No. 14-1419

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* SENATOR BEN NIGHTHORSE CAMPBELL, REPRESENTATIVE TOM COLE, AND GOVERNOR BILL RICHARDSON IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), *amici* respectfully request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari filed by petitioners. As required under Rule 37.2(a), *amici* provided noticed to all parties' counsel of their intent to file this brief more than 10 days before its due date. Petitioners have consented to the filing of this brief in a letter dated June 24, 2015. Counsel for Respondents did not respond to *amici's* request for consent and, therefore, *amici* are filing this motion.

Amici seek leave to file this brief because they are deeply concerned that the Third Circuit's application of the absurdity doctrine to abrogate the plain language of Native American Graves Protection and Repatriation Act ("NAGPRA") violates constitutional separation of powers. The Third Circuit substituted its own policy concerns for the plain text of NAGRPA, leading the Court to a decision that is at odds with the language of NAGRPA, as well as its fundamental purpose.

Congress passed NAGPRA in response to its finding that the rights of Native Americans to practice their religions have historically—and continue to be—disrespected and violated. As such, NAGPRA is one of the most critical pieces of Native American civil and human rights legislation ever passed by Congress. In this instance, the use of a state trooper to interrupt and remove Native remains from a traditional Sac and Fox burial on Sac and Fox soil exemplifies the disrespect for Native religions that Congress intended for NAGPRA to address.

Furthermore, the disregard for the plain text of a congressional statute is particularly troublesome in

the area of Indian affairs. This Court has acknowledged that as a result of "moral obligations" in the treaties between Indian Nations and the United States, there exists "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The Court has assigned management of this trust relationship to Congress. *See United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2323 (2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."). Congress, however, cannot effectuate the duties of this trust relationship if courts are permitted to abrogate the plain language of congressional statutes based on policy considerations that find no support in the statute's text or legislative history.

If left undisturbed, the Third Circuit's decision will undermine the enforcement of NAGPRA nationwide. Nothing could be farther from the intentions of NAGPRA's drafters.

For these reasons, and because *amici* are well-equipped to help the Court evaluate the parties' arguments, the Court should grant this motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF THE *AMICI*

Senator Ben Nighthorse Campbell of Colorado served in the U.S. Congress from 1987 to 2005, initially in the U.S. House of Representatives (1987-1993), and then in the United States Senate (1993-2005). While in the House, he was central to the development and enactment of the repatriation laws. He was an original sponsor of H.R. 2668, the 1989 National Museum of the American Indian Act ("NMAIA"), with its historic repatriation provision governing the Smithsonian Institution's collections, as well as an original sponsor of the 1990 Native American Graves Protection and Repatriation Act ("NAGPRA"). He was a member of the House Committee on Interior and Insular Affairs, which exercised legislative and oversight jurisdiction over nearly all federal Indian policy, including federal repatriation laws. During this time, he worked closely with the Committee's longtime Chairman, Representative Morris K. Udall of Arizona ("Chairman Udall"), and with Chairman Udall's counterpart in the Senate, Senator Daniel K. Inouye of Hawaii, Chairman ("Chairman Inouye") of the Senate Committee on Indian Affairs, to develop both the 1989 NMAIA and the 1990 NAGPRA. Together with Chairman Udall, Chairman Inouye, and others, Senator Campbell was a co-sponsor of the year-long study, "The National Dialogue on Museum-Native American Relations," at the Heard Museum in Phoenix, Arizona.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of Record for all parties received timely notice of *amici curiae's* intention to file the brief. Petitioners consented to the filing of this brief in a letter

Senator Campbell's key role in developing the NMAIA and NAGPRA, including involvement in the aforementioned study and negotiations, render his participation as an amicus in the present case highly relevant. The *Report of the Panel for a National Dialogue on Museum/Native American Relations* (February 28, 1990), *available at* http://www.saa.org/Portals/0/SAA/repatriation/HeardReport.1990-02-28. pdf ("National Dialogue Report") was critical to the drafting and passage of the final bill now known as NAGPRA. S. Rep. No. 101-473, at 2, 3, 4, 6 (1990). The National Dialogue Report was a catalyst for the development of the more informed and nuanced language and policy advances (as compared to the 1989 repatriation law that only covered Smithsonian collections) in the 1990 NAGPRA, which Congress applied to all federally funded institutions, museums, and state and local governments and holding repositories throughout the United States. In pertinent part, the National Dialogue Report's *General Principles: The Human Rights of Native Americans* section reads as follows:

> In far too many instances, the human rights of Native American nations and people have been violated in the past through the collection, display and other use of human remains and cultural materials without Native American consent and in ways inconsistent with Native American traditions and religions. Often, these violations have occurred in the name of science, non-indigenous religions, economic development and entertainment, as well as in pursuance of commercial grave robbing. All

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dated June 24, 2015. Counsel for Respondents did not respond to *amici's* request for consent.

