

Case No. 24-2081

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

WINNEBAGO TRIBE OF NEBRASKA,

Appellant,

v.

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

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
Hon. Claude M. Hilton, District Judge | Case No. 1:24-cv-00078-CMH-IDD

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INTRODUCTION

The Native American Graves Protection and Repatriation Act (“NAGPRA”) provides a straightforward solution to a problem Indian Tribes have endured for generations: federal agencies’ and museums’ wrongful possession of Native American human remains. 25 U.S.C. §§ 3001-3013. NAGPRA creates a simple framework to establish the cultural affiliation of Native American human remains (and other “cultural items,” 25 U.S.C. §§ 3001(3)) so they can be repatriated. The plain text and structure of NAGPRA make clear that the crux of NAGPRA’s repatriation provisions is the determination of cultural affiliation. Accordingly, NAGPRA outlines specific processes agencies and museums follow to establish cultural affiliation themselves while also providing Indian Tribes an avenue to establish cultural affiliation when agencies or museums fail to do so. Once cultural affiliation is established, remains and other cultural items are subject to repatriation. Defendants are incorrect that NAGPRA imposes an additional requirement that remains and other cultural items be within “holdings or collections” to be subject to repatriation. Defendants’ attempt to complicate a straightforward statutory scheme should be rejected.

Defendants are unable to contend with the absence of a requirement in NAGPRA’s plain text and structure that Native American human remains be in “holdings or collections” to be repatriated. Even if Defendants were correct, they

are unable to grapple with the numerous allegations in the Winnebago Tribe of Nebraska’s (“Winnebago”) complaint which establish that Carlisle Barracks Post Cemetery (“Carlisle Cemetery” or “the Cemetery”) and remains therein constitute holdings or collections. As such, Defendants resort to improperly denying Winnebago’s allegations and misrepresenting Winnebago’s allegations and arguments. Holding on by a thread, Defendants continue to press *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), as persuasive authority, despite its irrelevant legal conclusions and vast factual differences which render it inapposite to this case.

In its opening brief, Winnebago explained several errors the District Court made in dismissing Winnebago’s action. In their response, Defendants fail to justify the District Court’s errors or provide alternative grounds to affirm. Indeed, Defendants only introduce new errors. This Court should reverse the District Court and remand the case for further proceedings.

ARGUMENT

I. 25 U.S.C. § 3005(a)(4)’s Plain Text and Structure Do Not Restrict Repatriation of Native American Human Remains to Those in “Holdings or Collections.”

Contrary to Defendants’ assertions, repatriation under 25 U.S.C. § 3005(a)(4) is not constrained to “holdings or collections” of Native American human remains. In making this assertion, Defendants fail to understand the

distinctions between NAGPRA's two provisions that provide for the repatriation of Native American human remains. The first repatriation provision, 25 U.S.C. § 3005(a)(1), provides for repatriation when agencies and museums have already determined cultural affiliation in an inventory, pursuant to 25 U.S.C. § 3003. The second repatriation provision, Section 3005(a)(4), provides for repatriation when agencies or museums *have not* established cultural affiliation in an inventory. In those cases, Indian Tribes may establish cultural affiliation themselves. In misunderstanding NAGPRA's repatriation provisions, Defendants improperly read a limitation into Section 3005(a)(4) as applying only to remains that are "subject to" NAGPRA's inventory requirement. Finally, Defendants' fearmongering about a ruling in Winnebago's favor is undermined by NAGPRA's "right of possession" provisions.

A. Defendants' Framing of "Holdings or Collections" as a Barrier to Repatriation is Not Supported by NAGPRA's Plain Language or Structure.

Defendants' argument that repatriation under Section 3005(a)(4) is only available for remains in "holdings or collections" is based solely on Section 3005(a)(4)'s reference to Section 3003. Defendants contend that because Section 3003(a) applies to holdings or collections, Section 3005(a)(4)'s mere reference to Section 3003 makes repatriation under Section 3005(a)(4) limited to remains in holdings or collections. ECF No. 34 at 13-14. Defendants' argument

misunderstands why Section 3005(a)(4) references Section 3003, and their interpretation would prevent repatriation from occurring under scenarios permitted by Section 3005(a)(4)'s plain text. By contrast, Winnebago's straightforward interpretation of Section 3005(a)(4) adheres to the plain text and structure of the repatriation provisions under 25 U.S.C. § 3005(a). These provisions work together to achieve NAGPRA's objective to establish cultural affiliation—whether by an agency, museum, or Indian Tribe—so remains may be returned to their rightful resting places and buried according to the requisite Tribal customs and traditions. Nothing in Section 3005(a)(4) specifically, or NAGPRA generally, limits repatriation under Section 3005(a)(4) to remains in holdings or collections.

