

Case No. 24-2081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WINNEBAGO TRIBE OF NEBRASKA,

Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY *et al.*,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
Hon. Claud M. Hilton, District Judge | Case No. 1:24-cv-00078-CMH-IDD

JOINT APPENDIX

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APPEAL,CLOSED

U.S. District Court
Eastern District of Virginia - (Alexandria)
CIVIL DOCKET FOR CASE #: 1:24-cv-00078-CMH-IDD

Winnebago Tribe of Nebraska v. Department of the Army et al
Assigned to: District Judge Claude M. Hilton
Referred to: Magistrate Judge Ivan D. Davis
Case in other court: 4th Circuit, 24-02081
Cause: 25:640 Indian Tribal Rights

Date Filed: 01/17/2024
Date Terminated: 08/20/2024
Jury Demand: None
Nature of Suit: 899 Other Statutes:
Administrative Procedures Act/Review or
Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

Winnebago Tribe of Nebraska
a federally recognized Indian Tribe

represented by **Beth Margaret Wright**
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ATTORNEY TO BE NOTICED

Rebecca S. Levenson
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LEAD ATTORNEY
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ATTORNEY TO BE NOTICED

Rebecca S. Levenson
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Defendant

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represented by **Dale Wood Pittman**

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/28/2024	55	USCA Case Number 24-2081, case manager Taylor Barton 4th Circuit for 53 Notice of Appeal filed by Winnebago Tribe of Nebraska. (swil) (Entered: 10/29/2024)
10/23/2024	54	Transmission of Notice of Appeal to US Court of Appeals re 53 Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (Sbro,) (Entered: 10/23/2024)
10/21/2024	53	NOTICE OF APPEAL as to 50 Memorandum Opinion, 51 Order on Motion to Dismiss for Failure to State a Claim by Winnebago Tribe of Nebraska. Filing fee \$ 605, receipt number AVAEDC-9803948. (Werkheiser, Gregory) (Entered: 10/21/2024)
09/17/2024	52	TRANSCRIPT of Motion Hearing held on July 12, 2024, before Judge Claude M. Hilton, Court Reporter/Transcriber Julie Egal, Telephone number 571-229-7074. NOTICE RE REDACTION OF TRANSCRIPTS: The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 10/17/2024. Redacted Transcript Deadline set for 11/18/2024. Release of Transcript Restriction set for 12/16/2024.(egal, julie) (Entered: 09/17/2024)
08/20/2024	51	ORDERED that Defendants' Motion to Dismiss is GRANTED, and this case is DISMISSED in re 30 Motion to Dismiss with prejudice for Failure to State a Claim. Signed by District Judge Claude M. Hilton on 8/20/2024. (Sbro,) (Entered: 08/20/2024)
08/20/2024	50	MEMORANDUM OPINION in re 30 MOTION to Dismiss for Failure to State a Claim. Signed by District Judge Claude M. Hilton on 8/20/2024. (Sbro,) (Entered: 08/20/2024)
07/12/2024	49	Minute Entry for proceedings held before District Judge Claude M. Hilton: Motion Hearing held on 7/12/2024. Appearances of counsel. Defts' 30 MOTION to Dismiss for Failure to State a Claim is argued and TAKEN UNDER ADVISEMENT. (Court Reporter J. Egal.) (yguy) (Entered: 07/12/2024)
07/10/2024	48	NOTICE of Supplemental Authority by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates re 30 MOTION to Dismiss for Failure to State a Claim (<i>Supplemental Authority</i>) (Attachments: # 1 Exhibit Loper Bright Enterprises v. Raimondo)(Dykema, Peter) Modified on 7/11/2024 (Sbro,). (Entered: 07/10/2024)

07/10/2024	47	NOTICE of Appearance by Marion Forsyth Werkheiser on behalf of Winnebago Tribe of Nebraska (Werkheiser, Marion) (Entered: 07/10/2024)
06/21/2024	45	RESPONSE in Support re 30 MOTION to Dismiss for Failure to State a Claim filed by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates. (Dykema, Peter) (Entered: 06/21/2024)
06/17/2024	46	Amicus Brief by Catawba Nation, United South and Eastern Tribes Sovereignty Protection Fund. (dvanm) (Entered: 06/21/2024)
06/17/2024	44	ORDERED that this Motion 37 is GRANTED; and IT IS ORDERED that the brief of Amici, attached to the Motion, is deemed filed in the above-captioned proceeding. Signed by District Judge Claude M. Hilton on 06/17/2024. (dvanm) (Entered: 06/17/2024)
06/17/2024	43	ORDER granting 40 Motion for Pro hac vice Appointed Lydia Kirtrice Locklear for Catawba Nation. Signed by District Judge Claude M. Hilton on 6/17/2024. (swil) (Entered: 06/17/2024)
06/17/2024	42	ORDER granting 39 Motion for Pro hac vice Appointed Kaitlyn Elizabeth Klass for United South and Eastern Tribes Sovereignty Protection Fund. Signed by District Judge Claude M. Hilton on 6/17/2024. (swil) (Entered: 06/17/2024)
06/14/2024	41	Waiver of re 37 MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss Oral Argument</i> by Catawba Nation, United South and Eastern Tribes Sovereignty Protection Fund (Pittman, Dale) (Entered: 06/14/2024)
06/13/2024		Notice of Correction re 37 MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss</i> . The filing user has been notified to file a Notice of Hearing or a Waiver of Oral Argument. (dvanm) (Entered: 06/13/2024)
06/12/2024	40	Motion to appear Pro Hac Vice by Lydia Kirtrice Locklear and Certification of Local Counsel Dale W. Pittman Filing fee \$ 75, receipt number AVAEDC-9578634. by Dale W. Pittman. (Pittman, Dale) (Entered: 06/12/2024)
06/12/2024	39	Motion to appear Pro Hac Vice by Kaitlyn Elizabeth Klass and Certification of Local Counsel Dale W. Pittman Filing fee \$ 75, receipt number AVAEDC-9578604. by Dale W. Pittman. (Pittman, Dale) (Entered: 06/12/2024)
06/12/2024	38	Memorandum in Support re 37 MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss</i> filed by Catawba Nation, United South and Eastern Tribes Sovereignty Protection Fund. (Attachments: # 1 Exhibit Amicus Brief, # 2 Exhibit A - Harris Sworn Statement)(Pittman, Dale) (Entered: 06/12/2024)
06/12/2024	37	MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss</i> by United South and Eastern Tribes Sovereignty Protection Fund, Catawba Nation. (Attachments: # 1 Proposed Order) (Pittman, Dale) (Entered: 06/12/2024)
06/10/2024	36	NOTICE of Appearance by Dale Wood Pittman on behalf of Winnebago Tribe of Nebraska (Pittman, Dale) (Entered: 06/10/2024)
06/07/2024	35	RESPONSE to Motion re 30 MOTION to Dismiss for Failure to State a Claim filed by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Entered: 06/07/2024)

05/16/2024	34	ORDERED that the parties' joint motion is GRANTED; and it is further ORDERED that Plaintiff shall file any response to Defendants motion to dismiss on or before June 7, 2024; and it is further ORDERED that Defendants shall file any reply in support of their motion to dismiss on or before June 21, 2024 re 33 Motion. Signed by District Judge Claude M. Hilton on 5/16/2024. (Sbro,) Modified on 5/28/2024 (Sbro,). (Entered: 05/16/2024)
05/15/2024	33	Joint MOTION to Alter Remaining Briefing Deadlines related to Defendants' motion to dismiss by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates. (Attachments: # 1 Proposed Order)(Levenson, Rebecca) (Entered: 05/15/2024)
05/06/2024		Set Deadline as to 30 MOTION to Dismiss for Failure to State a Claim. Motion Hearing set for 7/12/2024 at 10:00 AM in Alexandria Courtroom 800 before District Judge Claude M. Hilton. (triv) (Entered: 05/06/2024)
05/03/2024	32	Notice of Hearing Date re 30 MOTION to Dismiss for Failure to State a Claim (Dykema, Peter) (Entered: 05/03/2024)
05/03/2024	31	Memorandum in Support re 30 MOTION to Dismiss for Failure to State a Claim filed by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates. (Attachments: # 1 Exhibit A - Letter)(Dykema, Peter) (Entered: 05/03/2024)
05/03/2024	30	MOTION to Dismiss for Failure to State a Claim by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates. (Dykema, Peter) (Entered: 05/03/2024)
05/02/2024	29	NOTICE of Appearance by Rebecca S. Levenson on behalf of Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates (Levenson, Rebecca) Modified to correct docket text on 5/3/2024 (Sbro,). (Entered: 05/02/2024)
04/19/2024	28	It is hereby ORDERED that the Motion is GRANTED. Defendants shall submit their response to the Complaint no later than May 3, 2024 re 27 Consent MOTION for Extension of Time to File Answer re 1 Complaint. Signed by Magistrate Judge Ivan D. Davis on 4/19/2024. (Sbro,) (Entered: 04/19/2024)
04/19/2024	27	Consent MOTION for Extension of Time to File Answer re 1 Complaint, by Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates. (Attachments: # 1 Proposed Order)(Dykema, Peter) (Entered: 04/19/2024)
04/15/2024	26	NOTICE of Appearance by Peter Kryn Dykema on behalf of Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates (Dykema, Peter) (Entered: 04/15/2024)
04/12/2024	25	ORDER granting 24 Motion for Pro hac vice Appointed Jennifer Ann Morris for Winnebago Tribe of Nebraska. Signed by District Judge Claude M. Hilton on 4/12/2024. (swil) (Entered: 04/15/2024)
04/09/2024	24	Motion to appear Pro Hac Vice by Jennifer Ann Morris and Certification of Local Counsel Greg Werkheiser Filing fee \$ 75, receipt number AVAEDC-9461107. by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Main Document 24 replaced to correct PDF fillable form on 4/11/2024) (Sbro,). (Entered: 04/09/2024)

03/15/2024	23	ORDERED that the Motion is GRANTED. Attorney Jessica R. G. Krauss is hereby withdrawn as counsel of record for Plaintiff re 21 Motion to Withdraw as Attorney. Signed by Magistrate Judge Ivan D. Davis on 3/15/2024. (Sbro,) (Entered: 03/15/2024)
03/13/2024	22	Waiver of re 21 MOTION to Withdraw as Attorney <i>Oral Arguments</i> by Winnebago Tribe of Nebraska (Krauss, Jessica) (Entered: 03/13/2024)
03/11/2024	21	MOTION to Withdraw as Attorney by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 03/11/2024)
02/28/2024	20	SUMMONS Returned Executed by Winnebago Tribe of Nebraska All Defendants (Krauss, Jessica) (Entered: 02/28/2024)
02/22/2024	19	Summons Issued as to Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates, U.S. Attorney and U.S. Attorney General NOTICE TO ATTORNEY: Please remove the headers and print two duplexed copies of the electronically issued summons for each Defendant. Please serve one copy of the summons and a copy of the Complaint upon each Defendant. Please ensure that your process server returns the service copy (executed or unexecuted) to your attention and electronically file it using the filing events, Summons Returned Executed as to USA or Summons Returned Unexecuted as to USA. (Attachments: # 1 Notice to Attorney) (Sbro) (Entered: 02/22/2024)
02/20/2024	18	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 02/20/2024)
01/19/2024	17	ORDER granting 12 Motion for Pro hac vice Appointed Jason Searle for Winnebago Tribe of Nebraska. Signed by District Judge Claude M. Hilton on 1/19/2024. (swil) (Entered: 01/22/2024)
01/19/2024	16	ORDER granting 11 Motion for Pro hac vice Appointed Wesley James Furlong for Winnebago Tribe of Nebraska. Signed by District Judge Claude M. Hilton on 1/19/2024. (swil) (Entered: 01/22/2024)
01/19/2024	15	ORDER granting 10 Motion for Pro hac vice Appointed Beth Margaret Wright for Winnebago Tribe of Nebraska. Signed by District Judge Claude M. Hilton on 1/19/2024. (swil) (Entered: 01/22/2024)
01/19/2024	14	ORDER granting 9 Motion for Pro hac vice Appointed Danelle Jeanine Smith for Winnebago Tribe of Nebraska. Signed by District Judge Claude M. Hilton on 1/19/2024. (swil) (Entered: 01/22/2024)
01/18/2024		Notice of Correction re 9 Motion to appear Pro Hac Vice by Danelle Smith and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9312948. , 11 Motion to appear Pro Hac Vice by Wesley Furlong and Certification of Local Counsel Filing fee \$ 75, receipt number AVAEDC-9312977. , 12 Motion to appear Pro Hac Vice by Jason Searle and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9313012. , 10 Motion to appear Pro Hac Vice by Beth Wright and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9312960. , 8 Notice of Appearance. Unfortunately, document number is an incorrectly saved PDF fillable form which we have removed. For future reference please file the document after saving it correctly. To correctly save the PDF fillable form, click on the File menu select Print, and then select your PDF writer from the Printer Name List, then click on Print or OK depending on your program. The Clerk's office corrected these errors and no further action is required at this time. (CWel) (Entered: 01/18/2024)

01/18/2024	13	Summons Issued as to Karen Durham-Aguilera, Priscella A Nohle, United States Department of the Army, United States Department of the Army, Office of Army Cemeteries, Christine E Wormuth, Renea C Yates, U.S. Attorney and U.S. Attorney General NOTICE TO ATTORNEY: Please remove the headers and print two duplexed copies of the electronically issued summons for each Defendant. Please serve one copy of the summons and a copy of the Complaint upon each Defendant. Please ensure that your process server returns the service copy (executed or unexecuted) to your attention and electronically file it using the filing events, Summons Returned Executed as to USA or Summons Returned Unexecuted as to USA. (Attachments: # 1 Notice to Attorney)(Cwel,) (Entered: 01/18/2024)
01/17/2024		Initial Case Assignment to District Judge Claude M. Hilton and Magistrate Judge Ivan D. Davis. (Cwel) (Entered: 01/18/2024)
01/17/2024	12	Motion to appear Pro Hac Vice by Jason Searle and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9313012. by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Main Document 12 replaced to correct PDF fillable form on 1/18/2024) (Dest). (Entered: 01/17/2024)
01/17/2024	11	Motion to appear Pro Hac Vice by Wesley Furlong and Certification of Local Counsel Filing fee \$ 75, receipt number AVAEDC-9312977. by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Main Document 11 replaced to correct PDF fillable form on 1/18/2024) (Dest). (Entered: 01/17/2024)
01/17/2024	10	Motion to appear Pro Hac Vice by Beth Wright and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9312960. by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Main Document 10 replaced to correct PDF fillable form on 1/18/2024) (Dest). (Entered: 01/17/2024)
01/17/2024	9	Motion to appear Pro Hac Vice by Danelle Smith and Certification of Local Counsel Gregory Werkheiser Filing fee \$ 75, receipt number AVAEDC-9312948. by Winnebago Tribe of Nebraska. (Werkheiser, Gregory) (Main Document 9 replaced to correct PDF fillable form on 1/18/2024) (Dest). (Entered: 01/17/2024)
01/17/2024	8	NOTICE of Appearance by Gregory Alan Werkheiser on behalf of Winnebago Tribe of Nebraska (Werkheiser, Gregory) (Entered: 01/17/2024)
01/17/2024	7	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	6	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	5	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	4	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	3	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	2	Proposed Summons by Winnebago Tribe of Nebraska. (Krauss, Jessica) (Entered: 01/17/2024)
01/17/2024	1	Complaint (Filing fee \$ 405, receipt number AVAEDC-9311576.), filed by Winnebago Tribe of Nebraska. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11

	Exhibit, # 12 Exhibit)(Krauss, Jessica) (Main Document 1 replaced to correct complaint on 1/17/2024) (Sbro). (Entered: 01/17/2024)
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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

**WINNEBAGO TRIBE OF NEBRASKA, a
federally recognized Indian Tribe,**

Plaintiffs,

v.

**UNITED STATES DEPARTMENT OF THE
ARMY; UNITED STATES DEPARTMENT
OF THE ARMY, OFFICE OF ARMY
CEMETERIES; CHRISTINE E. WORMUTH,
KAREN DURHAM-AGUILERA, RENE A.
YATES, Lieutenant Colonel PRISCELLA A.
NOHLE, in their official capacities,**

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Civil No. _____

INTRODUCTION

1. This is an action for declaratory and injunctive relief, as provided by 25 U.S.C. § 3013 and 28 U.S.C. §§ 2201 and 2202, brought by Plaintiff Winnebago Tribe of Nebraska (“Winnebago” or “Plaintiff”), a federally recognized Indian Tribe, against Defendants the United States Department of the Army (“DOA”); the United States Department of the Army, Office of Army Cemeteries (“OAC”); Christine E. Wormuth, in their official capacity as Secretary of the Army; Karen Durham-Aguilera, in their official capacity as Executive Director of the Office of Army Cemeteries; Renea C. Yates, in their official capacity as Director of the Office of Army Cemeteries; and Lieutenant Colonel Priscella A. Nohle, in their official capacity as Garrison Commander of the United States Army Carlisle Barracks (collectively, “Defendants”), for on-going violations of the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001-3013, and its implementing regulations, 43 C.F.R. § 10 (2023).

2. Defendants currently possess and control the bodily remains of two of Winnebago's boys, Samuel Gilbert and Edward Hensley, within a holding or collection of Native American human remains buried at the Carlisle Barracks Post Cemetery ("Carlisle Cemetery"), a cemetery at the Carlisle Barracks Army base, in Carlisle, Pennsylvania. Winnebago seeks declaratory relief to address Defendants' on-going violations of NAGPRA. These violations stem from Defendants' denial of Winnebago's request to repatriate the remains of Samuel and Edward, in accordance with 25 U.S.C. § 3005(a)(4). Additionally, Winnebago seeks injunctive relief to correct these violations and to enjoin Defendants to repatriate the remains of the boys pursuant to 25 U.S.C. § 3005(a)(4) and NAGPRA's other applicable provisions.

3. On October 16, 2023, Winnebago sent a formal letter to Defendants requesting that they repatriate the remains of Samuel and Edward from Carlisle Cemetery pursuant to NAGPRA. On December 11, 2023, Winnebago received a letter from Defendant Karen Durham-Aguilera denying Winnebago's request and refusing to repatriate Samuel and Edward pursuant to NAGPRA. Defendant Durham-Aguilera stated that OAC would only consider "disinterring and returning" Samuel and Edward according to makeshift OAC internal policies and practices ("the OAC Disinterment and Return Process"). Defendants' denial and continuing refusal to comply with Winnebago's repatriation request violates NAGPRA.

4. Defendants' conduct perpetuates an evil that the United States Congress sought to correct when it enacted NAGPRA in 1990; namely, the United States Army's ("the Army") historical and longstanding practice of abusing and mishandling Native American human remains, funerary and sacred objects, and objects of cultural patrimony, and its refusal to treat such remains and objects with dignity and respect.

5. Defendants denied Winnebago's request on the erroneous basis that NAGPRA does not apply to the repatriation of "Native American human remains" (43 C.F.R. § 10.1 (2023)) in their possession and control at Carlisle Cemetery. Defendants' main justification for this position is that the Native American human remains at Carlisle Cemetery do not constitute a holding or collection under NAGPRA. Defendants' position, however, obfuscates the actual standard articulated in NAGPRA that determines the statute's applicability to Winnebago's request. The actual standard is whether Native American human remains are "possessed or controlled by Federal agencies[.]" 25 U.S.C. § 3005(a). It is obvious and undisputed that Samuel's and Edward's remains are Native American human remains in Defendants' possession and control. And even if relevant, Defendants' position is incorrect, as Samuel's and Edward's remains are part of a holding or collection for the purposes of NAGPRA. By refusing to repatriate Samuel and Edward to Winnebago pursuant to NAGPRA, Defendants violated federal law, unlawfully denied Winnebago its right to have Samuel and Edward repatriated, and undermined Congress's objectives in enacting NAGPRA in 1990.

6. Defendants' refusal to comply with NAGPRA unlawfully restricts a myriad of rights Congress extended to Indian Tribes under the law. Under NAGPRA, it is Winnebago's right to direct the repatriation of the remains of Samuel and Edward. Instead of complying with NAGPRA's heightened standards, Defendants have attempted to force the application of the generic and toothless OAC Disinterment and Return Process for the return of Samuel and Edward, a process that strips Winnebago of the rights guaranteed under NAGPRA.

7. For example, pursuant to NAGPRA, upon receiving Winnebago's repatriation request, Defendants are *required* to repatriate Samuel and Edward to Winnebago itself, as an Indian Tribe, within ninety days, and in a culturally appropriate manner. In contrast, by imposing

the OAC Disinterment and Return Process, Defendants retain complete discretion over whether to return the boys' remains at all. And if Defendants decide to return the remains, the OAC Disinterment and Return Process provides no timeline, allowing Defendants to drag their feet and adopt generic protocols for disinterment instead of those aligned with Winnebago cultural traditions. Under the OAC Disinterment and Return Process, Defendants will not return Samuel and Edward to Winnebago directly or by its request alone; instead, Defendants require a "closest living relative,"—a concept that is nowhere defined and nearly impossible to apply in these circumstances—to initiate the OAC Disinterment and Return Process.

8. Beyond the right of an Indian Tribe to itself request the repatriation of culturally affiliated Native American human remains, Indian Tribes are entitled to other crucial rights under NAGPRA, such as the right to robust consultation regarding the handling and disposition of their relatives' remains. NAGPRA also includes mechanisms that enable Indian Tribes to hold federal agencies accountable for carrying out expeditious and culturally appropriate repatriations. Indian Tribes have the right to bring enforcement actions in federal district courts for violations of NAGPRA.

9. Through NAGPRA, Congress sought to return control over the manner and disposition of Native American human remains to their culturally affiliated Indian Tribes. Unlike the OAC Disinterment and Return Process, NAGPRA provides a clear, familiar, and culturally sensitive framework for Indian Tribes to follow in securing the remains of their relatives. Indian Tribes regularly utilize NAGPRA to repatriate relatives in virtually every other setting in which a federal agency has possession or control of Native American human remains. Congress did not exempt Defendants from NAGPRA's application and accountability measures. Indeed,

NAGPRA expressly recognizes the federal government's trust responsibility to Indian Tribes. *See* 25 U.S.C. § 3010.

10. The historical context of how Defendants came to possess and control the holding or collection of Native American human remains at Carlisle Cemetery, and why Winnebago seeks the repatriation of Samuel's and Edward's remains pursuant to NAGPRA, begins with the Carlisle Indian Industrial Boarding School ("Carlisle Indian School" or "Carlisle"). In 1895, Captain W. H. Beck, United States Army, Indian Agent of the Omaha and Winnebago Indian Agency, sent Samuel and Edward from their home in Winnebago to Carlisle. Samuel and Edward, like so many other Indian children forcibly removed to Indian boarding schools nationwide, were sent to Carlisle to erase their Native American culture and identity and replace it with Euro-American culture.

11. Samuel and Edward, like so many other Indian children sent to Indian boarding schools, died during and because of their time at Carlisle. Upon their deaths, Carlisle officials failed to return Samuel and Edward home to their families and communities for proper burials pursuant to Winnebago beliefs, customs, and practices. Instead, Carlisle officials buried Samuel and Edward without notice to Winnebago or their families. Since then, Defendants have grossly mishandled Samuel's and Edward's remains, along with the rest of the remains at Carlisle Cemetery. Moreover, Defendants use the holding or collection of remains at Carlisle Cemetery for research, display, tourism, and education. Particularly egregious, Defendants use the holding or collection for these purposes to serve their institutional goals: to tell their own version of Carlisle's history and to distance themselves from and absolve themselves of responsibility for their role in tragic aspects of that history.

12. Today, Winnebago continues to experience the pain of knowing that Samuel's and Edward's spirits remain lost and unable to rest as they have been waiting to come home for nearly 125 years. Winnebago brings this action to have Samuel and Edward repatriated in an expeditious and appropriate manner, and to do so by vindicating its right to repatriate the boys' remains from Defendants' holding or collection at Carlisle Cemetery, in accordance with the substantive and procedural rights guaranteed to it under NAGPRA.

PARTIES

I. Plaintiff

13. Plaintiff WINNEBAGO TRIBE OF NEBRASKA is a sovereign Tribal Nation and a federally recognized Indian Tribe, *see* 89 Fed. Reg. 944, 947 (Jan. 8, 2024), whose present-day reservation lands were established by the Treaty with the Winnebago, 1865. Treaty with the Winnebago, 14 Stat. 671, art. 2 (Feb. 13, 1866). Winnebago's reservation and Tribal Lands are located in the States of Nebraska and Iowa, and Winnebago's seat of government is Winnebago, Nebraska.

II. Defendants

14. Defendant UNITED STATES DEPARTMENT OF THE ARMY is a federal agency located in Arlington, Virginia, and whose mailing address is: 101 Army Pentagon, Washington, DC 20310-0101. DOA is responsible for ensuring that it, its subordinate agencies, including OAC, and all officials thereunder comply with NAGPRA. DOA is the federal agency with direct supervision over OAC and Carlisle Cemetery and their officials.

