

Nos. 13-2446 & 13-2451

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

JOHN THORPE; SAC AND FOX NATION 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.

*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.*

**MOTION OF THE NATIONAL CONGRESS OF THE AMERICAN
INDIANS 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**

MATTHEW CAMPBELL
Counsel of Record for Amicus Curiae
RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302
(303) 447-8760

December 8, 2014

The National Congress of American Indians (“NCAI”) hereby moves for leave to file a brief as amicus curiae in support of Plaintiff-Appellee’s Petition for Rehearing and Rehearing En Banc.¹ Counsel for NCAI conferred with counsel for all parties regarding this motion on or before November 25, 2014. On November 26, counsel for the Borough stated that NCAI’s request for consent was premature as the Thorpes and Sac and Fox Nation had yet to file a Petition for Rehearing or indicate their intention to do so. On December 4, counsel for NCAI indicated that he had conferred with the Thorpes and Sac and Fox Nation and that they did indeed intend to file a Petition for Rehearing. Counsel again requested that the Borough consent to a motion for leave to file an amicus brief in support. To date, counsel for the Borough has not responded to this second request. The individual defendant-appellants take no position on this motion as the proposed amicus brief does not address the Section 1983 claim. The Thorpes and Sac and Fox Nation consent to this motion. A copy of the proposed brief is attached to this motion.

¹ Fed. R. App. P. 29 generally governs the filing of amicus briefs. Local Rule 29.1(a) 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. This Circuit has permitted such amicus briefs in the past. *See, e.g.* Order granting Motion by Public Citizen, Inc. for Leave to Proceed as Amicus Curiae and to File Brief in Support of Appellee’s Petition for Rehearing, *Carrera v. Bayer Corp*, No. 12-02621 (3d Cir. Feb. 26, 2014); Order Granting Motion filed by Surviving Spouses Against Deportation to Proceed as Amicus Curiae in Support of Appellee’s Petition for Rehearing, *Robinson v. Napolitano*, No. 07-02977 (3d Cir. Feb. 20, 2009). The Motion and proposed brief comply with Fed. R. App. P. 29 and 3d Cir. L.A.R. 29.1.

STATEMENT OF INTEREST

NCAI is the oldest and largest national organization that represents and advocates for the interests of Native Americans. NCAI's membership is comprised of tribal governments and individual tribal citizens. During congressional hearings, NCAI offered extensive testimony in support of the historic Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (2012) ("NAGPRA"); the National Museum of the American Indian Act of 1989 (103 Stat. 1336) and its historic repatriation provision, 20 U.S.C. §§ 80q-9 to 12 (2012); and the American Indian Religious Freedom Act of 1978, 42 U.S.C. §1996 (2012) (under which the first human remains and cultural items of Native Americans were repatriated).

NCAI has an ongoing interest in NAGPRA's proper implementation and has shown continued commitment to its preservation and enforcement. For example, in 2012 NCAI re-established the NCAI Tribal NAGPRA Commission, and NCAI continues to consider and enact resolutions pertaining to the repatriation laws of 1989 and 1990 through the NCAI Human, Religious and Cultural Concerns Subcommittee and the NCAI Litigation and Governance Committee. NCAI passed a resolution at this year's annual convention in Atlanta addressing its concern about the panel's opinion.

NCAI is thus well positioned, pursuant to Fed. R. App. P. 29, to provide this Court with critical context on the creation of NAGPRA, the intent of Congress in enacting NAGPRA, and the unique facets of American Indian cultural resources and repatriations effected by this case.

RELEVANCE OF AMICUS BRIEF

The application of NAGPRA is of exceptional importance to the 566 federally-recognized Indian tribes, the 5.2 million individual Native Americans and Alaska Natives, and the 1.2 million Native Hawaiians across the nation. Not one of the 566 federally-recognized Indian tribes resides within the boundaries of the Third Circuit. Yet, the rights of these tribes and individuals could be severely impacted by a panel opinion that disregards the plain meaning of the provisions of NAGPRA and misconstrues the intent of Congress in enacting this broad remedial statute.

