No. 14-___

IN THE

Supreme Court of the United States

SAC AND FOX NATION OF OKLAHOMA, WILLIAM THORPE, AND RICHARD THORPE,

Petitioners,

v.

BOROUGH OF JIM THORPE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Native American Graves Protection and Repatriation Act (NAGPRA) applies to "any" institution or state or local government agency that receives federal funds and "has possession of, or control over," Native American human remains. The Act requires these covered entities to inventory those remains and, at the request of Native American tribes or lineal descendants, to return them.

The question presented is whether the absurdity doctrine allows courts to exempt otherwise covered entities from NAGPRA based on how the entity acquired the Native American remains.

PARTIES TO THE PROCEEDING

Petitioners Sac and Fox Nation of Oklahoma, William Thorpe, and Richard Thorpe were the appellees and cross-appellants in the court of appeals and plaintiffs in the district court. The original plaintiff in the district court was John Thorpe, who died in 2011.

Respondent, the Borough of Jim Thorpe, was the appellant and cross-appellee in the court of appeals. Respondents Michael Sofranko, Ronald Confer, John McGuire, Joseph Marzen, W. Todd Mason, Jeremy Melber, Justin Yaich, Joseph Krebs, Greg Strubinger, Kyle Sheckler, and Joanne Klitsch, current or former officers of the Borough of Jim Thorpe, were sued as defendants in the district court under 42 U.S.C. § 1983. They were cross-appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sac and Fox Nation, William Thorpe, and Richard Thorpe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is published at 770 F.3d 255 (3d Cir. 2014). The opinion of the United States District Court for the Middle District of Pennsylvania (Pet. App. 24a) is unreported, but is available at 2013 WL 1703572.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2014. Pet. App. 2a. A timely petition for rehearing and rehearing en banc was denied on February 3, 2015. *Id.* 68a. On April 21, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 3, 2015. No. 14A1077. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*, defines "museum" as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C. § 3001(8). The entire Act is reproduced at Pet. App. 69a.

INTRODUCTION

The Native American Graves Protection and Repatriation Act (NAGPRA) addresses a systemic wrong: the mistreatment of Native American remains. For many Native Americans, adhering to tribal burial customs is integral to their cultural identity and religious beliefs. Yet over this country's history, thousands of Native Americans' remains have been kept away from tribal land and without a traditional burial – be it for study, display, or profit. This is an ongoing source of anguish to Native Americans and their tribes.

NAGPRA, enacted in 1990, provides a remedy for this injustice. Through a process called "repatriation," the Act allows tribes and descendants to request the return of remains held by various covered entities, including municipalities, so that Native Americans may lay their people to rest.

In this case, which concerns the remains of legendary athlete Jim Thorpe, the Third Circuit created a categorical exception to these repatriation provisions. Acknowledging that NAGPRA's text renders the Act applicable to any state or local governmental entity that receives federal funds and possesses Native American remains "regardless of the circumstances surrounding the possession," the court of appeals nonetheless held that such coverage is absurd. Pet. App. 18a. The court of appeals accordingly ruled that entities are exempt from NAGPRA when they received remains from the decedent's non-Indian next of kin. *Id.* 23a.

The Third Circuit's invocation of the absurdity doctrine thwarts NAGPRA's conferral of power on Native Americans to determine the appropriate

religious treatment and final disposition of their people's remains. This Court's review is therefore warranted.

STATEMENT OF THE CASE

A. Statutory Framework

NAGPRA gives Native Americans the power to determine the treatment and disposition of Native "cultural items," including human remains. *See* 25 U.S.C. § 3001(3). The statute contains both grave protection provisions and repatriation provisions. The former prohibit the removal of remains discovered on federal or tribal lands without the consent of the tribe or lineal descendants. *Id.* § 3002. The repatriation provisions, the subject of this suit, give Native Americans the ability to reclaim the remains of their people from institutions holding the remains.

1. NAGPRA seeks to eradicate "cultural insensitivity to Native American peoples" by remedying past indignities and prioritizing Native American claims to Native items. S. Rep. No. 101-473, at 5 (1990). Congress specifically identified two continuing injustices relevant here: the looting of Native American graves and the obstruction of traditional Native American religious burial practices. *Id.* at 4-5; H.R. Rep. No. 101-877, at 10, 13 (1990).

Throughout our country's history, Native American gravesites have been exploited for "profit or curiosity." H.R. Rep. No. 101-877, at 10. In 1868, for example, the Surgeon General ordered the Army to collect and "send him Indian skeletons" so that he could determine if Native American inferiority was

"due to the size of the Indian's cranium." Pet. App. 9a (citing H.R. Rep. No. 101-877, at 10). The Army, in response, obtained over 4,000 Native American skulls from battlefields and graves.[1] Over the years, the remains of between 100,000 and two million Native Americans have been appropriated "for storage or display by government agencies, museums, universities, and tourist attractions." Pet. App. 10a (citation and internal quotation mark omitted). Consequently, NAGPRA provided "additional protections to Native American burial sites." S. Rep. No. 101-473, at 4; *see also* H.R. Rep. No. 101-877, at 13.

Until NAGPRA, museums holding remains often ignored Native Americans' concern for the proper burial of their people. *See* H.R. Rep. No. 101-877, at 13. Native Americans thus were unable to bury their dead properly, "an important part of the religious and traditional life cycle of Native Americans." S. Rep. No. 101-473, at 4. Many Native Americans believe "that the spirits of their ancestors w[ill] not rest" until their remains are "returned to their homeland," H.R. Rep. 101-877, at 13, and have, accordingly, sought the right to "provide an appropriate resting place" for the remains of their ancestors held outside tribal gravesites, 20 U.S.C. § 80q(8) (congressional finding for companion statute). The tradition of petitioner Sac and Fox Nation, for instance, holds that a soul cannot rest until it completes its journey

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[1] Willow Lawson, *Indian Skeletons May Never Leave Museums*, ABC News (Aug. 10, 2014), http://abcnews.go.com/Technology/story?id=98486.

to the "other side" and back. *See* D. Ct. ECF 98-3 ¶ 13(d) (Aff. of Sandra K. Massey, Historic Preservation Officer, Sac and Fox Nation) ("Massey Aff.").

2. The institutions subject to NAGPRA's repatriation provisions are known under the Act as "museums." NAGPRA defines "museum" as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C. § 3001(8). The Act includes human remains in its definition of "cultural items." *Id.* § 3001(3).

Museums must comply with NAGPRA's inventory, notice, and repatriation requirements. 25 U.S.C. §§ 3003-05. They thus must ascertain the geographical and cultural affiliation of items that they hold, notify affected Native American tribes, and, in some cases, repatriate those items – that is, return them to tribes or lineal descendants. *Id.* During this process, museums must consult affected tribes. *Id.* § 3003. In the event of repatriation, the museum must "expeditiously" transfer the item in question to the requesting party. *Id.* § 3005(a)(1). If more than one party requests repatriation, the remains must be transferred to the "most appropriate claimant." *See id.* § 3005(e).

NAGPRA specifies a process for resolving disputes if a museum "cannot clearly determine which requesting party is the most appropriate claimant." 25 U.S.C. § 3005(e). Museums and claimants are first encouraged to resolve their disputes through "informal negotiations." 43 C.F.R. § 10.17(a). If that fails, parties may seek guidance

from the NAGPRA Review Committee, created under the Act, 25 U.S.C. § 3006, which may issue non-binding "advisory findings," 43 C.F.R. § 10.17(b).[2] Any aggrieved party may seek relief in federal district court, which is authorized to "issue such orders as may be necessary to enforce" NAGPRA. 25 U.S.C. § 3013.

The United States Department of the Interior administers NAGPRA through the National NAGPRA Program.[3] Museums often manage their own NAGPRA offices to ensure compliance with the Act.[4] Many tribes, including the Sac and Fox Nation, also have dedicated NAGPRA offices that work with museums to ensure the proper repatriation of Native remains and cultural items. *See* Massey Aff. ¶¶ 4-5. The Sac and Fox Nation alone has participated in over forty repatriations from museums across the country. *Id.* ¶ 6.

A wide variety of institutions have fulfilled their obligations as museums under NAGPRA. These include cities (Providence, R.I.), municipal and county agencies (Dallas Water Utilities, Kerr County Attorney's Office), state agencies (Washington State

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[2] *See also* Nat'l Park Serv., U.S. Dep't of the Interior, *Native American Graves Protection and Repatriation Review Committee Interim Dispute and Findings of Fact and Procedures* (Mar. 2014), http://www.nps.gov/NAGPRA/REVIEW/Interim-RC-Dispute-and-FF-Procedures-March2014-final.pdf

[3] *National NAGPRA*, Nat'l Park Serv., U.S. Dep't of the Interior, http://www.nps.gov/nagpra/ (last visited May 30, 2015).

[4] *E.g.*, *Repatriation*, Nat'l Museum Am. Indian, http://nmai.si.edu/explore/collections/repatriation/ (last visited May 30, 2015) (describing the museum's repatriation office).

Parks and Recreation Commission, Michigan State Police), universities (Columbia), public museums (Milwaukee Public Museum), zoos (Toledo Zoological Society), and historical societies (History Colorado).[5] The Act has applied to institutions with collections of all sizes, including the Coast Guard, which possessed only two remains, and the Tennessee Valley Authority, which possessed over 8,000. Nat'l NAGPRA Program, U.S. Dep't of the Interior, *FY 2014 Final Report* 26 (2015).

To date, over 16,000 human remains and over 275,000 objects have been repatriated under NAGPRA. Nat'l NAGPRA Program, *supra*, at 13. Recognizing NAGPRA's successes, the Third Circuit observed that the Act "warrants its aspirational characterization as human rights legislation." Pet. App. 12a (quoting *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997)) (internal quotation mark omitted).

B. Factual Background

1. Jim Thorpe was born "Wa-tha-huk," a member of the Sac and Fox Nation, in 1887 in present-day Oklahoma. Massey Aff. ¶¶ 7-8; Kate Buford, *Native American Son: The Life and Sporting Legend of Jim Thorpe* 6 (2010). To many, he is remembered as the "world's greatest athlete." *E.g.*, Robert W. Wheeler, *Jim Thorpe: World's Greatest Athlete* (1981). At the 1912 Olympics in Stockholm, Thorpe won gold

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[5] *See* 62 Fed. Reg. 23,794-95 (May 1, 1997); *Notices of Inventory Completion Database*, Nat'l Park Serv., U.S. Dep't of the Interior, http://www.nps.gov/nagpra/FED_NOTICES/NAGPRADIR/index.html (last visited May 30, 2015).

medals in both the pentathlon and the decathlon. He was a world-class, multi-sport athlete, *id.* at 141, and an inaugural inductee of the Pro Football Hall of Fame.[6]

Thorpe also championed Native American rights. He met with high-ranking government officials in his campaign against non-Indians posing as Indian "extras" in Hollywood films. Buford, *supra*, at 296-97. Thorpe was also the spokesman for his tribe's traditional faction. *Id.* at 303-04. In 1937, he worked to retain the Sac and Fox's existing governance structure in the face of a statute requiring adoption of a federally imposed structure as a prerequisite for receiving federal funding. *Id.*

Thorpe spoke often of his desire to be buried on tribal land as required by Sac and Fox religious tradition. Following a heart attack in the early 1940s, Thorpe told his son, petitioner William Thorpe, that he wanted his body "returned to Sac and Fox country" for his "last rites and burial." D. Ct. ECF 98-1 ¶ 7b (Aff. of William K. Thorpe) ("William Thorpe Aff."). Thorpe made this wish known to his other son, petitioner Richard Thorpe, as late as 1948. D. Ct. ECF 98-2 ¶ 7 (Aff. of Richard A. Thorpe) ("Richard Thorpe Aff.").

2. Thorpe died in 1953. At that time, his sons were serving in the military, and he was estranged from his third wife, Patsy Thorpe, a non-Native American. Richard Thorpe Aff. ¶ 8; William Thorpe

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[6] *Hall of Famers by Year of Enshrinement*, Pro Football Hall of Fame, http://www.profootballhof.com/hof/years.aspx (last visited May 30, 2015).

Aff. ¶ 8; Buford, *supra*, at 362-63. Thanks to donations solicited by third-party fundraisers, about two weeks after his death, Thorpe's body was returned to his ancestral homeland in Oklahoma for burial. Buford, *supra*, at 365-66.

Members of the Sac and Fox Nation and other members of Thorpe's family gathered in Shawnee, Oklahoma for the traditional Sac and Fox two-day funeral.[7] Buford, *supra*, at 369-70. The ceremony began with the traditional evening feast, during which the Sac and Fox people offered food to the spirits and returned Thorpe's Native American name to his clan. *See* Massey Aff. ¶ 13(b).

But the ritual was never completed. Patsy Thorpe arrived with law enforcement officers and removed the casket. Massey Aff. ¶ 12; Richard Thorpe Aff. ¶ 9; William Thorpe Aff. ¶ 9. Thus, Thorpe's soul had not yet completed its journey to the "other side." *See* Massey Aff. ¶¶ 13-14. This episode is still remembered in Thorpe's tribe "as a serious injustice and affront to the Sac and Fox people." *Id.* ¶ 12.

Despite objections from the Sac and Fox Nation and members of Thorpe's immediate family, Patsy Thorpe began negotiating with several institutions and municipalities, exploring possible places to bury Thorpe's body. William Thorpe Aff. ¶ 13. A "bidding

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[7] It took petitioners some time to travel back from military service. At the time of their father's death, William Thorpe was in Korea with the Army, William Thorpe Aff. ¶ 8, and Richard Thorpe was near San Diego with the Navy, Richard Thorpe Aff. ¶ 8.

war" ensued, with municipalities and institutions competing for Thorpe's remains. Jack McCallum, *The Regilding of a Legend*, Sports Illustrated (Oct. 25, 1982);[8] *see also* Buford, *supra*, at 366-67, 370.

Participants in the negotiations included two economically distressed coal-mining towns in eastern Pennsylvania, Mauch Chunk and East Mauch Chunk. Buford, *supra*, at 371-72. Though Jim Thorpe had never been associated with these towns, Patsy Thorpe soon discovered that they were willing to strike a deal, believing that they could use Thorpe's body to generate a tourism industry in the economically failing area.[9] Patsy Thorpe received $500 from the towns in exchange for the remains. Buford, *supra*, at 373. Throughout this process, neither she nor the towns consulted Thorpe's children or the Sac and Fox Nation. Richard Thorpe Aff. ¶ 10; William Thorpe Aff. ¶ 9.

Under the agreement, the towns merged into a single municipality named the Borough of Jim Thorpe and built an above-ground mausoleum to hold Thorpe's body and – the towns hoped – to attract visitors to the area. McCallum, *supra*. The Borough initially planned to establish, among other attractions, a football shrine, a hospital, an Olympic stadium, and a sporting goods factory that would produce Thorpe-branded merchandise. Buford, *supra*, at 372-73; *Scorecard*, *supra*. Patsy Thorpe, for

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[8] http://www.si.com/vault/1982/10/25/625690/the-regilding-of-a-legend.