NAGPRA's two provisions for repatriation of Native American human remains are Sections 3005(a)(1) and 3005(a)(4). Section 3005(a)(1) provides for repatriation when agencies and museums have already determined cultural affiliation of Native American human remains. *See* 25 U.S.C. § 3005(a)(1). Alternatively, Section 3005(a)(4) provides for repatriation when agencies and museums have not, *via* an inventory, fulfilled their obligation under Section 3003 to establish the cultural affiliation of remains in their possession or control. *See id.* § 3005(a)(4). In those cases, Section 3005(a)(4) provides for repatriation if an Indian Tribe can establish cultural affiliation itself. *See id.*

Defendants' suggestion that Section 3005(a)(4) applies only to holdings or collections of Native American human remains because it references Section 3003 misunderstands why Section 3005(a)(4) references Section 3003. Section 3005(a)(4) references Section 3003 only to clarify that Section 3005(a)(4) provides for repatriation when cultural affiliation *has not* been established by an inventory pursuant to Section 3003. *See id.* In lieu of determining cultural affiliation through an inventory, Section 3005(a)(4) provides that cultural affiliation may be established through evidence presented by Indian Tribes. Thus, it is clear the crux of repatriation under both Sections 3005(a)(1) and 3005(a)(4) is the determination of cultural affiliation, not of whether remains are in holdings or collections. If an Indian Tribe can establish cultural affiliation on its own, there is no need for an inventory. The difference between Sections 3005(a)(1) and 3005(a)(4) is simply how cultural affiliation is determined. Section 3005(a)(4)'s reference to Section 3003 does not limit repatriation to holdings or collections but simply clarifies the section provides for repatriation of remains not provided for in Section 3005(a)(1). Reading Section 3005(a)(4) as limited to holdings or collections is unduly restrictive of its plain language.

Defendants also misconstrue Winnebago's argument about how Section 3005(a) informs the interpretation of its subparts. Defendants suggest Winnebago reads Section 3005(a) to "limit the plain meaning" of its subparts. ECF No. 34 at

28-29. Not so. Rather, the initial scope of which remains are subject to repatriation under NAGPRA is established by Section 3005(a) and not, as Defendants argue, in an indirect and unclear manner by Sections 3003. *See Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 250 (4th Cir. 2004) (“[T]he title of a statute and the head of a section are tools available for the resolution of a doubt about the meaning of a statute.” (internal citations omitted)). When interpreting the plain language of a statute, this Court looks to “the specific context in which the language is used, and the broader context of the statute as a whole.” *Hurlburt v. Black*, 925 F.3d 154, 158 (4th Cir. 2019) (citing *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 434-35 (4th Cir. 2012)). Section 3005(a) sets the outer boundaries of Native American human remains and other cultural items subject to repatriation—*i.e.*, any that are “possessed or controlled” by agencies and museums. 25 U.S.C. § 3005(a). Sections 3005(a)(1) and 3005(a)(4) operate within those boundaries to provide distinct avenues for repatriation depending on how cultural affiliation is determined. Section 3005(a)(1) covers human remains whose cultural affiliation has been established pursuant to a Section 3003 inventory. Section 3005(a)(4) covers remaining human remains—*i.e.*, those whose cultural affiliation has not been established pursuant to an inventory.

Defendants’ proposed holdings or collections limitation to Section 3005(a) is inconsistent with its plain text. It is clear from Section 3005(a) that remains

“possessed or controlled” by agencies and museums are subject to repatriation.

Section 3005(a) does not mention the term “holdings or collections” or in any way suggest its scope is limited to holdings or collections. Had Congress intended to limit the scope of repatriation to human remains in holdings or collections, Section 3005(a) would state this limitation plainly. *See Vanda Pharms., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 98 F.4th 483, 495 (4th Cir. 2024). In any event, “[a] court cannot assume that Congress has omitted from statutory text a requirement that it intended to apply, particularly where the same statute includes different requirements.” *Children’s Hosp. of the King’s Daughters, Inc. v. Price*, 258 F. Supp. 3d 672, 685 (E.D. Va. 2017), *vacat’d on other grounds sub nom. Children’s Hosp. of the King’s Daughters, Inc. v. Azar*, 896 F.3d 615 (4th Cir. 2018). Yet, this is exactly what Defendants ask for in arguing that all repatriations under Section 3005(a) are limited to holdings or collections. If Congress had intended to limit the scope as Defendants suggest, it could have easily done so, but it did not.

