No. 14-1419

IN THE

Supreme Court of the United States

SAC AND FOX NATION OF OKLAHOMA, ET AL.,
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

BRIEF OF *AMICI CURIAE* SCHOLARS OF STATUTORY INTERPRETATION AND NATIVE AMERICAN LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors at law schools across the country. Some amici teach courses, lecture widely, conduct research, and publish extensively in the field of statutory interpretation and related subjects. Their interest is in preserving the integrity of the judiciary and the judicial role as it relates to statutory interpretation. Other amici are experts in the field of Native American law who are deeply familiar with the statute at issue and its importance to Native American tribes. This brief draws on amici's extensive research and expertise in the fields of statutory interpretation and Native American law.[2]

While amici may disagree regarding many statutory interpretation issues, they all agree that the Third Circuit's opinion in this case significantly deviates from this Court's precedents, reflects confusion as to the proper application of the canons of interpretation (specifically the absurdity doctrine), encourages other courts to similarly misuse those canons, and raises separation-of-powers questions. Amici believe that in this case, the Third Circuit's misapplication of the absurdity canon requires that

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[1] All parties have been timely notified of the undersigned's intent to file this brief; both Petitioners and Respondents have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amici or their counsel contributed money or services to the preparation or submission of this brief.

[2] Amici and their institutional affiliations are listed in the Appendix.

certiorari be granted and the lower court's decision reversed.

SUMMARY OF ARGUMENT

The Third Circuit candidly acknowledged that under the plain language of the Native American Graves and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013, the Borough of Jim Thorpe qualifies as a "museum." Under section 7 of the Act, where a "museum" holds the human remains of a Native American, the Native American descendants can demand the return of the remains for proper handling and burial on ancestral lands. 25 U.S.C. § 3005 *et seq.* Section 2 of the Act, in turn, defines "museum" to mean "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items." 25 U.S.C. § 3001(8).

As the court recognized, "the Borough has 'possession of, or control over,' Jim Thorpe's remains"; "he is of Native American descent"; and "the Borough received federal funds after the enactment of NAGPRA." Pet. App. 15a. Consequently—and as the Third Circuit acknowledged—NAGPRA's plain language requires the return of Jim Thorpe's remains to his lineal descendants for burial on his ancestral lands. *See* 25 U.S.C. § 3005(a)(1) (requiring that, upon the request of a known lineal descendant of the Native American, a museum "shall expeditiously return [Native American human] remains and associated funerary objects").

Nevertheless, in an application of the so-called "absurdity doctrine," the court nullified the statute's plain language on the ground that applying the provision as written would lead to purportedly absurd results. The Third Circuit's reasoning and conclusion misuse the absurdity doctrine. Rather than identifying any absurdity, the opinion below simply amounts to a disagreement with the wisdom of the policy choices reflected in the statutory text. Further, it reflects abiding confusion about how and when to apply the absurdity doctrine and, in turn, invites other lower courts to similarly misapply the canon.

This Court should grant the petition for certiorari and reverse the decision below.

ARGUMENT

I. The Opinion Below Misuses The Absurdity Doctrine.

The familiar cardinal rule of statutory interpretation is that the plain meaning of statutory language controls. *See, e.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) ("The starting point in every case involving construction of a statute is the language itself."). Where a provision's plain meaning or its proper application is unclear, this Court considers various canons and presumptions to assist in resolving the ambiguity. *Corley v. United States*, 556 U.S. 303, 325 (2009) ("Canons of interpretation are quite often useful . . . when

statutory language is ambiguous." (internal quotation marks omitted)).

One such rule is that, where statutory language is ambiguous, the Court prefers an interpretation that avoids absurd results over one that leads to absurdity. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) ("[T]he courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." (internal quotation marks omitted; alteration in original)). This is the typical use of the absurdity doctrine.

The Third Circuit, however, did not deploy the absurdity doctrine in this common and benign manner. Instead, it invoked a more far-reaching form of the canon: in the rarest of circumstances, the unambiguous *plain language* of a statute may be nullified when it would lead to an absurd result. *See Griffin*, 458 U.S. at 571 ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."). The justifications for and boundaries of this use of the canon are controversial and subject to substantial judicial and scholarly debate. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 105 (2007) (Stevens, J., concurring) ("[A] judicial decision that de-

parts from statutory text may represent 'policy-driven interpretation.'" (citation omitted)); *Dodd v. United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *see also* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2003) (discussing and critiquing justifications for the absurdity doctrine); Linda D. Jellum, *Why Specific Absurdity Undermines Textualism*, 76 Brook. L. Rev. 917 (2011) (same); Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am. U. L. Rev. 127 (1994) (same).