[9] Buford, *supra*, at 372; *Scorecard*, Sports Illustrated (Nov. 20, 1978), http://www.si.com/vault/1978/11/20/823169/scorecard.

her part, envisioned opening a tourist hotel in the area to be called "Jim Thorpe's Teepees." McCallum, *supra*. Although the gravesite ultimately did not attract the attention that Patsy Thorpe and the Borough had hoped, the Borough still maintains the mausoleum so that the public may visit Jim Thorpe's remains. *Id.*

3. Since the Borough's acquisition, Thorpe's remains have been mistreated and his Native heritage dishonored. For example, during a Borough-sponsored ceremony, pallbearers were curious as to why the casket seemed "heavy," and local morticians pried it open. McCallum, *supra*. Inside, they discovered a "plastic bag over [Thorpe's] head." Buford, *supra*, at 373.

Three years after receiving Thorpe's remains, the Borough arranged a faux "Indian Ceremony" at the gravesite. Massey Aff. ¶ 15. This ceremony was not conducted in accordance with the traditions of the Sac and Fox Nation. *Id.* The Borough has since conducted at least two other purportedly "Indian" ceremonies at the mausoleum. *Id.* However, as the Sac and Fox Nation's Historic Preservation officer explained, these ceremonies were "not of our Tribe or belief system." *Id.* Thus, the Borough's treatment of Native American religious ceremonies "mocks them as being interchangeable" and further denigrates the religious beliefs of the Sac and Fox people. *Id.*

Borough residents soon realized that Thorpe's mausoleum would not reverse their town's economic decline. McCallum, *supra*. Some residents unsuccessfully attempted to remove Thorpe's body and dump it on the porch of one of the mausoleum's initial supporters. Buford, *supra*, at 373. Vandals

also struck the mausoleum 123 times with a hammer. *Id.* at 374. The damage was still visible twenty years later. McCallum, *supra*. Summing up the Borough's attitude, a former Borough councilman told *Sports Illustrated*, "All we saw were dollar signs, but all we got was a dead Indian." *Scorecard*, *supra*.

C. Procedural History

1. John Thorpe, Thorpe's youngest son, filed suit against respondents in the United States District Court for the Middle District of Pennsylvania. Pet. App. 28a. The complaint based jurisdiction on 28 U.S.C. § 1331 and sought a declaration that the Borough of Jim Thorpe is subject to NAGPRA and therefore must inventory Jim Thorpe's remains. Compl. 8, 12, D. Ct. ECF 1. When John Thorpe died in 2011, the Sac and Fox Nation, Richard Thorpe, and William Thorpe joined the suit as plaintiffs. *See* Pet. App. 7a.[10]

Petitioners and the Borough cross-moved for summary judgment regarding the claim at issue here: whether the Borough is a "museum" under NAGPRA and thus subject to the Act's inventory, notice, and repatriation provisions. Pet. App. 25a. The district court ruled in petitioners' favor, holding that the Borough was a local government agency that received federal funds and possessed cultural items

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[10] Petitioners also alleged a claim under 42 U.S.C. § 1983 for the Borough's violation of their NAGPRA rights. The district court dismissed the § 1983 claim, and the Third Circuit affirmed that dismissal solely on the ground that the petitioners lacked any rights under NAGPRA. Pet. App. 23a n.18.

and thus was a "museum" under NAGPRA. *Id.* 41a-58a.[11]

2. The Third Circuit reversed. It acknowledged that the district court's result was required by the "literal application of the text of NAGPRA" and that "[o]rdinarily" courts should "look to the text" to interpret a statute. Pet. App. 15a. Nonetheless, according to the Third Circuit, applying NAGPRA "regardless of the circumstances surrounding the possession," *id.* 18a, would contravene "Congress's intent to exclude situations such as Thorpe's burial in the Borough," where the next of kin had chosen the body's resting place. *See id.* 22a-23a. The Third Circuit therefore held that allowing the Sac and Fox Nation and Thorpe's lineal descendants to remove Thorpe's remains and complete his burial ceremony on tribal land was "such a clearly absurd result and so contrary to Congress's intent" that the Borough was not a museum "for the purposes of Thorpe's burial." *Id.* 23a.[12]

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[11] The district court rejected the Borough's argument that the doctrine of laches barred the suit because the Borough "failed to make the necessary showing of prejudice." Pet. App. 61a-63a. It also rejected the Borough's argument that the court lacked federal-question jurisdiction under the probate exception to 28 U.S.C. § 1331. *Id.* 34a-41a.

[12] The Third Circuit suggested a textual basis for excluding the Borough from NAGPRA's definition of "museum," but did not rely on it as part of its holding. In its definitions section, the Act defines the "right of possession" to include human remains "obtained with full knowledge and consent of next of kin or the official governing body" of the Native American tribe. 25 U.S.C. § 3001(13). The Third Circuit acknowledged, however, that although the Act exempts museums from repatriating cultural

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Rewriting Of NAGPRA Requires This Court's Review.

A. NAGPRA's Definition Of A "Museum" Does Not Turn On How An Entity Acquired Possession Of Native American Remains.

"[S]tatutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129-30 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)); *accord Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). NAGPRA defines "museum" as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items," 25 U.S.C. § 3001(8), including human remains, *id.* § 3001(3).

As the Third Circuit acknowledged, a "literal application" of this definition covers all entities that receive federal funding and have possession of or control over Native American remains, regardless of whether the remains were acquired from relatives of the deceased. Pet. App. 22a. And Congress prefaced "museum" with "any." 25 U.S.C. § 3001(8). That word indicates that the statute embraces *all* entities that meet the statutory requirements – that is,

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objects for which they have a "right of possession," it does *not* do so for human remains. Pet. App. 22a; *see* 25 U.S.C. § 3005(c). The Third Circuit also recognized that the repatriation provisions require museums to perform inventory and notice for *all* items, including those to which they have a "right of possession." Pet. App. 18a n.16.

covered entities "of whatever kind." *Brogan v. United States*, 522 U.S. 398, 400 (1998) (citation and internal quotation marks omitted). The statutory definition thus "offers no indication whatever that Congress intended [a] limiting construction." *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). The statute simply requires possession or control; it says nothing about the method by which an entity acquired remains.

NAGPRA's structure confirms that an entity's method of acquisition is irrelevant to whether it constitutes a "museum." The Act provides that institutions need not repatriate cultural objects *other than* human remains that they lawfully acquired. 25 U.S.C. § 3005(c). "The contrast" between NAGPRA's treatment of human remains and other cultural objects shows that Congress "kn[ew] how to impose express limits" on the Act's coverage based on the method of acquisition when it wanted to do so. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010). That the statute contains no exception for human remains shows that Congress viewed the method of acquisition as irrelevant to whether an entity that has possession or control over remains is subject to the Act. The court of appeals' decision thus "more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'" *Id.* (alterations in original) (quoting *Pasquantino v. United States*, 544 U.S. 349, 359 (2005)).

And in case there were any doubt, treating entities such as the Borough as "museums" comports with the ordinary understanding of that term. The Borough created a physical site – the Jim Thorpe mausoleum – to serve as a tourist attraction centered

on the remains of Jim Thorpe. The town envisioned the site as the centerpiece of its plans for economic revival. The Borough's museum remains a place where visitors can and do view Thorpe's remains.[13]

B. The Third Circuit Misapplied The Absurdity Doctrine.

1. The Absurdity Doctrine Applies Only In Exceptional Circumstances.

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, "[t]he words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion" by courts. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). When the text of a statute is unambiguous, "'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

In truly exceptional circumstances – when following the text would clearly "thwart" legislative intent – courts may invoke the absurdity doctrine to set aside a statute's plain meaning. *Griffin*, 458 U.S. at 571 (citation omitted). As early as 1819, Chief Justice Marshall observed that a court should invoke

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[13] *See, e.g.*, *Jim Thorpe, Pennsylvania: Jim Thorpe's Tourist Attraction Grave*, RoadsideAmerica.com, http://www.roadsideamerica.com/tip/3583 (last visited May 30, 2015) (rating the mausoleum as "worth a detour").

the doctrine only if the text-based result were "so monstrous, that all mankind would, without hesitation," reject it. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819). Thus, a result is absurd only when there is no conceivable reason Congress could have intended the statute to apply as written. *See* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2391 (2003).

Consistent with this high bar, the Court has routinely declined to invoke the absurdity doctrine when the results were seemingly overbroad, harsh, or odd. In *Brogan v. United States*, 522 U.S. 398 (1998), for example, the Court addressed whether bare denials of guilt to government agents, if untrue, came under a statute that criminalized making "'any' false statement" to those agents. *Id.* at 401 (quoting 18 U.S.C. § 1001 (1988)). The Court noted concern that punishing these so-called "exculpatory no's" could lead to harsh results. *Id.* at 405. For example, a defendant's false denial regarding one element of a crime could lead to a five-year sentence even if the defendant's underlying conduct was altogether lawful. *See id.* at 411 (Ginsburg, J., concurring). Many courts of appeals, wary of prosecutorial abuse, had excluded exculpatory no's from the statute's reach. *See id.* at 401 (majority opinion). However, the Court found that the text was clear: "any false statement" meant a false statement "of whatever kind." *Id.* at 400. This Court observed that judges are not free to "create their own limitations on legislation, no matter how alluring the policy arguments." *Id.* at 408. Courts must leave revisions to Congress. *See id.* at 405.

The Court came to a similar result in *Griffin*, 458 U.S. 564. There, the Court considered a penalty provision for withholding seamen's wages that required employers to pay double wages for every day those wages were improperly withheld, without any limit. *Id.* at 573. The Court applied the provision as written, even though it resulted in the seaman recovering over $300,000 for only $412.50 in withheld wages. *Id.* at 574-75. The Court explained that it was up to Congress – and not the courts – to revise the statute to limit what could be viewed as a harsh result. *Id.* at 576.

Similar reasoning motivated the result in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). There, the Court addressed the question of who was responsible for paying health benefits to retired coal miners. *Id.* at 442. The statute provided that the Coal Act Commissioner could assign responsibility to a miner's former employer or to companies "related" to the former employer, such as other members of the same group of corporations. *Id.* at 450-52. The statute included in the definition of "related" companies their successors-in-interest. *Id.* at 452. But the statute did not mention the successors-in-interest of the former employer. *Id.* As a result, under the statute as written, the Commissioner could hold responsible the successors of companies associated with the former employer, but not the successors of the former employer itself, the more natural parties to bear the former employer's liabilities. Nonetheless, the Court followed the plain meaning of the statute and refused to allow the Commissioner to assign responsibility to the successor-in-interest of the actual employer. *Id.* at 450. The Court reasoned that despite the oddity of

the outcome, Congress conceivably could have intended this result, perhaps as the result of some sort of legislative compromise. *Id.* at 461.

The absurdity doctrine is thus exemplified in this Court's jurisprudence not principally by its invocation, but by its express rejection. In fact, over the last three decades, this Court has invoked the absurdity doctrine only in a handful of cases where the result demanded by the statutory text raised serious constitutional concerns – a result the Court assumed Congress could not have intended. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-67 (1989) (invoking absurdity doctrine to avoid "formidable" constitutional concerns about infringing on the President's power to appoint judges); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994) (same for First Amendment concerns); *Burns v. United States*, 501 U.S. 129, 138 (1991) (same for due process concerns); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10 (1989) (same for due process concerns).

2. Applying NAGRPA To Entities Such As The Borough Is Not Absurd.

This case does not warrant invocation of the absurdity doctrine. Applying NAGPRA to entities that acquired remains from a relative of the deceased does not thwart Congress's purposes. Rather, it is the Third Circuit's decision that thwarts Congress's goal of giving Native Americans control over their people's remains.

a. NAGPRA's primary purposes together reflect Congress's desire to remedy the mistreatment of Native American remains.

First, NAGPRA seeks to ensure that Native Americans can bury their dead in accordance with traditional Native American religious practices. This is an "important part of the religious and traditional life cycle of Native Americans." S. Rep. No. 101-473, at 4 (1990). Consistent with this goal, tribes and descendants, such as petitioners here, seek only the right to return Native American bodies to their ancestral burial places and to perform traditional burial ceremonies.

Second, NAGPRA aims to ensure "dignity and respect" for Native American human remains and to combat "cultural insensitivity" toward such remains. S. Rep. No. 101-473, at 5-6. The drafters expressed particular concern for the exploitation of remains for "profit or curiosity." Pet. App. 9a (quoting H.R. Rep. No. 101-877, at 10 (1990)). This case exemplifies that concern: "Dollar signs" are all the Borough saw in Thorpe's remains.[14]

b. Rather than adhere to the statutory text and Congress's goals in enacting it, the Third Circuit substituted its own views about NAGPRA's purposes, resting its decision on two related misunderstandings of congressional intent.

First, the court of appeals maintained that NAGPRA was designed to ensure the "*equal treatment*" of all human remains. Pet. App. 21a. (citation omitted). Not so. The very purpose of NAGPRA is to treat Native Americans and their remains preferentially. *See* 25 U.S.C. § 3003.

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[14] *See Scorecard*, Sports Illustrated, Nov. 20, 1978, http://www.si.com/vault/1978/11/20/823169/scorecard.

Contrary to the Third Circuit's "equal treatment" rationale, the statute expressly "reflects the unique relationship between the Federal Government and Indian tribes" and "should not be construed to establish a precedent with respect to any other" party. *Id.* § 3010. It thus allows repatriation of remains only to Native American descendants and tribes. *Id.* § 3005.

Second, the Third Circuit construed NAGPRA to permit the wishes of non-Indian next-of-kin to trump the interests of Native American descendants and tribal leaders in choosing the "final resting place" of their ancestors. Pet. App. 6a, 18a. But Congress gave lineal descendants and Native American tribes priority in making those decisions. *See* 25 U.S.C. § 3002. Congress considered giving museums that received remains from those with alienation authority, including next-of-kin, the right to avoid repatriation, but it ultimately chose not to. *Compare* H.R. 5237, 101st Cong. § 7(c) (as introduced in the House, July 10, 1990), *with* 25 U.S.C. § 3005(c). Accordingly, a next-of-kin's state-law ability to determine the initial disposition of a body is irrelevant to NAGPRA's repatriation process.

c. The Third Circuit's absurdity holding was motivated in part by a misunderstanding of how NAGPRA actually operates.

The Third Circuit worried that applying the Act to the Borough would involve NAGPRA in "family dispute[s]" that the Act was ill-suited to resolve. *See* Pet. App. 4a. Yet the Act expressly contemplates competing claims among lineal descendants and tribes. When more than one lineal descendant or Native American tribe makes a claim, the remains go

to "the most appropriate claimant." *See* 25 U.S.C. § 3005(e). Thus, requiring a museum such as the Borough to comply with NAGPRA does not mean that remains will be repatriated, as the Third Circuit appeared to believe. *See* Pet. App. 19a-20a. Rather, the museum would have to undergo NAGPRA's inventory and notice processes, informing all relevant parties of its possessions. *See id.* 33a; *see also* 25 U.S.C. § 3005.

At that time, any other descendants or tribes with claims to the remains – including any who may prefer that the remains stay where they are – could then submit a competing claim. Such a claim could be referred to the NAGPRA Review Committee, or to a district court if necessary. *See* 25 U.S.C. §§ 3005(e), 3006(c). The Third Circuit's decision scuttled that process before it began.

II. The Third Circuit's Misuse Of The Absurdity Doctrine Threatens NAGPRA's Future And Raises Separation Of Powers Concerns.

A. The Third Circuit's Decision Endangers NAGPRA's Continuing Viability.

Many institutions have participated in NAGPRA's inventory, notice, and repatriation processes, respecting Congress's decision to give Native Americans and their tribes the power to decide the fate of Native American remains. However, not all institutions willingly comply with NAGPRA, and the Third Circuit's decision, if left uncorrected, is likely to embolden these holdouts.