B. Nothing in Section 3005(a)(4) Requires Native American Human Remains be “Subject To” NAGPRA’s Inventory Provision.

Defendants assert that by referencing Sections 3003, Section 3005(a)(4)’s plain language establishes that repatriation is required only for human remains that are “*subject to the Section 3003 inventory requirement[.]*” ECF No. 34 at 20 (emphasis in original). But Section 3005(a)(4) does not say it is “subject to” or otherwise limited by any conditions which require remains to be inventoried under

Section 3003. By characterizing Section 3005(a)(4) as referencing remains “subject to” Section 3003, Defendants misleadingly suggest Section 3005(a)(4) concerns only such remains. Defendants’ interpretation of Section 3005(a)(4) unduly restricts the circumstances under which they must comply with repatriation requests pursuant to Section 3005(a)(4).

Section 3005(a)(4) provides for repatriation in scenarios where the cultural affiliation of human remains in the possession or control of a federal agency has not been established pursuant to an inventory, for whatever reason. *See* 25 U.S.C. § 3005(a)(4). Properly understood, Section 3005(a)(4)’s clauses applicable to human remains account for repatriation in multiple scenarios. These may include cases where a federal agency cannot establish cultural affiliation, purposely or inadvertently leaves remains out of an inventory, or fails to inventory remains in its possession or control. All such scenarios are covered by Section 3005(a)(4)’s plain text.

Defendants’ narrow interpretation of Section 3005(a)(4) creates an arbitrary and bureaucratic barrier to repatriation. While an Indian Tribe may be able to prove cultural affiliation with Native American human remains by a preponderance of the evidence, Defendants’ interpretation allows agencies and museums to arbitrarily proclaim that such remains are exempt from repatriation because they are not within holdings or collections. This restriction would undermine NAGPRA’s broad

repatriation mandate, especially in an environment where agencies and museums often resist repatriation and have historically used any means to avoid it. *See* Mary Hudetz, *ProPublica Updates Its Database of Museums' and Universities' Compliance With Federal Repatriation Law* (Feb. 25, 2024), <https://www.propublica.org/article/native-american-remains-returned-repatriation-nagpra> (“The Interior Department has acknowledged that many of the human remains it must eventually repatriate have long been unaccounted for in federal inventories.”). In step with NAGPRA’s purpose to rectify this injustice, Section 3005(a)(4) is a catchall provision that stands separate from Section 3003.

C. Defendants Mischaracterize NAGPRA’s “Right of Possession” Provisions and Lack Right of Possession to Samuel’s and Edward’s Remains.

Defendants and the District Court claim that allowing Winnebago to repatriate Samuel’s and Edward’s remains in this case would extend NAGPRA’s applicability to any Native American human remains buried in any federal cemetery. ECF No. 34 at 30; JA212. This assertion is an absurd scare tactic because Samuel’s and Edward’s case—in which two young boys died and were buried at a federal Indian boarding school—differs fundamentally from that of the vast majority of Native Americans buried in federal cemeteries as members of the United States military or those who were buried with the requisite notice and consent. In those cases, a federal agency would likely have “right of possession”

pursuant to 25 U.S.C. § 3001(13). In the case of Samuel's and Edward's remains, Defendants do not have right of possession. Defendants and the District Court fail to adequately address NAGPRA's right of possession provisions, which prevent the overly broad application of NAGPRA they fear would follow Winnebago's plain text interpretation of Section 3005(a)(4).

Defendants argue that Section 3001(13) does not apply to human remains and is inapplicable in this case. ECF No. 34 at 31. Section 3001(13)'s plain language forecloses Defendants' argument. Section 3001(13) provides that an agency or museum has a right of possession to Native American human remains that "were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or official governing body of the appropriate culturally affiliated Indian Tribe[.]" 25 U.S.C. § 3001(13). Agencies would not be required to repatriate Native American human remains in federal cemeteries if they were buried there with the "full knowledge and consent of the next of kin or official governing body of the appropriate culturally affiliated Indian Tribe[.]" *Id.* Carlisle Cemetery holds remains due to the Carlisle Indian Industrial School's ("Carlisle Indian School" or "Carlisle") unique and cruel history. On the other hand, Defendants provide no credible examples that other Native Americans were buried in federal cemeteries without their, their families, or their Indian Tribes' knowledge

or consent. The right of possession under Section 3001(13) prevents the far-reaching consequences Defendants and the District Court fear.