15. Defendant UNITED STATES DEPARTMENT OF THE ARMY, OFFICE OF ARMY CEMETERIES is a federal agency located in Arlington, Virginia, and whose mailing address is: 1 Memorial Avenue, Arlington, Virginia 22211-5003. OAC is a subordinate agency

of DOA, is the federal agency that directly manages Carlisle Cemetery, and is responsible for complying with NAGPRA.

16. Defendant CHRISTINE E. WORMUTH is sued in their official capacity as the Secretary of the Army. Defendant Wormuth is located in Arlington, Virginia, and their mailing address is: 101 Army Pentagon, Washington, DC 20310-0101. Defendant Wormuth is directly responsible for overseeing DOA's operations and programs, including OAC and Carlisle Cemetery, and ensuring DOA, its subordinate agencies, and officials comply with NAGPRA.

17. Defendant KAREN DURHAM-AGUILERA is sued in their official capacity as Executive Director of OAC. Defendant Durham-Aguilera is located in Arlington, Virginia, and their mailing address is: 1 Memorial Avenue, Arlington, Virginia 22211-5003. Defendant Durham-Aguilera is directly responsible for OAC's operations and programs, including management of Carlisle Cemetery and compliance with NAGPRA. Defendant Durham-Aguilera signed the letter denying Winnebago's NAGPRA repatriation request on behalf of the Defendants.

18. Defendant RENE C. YATES is sued in their official capacity as the Director of OAC. Defendant Yates is located in Arlington, Virginia, and their mailing address is: 1 Memorial Avenue, Arlington, Virginia 22211-5003. Defendant Yates is second-in-charge of OAC's operations and programs, management of Carlisle Cemetery, and compliance with NAGPRA.

19. Defendant Lieutenant Colonel PRISCELLA A. NOHLE is sued in their official capacity as Garrison Commander of the Carlisle Barracks. Defendant Nohle is located in Carlisle, Pennsylvania, and their mailing address is: 22 Ashburn Drive, Carlisle, Pennsylvania

17013-5006. As the Garrison Commander of the Carlisle Barracks, Defendant Nohle is responsible for NAGPRA compliance at the Carlisle Barracks.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (conferring United States district courts with original jurisdiction over civil actions arising under federal laws), 28 U.S.C. § 1362 (conferring United States district courts with jurisdiction over civil actions brought by Indian Tribes for matters or controversies arising under the laws of the United States), 25 U.S.C. § 3013 (conferring United States district courts with jurisdiction over actions to enforce NAGPRA), and, alternatively, 5 U.S.C. § 706 (providing a right to judicial review of agency actions).

21. This Court has authority to grant declaratory and injunctive relief pursuant to its inherent authority to issue equitable relief, 25 U.S.C. § 3013, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. § 706.

22. Defendants' sovereign immunity is expressly waived under 5 U.S.C. § 702.

23. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because all but one of the Defendants reside within the boundaries of this District and a substantial part of the events or omissions giving rise to this action occurred within this District. In particular, Defendant OAC, the federal agency that directly manages Carlisle Cemetery and receives and approves or denies requests for repatriation and disinterment from Carlisle Cemetery, and Defendant Durham-Aguilera, who denied Winnebago's repatriation request, are both located in Arlington, Virginia.

FACTUAL AND HISTORICAL BACKGROUND

24. Today, Samuel's and Edward's remains are buried at Carlisle Cemetery, 1,000 miles from where they belong. They are part of a holding or collection of Native American human remains at Carlisle Cemetery under Defendants' possession and control. On December 11, 2023, Defendants unlawfully denied Winnebago's request to repatriate Samuel and Edward pursuant to NAGPRA. Prior to that, for nearly 100 years, Defendants exercised careless and arbitrary control over the holding and collection of the Carlisle students' remains, at the expense of Indian Tribes. Defendants have repeatedly denied that NAGPRA applies at Carlisle Cemetery, basing their position on a clearly incorrect reading of NAGPRA's applicability standard. This position blatantly conflicts with the plain language and purpose of NAGPRA, a statute enacted to address the epidemic of museums and federal agencies—and, especially, the Army—misappropriating Native American human remains and leaving Indian Tribes with no legal recourse to secure the return of their relatives.

I. The history of Carlisle, the Carlisle cemeteries, and the Army's historical mismanagement of the holding or collection of Native American human remains in their possession or control demonstrates that Carlisle was never meant to be Samuel's and Edward's final resting place.

25. The history of Carlisle, the Carlisle cemeteries, how Defendants came into possession and control of the holding or collection of Native American human remains at Carlisle Cemetery, and the Army's historical mismanagement of it, show why Defendants are required to comply with Winnebago's NAGPRA request to repatriate Samuel and Edward to Winnebago.

A. Carlisle was established for the explicit purpose of erasing Native American culture by forcibly removing Indian children from their families and Indian Tribes.

26. General Richard Henry Pratt, United States Army, opened Carlisle on October 5, 1879, as one of the first federal off-reservation Indian boarding schools. JACQUELINE FEAR-SEGAL & SUSAN D. ROSE, *CARLISLE INDIAN INDUSTRIAL SCHOOL: INDIGENOUS HISTORIES, MEMORIES, AND RECLAMATIONS* 91 (2016) [hereinafter FEAR-SEGAL & ROSE].

27. The United States designed the off-reservation Indian boarding school system to remove children to places far from their communities, families, and Indian Tribes with the goal of “destroying tribal identity and assimilating Indians into broader society.” *Haaland v. Brackeen*, 599 U.S. 255, 298 (2023) (Gorsuch, J., concurring).

28. Indian children were often sent to federal off-reservation boarding schools like Carlisle without parental consent. *See* U.S. DEP’T OF INTERIOR, *FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT* 36 (May 2022) [hereinafter BOARDING SCHOOL REPORT], https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

29. When parents resisted, the Army was often deployed to Tribal Lands with clear “orders: *Take the children.*” *The Native American Boarding School System*, N.Y. TIMES, [hereinafter N.Y. TIMES] <https://www.nytimes.com/interactive/2023/08/30/us/native-american-boarding-schools.html> (emphasis added) (last visited Jan. 6, 2024).

30. The Carlisle Indian School operated according to a policy of assimilation through education, which Federal officials maintained to be a more “enlightened and humane” way to continue “dispossess[ing] Native peoples of their lands and extinguish[ing] their existence” to promote the expansion of the United States. FEAR-SEGAL & ROSE, *supra* ¶ 26, at 1-2.

31. Federal policy confirmed that assimilation through federal Indian boarding schools and Indian land dispossession worked in concert: “‘If it be admitted that education affords the true solution to the Indian problem, then it must be admitted that the boarding school is the very key to the situation.’” BOARDING SCHOOL REPORT, *supra* ¶ 28, at 38.

32. The United States Secretary of the Interior at the time supported these policy goals, concluding “that it would cost a million dollars to kill an Indian in warfare” but “only \$1200 to school an Indian child for eight years.” FEAR-SEGAL & ROSE, *supra* ¶ 26, at 7.

33. From 1879 to 1918, nearly 7,800 children were sent to Carlisle. *See* N.Y. TIMES, *supra* ¶ 29.

34. “Carlisle became the model for what would become a system of 408 similar federal institutions nationwide.” *Brackeen*, 599 U.S. at 299 (Gorsuch, J., concurring).

35. While nearly 7,800 Indian students attended Carlisle, “fewer than 7 percent of the Carlisle Indian School population graduated,” revealing that the true purpose of Carlisle was to eradicate and assimilate, not to educate. FEAR-SEGAL & ROSE, *supra* ¶ 26, at 100.

B. Edward’s and Samuel’s arrivals and deaths, and Carlisle officials’ neglect of the boys and their families after their deaths reveal that neither Winnebago nor Samuel’s and Edward’s families gave consent for the boys to be buried at Carlisle.

36. Consistent with federal policy to forcibly remove children from their Indian Tribes and families, on September 7, 1895, Captain Beck, the Indian Agent of the Omaha and Winnebago Indian Agency, sent Edward and Samuel to Carlisle.

37. Edward’s Carlisle Student Card indicates that he was to attend for five years. Pl.’s Ex. 1.

38. Edward died four years after his arrival at Carlisle, on June 29, 1899.

39. Edward's Student Card states his "Date Discharged" as June 29, 1899, and "Cause of Discharge" as "Died."

40. None of Carlisle's records indicate that Carlisle officials ever notified Edward's family or Winnebago of his death.

41. As such, neither Edward's family nor Winnebago had any choice or input about where and how he was buried.

42. Samuel's Carlisle Student Card states that he was to attend Carlisle for five years. Pl.'s Ex. 2.

43. Samuel died forty-seven days after his arrival at Carlisle, on October 24, 1895.

44. Samuel's Student Card states his "Date Discharged" as October 24, 1895, and his "Cause of Discharge" as "Died."

45. None of Carlisle's records indicate that Carlisle officials ever notified Samuel's family or Winnebago of his death.

46. As such, neither Samuel's family nor Winnebago had any choice or input about where and how he was buried.

47. Carlisle records indicate that both Samuel and Edward were originally interred in the Carlisle Indian burial ground.

C. Many other Indian students died at Carlisle.

48. During the first year that Carlisle was open, at least seven students died. CBPC Native American Student Decedent List, OFFICE OF ARMY CEMETERIES, <https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/CBPC%20Native%20American%20Decedent%20List%20as%20of%201%20June%202019.pdf?ver=2019-06-07-115642-010> (last visited, Jan. 16, 2024).

49. Amos LaFromboise, of Sisseton Wahpeton Oyate, was the first of these seven students to die. When Amos died, Carlisle did not have a school cemetery and Carlisle officials buried him in a “government-owned plot” in the town of Carlisle. FEAR-SEGAL & ROSE, *supra* ¶ 26, at 157.

50. Nearly three months after Amos’s death, the United States War Department (now the United States Department of Defense) determined that the government-owned plot only permitted the burials of “[w]hite persons” and not Indians. *Id.* at 159.

51. Subsequently, General Pratt had Amos’s body disinterred and reburied at the newly opened Carlisle Indian burial ground, located within the Carlisle Indian School grounds. *Id.*

52. No known records indicate that General Pratt or Carlisle officials notified or sought consent from Amos’s family or Sisseton Wahpeton Oyate for this move or his original burial.

53. During the school’s second year, Carlisle officials buried an additional ten students in the Carlisle Indian burial ground. *Id.* at 160.

54. During the school’s first decade, Carlisle officials buried ninety-six students at the Carlisle Indian burial ground, including Samuel and Edward. *Id.*

55. In total, Carlisle officials buried at least 179 students at the Carlisle Indian burial ground. HUGH MATTERNES, ET AL., NEW SOUTH ASSOCIATES, ARCHIVAL RESEARCH OF THE CARLISLE INDIAN SCHOOL CEMETERY 1 (2017), [hereinafter CARLISLE RESEARCH REPORT], <https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Archival%20Research%20Report%20-%20July%202017v2.pdf?ver=2019-06-07-121535-723>.

56. No known records indicate that *any* of the students' families or Indian Tribes gave permission to Carlisle officials to bury their children at the Carlisle Indian burial ground.

57. "There is no evidence that any Indian families or community members were ever present at interments or that they were permitted to carry out their own traditional ceremonies."

FEAR-SEGAL & ROSE, *supra* ¶ 26, at 160.

D. After the United States closed Carlisle, the Army prioritized expanding the grounds into a post, at the cost of hastily and carelessly removing the students' remains.

58. The United States government closed Carlisle in 1918 because of the high death rate of Indian students, evidence of rampant physical abuse, and financial corruption. *Id.* at 164.

59. After Carlisle closed, the Army turned the grounds into an Army hospital and, in 1920, opened an Army medical school on the grounds. *Id.*

60. During this time, the Army referred to the original Carlisle Indian burial ground as "solely an Indian Burial Ground" and refused to bury non-Indians there. *Id.*

61. At the same time, the Army showed little regard for the Carlisle Indian burial ground and the Native American human remains therein, letting the grounds fall "into a state of disrepair" and allowing many of the gravesite markers to rot away. *Id.*

62. When the Army decided to expand and develop the grounds into the Army War College, the Army deemed the Carlisle Indian burial ground as "an obstacle to the expansion of the post." *Id.*

63. In 1926, Army officials made a request to dig up the Carlisle students' remains to make way for the post's expansion. *Id.* at 164-65.

64. Questions arose about where to move the remains, as they could not be moved to the local government-owned cemetery plot because the students had no “[M]ilitary, [N]aval[,] Marine Corp or Coast Guard Service.” *Id.* at 165 (internal quotation marks omitted).

65. In 1927, the Army moved some indefinite portion of the remains collectively from the Carlisle Indian burial ground to their current location at Carlisle Cemetery. *Id.*; accord Pl.’s Exhibit 3.

66. After the move, the Army constructed a building for Army officers and a parking lot over the Carlisle Indian burial ground. FEAR-SEGAL & ROSE, *supra* ¶ 26, at 166.

67. Defendants’ 2017 Archival Research of the Carlisle Indian School Cemetery report (“Carlisle Research Report”) states that “the process and parties involved in the relocation of remains . . . are unknown.” CARLISLE RESEARCH REPORT, *supra* ¶ 55, at i.

68. When the Army moved the remains, “coffins crumbled when handled to any extent.” FEAR-SEGAL & ROSE, *supra* ¶ 26, at 165.

69. Upon information and belief, the remains were removed haphazardly and placed in pine boxes of one-foot width by two-feet length.

70. When the remains were reburied at Carlisle Cemetery, their placement “appears random.” CARLISLE RESEARCH REPORT, *supra* ¶ 55, at i.

71. After the collection of Native American human remains was removed to Carlisle Cemetery, the Army replaced gravestones with an astounding lack of care, incorrectly transcribing many students’ names, Tribal affiliations, and dates of deaths on the new gravestones or omitting them altogether. FEAR-SEGAL & ROSE, *supra* ¶ 26, at 167.

72. Edward’s current gravestone marker incorrectly spells Winnebago as “Winnebaloo” and omits his date of death.

73. Samuel's current gravestone marker incorrectly spells Winnebago as "Winnchaga."

74. The Army mishandled and mismanaged the remains during the move so egregiously, as a result, there are at least fourteen gravesites at the current Carlisle Cemetery marked "unknown." CARLISLE RESEARCH REPORT, *supra* ¶ 55, at 3.

75. In 1940 "during [the] excavation of a water line," the Army discovered that not all Native American human remains had been removed from the Carlisle Indian burial ground when it discovered the remains of student Wallace Derryman. *Id.* at 32. His remains were subsequently reburied at the current Carlisle Cemetery. *Id.*

76. In 2017, Defendants commissioned a ground penetrating radar survey of Carlisle Cemetery and the Carlisle Indian burial ground. *See* GROUND PENETRATING RADAR SURVEY OF THE CARLISLE INDIAN SCHOOL CEMETERY OLD BURIAL GROUND AND THE CARLISLE BARRACKS POST CEMETERY (February 2017), <https://armycemeteries.army.mil/Portals/1/Ground%20Penetrating%20Radar%20Survey.pdf>.

The survey sought to detect whether some remains may have been left behind and now lie beneath the base parking lot.

77. Upon information and belief, portions of remains from Carlisle students and other associated funerary objects from these students may be held by Defendants in undisclosed locations. *See* CARLISLE RESEARCH REPORT, *supra* ¶ 55, at 11.

78. Today, Defendants continue to operate the old Carlisle grounds as the Army War College, and it is an active Army base.

II. Defendants' refusal to comply with NAGPRA is irreconcilable with NAGPRA's legislative history and purpose to ensure the rights of Indian Tribes to control the return of their relatives remains.

79. NAGPRA “was first enacted in 1990 ‘as a way to correct past abuses to, and guarantee protection for, the human remains and cultural objects of Native American tribal culture.’” *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 259-60 (3d Cir. 2014) (quoting 173 A.L.R. Fed. 585).

80. The plain text of NAGPRA and NAGPRA’s legislative history show that the solution was a new federal law providing meaningful, enforceable legal mechanisms to restore Indian Tribes’ control over the manner and disposition of the remains of their relatives and cultural patrimony.

81. To this end, one of NAGPRA’s two primary objectives was to create a process to require federal agencies to “work with tribes” to repatriate such remains and objects. *Id.* at 260.

82. NAGPRA’s method to accomplish this objective was to establish a strong, systematic framework premised on tribal consultation in the repatriation of the remains of Indian Tribes’ relatives in the possession or control of federal agencies and museums. Consultation and strengthening the leverage of Indian Tribes in handling and disposition of the remains of their relatives were critical components of NAGPRA.

83. One of the fundamental issues leading to enactment of NAGPRA was that federal agencies had a long history of disregarding the sanctity of Native American human remains, and that there was no adequate legal mechanism in place under federal law for Indian Tribes to stop the misappropriation of their relatives’ remains or hold those in possession or control of relatives’ remains accountable for the treatment of such remains.

84. The Army was a notorious bad actor in terms of its long and sordid history of grave robbing, collecting, and desecrating Native American human remains and burial grounds. *Native American Grave and Burial Protection Act (Repatriation): Hearing on S. 1021 Before the*

Select Comm. On Indian Affairs, 101st Cong. 1-2 (1990) [hereinafter NAGPRA Hearing Record] (statement of Select Committee Chairman Sen. Daniel K. Inouye),

<https://heinonline.org/HOL/LandingPage?handle=hein.cbhear/nagvbupc0001&div=2&id=&page>

≡.

85. Indeed, the NAGPRA Senate Committee Hearing and the House Report begins with the Statement of Senator Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs, highlighting the macabre and disgraceful history of the Army exploiting Indian remains in the second half of the 19th Century. *Id.*

86. Senator Inouye noted that the Army plundered Indian burial grounds for research, indifferent to the concerns of Indian Tribes. “When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th century, his demands were enthusiastically met by not only Army medical personnel, but by collectors who made money by selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored.” *Id.* Senator Inouye stressed how especially grievous was the nature of the problem by acknowledging “the important role that death and burial rights play in Native American cultures.” *Id.*

87. “[T]he Army Medical Museum, founded in 1862, sought human remains of all races but from 1865 through the 1880s gathered primarily Indian remains.” *Id.* at 29 (statement of Select Committee Vice Chairman Sen. John McCain); *id.* at 319 (Dr. Bieder report; attachment to statement of Jerry Flute, field director of the Association of American Indian Affairs, Inc.).

88. Notably, during the time the Army Medical Museum was gathering remains, Carlisle was open and Carlisle officials were already abusing and neglecting the remains of

Native American students who died during and as a result of their time at Carlisle. *See supra* ¶¶ 58-78 (Discussing lack of care for the Carlisle Indian burial ground and lack of care, consultation, and consent during the disinterment and burial of remains).

89. Although federal agencies and museums testified during the congressional hearings that they could be trusted to handle Native American human remains and patrimony with care and respect, Congress determined that such sentiments were not good enough to address the harm already perpetrated.

90. For example, museum representatives abstractly waxed poetic about “dialog,” “conciliation,” and “impartial dispute resolution” in lieu of “judicial review.” NAGPRA Hearing Record, *supra* ¶ 84, at 42-43 (statement of Willard Boyd, President of the Field Museum of Natural History). Senator John McCain, Vice Chairman of the Select Committee on Indian Affairs, however, brought attention to the facts: out of hundreds of thousands of Native American human remains and objects possessed by those museums alone, none had been repatriated under such toothless, self-regulating policies to-date. *Id.* at 45 (Sen. McCain’s questioning of Mr. Willard Boyd, establishing that it was “correct” that “up to this time, there have not been any repatriations”).

91. Senator McCain further remarked that, while he appreciated museums’ well-intentioned efforts to preserve Native American culture and objects, there was “another side to that coin[,]” exemplified by a harrowing experience Chairman Inouye had recently had at the Smithsonian Museum of witnessing “thousands of remains sitting in boxes or lying around unattended for years and years.” *Id.* at 46.

92. Perhaps the most concise description of how NAGPRA was designed to correct the status quo was provided in a statement by Walter Echo-Hawk, a former attorney with the

Native American Rights Fund: “The purposes of the bill are straightforward. It does three basic things. First, it grants needed legal protections for Indian graves. Second, it allows Indians and Native people to bury their dead under specified repatriation guidelines and procedures. Third, it restores stolen or improperly acquired property to the rightful Native owners upon request.” *Id.* at 51 (statement of Walter Echo-Hawk).

93. Mr. Echo-Hawk’s statement highlighted the underlying problem of the concept of ownership that stood in the way of Indian Tribes recovering their relatives’ remains and patrimony.

94. This problem is reflected in the Senate Report Findings, which stated that “[c]onfusion exists over who should rightfully have control or ownership over skeletal remains and ownership of associated grave offerings and sacred ceremonial objects which are located on, or which have been disinterred from, Federal lands.” NAGPRA Hearing Record at 5 (congressional finding § 2(7)). Thus, Congress found it “necessary to clarify ownership interests in Native American items located on tribal and Federal lands.” *Id.* at 6 (congressional findings § 2(8)).

95. The solution was to create a regime based on empowering not those who currently exercised possession or control, but those who *should* have the right to remains and patrimony—*i.e.*, Indian Tribes.

96. This solution was particularly essential given that many Native American human remains and much patrimony had been obtained by or ended up in the possession of their contemporary owners by illegitimate means.

97. In sum, Congress enacted NAGPRA as remedial human rights legislation intended to protect Indian Tribes from the historical desecration of their relatives’ graves, in

large part by empowering Indian Tribes to control the process for the return of their relatives' remains.

98. NAGPRA's enactment as human rights legislation requires that it "be liberally interpreted as remedial legislation to benefit the class for whom it was enacted." Jack R. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 76 (1992).

III. Defendants unlawfully denied Winnebago's request to repatriate Samuel and Edward from Carlisle Cemetery pursuant to NAGPRA and, instead, have attempted to impose the OAC Disinterment and Return Process.

99. The legislative history and the plain language of the law demonstrate that NAGPRA applies to the Native American human remains at Carlisle Cemetery. NAGPRA's applicability is clear, particularly in light of the history of the Army's illegitimate acquisition and gross mishandling and mismanagement of the holding or collection of Native American human remains in its possession and control at Carlisle. Nonetheless, Defendants unlawfully denied Winnebago's request to repatriate its children pursuant to NAGPRA, and instead have sought to impose the unwieldy, arbitrary, and improper OAC Disinterment and Return Process.

A. Winnebago requested the return of Samuel and Edward pursuant to NAGPRA.

100. In July 2021, Sunshine Thomas-Bear, acting in her official capacity as Winnebago's Cultural Preservation Director, Tribal Historic Preservation Officer, and NAGPRA Representative, began investigating how to bring Samuel and Edward home from Carlisle Cemetery.

101. Because the Army had in their possession and control the remains of Samuel and Edward, Ms. Thomas-Bear assumed that the boys' remains would be repatriated pursuant to NAGPRA.

102. On July 16, 2021, Ms. Thomas-Bear contacted Justin Buller, Associate Deputy General Counsel, United States Army, to inquire about how to bring the Winnebago boys home from Carlisle Cemetery. Pl.'s Ex. 4 at 9.

103. On July 19, 2021, Mr. Buller responded, stating: "Thank you for reaching out to me. Mark Gilfillan (copied) can provide the documents that would need to be completed and provided to us to move forward with disinterments. That said I recommend that we at least do a teleconference or an in person meeting prior to completing the documents so that we can fully explain the program to your Tribal leaders and Families. Please let us know how you would like to proceed." *Id.* at 8.

104. On July 19, 2021, Ms. Thomas-Bear replied: "Yes we will move forward with the process. I will be awaiting documents that I will need to fill out then we can set up a meeting after you have received those documents?" *Id.* at 7.

105. On July 19, 2021, Mr. Buller replied, stating: "Let's do the meeting prior to completing the documents. As I am sure you have experienced sometimes government documents are painful and maybe not a [sic] clear as they could be[.]" *Id.*

106. After this reply, Ms. Thomas-Bear and Mr. Buller exchanged three more emails to confirm an initial meeting between Ms. Thomas-Bear and Mr. Gilfillan.

107. On July 27, 2021, Ms. Thomas-Bear had an initial phone conversation with Mr. Gilfillan, who was then Project Manager/Senior Tribal Liaison of the United States Army Corps of Engineers-Tribal Nations Technical Center of Expertise. During that call, Mr. Gilfillan explained the OAC Disinterment and Return Process.

108. Mr. Gilfillan explained that, to request the return of children's remains from Carlisle Cemetery, Ms. Thomas-Bear would need to identify the "closest living relative" of both

Edward and Samuel. Mr. Gilfillan stated that only the closest living relative could request the return of the children.

109. Mr. Gilfillan suggested that Ms. Thomas-Bear could identify the closest living relatives of Samuel and Edward by searching Winnebago's census rolls.

110. Ms. Thomas-Bear knew that identifying closest living relatives would be challenging, if not impossible, because neither Edward nor Samuel had any direct descendants, since they died at Carlisle without any children.

111. Mr. Gilfillan instructed that if Ms. Thomas-Bear could not identify the closest living relatives, then the Winnebago Tribal Council ("Council"), the governing body of Winnebago, would need to pass a formal resolution designating Ms. Thomas-Bear as the boys' closest living relative.