Despite such debates, there is widespread agreement that nullifying a statute's plain language under the absurdity doctrine raises serious constitutional separation-of-powers questions and, consequently, is appropriate only in the most extraordinary circumstances. *See, e.g.*, *Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) ("[W]e reiterate that it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." (internal quotation marks omitted; alteration in original)); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[A]n application of the [absurdity] principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."). In particular, the absurdity doctrine must never be used to substitute a court's policy preferences for those expressed by the legislature in the

language of the statute. *See Dodd*, 545 U.S. at 359 ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quotation marks omitted)); *Commissioner v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided."); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 196 (1978) ("It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest.").

Consistent with these principles, this Court has invoked the absurdity doctrine to nullify a statute's unambiguous plain language in only the narrowest circumstances. Appropriate circumstances may include where: (1) a provision's plain language is in tension with the overall structure of the statute;[3] (2) the plain language raises constitutional questions;[4] (3) the plain language flatly contradicts the

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[3] *Clinton v. City of New York*, 524 U.S. 417, 429 n.14 (1998) (finding an absurd result where "the structure of [the statute]" precluded applying the plain language); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (confronting "absurd" statute and arguing that the proper interpretation is one that is "most compatible with the surrounding body of law into which the provision must be integrated").

[4] *Green*, 490 U.S. at 527-28 (Scalia, J., concurring) (confronting statute which, if interpreted literally, produced an absurd, and perhaps unconstitutional, result).

legislature's express purpose and intent in enacting the law;[5] or (4) the plain language leads to a manifestly irrational result that would be "so monstrous, that all mankind would, without hesitation," reject it.[6]

The first three justifications for nullifying a statute's plain language due to absurdity are not relevant in this case. The decision below cites no tension within the law, raises no constitutional objection to the plain language, and cites no evidence of legislative intent contradicting the result that flows from applying the statute's plain meaning.[7]

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[5] *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454-67 (1989) (applying the absurdity doctrine where an exhaustive review of legislative history demonstrated that the words chosen by Congress did not reflect legislative intent); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242-43 (1989) (recognizing the legitimacy of applying the absurdity doctrine in the "rare case [in which] the literal application of a statute would produce a result demonstrably at odds with the intentions of its drafters," but declining to apply the principle to the statute at issue because strict application of the plain meaning would not truly "contravene the intent of the framers of the Code" (alteration in original)).

[6] *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819).

[7] Although the court claimed that a literal reading of "museum" would contradict legislative intent, Pet. App. 17a-19a, the evidence it cited suggested—at most—only that circumstances like these were not encompassed by Congress's *central* purpose in enacting the statute. The court cited nothing in the legislative history or statutory text showing that Congress wished to *preclude* repatriation of human remains where the original burial was in accordance with the wishes of the next-of-

While the court below did not say so explicitly, its invocation of the absurdity doctrine resonates, at best, with the fourth—and most controversial and limited—circumstance in which the canon might apply. That is, the court evidently concluded that applying the plain meaning of "museum" to the Borough is irrational. But this Court has repeatedly warned against the danger of judges deeming statutory schemes "irrational" simply because the policies seem misconceived. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 10 (1997) ("Given [a] clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good . . . policy."); *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) ("When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm.").

In order to limit the potential for this sort of abuse, this Court has tightly circumscribed the circumstances in which the plain meaning of a statute may be absurd on the ground of irrationality: it must be "so bizarre that Congress could not have intended it," *Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1991) (internal quotation marks omitted), or "so gross as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60; *see also Small v. United States*, 544 U.S. 385, 404 (2005) ("We should employ [the absurdity doctrine] only 'where the result of applying the plain language would be, in a

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kin, or where there may be competing claims among family members.

genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.'" (citation omitted; alteration in original)). In most cases, even strange or troubling results will not meet this standard. For example, in *Barnhart v. Sigmon Coal Co.*, the Court refused to apply the absurdity doctrine even where the plain meaning led to manifestly counterintuitive results. 534 U.S. 438, 459 (2002); *see also Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 30 (1989) (similar); *Locke v. United States*, 471 U.S. 84, 93-96 (1985) (similar).

The Third Circuit's decision ignores these admonitions and takes the concept of irrationality far beyond what this Court has countenanced. The Third Circuit identified two supposed irrationalities: first, that the plain language would require repatriation even where the original burial was "in accordance with the wishes of the decedent's next-of-kin"; and second, that NAGPRA would be used "to settle familial disputes within Native American families." Pet. App. 18a-19a.