The panel's opinion misunderstands NAGPRA's "competing claims" process, which is designed to protect the due process rights of all interested parties. Through its misunderstanding, the panel precludes exhaustion of the administrative process. The panel's opinion also creates a judicial exception to NAGPRA that will have far reaching consequences for Native American tribes and individuals across the country.

The amicus brief details how the “competing claims” process is to be applied and why the panel’s failure to allow that process to be exhausted was inappropriate. The brief also demonstrates that the panel’s judicially created “final resting place” exception has far reaching and unintended consequences, and therefore warrants rehearing. The matters 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, NCAI respectfully requests that this Court grant this Motion for Leave To File Amicus Curiae Brief in Support of the Plaintiff-Appellee’s Petition for Rehearing and Rehearing En Banc.

December 8, 2014

Respectfully submitted,

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Richard A. Guest
Native American Rights Fund

1514 P Street, NW (Rear)
Suite D
Washington, DC 20005
Telephone: (202) 785-4166
Facsimile: (202) 822-0068

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 27 and 32, as well as 3d Cir. L.A.R. 27, and 28 that the attached “Motion for leave to file Amicus Brief in Support of Panel Rehearing and Rehearing En Banc”:

(1) complies with the page limitation set forth in Fed. R. App. P. 27, because it does not exceed 20 pages in length, not counting required tables and certificates;

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font;

(3) the hard copies submitted to the clerk are exact copies of the ECF Submission; and

(4) has been scanned for viruses using Microsoft Security Essentials Virus Definition 1.189.1609.0 and according to this program is free from viruses.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to 3d. Cir. L.A.R. 28.3(d), that I am a member of the Bar of this court.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, pursuant to Fed. R. App. P. 27 and 29 and 3d Cir. L.A.R. 27.0 and 40.1, I electronically filed the foregoing, the “MOTION OF THE NATIONAL CONGRESS OF THE AMERICAN INDIANS 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,” with the Clerk of Court for the United States Court of Appeals for the Third Circuit via the Court’s appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time:

Matthew Campbell, mcampbell@narf.org
Christopher G. Fusco, cfusco@callahanfusco.com
Vincent R. Garvey, vgarvey@uslawcenter.com
Daniel E. Gomez, dgomez@cwlaw.com
Charles L. Riddle, Charles@charleslriddle.com
William G. Schwab, schwab@uslawcenter.com
Stephen R. Ward, sward@cwlaw.com
Daniel H. Wheeler, dhwheeler@comcast.net

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Attorney for Amicus Curiae

Nos. 13-2446 & 13-2451

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

JOHN THORPE; SAC AND FOX NATION 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.

*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.*

**BRIEF OF AMICUS CURIAE THE NATIONAL CONGRESS OF THE
AMERICAN INDIANS IN SUPPORT OF PLAINTIFF APPELLEE JOHN
THORPE, ET AL.'S PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

MATTHEW CAMPBELL
Counsel of Record for Amicus Curiae
RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302
(303) 447-8760

December 8, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), and 3d Cir. L.A.R. 26.1, Amicus Curiae National Congress of American Indians (“NCAI”) makes the following disclosure:

- 1) For non-governmental corporate parties please list all parent corporations: None.
- 2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party’s stock: None.
- 3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: Counsel for NCAI is aware of no such corporation.