112. These suggestions were problematic. For one, requiring the Council to pass such a resolution, which carries the weight of Tribal law, would be to require the Council to knowingly make a false statement to the federal government, as there is no evidence that Ms. Thomas-Bear is the boys' closest living relative.

113. Furthermore, Winnebago did not believe Defendants could direct its Council to pass a specific resolution as a fundamental matter of tribal sovereignty and self-governance.

114. Ms. Thomas-Bear herself did not feel comfortable identifying as the closest living relative of Samuel and Edward, as it would be a false statement.

115. Ms. Thomas-Bear was also unsure as to why Defendants were following an internal disinterment and return process designed for the return of the remains of service members to their next of kin, rather than NAGPRA. Ms. Thomas-Bear is familiar with NAGPRA

and knew it is tailored to address the difficult problems in repatriating Native American relatives whose remains had been misappropriated.

116. Ms. Thomas-Bear was also concerned because, as a Winnebago Tribal member herself, she knew that identifying an individual as the “closest living relative” was contrary to Winnebago practices regarding repatriation and feared that designating any particular person as a closest living relative would be divisive.

117. On September 16, 2021, Defendants visited Winnebago to discuss the return of Edward and Samuel. During this visit, they again insisted upon the OAC requirement to identify closest living relatives of Samuel and Edward for them to “qualify” for disinterment and return.

118. Following DOA’s visit, Ms. Thomas-Bear diligently searched Winnebago’s records but could not determine who to designate as the closest living relatives of Samuel and Edward.

119. Tragically, since Ms. Thomas-Bear first began her attempts to bring home Samuel and Edward in 2021, many Winnebago Tribal members have died without seeing the return of the boys.

120. Of these deaths, the death of one of the Council members and longtime NAGPRA champion, Louis LaRose, in November 2023, emphasized the importance of the expeditious repatriation of the boys’ remains pursuant to NAGPRA, the applicable federal law that is utilized in nearly every other context, that provides Indian Tribes with robust rights and mechanisms to ensure federal agencies’ compliance, and that Indian Tribes fought for years to see enacted.

121. According to Winnebago traditional beliefs, the longer that Samuel and Edward remain at Carlisle, the more harm is done to their spirits and to Winnebago.

122. Winnebago believes that Samuel and Edward have been in a perpetual state of unrest since their respective burials in 1895 and 1899 and that the boys have been waiting to come home since their deaths.

123. On October 16, 2023, Winnebago sent a letter, return receipt requested, to Defendants requesting the repatriation of Samuel and Edward, pursuant to NAGPRA, 25 U.S.C. § 3005(a)(4). *See* Pl.’s Ex. 5.

124. Each of the Defendants received Winnebago’s request letter on a date between October 23 and October 26, 2023.

B. Following Winnebago’s NAGPRA request, Defendants sought to unlawfully impose the OAC Disinterment and Return Process.

125. On November 2, 2023, Mr. Buller responded to Winnebago’s repatriation request, indicating that the Army had been carrying out the OAC Disinterment and Return Process for other Native American human remains at Carlisle Cemetery. Mr. Buller requested a virtual meeting to discuss Winnebago’s request but did not indicate whether the Army would grant Winnebago’s request and comply with NAGPRA to complete repatriation to Winnebago. Pl.’s Ex. 6.

126. On November 3, 2023, Winnebago responded to Mr. Buller, stating that it was aware that Defendants had disinterred and returned remains under the OAC Disinterment and Return Process, but restated that Winnebago’s request was to have Samuel and Edward repatriated pursuant to NAGPRA. *Id.* at 2.

127. On November 3, 2023, Mr. Buller responded, again failing to answer whether the Army would honor the request and stating, “this matter is highly complex and cannot be addressed with simple yes or no answers [].” *Id.* at 1-2.

128. On November 6, 2023, Winnebago responded, acknowledging that Defendants may view the matter as highly complex, but asserting that Winnebago does not. Winnebago reiterated that its sole question was whether Defendants would work with Winnebago to repatriate Samuel and Edward pursuant to NAGPRA, 25 U.S.C. § 3005(a)(4). Winnebago reminded that Defendants had ninety days after receipt of Winnebago's request to complete repatriation, unless Winnebago consented to an alternative timeline, and urged Defendants to comply with NAGPRA. *Id.* at 1.

129. On December 11, 2023, Mr. Buller forwarded a letter dated December 7th from Defendant Durham-Aguilera denying Winnebago's NAGPRA request. Pl.'s Ex. 7.

130. Defendant Durham-Aguilera stated that the letter served as the official written response for why the Army "cannot repatriate these children under [NAGPRA]." *Id.*

131. Defendant Durham-Aguilera stated that "disinterment and return" of Samuel and Edward might be done under the OAC Disinterment and Return Process and claimed that such was "in accordance with the [NAGPRA] savings clauses at 25 U.S. Code s. 3009." *Id.* Defendant Durham-Aguilera did not elaborate on how Defendants maintain that the OAC Disinterment and Return Process is in accordance with the NAGPRA savings clause under 25 U.S.C. § 3009.

132. Defendant Durham-Aguilera further stated: "[I]ndividually named graves located within the Carlisle Barracks Post Cemetery do not constitute 'holdings or collections' of the Army (s. 3003(a))." *Id.* Defendant Durham-Aguilera did not elaborate on why the Native American human remains at Carlisle do not constitute a holding or collection simply because some of the remains are marked by graves.

133. Defendant Durham-Aguilera further stated: "Federal Courts have held that NAGPRA (s. 3002) does not require the Army to engage in the intentional excavation or

exhumation of a grave.” *Id.* Durham-Aguilera did not elaborate as to why this would mean that Defendants could not comply with Winnebago’s NAGPRA request to *repatriate* Samuel and Edward. Durham-Aguilera further did not indicate which “Federal Courts” in which cases have held that Defendants are not required to engage in the intentional excavation or exhumation of a grave. Defendants did not cite any specific court or case, likely because they cannot: no federal court has ever held or said what Defendants assert.

C. The OAC Disinterment and Return Process is, at best, a modified version of Defendants’ process for the disinterment and return of military servicemembers and their dependents and is inapplicable once Indian Tribes make NAGPRA requests.

134. Since at least 2017, Defendants have maintained that the OAC Disinterment and Return Process, and not NAGPRA and its implementing regulations, applies to the handling and disposition of Native American human remains in their possession or control at the Carlisle Cemetery.

135. Defendants state that the authority to disinter and return Native American human remains from Carlisle Cemetery is pursuant to Army Regulation 290-5 (“AR 290-5”), https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31366-AR_290-5-001-WEB-2.pdf.

136. AR 290-5 “states the authority and prescribes the policies, procedures, and responsibilities for the development, operation, maintenance, administration, and inspection of cemeteries for which the Department of the Army is responsible. This includes Army national military cemeteries (ANMC), as defined in 10 USC 7721(b), [and] open and closed Army post cemeteries, as defined in Part 553, Code of Federal Regulations, Subpart B (32 CFR Part 553, Subpart B).” AR 290-5 § 1-1.

137. The Army classifies Carlisle Cemetery as an Army Post Cemetery. AR 290-5, app. B.

138. Burials in Army Post Cemeteries are typically reserved for those who have served in the United States military, their spouses, and their dependents. *See* 32 C.F.R. § 553.41 (2019).

139. AR 290-5 also acknowledges that Defendants have a duty to comply with NAGPRA at their cemeteries. AR 290-5 § 1-7(e)(1)(b); AR 290-5, at 37.

140. Defendants characterize the handling and disposition of Native American human remains from Carlisle Cemetery as “return and disinterment” to “closest living relatives,” pursuant to AR 290-5 § 3-7, as opposed to “repatriation” to “Indian tribes” pursuant to NAGPRA, 25 U.S.C. § 3005(a).

141. According to AR 290-5: “[I]nterments in ANMC and Army post cemeteries are considered permanent and final.” AR 290-5 § 3-7(a).

142. Further, “[d]isinterment and removal of remains from ANMC and Army post cemeteries at no expense to the Government are permitted with the prior approval of the Executive Director, ANMC.” *Id.*

143. According to AR 290-5, to request disinterment from an Army post cemetery, one must submit to the garrison commander the following: “(1) A notarized letter stating the reasons for the disinterment request with the name of the interred individual; (2) Notarized statements by all close living relatives (widow or widower; parents; adult brothers and sisters; and natural or adopted adult children; even though the legal relationship of that person to the decedent may have changed) of the interred individual, stating they have no objection to the proposed disinterment; (3) A notarized sworn statement from a third party who knows those who have provided the statements and attests to the fact that the persons providing the statements constitute all the close living relatives as defined in paragraph 3–7b(2).” AR 290-5 § 3-7(b).

144. Defendants have liberally modified the process outlined in AR 290-5 § 3-7 for the disinterment and return of Native American human remains at Carlisle Cemetery.

145. The modified process is based on informal practices developed at Defendants' convenience, rather than according to any newly issued regulations or formal amendments to the existing written policies, guidance, or regulations.

146. Defendants describe the OAC Disinterment and Return Process with respect to the holding or collection of Native American human remains at Carlisle Cemetery as follows: "Based on Army Regulation 290-5 Disinterment of remains a. Each request for disinterment of Native American remains from Carlisle Barracks Post Cemetery will be addressed to the Executive Director, Office of Army Cemeteries for approval.

<mailto:usarmy.pentagon.hqdaanmc.mbx.accountabilitycoe@army.mil>. The request will include the following documents: (1) Notarized affidavit by the *closest living relative* of the decedent requesting the disinterment. This document includes the reason for the proposed disinterment. (2) A notarized sworn statement by a person knowing that the person who supplied the affidavit is the closest living relative of the deceased." Pl.'s Ex. 8 (emphasis added) (2023 affidavit document described above in (1); exhibit, notarized sworn statement described above in (2)).

147. Defendants have continued to modify the affidavit document as Indian Tribes have put more pressure on them.

148. For example, Defendants have changed the sample affidavit. A prior version of the sample stated: "The decision that the remains of the decedent be interred at Carlisle Barracks was made by *an ancestor and the administrators* of the Carlisle Indian Industrial School." Pl.'s Ex. 9 at 2 (emphasis added) (2022 affidavit).

149. Defendants proposed this language in the sample affidavit, despite the historical record demonstrably establishing that it is untrue that any ancestors made the decision to have their relatives buried at either the Carlisle Indian burial ground or subsequently the Carlisle Cemetery.

150. The sample affidavit was revised and issued on July 23, 2023, now reads: “The decision that the remains of the decedent be interred at Carlisle Barracks was made by *the administrators* of the Carlisle Indian Industrial School.” Pl.’s Ex. 8 at 2 (emphasis added).

151. Defendants removed the reference to “ancestors” as being among those who made the decision to bury the decedent at the Carlisle Indian burial ground or the Carlisle Cemetery, tacitly acknowledging that none of the students’ families or Indian Tribes authorized Carlisle officials or Defendants to bury the students at Carlisle.

152. The OAC Disinterment and Return Process does not allow Indian Tribes to request the return of their children from Carlisle, only the “closest living relatives.”

153. The OAC Disinterment and Return Process does not require formal consultation, whether with “closest living relatives” or Indian Tribes, to ensure remains are handled in a culturally appropriate manner.

154. The OAC Disinterment and Return Process does not provide any timeline or deadlines to adhere to have Native American human remains returned.

155. In a series of Federal Register notices issued in connection with the disinterment of other Native American human remains at Carlisle Cemetery, Defendants have asserted that disinterment of students from Carlisle is not governed by NAGPRA for various reasons, which have changed from 2017 to 2023, as shown in the table below.

Federal Register Notices of Intent to Disinter, 2017-2023

Date of Notice	Request of...	Number of Students	Date of disinterment	Authority	NAGPRA does not apply because...
6/21/17	...students' "families"	3	8/8/17	Army Regulation 210-190	...the remains are not part of a collection, as they are interred in graves that are individually marked in the Cemetery.
5/21/18	...“closest living relative”	4	6/14/18	Army Regulation 210-190	...the remains are not part of a collection, as they are interred in graves that are individually marked in the Cemetery.
5/3/19	...“closest living relative”	6	6/15/19	Army Regulation 210-190	...the remains are not part of a collection, as they are interred in graves that are individually marked in the Cemetery.
4/2/21	...“closest living relative”	10	6/14/21	Army Regulation 290-5	...“[1.] Individually marked graves located within the Carlisle Barracks Post Cemetery do not constitute ‘holdings or collections’ of the Army (§ 3003(a)) [2.] nor does NAGPRA (§ 3002) require the Army to engage in the intentional excavation or exhumation of a grave.”
4/22/22	...“closest living descendent”	8	6/6/22	1. Army Regulation 290-5; 2. ‘in accordance with NAGPRA savings clauses at 25 U.S.C. 3009’	...“[1.] Individually marked graves located within the Carlisle Barracks Post Cemetery do not constitute ‘holdings or collections’ of the Army (§ 3003(a)) [2.] nor does NAGPRA (§ 3002) require the Army to engage in the intentional excavation or exhumation of a grave.”
5/24/23	...“the family members”	5	9/11/23	1. Army Regulation 290-5; 2. ‘in accordance with NAGPRA savings clauses at 25 U.S.C. 3009’	...“[1.] Individually marked graves located within the Carlisle Barracks Post Cemetery do not constitute ‘holdings or collections’ of the Army (§ 3003(a)) [2.] nor does NAGPRA (§ 3002) require the Army to engage in the intentional excavation or exhumation of a grave.”

156. A primary reason Defendants have provided for why they maintain NAGPRA does not apply is that the remains are buried in individually marked graves, thus somehow making them not part of holdings or collections subject to NAGPRA, without any explanation justifying this position.

157. Moreover, Defendants added an assertion in 2021 that NAGPRA does not require federal agencies to intentionally excavate graves.

158. These notices provide no explanation to support Defendants' conclusory assertions for why NAGPRA does not apply to Carlisle.

D. Defendants' denial of Winnebago's NAGPRA request was preceded by years of refusing to follow NAGPRA and failures under the OAC Disinterment and Return Process.

159. Defendants have refused to comply with NAGPRA to repatriate Native American human remains from Carlisle Cemetery pursuant to the law since NAGPRA was first enacted in 1990.

160. One of NAGPRA's most important provisions required federal agencies and museums to compile inventories of all "holdings or collections of Native American human remains" in their "possession and control[.]" 25 U.S.C. § 3003(a). These inventories were supposed to be completed within five years of NAGPRA's enactment—by 1995. *Id.* § 3003(b)(1)(B); *see* 43 C.F.R. § 10.9 (2023).

161. Alternatively, NAGPRA allowed federal agencies and museums to complete a written summary of all "holdings or collections of Native American human remains" in their "possession or control[.]" 25 U.S.C. § 3004(a). These summaries were supposed to be completed

within three years of NAGPRA's enactment—by 1993. *Id.* § 3004(b)(1)(C); *see* 43 C.F.R. § 10.8 (2023).

162. These inventories and summaries were supposed to be compiled in consultation with culturally affiliated Indian Tribes and made available to the culturally affiliated Indian Tribe within six months of their completion. *See* 43 C.F.R. §§ 10.8(d)(3), 10.9(c), (e) (2023).

163. The inventories and summaries are supposed to establish, to the greatest extent possible, the cultural affiliation of the Native American human remains in a federal agency's or museum's possession or control. *See* 25 U.S.C. §§ 3003(a), 3004(a); 43 C.F.R. §§ 10.8(a), 10.9(a) (2023).

164. NAGPRA's implementing regulations clarify that the purpose of these inventories and summaries is to facilitate the repatriation of Native American human remains to their culturally affiliated Indian Tribes. *See* 43 C.F.R. §§ 10.8(a), 10.9(a) (2023).

165. Defendants never completed an inventory or summary of the Native American human remains in their possession and control at Carlisle, pursuant to 25 U.S.C. §§ 3003 and 3004.

166. This failure has hampered efforts of Indian Tribes to seek repatriation of their relatives buried at Carlisle.

167. In 2007, the Northern Arapaho Tribal Historic Preservation Office ("Northern Arapaho THPO") wrote to Lieutenant Colonel Thomas G. Kane, Installation Legal Officer at the Army War College, to request the return of a Northern Arapaho child's remains. *See generally* Vi Waln, *Sicangu Youth Council Works with Northern Arapaho to Have Human Remains Returned*, LAKOTA TIMES (Jan. 21, 2016), <https://www.lakotatimes.com/articles/sicangu-youth-council-works-with-northern-arapaho-to-have-human-remains-returned/>.

168. Lieutenant Colonel Kane responded to the letter denying the request. In the denial letter, Lieutenant Colonel Kane stated that ‘the installation has serious concerns’ particularly in light of its view of the Cemetery as a historic site. *See id.*

169. Lieutenant Colonel Kane further stated that the Army would “hate to disrupt such a tranquil site, if it can be avoided” and “the cemetery represents one of the most beautiful tributes to the Native American people.” Pl.’s Ex. 10 at 1.

170. In 2015, the Northern Arapaho THPO wrote to Lieutenant Colonel Greg W. Ank, Carlisle Barracks Garrison Commander, to renew the Northern Arapaho Tribe’s (“Northern Arapaho”) request for the return of three of their children. Pl.’s Ex. 10.

171. In its letter, the Northern Arapaho THPO objected to the treatment of the remains of the Northern Arapaho’s children as a tourist attraction or object of research and asserted that the Northern Arapaho would exercise its rights under NAGPRA to seek repatriation of its children’s remains buried at Carlisle Cemetery. *Id.* at 1-2.

172. Defendants, initially, refused to return the remains of the Northern Arapaho’s children at all. That is, prior to 2017, Defendants did not even offer any Army process as an option to return the Northern Arapaho’s children, even though Defendants had a process for returning remains of prisoners of war to other countries.

173. It was only in 2017, following the Northern Arapaho’s persistence and growing pressure from other Indian Tribes, that Defendants announced they would return Native American human remains from Carlisle Cemetery, albeit, pursuant to the OAC Disinterment and Return Process.

174. This was the first time Defendants explicitly disavowed that NAGPRA applied to the Native American human remains at Carlisle Cemetery.

175. Notably, Defendants only furnished this option after the Northern Arapaho formally invoked NAGPRA.

176. Defendants did not invite or facilitate consultation with Indian Tribes regarding NAGPRA's application to the Native American human remains Carlisle Cemetery, nor did they provide opportunities for comment on Defendants' imposition of the OAC Disinterment and Return Process.

177. Since then, several other Indian Tribes have made efforts to have their children's remains brought home from Carlisle Cemetery, working—in essence, as third parties—with the OAC Disinterment and Return Process.

178. Upon information and belief, several Indian Tribes found the OAC Disinterment and Return Process to be onerous, time-consuming, and confusing to navigate, and ultimately were required to identify a “closest living relative” to secure the return of their relatives' remains.

179. Additionally, while NAGPRA requires the repatriation of remains within ninety days of a request, several Indian Tribes experienced multi-year-long delays under the OAC Disinterment and Return Process and Defendants did not provide any written deadlines to follow to have the remains returned.

180. The burdens that arise under the OAC Disinterment and Return Process have been exacerbated by Defendants' failure to locate and return the remains of Tribal relatives. On at least five prior occasions, when families and Tribal members went to Carlisle Cemetery to have their children's remains returned to them, Defendants exhumed graves that contained remains that were not those of the correct child, or contained multiple sets of remains within one box. *See Jenna Kunze, When it Comes to Indian Boarding School Graves, Tribal Spiritual Law is*

Shunned as Repatriations Continue to Fail Some Tribes, NATIVE NEWS ONLINE (June 23, 2022), <https://nativenewsonline.net/sovereignty/when-it-comes-to-indian-boarding-school-graves-tribal-spiritual-law-is-shunned-as-the-army-continues-to-fail-at-repatriations>.

181. As a result, these families and Tribal members were forced to leave Carlisle without their children's remains.

IV. Defendants rely on the incorrect provision to NAGPRA to deny its applicability at Carlisle.

A. NAGPRA applies because Defendants have possession or control over Samuel's and Edward's remains; Defendants' incorrect interpretation of the definition of "holding or collection" does not determine NAGPRA's applicability.

182. NAGPRA is exceedingly clear: Indian Tribes have the right to seek the repatriation of Native American human remains that are "possessed or controlled by Federal agencies[.]" 25 U.S.C. § 3005(a). Upon receiving such a request, federal agencies are *required* to repatriate such remains "expeditiously[.]" *Id.* § 3005(a)(1).

183. The only qualifications that NAGPRA's repatriation provision places on Indian Tribes' ability to repatriate their ancestors is: (1) the Native American human remains are culturally affiliated with the Indian Tribe, based on either an official NAGPRA inventory or summary, or the preponderance of the evidence, *id.* § 3005(a)(1), (a)(4), and (2) the remains are in the federal agency's possession or control. *Id.* § 3005(a).

184. Notably absent from NAGPRA's repatriation provision is any mention of the words "holding" or "collection." The only relevant factor is whether the Native American human remains are possessed or controlled by a federal agency, not whether they are part of a holding or collection. *See* 43 C.F.R. § 10.1(b)(1)(i) (2023).

185. Samuel's and Edward's remains are "Native American human remains" because the boys were Native American, and their remains were not "freely given" to Defendants in any sense. *Id.* § 10.2(d)(1); 25 U.S.C. § 3001(3).

186. Moreover, Defendants do not dispute that Samuel's and Edward's remains are culturally affiliated with Winnebago and therefore, Winnebago meets the "preponderance of the evidence" standard regarding cultural affiliation. *Id.* § 3005(a).

187. Further, it is undeniable that Defendants have "possession or control" over Samuel's and Edward's remains because they restrict who can access the remains and they maintain exclusive control over the remains. *See* 43 C.F.R. § 10.2(a)(3)(i)-(ii) (2023).

188. As such, under the plain language of NAGPRA, because Samuel and Edward's remains meet the definition of Native American human remains, and because Defendants maintain possession or control over them, the remains must be expeditiously returned pursuant to Winnebago's request.

189. Defendants' reliance on holdings or collections is irrelevant, as the applicable factor is possession or control. *See* 43 C.F.R. § 10.1(b)(1)(i) (2023).

B. Even if Defendants' standard was correct, their refusal to apply NAGPRA belies their treatment of the remains at Carlisle Cemetery as a holding or collection of Native American human remains.

190. Even if Defendants are correct that NAGPRA only applies to human remains in a federal agency's holding or collection, NAGPRA still applies to the remains of Samuel and Edward.

191. Defendants' assertion that the Native American human remains buried at the Carlisle Cemetery are not part of a holding or collection simply because they are "individually marked graves" is inconsistent with the plain meaning of holding and collection; the National

Park Service's ("NPS") newly-adopted regulations; the history of Carlisle (and the boarding school era, generally); NAGPRA's legislative history, purpose, and intent; and Defendants' management and treatment of the remains and the Cemetery.

192. Defendants' interpretation of the meaning of holding or collection is not entitled to deference, as they are not the agency responsible for interpreting and administering NAGPRA. *See* 25 U.S.C. § 3011; *A.T. Massy Coal Co. v. Holland*, 472 F.3d 148, 166 (4th Cir. 2006).

193. When Winnebago made its repatriation request on October 16, 2023, NAGPRA and its implementing regulations did not define "holding or collection."

194. On December 13, 2023, the NPS published a final rule, revising NAGPRA's implementing regulations. *See* 88 Fed. Reg. 86,452 (Dec. 13, 2023). The revised regulations went into effect on January 12, 2024. *See Id.* at 86,452. Since Winnebago's NAGPRA repatriation request and Defendants' denial occurred prior to the revised regulations coming into effect, Winnebago's request, Defendants' denial, and this action are governed by the regulations in place at the time the request was made.

195. Nevertheless, the revised regulations define, for the first time, "holding" and "collection" and affirm Winnebago's position that the Native American human remains in Defendants' possession or control are part of a holding or collection that is subject to NAGPRA's repatriation provisions. Specifically, the revised regulation clarify that a "[h]olding or collection means an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including: (1) Academic interest, (2) Accession; (3) Catalog; . . . (5) Conservation; (6) Education; . . . (8) Exhibition; . . . (10) Interpretation; (11) Preservation; (12) Public benefit; (13) Research; (14) Scientific interest; or (15) Study." *Id.* at 86,520.

196. Regardless of the new rulemaking, the plain meaning of “holding” and “collection” clearly demonstrates that the Native American human remains at Carlisle Cemetery is a “holding or collection.”

197. According to Merriam Webster Dictionary, collection is defined broadly as “something collected” (<https://www.merriam-webster.com/dictionary/collection>), with “collected” meaning “gathered together” (<https://www.merriam-webster.com/dictionary/collected>). Merriam Webster’s definition also notes that it is “especially: an accumulation of objects gathered for study, comparison, exhibition or as a hobby.” *Id.*

198. According to Merriam Webster Dictionary, the most pertinent definition of holdings is “property.” Holdings, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/holding>.

199. The Native American human remains at Carlisle Cemetery are part of a holding or collection for the purposes of NAGPRA because the manner in which Defendants have handled, represented, and used the remains within the Carlisle Cemetery is clearly centered on the remains’ historic nature and “Indian” and/or “Native American” identity.