1. As explained above (at 6-7), museums ranging from small cities to federal departments have complied with the NAGPRA process. Covered

entities have completed over 1,300 inventories, recording over 180,000 human remains. *See* Nat'l NAGPRA Program, *FY 2014 Final Report* 9-10 (2015). As a result of these notices, Native Americans have requested and recovered over 16,000 human remains since NAGPRA's inception. *See id.* at 10.

Native American tribes work with museums to identify tribes and descendants with valid claims, resolve competing claims, and ensure that repatriated items are properly treated on their return. *See* Massey Aff. ¶ 4. Many tribes have NAGPRA representatives who work to ensure that their members' remains are properly repatriated under the Act. *See Finding Our Way Home: Achieving the Policy Goals of NAGPRA: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 118 (2011) (statement of Reno Keoni Franklin, Chairman, National Association of Tribal Historic Preservation Officers).

2. Still, some institutions openly disagree with NAGPRA's fundamental principles and flout its implementation. NAGPRA's opponents label Native American cultural traditions and religious beliefs "simplistic" and lacking a "basis in modern science."[15] Following this lead, some museums refuse to comply with the Act. Between 1990 and 2014, the

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[15] *See* G. A. Clark, *Letter to the Editor*, Soc'y for Am. Archaeology Archeological Record, Mar. 2001, at 3; *see also* G. A. Clark, Letter to the Editor, *NAGPRA and the Demon-Haunted World*, Soc'y for Am. Archaeology Bull., Nov. 1996 (calling NAGPRA an "unmitigated disaster").

Department of the Interior's NAGPRA division found twenty-four instances of non-compliance. Nat'l NAGPRA Program, *supra*, at 18.

One way museums may flout NAGPRA is by failing to perform inventories and not sending notices to potentially affected tribes and lineal descendants. *See* Nat'l NAGPRA Program, *supra*, at 16, 18. These procedures are the primary means by which Native Americans learn of museums' possession of their cultural items. Institutions generally do not publicize how they acquired their cultural items, nor do they always display publicly all the items they possess. Thus, without NAGPRA's notices, Native Americans often have no way of knowing which cultural items are rightfully theirs. For this reason, though Congress created two exceptions to repatriation, it created no exceptions to NAGPRA's inventory and notice requirements.[16]

3. The Third Circuit manufactured a broad exception to NAGPRA that institutions that want to resist compliance can easily abuse. Instead of requiring all entities that fall under the statutory definition of "museum" to comply with the Act, the Third Circuit exempted museums based on the "circumstances surrounding" their acquisition of

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[16] Museums subject to NAGPRA may delay repatriating cultural items that are "indispensable for completion of a scientific study, the outcome of which would be of major benefit to the United States," but must repatriate the items within ninety days of completing the study. 25 U.S.C. § 3005(b). In addition, institutions need not repatriate non-remains cultural objects that they lawfully acquired. *Id.* § 3005(c). By contrast, human remains are always subject to repatriation.

remains. Pet. App. 18a. Museums can now rely on the decision below to unilaterally exempt themselves from NAGPRA's inventory and notice provisions. And because, by definition, Native American tribes are not notified of decisions *not* to inventory, the validity of the museum's reasoning would rarely, if ever, be contested.

In short, given the centrality of the inventory and notice provisions to the repatriation process, the court of appeals' decision to exempt institutions from NAGRPA's reach threatens the Act's ability to fulfill Congress's purposes.

B. The Third Circuit's Decision Raises Separation Of Powers Concerns.

Contrary to the Third Circuit's declaration (Pet. App. 15a), statutory interpretation does not "ordinarily" begin with the text. It *always* begins with the text. The text is the "starting point" because the "respected, and respective, constitutional roles" of the legislative and judicial branches demand that courts accede to Congress's statutory commands. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 542 (2004). When courts "carve out statutory exceptions based on judicial perceptions of good . . . policy," *United States v. Gonzales*, 520 U.S. 1, 10 (1997), or "to make statutes more consistent" with what they view as "widely shared social values," John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2391 (2003), they "threaten[] to upset the balance between legislative and judicial power," *id.*

The Third Circuit ignored these basic principles. Rather than seriously analyzing NAGPRA's text, or the reasons Congress might have drafted the text as it did, the court of appeals jumped straight to the

absurdity doctrine. *See* Pet. App. 15a-16a. Though the Third Circuit acknowledged that Congress defined museum "very broadly," *id.* 14a, it did not try to understand why. Instead, the court delved into a highly selective reading of the legislative history to support its own value judgments – judgments that are demonstrably at odds with both NAGPRA's text and its remedial purposes. *See supra* at 19-21.

This kind of judicial disregard for the words in the U.S. Code demands this Court's attention. Just as respect for a coordinate branch of government generally necessitates this Court's review when a court of appeals invalidates an act of Congress as unconstitutional, so too should this Court step in when a court of appeals abrogates a federal statute on absurdity grounds.

III. This Case Is An Excellent Vehicle To Consider NAGPRA's Meaning And To Clarify The Absurdity Doctrine.

This case presents the Court with a single, important question of statutory interpretation: whether an entity's status as a museum under NAGPRA turns on *how*, or only *whether*, it acquired possession of Native American remains. Because the Third Circuit agreed with the district court that there are no material facts in dispute and relied exclusively on the absurdity doctrine to reach its decision, Pet. App. 14a-17a, this case provides an excellent opportunity for this Court to clarify the meaning of NAGPRA. It also squarely presents the question of when it is proper to invoke the absurdity doctrine.

An answer to the question presented is likely to be outcome-determinative. Though the Borough advanced other defenses, the district court rejected

them all. Pet. App. 37a, 62a-63a. If NAGPRA does not cover the Borough, petitioners have no claim. If, on the other hand, the Borough is a "museum," then petitioners should prevail, and the Borough will have to comply with the Act's requirements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2015

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-2446

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

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; JOANNE KLITSCH

Borough of Jim Thorpe,

Appellant

No. 13-2451

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

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; JOANNE KLITSCH

Sac and Fox Nation of Oklahoma, William Thorpe, Richard Thorpe,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. No. 3-10-cv-01317)
District Judge: Honorable A. Richard Caputo

Argued: February 14, 2014

Before: MCKEE, *Chief Judge*, CHAGARES and SHWARTZ, *Circuit Judges*

(Filed: October 23, 2014)

* * * * *

OPINION

McKEE, *Chief Judge*

I. INTRODUCTION

Jim Thorpe, multi-sport Olympic gold medalist ("Thorpe"), died in California in 1953 without a will.[1] His estate was assigned to his third wife, Patricia ("Patsy"),[2] who eventually buried him in what is now Jim Thorpe, Pennsylvania ("the Borough"). Jim

[1] Some commentators still regard Thorpe as "the greatest Olympian of all time." *See* Sally Jenkins, *Greatest Olympic athlete? Jim Thorpe, not Usain Bolt*, WASHINGTON POST, Aug. 10, 2012, http://www.washingtonpost.com/sports/olympics/greatest-olympic-athlete-jim-thorpe-not-usainbolt/2012/08/10/f9114872-e33c-11e1-ae7fd2a13e249eb2_story.html.

[2] Patsy Thorpe is deceased. She and Jim Thorpe did not have children together.

Thorpe, Pennsylvania was a newly-formed borough that had been created from the merger of the boroughs of Mauch Chunk and East Mauch Chunk. Thorpe was buried in this new borough over the objections of several children from his previous marriages. Thorpe was a Native American of Sauk heritage and a member of the Sac and Fox Nation of Oklahoma. Over the years, some of Thorpe's eight children have spoken out in protest of their father's burial, advocating that he be reburied on Sac and Fox tribal land in Oklahoma.

In 1990, years after Thorpe's death and burial, Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA"). NAGPRA was intended to ameliorate and correct past abuses inflicted upon Native Americans and their culture and to protect Native American human remains and cultural artifacts. NAGPRA requires museums and Federal agencies possessing or controlling holdings or collections of Native American human remains to inventory those remains, notify the affected tribe, and, upon the request of a known lineal descendent of the deceased Native American or of the tribe, return such remains. 25 U.S.C. §§ 3003, 3005.

In 2010, John Thorpe, the son of Thorpe and his second wife Freeda, sued the Borough for failing to comply with NAGPRA.[3] The District Court concluded that the Borough was a "museum" within the meaning of NAGPRA and provisions of that law required the Borough to disinter Thorpe's remains and turn them

[3] John Thorpe was often called Jack Thorpe, both in his life and in this litigation. For clarity, we will refer to him only as John Thorpe.

over to the Sac and Fox tribe as requested by John Thorpe. This appeal followed.

We conclude that Congress could not have intended the kind of patently absurd result that would follow from a court resolving a family dispute by applying NAGPRA to Thorpe's burial in the Borough under the circumstances here. We therefore hold that the District Court erred in overturning the clearly expressed wishes of Thorpe's wife by ordering his body to be exhumed and his remains delivered to John Thorpe.[4]

II. FACTS AND PROCEDURAL HISTORY

Thorpe died in California in 1953. Thereafter, Patsy, in cooperation with the Oklahoma legislature, made initial plans for him to be buried in Oklahoma.[5] According to Plaintiffs, Thorpe had told family members that he wanted to be buried in Oklahoma. However, the parties agree that Patsy Thorpe had legal authority over the disposition of Thorpe's body and his estate. In any event, at some point following Thorpe's death, a bill was drafted by the Oklahoma legislature that would have provided funding for a permanent memorial near the contemplated site for Thorpe's grave. However, in what was a harbinger of difficulties to come, the bill was vetoed by the Governor of Oklahoma. This sad and regrettable posthumous saga took an even more ominous turn when Patsy, assisted by state law enforcement officers, intervened in Thorpe's ritual burial ceremony in

[4] Because we conclude that the Borough is not a "museum" because NAGPRA does not apply here, we do not consider the Borough's argument that the doctrine of laches bars this action.

[5] As we explained at the outset, Patsy is Thorpe's third wife.

Oklahoma, and caused Thorpe's casket to be removed and stored. After considering various sites for Thorpe's burial,[6] Patsy arranged to have Thorpe buried at a location in Jim Thorpe, Pennsylvania. That municipality was to be formed by the merger of Mauch Chunk and East Mauch Chunk, and the resulting borough was to be named Jim Thorpe. This agreement was reached despite the objection of several of Thorpe's children.[7] The agreement provided in part that Mauch Chunk and East Mauch Chunk would consolidate under the name "Jim Thorpe" "as a fitting tribute and memorial to the person and memory of the husband of [Patsy Thorpe] and that appropriately correlated to such designation of the name 'Jim Thorpe' the remains of [him] be laid to rest in the community so bearing his name." Appendix ("App.") 486. Patsy Thorpe intended that the Borough would be "the final and permanent resting place" for her husband. *Id.*

After the arrangements were made for the burial site in the Borough, Thorpe was first buried at the Evergreen Cemetery in the Borough while a mausoleum was being constructed for his remains. In

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[6] Patsy had also considered burying Thorpe in Carlisle, Pennsylvania, where Thorpe played football as a teenager under legendary coach Pop Warner at Carlisle Indian Industrial School. John Luciew, *Town of Jim Thorpe is Ready to Fight for Identity it Adopted 56 Years Ago*, PENNLIVE, Aug. 2, 2010, http://www.pennlive.com/midstate/index.ssf/2010/08/town_of_jim_thorpe_is_ready_to.html.

[7] Thorpe's descendents never reached a unanimous agreement about where he should be buried. Charlotte Thorpe, Jim Thorpe's daughter by his first wife Iva, helped Patsy decide on his final burial site in the newly formed borough of Jim Thorpe, Pennsylvania. Appendix ("App.") 413.

1957, he was interred in what was believed to be his final resting place.[8] The agreement Patsy had reached with the Borough provides that the Borough is responsible for the maintenance at the burial site. However, family members have visited the site over the years and have worked with the Borough to conduct tribal ceremonies. The Jim Thorpe Hall of Fame has also worked to improve the site.

John Thorpe filed the instant Complaint in 2010, alleging that the Borough had failed to comply with NAGPRA.[9] The Borough immediately moved to dismiss the complaint. The District Court dismissed John Thorpe's § 1983 claim but allowed him to proceed under NAGPRA.[10] John Thorpe was also ordered to join all necessary parties in an amended complaint or

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[8] At least Patsy and the leaders of the Borough thought this was his final resting place. The Mayor of the Borough testified that he was aware of newspaper articles and speeches in which John Thorpe, one of Thorpe's sons from his second marriage, expressed a desire to move the body, but the Borough was never formally informed of that desire. App. 361-62.

[9] Over fifty years passed between Jim Thorpe's death and this challenge to his burial. The Plaintiffs waited for their sister, Grace Thorpe, to die before instituting this action because she did not agree that Thorpe's remains should be removed from the Borough. App. 414. In addition, Plaintiffs did not challenge the disposition of Thorpe's estate in California immediately after his death. App. 390.

[10] 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

submit evidence and briefing showing that joinder of any or all of the necessary parties was not feasible and that the action could proceed in "equity and good conscience" under Rule 19(b). App. 171. John Thorpe died the following year and the proceedings were stayed until his attorney filed an amended complaint naming as new plaintiffs John's brothers Richard and William Thorpe, the sons of Jim Thorpe and his second wife Freeda ("Plaintiffs").

Thereafter, the District Court granted Plaintiffs' motion for summary judgment based on its conclusion that "[t]he Borough of Jim Thorpe is a 'museum' under [NAGPRA] and subject to the requirements of the Act, including those provisions governing repatriation requests." App. 80. The Borough appealed that finding and Plaintiffs appealed the District Court's dismissal of their § 1983 claim.[11]

III. JURISDICTION AND STANDARD OF REVIEW

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, and we have

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[11] Plaintiffs also sued several individual defendants, who are participating only in the cross-appeal as cross-appellees. Also participating in this appeal as amici are the National Congress of the American Indians, who favor moving Thorpe's remains to Oklahoma, as well as two of Jim Thorpe's grandsons, Michael Koehler and John Thorpe, who oppose repatriation because they believe their grandfather should rest in peace and that their family's burial decision should be respected. They are also concerned that the burial decisions of every Native American family will be jeopardized if the District Court's decision stands. Michael Koehler and John Thorpe are Charlotte Thorpe's children. Charlotte was the daughter of Jim and Iva Thorpe, Thorpe's first wife.

jurisdiction pursuant to 28 U.S.C. § 1291. NAGPRA's jurisdictional provision vests federal courts with jurisdiction over "any action brought by any person alleging a violation of" NAGPRA. 25 U.S.C. § 3013.[12] This Court exercises plenary review over the District Court's finding of law that NAGPRA applies to Thorpe's burial. *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008).

IV. HISTORY AND OVERVIEW OF NAGPRA

NAGPRA, 25 U.S.C. §§ 3001-3013, was first enacted in 1990 "as a way to correct past abuses to, and guarantee protection for, the human remains and cultural objects of Native American tribal culture." 173 A.L.R. Fed. 585. It was passed with two main objectives: "first, to protect Native American burial sites and to require excavation of such sites only by permit, and second, to set up a process by which federal agencies and museums holding Native American remains and cultural artifacts will inventory those items and work with tribes to repatriate them." *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999)(citing H.R. Rep.