/s/ Matthew Campbell

Dated: December 8, 2014

MATTHEW CAMPBELL
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302
(303) 447-8760

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY	vi
ARGUMENT.....	1
I. ENSURING NAGPRA IS PROPERLY AND UNIFORMLY APPLIED IS OF EXCEPTIONAL IMPORTANCE TO NATIVE AMERICANS.....	1
A. THE PANEL OVERLOOKED NAGPRA’S “COMPETING CLAIMS” PROCESS, WHICH IS INTENDED TO ENSURE THAT ALL INTERESTS ARE TAKEN INTO CONSIDERATION IN A REPATRIATION PROCEEDING BEFORE THE NAGPRA REVIEW COMMITTEE.....	2
B. THE PANEL’S JUDICIALLY CREATED “FINAL RESTING PLACE” EXCEPTION WARRANTS REHEARING BASED ON ITS FAR REACHING IMPLICATIONS.....	6
CONCLUSION	8
L.A.R. RULE 35.1 CERTIFICATE CONCERNING REHEARING EN BANC.....	viii
CERTIFICATE OF COMPLIANCE.....	ix
L.A.R. RULE 28.3 CERTIFICATE OF BAR MEMBERSHIP	x
CERTIFICATE OF SERVICE.....	xi
EXHIBIT A: NCAI RESOLUTION: SEEKING A JUST RESULT AND FINAL RESTING PLACE FOR JIM THORPE, IN ACCORDANCE WITH HIS EXPRESS WISHES	xii

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Burrage v. United States</i> , 134 S. Ct. 881, 892 (2014).....	6
<i>Morrow v. Balaski</i> , 719 F.3d 160, 181 (3d Cir. 2013).....	6

STATUTES, REGULATIONS, & RULES

Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2012) (“NAGPRA”)	vi
National Museum of the American Indian Act of 1989, 20 U.S.C. §§ 80q-9 to 12 (2012)	vi
American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2012).....	vi
25 U.S.C. § 3001(8)	viii
25 U.S.C. § 3003(a)	3
25 U.S.C. § 3003(b)	3
25 U.S.C. § 3003(e)	3
25 U.S.C. § 3005(a)	4
25 U.S.C. § 3005(a)(1).....	7
25 U.S.C. § 3005(b)	4
25 U.S.C. § 3005(e)	4, 5
25 U.S.C. § 3006(b)	4
25 U.S.C. § 3006(c)	4
25 U.S.C. § 3006(c)(2).....	4
25 U.S.C. § 3006(c)(4).....	4

25 U.S.C. § 3006(d)	5
25 U.S.C. § 3013.....	5
43 C.F.R. § 10.9.....	3
43 C.F.R. § 10.9(a)	3
43 C.F.R. § 10.9(b)	3
43 C.F.R. § 10.9(e)	3
43 C.F.R. § 10.10(b)(2).....	4
43 C.F.R. § 10.15(c)	5
43 C.F.R. § 10.16.....	5
43 C.F.R. § 10.17.....	5
Fed. R. App. P. 26.1.....	i
Fed. R. App. P. 29.....	vii, ix
Fed. R. App. P. 29(c)(1).....	i
Fed. R. App. P. 29(c)(5).....	vi
Fed. R. App. P. 32.....	ix
Fed. R. App. P. 32(a)(5).....	ix
Fed. R. App. P. 32(a)(6).....	ix
Fed. R. App. P. 40(a)	xi
Fed. R. App. P. 40(b)	ix
3d Cir. L.A.R. 26.1	i
3d Cir. L.A.R. 28.3(d).....	x
3d Cir. L.A.R. 35.1	viii, ix
3d Cir. L.A.R. 40.1	ix, xi

OTHER AUTHORITIES

NAGPRA Review Committee Findings and Recommendations and Minority Opinion Regarding a Dispute Between the Royal Hawaiian Academy of Traditional Arts and the Bernice Pauahi Bishop Museum, 68 Fed. Reg. 50,179 (Aug. 20, 2003)	5
NAGPRA Review Committee Advisory Findings, 62 Fed. Reg. 23,794 (May 1, 1997)	5
Notice of Inventory Completion: St. Joseph County Sheriff's Department, Centreville, MI, 78 Fed. Reg. 50,098 (Aug. 16, 2013)	3
Notice of Inventory Completion: Fremont County Coroner, Riverton, WY, 76 Fed. Reg. 14,058 (Mar. 15, 2011)	3
Notice of Inventory Completion: County of Nacogdoches, Nacogdoches, TX, 74 Fed. Reg. 10,763 (Mar. 12, 2009)	3
<i>History</i> , Dickson Mounds Museum, http://www.museum.state.il.us/ismsites/dickson/history.htm (last visited Dec. 8, 2014)	8