Defendants' contentions regarding NAGPRA's right of possession provisions ignore the facts and are contradictory. Defendants contradict themselves by, in one breath, acknowledging that Section 3001(13)'s right of possession applies to human remains only to immediately *deny* that the right of possession in Section 3001(13) applies to human remains. ECF No. 34 at 31. Defendants argue the right of possession in Section 3001(13) does not apply to human remains because an entirely different provision concerning right of possession, 25 U.S.C. § 3005(c), only applies to unassociated funerary objects, sacred objects, or objects of cultural patrimony. *Id.* Defendants also suggest that Section 3001(13) cannot create an exemption from repatriation, because it does not specifically reference burials, despite the fact that nothing in Section 3001(13)'s plain language exempts burials from its application. *Id.* Defendants conclude that Section 3001(13) does not prevent repatriation of buried Native American human remains, even remains that have been laid to rest with full knowledge and consent of next of kin or appropriate Indian Tribes. *Id.* These arguments hold no water.

Section 3001(13)'s plain language provides that right of possession applies to human remains and Section 3005(c) does not include any language indicating that right of possession does not apply to human remains. Indeed, Defendants

make no attempt to explain how the fact that Section 3005(c) does not address human remains means that Section 3001(13)'s application to human remains is inoperable. According to basic rules of statutory interpretation, Sections 3001(13) and 3005(c) must be interpreted to give full effect to every word. *Espinal-Andrades v. Holder*, 777 F.3d 163, 168 (4th Cir. 2015) (citation omitted); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1055-56 (D.S.D. 2000). Thus, if there is nothing irreconcilable about Sections 3001(13) and 3005(c), they should both be read to have effect to the full extent of their plain language. Defendants do not identify any conflict—or even mild tension—between the provisions, let alone anything irreconcilable.

In fact, a careful reading of Sections 3001(13) and 3005(c) reveals they serve distinct functions. Section 3001(13) indicates that human remains subject to NAGPRA's repatriation provisions are *only* those to which a federal agency or museum does not have "right of possession." 25 U.S.C. § 3001(13). This finds support in NAGPRA's current implementing regulations, as well as NAGPRA's implementing regulations in effect at the time Winnebago's cause of action arose. *Accord* 43 C.F.R. § 10.2 ("Human remains . . . does not include human remains to which a museum or Federal agency can prove it has right of possession."); 43 C.F.R. § 10.2(d)(1) (2023) ("This term does not include remains or portions of remains that may be reasonably determined to have been freely given[.]"). Section

3001(13) provides the standards by which an agency or museum may establish it has a right of possession. Reading Section 3001(13) in harmony with Section 3005(a) makes clear that even if the cultural affiliation of remains has been established, an agency or museum *is not required* to repatriate the remains if it has a right of possession. In contrast, Section 3005(c) confers a right on lineal descendants, Indian Tribes, and Native Hawaiian organizations to repatriate cultural items—not including Native American human remains—when they can present evidence showing an agency or museum does not have right of possession. 25 U.S.C. § 3005(c).

Finally, while Section 3001(13) does not use the term “burials,” nothing in Section 3001(13) expressly or impliedly provides that the right of possession does not apply to buried remains, as Defendants suggest. This further reinforces that Defendants do not have right of possession to Samuel’s and Edward’s remains. Section 3001(13) broadly applies to remains “excavated, exhumed, *or otherwise obtained*.” The Native American human remains buried at Carlisle Cemetery have been “otherwise obtained” by Defendants. Defendants obtained the remains after children were taken by the Army from their families and communities, buried in the original Indian burial ground when they died because of their time at Carlisle, and were subsequently exhumed and removed by Defendants to the Carlisle Cemetery. JA20-26. Samuel’s and Edward’s remains were buried, exhumed, and

reburied without *full knowledge and consent* of Samuel's and Edward's families or Winnebago. *Id.* Considering Section 3001(13)'s plain text and these uniquely cruel facts, Defendants cannot establish right of possession to Samuel's and Edward's remains.

Other provisions within NAGPRA, as well as its legislative history, affirm that Section 3001(13) applies to human remains. For example, NAGPRA criminalizes “knowingly sell[ing], purchas[ing], us[ing] for profit, or transport[ing] for sale or profit the human remains of a Native American *without the right of possession to those remains* as provided in [NAGPRA.]” 18 U.S.C. § 1170(a) (emphasis added). Additionally, NAGPRA's legislative history indicates that museums “*may refuse to return Native American human remains . . . where the cultural affiliation has been established and the culturally affiliated Indian tribe . . . has requested its return, if the museum has the right of possession to such remains or objects.*” See S. Rep. 101-473 (emphasis added).

Section 3001(13) clearly establishes that an agency has right of possession to human remains it obtained with proper knowledge and consent, regardless of where the remains are physically held. This forecloses the application of NAGPRA's repatriation provisions to all federal land or federal cemeteries in the remote scenario where a lineal descendant or Indian Tribe requests the repatriation of remains in those cases. By contrast, Defendants did not obtain Samuel's and

Edward's remains with the required knowledge and consent of their families or Winnebago.