But this case is not one of the rare instances in which the absurdity doctrine may legitimately be used to nullify a statute's plain language. To the contrary, the plain language here is entirely rational, harmonious with NAGPRA's structure, and consistent with Congress's purposes for enacting it. The court might have considered Congress's policy choices, reflected in the statute's plain language, to be distasteful, overbroad, or ill-conceived; but none of these characteristics rises to the level of irrationality nec-

essary to justify nullifying NAGPRA's plain language. *See Locke*, 471 U.S. at 95 ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.").

A. NAGPRA's Plain Language Applies Even Where The Original Burial Was In Accordance With The Wishes Of The Decedent's Next-Of-Kin.

The court below made much of the fact that Thorpe's burial in the Borough was in accordance with the wishes of his next-of-kin, and thus presumably lawful at the time. Pet. App. 4a-6a. In light of this, the court concluded that applying NAGPRA in such cases would be absurd. The court cited no language in the legislative history to affirmatively support this assertion. Instead, it relied on its own apparent discomfort with the repatriation requirement where the initial interment was lawful. Pet. App. 17a-21a. But NAGPRA's text and structure make clear that human remains must be repatriated even where, as here, the agency or museum lawfully obtained them.[8]

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[8] That Jim Thorpe's remains were buried rather than publicly displayed is irrelevant. Whether the remains were actually displayed in a glass case or, as here, interred underground as part of a shrine does not determine an entity's status as a museum. First, the statute defines what it means to be a "museum," and that definition is paramount. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) ("When a statute includes an explicit definition, we must follow that definition" (quotation marks omitted)). Nothing in the statutory definition of "muse-

Two categories of objects are subject to NAGPRA: (1) human remains and associated funerary objects; and (2) unassociated funerary objects, sacred objects, and objects of cultural patrimony. *See* 25 U.S.C. § 3001(3) (defining "cultural items"). NAGPRA recognizes that an agency or museum may have a right of possession to either type of item. It defines a "right of possession" as "possession obtained with the voluntary consent of an individual or group that had authority of alienation." *Id.* § 3001(13). For human remains and associated funerary objects, a right of possession exists where the object was "obtained with full knowledge and consent of the next of kin." *Id.* With respect to an unassociated funerary object, sacred object, or object of cultural patrimony, a right of possession exists where the object was obtained

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um" suggests that a distinction between interment and display of human remains is relevant.

Second, even the plain or dictionary meaning of the word "museum" easily encompasses Jim Thorpe's mausoleum. *See The Compact Oxford-English Dictionary* 1136 (2d ed. 1991) ("2.a. A building or portion of a building used as a repository for the preservation and exhibition of objects illustrative of antiques, natural history, fine and industrial art, or some particular branch of any of these subjects, either generally or with reference to a definite region or period. Also applied to the collection of objects itself."). Jim Thorpe's gravesite was designed to bring in curious tourists and provide them with information and entertainment. In fact, the towns of Mauch Chunk and East Mauch Chunk believed that Thorpe's body could be used to generate revenue, and, once the towns combined, the Borough built an above-ground mausoleum to attract visitors. Pet. at 10. The gravesite therefore easily falls within the dictionary meaning of "museum," even though Jim Thorpe's remains are interred rather than displayed there.

"from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object." *Id.*

It is uncontested that the Borough has a right of possession to Jim Thorpe's remains, as they were given to the Borough by Thorpe's lawful next-of-kin. *Id.* Such a right of possession, however, does not free the Borough from its obligations under NAGPRA. The statute explicitly provides that a right of possession in Native American cultural items confers benefits that differ depending on the object's category.[9] Under section 7, if the agency or museum can "prove that it has a right of possession" to "unassociated funerary objects, sacred objects, and objects of cultural patrimony," then it may retain them and need not return them to the claimant—in other words, they are exempt from the repatriation requirement. 25 U.S.C. § 3005(c).

But NAGPRA does not extend this exemption to human remains or associated funerary objects. *See NAGPRA Regs.*, 60 Fed. Reg. 62,134, 62,153 (Dec. 4, 1995) ("The right of possession basis for retaining cultural items in an existing collection does not apply to human remains or associated funerary objects, only to unassociated funerary objects, sacred objects,

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[9] The Third Circuit appears to have overlooked or ignored the different treatment of the two categories of objects. *See* Pet. App. 22a (discussing § 3001(13), which defines "right of possession" to include human remains, but failing to mention 18 U.S.C. § 1170, which provides that a museum with a "right of possession" to human remains merely is immune from criminal liability). *See also infra* Part II.A.

and objects of cultural patrimony."). Instead, it provides that an agency or museum holding a right of possession to such objects merely escapes criminal prosecution for illegal trafficking. 18 U.S.C. § 1170. That is, unlike in cases where the museum had no right of possession to the human remains, it will not be subject to criminal penalties. Yet the repatriation requirement still obligates the museum to return this category of objects to lawful claimants.