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF THE AMICUS CURIAE¹

Amicus Curiae National Congress of American Indians (“NCAI”) is the oldest and largest national organization that represents and advocates for the interests of Native Americans. NCAI’s membership is comprised of tribal governments and individual tribal citizens. During congressional hearings, NCAI offered extensive testimony in support of the historic Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (2012) (“NAGPRA”); the National Museum of the American Indian Act of 1989 (103 Stat. 1336) and its historic repatriation provision, 20 U.S.C. §§ 80q-9 to 12 (2012); and the American Indian Religious Freedom Act of 1978, 42 U.S.C. §1996 (2012) (under which the first human remains and cultural items of Native Americans were repatriated).

NCAI has an ongoing interest in NAGPRA’s proper implementation and has shown continued commitment to its preservation and enforcement. For example, in 2012 NCAI re-established the NCAI Tribal NAGPRA Commission, and NCAI continues to consider and enact resolutions pertaining to the repatriation laws of 1989 and 1990 through the NCAI Human, Religious and Cultural Concerns

¹ 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.

Subcommittee and the NCAI Litigation and Governance Committee. NCAI passed a resolution at this year's annual convention in Atlanta addressing its concern about the panel's opinion. *See* exhibit A.

NCAI is thus well positioned, pursuant to Fed. R. App. P. 29, to provide this Court with critical context on the creation of NAGPRA, the intent of Congress in enacting NAGPRA, and the unique facets of American Indian cultural resources and repatriations effected by this case.

I. ENSURING NAGPRA IS PROPERLY AND UNIFORMLY APPLIED IS OF EXCEPTIONAL IMPORTANCE TO NATIVE AMERICANS.¹

The application of NAGPRA is of exceptional importance to the 566 federally-recognized Indian tribes, the 5.2 million individual Native Americans and Alaska Natives, and the 1.2 million Native Hawaiians across the nation. Not one of the 566 federally-recognized Indian tribes resides within the boundaries of the Third Circuit. Yet, the rights of these tribes and individuals could be severely impacted by a panel opinion that disregards the plain meaning of the provisions of NAGPRA and misconstrues the intent of Congress in enacting this statute.

Throughout history, peoples have adopted varying customs and traditions in caring for the deceased. Some communities bury them in the ground, others choose cremation, and still others seal them away in elaborate mausoleums. Likewise, Indian tribes have developed their own unique customs, responsibilities, and ceremonies that are to be followed after a death. These customs may place certain responsibilities on individuals, or certain obligations on the tribe as a whole.

NAGPRA is a culturally sensitive, human rights law that is the product of years of effort by American Indians, Alaska Natives, Native Hawaiians, Congress, and the Administration. Its provisions were carefully crafted to take into

¹ NCAI fully agrees with the Plaintiff-Appellees/Cross-Appellants Petition for Rehearing and Rehearing En Banc, and expounds on their discussion of the importance of the repatriation process and correcting the panel's judicially created exception.

consideration unique cultural values that may not be understood by many, but were the result of Congress' willingness and ability to consider countless unique beliefs. Regrettably, the panel in this case has misunderstood NAGPRA's procedural protections and replaced its judgment for that of Congress and the Native Americans Congress sought to protect. The panel opinion also provides a loophole inviting other courts to ignore NAGPRA's mandates. Without rehearing, this fundamental misunderstanding will have far reaching implications in the future protection and repatriation of Native American cultural items and human remains.

A. The Panel Overlooked NAGPRA's "Competing Claims" Process, Which Is Intended to Ensure That All Interests Are Taken Into Consideration in a Repatriation Proceeding Before the NAGPRA Review Committee.

