No. 15-667

IN THE

Supreme Court of the United States

TIMOTHY WHITE, ROBERT L. BETTINGER, AND MARGARET SCHOENINGER,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS AND PROFESSOR KEITH KINTIGH SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* SUPPORTING PETITIONERS

The American Association of Physical Anthropologists (AAPA)[1] and Professor Keith Kintigh[2] move pursuant to Rule 37.2 for leave to file the attached brief *amici curiae* supporting the petition for a writ of certiorari. All counsel of record have been timely notified. Petitioners and Respondent Regents of the University of California have granted blanket consent to the filing of amicus briefs. Counsel for Respondent Kumeyaay Cultural Repatriation Committee withheld consent without explanation via email on December 3, 2015.

This case concerns the availability of judicial review under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, and the disposition thereunder of one of the most important archeological discoveries in the Americas. Both the AAPA and its members and Professor Kintigh have a longstanding concern with how this statute is construed and whether institutions' compliance may be reviewed by the courts when necessary.

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[1] The AAPA is the preeminent professional organization of biological anthropologists. Physical or biological anthropologists investigate human and primate evolution, skeletal form and function, genetics, and population structure and disease in both past and present peoples. *See generally* AAPA website, http://physanth.org (last visited Dec. 4, 2015).

[2] Professor Kintigh is Professor of Anthropology, Associate Director of Arizona State University's School of Human Evolution and Social Change, and Co-Director of the University's Center for Archaeology and Society. He is a former President of the Society for American Archaeology. He joins the attached brief in his individual capacity.

Each proposed *amicus* represented the scientific community in the coalition of American Indian and scientific groups that crafted NAGPRA. Professor Kintigh, an archaeologist specializing in the prehistory of the Southwestern United States, testified before multiple congressional committees regarding the legislation. AAPA members sit on the NAGPRA Review Committee, a statutorily-created body composed of representatives of the American Indian and scientific communities appointed by the Secretary of the Interior.[3] Many other AAPA members are responsible for implementing NAGPRA compliance practices at museums and academic institutions throughout the country. As such, *amici* possess unique expertise regarding the balance struck by Congress between tribal and scientific interests.

The AAPA and Professor Kintigh are also acutely interested in the outcome of this case and its implications for future anthropological study. Both are well-qualified to explain the scientific and cultural context in which this litigation occurs. Proposed *amici* are also better-situated than the parties to explain the unintended and adverse consequences of the decision below for this field of study, humanity's collective knowledge of human history in the Americas, and the possibility of accurate repatriation of ancient remains discovered in the future. To this end, their proposed

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[3] Former AAPA president Dr. Dennis O'Rourke and AAPA member Dr. Heather Edgar currently sit on the Committee, which monitors NAGPRA compliance, reports annually to Congress, and hears disputes between tribes, museums, and federal agencies regarding the application of NAGPRA. *See* http://www.nps.gov/nagpra/REVIEW/INDEX.HTM (last visited Dec. 2, 2015). Another former AAPA president, Dr. Phillip Walker, has also served in this capacity.

brief explains the limited state of current anthropological knowledge of human migration into the Americas and the potential for expanding our understanding of American pre-history through scientific study of the disputed remains.

For the foregoing reasons, leave to file the attached *amici curiae* brief should be granted.

Respectfully submitted,

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INTRODUCTION[1]

This case concerns the fate of two 9,000-year-old skeletons, among the oldest human remains ever discovered in the Americas. Pet. App. 5a. Petitioners—social and biological scientists seeking to study the so-called "La Jolla remains"—seek to contest Respondent University of California's decision to repatriate the remains to the Kumeyaay Indian tribes pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013. Pet. App. 6a. The Kumeyaay intend to inter the remains, rendering them permanently unavailable for scientific study. *Id.* at 46a.