[12] We must also ensure that we have jurisdiction to hear this case, because the "jurisdiction conferred by the Judiciary Act of 1789 . . . did not extend to probate matters." *Markham v. Allen*, 326 U.S. 490, 494 (1946). There are three circumstances in which the probate exception to jurisdiction applies: when the court is working to probate or annul a will, administer a decedent's estate, or assume *in rem* jurisdiction over property that is in the custody of the probate court. *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006). "[I]t does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id.* at 312. This case involves the status of Thorpe's remains, not his estate or will, and therefore does not touch upon anything that could be considered a "probate matter."

No. 101-877 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367-68 ("H.R. Rep.")); *United States v. Corrow*, 119 F.3d 796, 799-800 (10th Cir. 1997).

The Act was an attempt to respond to the looting and plundering of Native American burial grounds and the theft of cultural artifacts from Native American tribes that continued to pour salt into the many wounds that have been inflicted on Native Americans throughout the history of the United States. As stated in the House Report:

> Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. These activities were at their peak during the last century and the early part of this century.
>
> In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands Native American human remains and funerary objects being sold or housed in museums and educational institutions around the county.
>
> For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them. This effort has touched off an often heated debate on the rights of the Indian versus the importance

> to museums of the retention of their collections and the scientific value of the items.

H.R. Rep. The scope of the cultural plundering is breathtaking. "National estimates are that between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions." Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39 (1992).

The movement to pass a law protecting Native American human remains, funerary objects, cultural patrimony and sacred objects originated in a hearing held by the Select Committee on Indian Affairs in 1987. That hearing was for a bill that would provide for the repatriation of Indian artifacts. S. Rep. No. 101-473 (1990) ("S. Rep."). Smithsonian Secretary Robert McCormick Adams testified that of the 34,000 remains in the Institution's collection, approximately 42.5% of the specimens were the remains of North American Indians. "Tribal reaction to Secretary Adams' testimony was swift, and in the months which followed, Indian tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific tribe or region for their permanent disposition in accordance with tribal customs and traditions, and for the proper burial elsewhere of" nonidentifiable remains. *Id.* The proposed bill led to additional hearings, which resulted in establishing a year-long Panel for a National Dialogue on Museum/Native American Relations between museum professionals and Native Americans, designed to develop recommendations to address the

necessity of responding to tribal demands for repatriation. The National Museum of the American Indian Act, enacted in 1989, was the precursor to NAGPRA and established such a museum in the Smithsonian. It also included provisions for the treatment and disposition of human remains and sacred objects, including an inventory process. Pub. L. No. 101-185 (1989).

Legislative efforts to protect Native American remains continued throughout 1989 and 1990. During a hearing of the Select Committee on Indian Affairs, tribal representatives testified that:

> in cases where Native Americans have attempted to regain items that were inappropriately alienated from their tribes, they have met with resistance from museums and have lacked the legal ability of [sic] financial resources to pursue the return of the items. Several witnesses testified that in many instances Indian tribes do not know what types of remains or objects are in the possession of museums and have been unsuccessful in their attempts to obtain access to this information.

S. Rep.

Native America leaders also spoke about the need to provide additional protections to Native American burial sites. They testified that:

> Indian tribes have had many difficulties in preventing the illegal excavation of graves on tribal and Federal lands. Several witnesses testified that there is a flourishing trade in funerary and sacred objects that have been obtained from burials located on tribal and

> Federal lands. Additional testimony was received from witnesses who indicated that tribal and Federal officials have been unable to prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors.

Id.

The repatriation procedure proposed was modeled after the National Museum of the American Indian Act, which authorizes the repatriation of human remains and funerary objects from the collections of the Smithsonian Institution. S. Rep. New procedural requirements were a response to testimony by tribal witnesses about "vast numbers of Native American human remains contained in the Smithsonian collections which, according to tribal religious practices, must be given appropriate burials." *Id.*

The first draft of the Native American Repatriation of Cultural Patrimony Act – which eventually became NAGPRA – was modeled after the provisions contained in the National Museum of the American Indian Act. It attempted to "extend the inventory, identification and repatriation provisions [in the National Museum of the American Indian Act] to all Federal agencies and any institution which receives Federal funding." *Id.* This bill, along with a bill introduced by Senator McCain, the Native American Grave and Burial Protection Act, formed the basis of NAGPRA. NAGPRA extended the Museum of the American Indian Act to "Federal agencies and museums receiving Federal funds." *Id.* "NAGPRA's reach in protecting against further desecration of burial sites and restoring countless ancestral remains

and cultural and sacred items to their tribal homes warrants its aspirational characterization as 'human rights legislation.'" *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997) (quoting Trope & Echo-Hawk, *supra*, at 37).

NAGPRA has two parallel procedures, depending on whether the item in question is held by a federal agency or museum or is discovered on federal lands after November 16, 1990, NAGPRA's effective date. *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 938 (10th Cir. 1996). "First, the Act addresses items excavated on federal lands after November 16, 1990 and enables Native American groups affiliated with those items to claim ownership. *See* 43 C.F.R. § 10.1 (1995); H.R. Rep. No. 101-877. . . . Second, NAGPRA provides for repatriation of cultural items currently held by federal agencies, including federally-funded museums." *Id.*

The procedure for repatriation of human remains under NAGPRA is as follows: "Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains . . . shall compile an inventory [defined as "a simple itemized list"] of such [holdings or collections of Native American human remains] and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item." 25 U.S.C. § 3003(a). These are required to be completed in consultation with tribal governments no later than five years after November 16, 1990, and made available to a review committee established under the statute. 25 U.S.C. § 3003(b)(1).

If the cultural affiliation of Native American human remains is established, then "the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization," shall return the remains. 25 U.S.C. § 3005(a)(1). Where there are multiple requests for repatriation of any cultural item (which includes human remains), and the museum cannot clearly determine which requesting party is the most appropriate claimant, the museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction. 25 U.S.C. § 3005(e). Any "museum" that fails to comply with these requirements may be assessed a civil penalty by the Secretary of the Interior. 25 U.S.C. § 3007.

V. THE BOROUGH IS NOT A "MUSEUM" UNDER NAGPRA[13]

NAGPRA defines the word "museum" very broadly, as:

> any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.

25 U.S.C. § 3001(8).[14] The Borough is a local government entity that maintains Jim Thorpe's burial

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[13] Because we find that the statute does not apply to the Borough, we will not consider the Borough's constitutional arguments regarding NAGPRA.

[14] "'[C]ultural items means human remains and [associated funerary objects, unassociated funerary objects, sacred objects,

site. The parties agree that the Borough has "possession of, or control over," Jim Thorpe's remains, and that he is of Native American descent. Thus, the main question before the District Court was whether the Borough "receives federal funds." The District Court found that the Borough was a museum because the record showed that the Borough received federal funds after the enactment of NAGPRA. However, for the following reasons, we find that the Borough is not a "museum" as intended by NAGPRA. It is therefore not required to comply with NAGPRA's procedural requirement of providing an inventory of Thorpe's remains. Similarly, it is not subject to the statute's requirement that his remains be "returned" to Thorpe's descendants for "repatriation" at their request.[15]

Ordinarily, we look to the text of the statute, rather than the legislative history, to interpret a statute or determine legislative intent as an aid to interpretation. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *In re Visteon*

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and cultural patrimony]." 25 U.S.C. § 3001(3). "Human remains" is not defined in the statute, but is defined in the regulations that correspond to the statute to mean "the physical remains of the body of a person of Native American ancestry." 43 C.F.R. § 10.2(d)(1).

[15] Despite Plaintiffs' characterization of Thorpe's move from the Borough to Oklahoma as a "repatriation" or a "return," the parties all agree that Thorpe was never actually buried in Oklahoma. As we have explained, a ritual burial started there, but was never actually completed. Rather, his wife interrupted the burial and caused his remains to be transferred to Pennsylvania for burial in the Borough.

Corp., 612 F.3d 210, 220 (3d Cir. 2010) ("It is for Congress, not the courts, to enact legislation. When courts disregard the language Congress has used in an unambiguous statute, they amend or repeal that which Congress enacted into law."); *First Merchs. Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 402 (3d Cir. 1999). However, this rule of statutory construction is not an inviolable commandment that we must blindly enforce regardless of surrounding circumstances or the practical results of rigidly applying the text to a given situation. Thus, we have made exceptions in rare cases in which "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *First Merchs.*, 198 F.3d at 402 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). "In such situations, 'those intentions must be controlling.'" *Id.* As the Supreme Court has explained, "[s]tatutory interpretations 'which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Id.* (quoting *Griffin*, 458 U.S. at 575). "But only absurd results and 'the most extraordinary showing of contrary intentions' justify a limitation on the 'plain meaning' of the statutory language." *Id.* (quoting *Garcia*, 469 U.S. 70, 75 (1984)); *see also United States v. Terlingo*, 327 F.3d 216, 221 (3d Cir. 2003) (noting that courts may look behind a statute only when the plain meaning produces "a result that is not just unwise but is clearly absurd") (internal quotation marks omitted).

Furthermore, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning – or

ambiguity – of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal citation and quotation marks omitted). "A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation and internal quotation marks omitted). Accordingly, the Supreme Court has concluded that "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns v. United States*, 501 U.S. 129, 136 (1991), *abrogated on other grounds by Booker v. United States*, 543 U.S. 220 (2005).

We conclude that we are confronted with the unusual situation in which literal application of NAGPRA "will produce a result demonstrably at odds with the intentions of its drafters." *Griffin*, 458 U.S. at 571. We must therefore look beyond the text of NAGPRA to identify the intentions of the drafters of the statute, and that intent "must . . . control[] [our analysis.]" *Id.*

As we have explained, NAGPRA requires "repatriation" of human remains from "museums," where those remains have been collected and studied for archeological or historical purposes. 25 U.S.C. § 3005. It is clear from the legislative history we have recounted above that Congress was also concerned with returning to Native American tribes the human remains and artifacts that had been taken for profit, gain, exploitation, or rank curiosity without regard to

the concerns of the Native American tribe whose legitimate and paramount interest should have been recognized. However, the definition of "museum" in the text of NAGPRA sweeps much wider than that. If interpreted literally, it would include any state or local governmental entity that "has possession of, or control over, Native American cultural items[]" regardless of the circumstances surrounding the possession. This could include any items given freely by a member of the tribe. Here, it would include human remains buried in accordance with the wishes of the decedent's next-of-kin. Literal application would even reach situations where the remains of a Native American were disposed of in a manner consistent with the deceased's wishes as appropriately memorialized in a testamentary instrument or communicated to his or her family. There is therefore no limitation that would preserve the final wishes of a given Native American or exempt determination of his or her final resting place from the procedural requirements of NAGPRA.[16]

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[16] NAGPRA defines a museum's legitimate right of possession to include human remains that were freely given by the decedent's next-of-kin. 25 U.S.C. § 3001(13) ("The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin . . . is deemed to give right of possession to those remains.").

The statute does not explain the legal effect of this definition. NAGPRA provides that a museum may keep certain items requested by a descendent or tribe if the museum "prove[s] that it has a right of possession to the objects." 25 U.S.C. § 3005(c). However, this section by its terms does not apply to human remains, and instead only applies to "unassociated funerary objects, sacred objects or objects of cultural patrimony[.]" *Id.* Even if this section was interpreted to apply to human remains, however, it is not clear that a museum with a right of possession

"We have reserved some scope for adopting a restricted rather than a literal or usual meaning of [a statute's] words where acceptance of that meaning would thwart the obvious purpose of the statute." *Griffin*, 458 U.S. at 571 (internal quotations, ellipsis and citation omitted). Here, it is clear that the congressional intent to regulate institutions such as museums and to remedy the historical atrocities inflicted on Native Americans, including plundering of their graves, is not advanced by interpreting "museum" to include a gravesite that Thorpe's widow intended as Thorpe's final resting place. As we stated earlier, Plaintiffs do not maintain that Patsy was without authority to determine where Thorpe was to be buried. Moreover, as also explained above, the record is clear that Plaintiffs delayed bringing this suit until certain of Thorpe's survivors who favored his burial in the Borough died.

As stated in the House Report, "[t]he purpose of [NAGPRA] is to protect Native American burial sites and the *removal* of human remains." H.R. Rep. (emphasis added). NAGPRA was intended as a shield against further injustices to Native Americans. It was not intended to be wielded as a sword to settle familial disputes within Native American families. Yet, that is what we would allow if we were to enforce NAGPRA's repatriation provisions as written here.

Aside from the unusual arrangements between Patsy Thorpe and the Borough, and Plaintiffs' understandable desire to move Thorpe's remains to

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over those remains would be exempt from the procedural and inventory requirements of NAGPRA.

where they prefer for him to be buried,[17] his burial in the Borough is no different than any other burial, except that he is a legendary figure of Native American descent. If we were to find that NAGPRA applies to Thorpe's burial, we would also have to conclude that it applies to any grave located in "any institution or State or local government agency . . . that receives federal funds and has possession of, or control over, Native American cultural items." This could call into question any "institution" or "State or local government agency" that controls a cemetery or grave site where Native Americans are buried, and would give rights to any lineal descendant or tribe that has a claim to a person buried in such a cemetery. The Amicus brief on behalf of Thorpe's grandsons, Michael Koehler and John Thorpe, makes this clear:

> Imagine a scenario where a deceased person is buried by his widow at the site of her choosing. But after the widow dies, the next generation – or even complete strangers in the case of a tribe – decides to dig up the body with court approval and move it somewhere else for any reason they desire. They aren't even required to bury the

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[17] Nothing we have said prevents Plaintiffs from seeking reinterment via an action in Pennsylvania state court. However, "once a body is interred there is great reluctance in permitting same to be moved, absent clear and compelling reasons for such a move." *Novelli v. Carroll*, 420 A.2d 469, 476 (Pa. Super. Ct. 1980) (Watkins, J., dissenting) (citing *Stevens v. Ganz*, 49 Pa. D. & C.2d 283, 286 (1970)); *see also Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904) ("With regard to a reinterment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent, and reserving always the right of the court to require reasonable cause to be shown for it.").

> remains. This is not a "parade of horribles" conjured up by the Thorpe grandsons. That is their reality. If the district court's decision is allowed to stand, this scenario can repeat for funerals past and future as long as the deceased has any Native American ancestry.

Amicus Br. for Koehler and Thorpe, at 5. Accordingly, "based solely on the language and context of the most relevant statutory provisions, the court cannot say that Congress's intent is so clear and unambiguous that it 'foreclose[s] any other interpretation.'" *King v. Burwell*, 759 F.3d 358, 369 (4th Cir. 2014) (quoting *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1367, 1377 (Fed. Cir. 2011)).

There are numerous indications that Congress did not intend for NAGPRA to apply to this situation. The Senate Report explains that the statute was designed to "provide additional protections to Native American burial sites. Indian tribes have had many difficulties in preventing the illegal excavation of graves on tribal and Federal lands [, and] tribal and Federal officials have been unable to prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors." S. Rep. The Amicus brief submitted by the National Congress of the American Indians in support of Plaintiffs summarized the Antiquities Act of 1906. That Act defined Native American remains on federal lands as "archeological resources[.]" Amicus Br. of Nat'l Cong. of the Am. Indians, at 6. The collateral consequence was the disinterment of many remains for preservation in museums. The amici also refer to the Archaeological Resources Protection Act of 1979. That statute also deemed Native American remains on federal lands as

"archaeological resources" and permitted those remains to be disinterred. *Id.* at 6-7. This was in "sharp contrast to the legal treatment of non-Indian burials and remains, which were generally protected from looting and disturbance. NAGPRA was needed to ensure *equal treatment* of Native American remains." *Id.* (emphasis added). With this objective, "Congress sought to repatriate human remains and other objects by ensuring human remains . . . are returned." *Id.* at 10.