> [National Dialogue] Panel members deplore this history and agree that future practices must avoid a repetition of such excesses.

National Dialogue Report at 11-12.

Senator Campbell is an enrolled citizen and traditional chief of the Northern Cheyenne Tribe. Like Jim Thorpe, Senator Campbell is one of just a handful of Native athletes who have risen to the level of Olympians. He was Captain of the U.S. Olympic Judo Team at the 1964 Summer Olympics in Tokyo, after having won the Gold Medal in Judo in the 1963 Pan-American Games. Senator Campbell later became the first Native American and the first Olympian to chair the Senate Committee on Indian Affairs (1997-2001 and 2003-2004), which is the Senate body with legislative and oversight jurisdiction regarding most federal Indian matters, including federal repatriation laws and their implementation. His duties as both a member and Chair of the Senate Committee on Indian Affairs throughout his Senate tenure included overseeing and reviewing the federal administrative and regulatory implementation of repatriation laws, the progress of federal and federally-assisted institutions and collections in complying with repatriation laws, and decisions in repatriations and repatriation matters.

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

Representative Tom Cole of Oklahoma has served in the U.S. House of Representatives since 2003. Representative Cole is an enrolled citizen of the Chickasaw Nation and is one of only two Native Americans currently serving in Congress. He is the Co-Chair of the Congressional Native American Caucus. Representative Cole is Chairman of the House Appropriations Committee's Subcommittee on Labor, Health and Human Services, Education and Related Agencies (Labor-HHS-Education)[2] and is a member of the Appropriations Subcommittees on Defense[3] and Interior,[4] as well as a member of the House Budget Committee. He also serves as a Deputy Whip for the Republican Conference and is a member of the Republican Steering Committee. Many of his budgeting, appropriating, and legislating duties entail oversight of NAGPRA and related laws, policies, and practices.

Governor Bill Richardson of New Mexico served in the U.S. House of Representatives (1982-1996), as U.S. Ambassador to the United Nations (1997-1998), as Secretary of Energy (1998-2000), and as Governor of New Mexico (2003-2011). As a member of Congress, he served on the House Committee on Interior and

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[2] *Labor, Health and Human Services, Education, and Related Agencies*, U.S. House of Representatives Committee on Appropriations, http://appropriations.house.gov/subcommittees/subcommittee/?IssueID=34777 (last visited Jun. 29, 2015).

[3] *Defense Subcommittee Members*, U.S. House of Representatives Committee on Appropriations, http://appropriations.house.gov/about/members/defense.htm (last visited Jun. 29, 2015).

[4] *Interior Subcommittee Members*, U.S. House of Representatives Committee on Appropriations, http://appropriations.house.gov/about/members/interiorenvironment.htm (last visited Jun. 29, 2015).

Insular Affairs, the committee with jurisdiction over the NAGPRA legislation, and was key to the development and enactment of both the 1989 NMAIA and the 1990 NAGPRA. Like his colleague Senator Campbell, he co-sponsored "The National Dialogue on Museum-Native American Relations," at the Heard Museum in Phoenix, Arizona (1987-1989), and continued in a central oversight role regarding repatriation laws and their implementation for the House Interior (later, Natural Resources) Committee. He chaired the Subcommittee on Native American Affairs (1993-1995), the Subcommittee with both oversight and legislative responsibility over the repatriation laws.

SUMMARY OF THE ARGUMENT

NAGPRA is one of the most critical pieces of Native American civil and human rights legislation ever passed by Congress. It protects that which is most sacred to all of humanity: the right to be buried in accordance with your own religion and in the same manner or under the same soil as your relatives. As this Court has repeatedly recognized, Congress alone holds the constitutional authority to regulate relations between Indian Nations, their members, and state and local governments. *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975). This Court has also recognized that Congress alone holds the power to legislate, and thus courts are not permitted to substitute their own policy judgments for those promulgated by elected members of Congress.

