No. 14-___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

BOROUGH OF JIM THORPE, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDING

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

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

INTRODUCTION

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

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

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

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

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

STATEMENT OF THE CASE

A. Statutory Framework

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural History

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

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

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

B. The Third Circuit Misapplied The Absurdity Doctrine.

1. The Absurdity Doctrine Applies Only In Exceptional Circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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