

No. 24-2081

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

WINNEBAGO TRIBE OF NEBRASKA, a federally recognized Indian Tribe,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 1:24-cv-78

**BRIEF OF UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY
PROTECTION FUND, NATIONAL ASSOCIATION OF TRIBAL
HISTORIC PRESERVATION OFFICERS, ASSOCIATION ON
AMERICAN INDIAN AFFAIRS, AND CATAWBA NATION AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Loc. R. 26.1, I hereby certify that *Amici* are not publicly held corporations or entities and have no parent corporations or 10% or greater ownership interests held by any publicly held corporations or entities. No publicly held corporation or entity has a direct financial interest in the outcome of this litigation.

January 29, 2025

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INTERESTS OF *AMICI*¹

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is a non-profit, inter-Tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.² USET SPF was formed to advocate on behalf of its Tribal Nation members by advancing inherent Tribal sovereign rights and authorities and holding the United States accountable for its trust and treaty obligations. The Catawba Nation (Catawba) is a USET SPF member and a federally recognized Tribal Nation with its seat of government in South Carolina.

¹ No counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money intended to fund the preparation or submission of this brief, and no person or entity other than *Amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief.

² USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA), and Wampanoag Tribe of Gay Head (Aquinnah) (MA).

The National Association of Tribal Historic Preservation Officers (NATHPO) is a non-profit, inter-Tribal organization devoted to supporting Tribal historic preservation programs and implementing federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance.

The Association on American Indian Affairs (AAIA) is the longest-serving national Native non-profit, operating since 1922. AAIA has worked to end Indian boarding schools since its founding, as well as to provide expertise and training on repatriation under domestic and international laws.

Amici have deep interests in ensuring Tribal Nations can exercise inherent rights and authorities to bring the remains of our children home, and that we can utilize the Native American Graves Protection and Repatriation Act (NAGPRA) as Congress intended. This is especially true when our children were ripped from their families and collected for relocation to Indian boarding schools, with the express goal of severing ties to their Tribal communities and destroying Tribal Nations' cultures and lifeways.

Amici are grateful to Plaintiff-Appellant the Winnebago Tribe of Nebraska (Winnebago) for bringing this case for the benefit of all Tribal Nations whose children remain interred at Carlisle Indian Industrial School (Carlisle) and other

Indian boarding schools. Catawba's own experience seeking to bring a Catawba child home from Carlisle further strengthens *Amici's* interests in this litigation.

This brief will aid the Court in understanding how the position taken by Defendants-Appellees—the U.S. Department of the Army, the Office of Army Cemeteries, and several Army officials (collectively, the Army)—has harmed and dishonored *Amici* and all of Indian Country.

SUMMARY OF ARGUMENT

The District Court wrongly granted the Army's Motion to Dismiss, buying the Army's legally incorrect and morally corrupt argument that NAGPRA does not compel exhumation and repatriation of Native children at the Carlisle cemetery.

The true Indian boarding school story—in which the United States collected, killed, and continues to hold captive Native children without their families' consent—supports the legal conclusion that the Carlisle cemetery is a collection or holding for which the Army has repatriation obligations under NAGPRA.

During the Indian boarding school era, Native children were torn from their families and Tribal communities, relocated far away, treated as militants, and subjected to inhumane practices that included corporal punishment, physical, sexual, and emotional abuse, manual labor, malnourishment, and exposure to disease. Too often, Native children died because of these harsh conditions and were buried against their families' and Tribal Nations' wishes on the boarding

school grounds.

Some Tribal Nations have sought to heal the reverberating fractures by ending the confinement of our lost, lonely children and bringing them home. Yet when Tribal Nations ask the Army, which controls the Carlisle cemetery, to repatriate our children, the Army refuses to comply with NAGPRA. Instead, the Army offers up Army Regulation 290-5, the Office of Army Cemeteries' Disinterment and Return Process.

Insistence on applying military disinterment procedures continues the abhorrent treatment of our stolen children as captive militants. It perpetuates the very Indian boarding school atrocities for which the President of the United States has now formally apologized, and which the U.S. Department of the Interior (Interior) has painstakingly sought to address in its truth and reconciliation efforts. The Army has a responsibility to act in a manner consistent with the President and Interior, as they are a single federal entity bound by trust and treaty obligations.

The Army's assertions, repeated by the District Court, that Congress did not intend for NAGPRA to apply in circumstances like the Carlisle cemetery are misguided at best. Even if NAGPRA's repatriation requirements apply only to "holdings or collections"—a point we do not concede but leave to the parties to address—our children were *collected* and are now *held* by the Army, a federal agency, at the Carlisle cemetery.

The Army's slippery slope argument that requiring repatriation here could require the disinterment of any Native body from any federal cemetery does not hold water. In most situations, a Native person buried in a cemetery will have been interred there at the family's direction, and therefore any agency overseeing the cemetery can be said to have a right of possession under NAGPRA over the remains. But our children kept in cemeteries at Indian boarding schools were buried without their families' consent, and therefore the Army cannot be said to have a right of possession. Further, NAGPRA and its implementing regulations acknowledge that return of Native remains may sometimes require exhuming or disinterring those remains, and—despite the Army's assertions otherwise—no case has *ever* held that NAGPRA cannot require such disinterment.