Our conclusion that Congress did not intend the result required by a literal application of the text of NAGPRA is reinforced by examining multiple sections of the statute. For example, as noted earlier, § 3001(13) defines "right of possession" to include human remains freely given by the deceased or the deceased's next of kin. This definition is further evidence of Congress's intent to exclude situations such as Thorpe's burial in the Borough. Our conclusion is also consistent with the inventory requirement. Section 3003 applies to a "museum which has possession or control over *holdings or collections of Native American human remains*[.]" This implies that the statute assumes that a museum is holding or collecting the remains for the purposes of display or study, as opposed to serving as an original burial site. Finally, NAGPRA requires that remains be "returned." 25 U.S.C. § 3005. This assumes that the human remains were moved from their intended final resting place. Thorpe was buried in the Borough by his wife, and she had the legal authority to decide where he would be buried. Thus, there is nowhere for Thorpe to be "returned" to. As the House Report explains: "[f]or many years, Indian tribes have attempted to have the

remains and funerary objects of their ancestors returned to them." H.R. Rep. (emphasis added).

Thorpe's remains are located at their final resting place and have not been disturbed. We find that applying NAGPRA to Thorpe's burial in the Borough is such a clearly absurd result and so contrary to Congress's intent to protect Native American burial sites that the Borough cannot be held to the requirements imposed on a museum under these circumstances. We reverse the District Court and hold that the Borough is not a "museum" under NAGPRA for the purposes of Thorpe's burial.[18]

V. CONCLUSION

For the foregoing reasons, we will reverse the judgment of the District Court as to the applicability of NAGPRA to the burial of Jim Thorpe in the Borough, and affirm the District Court's dismissal of Plaintiffs' § 1983 claim. We will remand the action for the District Court to enter judgment in favor of Appellant, the Borough of Jim Thorpe.

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[18] In the cross-appeal, the Plaintiffs challenge the District Court's finding that they cannot obtain relief for a violation of NAGPRA under 42 U.S.C. § 1983. In light of our finding that NAGPRA is not applicable to Thorpe's burial in the Borough, Plaintiffs cannot sustain a claim for a violation of NAGPRA under either that statute or § 1983. Therefore we will affirm the District Court's dismissal of Plaintiffs' § 1983 claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

JOHN THORPE, RICHARD THORPE, WILLIAM THORPE, and the SAC and FOX NATION OF OKLAHOMA,	CIVIL ACTION NO. 3:CV-10-1317 (JUDGE CAPUTO)
Plaintiffs,	
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 JOANA KLITSCH,	
Defendants.	

MEMORANDUM

Presently before the Court are the Borough of Jim Thorpe's (the "Borough") Motion and Cross-Motion for Summary Judgment (Docs. 93; 99) and Plaintiffs the Sac and Fox Nation of Oklahoma, Richard Thorpe, and William Thorpe's (collectively, "Plaintiffs") Motion for Summary Judgment. (Doc. 95.) Following his death in 1953, legendary athlete Jim Thorpe, an American

Indian of Sauk heritage and an enrolled member of the Sac and Fox Nation, was buried in what became known as the Borough of Jim Thorpe, Pennsylvania. The series of events that resulted with the burial of Jim Thorpe in Pennsylvania included an agreement between Jim Thorpe's wife at the time of his death, Patricia Thorpe, and two neighboring municipalities. The municipalities and Patricia Thorpe agreed, among other terms, that the municipalities would unify and consolidate as the Borough of Jim Thorpe and the remains of Jim Thorpe would be interred in a mausoleum in the Borough. Dissatisfied with this arrangement, Jim Thorpe's two living sons and the Sac and Fox Nation maintained this action against the Borough and its officers under the Native American Graves Protection and Repatriation Act.

Now, following the close of discovery, Plaintiffs seek summary judgment in their favor and a declaration that the Native American Graves Protection and Repatriation Act applies to the Borough and the remains of Jim Thorpe. The Borough opposes Plaintiffs' motion and also requests summary judgment in its favor. The Borough argues that the Court lacks jurisdiction to entertain this action pursuant to the "probate exception" to federal jurisdiction. The Borough further asserts that it is not a "museum" under the Native American Graves Protection and Repatriation Act because it never received "Federal funds", or, alternatively, that Plaintiffs' claims are barred by the doctrine of laches. Because the "probate exception" to federal jurisdiction is inapplicable to the instant matter and the Borough did not suffer any prejudice from Plaintiffs' delay in commencing suit, the Borough's motion for summary

judgment will be denied. Moreover, because the Borough qualifies as a "museum" for purposes of the Native American Graves Protection and Repatriation Act, Plaintiffs' motion for summary judgment will be granted and the Borough's cross-motion will be denied.

I. Background

A. Factual Background

Legendary athlete Jim Thorpe died on March 28, 1953. (Doc. 98, *Pls.' Statement Material Facts*, "*Pls.' SMF*", ¶ 1; Doc. 100, *Def.'s Ans. Pls.' SMF*, "*Def.'s Answer*", ¶ 1.) Jim Thorpe was an American Indian of Sauk heritage and an enrolled member of the Sac and Fox Nation. (*Id.*) At the time of his death, Jim Thorpe was married to his third wife, Patricia Thorpe. (Doc. 94, *Def.'s Statement Material Facts*, "*Def.'s SMF*", ¶ 10; Doc. 104, *Pls.' Answer to Def.'s SMF*, "*Pls.' Answer*", ¶ 10.) Jim Thorpe was also survived by four daughters and four sons. (*Def.'s SMF*, ¶¶ 14-15; *Pls.' Answer*, ¶¶ 14-15.) When he died, Jim Thorpe's residence was in Lomita, California. (*Def.'s SMF*, 11; *Pls.' Answer*, 11.) Today, Plaintiffs Richard and William Thorpe are Jim Thorpe's sole surviving children. (*Pls.' SMF*, ¶ 2; *Def.'s Answer*, ¶ 2.)

Following Jim Thorpe's death, traditional Sac and Fox funeral and burial rites were commenced, but were interrupted and never completed. (*Pls.' SMF*, ¶ 5.) Jim Thorpe died intestate, and his estate was assigned to Patricia Thorpe, his surviving spouse. *Def.'s SMF*, Ex. C, 10.)

Subsequently, Patricia Thorpe entered into an agreement dated May 19, 1954 with the Boroughs of Mauch Chunk and East Mauch Chunk that set forth terms and conditions for the renaming of the

municipalities and the interment of Jim Thorpe. (*Defs. SMF*, ¶ 20.) As part of the Agreement, the municipalities were consolidated under the name "Jim Thorpe." (*Id.* at ¶ 21.) The Agreement provided that Patricia Thorpe, her heirs, administrators and executors would not remove or cause to be removed the body of Jim Thorpe, and such obligations were binding "upon the first party and upon her heirs, administrators and executors only for so long as the boroughs of East Mauch Chunk and Mauch Chunk, parties hereto, are officially known and designated as 'Jim Thorpe.'" (*Id.* at ¶ 23, Ex. D.) Individual Plaintiffs and the Sac and Fox Nation, however, were not parties to the Agreement. (*Pls.' SMF*, ¶ 6; *Def.'s Answer*, ¶ 6.) Pursuant to the Agreement, Jim Thorpe's remains were interred within the Borough, and the remains continue to be interred on Borough-owned land in a mausoleum maintained by the Borough. (*Def.'s SMF*, ¶¶ 25-26; *Pls.' Answer*, ¶¶ 25-26; *Pls.' SMF*, ¶ 7; *Def.'s Answer*, ¶ 7.) Mauch Chunk and East Mauch Chunk changed their identity to that of a single Borough under the name of Jim Thorpe, and the Borough has maintained the interment site for the last fifty-five years. (*Def.'s SMF*, ¶¶ 27-31; *Pls.' Answer*, ¶¶ 27-31.)

Plaintiff William Thorpe has been aware that his father was buried in the Borough since the 1950s. (*Def.'s SMF*, ¶ 34; *Pls.' Answer*, ¶ 34.) William and his brothers contemplated filing a lawsuit back in the 1950s or 1960s but did not because of a difference of opinion with their half sisters. (*Def.'s SMF*, ¶ 35.) William Thorpe also had discussions about commencing an action under the Native American Graves Protection and Repatriation Act in the early

1990s, but no action was brought at that time. (*Id.* at ¶ 41, (citing *William Thorpe Dep. Tr.*, 34:13-25).)

Plaintiff Richard Thorpe learned that his father was buried in Pennsylvania years ago by reading the newspaper. (*Id.* at ¶ 42 (citing *Richard Thorpe Dep. Tr.*, 22:20-23:4).) Approximately fifteen or sixteen years ago, Richard Thorpe visited his father's burial site in Pennsylvania. (*Id.* at ¶ 43.)

B. Procedural History

John Thorpe filed a complaint against the Defendants on June 24, 2010. Defendants moved to dismiss the complaint on August 23, 2010; the motion was granted in part and denied in part in an order issued February 4, 2011. John Thorpe's claim under § 1983 was dismissed, but he was allowed to proceed with his claim under the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001 to 3013. Further, he was ordered to join all necessary parties in an amended complaint or to submit evidence and briefing showing that joinder of any or all of the necessary parties was not feasible and that the action could proceed in "equity and good conscience" under Rule 19(b).

On February 22, 2011, John Thorpe died, and the proceedings were stayed for sixty-seven days. Counsel for John Thorpe filed an amended complaint on May 2, 2011, adding as Plaintiffs Richard and William Thorpe, the sole surviving sons of Jim Thorpe, and the Sac and Fox Nation. The First Amended Complaint re-alleged Plaintiffs' § 1983 claims to preserve them for appeal and also set forth a claim under the Equal Access to Justice Act, 28 U.S.C. § 2412(b). The Borough filed a motion to dismiss the amended

complaint on May 20, 2011, and then another motion to dismiss on other grounds on June 16, 2011. The individual Defendants filed a motion to dismiss the amended complaint on May 20, 2011, and then another motion to dismiss on other grounds on June 22, 2011. On November 23, 2011, Defendants' motions to dismiss were granted in part, and Plaintiffs' § 1983 and Equal Access to Justice Act claims were dismissed. However, I further determined that Jim Thorpe's lineal descendants were not necessary parties to this action under Rule 19. Plaintiffs were also granted leave to file an amended pleading.

On December 13, 2011, Plaintiffs filed a Second Amended Complaint seeking permanent injunctive relief requiring the Borough to comply with NAGPRA, declarations that the Borough is a "museum" as defined by NAGPRA and in violation of the statute's requirements, and a judgment for attorney's fees and costs. The Borough filed its Answer and Affirmative Defenses to the Second Amended Complaint on January 25, 2012.[1]

The action proceeded to discovery. On December 31, 2012, the Borough and Plaintiffs both filed motions for summary judgment. (Docs. 93; 95.) The Borough, on January 18, 2013, filed its opposition to Plaintiffs' motion for summary judgment and a "cross-motion for summary judgment." (Doc. 99.) On January 24, 2013, Plaintiffs' response to the Borough's motion for

[1] On December 28, 2011, individual Defendants were granted until January 26, 2012 to respond to Plaintiffs' Second Amended Complaint. (Doc. 74.) It appears from the docket that no response was filed.

summary judgment was filed. (Doc. 105.)[2] On February 4, 2013, Plaintiffs filed their reply brief to the Borough's response and cross-motion for summary judgment. (Doc. 107.) Lastly, on February 5, 2013, the Borough filed a reply brief to Plaintiffs' response to its summary judgment motion. (Doc. 108.) The motions for summary judgment are therefore fully briefed and ripe for disposition.

II. Discussion

A. Legal Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and

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[2] The Borough contends that Plaintiffs' response filed on January 24, 2013 was untimely. (Doc. 108, 1 n.1.) "A brief in opposition to a motion for summary judgment and L.R. 56.1 responsive statement, . . . shall be filed within twenty-one (21) days after service of the movant's brief." M.D. Pa. Local Rule 7.6. While not specified by the Borough, the Borough's submission implies that Plaintiffs' response was due on or before January 22, 2013 (as January 21, 2013 was a "legal holiday"). *See* Fed. R. Civ. P. 6(a)(1)(C); *see also* Fed. R. Civ. P. 6(a)(6). However, Rule 6(d) provides that "[w]hen a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)." Fed. R. Civ. P. 6(d). Here, the Borough served its motion for summary judgment and supporting documents on December 31, 2012 "by electronic service pursuant to the ECF system." (Doc. 97.) Because service of the Borough's motion was made by electronic means under Rule 5(b)(2)(E), three days were added to January 22, 2013, resulting in a response deadline of January 25, 2013. Plaintiffs' response filed on January 24, 2013 was therefore timely.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Wright v. Corning*, 679 F.3d 101, 103 (3d Cir. 2012) (quoting *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995)). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248(1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. *See Edelman v. Comm'r of Soc. Sec.*, 83 F.3d 68, 70 (3d Cir. 1996). Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Anderson*, 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.* Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* 2D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the non-moving party has the burden of proof, simply point out to the court that "the non-moving party has failed to make a sufficient showing on an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"When considering whether there exist genuine issues of material fact, the court is required to examine the evidence of record in the light most

favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *Anderson*, 477 U.S. at 256-57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

"To prevail on a motion for summary judgment, the non-moving party must show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial." *Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007) (citing Fed. R. Civ. P. 56(e)). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." *Id.* (quoting *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005)). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Where cross-motions for summary judgment are filed, as is the case here, the summary judgment standard remains the same. *Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008). Of course, when presented with cross motions for summary judgment,

the Court must and does consider the motions separately. *See Williams v. Phila. Hous. Auth.*, 834 F. Supp. 794, 797 (E.D. Pa. 1993), *aff'd*, 27 F.3d 560 (3d Cir. 1994).

B. Summary Judgment Motions

1. The Borough's Motion and Cross-Motion

As noted, the Borough filed its summary judgment motion on December 31, 2012. The Borough asserts that the Court lacks jurisdiction to resolve Plaintiffs' request for relief pursuant to the "probate exception" to federal jurisdiction. Furthermore, the Borough maintains that Plaintiffs' request for equitable relief under the NAGPRA is barred by the doctrine of laches. Additionally, in its cross-motion for summary judgment, the Borough argues that it only benefitted from "Federal funds" since the enactment of the NAGPRA. As a result, the Borough contends that it is not a "museum" for purposes of the statute.

2. Plaintiffs' Motion

Plaintiffs' motion for summary judgment was also filed on December 31, 2012. Specifically, Plaintiffs seek a declaration that the NAGPRA applies to the Borough and to the remains of Jim Thorpe.[3] Plaintiffs further request a declaration that the Borough must comply with the repatriation provisions of the NAGPRA. In support, Plaintiffs contend that the provisions of the NAGPRA apply in this case because:

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[3] In opposition to Plaintiffs' motion for summary judgment, the Borough asserts that Plaintiffs are required to establish the four equitable elements for entry of an injunction. Plaintiffs respond by emphasizing that they have only sought a declaration as to the applicability of the NAGPRA. (Doc. 107, 17-20.)