Senator Campbell, Representative Cole, and Governor Richardson (collectively, "the Congressional Amici") therefore agree with the principal parties' petition for *certiorari* that the Third Circuit clearly erred when it misapplied the absurdity doctrine to

substitute its own policy judgment for that of Congress, thereby abrogating the plain language of NAGPRA. As the original drafters of this critical piece of legislation, and as a current member of Congress charged with the duty of fulfilling the United States' historic trust duties to Indian Nations and People, the Congressional *Amici* further submit that the judicial abrogation of NAGPRA gives rise to heightened constitutional separation of powers concerns. The substitution of judicial policy concerns for the plain text of legislation in the field of Indian affairs poses a serious threat to Congress's ability to legislatively fulfill the United States' historic trust duties to Indian tribes. Consequently, the Third Circuit's decision presents acute constitutional concerns that command this Court's review.

The Third Circuit's disregard for the plain text of NAGRPA has resulted in a decision directly at odds with the intentions of NAGPRA's drafters. Congress passed NAGPRA in response to its finding that the rights of Native Americans to practice their religions have historically—and continue to be—disrespected and violated. Congress characterized this disrespect as a false belief that Native religions are illegitimate, or not truly religions. *See* 136 Cong. Rec. H10,985 (daily ed. Oct. 22, 1990) (statement of Rep. Collins, quoting Suzan Shown Harjo, Executive Director of the National Congress of American Indians) (characterizing the misguided American belief as: "'White people have 'religions.' [T]he nonwhite people have 'myths' and 'lore.'"). Congress further noted that Native religious ceremonies have routinely "been interrupted" by non-Native people and governments, and thus sought to pass legislation to engender "*the renewal of ceremonies that are part of their religions*." H.R. Rep. No. 101-877, at 14 (1990) (emphasis added); *see also*

National Dialogue Report at 1 (Proposed Finding/ Recommendation 2 emphasizes following "the wishes of the nation" in regard to the disposition of human remains).[5] In the *Findings* section of the 1989 NMAIA, Congress characterized Indian tribes, Alaska Native villages, and Native Hawaiian communities as "determined to provide an appropriate resting place for their ancestors . . . ." 135 Cong. Rec. S22,901 (daily ed. Oct. 3, 1989). Based on these findings—and widespread concern raised in hearings and correspondence regarding exploitation and desecration of Native ancestors of distant and contemporary times throughout the U.S.—Congress decided that "[r]espect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made" pursuant to the statute. H.R. Rep. No. 101-877, at 10-11 (1990) (internal quotation marks and citation omitted). In this instance, the use of a state trooper to interrupt and remove Native remains from a traditional Sac and Fox burial on Sac and Fox soil exemplifies the disrespect for Native religions that Congress intended for NAGPRA to address.

Congress also passed NAGPRA to deal with the cultural misunderstanding and commensurate harm that results from the historic practice of using Native remains for the economic benefit of non-Indians. As Senator Inouye, who was Chairman of the Senate Committee on Indian Affairs at the time, explained:

> When human remains are displayed in museums or historical societies, it is never

[5] The Senate Committee adopted the findings and recommendations of the National Dialogue Report. *See* S. Rep. No. 101-473, at 6 (1990) ("The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations.").

> the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

136 Cong. Rec. S17,173 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

The use of Jim Thorpe's remains to attract tourism to the Borough perpetuates the misconception that what is sacred to Native Americans is appropriate for cultural exploitation by the American public. As Congress noted in 1990, this trivialization of the sanctity of American Indian life and legacy constitutes a human rights violation of significant gravity. Congress designed NAGPRA to prevent these violations.

The Third Circuit's use of the absurdity doctrine is particularly troublesome here because it abrogates legislation concerning the rights of Native Americans and their tribal nations. Allowing courts to substitute their own policy judgments for those of Congress, especially in the area of Indian affairs, raises serious constitutional concerns related to separation of powers, and further impedes the ability of Congress to ensure the United States fulfills its duties and obligations pursuant to its trust relationship with Indian Nations. This Court's review is necessary to correct the error below.

ARGUMENT

I. Constitutional Separation of Powers Commands Review of the Third Circuit's Decision

The Third Circuit's application of the absurdity doctrine violates constitutional separation of powers. First, the Third Circuit impermissibly substituted its own policy judgment based on state and common family law for the judgment only Congress may exercise in executing the federal government's trust authority over Indian affairs. *See Jicarilla Apache Nation*, 131 S.Ct. at 2323 ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."). Second, the Third Circuit abrogated the plain language of NAGPRA without any consideration for whether its interpretation was consistent with NAGPRA's legislative purpose, which wholly supports the statute's literal application. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (the plain text of congressional statutes should only be overlooked where "alternative interpretations consistent with the legislative purpose are available").