Petitioners argue the University failed to properly determine whether the La Jolla remains were "Native American" within the meaning of the Act as required by NAGPRA's inventory provision, 25 U.S.C. § 3003(a). Pet. App. 19a. They further assert the remains do not appear to be "Native American" as defined in the Act because the statute applies only to remains "bear[ing] some relationship to a *presently existing* tribe," *see Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004) (emphasis in original), and the University lacked any evidence linking the La Jolla individuals to the Kumeyaay. Pet. App. 50a. To the extent the remains predate any known cultural

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2(a). All parties other than Respondent Kumeyaay Cultural Repatriation Committee consented, as indicated in *amici*'s motion.

affiliations to present-day American Indians, NAGPRA's repatriation provision, NAGPRA § 3005, does not govern their disposition. *See Bonnichsen*, 367 F.3d at 882.

The district court dismissed the action without reaching the merits, finding the Kumeyaay necessary and indispensable under Federal Rule of Civil Procedure 19(b) but immune from suit. Pet. App. 28a. The Ninth Circuit affirmed over Judge Murguia's dissent. *Id.* at 35a. She argued the Kumeyaay were unnecessary to a dispute over the University's threshold determination of NAGPRA applicability pursuant to a statutorily-prescribed inventory identification procedure, reasoning that the tribe lacked a unique interest in a lawful administrative process. *Id.* at 38a.

The Ninth Circuit's decision—which permits a single tribe with no connection beyond geographic proximity to shield institutions' NAGPRA determinations from judicial review—is fundamentally at odds with Congress's intended protection and accommodation of scientific and tribal (including competing tribal) interests under NAGPRA. *See* H.R. Rep. No. 101-877, at 10 (1990) (discussing the balance between "the rights of the Indian [and] the importance to museums of the retention of their collections and the scientific value of the items"); 136 Cong. Rec. S17,173 (Oct. 26, 1990) (floor remarks of Sen. McCain, a primary sponsor, calling the bill "a true compromise" between tribes and museums); NAGPRA § 3005(b) (permitting completion of scientific studies even where repatriation is required if "the outcome . . . would be of major benefit to the United States"); *id.* § 3002(a)(2)(B) (vesting ownership in the tribe with "the closest

cultural affiliation" in the absence of lineal descendants); *id.* § 3002(a)(2)(C)(2) (permitting a tribe to challenge repatriation of culturally unidentifiable remains based on geographic proximity by showing a stronger cultural relationship by a preponderance of the evidence).

First, the decision contravenes clear congressional intent that "any person"—including experts such as Petitioners and *amici* here—be able to enforce statutory compliance in the federal courts. *See* NAGPRA § 3013. *Second*, it appears to frustrate tribes' enforcement ability as well, *see id.* § 3005(e) (discussing competing tribal claims for repatriation), by denying federal jurisdiction over competing tribal repatriation claims where, as here, the receiving tribe refuses to waive sovereign immunity.

Finally, the Ninth Circuit's decision deprives all interested persons—scientists, tribes, and the American and global public alike—of the knowledge that could be gained from study of two of the western hemisphere's most important archeological discoveries and other similarly-ancient remains. This irreparable loss not only denies the broader public an enhanced understanding of human history and the peopling of the New World, but also denies American Indian tribes other than the Kumeyaay—as well as other indigenous peoples of the Americas—important knowledge about a potential ancestor. In so doing, it frustrates NAGPRA's goal of accurate and appropriate repatriation based on cultural affiliation where possible. *See id.* § 3005(a). Further, it effectively guarantees that connections between ancient remains and modern American Indians will remain elusive despite rapid advancements in paleogenetics and related fields of

study with the potential to bridge these historical gaps.

INTEREST OF *AMICI CURIAE*

Amici's interests in this matter are twofold. *First*, as explained in their motion for leave to file, *amici* have a longstanding interest in ensuring full compliance with NAGPRA by all covered institutions to protect the scientific, tribal, and public interests the statute is intended to accommodate.

Second, amici have a profound interest in ensuring opportunities for scientific study of exceedingly rare ancient human remains such as those at issue here. Such remains hold invaluable clues regarding the peopling of this hemisphere and the origins of present-day American Indian cultures. *Amici* and affiliated scientists stand at the forefront of rapidly-developing scientific techniques with the potential to unravel these mysteries. They offer their expertise to inform the Court regarding the scientific value of ancient specimens such as the La Jolla remains.