We ask this Court to hold the Army accountable for its legal and moral failings. Congress, in enacting NAGPRA, recognized our right to be reunited with the remains of our people, including those of our children held captive on Indian boarding school grounds. The Army's failure to return our children is a continuing human rights violation and an affront to the international community's evolving expectations of humanity.

ARGUMENT

I. THE ARMY'S REFUSAL TO REPATRIATE OUR CHILDREN UNDER NAGPRA CONTINUES THEIR WRONGFUL TREATMENT AS CAPTIVE MILITANTS.

The District Court referred blandly to Carlisle as an “Indian School,” providing no context regarding its dark and malicious purpose. JA208 (Mem. Op. at 1).³ The Army similarly failed to acknowledge the true horror of Indian boarding schools, parroting old ideologies about a “school program” in which “capable persons of good moral character” would instruct Native people with their “consent.” JA115 (Mem. Supp. Defs.’ Mot. Dismiss 1).

In truth, the federal government treated Native children as captive militants, often resulting in their death, and the Army’s insistence on applying its process for disinterring service members instead of the healing and accountability-creating provisions of NAGPRA perpetuates these harms. This treatment cannot be reconciled with the United States’ broader efforts to acknowledge and atone for the Indian boarding school era.

A. The United States Treated Native Children as Militants During the Indian Boarding School Era.

The federal government operated Carlisle from 1879 until 1918.⁴ Carlisle

³ *Winnebago Tribe of Neb. v. Dep’t of Army*, No. 1:24-cv-78, 2024 WL 3884194 (E.D. Va. Aug. 20, 2024).

⁴ U.S. Dep’t of Interior, Federal Indian Boarding School Initiative Investigative Report Vol. I, App. A&B at 58 (2022) [DOI Vol. I Report Appendix] (Carlisle Indian Industrial School Profile), bia.gov/sites/default/files/dup/inline-files/appendix_a_b_school_listing_profiles_508.pdf; *see also* U.S. Dep’t of Interior, Federal Indian Boarding School Initiative Investigative Report Vol. I (2022) [DOI Vol. I Report], bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf; U.S. Dep’t of Interior, Federal Indian Boarding School Initiative Investigative Report Vol. II (2024) [DOI Vol. II

was the first government-run Indian boarding school, DOI Vol. I Rep. App. 58, serving as the model for what would become a system of at least 417 federal Indian boarding schools nationwide, *see* DOI Vol. II Rep. 13.

Carlisle and other Indian boarding schools were integral to one of the darkest eras of federal Indian law and policy. *See Haaland v. Brackeen*, 599 U.S. 255, 297–302 (2023) (Gorsuch, J., concurring). Using so-called “education” as a key weapon, the United States was bent on forcing Native people to assimilate into the colonizer’s culture to simplify its dispossession of Tribal Nations’ lands and resources. *See* DOI Vol. I Rep. 21, 51. By ripping our children away, disrupting family ties and completely isolating them, the United States hoped to sever their bonds to their cultures—tearing gaping holes in the fabric of our homes and communities, the effects of which persist today. *See id.* at 38–39, 51–52. In a larger sense, assimilation was an attempt to end the existence of sovereign Tribal Nations and the trust and treaty obligations owed to us by the federal government.

During the Indian boarding school era, Native children were forcibly removed from their families, including by “police,” often without parental consent. *Id.* at 29, 36. Congress enacted laws to compel Native parents to send their children away, including by directing Interior to withhold treaty-guaranteed

Report],
[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).

rations. *Id.* at 35–36. Once held at these so-called schools, Native children faced corporal punishment that included solitary confinement, flogging, and withholding of food, as well as public humiliation; punishments they were sometimes forced to inflict upon one another for breaking rules. *Id.* at 54–55. Physical, sexual, and emotional abuse were rampant, *id.* at 56, while students lived with disease, malnourishment, poor diet and water quality, overcrowding, and lack of healthcare, *id.* at 56–57. Native children, including the very young, were also forced into manual and other labor and heavy industrial work, *see id.* at 60–63, practices that would likely violate child labor laws today.

The Army baked into the fabric of the Indian boarding school system the same tactics it used on adult militants to break Native children’s self-identities. Carlisle was a military barracks prior to serving as a school, *see* DOI Vol. I Rep. App. 58, and in this setting U.S. Army Officer Richard H. Pratt imposed “rigorous military discipline” on the young and bewildered Native children taken there, *see id.* at 78. This template was replicated throughout the entire Indian boarding school system, which used “systematic militarized and identity-alteration methodologies” for assimilation. DOI Vol. I Rep. 51. Native children were uniformed and drilled in military tactics, often organized into military-like companies with some individuals designated as sergeants and corporals. *Id.* at 52. The U.S. War Department was initially responsible for Indian affairs, including the

education of Native children, *id.* at 26, and this responsibility was not transferred to Interior, and, therefore, civil control, until 1849, *id.* at 28. Even after this transfer, the War Department continued to play a role in federal Indian boarding schools. *Id.* at 29–31. Carlisle also housed child prisoners of war. *Id.* at 1.

