Dakota family that has just two relatives. We have these extended families. So our first cousins are brothers and sisters. . . . And so when the United States Army and Mr. Pratt [sent our children to Carlisle], they were trying to break up our extended families. They broke up our *tiyospaye*. And so my thing is, it would be goodwill on behalf of the United States Army . . . to at least support more than two family members. Which one of those eighty-year-old nieces or nephews are you going to tell to stay home? . . . [W]e don't have any families where there's only two family members. That is not our concept. A'ho.”<sup>53</sup>

Much like the Army's problematic insistence on sworn statements from the singular “closest living relatives” of Amos and Edward, the

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<sup>52</sup> SWO-Army Meeting Video at 1:08:15–1:09:30.

<sup>53</sup> *Id.* at 50:50–52:51.

Army's limitation on who could be present for repatriation was yet another affront to Amici's concepts of family.

The Army's limited-invite list also threatened to prevent the repatriation from being a communally healing experience for the Tribes. There is a reason Amici came together as whole communities to work to bring Edward and Amos home, culminating in a gathering with drums, prayer, and other traditions at the signing ceremony to complete the Army's paperwork. That ceremony was wrapped up in the Dakota tradition of kinship. And it was healing and empowering to gather in community.

Likewise, Amici's traditional rites, practiced in community, are crucial for repatriation to be a source of healing rather than a traumatic digging-up of the past.<sup>54</sup> During the boarding-school era, the federal government tried to take Amici's ceremonies, traditions, and cultures

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<sup>54</sup> Native American Rights Fund, *NAGPRA, Carlisle, and Indigenous Activism*, 49 NARF Legal Rev. 1 (2024) <https://narf.org/nill/documents/nlr/nlr49-2.pdf> ("Each Native community has unique history and traditions, and each must take its own road to recovery. . . . These repatriation efforts can be especially traumatic and challenging given the context of the federal Indian boarding schools and the cultural genocide that those schools embodied.").

away from them. The least the government could do now is respect the Tribes' dignitary right to bring Edward and Amos home in a culturally appropriate way. Limiting the trip to two family members and one or two Tribal leaders was not the way to do it.

Thankfully, that is not what happened.

**B. The Plan of Action Amici negotiated laid out what NAGPRA would have required in the first place and brought healing to the whole community.**

Through counsel and the invocation of NAGPRA, Amici were able to negotiate a first-of-its-kind Plan of Action that approximates what NAGPRA would have required to begin with. The Plan of Action empowered Amici to repatriate Edward and Amos with song and ceremony according to their traditions, and—importantly—to do so in community.<sup>55</sup> Never before had the Army allowed for such ceremony to

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<sup>55</sup> NARF, *Tribes Lead Process* (“The Plan allowed the Tribes to take a clear and active role in determining how the disinterment and return of Amos and Edward would unfold. Through the Plan, the Tribes negotiated for provisions regarding the Tribes’ travel to Carlisle, coverage of expenses, the forensic analysis conducted to verify Amos’ and Edward’s remains, and specific tribal ceremonies the Tribes performed.”).



accompany the disinterment and repatriation of Native children buried at Carlisle—until now.<sup>56</sup>



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<sup>56</sup> Mary Annette Pember & Stewart Huntington, *Tribes Strike Historic Deal with Army over Repatriations*, ICT News (Sept. 15, 2023), <https://ictnews.org/news/tribes-strike-historic-deal-with-army-over-repatriations> (“Previous repatriations from Carlisle’s cemetery were handled under Army protocol, which restricted Indigenous ceremonies and specified that remains be handed over only to next of kin.”).

<sup>57</sup> *Id.* (showing, from left to right, SWO archivist Tamara St. John, SWO Chairman J. Garret Renville, and SWO THPO Officer Dianne Desrosiers, holding up the Plan of Action and standing behind two empty chairs Amici have held open for Amos and Edward’s return).



When the day came, Amici showed up as a people, some 60 strong; multiple generations made the 24-hour journey together.<sup>58</sup> As SWO THPO director Dianne Desrosiers said, “We have a lot of people at home who have supported us, including present and past tribal leadership. With that support, all our people that came here have one heart and one mind to do what we were tasked to do, to bring our children home.”<sup>59</sup>