As longtime NAGPRA advocates, *amici* are deeply sensitive to American Indian interests in repatriation of remains and funerary objects as a means of righting the historical wrongs through which many American Indian cultural objects were acquired over the course of this Nation's history. At the same time, *amici* stand as advocates for the broader public interest in scientific study of remains predating any known cultural affiliation.

Amici believe NAGPRA, when properly construed and applied, harmonizes these interests. They therefore maintain that scientific data should be used in conjunction with other pertinent information to assess the Native American status of ancient remains,

thereby both enabling accurate disposition of remains to the true descendant group, if any, and contributing to a greater understanding of the history of humankind.

DISCUSSION

I. LITTLE IS KNOWN REGARDING HUMAN MIGRATION TO AND THROUGHOUT THE AMERICAS OR THE CONNECTION BETWEEN EARLY INHABITANTS OF THIS HEMISPHERE AND PRESENT-DAY AMERICAN INDIANS.

Anthropologists and other scientists in related disciplines largely agree that the earliest ancestors of modern American Indians arrived on this continent from Asia approximately 15,000 years ago. *See* Ted Goebel et al., *The Late Pleistocene Dispersal of Modern Humans in the Americas*, 319 Sci. 1497, 1502 (2008).[2] Even this date is subject to question, however, with new discoveries being made on a regular basis and some scientists pointing to earlier sites as evidence of earlier migrations from Asia. *See id.* at 1500.

The predominant migration hypothesis is that the earliest inhabitants settled on the Bering land bridge between what is now Siberia and Alaska during the last ice age and traveled into the Americas before rising sea levels severed this link between Asia and North America. *See* Scott A. Elias, *First Americans Lived on Bering Land Bridge for Thousands of Years*, Sci. Am., Mar. 4, 2014.[3] Alternate hypotheses—including that the first people in the Americas came

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[2] *Available at* http://www.centerfirstamericans.com/cfsa-publications/Science2008.pdf.

[3] *Available at* http://www.scientificamerican.com/article/first-americans-lived-on-bering-land-bridge-for-thousands-of-years/.

by sea, following the chain of volcanic islands across the northern Pacific Ocean—have also been advanced in the scholarly literature. *See* Andrew Curry, *Coming to America*, Nature, May 3, 2012, at 30–32.[4]

The spread of these original inhabitants throughout the Americas is likewise largely a mystery. Experts debate various migration routes from the Bering land bridge as well as the number of waves of dispersal. *See* Goebel, *supra*, at 1498–99. Even less is known about when and how these early populations expanded eastward from their original route or routes. *See generally* David G. Anderson & J. Christopher Gillam, *Paleoindian Colonization of the Americas: Implications from an Examination of Physiography, Demography, and Artifact Distribution*, 65 Am. Antiquity 43, 66 (2000).[5]

Each new piece of evidence tends to yield as many questions as answers. For example, recent analysis of DNA from a 12,000-year-old skeleton in Montana revealed a closer kinship to Native South Americans than North Americans, while the DNA of certain ancient remains discovered in South America has revealed evidence of particular Asian ancestry not found in modern Native North Americans, suggesting that original populations closer to the Bering Strait continued to be influenced by subsequent and as-yet-undiscovered migrations. *See* Michael Balter, *Native Americans Descend from Ancient Montana Boy*, Sci., Feb. 12, 2014, http://news.sciencemag.org/archaeo

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[4] *Available at* http://www.nature.com/polopoly_fs/1.10562!/menu/main/topColumns/topLeftColumn/pdf/485030a.pdf.

[5] *Available at* http://pidba.org/anderson/cv/Anderson%20Gillam%202000%20American%20Antiquity.pdf.

logy/2014/02/native-americans-descend-ancient-montana-boy.

Study of modern-day Native North Americans can supply only small pieces of these historical puzzles. The various tools suggested by NAGPRA itself—including "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, [and] historical," *see* NAGPRA § 3005(a)(4)—enable experts to establish only the most tentative *cultural* affiliations between living groups and those that existed before 1492, in part because the arrival of Europeans in the Americas thoroughly disrupted and changed existing cultures at that time and in subsequent centuries. *See, e.g., Bonnichsen*, 367 F.3d at 880–81 (noting expert findings that evidence of permanent villages in the area went back only 2,000 to 3,000 years and that "the empirical gaps in the record preclude establishing cultural continuities or discontinuities, particularly before about 5,000 B.C."). Biological association between the remains of ancient individuals and descendant groups is less tentative, but is only possible with scientific study. *See infra* Part II.