II. Winnebago Has Alleged Sufficient Facts that Carlisle Cemetery and the Remains Therein Constitute “Holdings or Collections.”

In its opening brief, Winnebago discussed the numerous allegations made in its complaint that, if true, would establish Carlisle Cemetery and the remains therein constitute holdings or collections according to those terms' ordinary meanings. While Defendants, the District Court, and Winnebago all rely upon the same definitions of the terms “holding” and “collection,”¹ the District Court and Defendants both fail to credit the numerous allegations in Winnebago's complaint demonstrating how Carlisle Cemetery and the remains buried there plainly fall within those definitions.

In their response, Defendants improperly defend the District Court's ruling by, for the first time, denying factual allegations in Winnebago's complaint, and by claiming Winnebago's complaint lacks certain allegations that establish the Cemetery and the remains are holdings or collections. Defendants' improper denials and misrepresentations of Winnebago's complaint violate the standard of

¹ Winnebago provided a more complete analysis of these terms by considering parts of the definitions of “holding” and “collection” which Defendants and the District Court ignored. *See* ECF No. 16 at 35, 39-44. Nonetheless, considering only the parts of the definitions addressed by both Parties and the District Court, Winnebago has made allegations sufficient to show the remains fall within those definitions. *See id.*, at 35-41, 43-44.

review on a motion to dismiss for failure to state a claim. Further, Defendants fail to rebut Winnebago's allegations which are sufficient to establish that the Cemetery and the remains are holdings or collections. Taking Winnebago's allegations as true and construing them in the light most favorable to Winnebago, Carlisle Cemetery and the remains constitute holdings or collections and Defendants are required to repatriate Samuel and Edward to Winnebago.

A. Defendants Improperly Deny Certain Allegations Winnebago Made Regarding How Carlisle Cemetery and the Remains Constitute "Holdings" or "Collections."

In a misguided effort to sustain the District Court's dismissal of Winnebago's claims, Defendants resort to disputing Winnebago's well-pleaded allegations that establish Carlisle Cemetery and the remains constitute holdings or collections. Specifically, Defendants now deny Winnebago's allegations that (1) Samuel's and Edward's remains are not buried in their intended final resting place; (2) the Cemetery is a "stop" on Defendants' historical tours; and (3) Defendants have "studied" the remains. ECF No. 34 at 34, 37-39. Defendants' denials are improper at this stage and contrary to the black letter law.

Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). "A district court can properly grant a Rule 12(b)(6) dismissal only if the complaint fails to contain sufficient factual matter,

accepted as true, to state a claim to relief that is plausible on its face.” *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018) (cleaned up). In evaluating the sufficiency of the allegations, courts are “obliged to . . . draw all reasonable inferences in favor of the plaintiffs.” *Id.* at 685. A claim is plausible when the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Woods v. City of Greensboro*, 855 F.3d 639, 647 (4th Cir. 2017) (cleaned up). In light of these standards, the District Court erred in dismissing Winnebago’s claims, as the claims are backed by numerous allegations which fulfill the minimal requirements for a sufficient pleading under Rule 8(a)(2).

Defendants err in affirmatively denying—for the first time—certain allegations Winnebago makes in its complaint. Denying these allegations addresses neither the sufficiency of the allegations nor contests whether they plausibly establish Defendants’ liability. For example, Defendants deny Winnebago’s allegations that Samuel’s and Edward’s remains are not in their intended final resting place. ECF No. 34 at 34 (asserting that the remains cannot be holdings or collections because Defendants laid the remains “to rest” at Carlisle Cemetery). Yet, Winnebago’s complaint alleges the opposite: that Samuel and Edward are not “at rest” because they are not buried in their intended final resting place. Winnebago’s complaint alleges the United States buried, exhumed, and reburied

Samuel and Edward all without notice to or consent from their families or Winnebago; that Samuel's and Edward's remains were not buried, exhumed, and reburied according to requisite Winnebago customs and traditions; and, as a result, that Samuel and Edward are in a perpetual state of unrest as they await to return home. JA15-16, JA 22-26. These allegations refute the District Court's and Defendants' suggestion that the remains cannot meet the definitions of holding or collection because they are "graves in a cemetery" that have been laid to rest. JA213; ECF No. 34 at 34. These allegations also demonstrate how Defendants have treated Samuel's and Edward's remains as their property, bringing them within the ordinary meaning of holding. Appellant's Opening Brief, ECF No. 16 at 39-40 (hereinafter "ECF No. 16"). These allegations are entitled to an assumption of truth for purposes of the motion to dismiss. *See Hurley*, 911 F.3d, at 685. Defendants' insistence that the remains at Carlisle Cemetery lie in their final intended resting place is a misplaced affirmative defense that cannot be resolved without discovery and fact-finding by the District Court. *See United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 145-46 (4th Cir. 2014) (citing *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007))