Children who survived their boarding school experiences were significantly more likely to suffer from chronic physical health problems, such as cancer, tuberculosis, and diabetes, and from post-traumatic stress disorder, depression, and unresolved grief. *Id.* at 88–89. Survivors’ trauma compounded over generations, affecting descendant Native children and even manifesting biologically via epigenetic inheritance. *Id.* at 89.

Many children did not survive. Thus far, Interior has confirmed 74 marked or unmarked burial sites at different federal Indian boarding school locations, and it has identified “at least 973 documented Indian child deaths” from the boarding school era of 1819–1969, acknowledging “that the actual number of children who died while in Indian boarding schools is greater.” DOI Vol. II Rep. 15–16.

B. Application of Army Regulation 290-5 Continues the Federal Government’s Wrongful Treatment of Native Children as Militants and Does Not Provide the Protections of NAGPRA.

Amici know the devastating reality of having our children taken from their homes and communities to Indian boarding schools and the ongoing harms of the Army’s refusal to return them. Catawba’s experience trying to bring home Wade

Ayers,⁵ a Catawba child who died at Carlisle in 1904, is particularly heart wrenching.

Just 13 years old when he arrived at Carlisle on August 30, 1903, Wade died only a few short months later on January 18, 1904, of what Carlisle officials called “vaccine fever.” Harris Statement ¶¶ 6–8 (Ex. A).⁶ An obituary in the school’s newspaper read:

Wade Ayers, Catawba, of South Carolina, was laid to rest last Sunday. He was a boy of lovable disposition and with a keen sense of justice and right. After vaccination he took cold in his arm, which with serious complications ended his life. . . . His bright little face was always an inspiration and his cheerful disposition brought sunshine to those discouraged.⁷

Wade’s Catawba relatives fought for years for his repatriation, forced to use the disinterment process of Army Regulation 290-5 because the Army insisted that NAGPRA does not apply to children held in the Carlisle cemetery. Harris Statement ¶¶ 13–16.⁸

⁵ Wade’s last name is spelled “Ayers” and “Ayres” in different historical documents, but Catawba recognizes the spelling as “Ayers.”

⁶ See also U.S. Dep’t of Interior, Carlisle Indian Indus. Sch. Descriptive and Historical Record of Student: Wade Ayres (1904), carlisleindian.dickinson.edu/sites/default/files/docs-ephemera/NARA_1328_b001_c00a_0150.pdf. Note that we have addressed a clerical error in the sworn statement of Catawba Chief Brian Harris that was attached to the amicus brief in the District Court (as ECF No. 38-2), and we therefore reattach a corrected version hereto as Exhibit A.

⁷ *Man-on-the-Band-Stand*, The Red Man and Helper vol. 19-25, at 3 (Jan. 22, 1904), carlisleindian.dickinson.edu/sites/default/files/docs-publications/RedMan-Helper_v04n21_1.pdf.

⁸ See Notice of Intended Disinterment, 87 Fed. Reg. 24,140 (Apr. 22, 2022)

As noted by the District Court, JA208 (Mem. Op. at 1), the Army similarly claimed in Winnebago's case that it is "ready and willing to assist in the return of the [children's] remains to their rightful resting place" under a regime based on Army Regulation 290-5, JA109 (Mem. Supp. Defs.' Mot. Dismiss).

But Army Regulation 290-5 is not a procedure designed for the delicate task of reuniting children ripped from their Tribal communities and sent to Indian boarding schools. It is instead designed for service member cemeteries and cemeteries that were established to inter enemy prisoners of war or persons who died while criminally incarcerated. *See* Army Regul. 290-5 ¶ 1-1.⁹ It was wrong

("Individually marked graves located within the Carlisle Barracks Post Cemetery do not constitute 'holdings or collections' of the Army (§ 3003(a)) nor does NAGPRA (§ 3002) require the Army to engage in the intentional excavation or exhumation of a grave.").

⁹ Army Regulation 290-5 does not contain provisions designed specifically for disinterment from cemeteries located at Indian boarding schools. *See* U.S. Army, Off. of Army Cemeteries, Army Regul. 290-5 (Oct. 21, 2020) [Army Regulation 290-5], armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31366-AR_290-5-001-WEB-2.pdf. However, as the Carlisle cemetery is an Army post cemetery, Army Regulation 290-5 can be read to apply. *See id.* ¶ 3-7; *see also id.* at 35 (defining terms). Additionally, the Army has issued a form slightly changing the Army Regulation 290-5 process for those requesting disinterment of Native remains from the Carlisle cemetery. U.S. Army, Off. of Army Cemeteries, Disinterment Request Form (2023) [Carlisle Disinterment Form], armycemeteries.army.mil/Portals/1/Disinterment-Request-Forms-23-JUL-2023.pdf. When the Army carries out disinterments from Carlisle, it describes them as "conducted under the authority of Army Regulation 290-5." *E.g.*, 87 Fed. Reg. 24,140; *see also* JA93 (Compl. Ex. 7); Press Release, Off. of Army Cemeteries Pub. Affs., U.S. Army, Office of Army Cemeteries Finalized Fifth Disinterment Project at Carlisle Barracks (July 7, 2022), [Army Press Release], armywarcollege.edu/News/archives/14284.pdf. Thus, while Army Regulation

for the federal government to treat our children as militants and prisoners of war while they were alive at Indian boarding schools, and it is wrong for the Army to continue to do so now.