Well-preserved, complete ancient American remains—which at present number fewer than ten—therefore constitute far and away the most promising link to more ancient historical knowledge. *See generally* Sally M. Walker & Douglas W. Owsley, *Their Skeletons Speak: Kennewick Man and the Paleoamerican World* (2012). Scientific study of the approximately 9,000-year-old La Jolla remains would thus almost certainly provide crucial information concerning the peopling of the New World. Indeed, study of the so-called Kennewick Man—one of very few complete adult skeletons of comparable age and completeness to the La

Jolla remains to be recovered in North America and the subject of the *Bonnichsen* litigation[6]—has led to precisely these types of discoveries, which are of major benefit to the United States for understanding its prehistory and ensuring the most unambiguous disposition of these remains.

II. STUDY OF THE KENNEWICK MAN FOLLOWING THE *BONNICHSEN* CASE DEMONSTRATES THE VALUE OF PERMITTING SCIENTIFIC STUDY OF ANCIENT NORTH AMERICAN REMAINS.

The *Bonnichsen* case, like the case below, also involved an approximately 9,000-year-old skeleton, this one found in 1996 on federally-managed land along the Columbia River near Kennewick, Washington. *Bonnichsen*, 367 F.3d at 868–69. The Secretary of the Interior, like the University here, determined the remains were Native American based solely on their antiquity and burial location. *Id.* at 872. Lacking any evidence connecting Kennewick Man to a particular tribe, the Secretary decided to repatriate the remains

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[6] Although the Kennewick Man remains are of comparable age and completeness, the male-female pairing of the La Jolla remains make the genetic data they could provide even more valuable because they may reveal whether males and females in this ancient population came from different ancestral groups, something that cannot be determined from single individuals. *See generally* Peter A. Underhill & Toomas Kivisild, *Use of Y Chromosome and Mitochondrial DNA Population Structure in Tracing Human Migrations*, 41 Ann. Rev. Genetics 539 (2007) (explaining use of Y Chromosome and Mitochondrial DNA to trace paternal and maternal genetic inheritance, respectively); *see also* The Genographic Project, The New Y Chromosome and Mitochondrial DNA Trees, https://genographic.nationalgeographic.com/tree-updates/ (last visited Dec. 16, 2015).

to a coalition of local tribes based solely on geographic proximity. *Id.*

As here, a group of scientists filed suit to enjoin repatriation and obtain permission to study the remains. The Ninth Circuit vacated the Secretary's determination, holding: 1) "that Congress was referring to *presently existing* Indian tribes when it referred to a 'tribe, people, or culture that is indigenous to the United States,'"; and 2) that the Secretary's decision was arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A) because "[t]he administrative record contains no evidence—let alone substantial evidence—that Kennewick Man's remains are connected by some special or significant genetic or cultural relationship to any presently existing indigenous tribe, people, or culture." *Id.* at 875, 880 (quoting NAGPRA § 3001(9)) (emphasis added by the court).

Following the decision, a team of scientists was permitted to examine the 300 bones and fragments in 2005 and 2006. *See* Douglas Preston, *The Kennewick Man Finally Freed to Share His Secrets*, Smithsonian, Sept. 2014.[7] Using numerous minimally-invasive, non-destructive techniques such as measurement with osteological tools and close visual inspection of the remains, the scientists were able to learn about Kennewick Man's age, height, weight, health, injuries, and burial. *Id.* Members of the scientific team were able to use these clues to develop hypotheses about Kennewick Man's lifestyle and culture, including possible individual activity patterns such as spear fishing, *see Kennewick Man: The Scientific Investigation of an Ancient American Skeleton* ch. 7 (Douglas W. Owsley & Richard L. Jantz eds., 2014),

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[7] *Available at* http://www.smithsonianmag.com/history/kennewick-man-finally-freed-share-his-secrets-180952462/?no-ist.

and cultural burial practices based on the position and orientation in which he was originally buried and the approximate depth of the grave, *see id.* at 378.