Defendants also deny Winnebago's allegation that Defendants use Carlisle Cemetery as a stop on their historical walking tours. ECF No. 34 at 38-39. Winnebago alleges that Defendants use Carlisle Cemetery and the remains for

‘exhibition’ by including them as a stop on their tours, bringing them within the ordinary meaning of “collection.” *See, e.g.*, ECF No. 16 at 40-41. Disputing this assertion, Defendants state they merely “acknowledge[] the presence of the Carlisle Cemetery in pamphlets” they distribute to tourists. *Id.*² However, Defendants may only properly deny this allegation in an answer to the complaint, and the factual dispute must be resolved during the fact-finding stages of the case. *See United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990); *see also Greensboro*, 855 F.3d at 650 (differentiating plausibility analysis at the motion to dismiss stage from fact-finding at subsequent stages); *Gelin v. Maryland*, 132 F.4th 700, 708-09 (4th Cir. 2025) (explaining that evaluating the sufficiency of evidence is an appropriate matter for summary judgment, but not for motions to dismiss). The District Court was required to take as true Winnebago’s allegation that Carlisle Cemetery is a stop on Defendants’ tours of the Barracks, tours which focus on the area’s history as the site of the infamous Carlisle Indian School. JA49-50. Properly drawing all reasonable inferences in favor of Winnebago, this allegation establishes

² Defendants’ assertion that they present Carlisle Cemetery in the pamphlets used for “historical walking tours” still supports Winnebago’s more general allegations that Defendants use the Cemetery as a tourist attraction and exhibit to tell a whitewashed history of Carlisle that serves their institutional purposes. *See* JA5, JA49-50.

that Defendants use the Cemetery and the remains for exhibition, bringing them within the ordinary meaning of collection. ECF No. 16 at 41.³

Defendants also deny Winnebago's allegation that Defendants have studied Carlisle Cemetery and the remains buried there. Yet, Defendants' ground-penetrating radar survey and accompanying archival research report clearly constitute research, or study, of the remains, bringing them within the ordinary meaning of collection. *See., e.g.*, ECF No. 16 at 40-41. While Defendants "do[] not dispute that ground-penetrating radar was used at the original School cemetery and the Carlisle Cemetery[,]" they insist "no studies were done." ECF No. 34 at 38. But ground penetrating radar surveys do exactly what Defendants claim they do not do: study what is in the ground. Winnebago alleges Defendants conducted the ground-penetrating radar survey of Carlisle Cemetery and the original Indian burial ground to better understand both sites and determine whether any remains may have been left behind in the hasty 1927 transfer from the original Indian burial ground to Carlisle Cemetery. JA25-26. Defendants are notably silent about the ground-penetrating radar survey's associated archival research report, despite Winnebago's multiple allegations regarding it and an excerpt of it being attached as

³ This establishes that Defendants use Carlisle Cemetery and remains for various other purposes identified by NAGPRA's regulatory definition of "holdings or collections" that bring the remains within that definition. *See* ECF No. 34 at 33 (noting the regulatory definition of holdings or collections encompasses remains used for academic interest, education, and public benefit (among others)).

an exhibit to the complaint. JA69-72. If Defendants' survey and archival research report do not constitute study, it is hard to imagine what would. Winnebago also alleges that Defendants—through the Office of Army Cemeteries webpage about Carlisle Cemetery—have invited the public to visit Dickinson College's "Digital Resource Center" webpage, which describes Carlisle Cemetery as an object of research to better understand Carlisle's "complex legacy" and includes copies of the student cards for students who attended and died at Carlisle. JA50. These allegations, construed in the light most favorable to Winnebago, also bring the Cemetery and the remains within the ordinary meaning of collection.

Defendants' effort to justify the District Court's ruling by denying Winnebago's factual allegations is improper. If Defendants wish to deny any of Winnebago's allegations, they must do so in an answer to the complaint and any factual disputes must be resolved at the fact-finding stages of the proceedings. Winnebago's allegations that Samuel and Edward are not in their intended final resting place, that Defendants use Carlisle Cemetery as a stop on their tours, and that Defendants have studied the Cemetery and the remains must be taken as true for purposes of reviewing the District Court's dismissal. Construed in the light most favorable to Winnebago, these allegations establish that Carlisle Cemetery and the remains are holdings or collections and make the complaint sufficient for purposes of Rule 8(a)(2).

B. Defendants Misrepresent Winnebago's Allegations and Falsely Claim Winnebago's Complaint Lacks Allegations that Establish Carlisle Cemetery and the Remains Constitute "Holdings or Collections."