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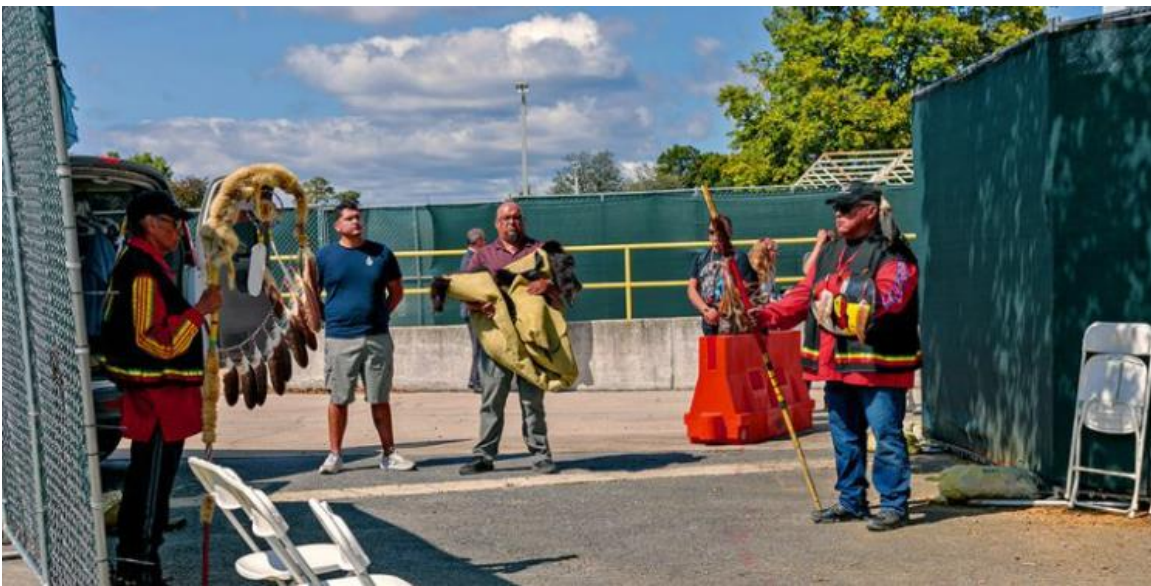
<sup>58</sup> NARF, *Tribes Lead Process*.

<sup>59</sup> *Id.*

<sup>60</sup> Jenna Kunze, *'It's Happy Sad': Two Oyate Boys Leave Carlisle, Others Left Behind*, Native News Online (Sept. 25, 2023), <https://nativenewsonline.net/sovereignty/carlisle> (showing SWO assistant archivist Angeline Wanna singing while carrying the coffin holding Amos, beside her grandmother, followed by Spirit Lake Chairwoman Lana Street carrying the coffin holding Edward).

And that is what Amici did. They sang traditional songs, wore regalia, smudged sage (and even handed it out to each Army staffer, with instructions on how to use it), and offered prayers, including for the children who remain buried at Carlisle.<sup>61</sup>

They wrapped Amos and Edward's remains in buffalo robes and processed with them to members of the Kit Fox Society who had been standing guard, and who immediately began the 24-hour return journey without stopping overnight:



So Amici brought Edward and Amos home and laid them to rest within Sisseton Wahpeton Oyate's lands. As Spirit Lake Chairwoman

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<sup>61</sup> *Id.*; NARF, *Tribes Lead Process*.

<sup>62</sup> NARF, *Tribes Lead Process*.

Lana Street said, “We mutually agreed that Amos and Edward will be buried together in Sisseton, as they were here. We wanted to keep them together.”<sup>63</sup>

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Amici’s repatriation of Edward and Amos was a success. But that is only because, after years of perseverance, they negotiated a Plan of Action that empowered them to play active roles in the process—exactly what NAGPRA requires. The Army’s internal procedure had given the Army unilateral control, including to determine the timing and nature of disinterment. Any consultation with the Tribes became a gratuity that the Army could—and did—withhold at will. And its arcane requirements (sensible as they may be in the context of servicemember disinterment) were unworkable as applied to repatriating Native children from Carlisle. Amici learned all of this the hard way.

In contrast, NAGPRA requires consistent communication and government-to-government consultation, rooted in cultural respect, between federal agency and Native Nation. Indeed, NAGPRA requires

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<sup>63</sup> Kunze, *‘It’s Happy Sad,’ supra*.

the very kind of Plan of Action that Amici were able to negotiate. *See* 43 C.F.R. § 10.4(b) (“After consultation with the lineal descendent, Indian Tribe, or Native Hawaiian organization, the Federal agency or DHHL must approve and sign a plan of action.”).

In the end, the Plan of Action was successful because it departed from the Army’s disinterment procedure and approximated what NAGPRA would have required to begin with. The fact that the Army procedure was so unworkable—and at times, downright culturally insensitive—compared to NAGPRA’s natural fit only highlights that Congress intended NAGPRA to govern.

## CONCLUSION

Amici hope that their story of how they brought Edward and Amos home can provide an illustration for the Court that NAGPRA, and not the Army’s internal procedure, is the proper authority for repatriating Native remains from Carlisle. Amici therefore urge the Court to reverse the district court’s dismissal and hold that NAGPRA requires the Army to repatriate the Winnebago Tribe’s children so they can finally be laid to rest at home, just like Edward and Amos were.

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Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(f). This brief contains 6,471 words, including all headings, footnotes, and quotations, and excluding the parts exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been typed in size-14 Century Schoolbook font in Microsoft Word for Office 365.

/s/ Steven J. Alagna

### **CERTIFICATE OF SERVICE**

I certify that on January 29, 2025, I electronically filed the foregoing Brief of Sisseton Wahpeton Oyate and Spirit Lake Tribe as Amici Curiae Supporting Plaintiff-Appellant and Reversal brief via this Court's CM/ECF system, which will serve all counsel of record in the above-captioned case.

/s/ Steven J. Alagna