These visual inspection techniques were amplified through modern imaging technology such as CT scans, which were used to create three-dimensional images of each bone. *See* Preston, *supra*. In addition to assisting scientists in analyzing limb bones to explore Kennewick Man's activity and behavior, *see* Christopher B. Ruff, *Gracilization of the Modern Human Skeleton*, 94 Am. Sci. 508 (2006),[8] these scans enabled experts in skeletal morphology to analyze the shape of the skull and other bones and hypothesize regarding affinities between the remains and other ancient or even modern peoples. *See Kennewick Man*, *supra*, at 466–68. Based on skull morphology, the scientists postulated that Kennewick Man might be more closely related to human groups living on the western Pacific Rim, such the Ainu in Japan or various Polynesian groups, than to modern American Indians. *See id.* at 478.

Scientists also analyzed variations in carbon, nitrogen, and oxygen isotopes in the remains. *See* Preston, *supra*. Rapid technological advances now make it possible to conduct such isotopic analyses from barely one-tenth of a milligram of bone, approximately ninety percent less than was needed just a decade ago. *See Kennewick Man, supra*, at 85. Such analyses can reveal not only the types of food a person ate, but also clues regarding the geographic locations of those food sources. *See* Tosha L. Dupras & Henry P. Schwarcz, *Strangers in a Strange Land: Stable Isotope Evidence*

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[8] *Available at* http://www.csub.edu/~kgobalet/files/Bio470/Ruff%202006%20Gracilization%20of%20Human%20Skeleton.pdf.

for Human Migration in the Dakhleh Oasis, 28 J. Arch. Sci. 1199 (2001). Using these techniques, the Kennewick Man team was able to determine that Kennewick Man subsisted almost exclusively on marine animals and drank high-altitude glacial runoff, suggesting origins along the Alaska coast hundreds of miles from his final resting place. *See Kennewick Man, supra*, at ch. 9.

Finally, the Kennewick Man team attempted to extract and analyze DNA from the remains. *See* Preston, *supra.* Although initially unsuccessful, vast improvement in ancient DNA sequencing technology in recent years ultimately enabled scientists to successfully sequence Kennewick Man's DNA from a 200-milligram bone fragment in June 2015. *See* Helen Thompson, *Genome Analysis Links Kennewick Man to Native Americans*, Smithsonian.com, June 18, 2015, http://www.smithsonianmag.com/science-nature/genome-analysis-links-kennewick-man-native-americans-180955638/. Scientists, including many affiliated with the AAPA, have been able to use such newly-available DNA sequencing techniques to reconstruct ancient migration patterns and biological relationships among peoples by comparing the DNA of living groups with each other and with samples obtained from millennia-old human remains to shed light on theories of human dispersal to and migration within the Americas. *See* Balter, *supra*; *see also* Jacob Mikanowski, *Origins: Paleogenetics is Helping to Solve the Great Mystery of Prehistory: How Did Humans Spread Out Over the Earth*, Aeon, Sept. 14, 2015, https://aeon.co/essays/what-can-paleogenetics-tell-us-about-our-earliest-ancestors.

These results challenged the Pacific Rim affiliation hypothesis based on skull morphology and showed

instead that Kennewick Man was genetically most closely related to a sample of living American Indians distributed throughout much of the United States and beyond. *See* Morten Rasmussen et al., *The Ancestry and Affiliations of Kennewick Man*, 523 Nature 455 (2015).[9] Although this genetic analysis was unable to associate Kennewick Man with any particular modern tribe, continued application of such rapidly-improving scientific techniques and new discoveries of other sets of ancient remains may well make it possible to establish such connections in the future. This can only happen, however, if the study of exceedingly ancient North American human remains is allowed to continue consistent with NAGPRA's intended goals of advancing public knowledge and fostering accurate repatriation.

[9] *Available at* http://www.nature.com/nature/journal/v523/n7561/full/nature14625.html.

CONCLUSION

For the foregoing reasons, reconsideration of the Ninth Circuit's decision concerning the La Jolla remains is of the utmost importance to all persons interested in the history of humankind. The petition for a writ of certiorari should therefore be granted.

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