NAGPRA, on the other hand, was enacted for Tribal Nations specifically, in recognition of the United States' trust and treaty obligations. *See* 25 U.S.C. § 3010 (acknowledging NAGPRA “reflects the unique relationship between the Federal Government and Indian tribes”). Congress in enacting NAGPRA made clear that it is a tool for protecting our human rights. 136 Cong. Rec. 35678 (1990) (statement of Sen. Inouye) (“[T]he bill before us today . . . is about human rights.”); 136 Cong. Rec. 31939 (1990) (statement of Rep. Richardson).

Functionally, Army Regulation 290-5, as informally modified by the Army for disinterment of Native remains from the Carlisle cemetery, does not provide the same protections Congress designed when it crafted NAGPRA.¹⁰ For example, under NAGPRA, Tribal Nations are authorized to request repatriation of Native remains with which we have a cultural affiliation, and federal agencies—such as

290-5 was not designed for Indian boarding schools, the Army has attempted to fit Carlisle into its parameters.

¹⁰ We note that the Army is *already* in violation of the very standards it claims Army Regulation 290-5 will uphold. The federal government's 1927 relocation of the children in the Carlisle cemetery amounts to disinterment without the consent of close living relatives, *see* Army Regul. 290-5 ¶ 3-7(b)(2), while the Army's misplacement of children's bodies within the Carlisle cemetery is an ongoing violation of its recordkeeping requirements, *see id.* ¶ 5-4(a), (a)(4).

the Army—must “expeditiously return” such remains upon that request. 25 U.S.C. § 3005(a)(1). Army Regulation 290-5 does not afford Tribal Nations a seat at the table, instead requiring notarized statements from “close living relatives,” Army Regul. 290-5 ¶ 3-7(b)(2); *see also* Carlisle Disinterment Form (requiring affidavit from “closest living relative” as requester). In another example of meaningful differences, NAGPRA has important inventory and information-sharing requirements, 25 U.S.C. §§ 3003, 3005(d); 43 C.F.R. § 10.10(d), unmatched by Army Regulation 290-5’s burial recordkeeping requirements, Army Regul. 290-5 ¶ 5-4. NAGPRA contains enforcement mechanisms, 25 U.S.C. § 3013; *see also* 43 C.F.R. § 10.1(h)–(i); 25 U.S.C. § 3006(a), while Army Regulation 290-5 does not provide oversight or a right of action regarding disinterment decisions, Army Regul. 290-5 ¶ 2-6(b)(2)(g); Carlisle Disinterment Form.

These contrasts could mean a different outcome for Catawba’s child—who remains trapped within the confines of the Carlisle cemetery, a prisoner of the federal government in death as he and his fellow students were in life. *See* Harris Statement ¶¶ 22–24. Wade died before he grew old enough to have children of his own, like so many other Native children held in Indian boarding school cemeteries. *Id.* ¶¶ 11–12. Yet, after years of persistent work by Catawba and Wade’s non-lineal relatives, in 2022 he was finally set to come home. *Id.* ¶ 17.¹¹ But when

¹¹ *See* 87 Fed. Reg. 24,140 (listing “Wade Ayres” among those set for disinterment).

Wade's grave was disinterred, the Army found a young girl's body under his headstone instead. *Id.* ¶ 18; *see also* Army Press Release.

Thereafter, the Army told Catawba and Wade's relatives that it did not know the precise location of Wade's remains within the Carlisle cemetery, and thus it could not facilitate his repatriation home. Harris Statement ¶ 19. Catawba believes the federal government negligently and callously misplaced Wade when the Army moved his body and the bodies of the other Native children buried at Carlisle in 1927 to make way for the expansion of the Army War College and the construction of a parking lot. *Id.* ¶ 21. Indeed, the Army admitted that its historical records associated with the movement of the cemetery are so poor that it is not sure the markers are correctly associated with the physical remains. JA116 (Mem. Supp. Defs.' Mot. Dismiss 2).¹² The Army still has not notified Catawba or Wade's relatives of the location of Wade's body or otherwise collaborated to find Wade since the failed disinterment. Harris Statement ¶¶ 22–23. Instead, it has quietly removed Wade's headstone. *Id.* ¶ 20.

Armed with a real seat at the table, NAGPRA's requirement to inventory and provide information about Wade's location, and NAGPRA's enforcement

¹² *See also* Env't Rsch. Grp.–New S. Assocs. Joint Venture, Archival Research of the Carlisle Indian School Cemetery 34–40 (2017), armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Archival%20Research%20Report%20-%20July%202017v2.pdf?ver=2019-06-07-121535-723 (prepared on behalf of the Army).

mechanisms, Catawba might be able to force the Army to repatriate Wade. While the Army continues to dodge its NAGPRA obligations and instead subjects children at Carlisle to its blunt Army Regulation 290-5 military procedures, Wade is not at rest, and Wade's separation from his people harms the Catawba community to this day. *Id.* ¶ 25.

C. The Army's Continued Captivity of Our Children Undermines the Federal Government's Truth and Reconciliation Efforts Regarding the Indian Boarding School Era.

