

Nos. 13-2446 & 13-2451

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**In The  
United States Court of Appeals  
for the Third Circuit**

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JOHN THORPE; SAC AND FOX OF OKLAHOMA;  
WILLIAM THORPE; and RICHARD THORPE;

*Plaintiffs-Appellees/Cross-Appellants,*

v.

BOROUGH OF JIM THORPE; MICHAEL SOFRANKO;  
RONALD CONFER; JOHN McGUIRE; JOSEPH MARZEN;  
W. TODD MASON; JEREMY MELBER; JUSTIN YAICH;  
JOSEPH KREBS; GREG STRUBINGER; KYLE SHECKLER;  
and JOANNE KLITSCH;

*Defendants-Appellants/Cross-Appellees.*

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*On Appeal from an Order Entered by the Honorable A. Richard Caputo, United  
States District Judge, Middle District of Pennsylvania, No. 3:10-cv-1317-ARC.*

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**OPPOSED MOTION OF SENATOR BEN NIGHTHORSE CAMPBELL  
FOR LEAVE TO FILE *AMICUS CURIAE BRIEF* IN SUPPORT OF  
PLAINTIFF APPELLEE JOHN THORPE, *ET AL.*'S PETITION FOR  
PANEL REHEARING AND REHEARING EN BANC**

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December 8, 2014

Senator Ben Nighthorse Campbell (“Senator Nighthorse Campbell”) hereby moves for leave to file a brief as *amicus curiae* in support of Plaintiffs-Appellees’ Petition for Rehearing and Rehearing En Banc.<sup>1</sup> All parties have been contacted and consent has been requested; the Plaintiffs-Appellees/Cross-Appellants have consented, the Defendants-Appellants/Cross-Appellees have not consented to the filing of the *amicus* brief. A copy of the proposed brief is attached to the motion.<sup>2</sup>

### STATEMENT OF INTEREST

Senator Nighthorse Campbell was instrumental in the passage and oversight of the Native American Graves Protection and Repatriation Act (“NAGPRA”) (25 U.S.C.A. §§ 3001-3013).

Senator Nighthorse Campbell of Colorado served in the U.S. Congress from 1987 to 2005, in the 100<sup>th</sup> through 108<sup>th</sup> Congresses, in the House of Representatives (1987-1993), and subsequently in the Senate (1993-2005). While in the House, Senator Nighthorse Campbell was central to enactment of the repatriation laws, as an original sponsor of H.R. 2668, the 1989 National Museum

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<sup>1</sup> Fed. R. App. P. 29 governs the filing of amicus briefs in support of a principal brief on appeal. Local Rule 29.1 governs the filing of amicus briefs once a rehearing has been granted. This motion and brief is in support of a Petition for Rehearing, and therefore seeks leave for that purpose.

<sup>2</sup> Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

of the American Indian (“NMAI”) Act and its historic repatriation provision pertaining to the Smithsonian Institution’s collections, and as an original sponsor of the 1990 Native American Graves Protection and Repatriation Act. He was a Member of the House Committee on Interior and Insular Affairs, which exercised jurisdiction over federal repatriation laws. During this time, he worked closely with the Committee’s longtime Chairman, Representative Morris K. Udall of Arizona (“Chairman Udall”), and with Senator Daniel K. Inouye, Chairman of the Senate Select Committee on Indian Affairs (“Chairman Inouye”) to develop the 1990 NAGPRA. Together with Chairman Udall and Chairman Inouye, Senator Nighthorse Campbell was a co-sponsor of the yearlong study, “The National Dialogue on Museum-Native American Relations” (“National Dialogue”) at the Heard Museum in Phoenix, Arizona. This study was critically important as a foundation for the law now known as NAPGRA.

Senator Nighthorse Campbell is an enrolled citizen and traditional chief of the Northern Cheyenne Tribe. Like Jim Thorpe, Senator Nighthorse Campbell is one of just a small handful of Native Olympian athletes, having represented the United States in the 1964 Summer Olympics. He later became the first Native American to Chair the Senate Committee on Indian Affairs (1997-2001 and 2003-2004)—the Senate body with legislative and oversight jurisdiction regarding federal Indian matters, including federal repatriation laws. His duties as both a

Member and Chair of the Senate Committee on Indian Affairs throughout his Senate tenure included overseeing and reviewing the federal administrative and regulatory implementation of repatriation laws, the progress of federal and federally-assisted institutions and collections to comply with repatriation laws, and decisions in repatriations and repatriation matters.

In the quarter-century since enactment of the repatriation laws, many of NAGPRA's most vigorous proponents have passed on, including Chairman Udall and Chairman Inouye, compelling Senator Nighthorse Campbell to convey his views, which he shared with his colleagues in Congress, regarding what they intended when they enacted one of the most critical pieces of Native American human rights legislation for American Indians in United States history.

### **RELEVANCE OF AMICUS BRIEF**

Congress enacted NAGPRA to correct significant human rights abuses occurring in Native American communities across the Nation. The Panel, however, replaced the plain text of the statute with judicial discretion, concluding that the Borough of Jim Thorpe was not a museum within the meaning of the Act because, in its view, "the literal application [of NAGPRA] will produce a result demonstrably at odds with the intentions of its drafters." Slip Op. at 15 (internal quotations and citations omitted). As one of the principal drafters of NAGPRA, Senator Nighthorse Campbell offers a relevant perspective on how the Panel's

avoidance of the plain language of the statute has prevented an application of NAGPRA that Congress fully intended. Because the unwarranted displacement of a statute's unambiguous language pursuant to the absurdity doctrine constitutes a violation of the constitutional separation of powers between the legislature and the judiciary, Senator Nighthorse Campbell's *amicus* brief offers a critical perspective on the implications of the Court's application of the statute's unambiguous language through the application of the absurdity doctrine.

Therefore, the issues addressed in the proposed amicus brief are critical to the disposition of this case and will assist the Court in evaluating the Petition.

### CONCLUSION

For the foregoing reasons, Senator Nighthorse Campbell respectfully requests that the Court grant this Opposed Motion for Leave To File Amicus Curiae Brief in Support of the Plaintiffs-Appellees' Petition for Rehearing and Rehearing *En Banc*.

Respectfully submitted,



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