The panel's decision is based on a misunderstanding of NAGPRA's administrative process, which is intended to address the competing claims in this case. The panel's opinion should be reversed and this matter remanded for further proceedings before the NAGPRA Review Committee, which is appointed by the Secretary of the Interior.

Procedurally, NAGPRA first requires local government agencies that receive federal funds and have possession or control over Native American human remains to compile an inventory (a simple itemized list), and to the extent possible identify

their geographical and cultural affiliation. 25 U.S.C. §§ 3003(a), (b), (e).² The purpose of the inventory is to facilitate repatriation by providing clear descriptions for notice. *See* 43 C.F.R. § 10.9(a), (e). The local government agency must consult with all lineal descendants and culturally affiliated tribes as early as possible during the inventory process. *Id.* § 10.9(b).

Second, after inventory but prior to repatriation, NAGPRA requires a notice of inventory completion that summarizes the results of the inventory, which must be sent to all lineal descendants and affiliated tribes as well as published. *Id.* § 10.9(e). This publication has been done by thousands of entities including state and local governments that, like the Borough, only possessed one item and were not displaying the remains or objects of cultural patrimony.³ *See* Notice of Inventory Completion: St. Joseph County Sheriff's Department, Centreville, MI, 78 Fed. Reg. 50,098 (Aug. 16, 2013); Notice of Inventory Completion: Fremont County Coroner, Riverton, WY, 76 Fed. Reg. 14,058 (Mar. 15, 2011); Notice of Inventory Completion: County of Nacogdoches, Nacogdoches, TX, 74 Fed. Reg. 10,763 (Mar. 12, 2009). To provide additional protections, repatriation cannot occur until at least thirty days after notice of inventory completion is published in the Federal

² There are specific procedures for the inventory, which are not particularly difficult to comply with. 43 C.F.R. § 10.9 (2014). Thorpe's funeral home records and contemporaneous reports likely make an inventory in this matter very simple.

³ It cannot be disputed here that Jim Thorpe's remains are displayed as a tourist attraction.

Register. 43 C.F.R. § 10.10(b)(2). The panel's decision to not apply NAGPRA's process to the Borough in this situation disrupts the standard inventory practice provided by Congress and undertaken by entities like the Borough since NAGPRA's enactment.

Third, after inventory and notice, NAGPRA provides that the local government agency, upon the request of a known lineal descendant or of a culturally affiliated tribe, shall expeditiously return such remains. 25 U.S.C. § 3005(a). However, this expeditious return is subject to two exceptions, one of which is applicable to this case. *See id.* §§ 3005(b) (scientific study exception), 3005(e) (competing claims exception). When there are "competing claims" to the remains, the local government agency may retain the remains until the dispute is resolved, which is what the Borough would have done had the process been exhausted. *Id.* § 3005(e).

Competing claims, such as this one, are considered before a Review Committee composed of experts in the field with authority to review and facilitate the resolution of disputes. *Id.* §§ 3005(e), 3006(b), 3006(c). The Review Committee is tasked to "ensure a fair, objective consideration and assessment of all available relevant information and evidence" and with "facilitating the resolution of any disputes among Indian tribes . . . or lineal descendants and Federal agencies or museums relating to the return of such items[.]" *Id.* §§ 3006(c)(2), (4). Finally,

if the Review Committee's process is inconclusive, NAGPRA gives district courts authority to resolve disputes and the Review Committee's findings are "admissible" in any action brought under NAGPRA. *Id.* §§ 3005(e), 3006(d), 3013.⁴ Through the creation of this competing claims process, Congress knew that there could be competing claims within families and did not intend a departure from these procedural protections.