Thus, Congress recognized that an agency or museum might have initially obtained human remains through lawful means, and it provided certain benefits to possessors in those circumstances. But, as the plain language of NAGPRA makes clear, Congress decided to treat human remains and associated funerary objects differently from other kinds of objects, by requiring that they be returned to lineal descendants or other enumerated claimants.[10] Thus, how an entity initially obtained human remains has no bearing on its obligation to return them.

It is easy to imagine rational reasons why Congress may have chosen to draw this distinction. First, it could have concluded that human remains and associated funerary objects are qualitatively different from other kinds of cultural items and bear more importance to tribes. This would justify NAGPRA's different treatment of the two categories of objects.

Second, Congress could have drawn this distinction because of differences in the property status of

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[10] *Compare* 25 U.S.C. § 3005(c), *with* 18 U.S.C. § 1170.

the two categories of objects. With respect to repatriation, Congress initially made no distinction between human remains and associated funerary objects, on the one hand, and other cultural objects, on the other.[11] By the time the statute was enacted, however, it provided for the two categories of objects to be treated differently when the museum or agency had a right of possession.[12] Congress may have made this distinction due to a concern that, where a right of possession to non-human remains existed, the repatriation requirement could implicate the Takings Clause. But that concern did not apply in the case of human remains. *See NAGPRA Regs.*, 60 Fed. Reg. at 62,153 ("American law generally recognizes that human remains can not [sic] be 'owned.'"); *cf.* H.R. Rep. No. 101-877, at 14-15, 25-29 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4367, 4373-74, 4384-88 (noting that definition of "right of possession" was amended "to meet the concerns of the Justice Department about the possibility of a 5th amendment taking of the private property of museums through the application of the terms of the Act").

B. NAGPRA Explicitly Anticipates And Provides Guidance For Resolving Familial Disputes.

The Third Circuit also identified a second purportedly absurd result of applying the plain lan-

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[11] As introduced on July 10, 1990, NAGPRA's repatriation requirement made no distinction between the two categories of objects. *See* H.R. 5237, 101st Cong. § 6(a) (as introduced in the House, July 10, 1990).

[12] *See* 25 U.S.C. § 3005(c).

guage: NAGPRA would be used to resolve disputes within Native American families as to the proper treatment of ancestral remains. As the court put it, NAGPRA was not intended "to settle [such] familial disputes within Native American families." Pet. App. 19a.

This, too, misuses and unduly expands the absurdity doctrine. Congress well understood that NAGPRA could give rise to family disputes. First, simply as a matter of logic, *any* scheme that (like NAGPRA) gives remote descendants the opportunity to make claims on ancestral remains and other objects invariably invites competing claims. After all, different descendants might have different views on the matter.

Second, even a cursory review of NAGPRA's language reveals that Congress explicitly anticipated family disputes. Section 7 provides that if there are "competing claims" concerning an object, then "the agency or museum may retain [the] item" until the dispute is resolved. 25 U.S.C. § 3005(e). Moreover, the statute provides a mechanism for resolving familial disputes over an item's disposition. Section 8 directs the Secretary of the Interior to establish a review committee that is tasked with "monitor[ing] and review[ing] the implementation of the . . . repatriation activities required [by NAGPRA]." *Id.* § 3006(a). Most notably, subsection 8(c)(4) charges the review committee with "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 . . . ." *Id.* § 3006(c)(4) (emphasis added). To

resolve disputes, the review committee is directed to compile a report and recommendations for proper handling of such disputed items. *Id.* § 3006(c)(9), (e). And if resolution cannot be achieved through this administrative process, NAGPRA grants federal district courts ultimate enforcement authority. *Id.* § 3013. In a district court proceeding under this section, the review committee's report and recommendation are admissible evidence. *Id.* § 3006(d).

Although NAGPRA does not mandate exhaustion of this administrative process prior to initiating suit in a district court, the fact that Congress created this detailed process demonstrates that it fully expected that there could be competing claimants. That manifest expectation defeats any notion that the possibility of intra-familial disputes justifies application of the absurdity doctrine. Of course, a disinterested observer might question the wisdom of the mechanism Congress devised for resolving such disputes. But given that Congress explicitly incorporated that mechanism into the statutory scheme, there is no legitimate basis for applying the absurdity doctrine on the ground that the statute's plain meaning would implicate intra-familial disputes.