Defendants state that Winnebago's complaint lacks necessary allegations to bring the remains within the ordinary meanings of "holding" and "collection." Yet, the purported missing allegations are plainly visible in the complaint. Defendants also mischaracterize Winnebago's arguments about how certain allegations establish Carlisle Cemetery and the remains as holdings or collections. Defendants cannot rely on their misrepresentations to prevail.

Defendants incorrectly suggest that the intent behind a federal agency's or museum's initial acquisition of remains is dispositive of whether the remains constitute a holding or collection. For instance, Defendants insinuate that because the remains were not gathered at Carlisle Cemetery "to be exhibited," the remains cannot be a holding or collection. ECF No. 34 at 39. But remains do not have to be "exhibited" to fall within the ordinary meanings of holding or collection. Contrary to Defendants' assertions, NAGPRA is equally concerned with remains stored in boxes, or forgotten in basements, or acquired for reasons other than being exhibited, as it is with remains on exhibition. In many scenarios, remains subject to repatriation are those in federal "repositories."⁴ Glaringly, by their own

⁴ A recent repatriation notice describes Native American human remains as under the "control" and "physical custody" of federally funded institutions and as being

representations, Defendants have stated that they use the Cemetery as a “repository for the remains of Indian School students.” JA50.

Further, Winnebago does not allege the remains were gathered at Carlisle Cemetery to be exhibited. Rather, Winnebago alleges Defendants accumulated the remains to make way for construction of a parking lot. JA24-25. Since then, Winnebago alleges that Defendants have used the remains for exhibition and have exploited them for other purposes. JA49-53. These allegations demonstrate that Defendants have treated the remains as their property to use as they see fit, bringing them within the ordinary meanings of holding and collection. ECF No. 16 at 39-42.

Defendants also assert that for the remains to be a collection, Winnebago was required to allege that “the government acted affirmatively to ‘accumulate’ or ‘gather or pile up’ remains.” ECF No. 34 at 34. While this affirmative act of gathering or piling is unnecessary for remains to be a collection, Winnebago alleges Defendants did just that. Winnebago alleges that in 1927, Defendants exhumed and collectively transferred the remains *en masse* from the original Indian burial ground to Carlisle Cemetery and that, in doing so, Defendants gathered the remains and piled multiple sets of remains into the same boxes. JA24-

currently held in “repositories.” *See* 88 Fed. Reg. 18,578 (Mar. 29, 2023). The remains addressed here were not “exhibited” yet were still subject to repatriation.

26, 45-46. These actions constitute affirmative accumulation, gathering, and piling of remains by the Defendants. ECF No. 16 at 39-42.

Defendants ignore numerous other allegations Winnebago has made which establish that the remains meet the ordinary meanings of holding and collection. Defendants hold, use, and restrict access to Carlisle Cemetery and the remains because of the remains' unique identity as Indians who attended the infamous Carlisle Indian School. *See, e.g.*, JA49-50. Winnebago alleges that Defendants even initially refused to return remains at all because Defendants maintained that Carlisle Cemetery represented "one of the most beautiful tributes to the Native American people." JA42. Winnebago further alleges that Defendants use the Cemetery to hold the remains until their "closest living relatives" request the disinterment of the remains pursuant to Defendants' Disinterment and Return Process. *See, e.g.*, JA31-42. Defendants' manner of holding the remains shows how Defendants treat the remains as their property and use Carlisle Cemetery as a holding for the remains. Defendants and the District Court cannot ignore how these allegations establish that the remains are part of Defendants' holding or collection.

Defendants do not adequately address the sufficiency of Winnebago's allegations that demonstrate how Carlisle Cemetery and the remains are holdings or collections. Neither do Defendants adequately address whether those allegations plausibly establish Defendants' obligation to repatriate Samuel and Edward to

Winnebago. Winnebago made numerous allegations demonstrating that Defendants treat the remains as their property and actively manage them as holdings or collections.

III. *Thorpe v. Borough of Thorpe* Does Not Support the Dismissal of Winnebago's Complaint.

Defendants characterize *Thorpe* as “persuasive authority” but fail to address significant legal and factual distinctions which render it inapposite to this case. *See* ECF No. 34 at 42-44. Instead, Defendants cherry-pick quotes from *Thorpe* about NAGPRA's legislative history in an attempt to assert that the repatriation of Samuel and Edward somehow runs afoul of NAGPRA's purposes. *Id.* Defendants' arguments are unavailing.