The Review Committee has indeed considered cases involving multiple claimants. *See* NAGPRA Review Committee Findings and Recommendations and Minority Opinion Regarding a Dispute Between the Royal Hawaiian Academy of Traditional Arts and the Bernice Pauahi Bishop Museum, 68 Fed. Reg. 50,179 (Aug. 20, 2003) (dispute involving thirteen claimants and lack of notice); NAGPRA Review Committee Advisory Findings, 62 Fed. Reg. 23,794 (May 1, 1997) (dispute between the City of Providence, RI, and two claimants over a Carved Wooden Figure). Most cases involving multiple claimants will likely be some form of family dispute, whether it is two generations removed or more, and resolving these disputes is one of the main tasks Congress gave to the Review Committee. Review by the federal courts occurs after exhaustion of these administrative remedies and creation of an administrative record only if a

⁴ NAGPRA's regulations contain provisions addressing exhaustion of administrative remedies, dispute resolution, and factual findings of the Review Committee. 43 C.F.R. §§ 10.15(c), 10.16, 10.17. The Review Committee has also created formal procedures to handle competing claims.

resolution cannot be reached. This process was designed to allow not only family members to have a voice, but also to give a voice to tribes that may have cultural responsibilities to the deceased. While these cultural values may be foreign to many, Congress recognized their importance by giving tribes a voice in the process.

The panel's opinion precludes adherence to this administrative review process that protects the due process rights of all interested parties. This process demonstrates that Congress anticipated there could be competing claims involving family members and provided for those interests to be taken into consideration in the repatriation process. Regrettably, the panel's opinion erases this process, and threatens its future use, as it has yet to take place here. Rehearing is warranted to correct the panel's misunderstanding and to allow NAGPRA's processes to be exhausted. *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (citation omitted); *Morrow v. Balaski*, 719 F.3d 160, 181 (3d Cir. 2013) (Smith, concurring) (explaining that en banc review is for correcting panel decisions involving difficult and important questions of law, among other things).

B. The Panel's Judicially Created "Final Resting Place" Exception Warrants Rehearing Based on its Far Reaching Implications.

Instead of allowing NAGPRA's administrative process to occur, the panel relies on hypothetical outcomes to create a judicial "final resting place" exception. This loophole will have far reaching implications. The panel concludes that, on its face, NAGPRA applies to the Borough. Op. at 13–16. The panel states, however, that applying NAGPRA here would produce an absurd result "demonstrably at odds with the intentions" of Congress.⁵ Op. at 14–15 (citation omitted). Rather than reading "return" in the context of the statute and its processes as a whole, the panel read the term as an implied assumption that "human remains were moved from their intended final resting place." Op. at 20. By doing so, the panel judicially creates a "final resting place" exception to NAGPRA and removes clear statutory provisions that were intended to address this exact situation. Contrary to the panel's reading, the term "return" is located in the repatriation provision of NAGPRA, and it is only upon a "request of a known lineal descendant . . . or of the tribe" that a "return" must be made. 25 U.S.C. § 3005(a)(1). Therefore, the "return" is to the descendant or tribe, not to an original burial location.

The panel's "final resting place" exception could have far reaching impacts across Indian Country and could produce its own absurd results. There are many instances of repatriations from repositories and collections that involve no burial at all – where Native remains were taken from massacre sites and battlefields, for

⁵ The panel never states what the absurd result is and the confusion caused by this itself warrants rehearing.

example, and later repatriated from state and local tourism centers, state and local historical societies, schools, archives, the National Park Service, and other controlling entities. Likewise, there are numerous examples of individuals or communities building museums on top of burial mounds containing Native American remains. *See, e.g., History*, Dickson Mounds Museum, <http://www.museum.state.il.us/ismsites/dickson/history.htm> (last visited Dec. 8, 2014). The “final resting place” exception would thwart Congress’ intent, and rehearing is warranted in this situation to correct the panel’s creation of a judicial exception to NAGPRA’s clear application.

CONCLUSION

For the foregoing reasons, the panel’s decision warrants a rehearing before the panel and/or before the Court en banc.