C. The Opinion Below Would Not Eliminate The Supposed Absurdities.

Even assuming that the result of applying the plain language might be irrational for the reasons given by the Third Circuit, the decision below would not eliminate these absurdities—a fact that only underscores the extent to which the court's decision un-

tethers the absurdity doctrine from its proper moorings.

Suppose that the next-of-kin of a Native American had given that person's remains to an entity that is a "real" museum in the eyes of the Third Circuit, and that certain lineal descendants then made a claim for repatriation. Just as in the present case, the museum would hold a right of possession, and a dispute could arise among the family members. That is, these supposed absurdities could occur in even the most run-of-the-mill cases that come within NAGPRA's scope. Nullifying NAGPRA's plain language to negate the Borough's status as a museum therefore does nothing at all to address the Third Circuit's concerns, as there is no connection between its reasoning (that the statute may give rise to absurd results) and its ultimate holding (that the Borough is not a "museum" as defined in section 2 of NAGPRA). This logical disconnect between the Third Circuit's reasoning and its holding thoroughly undermines the decision below.

In sum, applying the plain language in this case leads to no absurdities at all, but only to results that are fully anticipated by, consistent with, and provided for in the statutory scheme.

II. The Opinion Below Distorts Other Well-Established Canons Of Statutory Construction.

In the course of misapplying the absurdity doctrine, the Third Circuit's opinion flouts other established canons of statutory interpretation, each of which would demand an outcome different from the one the court reached. These canons reflect the im-

portance of judicial restraint and respect for statutory text and separation of powers where, as here, the statute's language is clear and consistent with legislative purposes.

A. The *Expressio Unius* Canon Requires The Opposite Result.

The familiar *expressio unius* canon of construction strongly supports the Petitioners. This canon dictates that "[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Clay v. United States*, 537 U.S. 522, 528 (2003) (internal quotation marks omitted). In other words, the canon reflects "the common sense language rule that the expression of one thing suggests the exclusion of another thing." Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 351 (2010).

In NAGPRA, Congress expressly provided that in certain enumerated circumstances, a "right of possession" negates the obligation to repatriate cultural items. Yet this carve-out is limited to "Native American unassociated funerary objects, sacred objects or objects of cultural patrimony." 25 U.S.C. § 3005(c). *See supra* Part I.A. The existence of retention provisions applicable to certain cultural items—and not others—establishes that Congress knew how to preserve a museum's ability to retain human remains rightfully in its possession, yet chose not to do so. *See Hardt v. Reliance Standard Life Ins. Co.*, 560

U.S. 242, 252 (2010). Indeed, Congress considered—but rejected—a provision that would have treated human remains like other cultural objects for purposes of repatriation. *See* H.R. 5237, 101st Cong. § 6(c) (as introduced in the House, July 10, 1990).

In circumstances such as these, the *expressio unius* canon applies with full force, and precludes a court from reading into the statute what Congress declined to include. *See, e.g.*, *Clay* , 537 U.S. at 528; *Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The Opinion Below Violates The Canon That Exceptions Are To Be Narrowly Construed.

Further, the opinion below disregards the principle that, where "a general statement of policy is qualified by an exception" the court "usually read[s] the exception narrowly in order to preserve the primary operation of the provision." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989). As this Court has explained, "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips Inc. v. Walling*, 324 U.S. 490, 493 (1945).

Regrettably, the effect of the Third Circuit's decision was to do just that. Congress provided a right-of-possession exception to the general policy of repatriation of cultural items. It limited that exception, however, to encompass only unassociated funerary objects, sacred objects or objects of cultural patrimony. *See supra* Part I.A. By effectively expanding that exception to include human remains, the Third Circuit's opinion gives it a scope far beyond what

Congress intended—and, indeed, a scope so broad as to encompass *all* cultural items. Had Congress desired such an outcome, it would have permitted any museum or agency with a right of possession to avoid repatriation without regard to the type of cultural item at issue. But that is not what Congress did.

Congress' varied approach to different types of cultural items when crafting exceptions to the repatriation requirement is easily explained. *See supra* Part I.A. Accordingly, the statute's express treatment of human remains is properly viewed as a deliberate policy decision by the legislature, rather than an oversight to be remedied by the courts. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

CONCLUSION

Contrary to the opinion of the Third Circuit, applying the plain language of NAGPRA would not produce an absurd result. In fact, the return of Jim Thorpe's remains to his ancestral lands would be fully consistent with the statutory scheme and with Congress's goals. Judges are entitled to question the wisdom of a statute and the policy choices it reflects, but they may not nullify the statute's plain language on this basis. This Court should grant the petition and reverse the decision below.

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