Constitutional separation of powers requires federal courts to adhere to the plain text of a congressional statute, even in instances where the reviewing court finds the statute's outcome to be "harsh." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004). That is, when statutory language is plain and unambiguous, "the sole function of the courts . . . is to enforce it according to its terms." *Id.* at 534 (2004) (internal quotation marks omitted). As this Court has explained, the Court's:

> unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."

Id. at 538 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)). Consequently, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

This Court has recognized "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Here, where the Third Circuit did not fill in any identifiable gap, but instead rewrote the rules that Congress enacted, the remedy for any "absurd" results lies strictly in the legislature—not in the courts. *See Lamie*, 540 U.S. at 542 ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."). Even if the Third Circuit could conclude that Congress mistakenly failed to carve out an exception that would apply to the present facts, constitutional separation of powers precludes courts from "'rescu[ing] Congress from its drafting errors, and [] provid[ing] what [courts] might think [] is the preferred result.'" *Id.* (quoting *Granderson*, 511 U. S. 39, 68 (1994)).

A. Rewriting NAGPRA Violates Separation of Powers Because It Undermines Congress's Ability to Regulate the United States' Trust Relationship with Indian Tribes

The Third Circuit's interference with Congress' exclusive authority over Indian affairs compels this Court's review. Because NAGPRA was enacted pursuant to Congress' exclusive authority over Indian affairs, the Third Circuit's misapplication of the absurdity doctrine to rewrite the statute unconstitutionally interferes with Congress' authority to protect and preserve the sovereign authority of tribal governments in determining the appropriate religious treatment and final disposition of their citizens' remains.

NAGPRA is the result of Congress exercising, performing, and fulfilling its authority and duty to uphold the trust relationship between Indian Nations, Indian People, and the United States. Between 1989 and 1990, Congress held hearings and considered evidence of what it characterized as a historic "attitude that accepted the desecration of countless Native American burial sites . . . ." H.R. Rep. No. 101-877, at 10 (1990). Congress concluded that this attitude of disrespect for Native religions and burial ceremonies created the foundation for contemporaneous trading of Native remains for profit, a practice that constitutes nothing less than a profound violation of the "civil rights of America's first citizens." 136 Cong. Rec. S17,173 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

In providing Congress with requested information needed to enact the legislation, the National Dialogue Report considered the ability of Indian tribes to ensure

that their citizens will be buried in accordance with their own religious beliefs to be a right inherent to "the rights of self-determination" enjoyed by sovereign Indian Nations. National Dialogue Report at 11. Congress thus concluded legislation was necessary to "allow tribes to repatriate human remains and sacred ceremonial objects, which were improperly taken from their possession." 136 Cong. Rec. H10,985 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson).

Consequently, Congress enacted NAGPRA pursuant to its trust authority, noting NAGRPA upholds "the unique relationship between the Federal government and Indian tribes and Native Hawaiian organizations . . . ." H.R. Rep. No. 101-877, at 10 (1990); *see also* 25 U.S.C. § 3010 (NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes").

Placing the Third Circuit's decision within the context of Congress's constitutional duty to effectuate the United States' trust duties reveals the profound error in the court's departure from the plain text of the statute. U.S. Const. art. I, § 8 gives Congress exclusive authority to regulate relations between Indian tribes, the federal government, and state and local governments. *Mazurie*, 419 U.S. at 554 n.11. This Court has described the authority of Congress in this realm as "plenary," "broad," and "exclusive." *See id.*; *United States v. Lara*, 541 U.S. 193, 200 (2004). This power is not limited to reservations or Indian lands. Rather, "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off

a reservation and whether within or without the limits of a state").

Accordingly, "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). Congress's authority to legislate over Indian affairs arises not only from the text of the Constitution itself, but also from this Court's recognition that throughout this "Nation's history, [it has been the hundreds of] treaties, and [congressional] legislation made pursuant to those treaties, [that has] governed relations between the Federal Government and the Indian tribes." *Lara*, 541 U.S. at 201.

That is, as a result of the treaties signed with Indian tribes to acquire the majority of the lands constituting the United States today, the federal government "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United* States, 316 U.S. 286, 297 (1942). Since this Court's decision in *Seminole Nation*, these "moral obligations" grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). This Court has assigned management of this trust relationship to Congress. *See Jicarilla Apache Nation*, 131 S.Ct. at 2323 ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."); *Blackfeather v. United States*, 190 U.S. 368, 372 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize . . . .").