(1) the Borough has control and possession over Jim Thorpe's remains; (2) the Borough is a "museum" under the NAGPRA since it received "Federal funds"; and (3) the Borough has no legal claim under the NAGPRA or otherwise to retain Jim Thorpe's remains. And, according to Plaintiffs, as there are no material facts in dispute regarding their entitlement to invoke the NAGPRA, summary judgment in their favor is appropriate.

C. Analysis

1. The "Probate Exception" Does Not Bar Jurisdiction

The Borough's threshold argument in moving for summary judgment is that the "probate exception" to federal jurisdiction bars the Court from entertaining Plaintiffs' request for relief. According to the Borough, federal courts lack power "to exercise *in rem* jurisdiction over probate property (including remains by extension) that had previously been validly adjudicated by another court." (Doc. 96, 8.) The Borough further maintains that "Plaintiffs are attempting to overrule, undermine, and challenge the surviving spouse/executrix's and California Court's decision from 60 years ago without returning to that Court for relief." (Doc. 108, 13.)

Plaintiffs dispute the relevance of the "probate exception" to bar jurisdiction over their claims under the NAGRPA. Specifically, Plaintiffs assert that the Borough fails to recognize that human remains are not part of a decedent's probate estate. (Doc. 105, 6.) Furthermore, as this case does not raise any issues with respect "to any will or administration of Jim Thorpe's estate or distribution of any property," (Doc.

98, 34 n.54), Plaintiffs argue that the "probate exception" is inapplicable to this action. The "probate exception" to federal jurisdiction is not "compelled by the text of the Constitution or federal statute," but is instead a "doctrine[ ] stemming in large measure from misty understandings of English legal history." *Marshall v. Marshall*, 547 U.S. 293, 300 (2006). Under the exception, a federal court "has no jurisdiction to probate a will or administer an estate." *Markham v. Allen*, 326 U.S. 490, 494 (1946). In *Markham*, however, the Court recognized that the "probate exception" does not bar a federal court from exercising jurisdiction over all claims related to such a proceeding:

> [F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction over the probate or control of the property in the custody of the state court.
>
> Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

Id. (citations and internal citations omitted).

Sixty years later, the Supreme Court indicated concern with lower courts' interpretation of *Markham*, as some courts "puzzled over the meaning of the words 'interfere with the probate proceedings,' and some . . . read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate." *Marshall*, 547 U.S. at 311. The Court interpreted "*Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe 'disturb[ing] or affect[ing] the possession of property in the custody of a state court.'" *Id.* at 311. *Marshall* thus clarified the scope of the "probate exception" to federal jurisdiction:

> [W]e comprehend the "interference" language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Id. at 311-12.

Following *Marshall*, the "probate exception" applies only when a federal court is endeavoring to "(1) probate or annul a will, (2) administer a decedent's estate, or (3) assume *in rem* jurisdiction over property that is in the custody of the probate court." *Three Keys*

Ltd. v. SR Util. Holding Co., 540 F.3d 220, 227 (3d Cir. 2008).

For several reasons, the "probate exception" to federal jurisdiction is inapplicable to this case. Initially, neither the Supreme Court nor the Third Circuit has determined that there exists an uncodified exception to a federal court's jurisdiction over an enforcement action under the NAGPRA. *Cf. Marshall*, 547 U.S. at 308-09 ("We therefore need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under § 1334."). Likewise, there have been no decisions from other federal courts addressing the applicability of the "probate exception" to claims under the NAGPRA. Moreover, it is uncertain if the "probate exception" "even applies to federal question cases." *See United States v. Tyler*, No. 10-1239, 2012 WL 848239, at *4 (E.D. Pa. Mar. 13, 2012) (comparing *Jones v. Brennan*, 465 F.3d 304, 306 (7th Cir. 2006) (probate exception applicable to both federal question and diversity cases); *Tonti v. Petropoulous*, 656 F.2d 212, 215–16 (6th Cir. 1981) (same), with *In re Goerg*, 844 F.2d 1562, 1565 (11th Cir. 1988) (probate exception applicable only to diversity cases)).[4] While this issue has not been addressed by the Third Circuit, the exception has been described "as an 'exception to diversity jurisdiction.'" *Id.* (quoting *Three Keys*, 540 F.3d at 222, 226, 227; *Golden ex. rel. Golden v. Golden*,

[4] The Ninth Circuit also found the "probate exception" applicable to both federal question and diversity cases. *In re Marshall*, 392 F.3d 1118, 1131-32 (9th Cir. 2004). The Supreme Court reversed on other grounds without considering "whether there exists any uncodified probate exception to federal bankruptcy jurisdiction." *Marshall*, 547 U.S. at 308-09.

382 F.3d 348, 352, 354, 357 (3d Cir. 2004); *Marshall v. Lauriault*, 372 F.3d 175, 179–82 (3d Cir. 2004); *Moore v. Graybeal*, 843 F.2d 706, 709 (3d Cir. 1988)). And, the "domestic relations exception," a jurisdictional limitation closely related to the "probate exception," "does not apply in federal question cases." *Id.* (citing *Flood v. Braaten*, 727 F.2d 303, 307 (3d Cir. 1984) ("[T]he domestic relations exception *per se* applies only to actions in diversity.")).

Even if the "probate exception" applies to claims under the NAGPRA, however, the Borough has failed to establish that the claims in this action fall under any of the prohibitions to federal jurisdiction identified by the Supreme Court in *Marshall* or the Third Circuit in *Three Keys*.

First, this action does not implicate the "probate or annulment of a will," as Jim Thorpe died without a will. *See Marshall*, 547 U.S. at 311-12.

Second, the instant dispute does not involve a request for this Court to administer Jim Thorpe's estate. *See Marshall*, 547 U.S. at 311-12. "The basic purposes of administering a decedent's estate are to preserve and protect the estate; to satisfy and discharge all debts and claims, including expenses of administration, that are charges or liens on the property; and to distribute the residue of the property, at a proper time, to those persons who are entitled to receive it." *Estate of Jiminez*, 65 Cal. Rptr. 2d 710, 714 (Cal. Ct. App. 1997). Estate administration thus involves "ascertaining the nature, extent, and total value of the decedent's property and transferring it to the proper persons, who include creditors and taxing authorities as well as heirs." *In re Estate of Bonanno*,

80 Cal Rptr. 3d 560, 567 (Cal. Ct. App. 2008). Here, Plaintiffs' claims do not require the Court to ascertain the nature or extent of Jim Thorpe's estate or otherwise distribute or transfer estate property.

Third, contrary to the claims of the Borough, Plaintiffs do not seek to have the Court assume *in rem* jurisdiction over property that is in the custody of a probate court. *See Marshall*, 547 U.S. at 311-12. Indeed, the Borough's arguments that Jim Thorpe's remains are probate property and disputes over his remains must be raised in a California probate court are nearly identical to those rejected in *Estate of Jiminez*. In that case, a dispute among heirs was brought in a probate court concerning the decedent's wishes for her burial. *See Estate of Jiminez*, 65 Cal. Rptr. 2d at 712. While the decedent left a will, it did not contain any instructions concerning disposition of her remains. *See id.* at 711. The probate court dismissed the petition on the ground that the dispute over the disposition of remains was not within the jurisdiction of the probate court. *See id.*

The California Court of Appeal affirmed the probate court's order of dismissal. *See id.* Significantly, the court recognized that "[t]he body of one whose estate is in probate unquestionably forms no part of the property of that estate." *Id.* at 714 (Cal. Ct. App. 1997); *see also Kulp v. Kulp*, 920 A.2d 867, 872 (Section 305 of the Probate, Estates, and Fiduciaries Code supports the position "that the right to dispose of a decedent's remains is not a property right"); *Wynkoop v. Wynkoop*, 42 Pa. 293, 1861 WL 5846 (Pa. 1862) ("There is no right of property in such [human] remains, from their very nature."). The court further rejected the claim that Health and Safety Code section

7100 empowered a probate court to enforce its provisions.[5] Rather, because section 7100 relates only to "initial burial decisions" and its "provisions are not located in the Probate Code, they do not specifically empower the probate court to enforce them." *Estate of Jiminez*, 65 Cal. Rptr. 2d at 713 (quoting *Walker v. Konitzer*, 31 Cal. Rptr. 906 (Cal. Ct. App. 1963)). Accordingly, "where the decedent's wishes are not contained in the will itself, a dispute over disposition of the remains belongs in the civil court, not probate." *Id.* at 715. Moreover, "the fact that the question of disinterment is said to be a matter for the court sitting in equity further tends to suggest that a request, if not based on the terms of the will itself, is not a probate matter." *Id.* at 715 (internal citations omitted).

Consistent with California law, and the law generally, the body of one whose estate is in probate is not part of the property of the estate. *See, e.g.*, 22A Am. Jur. 2d *Dead Bodies* § 3 (2013) ("At common law, there is no property right in the body of a deceased person," and "the body of a deceased forms no part of the property of one's estate in the usual sense, as do other chattels or property."). Therefore, Jim Thorpe's remains were not estate property in custody of a California probate court. Plaintiffs' claims, as a result, do not endeavor to have the Court "assume *in rem* jurisdiction over property that is in the custody of the probate court," *Three Keys*, 540 F.3d at 227, or involve "disturbing or affecting the possession of property in

[5] Section 7100 governs the right to control the disposition of the remains of a deceased person. *See* Cal. Health & Safety Code § 7100 (2013).

the custody of a state court." *Marshall*, 547 U.S. at 311.[6]

In accordance with *Marshall*, Plaintiffs' claims fall "outside the bounds of the probate exception." *Marshall*, 547 U.S. at 308. The Borough's motion for summary judgment pursuant to the "probate exception" to federal jurisdiction will therefore be denied.

2. Applicability of the NAGPRA to the Borough

a. Overview of the NAGPRA

Congress passed the Native American Graves Protection and Repatriation Act, codified at 25 U.S.C. §§ 3001-3013, in 1990 "to strengthen federal protection of Native American burial sites and to enable tribes to pursue the recovery of sensitive materials in museum collections." Martin Sullivan, *A Museum Perspective on Repatriation: Issues & Opportunities*, 24 Ariz. St. L.J. 283, 283 (1992) (citing 25 U.S.C. §§ 3001-3013).

The NAGPRA protects Native American "cultural items," which include human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3)(A)-(D). The NAGPRA gives Native Americans an interest of ownership or control in Native American cultural items in two circumstances. *See* H.R. Rep. No. 101-877, at 8-9 (1990). First, it gives a right to repatriation of Native

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[6] And, contrary to the Borough's suggestion, Plaintiffs were not required to bring their claims in a California probate court as a result of section 7100. As Plaintiffs note, pursuant to *Estate of Jimenez*, had they brought their claims in a probate court, the action would necessarily have been dismissed for lack of jurisdiction.

American cultural items – including human remains – that are excavated or discovered on federal or tribal lands. *Id.* Second, the act gives a right of repatriation when these items are possessed or controlled by museums or federal agencies.[7]

At issue in this case are the museum provisions, which address Native American cultural items – including human remains – possessed or controlled by a museum or federal agency. *See* 25 U.S.C. §§ 3002-3008. A "museum" is defined as:

> any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

25 U.S.C. § 3001(8).

Museums and federal agencies which have "possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item."

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[7] Consistent with these objectives, the NAGPRA provisions can be divided into two groups: the "discovery" provision, and the "museum" provisions. The discovery provision relates to Native American human remains, funerary objects, sacred objects and objects of cultural patrimony that are excavated or discovered on Federal or tribal lands after November 16, 1990. *See* 25 U.S.C. § 3002. The discovery portion of the NAGPRA is not at issue in this case.

Id. at § 3003.[8] Once the cultural affiliation of Native American human remains is established, a lineal descendant of the Native American or the tribe may request the return of the remains. *Id.* at § 3005(a).

Congress provided that the Secretary of the Interior would establish a committee of seven members to review and make findings related to the repatriation of cultural items "upon the request of any affected party." 25 U.S.C. § 3006(c)(3). Additionally, the committee is responsible for "facilitating the resolution among . . . lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable." *Id.* at § 3006(c)(4). The records and findings the review committee makes relating to the repatriation of human remains may be admissible in an action brought under the NAGPRA. *Id.* at § 3006(d).

The NAGPRA provides lineal descendants with a right to request their ancestors' remains, and they can avail themselves of a private right of action to enforce the repatriation provisions. (Doc. 22, 15 (citing 25

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[8] "Native American human remains" is not statutorily defined. However, the implementing regulations promulgated by the Secretary of the Interior define "human remains" as "the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets." 43 C.F.R. 10.2(d)(1). It is undisputed that Jim Thorpe was an American Indian of Sauk heritage and an enrolled member of the Sac and Fox Nation. (*Pls.' SMF*, ¶ 1; *Def.'s Answer*, ¶ 1.) I previously determined that "Native American human remains" "plainly encompasses the remains of Jim Thorpe." (Doc. 22, 21.)

U.S.C. § 3002(a)(1); 25 U.S.C. § 3013).) Indeed, when disputes under the NAGPRA arise, "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013.

b. The Borough is a "Museum" Under the NAGPRA

The applicability of the NAGPRA to the Borough depends on whether the Borough qualifies as a "museum" under the statute. (Doc. 22, 19-22.) Here, the Borough does not dispute that it has possession or control over the remains of Jim Thorpe "like a cemetery has control of remains buried within its lot." (Doc. 101, 4.) Nor does the Borough contest that Jim Thorpe was a Native American or a member of the Sac and Fox Nation. (*Def.'s Answer*, ¶ 1.) Thus, the Borough's status as a "museum" for purposes of the NAGPRA depends on whether it "receive[d] Federal funds." 25 U.S.C. § 3001(8). Plaintiffs claim that the Borough was the recipient of "Federal funds" in at least the following instances: (1) a federal grant under the American Recovery and Reinvestment Act of 2009 ("ARRA"), which was administered by the Pennsylvania Infrastructure Investment Authority ("PENNVEST") and was awarded to fund the replacement of water meters within the Borough (Doc. 98, Ex. 5, "013", "019"); (2) federal relief grants from the Federal Emergency Management Agency ("FEMA"), which, although administered by the Pennsylvania Emergency Management Agency ("PEMA"), the "federal share" of the payment was approved by FEMA (Doc. 98, Ex. 6, "004"; Ex. 15,

"009"); (3) yearly grants funded by the United States Department of Housing and Urban Development's Community Development Block Grant ("CDBG") program, which were administered by the Carbon County Office of Planning and Development, totaling $787,965.00 to the Borough for 2005-2011 (Doc. 98, Ex. 7, "001", "016", "027", "038", "045", "053", "060", "068"); (4) a Bond Purchase Agreement administered by PENNVEST to finance construction of improvements to the Borough's public water system facilities (Doc. 98, Ex. 5, "001", "004", "079-122"); and (5) other water and sewer related projects administered by PENNVEST. (Doc. 98, Ex. 5, "001".)

The Borough has not questioned the authenticity of the documentation submitted by Plaintiffs. However, the Borough disputes the characterization of these funds as "Federal" for purposes of the NAGPRA since these funds were received by the Borough from agencies of the Commonwealth or Carbon County.

The phrase "receives Federal funds" is not defined by statute. NAGPRA's regulations, however, provide:

> The phrase "receives Federal funds" means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government

> or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.