Paradoxically, while the Army has refused to repatriate our children from Carlisle under NAGPRA, the United States has undertaken the important task required by its trust and treaty obligations of investigating, documenting, and apologizing for the true and dark history of the Indian boarding school era.

President Biden on October 25, 2024, issued a historic apology for the United States' role in the Indian boarding school era,¹³ and on December 9, 2024, he announced the establishment of the Carlisle Federal Indian Boarding School National Monument.¹⁴ His actions were the result of the Federal Indian Boarding

¹³ The White House, *President Biden Delivers Remarks at the Gila River Indian Community in Arizona*, YouTube (Oct. 25, 2024), [youtube.com/watch?v=j4iCQT3cD9g](https://www.youtube.com/watch?v=j4iCQT3cD9g).

¹⁴ The White House, *A Proclamation on the Establishment of the Carlisle Federal Indian Boarding School National Monument* (Dec. 9, 2024), [whitehouse.gov/briefing-room/presidential-actions/2024/12/09/a-proclamation-on-the-establishment-of-the-carlisle-federal-indian-boarding-school-national-monument/](https://www.whitehouse.gov/briefing-room/presidential-actions/2024/12/09/a-proclamation-on-the-establishment-of-the-carlisle-federal-indian-boarding-school-national-monument/).

School Initiative undertaken by Interior. *See* DOI Vol. II Rep. 98–99. Since Interior announced this Initiative in June 2021, it conducted extensive Tribal consultation and historical research and thereafter released a two-volume Investigative Report in May 2022 and July 2024. Combined, these groundbreaking Investigative Reports detail a painful history with nefarious motivations and devastating impacts, including our children’s loss of life and continued confinement at cemeteries on Indian boarding school grounds.

Indeed, much of the history within this brief—a history for which the President felt compelled to apologize—is taken from the undisputed pages of Interior’s Investigative Reports. In fact, the Army cited Interior’s 2022 Investigative Report, stating there is no dispute as to its contents. JA115 (Mem. Supp. Defs.’ Mot. Dismiss 1). This makes sense, as Interior has developed significant expertise implementing the United States’ trust and treaty obligations to Tribal Nations and houses the National NAGPRA Program.

Importantly, Interior has made clear in its Investigative Reports that the federal government should identify and repatriate children from Indian boarding school grounds, including pursuant to NAGPRA. DOI Vol. I Rep. 98; DOI Vol. II Rep. 16–17, 26.

It is no wonder the United States is taking steps to grapple with its Indian boarding school past. Expectations of the international community have evolved

since that dark era, and the United States should feel compelled to evolve with them. The Indian boarding school system would today be considered an egregious human rights violation.¹⁵ And Indigenous peoples are recognized by the international community as having a human right to repatriation of our people's remains. *See, e.g.*, UNDRIP art. 12.

The Army must not be allowed to continue to evade NAGPRA and undermine the United States' important work to grapple with and to help heal the Indian boarding school chapter of American history.

II. THE CARLISLE CEMETERY IS A HOLDING OR COLLECTION FOR PURPOSES OF NAGPRA.

NAGPRA requires repatriation of Native remains that are under the control or possession of federal agencies, 25 U.S.C. § 3005, and the Army takes the position that this requirement only applies to holdings or collections, incorporating those terms from NAGPRA's inventory provision, *id.* § 3003. No party disputes that, for purposes of NAGPRA, the Winnebago children at issue in this case and buried at Carlisle qualify as Native American human remains; that the Army is a

¹⁵ *See, e.g.*, G.A. Res. 61/295, art. 7(2), U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [UNDRIP], [un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/UNDRIP_E_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/UNDRIP_E_web.pdf); G.A. Res. 217A, U.N. Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI), U.N. International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 44/25, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

federal agency; and that the Army has possession or control over the aforementioned children. Thus, the entire outcome of this case—according to the Army—turns on whether the Carlisle cemetery qualifies as a holding or collection, and it clearly does.

A. The Carlisle Cemetery Meets the Plain Meaning Definitions of “Holding or Collection.”

NAGPRA does not define the terms “holding” or “collection,” *see* 25 U.S.C. §§ 3001, 3003, and so Interior provided these definitions in its implementing regulations, *see id.* § 3011; *see also* JA213 (Mem. Op. at 6 n.1). According to the regulations, “[h]olding or collection means an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose,” including but not limited to several specifically enumerated purposes. 43 C.F.R. § 10.2. The District Court said the dictionary definitions of “collection” and “holding” are consistent with Interior’s definitions, explaining that together they “capture the ordinary sense that a ‘collection’ is an accumulation of things, and a ‘holding’ is an accumulation of assets.” JA213 (Mem. Op. at 6).

Surely, an accumulation of Native children’s bodies that the Army collected and continues to hold captive meets the broad plain language definitions articulated by the District Court. The Carlisle cemetery also meets Interior’s regulatory definitions because it is an “accumulation” of Native remains “for any temporary or permanent purpose”—not to mention because the Army claims it maintains the

cemetery for purposes specifically enumerated in the regulations, including but not limited to education, preservation, and public benefit. 43 C.F.R. § 10.2.

B. If Ambiguity Exists, the Indian Canon of Construction Requires a Broad Interpretation of “Holding or Collection” to Include Indian Boarding School Cemeteries.