The "trust relationship" between Indian tribes and the United States is "an instrument of federal policy[,]" *Jicarilla Apache Nation*, 131 S.Ct. at 2327 n.8., and Congress therefore has the authority to "invoke[] its trust relationship to prevent state interference with its policy toward the Indian tribes." *Id.* at 2327. As a result, Congress's power—and duty—to protect the right of Indians to be buried in accordance with their religious beliefs cannot be overridden by a federal court utilizing state law notions of property, contracts, or family law. *See United States v. Sandoval*, 231 U.S. 28, 46-47 (1913) (traditional realms of state law cannot override legislation passed by Congress that upholds the United States' duties of "guardianship and protection" of Indian Nations and People). A federal court's substitution of state law policy considerations for those codified in NAGPRA by Congress constitutes judicial overreach and violates constitutional separation of powers. *See Jicarilla Apache Nation*, 131 S.Ct. at 2323, 2327 n.8; *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979).

Congress cannot effectively exercise its power over Indian affairs and satisfy the federal government's trust obligations to Indian Nations when federal courts are permitted to circumvent and/or rewrite the plain language of its statutes. The application of the absurdity doctrine to rewrite a statute passed pursuant to Congress' authority over Indian affairs raises heightened constitutional concerns that compel this Court's review.

B. The Third Circuit's Revision of NAGPRA Is Inconsistent with NAGPRA's Legislative Purpose

The Third Circuit's decision further necessitates this Court's review because the panel's interpretation of NAPGRA is entirely inconsistent with the statute's purpose, which the Third Circuit erroneously failed to consider. *See Griffin*, 458 U.S. at 575 (the absurdity doctrine should not be applied unless "alternative interpretations consistent with the legislative purpose are available"). Such judicial abrogation of a congressional statute—with no regard for the statute's purpose or the intentions' of the drafters—violates constitutional separation of powers and commands this Court's review.

First, "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Id.* at 571 (citation and quotation marks omitted). The text Congress elected to utilize in NAPGRA makes very clear Congress' purpose, and thus the Third Circuit's alternative interpretation cannot be squared with the statute's text, or its actual purpose.

Second, the Third Circuit claimed the application of NAGPRA to the present case would be at odds with the intentions of NAGPRA's drafters without citing, or considering, any evidence of the drafter's actual intentions. A review of the legislative record provides no support for the Third Circuit's alternative interpretation, and thus the Third Circuit's decision cannot be construed as consistent with the intentions of NAGPRA's drafters.

i. The Plain Text of the Statute Evinces a Congressional Purpose to Protect the Right of Native Americans to be Buried in Accordance with Their Religious Beliefs

Congress could not have been more transparent. In passing NAGPRA, Congress intended to afford individual Native Americans, like Jim Thorpe, the right to be buried in accordance with their own religious beliefs. NAGPRA's plain language reveals a clear congressional purpose to recognize the inherent authority in Indian Nations, like Sac and Fox Nation, to protect the rights of their citizens to be buried in accordance with their religious tenets. Because the plain language in a statute is the best evidence of congressional purpose, the Third Circuit's analysis should have ended there. *See Griffin*, 458 U.S. at 571 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") (citation and quotation marks omitted).

Indeed, the statute includes a clear articulation of its legislative purpose, stating that the law was designed to serve numerous goals, including "strengthen[ing] support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian tribes, in accordance with Public Law 95–341 (commonly known as the American Indian Religious Freedom Act; 42 U.S.C. 1996)." 25 U.S.C. § 3051(7). Nothing in the text of the statute supports the idea that NAGPRA's legislative purpose was to preserve common or state laws that conflict with these purposes.

ii. The Legislative Record Only Supports the Application of the Statute's Plain Text

Furthermore, a review of NAGPRA's legislative record only supports the application of the statute's plain text.

First, the legislative record reveals that Congress intended to define "museum" broadly, encompassing local governments, including cities and municipalities like the Borough of Jim Thorpe. The final definition of "museum" was the product of much debate. S. Rep. No. 101-473, at 4 (1990) ("There has been much debate with regard to the definitions contained in the Act."). In particular, Congress debated "[t]he scope of individuals covered by the legislation[.]" 136 Cong. Rec. H10,985 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). In response to "concern[s] that the broad definition of museum could possibly include private individuals who receive Federal grants or payments such as social security[,] . . . [t]he definition of museum was narrowed to include only 'institutions of state or local government agencies.'" *Id.* A court cannot remove a term from a congressional definition that Congress itself declined to remove.