December 8, 2014

Respectfully submitted,

/s/ Matthew Campbell

Matthew L. Campbell

CO Bar No. 40808

NM Bar No. 138207

Native American Rights Fund

1506 Broadway

Boulder, CO 80302

Telephone: (303) 447-8760

Facsimile: (303) 443-7776

mcampbell@narf.org

Richard A. Guest
Native American Rights Fund
1514 P Street, NW (Rear)
Suite D
Washington, DC 20005
Telephone: (202) 785-4166
Facsimile: (202) 822-0068
richardg@narf.org

Attorneys for Amici Curiae

CERTIFICATE CONCERNING REHEARING EN BANC

The following certification is made pursuant to 3d Cir. L.A.R. 35.1 with respect to this petition for panel rehearing and rehearing en banc:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, *i.e.*, it decides an issue of first-impression under a statute of extreme importance to the 566 federally recognized tribes residing outside of the Third Circuit and the millions of American Indian people throughout the United States—namely, the scope of the term “museum,” which establishes which entities fall within the Native American Graves Repatriation and Protection Act, 25 U.S.C. § 3001(8) and creates a precedential Circuit Court opinion beyond that intended by Congress by misunderstanding NAGPRA’s administrative process and creating a judicial exception to NAGPRA’s application.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32 and 40(b), as well as 3d Cir. L.A.R. 40.1, that the attached “Brief in Support of Panel Rehearing and Rehearing En Banc”:

(1) complies with the page limitation set forth in Fed. R. App. P. 29 and 40(b), because it does not exceed 7.5 pages in length, not counting required tables and certificates;

(2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font;

(3) the hard copies submitted to the clerk are exact copies of the ECF Submission;

(4) contains the certificate concerning hearing en banc required under 3d Cir. L.A.R. 35.1; and

(5) has been scanned for viruses using Microsoft Security Essentials Virus Definition 1.189.1609.0 and according to this program it is free from viruses.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to 3d. Cir. L.A.R. 28.3(d), that I am a member of the Bar of this court.

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, pursuant to Fed. R. App. P. 40(a) and 3d Cir. L.A.R. 40.1, I electronically filed the foregoing, the “BRIEF OF AMICUS CURIAE THE NATIONAL CONGRESS OF THE AMERICAN INDIANS IN SUPPORT OF PLAINTIFF APPELLEE JOHN THORPE, ET AL.’S PETITION FOR PANEL REHEARING AND REHEARING EN BANC,” with the Clerk of Court for the United States Court of Appeals for the Third Circuit via the Court’s appellate CM/ECF system. Participants in the case who were registered CM/ECF users were served by the CM/ECF system at that time:

Matthew Campbell, mcampbell@narf.org
Christopher G. Fusco, cfusco@callahanfusco.com
Vincent R. Garvey, vgarvey@uslawcenter.com
Daniel E. Gomez, dgomez@cwlaw.com
Charles L. Riddle, Charles@charlesriddle.com
William G. Schwab, schwab@uslawcenter.com
Stephen R. Ward, sward@cwlaw.com
Daniel H. Wheeler, dhwheeler@comcast.net

/s/ Matthew Campbell

Matthew L. Campbell
CO Bar No. 40808
NM Bar No. 138207
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
mcampbell@narf.org