43 C.F.R. § 10.2(a)(3)(iii). Pursuant to this definition, Plaintiffs assert that the NAGPRA's "Federal funds" requirement can be satisfied by direct or indirect receipt of funds from the Federal Government. Satisfaction of the "Federal funds" requirement through indirect funding, Plaintiffs contend, is permissible and consistent with the Supreme Court's decision in *Gove City College v. Bell*, 465 U.S. 555 (1982).

Grove City addressed the prohibition on sex discrimination in educational programs receiving "Federal financial assistance" under Section 901(a) of Title IX of the Education Amendments of 1972. *Grove City*, 465 U.S. at 557.[9] Among other issues before the Court was "whether Title IX applies at all to Grove City College, which accepts no direct assistance but enrolls students who receive federal grants that must be used for educational purposes." *Id.* at 558. Based on its desire to avoid federal oversight, Grove City, a private, coeducational college, declined to participate in direct institutional aid programs and federal student assistance programs. *See id.* at 559. However, the College enrolled a large number of students who received federal grants that were used to pay for their

[9] Section 901(a), 20 U.S.C. § 1681(a), provided that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . ." 28 U.S.C. § 1681(a).

education. *See id.* The College nonetheless argued that it did not receive federal financial assistance within the meaning of Title IX simply because some of its students received federal grants to fund their tuition and pay for their education. *See id.* at 563.

According to the Supreme Court, "Grove City's argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of § 901(a)." *Id.* at 564. Significantly, the Court found "no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation." *Id.* (citation omitted). The Court further emphasized that "by its all inclusive terminology § 901(a) appears to encompass all forms of federal aid to education, direct or indirect. We have recognized the need to accord Title IX a sweep as broad as its language, and we are reluctant to read into § 901(a) a limitation not apparent on its face." *Id.* (citations, internal citations, and quotations omitted).[10]

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[10] The *Grove City* Court also held that the anti-discrimination language of § 901(a) was "program specific." *Grove City*, 465 U.S. at 570-71. In other words, the prohibition on discrimination applied only to an institution's operation of the particular program that received federal funds. In response to this determination, Congress passed the Civil Rights Restoration Act of 1987 to broaden the definition of "program or activity" so that the anti-discrimination provisions would apply "institution-wide." Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, note following 20 U.S.C. § 1687; *see also Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 551 F.3d 193, 200 (3d Cir. 2008) (explaining the passage of the Civil Rights Restoration Act of 1987 as a response to *Grove City* and its progeny).

The Borough asserts that *Grove City* is inapplicable to the instant dispute. Instead, the Borough argues that resolution of the "Federal funds" issue is controlled by the Supreme Court's decision in *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

Paralyzed Veterans involved the prohibition on discrimination against qualified handicapped persons in any program or activity receiving federal financial assistance under Section 504 of the Rehabilitation Act of 1973 . *See Paralyzed Veterans*, 477 U.S. at 599. Under the Airport and Airways Development Act of 1970, the United States provided financial assistance to airport operators. The Government also operated the nationwide air traffic control system. *See id.* The issue before the Court was "whether, by virtue of such federal assistance, § 504 is applicable to commercial airlines." *Id.*

The Court first emphasized that § 504 required identification of the recipient of the federal assistance, which involved consideration of the underlying grant statutes. *See id.* at 604. After reviewing these grant statutes, the Court found that Congress "made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of § 504 is the operator of the airport and not its users." *Id.* at 605. Congress, according to the *Paralyzed Veterans* Court, imposed the obligations of § 504 only upon "those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." *Id.* at 606.

The Court also addressed and rejected the respondents' claim that the airlines were "indirect recipients" of the aid to airports. *See id.* The respondents' argument, which they claimed was consistent with *Grove City*'s recognition that federal financial assistance could be direct or indirect, confused "intended *beneficiaries* with intended *recipients*." *Id.* (emphasis in original). *Grove City*, as interpreted by the *Paralyzed Veterans* Court, "stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly," but it does not provide that federal coverage "follows the aid past the recipient to those who merely benefit from the aid." *Id.* at 607. As a result, the college in *Grove City* and the airlines in *Paralyzed Veterans* were in two distinct positions. That is, in *Grove City* it was apparent "that Congress' intended recipient was the college, not the individual students to whom the checks were sent from the Government." *Id.* at 606-07. This "unusual disbursement pattern of money from the Government through an intermediary . . . to the intended recipient" caused the *Grove City* Court to recognize that federal financial assistance could be indirectly received. *Id.* at 607. *Paralyzed Veterans*, however, lacked a similar funding scheme or the indirect receipt of funds. Instead, it "[was] clear that the airlines [did] not actually receive the aid; they only benefit[ted] from the airports' use of the aid." *Id.* at 607. The Court further found the airport operators to be in a different position as the students in *Grove City* and not "mere conduits of the aid" because the airports were the intended recipients of the assistance. *See id.*

Paralyzed Veterans and *Grove City* thus instruct that "the recipient of that assistance" be identified. *Id*; *see also Smith v. NCAA*, 266 F.3d 152, 161 (3d Cir. 2001) ("intent of the grant-maker is not the only relevant consideration regarding whether an entity is an indirect recipient of federal financial assistance. Courts should also consider the degree to which the entity is able to control decisions made with respect to the money, the most important decision being whether the grant money should be accepted at all."); *Cureton v. NCAA*, 198 F.3d 107, 116 (3d Cir. 1999) ("the critical inquiry in determining whether an entity is an indirect recipient of Federal assistance is whether that entity is the intended recipient of Federal funds, intention being from Congress's point of view.")

Prior to resolving whether the Borough was the recipient or beneficiary of federal funding, it is necessary to address the Borough's contention that the "plain language in NAGPRA only speaks to direct recipients of federal funds." (Doc. 101, 8 (citing 25 U.S.C. § 3001(8)). This claim is simply not supported by the NAPGRA's statutory language or its regulations. The face of the statute makes clear that the NAGPRA does not differentiate between direct and indirect receipt of "Federal funds." Specifically, under § 3001, a "museum" is "*any* institution or State or local government agency (including any institution of higher learning) *that receives Federal funds* . . . ." 25 U.S.C. § 3001(8) (emphasis added). Just like the language "under any education program or activity receiving Federal financial assistance" in *Grove City*, 465 U.S. at 557 n.1, there is nothing in the statute to support the Borough's claim that only "museums" receiving funds directly from the Federal Government are

subject to regulation. Finding the indirect receipt of "Federal funds" sufficient to render an institution or state or local government agency a "museum" under the NAGPRA is also in harmony with its regulations. *See* 43 C.F.R. § 10.2(a)(3)(iii) ("receives Federal Funds" includes funds received after November 16, 1990 "through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds."). The Borough's contention that the NAGPRA applies only to direct recipients of federal funding is without merit.

The evidence of record establishes that the Borough was the recipient of "Federal funds" since the enactment of the NAGPRA. For example, in 2009, under loan number 83119, the Borough obtained federal funds for a water meter replacement project administered by PENNVEST. (Doc. 98, Ex. 5, "068".) The Funding Offer, accepted by John McGuire on October 7, 2009, states: "Federal Participation: Funding Recipient agrees to inform all parties that this project is being supported in part by Federal funding . . . ." (*Id.* at Ex. 5, "018".) The Funding Agreement entered into by PENNVEST and the Borough states: "[t]his project will be funded in whole or in part with federal monies through the DWSRF and it has a Catalog of Federal Domestic Assistance (CFDA) number of 66.468." (*Id.* at Ex. 5, "054".) An exhibit to the Funding Agreement, entitled "Project Specific Terms," and referred to in the Funding Agreement under the provision "Funding Source," adds: "Grant: FLF ARRA- Federal Loan Forgiveness ARRA- Federal loan forgiveness using the American Recovery and Reinvestment Act 2009 fund." (Doc. 98,

Ex. 5, "068".) The Borough Council, by Resolution No. 2009-9, approved the Funding Agreement, identifying itself as "Funding Recipient- Loan Number 83119" as part of its "Resolution to Accept Grant." (Doc. 103, Ex. 2, "067".) PENNVEST's records also indicate that the water replacement project received approval on July 21, 2009 for the amount of $1,219,854.00. The source was identified as "federal." (Doc. 98, Ex. 5, "001".) Moreover, Plaintiffs' evidence demonstrates that payment requests for loan number 83119 were submitted by the Borough and signed by Louise McCaffrey as the "Authorized Signature of Funding Recipient" for disbursement of funds pursuant to this grant. (Doc. 98, Ex. 6, "009", "011", "013", "015", "017", "019", "021", "023", "025", "027", "029".) Corresponding documents identify these disbursements as ARRA "loan forgiveness AMT." (*Id.* at Ex. 6, "010", "012", "014", "016", "018", "020", "022", "024", "026", "028".) These documents directly correspond to bank statements and remittance sheets submitted by the Borough which show receipt and deposit of funds disbursed pursuant to loan number 83119. (Doc. 100, Ex. 3, at Ex. C thereto.) At the completion of the water meter project, Paul Marchetti of PENNVEST sent correspondence to Rich Cardamone of PENNVEST instructing him to "release holdback in the amount of $53,972.39." (Doc. 98, Ex. 15, "006".) The correspondence further states that "[t]his project was funded entirely with ARRA grant funds, . . ." (*Id.*)

The water meter replacement project evidence is not the only summary judgment evidence evincing the Borough as the recipient of "Federal funds." A letter from PEMA to the Borough indicates that "[t]he Federal Emergency Management Agency (FEMA) has

approved Project Worksheet(s) (PW) under the Public Assistance Program for Summer Floods 2006, FEMA-1649-DR-PA" in the amount of $33,349.23. (Doc. 98, Ex. 6, "009".) A remittance advice for this amount was submitted by the Borough, indicating "PEMA INV #16496204 2 12 FEMA 1649 SUMMER 06 FLOODS." (Doc. 100, Ex. 3, at Ex. A thereto.) An invoice from PEMA to the Comptroller indicates that the entire invoice amount is "Federal Share." (Doc. 98, Ex. 6, "004".)

Moreover, on or about January 18, 2006, the Borough entered into a Bond Purchase Agreement for a $6,258,392.00 Guaranteed Water Revenue Bond with PENNVEST with loan M.E. No. 80133. (Doc. 98, Ex. 5, "079-084".) Exhibit 1-A to the Bond Purchase Agreement is entitled "Audit Requirements for Entities Receiving Federal Awards from Commonwealth." (*Id.* at "119".) PENNVEST's records indicate that the source of this loan was "federal." (*Id.* at "001".) Plaintiffs have also produced evidence evincing receipt of funds under loan M.E. No. 80133. (Doc. 98, Ex. 15, "005".) Based on this evidence, Plaintiffs have demonstrated that the Borough was provided funds originating with the Federal Government for infrastructure projects since the enactment of the NAGPRA.

The Borough maintains, however, that it was not the intended recipient of the funding. It claims the funds were intended for the Commonwealth, not the Borough, and that only the Commonwealth was in the position to accept the funds identified by Plaintiffs. Essentially, the Borough contends that it, like the airlines in *Paralyzed Veterans*, was a mere beneficiary of federal aid.

The Borough's attempt to align itself with the airlines in *Paralyzed Veterans* is unavailing. For one, although the Borough claims that it did not have the opportunity to accept or reject the federal funds it received, this argument is contradicted by the evidence of record. As discussed, the Borough entered into funding and loan agreements identifying the Federal Government as the source of the funds. The evidence further confirms that the Borough Council applied for, authorized and accepted these funds. Thus, in contrast to the airlines in *Paralyzed Veterans*, the Borough was specifically in the position to reject federal funds if it wished to avoid compliance with civil rights laws such as the NAGPRA.

This case is also unique from *Paralyzed Veterans* in another key respect. There, the airlines did not receive "a single penny" of the federal assistance. Here, however, money was in fact given to the Borough and deposited into Borough accounts. The Borough did not simply benefit from funds originating with the Federal Government but spent by the Commonwealth, it actually received and spent federal funds. Thus, the Borough was not merely an intended beneficiary of federal assistance; it was the intended recipient of federal funding.

The relationship between the Commonwealth and the Borough is also unlike that between the airport operators and airlines in *Paralyzed Veterans*. In that case, it was apparent that the intended recipient of the funds were the airports, which prevented the airport operators from being considered "conduits" of the aid. *See* 477 U.S. at 2712. Conversely, the Commonwealth here was a "conduit" of federal funds made available for use by the Borough. For instance, with respect to

the water meter replacement project, it is clear that the Borough was intended to receive federal funds under the ARRA. Even though these funds passed through PENNVEST before final deposit with the Borough, the Borough's identity as the recipient of that aid is apparent. In fact, the Funding Agreement Addendum addresses issues "applicable to ARRA funds provided through the Pennsylvania Infrastructure Investment Authority to Funding Recipients, hereinafter referred to as Contractors." (Doc. 98, Ex. 5, "060".) And, unlike in *Paralyzed Veterans*, Congress identified local governments such as the Borough as intended recipients of federal assistance under the American Recovery and Reinvestment Act. Specifically, the purposes of the ARRA include: "to preserve and create jobs and promote economic recovery"; "to assist those most impacted by the recession"; and "to stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases." American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

The relationship between the Commonwealth and Borough is therefore much more akin to that between the students and college in *Grove City*. Notably, the Commonwealth and the students in *Grove City* served the same role with respect to the distribution of federal assistance- they were the vehicles by which the federal funds reached their final destinations. As in *Grove City*, "there is no basis in the statute for the view that only institutions that . . . receive checks directly from the federal government are subject to regulation." 465 U.S. at 564.

Finding the Borough to have received federal assistance in this case is consistent with *Bentley v. Cleveland County Board of County Commissioners*, 41 F.3d 600 (10th Cir. 1994), a case relied on by Plaintiffs. In *Bentley*, the plaintiff alleged violations of § 504 of the Rehabilitation Act. *See id.* at 602. Prior to the commencement of the litigation, the defendant, the board of county commissioners, entered into an agreement with the Oklahoma State Department of Transportation pursuant to which the Department agreed to recommend the county to receive federal funds under the Federal Bridge Replacement and Rehabilitation Program. *See id.* The county commissioners all signed the agreement, and the county ultimately received the funds. *See id.* at 603. Nevertheless, the defendant, much like the Borough here, claimed that it was not covered by the applicable statute because "it received the funds indirectly from the State Department of Transportation." *See id.* at 603. The defendant, also like the Borough in this case, cited *Paralyzed Veterans* to support the proposition that only direct recipients of federal assistance were covered by the statute at issue. *See id.* at 604.

The United States Court of Appeals for the Tenth Circuit found the defendant's arguments unpersuasive. Specifically, the court noted that *Paralyzed Veterans* "did not hold that only direct recipients of federal funds were covered programs or activities, but rather made a distinction between recipients of federal funds and mere beneficiaries." *Id.* The court concluded that the defendant had the ability to accept or reject funds as the commissioners each "signed an agreement with the Oklahoma Department of Transportation that expressly sought federal funds.