200. For all intents and purposes, Defendants operate the Carlisle Cemetery not as an actual cemetery, but as a museum and tourist attraction, with the holding or collection of Native American students’ remains buried there as an exhibit and for any other purpose they deem fit.

201. For instance, Defendants conduct tours of the Carlisle Barracks, which focus on buildings and places of historic importance when the area was an Indian boarding school.

202. Among the stops on the tour is the Carlisle Cemetery, which welcomes visitors with a plaque inscribed “INDIAN CEMETERY” and identifying the remains as those of

“INDIANS WHO DIED WHILE ATTENDING THE CARLISLE INDIAN SCHOOL.” Pl.’s Ex.

11. CARLISLE RESEARCH REPORT, *supra* ¶ 55, at 39.

203. Defendants’ Carlisle Research Report highlights that Defendants have always viewed and treated the Native American human remains as a collection or holding. *See generally* CARLISLE RESEARCH REPORT, *supra* ¶ 55.

204. This report refers to the Carlisle Cemetery as a “repository for the remains of Indian School students.” *Id.* at 32.

205. Today, a plaque from the Pennsylvania Historical and Museum Commission is mounted outside Carlisle Cemetery. The plaque “informs passers-by of the history of the Carlisle Indian Industrial School and its intention ‘to assimilate American Indians into mainstream culture.’” FEAR-SEGAL & ROSE, *supra* ¶ 26, at 152.

206. Defendants also maintain a webpage for Carlisle Cemetery, the “Overview” of which notes, “The school was the model for a nationwide system of boarding schools intended to assimilate American Indians into mainstream culture.” *Cemetery Overview*, OFFICE OF ARMY CEMETERIES, [hereinafter *Cemetery Overview*] <https://armycemeteries.army.mil/Cemeteries/Carlisle-Barracks-Main-Post-Cemetery> (last visited Dec. 30, 2023).

207. The overview concludes: “Small, *orderly and historical*, the Carlisle Cemetery *offers visitors a glimpse into the unique past of the United States and Native American history.*” *Id.* (emphasis added).

208. OAC’s webpage provides a link to a function that allows one to locate gravesites of specific Native American human remains. *See Carlisle Barracks*, ARMY CEMETERIES

EXPLORER, <https://ancexplorer.army.mil/publicwmv/index.html#/carlisle-barracks/search/> (last visited Dec. 30, 2023).

209. While Defendants are responsible for thirty cemeteries across the United States, Defendants do not operate any of the other twenty-nine cemeteries the same way they operate Carlisle Cemetery.

210. In most cases, individuals are buried at DOA cemeteries by their (or their families') choice and because of their service in a military or military affiliation. *See* 32 C.F.R. §§ 553.43-553.49 (2019).

211. This is, clearly, not true of the Native American human remains at Carlisle Cemetery, which are of individuals who were not military service members and who were buried at the Carlisle Indian burial ground, disinterred, and removed to the current Carlisle Cemetery without notice to, let alone with consent of, their Indian Tribes or families.

212. The OAC webpage also includes a "Return of Native American Remains" tab, a unique feature that it does not have for any other of its twenty-nine cemeteries. *See Cemetery Overview, supra* ¶ 205.

213. The OAC webpage invites viewers to seek further information, providing a link to the "Digital Resource Center" webpage created by Dickinson College, which describes Carlisle Cemetery as an object of research to better understand Carlisle's "complex legacy." *Welcome, CARLISLE INDIAN SCH. DIGITAL RES. CTR.*, <https://carlisleindian.dickinson.edu/> (last visited Dec. 30, 2023).

214. The Dickinson website includes student cards for many students who attended Carlisle. <https://carlisleindian.dickinson.edu/> (last visited Jan. 16, 2024).

215. DOA also internally and externally classifies the Native American human remains at Carlisle Cemetery in a different manner than remains at its other cemeteries.

216. In each record catalogue, DOA classified remains of Carlisle students separately from military remains. *See CARLISLE RESEARCH REPORT, supra* ¶ 55, at 48.

217. For example, in 1982, the U.S. Military History Institute (“USMHI”), a division of the Army Heritage Education Center, catalogued the Native American human remains at Carlisle Cemetery. *Id.*

218. The remains of Thomas Marshall, a Native American man who was a Carlisle employee when he died in 1899, were left out of this catalogue. *Id.*

219. Defendants state that Mr. Marshall was excluded from this catalogue because of “the difference between modern and USMHI Native American decedent accounts.” *Id.*

220. In 1998, eight years after NAGPRA’s enactment, DOA again catalogued the Native American human remains at Carlisle Cemetery. *Id.*

221. As explained above, while NAGPRA required every federal agency to compile an inventory or summary of every Native American human remain under their possession or control, 25 U.S.C. §§ 3003(a), 3004(a), DOA’s 1998 catalogue was not produced pursuant to NAGPRA.

222. Again, in this catalogue, DOA classified the Native American human remains of Carlisle students separately from military remains. *See CARLISLE RESEARCH REPORT, supra* ¶ 55, at 48.

223. The manner in which Defendants have handled, represented, and used the remains at the Carlisle Cemetery for display, education, tourism, and research, as well as the catalogues

they have produced for particular sets of remains demonstrate that the Native American human remains buried at Carlisle are part of a collection or holding for the purposes of NAGPRA.

224. The history of Carlisle, and the Indian boarding school era more generally, NAGPRA's legislative history, purpose, and intent, as well as the manner in which Defendants manage and use the Native American human remains buried at the Carlisle Cemetery demonstrates that Samuel's and Edward's remains are part of a collection or holding and that NAGPRA application is requisite.

APPLICABLE LAW

I. NAGPRA

225. NAGPRA establishes two procedures that allow Indian Tribes to protect and repatriate Native American human remains.

226. First, NAGPRA establishes procedures to protect and repatriate Native American human remains that are inadvertently discovered on Federal and Tribal land. *See* 25 U.S.C. § 3002.

226. Second, NAGPRA establishes procedures by which Indian Tribes can secure the repatriation of Native American human remains that are "possessed or controlled by Federal agencies and museums[.]" *Id.* § 3005(a).

227. Winnebago's request and this action concern the second part of NAGPRA, the repatriation provision.

228. Under this second part, NAGPRA outlines the systematic process for the "repatriation of human remains currently held by federal agencies" to the requesting Indian Tribe. *Thorpe*, 770 F.3d at 262.

229. This process establishes a robust set of rights for Indian Tribes to secure repatriation of and control the manner and disposition of Native American human remains in the possession and control of federal agencies and museums and creates significant duties and obligations on these federal agencies and museums to repatriation such remains. *See* 25 U.S.C. § 3005; 43 C.F.R. § 10.10 (2023).

230. NAGPRA's regulations define "Native American human remains" as "the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets." 43 C.F.R. § 10.2(d)(1) (2023).

231. NAGPRA's regulations define "possession" as "having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations." *Id.* § 10.2(a)(3)(i).

232. NAGPRA's regulations further define "control" as "having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency." *Id.* § 10.2(a)(3)(ii).

233. Where a federal agency has compiled an inventory or summary of Native American human remains and established their cultural affiliation pursuant to 25 U.S.C. §§ 3003(a) and 3004(a), the federal agency "shall expeditiously return such remains" to the

culturally affiliated Indian Tribe when that Indian Tribe requests their repatriation. 25 U.S.C. § 3005(a)(1).

234. Where a federal agency has *not* compiled an inventory or summary of Native American human remains and established their cultural affiliation pursuant to 25 U.S.C. § 3003(a) and 3004(a), the federal agency “shall expeditiously return such remains” to an Indian Tribe that requests their repatriation and “can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” *Id.* § 3005(a)(4).

235. An Indian Tribe’s request for the repatriation of Native American human remains made pursuant to 25 U.S.C. § 3005(a) triggers several rights of Indian Tribes and duties of federal agencies.

236. For instance, NAGPRA’s regulations require that the “[r]epatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of § 10.10 (b)(1) from the culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of inventory completion in the Federal Register as described in § 10.9.” 43 C.F.R. § 10.10(b)(2) (2023).

237. Further, the consultation requirements outlined in 43 C.F.R. § 10.10 (2023) detail explicit rights of Indian Tribes after they make such repatriation requests.

238. In particular, NAGPRA’s regulations mandate that “[t]he repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the museum or Federal agency in consultation with the requesting lineal descendants, or

culturally affiliated Indian tribe or Native Hawaiian organization, as appropriate, to determine the place and manner of the repatriation.” *Id.* § 10.10(d).

239. During the consultation, the agency “must inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.” *Id.* § 10.10(e).

240. An agency “must adopt internal procedures adequate to permanently document the content and recipients of all repatriations.” *Id.* § 10.10(f)(1).

241. Indian Tribes may also request that agency officials “take such steps as are considered necessary pursuant to otherwise applicable law, to ensure that information of a particularly sensitive nature is not made available to the general public.” *Id.* § 10.10(f)(2).

242. Because repatriations are often costly, NAGPRA authorizes the Secretary of the Interior “to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.” 25 U.S.C. § 3008(a).

243. NAGPRA grants are non-competitive grants, awarded on a rolling basis, and are for amounts up to \$25,000. *See Repatriation Grants*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/repatriation-grants.htm> (last visited Dec. 30, 2023).

244. These grant funds are only available for NAGPRA repatriations. *See FY2024 NAGPRA Repatriation Grants*, GRANTS.GOV, <https://www.grants.gov/search-results-detail/351058> (last visited Dec. 30, 2023).

245. NAGPRA also includes a savings provision that allows federal agencies and Indian Tribes to *consensually* enter into alternative agreements regarding the disposition or

control over remains and objects. *See* 25 U.S.C. § 3009(1)(B). The savings provision also states that it is not to be construed to “deny or otherwise affect access to any court,” nor to limit any substantive or procedural rights of Indian Tribes. *Id.* § 3009(3)-(4).

246. Thus, the savings provision provides Indian Tribes and federal agencies with flexibility to negotiate the terms of repatriations, without sacrificing Indian Tribes’ rights under NAGPRA or limiting the federal government’s responsibility to fulfill its obligations under NAGPRA.

247. NAGPRA also includes an enforcement provision, vesting United States district courts with jurisdiction over actions alleging violations of NAGPRA’s provisions and the authority to issue relief necessary to enforce its provisions. *Id.* § 3013. This provision provides Indian Tribes with a private right of action to enforce violations of NAGPRA against federal agencies in federal court. *See San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003).

248. NAGPRA’s regulations clarify that any final determination making NAGPRA inapplicable is subject to judicial review. *See* 43 C.F.R. § 10.1(b)(3) (2023).

249. NAGPRA’s regulation also delineates what constitutes “final agency action” under NAGPRA’s repatriation procedures: “With respect to Federal agencies the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).” *Id.*

250. Finally, NAGPRA expressly recognizes the “unique relationship between the Federal government and Indian tribes.” 25 U.S.C. § 3010. This includes the United States’ trust

responsibility to Indian Tribes. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (stating that the federal government, in its dealings with Indians, “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards”).

II. Administrative Procedure Act (APA)

251. Under the APA, courts may “compel agency action unlawfully withheld or unreasonably delayed[.]” 5 U.S.C. § 706(1).

252. Under the APA, courts may also “hold unlawful and set aside agency action, findings, and conclusions found to be[] . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and] (D) without observance of procedure required by law[.]” *Id.* § 706(2)(A), (C)-(D).

CLAIMS

FIRST CLAIM FOR RELIEF

Failure to Repatriate (25 U.S.C. §§ 3005, 3013)

253. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

254. Samuel’s and Edward’s remains are “Native American human remains” under NAGPRA’s definition of “cultural items.” 43 C.F.R. § 10.2(d)(1) (2023); 25 U.S.C. § 3001(3)(A).

255. Samuel’s and Edward’s remains are under Defendants’ “possession or control.” 25 U.S.C. § 3005(a).

256. Samuel's and Edward's remains are part of Defendants' "holding or collection" of Native American human remains. *Id.* § 3004(a).

257. Winnebago is an Indian Tribe under NAGPRA's definition. 25 U.S.C. § 3001(7).

258. Defendants never compiled an inventory or summary of the Carlisle Cemetery collection or holding of Native American human remains in their possession and control and never established the cultural affiliation of those human remains, including Samuel and Edward, pursuant to NAPGRA. *See id.* §§ 3003(a), 3004(a); 43 C.F.R. §§ 10.8, 10.9 (2023).

259. On October 16, 2023, Winnebago submitted a written request to Defendants, pursuant to 25 U.S.C. § 3005(a)(4) and 43 C.F.R. § 10.10(b) (2023) to repatriate Samuel and Edward.

260. Defendants do not dispute that Samuel and Edward are culturally affiliated with Winnebago. Indeed, Defendants have in their possession, and have presented to Plaintiff, ample evidence that the remains of Samuel and Edward are in fact culturally affiliated with Winnebago.

261. Samuel's and Edward's remains were not freely given, nor have Defendants obtained consent from their families or Winnebago to possess or control their remains. Defendants, therefore, do not have the "right of possession" to Samuel's and Edward's remains, 25 U.S.C. § 3001(13).

262. None of the exceptions to repatriation provided at 43 C.F.R. § 10.10(c) (2023) apply.

263. Defendants had ninety days upon receipt of Winnebago's written request to repatriate Samuel and Edward. *Id.* § 3005(b); 43 C.F.R. § 10.10(b)(2) (2023).

264. On December 11, 2023, Defendants sent a letter to Winnebago denying Plaintiff's request to repatriate Samuel and Edward pursuant to NAGPRA.

265. Defendants' letter denying Winnebago's request to repatriate the remains of Samuel and Edward constitutes reviewable agency action. *See* 43 C.F.R. § 10.1(b)(3) (2023) ("Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).").

266. Defendants' denial of Winnebago's written request and their failure to repatriate Samuel and Edward violates NAGPRA and are therefore unlawful.

267. NAGPRA provides Winnebago with a private right of action to enforce violations of NAGPRA, 25 U.S.C. § 3013; *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886, and the APA waives Defendants' sovereign immunity. 5 U.S.C. § 702.

SECOND CLAIM FOR RELIEF IN THE ALTERNATIVE

Failure to Repatriate (25 U.S.C. § 3005; 5 U.S.C. § 706)

268. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

269. Samuel's and Edward's remains are "Native American human remains" under NAGPRA's definition of "cultural items." 43 C.F.R. § 10.2(d)(1) (2023); 25 U.S.C. § 3001(3)(A).

270. Samuel's and Edward's remains are under Defendants' "possession or control." 25 U.S.C. § 3005(a).

271. Samuel's and Edward's remains are part of Defendants' "holding or collection" of Native American human remains. *Id.* § 3004(a).

272. Winnebago is an Indian Tribe under NAGPRA's definition. 25 U.S.C. § 3001(7).

273. Defendants never compiled an inventory or summary of the Carlisle Cemetery collection or holding of Native American human remains in their possession and control and never established the cultural affiliation of those human remains, including Samuel and Edward, pursuant to NAPGRA. *See id.* §§ 3003(a), 3004(a); 43 C.F.R. §§ 10.8, 10.9 (2023).

274. On October 16, 2023, Winnebago submitted a written request to Defendants, pursuant to 25 U.S.C. § 3005(a)(4) and 43 C.F.R. § 10.10(b) (2023) to repatriate Samuel and Edward.

275. Defendants do not dispute that Samuel and Edward are culturally affiliated with Winnebago. Indeed, Defendants have in their possession, and have presented to Plaintiff, ample evidence that the remains of Samuel and Edward are in fact culturally affiliated with Winnebago. Defendants had ninety days upon receipt of Winnebago's written request to repatriate Samuel and Edward. 25 U.S.C. § 3005(b); 43 C.F.R. § 10.10(b)(2) (2023).

276. Samuel's and Edward's remains were not freely given, nor have Defendants obtained consent from their families or Winnebago to possess or control their remains. Defendants, therefore, do not have the "right of possession" to Samuel's and Edward's remains. 25 U.S.C. § 3001(13).

277. None of the exceptions to repatriation provided at 43 C.F.R. § 10.10(c) (2023) apply.

278. On December 11, 2023, Defendants sent a letter to Winnebago denying Plaintiff's request to repatriate Samuel and Edward pursuant to NAGPRA.

279. Defendants' letter denying Winnebago's request to repatriate the remains of Samuel and Edward constitutes a final agency action under the APA. *See* 43 C.F.R. § 10.1(b)(3) (2023) ("Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).").

280. Defendants' denial of Winnebago's written request and their refusal to repatriate Samuel and Edward violates NAGPRA, and constitute "agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1), are "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law[.]" *id.* § 706(2)(A), are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" *id.* § 706(2)(C), and were made "without observance of procedure required by law[.]" *Id.* § 706(2)(D). The APA waives Defendants' sovereign immunity. *Id.* § 702.

281. Winnebago pleads this Second Claim for Relief in the alternative to its First Claim for Relief, since NAGPRA provides Winnebago with a private right of action to enforce its provisions against Defendants, separate from the APA.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests the Court to:

A. Declare that Defendants' denial of Winnebago's written request to repatriate the remains of Samuel and Edward in Defendants' possession or control from the holding or collection of Native American human remains at Carlisle Cemetery and their refusal to repatriate Samuel and Edward within ninety days of their receipt of Winnebago's written request is in violation of NAGPRA, 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.10(b)(2) (2023);

B. Alternatively, declare that Defendants' denial of Winnebago's written request to repatriate the remains of Samuel and Edward in Defendants' possession or control from the holding or collection of Native American human remains at Carlisle Cemetery and their refusal to repatriate Samuel and Edward within ninety days of their receipt of Winnebago's written request was in violation of NAGPRA, 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.10(b)(2) (2023), and thus was agency action unlawfully withheld, arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, short of statutory right, and without observance of procedure required by law, 5 U.S.C. §§ 706(1), (2)(A), (C), (D);

C. Issue injunctive relief enjoining Defendants to repatriate Samuel and Edward pursuant to 25 U.S.C. § 3005 within ninety days of the Court's ruling;

D. Award attorneys' fees as authorized by law, including under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

E. Award any other just relief as this Court deems just and proper.

Dated: January 17, 2024

Respectfully submitted,



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** Pro hac vice forthcoming*

Counsel for THE WINNEBAGO TRIBE OF NEBRASKA

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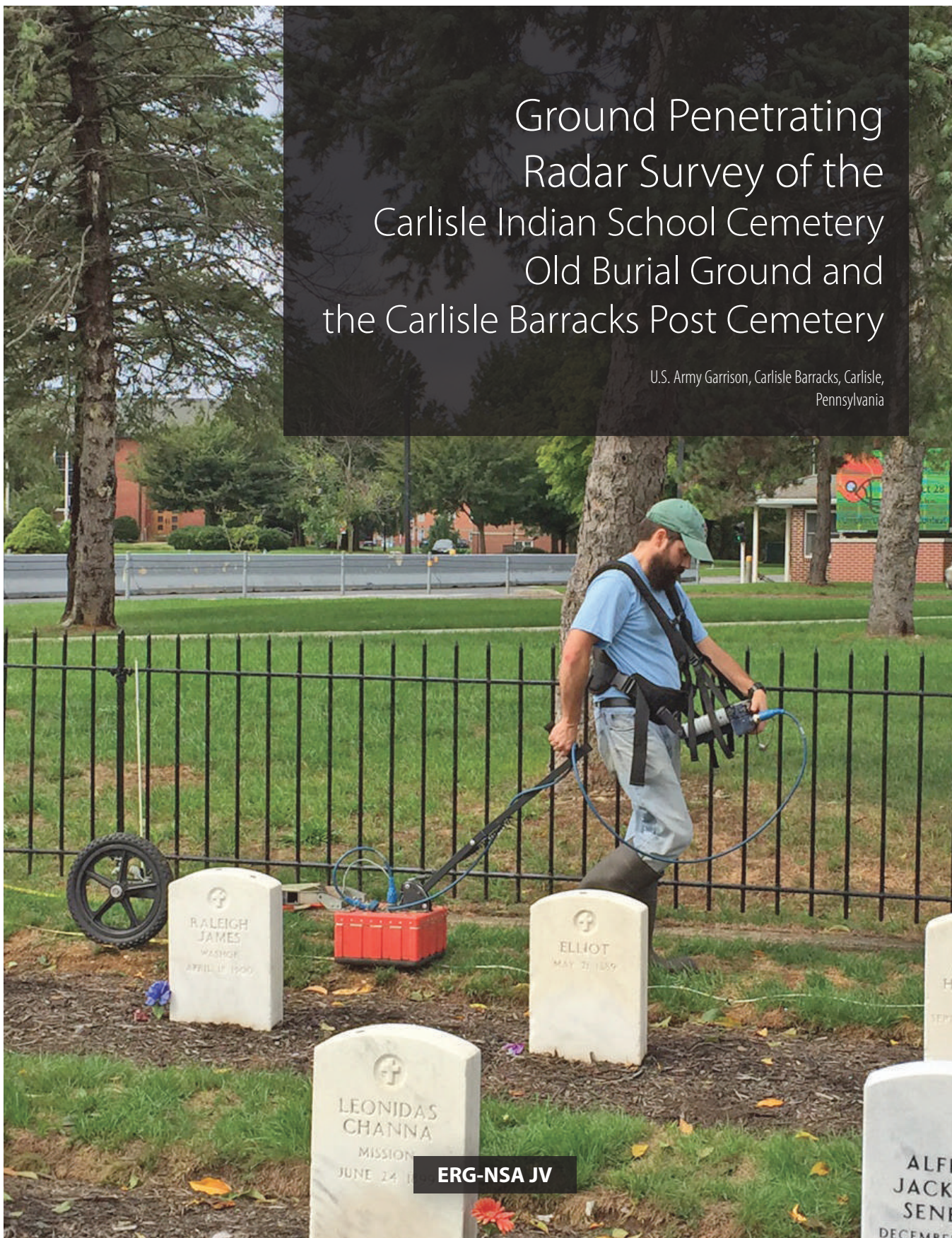
PLAINTIFF'S EXHIBIT 1

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PLAINTIFF'S EXHIBIT 2

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PLAINTIFF'S EXHIBIT 3



**Ground Penetrating Radar Survey of the
Carlisle Indian School Cemetery Old Burial Ground
and the Carlisle Barracks Post Cemetery**

U.S. Army Garrison, Carlisle Barracks, Carlisle, Pennsylvania

Contract W912P9-16-D-0015, Task Order 10

Report submitted to:

U.S. Army Corps of Engineers, St. Louis District • Mandatory Center of Expertise for the
Curation and Management of Archaeological Collections • 1222 Spruce Street •
St. Louis, Missouri 63103

Report prepared by:

New South Associates • 6150 East Ponce de Leon Avenue • Stone Mountain, Georgia 30083

and

Environmental Research Group • 843 West 36th Street • Suite 200 • Baltimore, MD 21211



J.W. Joseph, Ph.D., RPA – Principal Investigator

Shawn M. Patch, RPA, New South Associates – Geophysical Specialist and Co-Author
J. W. Joseph, Ph.D., RPA, New South Associates – Principal Investigator and Co-Author

15 February 2017 • **Final Report**
New South Associates Technical Report 2660

2 |

Figure 1.

Location of Carlisle Barracks Old Burial Ground and Post Cemetery



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PLAINTIFF'S EXHIBIT 4

Subject: FW: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students
Attachments: image001.png; image007.png; Carlisle - Archival Research Report - July 2017v2.pdf; CBPC Native American Decedent List as of 1 Aug 2018.pdf

From: "Gilfillan, Mark A CIV USARMY CESP (USA)" [REDACTED]
Date: July 27, 2021 at 2:03:15 PM CDT
Subject: RE: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

For our discussion in a few minutes.

<https://armycemeteries.army.mil/Cemeteries/Carlisle-Barracks-Main-Post-Cemetery>

In Service,

Mark Gilfillan
Project Manager/Senior Tribal Liaison
US Army Corps of Engineers-Tribal Nations Technical Center of Expertise
[REDACTED]
[REDACTED]

<https://www.spa.usace.army.mil/Missions/TNTCX/>

Please note: Our out of the office notification has been disabled. If I do not respond to your message in a few days, I may be out of the office. I will respond as soon as I am able. Thank you.

The U.S. Army Corps of Engineers Tribal Policy Principles: Recognize Tribal sovereignty – Honor the Trust responsibility – Engage in government-to-government relationships- Engage in pre-decisional Consultation – Promote economic capacity building and growth – Protect natural and cultural resources. USACE will comply with the Native American Graves Protection and Repatriation Act and act to ensure reasonable access to sacred sites.

From: Sunshine Bear [REDACTED]
Sent: Tuesday, July 27, 2021 10:06 AM
To: Gilfillan, Mark A CIV USARMY CESP (USA) [REDACTED]
Subject: Re: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Ok I am central if you can send me an invite that would work I have the afternoon free.

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[REDACTED]

“Just because something works doesn’t mean it can’t be improved.”