The Indian canon of construction, an often-cited and enduring statutory construction rule, requires ambiguous statutes to be interpreted liberally in favor and to the benefit of Tribal Nations. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Nowhere does NAGPRA state that holdings or collections exclude otherwise-covered Native remains that have been collected and are now held by the federal government, but in the ground. NAGPRA’s statutory silence must not be read to the detriment of Tribal Nations seeking to bring their children home.

III. NAGPRA CAN REQUIRE EXHUMING AND REPATRIATING THE REMAINS OF A NATIVE PERSON, AND THIS DOES NOT LEAD TO THE SLIPPERY SLOPE CONCLUSION THAT ALL NATIVE REMAINS WOULD BE SUBJECT TO DISINTERMENT.

The District Court wrongly concluded, at the Army’s urging, that “a cemetery”—including the Carlisle cemetery—“is neither a holding nor collection under NAGPRA.” JA212 (Mem. Op. at 5). It similarly stated that “applying [NAGPRA] to order disinterment would run contrary to Congress’s intent to protect Native American burial sites” and “would invert a statute designed to respond to the illegal excavation of graves on tribal and Federal lands.” JA214-

215 (Mem. Op. at 7–8). While NAGPRA certainly does not require the excavation and return of all Native remains, it does require exhumation of children held captive at the Carlisle cemetery upon a Tribal Nation’s request.

A. Indian Boarding School Cemeteries Are Not Like Other Cemeteries.

The Army asserted that “[i]n our cemeteries we commemorate and honor the dead; we do not hoard or amass the dead.” JA124 (Mem. Supp. Defs.’ Mot. Dismiss 10). The Army even claimed the Native children at Carlisle had been “laid to rest.” JA125 (*id.* at 11).

Unquestionably, the federal government maintains cemeteries commemorating United States service members, such as the Normandy American Cemetery in France that honors American soldiers who lost their lives in D-Day operations.¹⁶ However, before their burial on foreign soil, these soldiers’ next of kin had the option to instead bring their loved ones’ bodies home.¹⁷

The cemeteries at Carlisle and other Indian boarding schools are not the same. First and foremost, no one gave Native children’s families the option of bringing their bodies home. The families often did not even receive timely notice of a child’s passing. NAGPRA, pursuant to its right of possession provisions,

¹⁶ *Normandy American Cemetery*, Am. Battle Monuments Comm’n, <https://www.abmc.gov/normandy> (last visited Jan. 17, 2025).

¹⁷ *History*, Am. Battle Monuments Comm’n, <https://www.abmc.gov/about-us/history> (last visited Jan. 17, 2025).

recognizes a Native family's right to choose to inter a deceased family member in a consensual resting place. 25 U.S.C. § 3001(13) (defining "right of possession" and referring to Native remains "obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe"); 18 U.S.C. § 1170(a) (exempting those with a right of possession to Native human remains from NAGPRA's illegal trafficking criminal provisions); S. Rep. No. 101-473, at 5 (1990) (explaining Congress intended to exempt from NAGPRA's repatriation requirement Native remains a museum or federal agency "originally acquired [] with the full knowledge and consent of the next of kin or the Indian tribe"); *see also* 25 U.S.C. § 3002(e) (acknowledging the right of a Tribal Nation to relinquish control over Native remains).

Second, Native children buried at Carlisle and other Indian boarding schools are not being honored for a valiant decision to fight and die for the United States. They were at school, not a war zone; meant to be educated, not put in mortal danger. Instead, they are held captive by the government that collected them, killed them, and continues to hold their bodies. These children are not at rest. *See* Harris Statement ¶ 25.

B. No Case Supports the Assertion that NAGPRA Does Not Require Exhuming or Disinterring Graves.

The District Court misconstrued case law to support its conclusion that NAGPRA cannot require disinterment of Native children held at Carlisle.

In *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), a Native man's remains had been laid to rest in a municipal cemetery at the direction of his wife, whom the parties agreed was his next of kin and had legal authority over the disposition of his remains. As his family member, his wife knowingly chose to bury him at that cemetery and thereby provide the cemetery a right of possession over his body for purposes of NAGPRA.

Here, no one claims the children were buried at the Carlisle cemetery with their families' or their Tribal Nations' consent, nor does anyone claim their disinterment and reburial by the federal government in 1927 was accomplished with such consent. There is no right of possession supporting the Army's continued control over these children's bodies.

The other cases cited by the Army in its Motion to Dismiss—*Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114 (E.D. Wis. Aug. 17, 2006), and *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010)—also fail to support the assertion that NAGPRA does not require intentional excavation or disinterment of Native remains.

One fundamental distinguishing factor is that both cases dealt with the graves provision of NAGPRA. 25 U.S.C. § 3002.¹⁸ Under NAGPRA's graves

¹⁸ The court in *Thorpe* did not analyze the applicability of NAGPRA's graves provision, since the cemetery was not alleged to be on federal or Tribal land. *See* 770 F.3d at 262.

provision, ownership or control of Native American human remains that are either merely discovered or actually excavated on federal or Tribal lands after NAGPRA's 1990 enactment belongs to lineal descendants, if known, or to the most culturally connected Tribal Nation. *Id.* § 3002(a).