Thus, the Board knowingly requested and accepted federal funds and cannot avoid the accompanying obligation to comply with federal civil rights laws." *Id.*

Bentley provides persuasive support for concluding that the Borough was an intended recipient of "Federal funds." Indeed, the Borough entered into funding and loan agreements with PENNVEST for federal funds available under the ARRA. This is no different than the defendant in *Bentley* that signed an agreement with the Oklahoma State Department of Transportation to receive federal funds under the Federal Bridge Replacement and Rehabilitation Program. *See Bentley*, 41 F.3d at 602-03.[11] The Funding Agreement signed by the Borough with PENNVEST identified that the project would "be funded in whole or in part with federal monies", contained a Funding Agreement Addendum captioned as "Implementation of the American Recovery and Reinvestment Act of 2009", and the Grant Amount of $1,219,854.00 was made as "Federal loan forgiveness using the American Recovery and Reinvestment 2009 fund." (Doc. 98, Ex. 5.) The evidence further establishes that the Borough Council approved the Funding Agreement by resolution and that the Borough received the funds. Thus, as in *Bentley*, the Borough's solicitation and acceptance of federal funds mandates its compliance with federal law.

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[11] The Borough attempts to distinguish *Bentley* by arguing that the defendant there had a contractual relationship with the Federal Government. (Doc. 101, 7 n.8.) The Borough misreads *Bentley*. As is the case here, the *Bentley* defendants' contractual agreement for receipt of federal funds was with a state agency. *See Bentley*, 41 F.3d at 603-04.

Based on the evidence of record, Plaintiffs have demonstrated that the NAGPRA is applicable to the Borough of Jim Thorpe. Jim Thorpe's remains are covered by the NAGPRA, the Borough has possession or control over the remains,[12] and the Borough was the intended recipient of "Federal funds" since the enactment of the NAGPRA. Accordingly, the Borough is as a "museum" for purposes of the Native American Graves Protection and Repatriation Act. Therefore, because it "receive[d] Federal funds," the Borough's cross-motion for summary judgment will be denied.

c. The Doctrine of Laches Does Not Bar the NAGPRA Claims

Lastly, the Borough contends that it should be granted summary judgment based on its defense of laches. In support, the Borough relies on the fact that Plaintiffs waited fifty-five years since Jim Thorpe was buried in the Borough and twenty years since the enactment of the NAGPRA to commence litigation. The Borough also insists that it suffered prejudice as a result of the delay. Plaintiffs, however, reason that the defense of laches is inapplicable in this case because the delay was the result of the Borough's own unclean

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[12] "Possession" under the regulations is defined as "physical custody of human remains, . . . with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations." 43 C.F.R. § 10.2(a)(3)(i). "Control" is similarly defined as "having a legal interest in human remains, . . . sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, . . . are in the physical custody of the museum . . . ." *Id.* at § 10.2(a)(3)(ii). As Jim Thorpe's remains are buried on Borough owned land and within a monument maintained by the Borough, the "possession" or "control" requirement under the statute is readily satisfied.

hands. Alternatively, Plaintiffs opine that the Borough failed as a matter of law to meet its burden to establish a laches defense.

The elements of the equitable defense of laches are "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *E.E.O.C. v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 80 (3d Cir. 1984). The burden of establishing it is on the defendant. *See id.* "As an equitable doctrine, the decision to apply laches is left to the sound discretion of the District Court." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 134 (3d Cir. 2000) (citing *Gruca v. U.S. Steel Corp.*, 495 F.2d 1252, 1258 (3d Cir. 1974)).

As to lack of diligence, the party's delay in bringing suit must be unreasonable. *See Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 138 (3d Cir. 2005). "While statutes of limitations do not directly apply to equitable claims . . . , a limitations period on an analogous claim for legal relief is highly relevant to a laches analysis." *In re Mushroom Transp. Co.*, 382 F.3d 325, 337 (3d Cir. 2005). Accordingly, "'if a statutory limitations period that would bar legal relief has expired, then the defendant in an action for equitable relief enjoys the benefit of a presumption of inexcusable delay and prejudice. In that case, the burden shifts to the plaintiff to justify its delay and negate prejudice.'" *Id.* (quoting *Great Atl.*, 735 F.2d at 80). In cases like this where the federal statute "does not specify a statute of limitation, courts must 'adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.'" *Santana Prods.*, 401 F.3d at 135 (quoting *Wilson v. Garcia*, 471 U.S. 261, 266-67

(1985)); *see also Warner v. Sun Ship, LLC*, No. 11-7830, 2012 WL 1521866, at *3 (E.D. Pa. Apr. 30, 2012) ("In cases such as this one, where the statute does not contain a limitations period, the Court begins its analysis by looking to the most analogous state statute of limitations to determine whether the presumption of laches attaches.").

Adoption of a time limit for Plaintiffs' NAGPRA claims would be inconsistent with the statute because, as explained during the rulemaking process:

> One commenter proposed inclusion of a ten year time limit during which Indian tribes must make claims for repatriation. Time limits for claims were discussed by Congress when the bill was being considered but were not included in the Act. Inclusion of such time limits in the regulations would contradict Congressional intent.

NAGPRA Regs., 60 Fed. Reg. 62,134, 62,155 (Dep't of Interior Dec. 4, 1995). The Borough, therefore, retains the burden of establishing unreasonable delay and prejudice.

With respect to the period of delay, the relevant period did not commence until 1990, the time with which the NAGPRA was enacted. Plaintiffs waited nearly twenty years thereafter to seek relief under the NAGPRA. Whether this delay was "unreasonable" need not be resolved, however, because the Borough has not met its burden of demonstrating prejudice as a result of the delay.

"The essential element of laches is prejudice; the party asserting the defense must show that it has suffered some significant injury from the delay in the

claim being brought." *In re Sheckard*, 394 B.R. 56, 66 (E.D. Pa. 2008). "'To establish prejudice, the party raising laches must demonstrate that the delay caused a disadvantage in asserting and establishing a claimed right or defense; the mere loss of what one would have otherwise kept does not establish prejudice.'" *In re Mushroom Transp. Co.*, 382 F.3d at 337 (quoting *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 208 (3d Cir. 1999)). Stated differently, the party must "show that some change in the condition or relations of the parties occurred during the period in which the plaintiff unreasonably failed to act." *Appel v. Kaufman*, 728 F. Supp. 2d 684, 698 (E.D. Pa. 2010) (citing *Leedom v. Thomas*, 473 Pa. 193, 373 A.2d 1329 (1977)). "Prejudice can arise through the death of the principal participants in the transactions complained of, the death of witnesses or witnesses to the transactions, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible." *Id.* (citing *In re Wallace's Estate*, 299 Pa. 333, 149 A. 473, 475 (1930); *Kern v. Kern*, 892 A.2d 1, 10 (Pa. Super. 2005)).

Here, the prejudice claimed by the Borough is insufficient to establish a defense of laches. The Borough's claimed prejudice includes: reliance on the agreement with Patricia Thorpe; changing of street signs in the Borough; provision of a suitable site for Jim Thorpe's remains for fifty-five years at the expense of revenue from real estate taxes; maintenance of the site during this time period by removing trash, cutting grass, and plowing snow; and renaming Mauch Chunk and East Mauch Chunk as "the Borough of Jim Thorpe." (Doc. 96, 14-15.) However, these actions in no way suggest that the

delay caused a disadvantage to a claimed defense under the NAGPRA. *See, e.g., Miller v. Richland Twp.*, No. 000-6080, 2001 WL 1496207, at *5 (E.D. Pa. Nov. 21, 2001) (continued output of money on business is not sufficient to establish prejudice).[13]

In its reply to Plaintiffs' opposition brief to its summary judgment motion, the Borough also suggests it was prejudiced in its defense of this action due to Plaintiffs' delay as witnesses died and memories of living witnesses faded. But, these occurrences did not prejudice the Borough in this case. Significantly, the testimony of these witnesses would not have impacted the material determination in this case. That is, the Borough's status as a "museum" for purposes of the NAGPRA did not depend on the testimony of witness such as Grace Thorpe, the half-sister of Richard and William Thorpe. As such, the loss of potential witnesses did not disadvantage the Borough in defending against Plaintiffs' claims under the NAGPRA.[14]

The Borough has failed to make the necessary showing of prejudice to avail itself of the defense of

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[13] The Borough seemingly implies that Plaintiffs are seeking to have the Borough stripped of its identity as "the Borough of Jim Thorpe." As stated by Plaintiffs, they have not sought a change in the Borough's name, demolition of the monument at Jim Thorpe's grave, or replacement of any signage in the Borough.

[14] Plaintiffs also claim that the doctrine of laches does not provide the Borough a defense due to the Borough's unclean hands. As the Borough has failed to establish that it was prejudiced by Plaintiffs' delay in filing suit, I make no determination as to whether the doctrine of unclean hands applies to the Borough.

laches in this case. Thus, the doctrine of laches will not be applied.

Accordingly, as Plaintiffs have established that the Borough is a "museum" under the NAGPRA, and the Borough has failed to meet its burden demonstrating the applicability of laches to the instant action, Plaintiffs are entitled to a declaration as to the applicability of the NAGPRA to the Borough. Plaintiffs' motion for summary judgment will be granted.

III. Conclusion

Given that Jim Thorpe's widow made an agreement with the municipalities to inter his body there in exchange for them naming their jointure Jim Thorpe, the result here may seem at odds with our common notions of commercial or contract law. Congress, however, recognized larger and different concerns in such circumstances, namely, the sanctity of the Native American culture's treatment of the remains of those of Native American ancestry. It did so against a history of exploitation of Native American artifacts and remains for commercial purposes. The Native American Graves Protection and Repatriation Act recognizes the importance of compliance with Native American culture and tradition where dealing with the remains of one of Native American heritage, and this is a case which fits within the reach of this congressional purpose.

Moreover, any concern about the loss of identity of the municipality of Jim Thorpe is misplaced. As noted, no relief in the form of the elimination of the name is sought by Plaintiffs. Therefore, the existence of the municipality of Jim Thorpe will continue.

Based on the analysis of this Memorandum, the "probate exception" to federal jurisdiction is inapplicable to the instant litigation and does not prevent the Court from entertaining Plaintiffs' claims. Additionally, the Borough has "receive[d] Federal funds" since the enactment of the Native American Graves Protection and Repatriation Act and is a "museum" for purposes of the statute. Lastly, the Borough's defense was not prejudiced as a result of Plaintiffs' delay in commencing this action. Therefore, the Borough's motion and cross-motion for summary judgment will be denied and Plaintiffs' motion for summary judgment will be granted.

An appropriate order follows.

April 19, 2013	/s/ A. Richard Caputo
Date	A. Richard Caputo
	United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

JOHN THORPE, RICHARD THORPE, WILLIAM THORPE, and the SAC and FOX NATION OF OKLAHOMA,	CIVIL ACTION NO. 3:CV-10-1317 (JUDGE CAPUTO)

Plaintiffs,

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 JOANA KLITSCH,

Defendants.

ORDER

NOW, this 19th day of April, 2013, **IT IS HEREBY ORDERED** that:

(1) The Borough of Jim Thorpe's Motion for Summary Judgment Under the Probate Exception to Jurisdiction and the Doctrine of Laches (Doc. 93) is **DENIED.**

(2) The Borough of Jim Thorpe's Cross-Motion for Summary Judgment (Doc. 99) is **DENIED.**

(3) Plaintiffs Richard Thorpe, William Thorpe, and the Sac and Fox Nation of Oklahoma's Motion for Summary Judgment (Doc. 95) seeking a declaration as to the applicability of the Native American Graves Protection and Repatriation Act is **GRANTED.** The Borough of Jim Thorpe is a "museum" under the Native American Graves Protection and Repatriation Act and subject to the requirements of the Act, including those provisions governing repatriation requests. *See* 25 U.S.C. §§ 3001-3013.

/s/ a. Richard Caputo
A. Richard Caputo
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-2446

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

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; JOANNE KLITSCH

Borough of Jim Thorpe,

Appellant

No. 13-2451

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

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; JOANNE KLITSCH

Sac and Fox Nation of Oklahoma, William Thorpe, Richard Thorpe,

Appellants

(D.C. No. 3-10-cv-01317)

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and KRAUSE, Circuit Judges

The petition for rehearing filed by Appellees/Cross Appellants/Amicus in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Theodore A. McKee
Chief Circuit Judge

Dated: February 3, 2015

tyw/cc: All counsel of Record

APPENDIX E

United States Code
Title 25. Indians
Chapter 32. Native American Graves Protection and Repatriation

§ 3001. Definitions

For purposes of this chapter, the term–

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" means human remains and–

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or

ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups

organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. § 1601 et seq.].

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which–

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means–

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

§ 3002. Ownership

(a) Native American human remains and objects

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)–

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony–

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe–

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) Unclaimed Native American human remains and objects Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006 of this title, Native American groups, representatives of museums and the scientific community.

(c) Intentional excavation and removal of Native American human remains and objects

The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if–

(1) such items are excavated or removed pursuant to a permit issued under section 470cc of Title 16 which shall be consistent with this chapter;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) Inadvertent discovery of Native American remains and objects

(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C.A. § 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such

activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) Relinquishment

Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

§ 3003. Inventory for human remains and associated funerary objects

(a) In general

Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information

possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) Requirements

(1) The inventories and identifications required under subsection (a) of this section shall be–

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after November 16, 1990, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 3006 of this title.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this chapter shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) Extension of time for inventory

Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) Notification

(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information–

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding

acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) Inventory

For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

§ 3004. Summary for unassociated funerary objects, sacred objects, and cultural patrimony

(a) In general

Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) Requirements

(1) The summary required under subsection (a) of this section shall be–

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after November 16, 1990.

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

§ 3005. Repatriation

(a) Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums

(1) If, pursuant to section 3003 of this title, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 3004 of this title, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to

subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where–

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this chapter.

(b) Scientific study

If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) Standard of repatriation

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return

such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) Sharing of information by Federal agencies and museums Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) Competing claims

Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.

(f) Museum obligation

Any museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter.

§ 3006. Review committee

(a) Establishment

Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities

required under sections 3003, 3004 and 3005 of this title.

(b) Membership

(1) The Committee established under subsection (a) of this section shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in

lieu of subsistence, in accordance with sections 5702 and 5703 of Title 5.

(c) Responsibilities

The committee established under subsection (a) of this section shall be responsible for–

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 3003 and 3004 of this title to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to–

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this chapter;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) Admissibility of records and findings

Any records and findings made by the review committee pursuant to this chapter relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 3013 of this title.

(e) Recommendations and report

The committee shall make the recommendations under paragraph (c)(5) of this section in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) Access

The Secretary shall ensure that the committee established under subsection (a) of this section and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) Duties of Secretary

The Secretary shall–

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) Annual report

The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) Termination

The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

§ 3007. Penalty

(a) Penalty

Any museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) Amount of penalty

The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this chapter, taking into account, in addition to other factors–

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

(c) Actions to recover penalties

If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) Subpoenas

In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

§ 3008. Grants

(a) Indian tribes and Native Hawaiian organizations

The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) Museums

The Secretary is authorized to make grants to museums for the purpose of assisting the museums in

conducting the inventories and identification required under sections 3003 and 3004 of this title.

§ 3009. Savings provision

Nothing in this chapter shall be construed to–

(1) limit the authority of any Federal agency or museum to–

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this chapter;

(2) delay actions on repatriation requests that are pending on November 16, 1990;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

§ 3010. Special relationship between Federal government and Indian tribes and Native Hawaiian organizations

This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

§ 3011. Regulations

The Secretary shall promulgate regulations to carry out this chapter within 12 months of November 16, 1990.

§ 3012. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary to carry out this chapter.

§ 3013. Enforcement

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.

United States Code
Title 18. Crimes and Criminal Procedure
Chapter 53. Indians

§ 1170. Illegal trafficking in Native American human remains and cultural items

(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.