Further, at the time of NAGPRA's passage, "[m]ore than 20 States . . . [had] enacted legislation" to protect burial rights. *Id.* (statement of Rep. Bennett). Members of Congress, however, believed that the laws in 20 states were "insufficient to protect [N]ative American burial sites nationwide." *Id.*; *see also id.* (statement of Rep. Collins) ("[S]everal States have passed new laws protecting all burial sites . . . . But I believe we must do more."). Indeed, since NAGPRA's passage in 1990, numerous cities and local governments have complied

with NAGPRA and participated in repatriations of Native remains.[6]

Second, the legislative record further reveals that Congress intended to address—and prevent—the disruption of traditional Native burial ceremonies, such as the disruption of Jim Thorpe's burial on Sac and Fox soil. In drafting NAGRPA, Congress recognized that Native Americans have a right to be buried "according to tribal religious practices, [and that they] must be given appropriate burials." S. Rep. No. 101-473, at 2 (1990).

Congress considered testimony from tribal leaders and representatives that the disruption of Native burial ceremonies and the taking of Native remains had caused trauma to their communities because "the spirits of their ancestors would not rest until they are returned to their homeland and that these beliefs have been generally ignored . . . ." H.R. Rep. No. 101-877, at 13 (1990); *see also* 136 Cong. Rec. S17,173 (daily ed. Oct. 26, 1990) (statement of Sen. Akaka) ("Native Hawaiians have always considered the burial of their kapuna, or ancestors, the epitome of cultural respect . . . . Their bones are the only connection between the spirit world and the physical world."). Thus, in instances "where remains are identifiable, tribal

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[6] These cities include (Providence, R.I.), municipal and county agencies (Dallas Water Utilities, Kerr County Attorney's Office), state agencies (Washington State Parks and Recreation Commission, Michigan State Police), universities (Columbia), public museums (Milwaukee Public Museum), zoos (Toledo Zoological Society), and historical societies (History Colorado). *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).

witnesses felt strongly that they should be returned for proper burial, which is an important part of the religious and traditional life cycle of Native Americans, including Native Hawaiians." S. Rep. No. 101-473, at 4 (1990).

As then Representative Campbell stated at the time, the legislation pertains to items, including human remains, "which were taken from a tribe without permission. It affords current day Indians the opportunity to determine the proper way that their ancestors be treated." 136 Cong. Rec. H10,985 (daily ed. Oct. 22, 1990) (statement of Rep. Campbell).

Third, the record makes clear that Congress intended for NAGPRA to prevent the trade/ownership/possession of Native remains to promote the economic interests and profits of non-Native entities. NAGPRA was designed to "regulate ownership, trade and disposition of Native American remains, burial objects, and objects of sacred or cultural significance." S. Rep. No. 101-473, at 19 (1990). At the time of NAGRPA's passage, Congress noted that "there is a flourishing trade in funerary and sacred objects that have been obtained from burials located on tribal and Federal lands." *Id.* at 4. As Senator Campbell noted, NAGPRA was necessary because Native human remains and cultural items were being traded "for profit or to satisfy some morbid curiosity." 136 Cong. Rec. H10,985 (daily ed. Oct. 22, 1990) (statement of Rep. Campbell). Consequently, the application of NAGPRA to invalidate the Borough's purchase and use of Jim Thorpe's remains as a tourist attraction or for display of any kind is entirely appropriate and consistent with the intentions of NAGPRA's drafters.

II. The Third Circuit's Decision Threatens to Undermine NAGPRA's Application Nationwide

The Third Circuit's conclusion that "museum" does not mean what Congress said it means threatens the ability of federally recognized tribes to repatriate the remains of their citizens nationwide. If left undisturbed, other municipalities, state governments, and non-Native entities may attempt to use the Third Circuit's decision in an effort to unlawfully disrupt Native burial ceremonies, take, trade, and/or possess Native remains.

Nothing could be farther from the intentions of NAGPRA's drafters.

CONCLUSION

The Third Circuit may disagree with the consequences of NAPGRA's application to Jim Thorpe's remains; however, "in such case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). The Congressional *Amici* therefore respectfully request that this Court grant Sac and Fox Nation's petition for *certiorari*.

Respectfully submitted,

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