In *Hawk v. Danforth*, the court would not order disinterment of Native remains because the remains had not been “discovered” under NAGPRA's graves provision where an individual merely alleged they *could* be located somewhere beneath a parking lot on a Tribal Nation's lands. 2006 WL 6928114, at *2.

In *Geronimo v. Obama*, the court would not order disinterment of Native remains because their alleged discovery and removal from covered federal or Tribal lands occurred prior to NAGPRA's 1990 enactment, thus falling outside the parameters of NAGPRA's graves provision,¹⁹ and again they were located in “*possible* burial sites.” 725 F. Supp. 2d at 186–87, 187 n.4 (emphasis added).

Winnebago does not seek to utilize the graves provision of NAGPRA in this case because it is instead pursuing return of its children under NAGPRA's repatriation provision, 25 U.S.C. § 3005, applicable to museums and federal agencies with possession or control over Native remains.²⁰ Nonetheless, we note

¹⁹ It should be noted that NAGPRA's repatriation provision at issue in this case is not limited by the time and place provenance requirements of NAGPRA's graves provision. *See* 25 U.S.C. § 3005.

²⁰ While in some limited instances application of NAGPRA's graves provision and repatriation provision may overlap, they are nonetheless “two parallel procedures.”

that these cases are unlike the Carlisle cemetery, which the parties agree contains Native remains still located on federal land after NAGPRA's 1990 enactment. *See* JA208 (Mem. Op. at 1).²¹

C. Congress Designed NAGPRA to Require Disinterment in Certain Circumstances.

The District Court implicitly recognized that NAGPRA is best read to encompass Carlisle under its repatriation provision, but it concluded Congress surely could not have intended this result. The District Court adopted *Thorpe*'s reasoning that, even when the "literal application of NAGPRA" as written would require its application, a court may choose not to apply NAGPRA when "that result would be 'demonstrably at odds with the intentions of NAGPRA's drafters.'" JA214 (Mem. Op. at 7 (quoting *Thorpe*, 770 F.3d at 264)); *see also* JA213 (*id.* at 6 (claiming legislative history "reflects that Congress did not envision applying NAGPRA's repatriation provisions to cemeteries")).²²

Thorpe, 770 F.3d at 262; *see also* 43 C.F.R. pt. 10 (separating subparts "Protection of Human Remains or Cultural Items on Federal or Tribal Lands" and "Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies"). These provisions provide two separate options for retrieval of Native remains under NAGPRA.

²¹ Although the Army may no longer know the specific location of some of the Carlisle children's bodies, those children were lost due to the federal government's own negligence when it disinterred and moved them for its own purposes—and, regardless, their general location as within the Carlisle cemetery is still known.

²² In *Thorpe*, the court interpreted NAGPRA's definition of "museum" non-literally to avoid NAGPRA's application to the Borough of Jim Thorpe, because it believed an affirmative duty to inventory and potentially repatriate all Native

But we know that Congress did intend NAGPRA to apply to Native remains in the ground. Congress discussed in depth how NAGPRA's provisions, once enacted, could require exhumation. In fact, Congress intended for NAGPRA through its graves provision, 25 U.S.C. § 3002, to remedy the problem that Native remains found within public lands were legally considered the property of the United States. *See, e.g.*, 136 Cong. Rec. 31937 (1990) (statement of Rep. Campbell) (“In some cases, repatriation has occurred but in far too many cases the tribes have been shut out and told they have no standing. In fact under current law, native American human remains found today on public land are still considered to be Federal property.”). Nowhere in NAGPRA's legislative history did Congress say that NAGPRA, including its repatriation provision, could *not* require return of Native remains located in the ground. *See, e.g.*, H.R. Rep. No. 101-877, at 11 (1990) (stating NAGPRA's repatriation provision would broadly apply to any federal agencies or museums that “have control over any of the items covered in the bill”).

Interior has implemented NAGPRA to require disinterment and return of

remains and funerary objects in the Borough's possession would be absurd. 770 F.3d at 264. But application of NAGPRA's repatriation provision to the children at the Carlisle cemetery is not absurd in the least. Here, all parties agree that the Army is a federal agency to which NAGPRA applies. And, because NAGPRA does not require repatriation of Native remains interred with the consent of their families, only Native remains buried non-consensually, like the children at Carlisle, would be covered.

Native remains at a Tribal Nation's request, and it recognized in its recently updated NAGPRA regulations that discovery of remains on federal land triggers certain procedural requirements. Under the regulations, federal agencies must invite Tribal Nations to consult "after a discovery," 43 C.F.R. § 10.4(b)(1), and through consultation develop a plan of action that indicates the parties' preference for maintaining remains *in situ* or relocating them, *id.* § 10.4(b)(3)(iv), and evaluates any potential need for excavation, *id.* § 10.4(b)(3)(vi)(B).²³ Thus, under the NAGPRA regulations, a Tribal Nation may call on Interior to excavate Native remains and facilitate their return.

The Army itself acknowledged that NAGPRA "broadly applies" to remains "excavated or discovered" on federal land. JA118 (Mem. Supp. Defs.' Mot. Dismiss 4); *see also* JA123 (*id.* at 9). Even Army Regulation 290-5 acknowledges that NAGPRA may apply. Army Regul. 290-5 ¶ 3-14(c).