Thorpe is fundamentally distinct from Winnebago's case on a factual basis and provides no legal precedent upon which Defendants can credibly base their arguments. In *Thorpe*, the Third Circuit *did not* hold that buried Native American human remains are not subject to NAGPRA's repatriation provisions, nor did it interpret Section 3005(a)(4). Instead, *Thorpe* held that the Borough of Jim Thorpe, Pennsylvania, (“the Borough”) did not meet NAGPRA's definition of “museum,” 25 U.S.C. § 3001(8), and therefore was not subject to NAGPRA's repatriation provisions. *See Thorpe*, 770 F.3d at 266 (“We reverse the District Court and hold that the Borough is not a ‘museum’ under NAGPRA for the purposes of Thorpe's burial.”). While the Third Circuit expressed concern over ordering the disinterment

of Jim Thorpe's remains, this concern was not because Thorpe's remains were buried. *Id.* Instead, the court's concern was that ordering Thorpe's disinterment and return would "overturn[] the clearly expressed wishes of Thorpe's wife[,] " who chose to bury her late husband in the Borough. *Id.* at 257. It was his wife's wishes, and not the fact that his remains were buried, that concerned the Third Circuit. Defendants conveniently ignore these core facts and *Thorpe's* limited holding.

In *Thorpe*, Thorpe's wife, exercising her legal right under California law, chose to bury her late husband in the Borough. *Id.* No parties disagreed that she had the legal authority to make this decision. *Id.* at 258. In its holding, the Third Circuit described the absurd result that would occur if it interpreted NAGPRA literally and ordered Thorpe's remains to be disinterred over the express wishes of his wife. *Id.* at 266. The facts in *Thorpe* and the potential outcome that concerned the Third Circuit are easily distinguishable from the facts underlying this case and the result sought by Winnebago.

As set forth in Winnebago's complaint, Samuel and Edward were taken from their families and community and forced to attend Carlisle. JA21-22. They subsequently died there, in the custody of the United States. JA21-22. Upon their deaths, Carlisle officials buried the boys in the original Indian burial ground. JA21-22. Carlisle officials did not notify the boys' families or Winnebago or seek and obtain their consent to bury them there. JA21-22. Then, in 1927, the Army

exhumed the boys and reburied them at the current Carlisle Cemetery. JA15-16.

Again, the Army did not notify the boys' families or Winnebago or seek and obtain their consent to exhume and rebury them. JA15-16.

Underscoring the decision in *Thorpe* was the Third Circuit's conclusion that because "NAGPRA requires that remains be 'returned[,]'" it must be "assume[d] that the human remains were moved from their intended final resting place." 770 F.3d at 266 (quoting 25 U.S.C. § 3005). In the court's view, because "Thorpe was buried in the Borough by his wife, and she had the legal authority to decide where he would be buried[,] . . . there was nowhere for Thorpe to be 'returned' to." *Id.* The same cannot be said for Samuel and Edward, who were taken from their families, died while in the custody of the United States, and were buried, exhumed, and reburied without notice to or consent from their families or Winnebago. As the Third Circuit observed, in passing NAGPRA, Congress stated that "for many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors *returned* to them." *Id.* (emphasis in original, brackets and citation omitted). That is precisely what Winnebago is attempting to do here: have their children returned to them.

Instead of addressing the holding and facts of *Thorpe* head on, Defendants selectively highlight passages from the Third Circuit's decision about NAGPRA's purpose in protecting Native American burial sites from illegal excavations. This

exercise proves irrelevant. Winnebago does not dispute that *one* of NAGPRA's purposes is protecting Native American burial sites from illegal excavation. However, NAGPRA's *other* purpose is repatriating Native American human remains improperly acquired by federal agencies. While citing vague passages from NAGPRA's legislative history, Defendants do not explain how repatriating Samuel's and Edward's remains, pursuant to the federal law designed to do just that, is inconsistent with NAGPRA's purpose in protecting Native American burial sites from *illegal* excavation. Nor do Defendants refute that repatriating Samuel's and Edward's remains fulfills NAGPRA's other, equally important purpose of repatriating Native American human remains.

Defendants do not address these issues, because they cannot. Samuel and Edward were taken from their families and community by the Army and died in the custody of the United States while at Carlisle. They were buried there, exhumed, and reburied without notice to or consent from their families or Winnebago. Repatriating Samuel and Edward to Winnebago does not run afoul of NAGPRA; instead, it fulfills NAGPRA's overarching purpose.

CONCLUSION

Winnebago Tribal members have long served honorably in the U.S. Armed Forces. Through this service, Winnebago veterans sought to preserve Winnebago culture and ways of life, the very ones Carlisle sought to eradicate. Winnebago

seeks reciprocal respect from Defendants, through their compliance with NAGPRA to repatriate Samuel and Edward.

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

RESPECTFULLY SUBMITTED this 27th day of May 2025.

/s/ Beth Margaret Wright

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