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From: Gilfillan, Mark A CIV USARMY CESP (USA) [REDACTED]
Sent: Friday, July 23, 2021 12:23 PM
To: Sunshine Bear [REDACTED]
Cc: [REDACTED]
Subject: RE: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Sunshine-

Thank you. Let’s connect next Wednesday, July 28, in the afternoon for a more robust discussion. I am Mountain Time.

In Service,

Mark Gilfillan
Project Manager/Senior Tribal Liaison
US Army Corps of Engineers-Tribal Nations Technical Center of Expertise

[REDACTED]

<image001.png>

<https://www.spa.usace.army.mil/Missions/TNTCX/>

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The U.S. Army Corps of Engineers Tribal Policy Principles: Recognize Tribal sovereignty – Honor the Trust responsibility – Engage in government-to-government relationships- Engage in pre-decisional Consultation – Promote economic capacity building and growth – Protect natural and cultural resources. USACE will comply with the Native American Graves Protection and Repatriation Act and act to ensure reasonable access to sacred sites.

From: Sunshine Bear [REDACTED]
Sent: Friday, July 23, 2021 8:15 AM
To: Gilfillan, Mark A CIV USARMY CESP (USA) [REDACTED]
Subject: Re: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Mark

I am open on Wednesday of next week?

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

“Just because something works doesn’t mean it can’t be improved.”

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From: Gilfillan, Mark A CIV USARMY CESPA (USA) [REDACTED]
Sent: Thursday, July 22, 2021 4:51 PM
To: Sunshine Bear [REDACTED]
Subject: RE: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Sunshine-

My contact information is below. I will be able to assist you anytime next week. Thank you.

In Service,

Mark Gilfillan
Project Manager/Senior Tribal Liaison
US Army Corps of Engineers-Tribal Nations Technical Center of Expertise

<https://www.spa.usace.army.mil/Missions/TNTCX/>

Please note: Our out of the office notification has been disabled. If I do not respond to your message in a few days, I may be out of the office. I will respond as soon as I am able. Thank you.

The U.S. Army Corps of Engineers Tribal Policy Principles: Recognize Tribal sovereignty – Honor the Trust responsibility – Engage in government-to-government relationships- Engage in pre-decisional Consultation – Promote economic capacity building and growth – Protect natural and cultural resources. USACE will comply with the Native American Graves Protection and Repatriation Act and act to ensure reasonable access to sacred sites.

From: Sunshine Bear [REDACTED]
Sent: Monday, July 19, 2021 11:46 AM
To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
Cc: Gilfillan, Mark A CIV USARMY CESPA (USA) [REDACTED]
Subject: Re: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Sounds good to me thanks!

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

“Just because something works doesn’t mean it can’t be improved.”

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From: Buller, Justin C CIV USARMY HQDA OGC (USA)
Sent: Monday, July 19, 2021 12:44 PM
To: Sunshine Bear
Cc: Gilfillan, Mark A CIV USARMY CESPK (USA)
Subject: RE: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Yes, that would likely be best...so maybe a phone call and then later we could travel to you to meet with the appropriate representatives.

Justin Buller
Associate Deputy General Counsel
Department of the Army
Office of the General Counsel

[REDACTED]

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From: Sunshine Bear [REDACTED]
Sent: Monday, July 19, 2021 1:43 PM
To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
Cc: Gilfillan, Mark A CIV USARMY CESPK (USA) [REDACTED]
Subject: Re: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Would you like the initial meeting with myself and then meet with others?

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

“Just because something works doesn’t mean it can’t be improved.”

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Case 1:24-cv-00078-CMH-IDD Document 1-5 Filed 01/17/24 Page 8 of 11 PageID# 72

distribution is prohibited. If you are not the intended recipient, please contact the sender immediately and destroy all copies of the original message.

From: Buller, Justin C CIV USARMY HQDA OGC (USA)
Sent: Monday, July 19, 2021 12:41 PM
To: Sunshine Bear
Cc: Gilfillan, Mark A CIV USARMY CESPCK (USA)
Subject: RE: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

Let's do the meeting prior to completing the documents. As I am sure you have experienced sometimes government documents are painful and maybe not as clear as they could be and as such Mark and I have found that sometimes a meeting prior is extremely helpful in expediting an approved request.

Justin Buller
Associate Deputy General Counsel
Department of the Army
Office of the General Counsel
[REDACTED]

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From: Sunshine Bear [REDACTED]
Sent: Monday, July 19, 2021 1:38 PM
To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
Cc: Gilfillan, Mark A CIV USARMY CESPCK (USA) [REDACTED]
Subject: [Non-DoD Source] Re: Winnebago Tribe of Nebraska Students

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Justin

Thank you for the reply! Yes we will move forward with the process. I will be awaiting documents that I will need to fill out then we can set up a meeting after you have received those documents?

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[Redacted]

[Redacted]

[Redacted]

[Redacted]

“Just because something works doesn’t mean it can’t be improved.”

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From: Buller, Justin C CIV USARMY HQDA OGC (USA)
Sent: Monday, July 19, 2021 12:34 PM
To: Sunshine Bear
Cc: Gilfillan, Mark A CIV USARMY CESPCK (USA)
Subject: RE: Winnebago Tribe of Nebraska Students

Good afternoon Sunshine Thomas-Bear,

Greetings from Washington DC.

Thank you for reaching out to me. Mark Gilfillan (copied) can provide the documents that would need to be completed and provided to us to move forward with disinterments. That said I recommend that we at least do a teleconference or an in person meeting prior to completing the documents so that we can fully explain the program to your Tribal leaders and Families.

Please let us know how you would like to proceed.

Thank you,
Justin

Justin Buller
Associate Deputy General Counsel
Department of the Army
Office of the General Counsel

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From: Sunshine Bear [REDACTED]
[REDACTED]
Sent: Friday, July 16, 2021 10:57 AM
To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
[REDACTED]
Subject: [Non-DoD Source] Winnebago Tribe of Nebraska Students

Justin,

Hello my name is Sunshine Thomas-Bear and I am the THPO for the Winnebago Tribe of Nebraska. I have been in contact with Jim at the Carlisle Indian School Project and have found that two of our children are buried at Carlisle. I am unsure about the remains recently found but that is what there is on record so far. I am inquiring about the process to return our children home and if there are others. Below is my contact information. Pinagigi.

Respectfully,

Sunshine Thomas-Bear

Wihokiri Wiga

Cultural Preservation Director

THPO Office/Angel De Cora Museum

Little Priest Tribal College - Thunder Clan Building

[REDACTED]

“Just because something works doesn’t mean it can’t be improved.”

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PLAINTIFF'S EXHIBIT 5

WINNEBAGO TRIBE OF NEBRASKA

Visit us at: www.winnebagotribe.com

October 12, 2023

Department of Defense
Office of the Secretary of Defense
Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon, Washington, DC 20301-1000

Department of the Army
Christine E. Wormuth
Secretary of the Army
101 Army Pentagon, Washington, DC 20310-0101

Department of the Army
Office of Army Cemeteries
Karen Durham-Aguilera
Executive Director
1 Memorial Avenue
Arlington, Virginia 22211-5003

Department of the Army
Office of Army Cemeteries
Renea C. Yates
Director
1 Memorial Avenue
Arlington, Virginia 22211-5003

Department of the Army
Lt. Col. Priscella A. Nohle
Garrison Commander, Carlisle Barracks
22 Ashburn Dr.
Carlisle, Pennsylvania 17013-5006

RE: Request to Repatriate Winnebago Children from Carlisle Barracks Post Cemetery

To Secretary of Defense Lloyd J. Austin III, Secretary of the Army Christine E. Wormuth, Executive Director Karen Durham-Aguilera, Director Renea C. Yates, and Lieutenant Colonel Priscella A. Nohle:

The Winnebago Tribe of Nebraska (“the Tribe”) requests the repatriation of Samuel Gilbert and Edward Hensley from the Carlisle Indian Industrial School cemetery, now known as the Carlisle Barracks Post Cemetery (“Carlisle Cemetery”), in Carlisle, Pennsylvania, pursuant to the Native American Graves Protection and Repatriation Act (“NAGPRA”). The Tribe requests that the Department of Defense (“DOD”); the Department of the Army (“DOA”); the Office of Army Cemeteries (“OAC”) repatriate Samuel and Edward expeditiously in accordance with 25 U.S.C. 3005(a)(4) and 43 C.F.R. 10.2(a). Under 25 U.S.C. 3005(a)(4) Native American human remains “shall be expeditiously returned where the requesting Indian tribe...can show cultural

Plaintiff's Exhibit 5

Page 1

JA85

Letter to Secretary of Defense, Secretary of the Army, Office of Army Cemeteries

October 12, 2023

Page 2 of 3

affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” The Tribe’s request fulfills this standard.

In accordance with 25 U.S.C. 3005(a)(3), 43 C.F.R. 10.10(d), and other applicable NAGPRA provisions and regulations, DOD, DOA, and OAC are required to consult with the Tribe in the repatriation process. DOD, DOA, and OAC are also required to consult with the Tribe pursuant to their trust responsibility and in accordance with Executive Order 13175 and 13647 as well as per DOD internal policies controlling Tribal consultations. All federal agencies and officials, including DOD, DOA, OAC, and their respective officials are required to abide by NAGPRA provisions and regulations and to carry out repatriation of Native American human remains in accordance therewith. 25 U.S.C. § 3001(4); 43 C.F.R. 10.2(a)(2). As such, the Tribe is entitled to robust consultation and, ultimately, the repatriation of Edward and Samuel pursuant to NAGPRA.

Both Winnebago oral history and archival research show that Edward and Samuel are culturally affiliated with the Winnebago Tribe of Nebraska. Further, Edward and Samuel’s Carlisle student cards show that Edward and Samuel are affiliated with the Tribe. Samuel and Edward were sent to Carlisle together from the Omaha and Winnebago Agency located in present day Winnebago, Nebraska on September 7, 1895. Samuel died less than two months after his arrival on October 24, 1895. Edward died on June 29, 1899. Carlisle officials not only failed to return Samuel and Edward to their home, but further failed to provide notice to their tribal family of their deaths. The Tribe believes that Samuel and Edward have been waiting to come home to Winnebago for over 100 years.

The collection of remains of Indian children at Carlisle Cemetery fall under NAGPRA and, thus, it is improper to follow OAC policies to handle disposition of remains therein. Furthermore, OAC policies are unwieldy or impossible to apply with candor and consistency to remains at Carlisle Cemetery. For example, per OAC’s internal disinterment and return process, only the “closest living relative” of a child buried at Carlisle Cemetery is allowed to request the return of the deceased child. Samuel and Edward have many relatives alive today who claim close familial ties to them. Neither child had children of their own to be able to identify a direct lineal descendent. Finding a “closest living relative” is thus confusing and divisive. Thus, the place and manner of their disposition should be driven and determined by the Tribe, exercising its sovereign prerogative to request repatriation under NAGPRA.

In 2021, DOA officials discussed OAC’s internal process for the disinterment and return of children from Carlisle Cemetery with the Tribe’s Tribal Historic Preservation Office. In those discussions, a DOA official characterized the internal process as “painful” and the government documents OAC requires as “maybe not as clear as they could be.” To the contrary, the Tribe is familiar with NAGPRA’s repatriation framework. Under NAGPRA, the Tribe has successfully facilitated the return of many Winnebago relatives for over 30 years. The Tribe is unwilling to participate in a process that the DOA’s own officials have characterized as painful and unclear.

NAGPRA requires DOD, DOA, OAC and other agencies and officials receiving this letter, to respond to this request within ninety (90) days of receipt. 43 C.F.R. 10.10(b)(2). The Tribe sincerely urges recipients of this letter to contact the Tribe to begin the process to expeditiously repatriate Samuel and Edward pursuant to NAGPRA. The Tribe will make reasonable efforts to work with DOD, DOA, and OAC to complete the repatriation process in

Plaintiff’s Exhibit 5

Page 2

Letter to Secretary of Defense, Secretary of the Army, Office of Army Cemeteries

October 12, 2023

Page 3 of 3

accordance with NAGPRA and its regulations. From the Company "A" Omaha Scouts to our present day servicemembers, many of our Tribal members have served honorably in the United States Armed Forces. The Tribe has historically shown DOA respect and honor and it expects the same in the repatriation of Samuel and Edward.

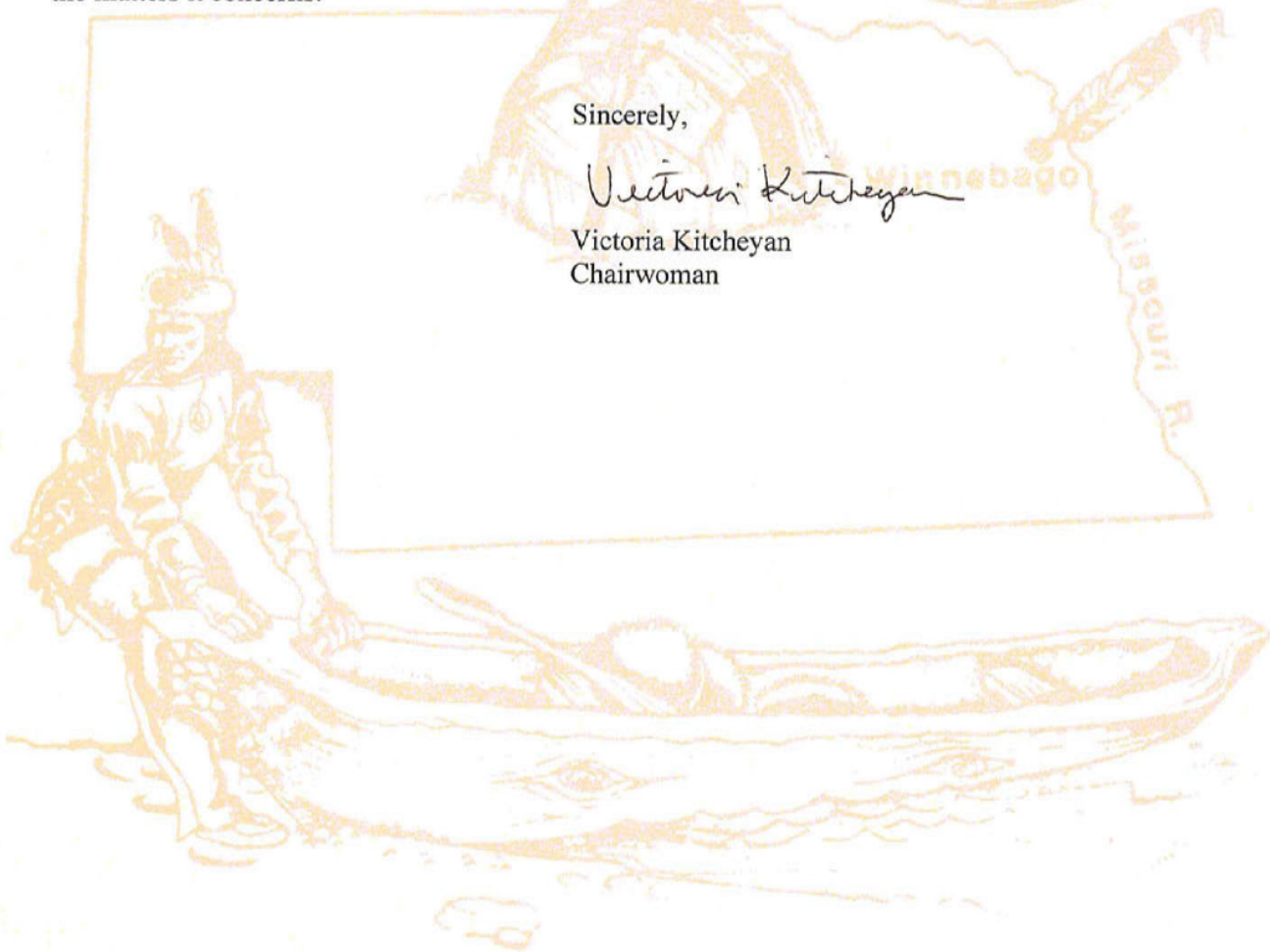
The Winnebago Tribe looks forward to working with the DOD, DOA, and OAC to bring Edward and Samuel home expeditiously, respectfully, and pursuant to NAGPRA. Please respond to this letter and send all communications through the General Counsel for the Winnebago Tribe, Danelle Smith, Big Fire Law & Policy Group, LLP, at [REDACTED]. The Tribe will only accept and respond to written communications from DOD, DOA, and OAC addressed to the Tribe's General Counsel regarding this request and the matters it concerns.

Sincerely,



Victoria Kitcheyan

Victoria Kitcheyan
Chairwoman



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PLAINTIFF'S EXHIBIT 6

Subject: FW: Letter from Winnebago Tribe Requesting Return of Members Buried at Carlisle Barracks

From: Danelle Smith

Sent: Monday, November 6, 2023 11:53 AM

To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]

Cc: Yates, Renea C CIV USARMY HQDA ANMC (USA) [REDACTED]; Koenig, Christopher J Jr CIV USARMY HQDA (USA) [REDACTED]

Subject: RE: Letter from Winnebago Tribe Requesting Return of Members Buried at Carlisle Barracks

Dear Mr. Buller,

The Tribe understands that the Army regards this matter as highly complex, but the Tribe does not. The Tribe's sole question is whether the Army will work with the Tribe to complete repatriation pursuant to 25 U.S.C. 3005(a)(4). If the Army's answer is yes, the Tribe was expecting to have further correspondence, and the Tribe is ready to plan a call as soon as possible to begin planning repatriation. If the Army's answer is no, then the Tribe is entitled to an official written response from the Army articulating the basis upon which the Army is denying the Tribe's request.

Under NAGPRA, after receipt of a Tribe's NAGPRA request, the Army has a 90-day regulatory deadline to complete repatriation, unless the Tribe consents to an alternative timeline. Thus, time is of the essence. The Tribe's sovereign interests are greater threatened the longer the Army delays consultation to plan repatriation pursuant to NAGPRA. The Tribe expects the Army to treat this matter with a level of urgency required to comply with its NAGPRA duties.

Thank you,
Danelle

Danelle J. Smith | Partner
[REDACTED]



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From: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]

Sent: Friday, November 3, 2023 4:32 PM

To: Danelle Smith [REDACTED]

Cc: Yates, Renea C CIV USARMY HQDA ANMC (USA) [REDACTED]; Koenig, Christopher J Jr CIV USARMY HQDA (USA) [REDACTED]

Subject: RE: Letter from Winnebago Tribe Requesting Return of Members Buried at Carlisle Barracks

Case 1:24-cv-00078-CMH-IDD Document 1-7 Filed 01/17/24 Page 3 of 4 PageID# 82

Hi Ms. Smith,

I appreciate your response.

With regard to your questions, this matter is highly complex and cannot be addressed with simple yes or no answers from the Army. As such I reiterate my request to arrange a virtual meeting in late November or early December.

Thank you
Justin

Justin Buller
Associate Deputy General Counsel
Department of the Army
Office of the General Counsel
[REDACTED]

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From: Danelle Smith [REDACTED]
Sent: Friday, November 3, 2023 4:35 PM
To: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
Cc: Yates, Renea C CIV USARMY HQDA ANMC (USA) [REDACTED]; Koenig, Christopher J Jr CIV USARMY HQDA (USA) [REDACTED]
Subject: [Non-DoD Source] RE: Letter from Winnebago Tribe Requesting Return of Members Buried at Carlisle Barracks

Dear Mr. Buller,

Thank you for your reply. The Tribe is aware that the Army has returned 32 Native children pursuant to internal OAC policies. However, the Tribe requested the repatriation of Samuel and Edward pursuant to the terms of NAGPRA and its regulations. The Tribe's NAGPRA request explained why NAGPRA is the controlling law requiring repatriation. Will the Army commit to following NAGPRA to comply with the Tribe's request to repatriate the boys to the Tribe pursuant to 32 U.S.C 3005(a)(4)?

Kind regards,

Danelle J. Smith | Partner
[REDACTED]

BIG FIRE
LAW & POLICY GROUP LLP

Case 1:24-cv-00078-CMH-IDD Document 1-7 Filed 01/17/24 Page 4 of 4 PageID# 83

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From: Buller, Justin C CIV USARMY HQDA OGC (USA) [REDACTED]
Sent: Thursday, November 2, 2023 2:19 PM
To: Danelle Smith [REDACTED]
Cc: Yates, Renea C CIV USARMY HQDA ANMC (USA) [REDACTED]; Koenig, Christopher J Jr CIV USARMY HQDA (USA) [REDACTED]
Subject: Letter from Winnebago Tribe Requesting Return of Members Buried at Carlisle Barracks

Dear Ms. Smith,

Greetings from Washington DC. I am the lead attorney for Native American Affairs for the U.S. Army and I am responding to the letter dated 12 October from the Chairwoman Kitcheyan of the Winnebago Tribe of Nebraska.

The U.S. Army operates Carlisle Barracks and the cemetery located there, and as such has responsibility for the ongoing program to assist Tribal Families in the return of their relatives buried in the cemetery. The Army assumed responsibility for the cemetery after the Carlisle Indian Industrial School closed in 1918, and the property (to include the cemetery) was transferred from the Indian Bureau to the Army. Since 2017 the Office of Army Cemeteries has returned 32 Native children from 14 Tribes and two Alaskan Native Villages to their Families. We are committed to working with the Winnebago Tribe of Nebraska and their Families to return their children to them.

I am requesting to arrange a time in late November or early December for the two of us, and a small group of our clients as appropriate, to have a virtual (zoom or TEAMS) discussion to discuss how we can work together to accomplish the Chairwoman's request. I look forward to hearing from you and working together to help return the Winnebago children to their Families.

Sincerely,
Justin

Justin Buller
Associate Deputy General Counsel
Department of the Army
Office of the General Counsel
[REDACTED]

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PLAINTIFF'S EXHIBIT 7



DEPARTMENT OF THE ARMY
OFFICE OF ARMY CEMETERIES
1 MEMORIAL AVENUE
ARLINGTON, VIRGINIA 22211-5003

December 7, 2023

Office of the Executive Director

Danelle J. Smith
[REDACTED]

Dear Mrs. Smith:

Thank you for the October 12, 2023, Winnebago Tribal letter to the Secretary of Defense and Secretary of the Army and your November 6, 2023, email addressed to Mr. Buller and the Office of Army Cemeteries concerning the return of Samuel Gilbert and Edward Hensley pursuant to 25 U.S.C. 3005(a)(4). This letter serves as the Army's official written response articulating the basis upon which the Army cannot repatriate these children under Native American Grave Protection and Repatriation Act (NAGPRA) 25 United States Code, Chapter 32.

The disinterment and return of Samuel and Edward can be conducted in a dignified and respectful manner under the authority of Army Regulation 290-5, in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA) savings clauses at 25 U.S. Code § 3009. Individually named graves located within the Carlisle Barracks Post Cemetery do not constitute "holdings or collections" of the Army (§ 3003(a)). Further, Federal Courts have held that NAGPRA (§ 3002) does not require the Army to engage in the intentional excavation or exhumation of a grave.

The disinterment and return of both children can be conducted entirely at the Army's expense. Specifically, the Army will fund up to four individuals (two family members, a spiritual representative, and a Tribal member) travel to and from Carlisle Barracks to allow their presence during the disinterment and will cover the costs of a casket and a standard government headstone to mark their final interment location. Finally, the Army welcomes, at private expense, as many additional Family and Tribal members as desired to attend the transfer ceremony conducted prior to their final journey home.

We are honored that the Winnebago Tribe of Nebraska remains interested in the dignified return of their loved ones. The Army continues to offer a virtual or in person meeting to discuss their dignified and respectful return.

My point of contact for this action is Ms. Renea Yates, Director, Office of Army Cemeteries,
[REDACTED]

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Durham-Aguilera".

Karen Durham-Aguilera
Executive Director

Case 1:24-cv-00078-CMH-IDD Document 1-9 Filed 01/17/24 Page 1 of 4 PageID# 86

PLAINTIFF'S EXHIBIT 8

Based on Army Regulation 290-5

Disinterment of remains

a. Each request for disinterment of Native American remains from Carlisle Barracks Post Cemetery will be addressed to the Executive Director of the Office of Army Cemeteries for approval. The request will include the following documents:

- (1) Notarized affidavit by the closest living relative of the decedent requesting the disinterment. This document includes the reason for the proposed disinterment.
- (2) A sworn statement by a person knowing that the person who supplied the affidavit is the closest living relative of the deceased.

Samples of affidavits are shown below:

As of July 2023

REQUEST FOR DISINTERMENT

I, _____ [insert the name of the requestor] hereby request the disinterment of the remains of my _____ [insert relationship to your ancestor; example: Uncle or Aunt] from Carlisle Barracks Post Cemetery. I understand that the Army has pledged to honor this request at no personal cost to myself.

The decision that the remains of the decedent be interred at Carlisle Barracks was made by the administrators of the Carlisle Indian Industrial School. Due to the passage of time, all those involved in making that decision are deceased.

This disinterment is requested because _____
[insert reason(s) that disinterment is desired; example: Carlisle Barracks is too distant from my ancestor's homeland].

I hereby certify that I am the closest living relative of the late [insert name of the deceased].