The District Court is correct that NAGPRA was designed "to protect Native American burial sites and the removal of human remains." JA214 (Mem. Op. at 7 (citations and internal quotations omitted)). But NAGPRA was also designed to establish Tribal Nations' ownership of the remains of our people discovered on federal land or otherwise held by federal agencies, and to facilitate Tribal Nations'

²³ Interior acknowledged that Indian boarding school cemeteries located on federal land are covered by NAGPRA. *See* NAGPRA Processes for Disposition or Repatriation, 88 Fed. Reg. 86,452, 86,471, 86,487, 86,492 (Dec. 13, 2023).

request for their repatriation.

An order to disinter our children so that they may be buried in an actual Native American burial site to be protected in the future is in full accord with the congressional intent of NAGPRA.

CONCLUSION

The Army holds itself out as an honorable institution that celebrates American values. But the Army's insistence that NAGPRA does not apply violates these values. Rather than the parade of horrors the Army predicts, *see* JA134-135 (Mem. Supp. Defs.' Mot. Dismiss 20–21), proper application of NAGPRA's requirements would simply result in Tribal Nations finally bringing our lost and lonely children home.

Respectfully Submitted,

January 29, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,427 words. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will send notification of such filing to all counsel of record. All counsel of record are registered CM/ECF users and service will be accomplished via the CM/ECF system.

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EXHIBIT A

**TO BRIEF OF UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY
PROTECTION FUND, NATIONAL ASSOCIATION OF TRIBAL
HISTORIC PRESERVATION OFFICERS, ASSOCIATION ON
AMERICAN INDIAN AFFAIRS, AND CATAWBA NATION AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

SWORN STATEMENT OF BRIAN HARRIS

No. 24-2081

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

WINNEBAGO TRIBE OF NEBRASKA, a federally recognized Indian Tribe,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 1:24-cv-78

SWORN STATEMENT OF BRIAN HARRIS

I, Brian Harris, hereby declare as follows:

1. I am over 18 years of age and am otherwise qualified to testify to the facts below.
2. I am the Chief of the Catawba Nation (Catawba), a federally recognized Indian tribe.
3. Wade Ayers was a citizen and community member of Catawba.
4. The United States took Wade from his family and sent him to Carlisle Indian Industrial School (Carlisle).
5. Wade was known to be in good health when he was taken from his family.
6. Wade arrived at Carlisle on August 30, 1903, at the age of 13.

7. Wade died on January 18, 1904, while still at Carlisle.
8. Carlisle officials reported Wade's cause of death as "vaccine fever," which Catawba believes was related to an influenza vaccine.
9. Wade was buried at the Carlisle cemetery without the consent of his family or Catawba.
10. When the federal government disinterred children's remains at the Carlisle cemetery and moved them to a new location in 1927, neither Wade's family nor Catawba consented to disinterment and movement of his body.
11. Wade does not have lineal descendants, as he died before he had any children.
12. Wade's immediate family is no longer alive.
13. Catawba citizens and Wade's relatives, with Catawba's support, have worked diligently for more than five years to bring Wade home.
14. The U.S. Department of the Army (Army) told Wade's relatives and Catawba that it would not repatriate Wade's remains pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), asserting that NAGPRA does not apply to the cemetery at Carlisle.
15. The Army told Wade's relatives and Catawba that it would apply the disinterment process under Army Regulation 290-5, as informally modified

by the Army for disinterment of remains from Carlisle, to explore repatriation of Wade.

16. Wade's relatives, with Catawba's support, attempted to work with the Army to utilize the disinterment process under Army Regulation 290-5, as modified, to bring Wade home to Catawba.
17. The Army scheduled a disinterment of Wade under Army Regulation 290-5.
18. In 2022, when Wade's grave was disinterred so that he might be repatriated under Army Regulation 290-5, as modified, the Army instead found the body of a girl under his headstone.
19. Upon discovering Wade's remains were not under his headstone, the Army told Wade's relatives and Catawba that it did not know the precise location of Wade's remains within the Carlisle cemetery and could not facilitate his repatriation.
20. The Army thereafter removed Wade's headstone.
21. Catawba believes that, if the Army no longer knows the precise location of Wade's remains within the Carlisle cemetery, this is due to the federal government's own negligence when it moved the Carlisle cemetery in 1927 to its current location to make way for the expansion of the Army War College and the construction of a parking lot.

22. Though no party disputes that Wade's remains are interred at the Carlisle cemetery, the Army has not communicated to Wade's relatives or Catawba that it has since identified the precise location of Wade's remains within the Carlisle cemetery.
23. The Army has not collaborated with Wade's relatives or Catawba to find Wade since the failed disinterment in July 2022.
24. To the best of my knowledge, Wade's remains are still in the Carlisle cemetery.
25. Catawba does not believe that Wade is at rest, and it harms our community for Wade to remain separated from us.

Pursuant to 28 U.S.C. § 1746, I state under penalty of perjury that the foregoing is true and correct.

Executed this 10 day of December, 2024.

DocuSigned by:
Brian Harris
80FEE105617E4CC...

Brian Harris, Chief
Catawba Nation