Counsel for Amicus Curiae

Exhibit A



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ATL-14-088

**TITLE: Seeking a Just Result and Final Resting Place for Jim Thorpe, in
Accordance with His Express Wishes**

EXECUTIVE COMMITTEE

PRESIDENT
Brian Cladoosby
Swinomish Indian Tribal Community

FIRST VICE-PRESIDENT
Randy Noka
Narragansett Tribe

RECORDING SECRETARY
Robert Shepherd
Sisseton Walpeton Oyate

TREASURER
Dennis Welsh
Colorado River Indian Tribes

REGIONAL VICE-
PRESIDENTS

ALASKA
Jerry Isaac
Tanana Chiefs Conference

EASTERN OKLAHOMA
S. Joe Crittenden
Cherokee Nation

GREAT PLAINS
Leander McDonald
Spirit Lake Tribe

MIDWEST
Aaron Payment
Sault Ste. Marie Tribe of Chippewa Indians

NORTHEAST
Lance Gumbs
Shinnecock Indian Nation

NORTHWEST
Fawn Sharp
Quinault Indian Nation

PACIFIC
Rosemary Morillo
Soboba Band of Mission Indians

ROCKY MOUNTAIN
Ivan Posey
Eastern Shoshone Tribe

SOUTHEAST
Ron Richardson
Haliwa-Saponi Indian Tribe

SOUTHERN PLAINS
Stephen Smith
Kiowa Tribe of Oklahoma

SOUTHWEST
Manuel Heart
Ute Mountain Ute Tribe

WESTERN
Arian Melendez
Reno Sparks Indian Colony

EXECUTIVE DIRECTOR
Jacqueline Johnson Pata
Tlingit

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the desecration and misappropriation of Native remains is a practice born out of genocide that threatens the very integrity of our existence as Native Peoples; and

WHEREAS, American Indian Nations continue to exist as independent sovereign Nations whose citizens retain the inalienable and exclusive right to determine the final resting place of their deceased relatives; and

WHEREAS, the Native American Graves Protection and Repatriation Act ("NAGPRA") was enacted to acknowledge Native American human rights and to eliminate the historic misappropriation of Native remains for use in public displays and exhibits, as well as anthropologic, cultural, or scientific studies; and

WHEREAS, NAGPRA was enacted to eliminate the historic misappropriation of Native remains for use as commodities to generate revenue for non-Native communities, corporations, and entities; and

WHEREAS, NAGPRA was enacted to accord human rights to the deceased person and familial rights to the deceased person's lineal descendants and next of kin, and Jim Thorpe's sons qualify under both categories; and

WHEREAS, NCAI was instrumental in the enactment of NAGPRA, having committed significant time, resources, and effort to educate the public and the United States Congress on the issues that formed the foundation and purpose of the law; and

WHEREAS, the Sac and Fox Nation is a sovereign nation, federally recognized by the United States government; and

WHEREAS, Jim Thorpe was a citizen of the Sac and Fox Nation whose remains were not, and never will be, for sale; and

WHEREAS, Jim Thorpe's sons, John, Bill, and Richard Thorpe, are his direct descendants; and

WHEREAS, the Borough of Jim Thorpe, Pennsylvania claims to have "purchased" Jim Thorpe's remains for the purpose of exhibiting them in a public display that the town uses to generate tourism and increase its revenue; and

WHEREAS, the Sac and Fox Nation, along with John, Richard, and Bill Thorpe, brought suit under NAGPRA to recover, repatriate, and return Jim Thorpe's remains so that they would reside next to his relatives on the Sac and Fox reservation, in accordance with the express wishes of Jim Thorpe to his family; and

WHEREAS, on October 23, 2014, the United States Court, Third Circuit of Appeals, in *John Thorpe, et al. v. Borough of Jim Thorpe*, determined that NAGPRA does not require the Borough of Jim Thorpe, Pennsylvania to return Jim Thorpe's remains to his sons and to the Sac and Fox Nation.

NOW THEREFORE BE IT RESOLVED, that the October 23, 2014 decision of the Third Circuit Court of Appeals contradicts the plain language of the NAGPRA statute, and the Borough of Jim Thorpe's continued refusal to allow for the repatriation of Jim Thorpe's remains constitutes a grave and willful violation of federal law that demands the corrective action of the United States government; and

BE IT FURTHER RESOLVED, that NCAI is authorized to continue to pursue this matter in litigation and, if necessary, in Congress; and

BE IT FURTHER RESOLVED, that NCAI is authorized to continue to support the Thorpe Family and the Sac and Fox Nation in their efforts to achieve a just result for Jim Thorpe; and

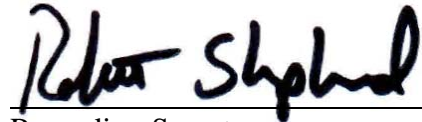
BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.


President

ATTEST:


Recording Secretary