Signed on this _____ [date]

[signature of closest living relative]

[printed name of closest living relative]

Sworn to and subscribed before me on this _____ [date]

[name and signature of Notary Public]

Notary Public

My commission expires _____ [date]

[Seal]

THIRD PARTY STATEMENT

I, _____ [insert name of person making this statement], hereby signify that _____ [insert name of relative requesting disinterment] is the closest known living relative of _____ [name of the deceased for who's return is being requested].

Signed on this _____ [date]

[signature of person making the above statement]

[printed name of person making the above statement]

Sworn to and subscribed before me on this _____ [date]

[name and signature of Notary Public]

Notary Public

My commission expires _____ [date]

[Seal]

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PLAINTIFF'S EXHIBIT 9

Disinterment of remains

a. Each request for disinterment of Native American remains from Carlisle Barracks Post Cemetery will be addressed to the Executive Director, Office of Army Cemeteries for approval. Requests should be emailed to: usarmy.pentagon.hqda-anmc.mbx.accountability-coe@army.mil.

b. The request will include the following documents:

- (1) Notarized affidavit by the closest living relative of the decedent requesting the disinterment. This document includes the reason for the proposed disinterment.
- (2) A notarized sworn statement by a person knowing that the person who supplied the affidavit is the closest living relative of the deceased.

Samples of affidavits are shown in Figures 2-1, 2-2.

As of March 2022

SAMPLE AFFIDAVIT

Figure 2-1: This document is to be completed and signed by the closest living relative of the deceased

To: Executive Director, Office of Army Cemeteries, Arlington, VA 22211-5003

I hereby request the disinterment of the remains of my _____
[insert relationship to your ancestor; *example: Great Aunt*] from Carlisle Barracks Post Cemetery. I understand that the Office of Army Cemeteries has pledged to honor this request at no personal cost to myself.

The decision that the remains of the decedent be interred at Carlisle Barracks was made by an ancestor and the administrators of the Carlisle Indian Industrial School. Due to the passage of time, all those involved in making that decision are deceased.

This disinterment is requested because _____
[insert reason(s) that disinterment is desired; *example: Carlisle Barracks is too distant from my ancestor's homeland for me to visit and leave offerings at the gravesite*].

I hereby certify that I am the closest living relative of the late [insert name of the deceased].

Signed on this [date]

[name and signature of closest living relative]

Sworn to and subscribed before me on this [date] day of [month year]

[name and signature of Notary Public]

Notary Public

My commission expires [date]

[Seal]

SAMPLE STATEMENT

Figure 2-2: This document is to be completed and signed by someone who knows the family or by another family member. The person who signs this form must be someone other than the requestor.

To WHOM IT MAY CONCERN:

I, [insert full name], hereby signify that [insert name of relative making request] is the closest known living relative of [name of the deceased].

Signature	Printed Name	Address

Sworn to and subscribed before me on this [date] day of [month year]

[name and signature of Notary Public]
Notary Public

My commission expires [date]

[Seal]

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PLAINTIFF'S EXHIBIT 10

Hinon'ainino'

Northern Arapaho Tribe
TRIBAL HISTORIC PRESERVATION OFFICE

[REDACTED] | [REDACTED] | [REDACTED] | [REDACTED]
January 8, 2015

Subject: Northern Arapaho Repatriation

LTC Greg W. Ank, Garrison Commander
U.S. Army Garrison
[REDACTED]

Garrison Commander,

The Northern Arapaho Tribal Historic Preservation Office (NATHPO) represents the Northern Arapaho Business Council, the official governing body of the Tribe, on all issues pertaining to the Native American Graves Protection and Repatriation Act (NAGPRA) and other issues of cultural resource protection. I am the director of NATHPO and would like to formally begin correspondence with you in this capacity.

NATHPO is aware of three (3) Northern Arapaho students interred at the Army War College:

Horace Washington
Hayes Vanderbilt Friday "Charles" "Little Plume"
Dickens Nor "Little Chief"

I have had former communications with Thomas G. Kane, Installation Legal Officer at the Army War College back in 2007 regarding Dickens Nor "Little Chief." In his letter addressed to me, dated September 25, 2007, he notes that the remains of Indian Children who died at Carlisle are in a cemetery that has become part of your community and they would "hate to disrupt such a tranquil site, if it can be avoided." He also states that many visitors, foreign and domestic visit the cemetery daily and "the cemetery represents one of the most beautiful tributes to the Native American people." (see attached letter).

Our ancestors should not be a tourist attraction. Our ancestors are no longer considered objects of research; they will no longer be considered road side attractions. These children were people; they were sons, daughters, nieces, nephews, future war chiefs, future mothers, grandmothers, grandfathers, and care takers of this land. For them to be taken away and never given back is appalling.

NATHPO is asking that the Army War College be forthcoming with the remains of these children. The Tribe, through NATHPO, will exercise its rights under NAGRPA to seek the repatriation of the Northern Arapaho students buried at the Carlisle Barracks Cemetery. It is our sovereign right and duty to make sure our ancestors are returned home where they belong. We understand that these children died over a hundred years ago and were buried in wooden boxes so the remains may be difficult to ascertain. However, the United States Military repatriates empty coffins when human remains are not found of loved ones; this is an option that we are willing to consider.

This action of repatriation is more than a movement; it is a healing of tribal wounds created by racism, stereotypes and genocide perpetuated in native communities through Trans-Generational Historic Trauma. No longer will we be told to wait. Our tribal communities need to heal.

NATHPO has requested that all tribes who have interred tribal members unite and come forward for their relatives by March 1st, 2016. After March 1, 2016 NATHPO will move forward with a formal request of repatriation of our ancestors interred at the Carlisle Barracks Cemetery, Army War College.

We have also received support from Rose Salamanca, a Conciliation Specialist in the Community Relations Service of the Department of Justice (DOJ), to facilitate a meeting for parties involved and their representatives from tribes and communities to ensure the NAGPRA compliance and the NAGPRA process is carried through.

Northern Arapaho Tribal Historic Office will wait for the Department of Justice to contact your office so we can move forward in facilitating a time and place for a meeting.

Thank you for your time and effort in this project. NATHPO will stay in contact and continue to work towards the repatriation of our ancestors and we are hopeful that previous correspondence with your institution is not indicative of how the process of repatriation will continue.

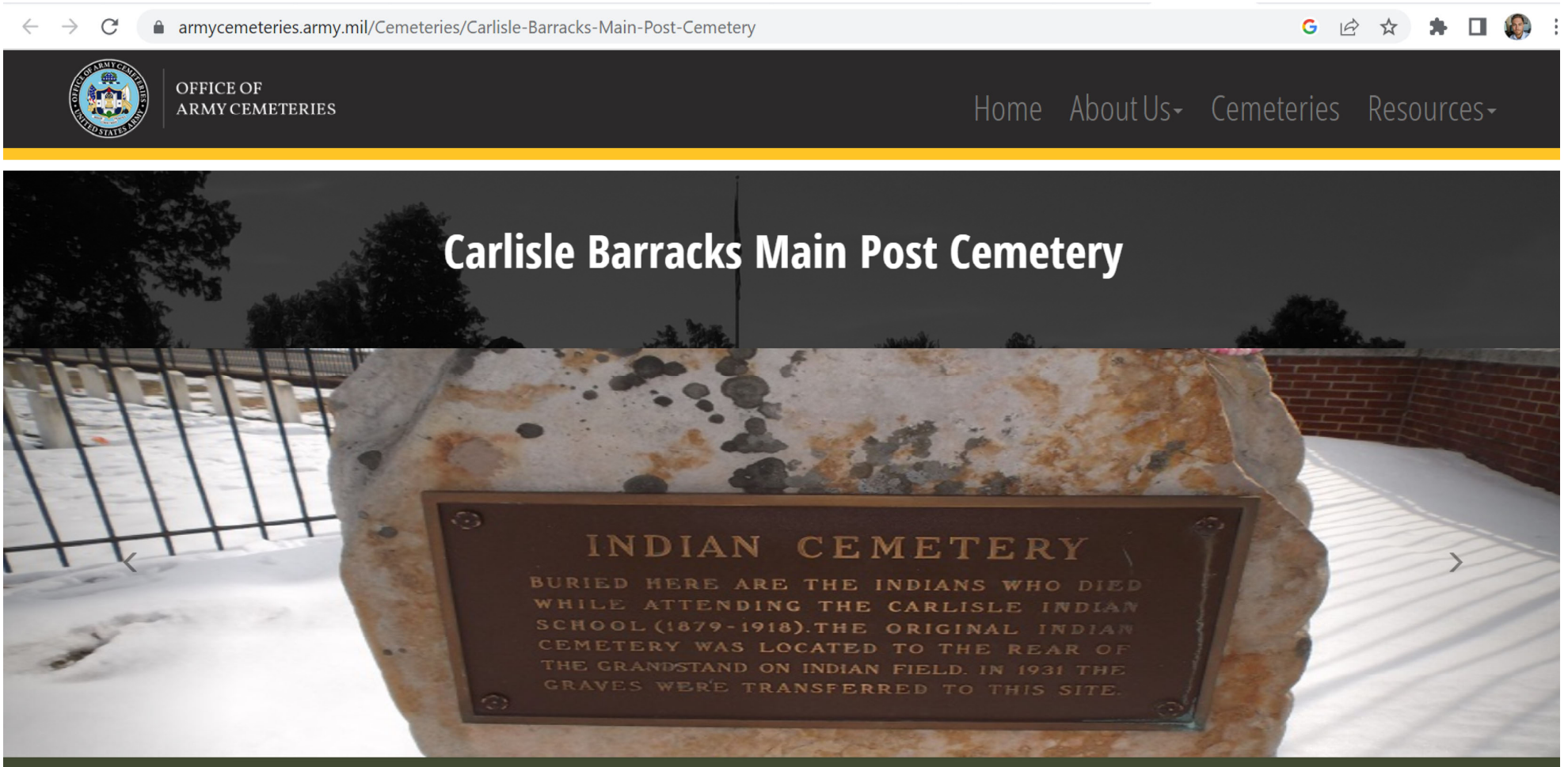
Yufna Soldier Wolf

NATHPO Director
[REDACTED]

The Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048, is a United States federal law enacted on 16 November 1990. The Act requires federal agencies and institutions that receive federal funding⁽¹⁾ to return Native American "cultural items" to lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations. Cultural items include human remains, funerary objects, sacred objects, and objects of cultural patrimony.

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PLAINTIFF'S EXHIBIT 11



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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I will today file the foregoing using the court's electronic filing system, which will cause service upon all counsel of record.

/s/ Peter Kryn Dykema

Peter Kryn Dykema

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WINNEBAGO TRIBE OF NEBRASKA, a
federally recognized Indian Tribe,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
ARMY; UNITED STATES DEPARTMENT
OF THE ARMY, OFFICE OF ARMY
CEMETERIES; CHRISTINE E. WORMUTH,
KAREN DURHAM-AGUILERA, RENE A C.
YATES, Lieutenant Colonel PRISCELLA A.
NOHLE, in their official capacities,
Defendants.

1:24-cv-78 - CMH-IDD

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Plaintiff seeks declaratory and injunctive relief pertaining to the repatriation of the remains of two boys interred, in 1895 and 1899, at the Army cemetery in Carlisle, Pennsylvania. To support its claims, the Complaint relies upon the repatriation provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3003, 3005, and the Interior Department's implementing regulations, 43 C.F.R. § 10 (2024).¹ As the Army has informed Plaintiff more than once, Defendants are ready and willing to assist in the return of the boys' remains to their rightful resting place, and at the Army's expense. But this lawsuit can be of no help in making that happen, because the invoked provisions of NAGPRA do not apply to the remains interred at the Carlisle Barracks Main Post Cemetery. The Complaint therefore does not state an actionable claim and must be dismissed under Fed. R. Civ. P. 12(b)(6).

¹ Interior's regulations were updated as of January 12, 2024. *See* 88 Fed. Reg. 86518 (Dec. 13, 2023). Unless otherwise indicated, all references to the C.F.R. are to the 2024 edition.

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FACTUAL BACKGROUND

A. The Carlisle School and Cemetery

The United States' school program for Native Americans dates back to 1819, when Congress authorized the President, wherever he deemed it "practicable," and where "the means of instruction can be introduced with their own consent," to "employ capable persons of good moral character to instruct [Indians] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic." Act of March 3, 1819, ch. 85, 3 Stat. 516 (codified at 25 U.S.C. § 271 (2020)).² In the century that followed, an extensive system of Indian boarding schools was developed, designed in significant part to accomplish the forced assimilation of Native Americans to European/American culture. Boarding School Report at 37-46. Between 1819 and 1969 the federal government operated 408 Indian boarding schools at 431 locations. *Id.* at 6, 82.

² See generally, Bryan Newland, U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report* (Boarding School Report) 27 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf. Because this Report is a public record, because Plaintiff relies upon it (ECF No. 1 ¶¶ 28, 31), and because (we expect) there will be no dispute as to its contents, the Report may be relied upon here without converting Defendants' motion to dismiss into a summary judgment motion. See *Clark v. BASF Salaried Employees' Pension Plan*, 329 F. Supp. 2d 694, 697 (W.D.N.C. 2004) (citing *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994), recognizing that the "district court may also take judicial notice of matters of public record without converting a 12(b)(6) motion into a motion for summary judgment"), *affirmed as modified by Clark v. BASF Corp.*, 142 Fed. App'x 659, 661 (4th Cir. 2005) (also recognizing that district court properly considered document, which was not part of the public record, without converting the motion to dismiss into a motion for summary judgment, where there was no dispute as to document's authenticity, the document was referenced in the complaint and the document was central to the plaintiff's claim); *Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995) (court may consider documents outside the pleadings, without converting motion to dismiss into a motion for summary judgment, to include "documents quoted, relied upon, or incorporated by reference in the complaint, [as well as] official public records pertinent to the plaintiff's claims," so long as the documents are "of unquestioned authenticity").

“The Carlisle Indian Industrial School (Carlisle Indian School) was established at Carlisle Barracks by the Bureau of Indian Affairs (BIA) in 1879 and operated until 1918 when the school was closed and the barracks returned to military use.”³ While in operation, the Carlisle Indian School offered education and training for industrial technology and other skills to over 10,500 Native Americans. Carlisle Research Report at i. The Carlisle Indian School Cemetery was established for the burial of Native American students who died while attending the school. *Id.*

The cemetery contains 229 burial plots, of which 180 have been identified as Native American, including 179 students and one former student. *Id.* at 1.⁴ Of the Native American burials, 157 have a known tribal affiliation and 23 burials have an unknown tribal affiliation. Carlisle Research Report at 1. There are members of approximately 50 tribes in the cemetery. *Id.* In 1927, the current Carlisle Indian School Cemetery’s burials were moved from the original burial ground to Carlisle Barracks Main Post Cemetery (Post Cemetery). *Id.* Because the historical records are poor, “it is impossible to definitively state whether the markers are correctly associated with the physical remains of the individuals name[d] on these respective markers without physical investigation.” *Id.* at i, 56.

³ J.W. Joseph *et al.*, New South Associates, *Archival Research of the Carlisle Indian School Cemetery* (Carlisle Research Report) at i (2017), <https://armycemeteries.army.mil/Portals/1/Documents/CarlisleBarracks/Archival%20Research%20Report%20-%20July%202017v2.pdf?ver=2019-06-07-121535-723>. The Carlisle Research Report, a public report that Plaintiff relies upon (ECF No. 1 ¶¶ 55, 67, 70, 74, 77) may be considered here without converting Defendants’ motion into a motion for summary judgment. *See* Footnote 2, *supra*.

⁴This number has been reduced, because the Army has disinterred the remains of thirty-two Native Americans buried at the Post Cemetery. *See, e.g.*, Office of Army Cemeteries Public Affairs, *Office of Army Cemeteries finalized fifth disinterment project at Carlisle Barracks*, U.S. Army War College News Archives (July 7, 2022), <https://www.armywarcollege.edu/News/archives/14284.pdf>.

The Army is currently engaged in a major effort to identify all Native American graves at the Post Cemetery and to return the remains to the decedents' families. *Id.* at 1. This effort is being carried out with the support of Registered Professional Archeologists, Board Certified Physical Anthropologists, and highly experienced professional cemetarians. *Id.* Notwithstanding the challenges presented by the imperfect historical records of the cemetery, the research team has created an inventory of 214 of the 229 burial plots, including 166 of the 180 Native American plots. *Id.* at Appendix A.

The Cemetery falls underneath the responsibility of the Carlisle Barracks Garrison Command and the U.S. Army's Installation Management Command. It is under the control of the Office of Army Cemeteries (OAC). OAC provides oversight and expertise for all Army cemeteries through policy, program management, inspections, training, and assistance.

B. NAGPRA

The origin and development of NAGPRA is recounted in Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History* (Trope & Echo-Hawk), 24 Ariz. St. L.J. 35 (1992) (cited at Compl. ¶ 98, ECF No. 1). *See also Thorpe v. Borough of Thorpe*, 770 F.3d 255, 259-62 (3d Cir. 2014). According to Trope & Echo-Hawk, one of the major incentives for the legislation was the existence of large collections of Native American remains held in museums:

In 1986, a number of Northern Cheyenne leaders discovered that almost 18,500 human remains were warehoused in the Smithsonian Institution. This discovery served as a catalyst for a concerted national effort by Indian tribes and organizations to obtain legislation to repatriate human remains and cultural artifacts to Indian tribes and descendants of the deceased. Between 1986 and 1990, a number of bills were introduced in the 99th, 100th, and 101st Congresses to address this issue.

Trope & Echo-Hawk, at. 54-55. Partly as a result of the Antiquities Act of 1906, which

characterized Native American remains on federal lands as federal property and as “archeological resources,” museums across the country had built collections like those of the Smithsonian. *Id.* at 42.

At the same time, despoilers of gravesites gathered bones and burial artifacts for sale here and in Europe. *Id.* at 43-44; H.R. Rep. No. 101-877 at 8-9 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4367, 4367-68.

NAGPRA seeks to deal with both problems, and also creates rules and procedures governing the disinterment of existing Native American gravesites. *See, generally, Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006).

Section 4 (codified at 18 U.S.C. § 1170) deals with profiteering and grave-robbing by criminalizing traffic in Native American human remains and cultural items.

Section 3 creates procedures for the protection and repatriation of remains unearthed after the Act’s passage. Section 3(a) broadly applies to remains and cultural items “excavated or discovered” after the passage of the Act and sets out a detailed hierarchy that addresses their “ownership or control.” 25 U.S.C. § 3002(a). Sections 3(c) and 3(d) distinguish between intentional, and inadvertent, disinterment of Native American remains and objects. Section 3(c) creates permitting and consultation requirements for the “intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal.” 25 U.S.C. § 3002(c). Section 3(d) governs the “inadvertent discovery of Native American remains and objects” by requiring that such discoveries be reported to the Interior Department and by setting rules for the disposition of the materials discovered.

Thus the entirety of Section 3 (which we refer to below by its codified number, “Section

3002”) deals with excavations of Native American remains and cultural items occurring after NAGPRA’s passage, and nothing in Section 3002 proactively requires excavation.

Some of the most hard-fought provisions of the bill, however, dealt with repatriation of remains already held by museums. The bill’s principal sponsors, Senators John McCain and Daniel Inouye, put it this way:

The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. . . For several years, the Congress has considered the difficult issue of the repatriation of Native American human remains and funerary objects from museum collections to Indian tribes.

136 Cong. Rec. S17173-02 (daily ed. Oct. 26, 1990) (remarks of Sen. McCain), 1990 WL 165443.

In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums and have not had the legal ability or financial resources to pursue the return of the goods. It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property.

Id. at S17174 (remarks of Sen. Inouye), 1990 WL 165443.

Congress resolved the museum collection issue by creating two, complementary, requirements. First, NAGPRA Section 5 requires that existing collections be inventoried.

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

25 U.S.C. § 3003(a). Second, where the decedent’s lineal descendants or cultural affiliation can be established, NAGPRA Section 7 requires repatriation of the inventoried remains and associated artifacts.

If . . . the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization . . . shall expeditiously return such remains and associated funerary objects.

25 U.S.C. § 3005(a).

The history and contents of NAGPRA are discussed in more detail below.

C. Plaintiff's Suit

Plaintiff Winnebago Tribe of Nebraska filed the instant action on January 17, 2024, seeking declaratory and injunctive relief “for ongoing violations of the Native American Graves Protection and Repatriation Act . . . , 25 U.S.C. §§ 3001-3013, and its implementing regulations, 43 C.F.R. § 10 (2023).” ECF No. 1 ¶ 1. The Defendants are the Department of the Army (Army), the OAC, and several Army officials sued in their official capacities. The suit seeks repatriation of the remains of two Winnebago boys, Samuel Gilbert and Edward Hensley, who (beginning in 1895, *see* Compl. Exs. 1 & 2, ECF Nos. 1-2, 1-3) attended the Carlisle school and are interred at the Post Cemetery. ECF No. 1 ¶ 2.⁵ The complaint seeks a declaration that Defendants have violated NAGPRA, and an injunction requiring that Defendants take actions under NAGPRA. *Id.* at 52-53 (Relief Requested).

⁵ While the Complaint’s factual allegations are accepted on a motion to dismiss, Defendants do not admit their truth. In particular, the Complaint alleges that “identifying [the boys’] closest living relatives would be challenging, if not impossible, because neither Edward nor Samuel had any direct descendants[.]” ECF No. 1 ¶ 110. In its efforts to return the boys’ remains, however, the Army learned that Plaintiff is aware of living relatives. *See* February 29, 2024, letter (attached as Exhibit A). That living relatives exist creates potential merits problems for the Complaint other than those addressed by the instant motion, including questions regarding prudential ripeness and the absence of justiciable final agency action. Given, however, that Plaintiff has failed to state a claim for relief redressable under NAGPRA, the Court need not reach those questions. Should the Court deny Defendants’ motion, we reserve the right to raise those issues on summary judgment. Exhibit A has no bearing on the instant motion.

The Army has informed Plaintiff that it is willing to carry out “the disinterment and return of both children entirely at the Army’s expense.” The Army also stated that it would pay for the expenses of up to four individuals to attend each disinterment and would provide a casket and “headstone to mark [the boys’] final interment location.” Compl. Ex. 7, ECF No. 1-8. The Army explained, however, that it does not believe that NAGPRA applies. *Id.*

ARGUMENT

NAGPRA’s inventory and repatriation requirements, in Sections 3003 and 3005, apply only to “Federal agenc[ies] and . . . museum[s] which ha[ve] possession or control over holdings or collections of Native American human remains.” 25 U.S.C. 3003(a). Those requirements do not apply to the remains now resting in the Post Cemetery because, under the statute’s plain meaning, the cemetery’s graves are not a “holding or collection.” Additionally, the three federal court decisions that have addressed the issue have held that NAGPRA does not obligate anyone to disinter Native American remains. These holdings are firmly supported by the language, history, and purpose of NAGPRA, and by its implementing regulations.

A. Legal Standards

In general, a motion to dismiss for failure to state a claim should be granted where the plaintiff fails to “state[] a plausible claim for relief,” that is, if the allegations of the complaint fail “to raise a right to relief above the speculative level.” *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555(2007)). In considering a motion to dismiss, the court accepts as true all well-pleaded factual allegations and views the complaint in a light most favorable to the plaintiff. *Id.*

As the Fourth Circuit has explained, the purpose of Rule 12(b)(6) is to provide a defendant with a mechanism for testing “the legal sufficiency of the complaint,” not the facts that support it. *See In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Walters*, 684 F. 3d at 439. Thus, a complaint should be dismissed if it lacks a cognizable legal theory. *Greer v. Gen. Dynamics Info. Tech., Inc.*, 808 F. App’x 191, 193 (4th Cir. 2020); *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). “A court properly dismisses a complaint on a Rule 12(b)(6) motion based upon the ‘lack of a cognizable legal theory’” *Searcy v. Locke*, 2010 WL 3522967, at *6 (E.D. Va. Sept. 7, 2010) (citation omitted); *cf. Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (If “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations . . . a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one” (citation omitted)) *superseded by a statute on other grounds*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

B. The Statute’s Plain Meaning Shows, and All Pertinent Caselaw Holds, that NAGPRA’s Repatriation Requirements Do Not Apply to Cemeteries

NAGPRA’s inventory and repatriation requirements, in Sections 3003 and 3005, apply only to “Federal agenc[ies] and . . . museum[s] which ha[ve] possession or control over holdings or collections of Native American human remains.” 25 U.S.C. 3003(a). There is no question that the Post Cemetery, which the Army controls, includes Native American remains. Whether the requirements of Sections 3003 and 3005 apply here therefore turns on two questions. First, do the remains now resting in the cemetery at the Carlisle Barracks comprise a “holding or collection” as those terms are used in NAGPRA? Second, do NAGPRA Sections 3003 and 3005

require disinterment of grave site remains? If the answer to either question is no, Plaintiff's suit fails. The answer to both questions is no.

1. Under the ordinary meaning of the terms the Post Cemetery is not a "holding or collection"

Plaintiffs invoke the repatriation requirements of 25 U.S.C. § 3005. ECF No. 1 ¶¶ 2, 5, 123, 128, 140, 182, 183, 186, 226, 229, 233, 234, 235, 255, 259, 263, 270, 274, 275. We thus note at the outset that this case (and our motion) do not implicate Section 3002, which governs remains inadvertently discovered or intentionally disinterred after the Act's passage. Nor should they; by its terms Section 3002 applies to remains that have been unearthed, not to remains in the ground. *Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114, at *2 (E.D. Wis. Aug. 17, 2006) (“[T]o the extent § 3002 could apply without respect to whether a museum or agency is involved, the Act applies only to remains or artifacts that are ‘excavated or discovered’—not to remains that may be still buried. 25 U.S.C. § 3002(a)”)⁶

a. A cemetery does not meet the ordinary meaning of a “holding or collection”

NAGPRA Sections 3003 and 3005 do not apply here because the Post Cemetery is not a “holding or collection.”⁷ The Merriam-Webster online dictionary defines a “collection” as “an accumulation of objects gathered for study, comparison, or exhibition or as a hobby.” The examples given are collections of poetry, photographs, and baseball cards. *See Collection*,

⁶ As noted, Section 3002 also regulates the intentional excavation or removal of Native American funerary items from federal or tribal lands, requiring (among other things) a permit and prior consultation with the appropriate Tribe. *See* 25 U.S.C. § 3002(c)(1), (2), (4); 43 C.F.R. §§ 10.3(b), 10.5. *See, generally, Yankton Sioux Tribe v. U.S. Army Corps of Eng's*, 209 F. Supp. 2d 1008, 1016-17 (D.S.D. 2002). The Complaint does not invoke any of these provisions.

⁷ The Complaint alleges otherwise. ECF No. 1 ¶¶ 2, 5, 10, 11, 12, 24, 25, 99, 132, 146, 190, 191, 192, 195, 196, 197, 199, 200, 203, 256, 271.

<https://www.merriam-webster.com/dictionary/collection> (last visited May 2, 2024). The collections of art, or of antiquities, held by museums around the world, provide another obvious illustration. A “holding” is defined as “property (such as land or securities) owned —usually used in plural.” *Holding*, <https://www.merriam-webster.com/dictionary/holding> (last visited May 2, 2024). These definitions capture the everyday sense that a “collection” is *an accumulation of things* for science, culture, or curiosity, and a “holding” is an *accumulation* of assets. Both terms naturally apply to a museum’s or federal agency’s inventory of previously excavated remains; neither term naturally applies to burials in a cemetery.

Congress authorized the Interior Department to promulgate regulations implementing NAGPRA, 25 U.S.C. § 3011, and the Department’s definition, while more expansive, captures this same sense. Under the regulations a “holding or collection” “means *an accumulation* of one or more objects, items, or human remains for any temporary or permanent purpose, including: (1) Academic interest; (2) Accession; (3) Catalog; (4) Comparison; (5) Conservation; (6) Education; (7) Examination; (8) Exhibition; (9) Forensic purposes; (10) Interpretation; (11) Preservation; (12) Public benefit; (13) Research; (14) Scientific interest; or (15) Study.” 43 C.F.R. § 10.2 (emphasis added). Again, each of these purposes applies to a museum; none to a cemetery. And a cemetery simply cannot be called an “accumulation.” Merriam-Webster defines “accumulate” as “to gather or pile up.” *Accumulate*, <https://www.merriam-webster.com/dictionary/accumulate> (last visited May 2, 2024). A cemetery is not an accumulation in this, its normal sense. In our cemeteries we commemorate and honor the dead; we do not hoard or amass the dead.⁸

⁸ The Interior Department’s commentary on its updated NAGPRA regulations is consistent,

But even if the statute were not clear, the legislative history (Section C below) reinforces this reading. Indeed, and in a very real sense, that is the whole point of NAGPRA. To our shame, European Americans, in the past, *did* treat Native American human remains and funerary objects as just so many collectibles, like stamps or baseball cards. Or as natural curiosities, like mammoth tusks. This macabre and prejudiced fascination is one reason why Native American human remains and cultural items were collected by museums, and why grave-robbers found such a ready market. Trope & Echo-Hawk, at 38-43. The point of NAGPRA was and is to right those wrongs, insofar as such wrongs can ever be righted.

And, as Plaintiffs assert, our boarding school system for Native Americans is yet another source of national shame. Regardless of the stated intent of its creators and administrators, it cannot be denied that that system far too often served as an instrument of racism and abuse. Boarding School Report, at 55-62.

But NAGPRA is not a vehicle for rendering judgement on the Native American public school system. Nor is it a vehicle for affirmatively relocating the contents of the cemeteries where students at those schools were laid to rest. NAGPRA Sections 3003 and 3005 are concerned with archaeological collections, not graveyards.

b. In holding that NAGPRA does not require disinterment

noting more than once that “holdings or collections” are typically maintained in “boxes.” *See* Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86452-01,86495-96 (Dec. 13, 2023) (“A few comments provided details on how long it takes identify human remains or cultural items in a holding or collection . . . One comment stated it takes 10 hours to review a single, standard box to identify the presence of human remains or cultural items”); *id.* at 86496 (“A museum or Federal agency can choose to review each box in a holding or collection to determine if it contains human remains or cultural items, but it must do so within the timeframes required by the Act and the regulations.”)

**of Native American remains, the caselaw confirms that
a cemetery is not a “holding or collection”**

The caselaw supports the idea that the inventory and repatriation requirements of Sections 3003 and 3005, in referring to “holdings or collections” of Native American remains, do not apply to gravesites. Two decisions have held that Sections 3003 and 3005 do not apply to remains in the ground.

In *Hawk v. Danforth*, the plaintiff alleged that his ancestors were buried underneath an Oneida tribal parking lot. He sued under NAGPRA to compel the Tribe to care for the gravesites and “provid[e] proper burials.” 2006 WL 6928114, at *1. The suit was dismissed, partly because the defendant was not a museum or federal agency. But the court also dismissed the complaint on the basis that the repatriation requirements of NAGPRA do not apply to remains and artifacts that are still in the ground. “In the plaintiff’s view,” the court noted, “the Tribe should excavate under the parking lot to find the remains he asserts are there.” *Id.* at 2. “This,” the court held, “has the Act backwards.” *Id.* “Simply put, no provision in the Act . . . requires a Tribe or anyone else to excavate an area in order to find remains or other artifacts.”

The same result obtained in *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010), which the court expressly tied to the “holding or collection” language in Section 3003. In *Geronimo*, the plaintiffs, claiming to be the descendants of the legendary Apache warrior, sought repatriation of Geronimo’s remains from the Yale University organization known as the Order of Skull and Bones. Because no final agency action by any of the federal defendants was alleged, jurisdiction under the Administrative Procedure Act was lacking and the case was dismissed on grounds of sovereign immunity. 725 F. Supp. 2d at 186. Plaintiffs also apparently alleged that the Skull and Bones Society had reburied Geronimo’s remains, because the court went on to

hold that in seeking excavation of those remains the complaint failed to state a cause of action.

Id. at 186-87.

To the extent the plaintiffs seek to require the federal defendants to excavate Geronimo's possible burial sites (see Compl. ¶ 1), they cite to no provision of NAGPRA that requires a federal agency to engage in an intentional excavation of possible burial sites. The plaintiffs refer to 25 U.S.C. § 3003, which required federal agencies and museums to create inventories of "holdings or collections of Native American human remains and associated funerary objects." However, the plaintiffs do not point to any authority interpreting this or any other section of NAGPRA as requiring an intentional excavation.

Id. at 187 n.4 (citing and comparing *Hawk*, 2006 WL 6928114, at *2). As in *Hawk v Danforth* and *Geronimo v Obama*, the remains in the ground at the Post Cemetery are not "holdings or collections" subject to NAGPRA. Sections 3003 and 3005 therefore do not apply here and Plaintiff's Complaint fails to state a claim.

c. Plaintiff's contrary arguments fail

The Complaint argues that it does not matter whether the Post Cemetery is a holding or collection. This, too, is incorrect.

The Complaint notes that the repatriation section, Section 3005, does not use the term "holding or collection." ECF No. 1 ¶ 184. While true, the point is irrelevant, because the statutory structure incorporates the "holding or collection" requirement into Section 3005. In regard to a "Federal agency or museum," and where the cultural affiliation of the remains has been established, the repatriation requirements of Section 3005 apply to remains that have been inventoried under Section 3003. 25 U.S.C. § 3005(a) ("If, pursuant to section 3003 . . . the cultural affiliation of Native American human remains . . . with a particular Indian . . . is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe . . . and pursuant to subsections (b) and (e) of this section,

shall expeditiously return such remains . . .”). And the inventory obligations of Section 3003 only apply to “[e]ach Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects.” 25 U.S.C. § 3003(a). Hence if Section 3003 does not apply, Section 3005(a) does not apply. And Section 3003(a) only applies to “holdings or collections.”

Even more broadly, the Interior Department’s regulations make it clear that *none* of the repatriation requirements of NAGPRA apply in the absence of a “holding or collection.” The introductory provisions of the regulations state that “[t]hese regulations require certain actions by . . . (ii) Any Federal agency *that has possession or control of a holding or collection* or that has responsibilities on Federal or Tribal lands.” 43 C.F.R. § 10.1(b)(1)(ii) (emphasis added).⁹ Plaintiff’s suggestion that the Act’s repatriation requirements apply in the absence of a holding or collection is thus refuted by the language of the statute itself and also by the implementing regulations.

The Complaint seeks to avoid Interior’s interpretive regulation by focusing attention on the now superseded version of 43 C.F.R. § 10.1(b)(1)(i), which did not refer to a “holding or collection.”¹⁰ The Complaint argues that the earlier version (the one in effect when Plaintiff originally requested repatriation and the Army agreed to cooperate, but denied the applicability of NAGPRA Section 3005) controls. ECF No. 1 ¶ 194. The Complaint is wrong, first, because “where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily

⁹ The reference to “Federal or Tribal lands” relates to the provisions of Section 3004 dealing with excavations or inadvertent discoveries, which, the parties agree, are not relevant here.

does not have an impermissible retroactive effect[.]” *Hicks v. Fed. Bureau of Prisons*, 603 F. Supp. 2d 835, 841-42 (D.S.C.), *aff’d*, 358 F. App’x 393 (4th Cir. 2009); *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008). Second, because the Complaint seeks only prospective relief (a declaratory judgment and an injunction) regulations that are no longer in effect are irrelevant. And we cannot imagine how Plaintiff could argue that an agency’s regulatory *adoption of a statutory term* – here, “holding or collection” – could somehow be inconsistent with the statute.

And even if, contrary to the statute and regulations, Plaintiff were correct that NAGPRA could apply to the Army in the absence of a “holding or collection,” the Complaint would still be subject to dismissal. As held in both *Geronimo* and *Hawk*, the statute does not require exhumation of existing graves. To the same effect is the decision in *Thorpe v Borough of Thorpe*, to which we now turn.

2. **The Third Circuit’s decision in *Thorpe v Borough of Thorpe* confirms that NAGPRA Sections 3003 and 3005 do not create obligations to disinter buried remains**

To apply NAGPRA Sections 3003 and 3005 to the Post Cemetery would produce results wholly at odds with the purpose and history of the statute. The Third Circuit’s decision in *Thorpe v Borough of Thorpe* makes the point forcefully.

At the direction of his widow, the famous athlete Jim Thorpe was buried in the Pennsylvania town that bears his name. 770 F.3d at 257. Fifty years later, several of Thorpe’s descendants sued the Borough, under NAGPRA, to have the remains disinterred for reburial near Thorpe’s birthplace in Oklahoma. *Id.* The issue was whether the Borough was a “museum,”

¹⁰ ECF No. 1 ¶ 189 (“Defendants’ reliance on holdings or collections is irrelevant, as the

under Section 3003(a), subject to NAGPRA's inventory and repatriation requirements. *Id.* at 263.

The court held that it was not.

The decision is striking because the parties agreed that the Borough had possession and control over the remains, *Thorpe*, 770 F.3d at 262, and because, as the court acknowledged, the statute's definition of "museum," read literally, plainly included the Borough. The relevance of the decision lies in the court's holding that reading NAGPRA to require the disinterment of buried remains was so totally at odds with the statute's purposes as to make adopting the literal meaning of the Act's definition intolerable. Plaintiff does not allege that the Post Cemetery is a museum,¹¹ so the actual holding does not apply here. But the court's rationale applies fully.

The *Thorpe* court noted, first, that the statutory definition of "museum" – "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items" – is "very broad[]." *Thorpe*, 770 F.3d at 262 (quoting 25 U.S.C. § 3001(8)). Because the defendant Borough was a local government body that had in fact received federal funds, and accepting the parties' agreement that the Borough had possession or control over the disputed remains, a literal reading would make the statute applicable. But, the court noted, Supreme Court precedent allows a different result in those rare situations where "the literal application of a statute will produce a result demonstrably at odds

applicable factor is possession or control. *See* 43 C.F.R § 10.1(b)(1)(i) (2023).")

¹¹ Creating potential confusion, the Complaint does describe the participation of the Army Medical Museum in the gathering of Native American remains "from 1865 through the 1880s." ECF No. 1 ¶ 87 (quoting *Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report, S. Hrg. 101-952: Hearings on S. 1021 and S. 1980 Before the S. Select Comm. on Indian Affs. (May 14, 1990 Report)*, 101st Cong. 319 (1990)) (statement of Select Committee Vice Chairman Sen. John McCain) at 29). But there can be no real confusion; the Post Cemetery is not a museum (either in common parlance, or under the statutory definition), and the Complaint does not allege that it is.

with the intentions of its drafters.” *Id.* at 263 (quoting *First Merchs. Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 402 (3d Cir.1999) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))). The court cautioned that “only absurd results and ‘the most extraordinary showing of contrary intentions’ justify a limitation on the ‘plain meaning’ of the statutory language.” *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984)). But even so, and “[a]s the Supreme Court has explained, ‘[s]tatutory interpretations “which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”’” *Id.* (second alteration in original) (quoting *First Merchs.*, 198 F.3d at 402). *See also United States v. Rippetoe*, 178 F.2d 735, 737 (4th Cir. 1949) (interpretations that would lead to absurd consequences “should be avoided whenever a reasonable application can be given consistent with the legislative purpose.”)

The court then “conclude[d] that we are confronted with the unusual situation in which literal application of NAGPRA ‘will produce a result demonstrably at odds with the intentions of its drafters’” and that the court was therefore bound to “look beyond the text of NAGPRA to identify the intentions of the drafters of the statute,” because “that intent ‘must . . . control[] [our analysis.]’” *Thorpe*, 770 F.3d at 264 (alterations and ellipsis in original) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

In seeking to “identify the intentions of the drafters of the statute,” the court began by identifying NAGPRA’s basic aims. Those aims, the court summarized, were twofold, “depending on whether the item in question is held by a federal agency or museum or is discovered on federal lands after November 16, 1990, NAGPRA’s effective date.” *Id.* at 262 (citing *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 938 (10th Cir.1996)). “First, the Act

addresses items excavated on federal lands after November 16, 1990 and enables Native American groups affiliated with those items to claim ownership.” *Id.* (citations omitted). As we have noted, the parties agree that this aspect of NAGPRA is not implicated here. “Second,” the *Thorpe* court continued, “NAGPRA provides for repatriation of cultural items currently held by federal agencies, including federally-funded museums.” *Id.* (citations omitted).

The problem, the court observed, was that a literal reading of the term “museum” would require the disinterment of Native American remains under circumstances completely unrelated to those contemplated by the statute’s drafters. As the court explained, “NAGPRA requires ‘repatriation’ of human remains from ‘museums,’ where those remains have been collected and studied for archeological or historical purposes.” *Id.* at 264 (citing 25 U.S.C. § 3005). But, the court concluded, “the definition of ‘museum’ in the text of NAGPRA sweeps much wider than that.”

If interpreted literally, it would include any state or local governmental entity that “has possession of, or control over, Native American cultural items[]” regardless of the circumstances surrounding the possession. This could include any items given freely by a member of the tribe. Here, it would include human remains buried in accordance with the wishes of the decedent’s next-of-kin. Literal application would even reach situations where the remains of a Native American were disposed of in a manner consistent with the deceased’s wishes as appropriately memorialized in a testamentary instrument or communicated to his or her family.

770 F.3d at 264 (second alteration in original). The court emphasized that judicial interpretations “adopting a restricted rather than a literal or usual meaning of [a statute’s] words,” where acceptance of the literal or usual meaning “would thwart the obvious purpose of the statute,” must have restricted scope. *Id.* at 264. The court in *Thorpe* concluded that the word “museum” as used in NAGPRA plainly fits the rule. *Id.* at 264 (alteration in original) (citation omitted).

Here, it is clear that the congressional intent to regulate institutions such as museums

and to remedy the historical atrocities inflicted on Native Americans, including plundering of their graves, is not advanced by interpreting “museum” to include a gravesite that Thorpe’s widow intended as Thorpe’s final resting place. . . . As stated in the House Report, “[t]he purpose of [NAGPRA] is to protect Native American burial sites and the removal of human remains.”

Id. at 264-65 (alterations in original).

In language directly applicable to the instant case, the Third Circuit in *Thorpe* went on to note that the statute should be read to avoid an intolerable result – namely, cemeteries all across the country, if under the management of State agencies or local governments, would be subject to NAGPRA’s inventory and repatriation requirements.

[Thorpe’s] burial in the Borough is no different than any other burial, except that he is a legendary figure of Native American descent. If we were to find that NAGPRA applies to Thorpe’s burial, we would also have to conclude that it applies to any grave located in “any institution or State or local government agency . . . that receives federal funds and has possession of, or control over, Native American cultural items.” This could call into question any “institution” or “State or local government agency” that controls a cemetery or grave site where Native Americans are buried, and would give rights to any lineal descendant or tribe that has a claim to a person buried in such a cemetery.

Id. at 265 (ellipse in original). Because this result “would thwart the obvious purpose of the statute,” the court concluded that the term “museum” must be construed more narrowly than its statutory definition would literally require.¹²

To read NAGPRA as requiring the unearthing of gravesites, as the court succinctly put it in *Hawk v. Danforth*, “has the Act backwards.” 2006 WL 6928114, at *2. Congress confirmed this in the statute’s statement of purpose: NAGPRA is “[a]n Act to provide for the *protection* of Native American graves” – not an Act for the *unearthing* of Native American graves. Native American Graves Protection and Repatriation Act, Pub. L. No. 101–601, 104 Stat 3048 (1990)

(codified at 25 U.S.C. § 3000 *et seq.*) (emphasis added). This statement of purpose is “a permissible indicator of [the statute’s] meaning.” *Bittner v. United States*, 598 U.S. 85, 98 n.6 (2023) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012)). Indeed, it is “a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.” *Id.*, (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 459, at 443 (1833)).

Here, the Complaint’s expansive reading of “holding or collection” would result in exactly the “absurd results” the *Thorpe* court found it necessary to avoid in order to comport with Congressional intent.

The Boarding School Report has identified burial sites “at approximately 53 different schools across the Federal Indian boarding school system,” and states that “the Department expects the number of identified burial sites to increase.” Boarding School Report at 8, 86. A reading of “holding or collection” as encompassing cemeteries would mean that many (perhaps all) of these cemeteries would be subject to NAGPRA’s inventory and repatriation requirements, including potential excavation of remains which, as the *Thorpe* court emphasized, would be contrary to NAGPRA’s goals.

And it would not end at Indian schools. The federal government maintains almost 200 national cemeteries. These include 155 cemeteries managed by the Department of Veteran

¹² It may fairly be questioned whether an entity managing a cemetery actually has possession or control of remains buried there, but as noted the Borough chose to concede this point in *Thorpe*.

Affairs¹³, 30 by the Department of the Army¹⁴, and fourteen by the National Park Service.¹⁵ The Complaint’s reading of “holding and collection” would expand NAGPRA to require that some 200 federally controlled cemeteries be inventoried to determine any Indian affiliation of the buried and, potentially, that thousands of graves be exhumed and their contents relocated. This would be an enormous undertaking. Further, under Plaintiff’s reading, such exhumation and relocation – as the *Thorpe* court emphasized – could be required even where the original burials were performed at the request of the decedents or their kin. 770 F.3d at 264. NAGPRA does not contain any indication that this was Congress’s intent.

We do not mean to suggest that an inventory of federally controlled gravesites, and potential return of Native American remains interred there, would necessarily be beyond the interests of the federal government. Indeed, at the Post Cemetery, that is exactly what the Army is doing, on its own initiative and at its own expense. *See* Carlisle Research Report; *see also*, *e.g.*, Office of Army Cemeteries Public Affairs, *supra* Footnote 4. Our point, instead, is simply that a nationwide inventory and repatriation effort involving federally controlled cemeteries would be a substantial and costly undertaking without any indication in the text, legislative history, or implementing regulations that this is what Congress intended. It is not for the courts to expand the statute’s reach. *Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017) (“[W]hen a statute is silent with respect to a particular subject, we will not construe the statute to nonetheless reach

¹³ *See National Cemetery Administration*, U.S. Dep’t of Veteran Affairs, <https://www.cem.va.gov/find-cemetery/all-national.asp> (last visited May 1, 2024).

¹⁴ *See Visit Army Cemeteries*, Office of Army Cemeteries, <https://armycemeteries.army.mil/Cemeteries> (last visited May 2, 2024)..

¹⁵ *See National Parks & National Cemeteries*, National Park Service, <https://www.nps.gov/ande/planyourvisit/np-natcems.htm> (last visited May 2, 2024).

the matter.”) *See also Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (to find a “fundamental” component in a regulatory scheme, the “textual commitment must be a clear one.”)

C. **NAGPRA’s Legislative History Confirms That the Statute’s Repatriation Requirements do not Apply to Cemeteries**

Even if the plain statutory meaning (and judicial interpretations thereof) were not enough, NAGPRA’s legislative history also supports a conclusion that Congress did not intend “holdings and collections” to include cemeteries. As regards Sections 3003 and 3005, the legislative history is overwhelmingly concerned with remains held by museums. The references to museums are too numerous to recite; a simple frequency analysis makes the point.¹⁶

In the main House Report (H.R. Rep. No. 101-877 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4367) there are **154** references to “museum” and “museums,” and **zero** references to “cemetery/ies” or “graveyard/s.”¹⁷ In the main Senate Report (S. Rep. No. 101-473 (1990)), there are **108** references to “museum/s” and, again, **zero** references to “cemetery/ies” or “graveyard/s.”¹⁸ In the May 17, 1989, Senate Hearing Report (135 Cong. Rec. S5517-5519 (daily ed. May 17, 1989) (statement of Sen. John McCain)), there are **40** references to

¹⁶ The scholarly field of “corpus linguistics” applies quantitative analysis to the interpretation of legal texts, often employing usage frequencies. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1417, 1441 (2017). The word frequency numbers offered here present a simple indicator of the problem(s) Congress had in mind (or did *not* have in mind) when formulating NAGPRA.

¹⁷ These numbers were derived by applying the locate function in Microsoft Word to the legislative materials found at the following locations in Westlaw: 1990 WL 200613.

¹⁸ Applied to: 1990 WL 201723,

“museum/s” and, again, **zero** references to “cemetery/ies” or “graveyard/s.”¹⁹ In the May 14, 1990, hearing report on the Senate Select Committee on Indian Affairs (*Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report, S. Hrg. 101-952: Hearings on S. 1021 and S. 1980 Before the S. Select Comm. on Indian Affs.* (May 14, 1990 Report), 101st Cong., (1990)) there are **971** references to “museum/s” and **152** references to “cemetery/ies” or “graveyard/s.”²⁰ In the July 17, 1990, Hearing Report of the House Committee on Interior and Insular Affairs (*Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects, Serial No. 101-62: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the Comm. on Interior and Insular Affs.* (July 17, 1990 Report), 101st Cong. (1990)) there are **736** references to “museum/s,” and **20** references to “cemetery/ies” or “graveyard/s.”²¹

As noted, the two cited Committee Reports (which include extensive exhibits) do refer to cemeteries and graveyards, but those references confirm that Congress was not considering the repatriation of remains buried there. The Senate Report, for example, refers to remains at the Smithsonian that were removed from a cemetery on Kodiak Island in the 1930’s. May 14, 1990 Report, 101st Cong. at 55. Similarly, Chairman Inouye noted that “there are more skeletal

¹⁹ Applied to: 1989 WL 176078

²⁰ Applied to:

[https://1.next.westlaw.com/Link/Document/Blob/I8ae0c16084d811dc817d010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=97f0f2b3-de62-4c45-91ec-04a2e72da09b&ppcid=aaba3d7d72014f408020bc2534e7abb0&contextData=\(sc.Keycite\)](https://1.next.westlaw.com/Link/Document/Blob/I8ae0c16084d811dc817d010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=97f0f2b3-de62-4c45-91ec-04a2e72da09b&ppcid=aaba3d7d72014f408020bc2534e7abb0&contextData=(sc.Keycite))

²¹ Applied to:

[https://1.next.westlaw.com/Link/Document/Blob/I8ab348c084d811dc817d010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=97f0f2b3-de62-4c45-91ec-04a2e72da09b&ppcid=aaba3d7d72014f408020bc2534e7abb0&contextData=\(sc.Keycite\)](https://1.next.westlaw.com/Link/Document/Blob/I8ab348c084d811dc817d010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=97f0f2b3-de62-4c45-91ec-04a2e72da09b&ppcid=aaba3d7d72014f408020bc2534e7abb0&contextData=(sc.Keycite))

remains in these museums than you find in the largest cemetery in the United States.” *Id.* at 60.

The cited House Committee Report refers repeatedly to the *protection* of cemeteries, not to their exhumation. *See, e.g.*, July 17, 1990 Report, 101st Cong. at 4, 73, 136, 139, 291.

The Complaint’s premise – that NAGPRA requires exhumation of remains from cemeteries – would, it seems, come as a surprise to those who, over several years, labored over the Act’s provisions.

The above-referenced legislative history reports on NAGPRA do contain numerous references to federal agencies, albeit far fewer than the references to museums. But the references to agencies do not suggest that in crafting Sections 3003 and 3005 Congress had affirmative disinterment from federal cemeteries in mind. To the contrary, in those few instances where discussion focused on federal agencies, the subject was agencies with major landholdings on which Indian remains had been discovered and collected. Thus, again, the focus is on already extant “holdings” and “collections.” To illustrate, the House Committee Report includes the testimony of Henry J. Sockbeson, Senior Staff Attorney of the Native American Rights Fund (NARF). Mr. Sockbeson testified:

No hard data is available, but NARF has requested most federal agencies and departments which administer federal lands to reveal the number of dead Native American bodies that they possess. To date we have received the following responses:

National Park Service 3,500 bodies
Tennessee Valley Authority 10,000 bodies
Bureau of Land Management 109 bodies
Fish & Wildlife Service 637 bodies
Air Force 140+bodies
Navy 85 bodies

July 17, 1990 Report, 101st Cong. at 58. Similarly, testimony by NARF staff attorney Walter Echo-Hawk before the Senate Select Committee on Indian Affairs reported:

To obtain census data on Native dead held by federal agencies, NARF is conducting a survey of 17 agencies identified by the National Park Service as having major archaeological programs. To date, only the National Park Service and the Tennessee Valley Authority have supplied figures: From National Park Service lands, about 3,500 Natives have been dug up and are now being warehoused; and the TVA has dug up about 10,000 Native dead from its lands.

May 14, 1990 Report, 101st Cong. at 185. In addition to confirming the fact that Congress's references to federal agencies contemplated agencies' archaeological collections, Mr. Echo-Hawk's testimony confirms that Mr. Sockbeson's references to "bodies" also refers to archaeological remains. And references to the Army typically involve the Army Medical Museum, not graveyards.

[I]t must be noted that the taking of Indian body parts was official federal government policy under the 1868 Surgeon General's Order to army personnel to procure as many Indian crania as possible for the Army Medical Museum. Under that Order, over 4,000 heads were taken from [battlefields], POW camps and [hospitals], and fresh Indian graves or burial scaffolds across the country, including some from slain warriors of my own Pawnee Tribe.

See id. at 186.

This focus on holdings or collections is reflected in the Ninth Circuit's reference to the requirements in NAGPRA Sections 3003 and 3005 as involving "cultural items already held by certain federally funded museums and educational institutions." *White v. Univ. of California*, 765 F.3d 1010, 1016 (9th Cir. 2014). As we noted above, quoting the remarks of the Act's principal sponsors, these sections of NAGPRA represent a reconciliation of the interests of museums with those of Tribes. The court in *White* likewise describes them as a "response to widespread debate surrounding the rights of tribes to protect the remains and funerary objects of their ancestors and

the rights of museums, educational institutions, and scientists to preserve and enhance the scientific value of their collections.” *Id.* (citing *Bonnichsen v. United States*, 367 F.3d 864, 874 n. 14 (9th Cir. 2004)); *see also id.* (describing “a process in which meaningful discussions between Indian tribes and museums regarding their respective interests in the disposition of human remains and objects in the museum[s’] collections could be discussed[,] and the resolution of competing interests could be facilitated”) (first alteration in original) (quoting S. Rep. No. 101–473, at 4 (1990)).

In sum, the legislative history of NAGPRA confirms that Sections 3003 and 3005, relating to inventorying and repatriating Indian remains, pertain to archaeological collections, not gravesites. And that is no less true when applied to federal agencies than when applied to museums.

D. NAGPRA’s Implementing Regulations Further Confirm That the Statute’s Repatriation Requirements do not Apply to Indian Boarding School Burial Sites

The regulations promulgated by the Interior Department also agree with our reading of NAGPRA. As previously noted, Congress delegated to the Secretary of the Interior the authority to issue regulations implementing NAGPRA. 25 U.S.C. § 3011. Section 10.4 of the current regulations details several requirements applicable to the disinterment or discovery of Native American remains occurring after NAGPRA’s passage. 43 C.F.R. § 10.4. Comments received on the proposed rule “requested a separate and simplified procedure for boarding school cemeteries on Federal lands.” 88 Fed. Reg. 86452-01 at 86487. The agency responded: “We cannot make the requested change for boarding school cemeteries. As stated in the proposed regulations, the Act does not require a Federal agency to engage in an excavation of possible burial sites

(*Geronimo v. Obama*, 725 F. Supp. 2d 182, 187, n. 4 (D.D.C. 2010)).” *Id.*

Similarly, Interior reported that some commenters raised the issue of “disposition of Native American children buried at Indian boarding schools.” Native American Graves Protection and Repatriation Act Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 87 Fed. Reg. 63202-01, 63205 (Oct. 18, 2022) (codified at 43 C.F.R. pt. 10). More specifically, the idea was that NAGPRA Section 3002, which deals with Native American remains disinterred after NAGPRA’s passage (either intentionally or inadvertently) provides “a possible method for repatriation of some Native American children” who were buried at Indian Boarding Schools. *Id.* The Interior Department agreed that, under Section 3002, “the intentional excavation provisions of NAGPRA apply to the human remains and cultural items disinterred from cemeteries on Federal or Tribal lands.” *Id.* But NAGPRA does not, Interior emphasized, *require* excavation. *Id.* (“NAGPRA does not require a Federal agency to engage in an intentional excavation of possible burial sites” (citing *Geronimo*, 725 F. Supp. 2d at 187 n.4)). But where excavation is undertaken, the federal agency “must comply with the Act, including the requirements for consultation with (or consent from) the appropriate Indian Tribe . . . (25 U.S.C. 3002(c)) and the order of priority for disposition of human remains (25 U.S.C. 3002(a)).” *Id.* This view, Interior emphasized, does “not conflict with the opinion of the United States Court of Appeals for the Third Circuit in *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), where the Court ruled that the repatriation provisions of NAGPRA (25 U.S.C. 3005) did not apply to a proposed disinterment and repatriation of human remains.” *Id.*

The Interior Department’s most recent rulemaking process is significant in at least two

ways.

First, the discussion bears directly on Plaintiff's assertion that NAGPRA 3005 requires disinterment and proscribes procedures for disinterment. If Section 3005 applied to federally controlled cemeteries, Section 3002 would be irrelevant with respect to those cemeteries because disinterment and repatriation would already be required. In that case, Interior would have had no reason to explain that Section 3002 would apply where a federal agency such as the Army chooses to disinter Native American remains buried in a cemetery on Federal land. But Interior clearly saw the need for the latter. And—absent an indication of Congressional intent for the outcome—to read Section 3005 to make Section 3002 irrelevant when it comes to federally controlled cemeteries violates the fundamental canon prescribing interpretations that render parts of a statute unnecessary. *Navy Fed. Credit Union v. LTD Fin. Servs., LP*, 972 F.3d 344, 361 (4th Cir. 2020) (“The canon against surplusage is strongest when an interpretation would render superfluous another part of the *same statut[e]*” (alteration in original) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013))).

Second, the discussion demonstrates Interior's understanding that, as the courts held in *Geronimo* and *Thorpe*, NAGPRA does not require disinterment of Native American remains. To the extent this Court finds that NAGPRA is ambiguous (or silent) on this point, Interior's interpretation is entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-845 (1984); *People for the Ethical Treatment of Animals v. U. S. Dep't of Agric.*, 861 F.3d 502, 506 (4th Cir. 2017) (under *Chevron* “we give plain and unambiguous statutes their full effect; but, where a statute is either silent or ambiguous, we afford deference ‘to the reasonable judgments of agencies with regard to the meaning of ambiguous terms [or silence] in

statutes that they are charged with administering” (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996)).

CONCLUSION

The Army is trying to do the right thing in honoring the remains of Samuel Gilbert and Edward Hensley. The Army is trying to do the right thing for all of those interred at the Post Cemetery in Carlisle. This lawsuit will not advance either goal. As a legal matter, this lawsuit *cannot* advance those goals, because the law invoked does not apply. In the Native American Graves Protection and Repatriation Act, Congress, working closely with representatives of Tribes, museums, and other interested parties, created rules and procedures designed to remedy many of the egregious wrongs done to the remains of Native American men, women, and children. But one thing the Act does *not* do is require cemetery managers to unearth the dead. That conclusion is compelled by the plain language of the Act as well as by the Act’s legislative history and by its implementing regulations. That conclusion has also been reached by every court that has addressed the issue.

Accordingly, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

Dated: May 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I will today file the foregoing using the court's electronic filing system, which will cause service upon all counsel of record.

/s/ Peter Kryn Dykema
Peter Kryn Dykema

Case 1:24-cv-00078-CMH-IDD Document 31-1 Filed 05/03/24 Page 1 of 2 PageID# 260



DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
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29 February 2024

**Exhibit A to
Defendants' May 3, 2024, Motion to Dismiss
Winnebago Tribe of Nebraska v. United States Army et al.
24-cv-78-CMH-IDD**

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Dear Attorneys Representing the Winnebago Tribe of Nebraska:

The Department of the Army is aware of the complaint your client filed on January 17, 2024, seeking return of the remains of Edward Hensley and Samuel Gilbert from the Carlisle Barracks Post Cemetery. As you are aware, the United States Army, through the Office of Army Cemeteries, has been working with representatives of the Winnebago Tribe of Nebraska to secure the return of the remains of Edward and Samuel to their relatives at the Army's expense. For several reasons, described below, we understand that Edward's and Samuel's living relatives (or at least some of them)

-2-

are known, which makes us optimistic that repatriation of their remains for burial according to Winnebago tradition will not pose any difficulties.

On October 7, 2022, Ms. Meredith Trautt, the Tribal Liaison for the Department of the Army, spoke with Ms. Sunshine Thomas-Bear, Tribal Historic Preservation Officer for the Winnebago Tribe of Nebraska. At that time Ms. Trautt walked Ms. Thomas-Bear through the Army's process for returning Edward's and Samuel's remains to their closest living relatives, which begins with a written request from the relatives. Ms. Thomas-Bear informed Ms. Trautt that the Tribe was in contact with the relatives, so that having them make the request for the return of the remains would not be an issue.

Additionally, Mr. Justin Buller, Associate Deputy General Counsel, U.S. Army, attended a meeting in September 2021 with the Winnebago Tribe where he was introduced to several Tribe members who said they were relatives of Edward and Samuel. Although Mr. Buller did not retain the names of the individuals, the discussion suggests that the identities of some of the boys' living relatives are known. We also recently became aware of an article published by the Winnebago Indian News about a meeting that took place on May 9, 2023, at the Little Priest Tribal College Auditorium with community members, counsel for the Native American Rights Fund and Big Fire Law, where two self-identified relatives of Edward, Thelma Whitewater and Charles Hindsley, were in attendance. I have attached that article to this letter for your reference.

The complaint filed in this case claims that the Tribe is unaware of the relatives of Edward and Samuel and that it "would be challenging if not impossible" to determine the closest living relative. While the Tribe may not be able to determine the closest living relative, it seems that the Tribe is aware of at least some of the relatives of Edward and will hopefully have the same information for Samuel. As the Army has communicated to the Winnebago, if the living relatives of Edward and Samuel determine who will represent them as the closest known living relative and make a request for the return of their family members' remains, the Army will carry out that request at Army expense. The Army therefore plans to reach out to the self-identified relatives as a demonstration of its commitment to carry out the families' wishes.

In order to return the remains with the least amount of delay, I am requesting that the Tribe provide the names and contact information of the relatives of Samuel and any other living relatives of Edward beyond Ms. Whitewater and Mr. Hindsley. It is our hope and expectation that in this manner these relatives' and the Tribe's wishes can be fulfilled expeditiously. Please provide any response to this letter to Andrew Corimski at (703) 981-3319 or andrew.j.corimski.civ@army.mil.

Sincerely,



Andrew J. Corimski
Litigation Attorney, U.S. Army
Environmental Law Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

WINNEBAGO TRIBE OF NEBRASKA, a
federally recognized Indian Tribe,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
ARMY; UNITED STATES DEPARTMENT
OF THE ARMY, OFFICE OF ARMY
CEMETERIES; CHRISTINE E.
WORMUTH, in her official capacity;
KAREN DURHAM-AGUILERA, in her
official capacity; RENE C. YATES, in her
official capacity; and Lieutenant Colonel
PRISCELLA A. NOHLE, in her official
capacity,

Defendants.

Case No. 1:24-cv-00078-CMH-IDD

**PLAINTIFF WINNEBAGO TRIBE OF NEBRASKA'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

In 1895, Captain W. H. Beck, United States Army (“Army”), Indian Agent of the Omaha and Winnebago Indian Agency, sent Samuel Gilbert and Edward Hensley from their home on Plaintiff Winnebago Tribe of Nebraska’s (“Winnebago”) reservation to Carlisle Indian Industrial School (“Carlisle Indian School” or “Carlisle”). Pl.’s Compl. ¶ 36, ECF No. 1 (hereinafter “Compl.”). Samuel and Edward would never return to Winnebago, as they died as a result of their time at Carlisle. *Id.* ¶¶ 38, 43. After their deaths, Carlisle and Army officials failed to notify Winnebago and the families of Samuel’s and Edwards deaths, depriving them of any chance to bring the boys’ remains home and give them proper Winnebago burials. *Id.* ¶ 45. Since their deaths, Congress passed the Native American Graves Protection and Repatriation Act (“NAGPRA” or “the Act”). NAGPRA is designed to ensure that misappropriated “Native American human remains”,² like those of Samuel and Edward, are returned to their culturally affiliated Indian Tribes for proper burials. Today, Winnebago seeks to enforce its rights under NAGPRA to bring Samuel and Edward home and finally lay them to rest in their intended final resting place.

Samuel’s and Edward’s disposition in Carlisle Cemetery originates with the federal Indian boarding school era, during which the United States took Indian children, often by force and without consent, from their families and Tribal communities to assimilate them into Euro-American culture. Winnebago, like many other Indian Tribes, tried to protect its children from this fate. Winnebago hid its children in the woods to protect them from being abducted by Army soldiers. Other Indian Tribes resisted too, but the United States would not be deterred, using coercive and forcible tactics to achieve its ends. The United States was so relentless that by 1926,

² 25 U.S.C. 3001(13).

“more than eighty per cent of school-age Indian children had been removed from their families.” Casey Cep, *Deb Haaland Confronts the History of the Federal Agency She Leads*, NEW YORKER, (Apr. 29, 2024), available at <https://www.newyorker.com/magazine/2024/05/06/deb-haaland-confronts-the-history-of-the-federal-agency-she-leads>. While the number is unknown, many Indian children, like Samuel and Edward, died at federal Indian boarding schools. Indian Tribes are now tasked with the horrific responsibility of locating and bringing the remains of their children home from places they never should have been in the first place.

Defendants have exacerbated these challenges by violating NAGPRA and refusing to honor Winnebago’s request to repatriate Samuel and Edward from Carlisle Cemetery. Defendants’ stance is not only unconscionable, but their arguments for why they are exempt from federal law are irreconcilable with NAGPRA’s plain language. Defendants’ actions defy the purpose of NAGPRA, which recognizes the right of Indian Tribes to bring their relatives home expeditiously and in a culturally appropriate manner, and equips Tribes with meaningful, enforceable legal mechanisms.

Defendants’ Motion to Dismiss should be denied, as Winnebago has pled facts sufficient to be entitled to relief, as supported on two distinct legal grounds. First, under the plain language of NAGPRA’s repatriation provisions, Samuel and Edward must be repatriated because they are “Native American human remains . . . possessed or controlled by” Defendants. 25 U.S.C. § 3005(a). Alternatively, Winnebago has pled facts sufficient to establish that the remains at Carlisle Cemetery are a “holding or collection,” under the ordinary meaning of those terms and are thus subject to NAGPRA’s repatriation provisions. Defendants’ historical and present-day mistreatment and misappropriation of the human remains buried at Carlisle Cemetery

demonstrate Defendants understand the Cemetery to be, and hold it out as, a holding or collection. None of the cases relied on by Defendants support their interpretations and defenses.

NAGPRA was passed because Native American human remains and burials have long been stolen, looted, and abused. NAGPRA recognizes Indian Tribes share the basic universal right as all others to handle and bury the remains of their relatives in accordance with their cultures and traditions. This is all Winnebago seeks to vindicate in repatriating their boys.

FACTUAL BACKGROUND

On October 16, 2023, Winnebago sent a formal letter to Defendants requesting the repatriation of the remains of Samuel and Edward from Carlisle Cemetery pursuant to NAGPRA, specifically to 25 U.S.C. § 3005(a)(4). Compl. ¶ 123. On December 11, 2023, Defendants denied this request and asserted that NAGPRA does not apply to the return of remains from Carlisle Cemetery. *Id.* ¶ 129. On January 17, 2024, Winnebago filed an action for declaratory and injunctive relief seeking the repatriation of its children pursuant to NAGPRA and to prevent other ongoing violations of the Act.

Winnebago's Complaint provides detailed factual allegations regarding how Defendants violated NAGPRA by refusing to repatriate Samuel's and Edward's remains in accordance with the Act. Defendants moved to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. As detailed below, Winnebago alleged facts sufficient to satisfy the lenient pleading standard of Federal Rule of Civil Procedure 8, and Defendants' Motion should be denied.

STANDARD OF REVIEW

Winnebago satisfies the pleading requirements of Rule 8. As such, Winnebago easily overcomes "the low bar required to survive a Motion to Dismiss[.]" *Roe v. Tucker*, No.

3:22cv749 (RCY), 2023 WL 4353699, at *4 (E.D. Va. July 5, 2023). To overcome a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a plaintiff must only state a plausible claim for relief. *Nahigian v. Juno Loudoun, LLC*, 684 F. Supp. 2d 731, 736-37 (E.D. Va. 2010). In determining whether a plaintiff satisfies this standard, courts assume the truth of all well-pleaded factual allegations and views the complaint in a light most favorable to the plaintiff. A complaint is facially plausible when the plaintiff pleads factual content that allows a court to draw a reasonable inference that the defendant is liable for the alleged conduct. *Menders v. Loudoun Cnty. Sch. Bd.*, 580 F. Supp. 3d 316, 323 (E.D. Va. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (cleaned up). Courts construe all reasonable inferences in favor of the plaintiff. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466, 472 (4th Cir. 2023). A claim will survive a motion to dismiss as long as it is supported by factual allegations that would entitle the plaintiff to relief under at least one cognizable legal theory. The rules “do not countenance dismissal of a complaint for an imperfect statement of the legal theory supporting the claim asserted.” *Va. is for Movers, LLC v. Apple Fed. Credit Union*, No. 1:23CV576 (DJN), 2024 WL 1091786, at *13, n.18 (E.D. Va. Mar. 13, 2024) (cleaned up).

For Defendants’ motion to succeed, they must establish that none of Winnebago’s claims are supported by allegations that would entitle Winnebago to relief under *any* cognizable legal theory. As set forth below, Defendants fail to meet their burden.

ARGUMENT

- I. Defendants fail to address Winnebago’s primary argument that Samuel and Edward must be repatriated because their remains are “Native American human remains” “possessed or controlled” by Defendants.**

Defendants do not address Winnebago's primary argument that Defendants are required to repatriate Samuel and Edward pursuant to the plain language of 25 U.S.C. § 3005(a)(4) because they are "Native American human remains"³ "possessed or controlled" by Defendants and are culturally affiliated with Winnebago. Defendants did not dispute these facts in their letter denying Winnebago's NAGPRA repatriation request, nor in their motion to dismiss. *See* Def.s' Mem. In Supp. of Mot. to Dismiss, ECF No. 31, 6, 8, (hereinafter "Def.s' Mot."). Defendants' failure to address the plain language of § 3005(a)(4) is fatal to their motion. Winnebago has pled allegations that, if true, entitle it to repatriation under § 3005(a)(4). Defendants' arguments that the remains at Carlisle Cemetery are not part of a "holding or collection" are not responsive to Winnebago's primary legal argument. As such, the Court may deny Defendants' motion without addressing whether Samuel's and Edward's remains are part of a holding or collection.

A. Defendants misstate Winnebago's repatriation request as being made under 25 U.S.C. § 3005(a)(1), instead of 25 U.S.C. § 3005(a)(4).

NAGPRA provides for the "[r]epatriation of Native American human remains . . . possessed or controlled by Federal agencies and museums[.]" 25 U.S.C. § 3005(a). NAGPRA's repatriation provisions may apply regardless of whether the remains are part of a holding or collection. *See generally id.* § 3005. Generally, § 3005(a) establishes the procedures by which Native American human remains and other "cultural items"⁴ are repatriated to Indian Tribes. Two subsections of § 3005(a)—*i.e.*, § 3005(a)(1) and § 3005(a)(4)—establish the procedures for

³ NAGPRA defines "Native American human remains" as encompassing only remains of Native Americans that *were not freely given*; that is, remains to which a museum or federal agency does not have a "right of possession." 25 U.S.C. § 3001(13); 43 C.F.R. § 10.2(d)(1) (2023); 43 C.F.R. § 10.2. As Winnebago has thoroughly pled, Samuel's and Edward's remains were not freely given, and Defendants cannot prove they have a right of possession to their remains. *See* Compl. ¶¶ 5, 11, 41, 49, 51, 211, 261, 276.

⁴ "Cultural items" includes human remains, associated and unassociated funerary objects, sacred objects, and cultural patrimony. 25 U.S.C. § 3001(3).

repatriation of human remains in specific circumstances. Defendants fail to recognize the critical differences between when § 3005(a)(1) and § 3005(a)(4) apply.

Section 3005(a)(1) concerns repatriation of human remains and cultural items whose cultural affiliation has been determined in an inventory of a holding or collection pursuant to 25 U.S.C. § 3003(a). *Id.* § 3005(a)(1). On the other hand, § 3005(a)(4) concerns repatriation of human remains and cultural items whose cultural affiliation has not been determined in an inventory of a holding or collection or that are excluded from a holding or collection but are nonetheless still possessed or controlled by an agency or museum. *Id.* § 3005(a)(4). Section 3005(a)(4) requires the repatriation of human remains or cultural items upon request of an Indian Tribe who “can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” *Id.* The applicability of § 3005(a)(4) turns only on whether the human remains or cultural items are “possessed or controlled” by a federal agency. Thus, unlike § 3005(a)(1), § 3005(a)(4) is not limited to human remains and cultural items that have been inventoried as part of a holding or collection or included within a holding or collection.

In support of its primary argument on the merits for both of its claims, Winnebago only has to plead factual allegations to establish the following: first, that Samuel’s and Edward’s remains are “Native American human remains”; that is, they are human remains of Native Americans that were not freely given and Defendants do not have a right of possession, 43 C.F.R. § 10.2(d)(1) (2023); 25 U.S.C. § 3001(13); second, that their remains are in the Defendants’ possession or control, 25 U.S.C. § 3005(a); third, that Winnebago requested their repatriation and demonstrated cultural affiliation by a preponderance of the evidence, *id.* §

3005(a)(4); and fourth, that Defendants denied Winnebago's repatriation request. *Id.* § 3013; 43 C.F.R. § 10.1(b)(3) (2023). Winnebago's Complaint sufficiently pleads allegations—which are undisputed—that establish these elements.

Instead of addressing Winnebago's argument head on, Defendants falsely attribute the language of § 3005(a)(1) to § 3005(a), making it appear as though all of NAGPRA's repatriation provisions are applicable only to Native American human remains that have been inventoried, pursuant to § 3003, as part of a holding or collection.⁵ In so doing, Defendants also ignore the specific provision under § 3005(a), § 3005(4), pursuant to which Winnebago made its repatriation request. Defendants incorrectly assert that all repatriations under § 3005(a) require remains be within a holding or collection per § 3003. In support of this, Defendants cite to § 3005(a) and quote the statute as set forth below:

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

Def.'s Mot. 13-14 (alterations in original).

This language, however, is not actually found at § 3005(a). Rather, this language is in § 3005(a)(1). Despite Defendants' suggestion, § 3005(a) is a section title that does not mention holdings or collections or inventories, let alone cabins all repatriations to only human remains that are in holdings or collections. Instead, § 3005(a) affirms that NAGPRA's repatriation provisions apply broadly to human remains “possessed or controlled by Federal agencies and museums[.]” By misattributing § 3005(a)(1)'s language to § 3005(a) generally, Defendants

⁵ Nowhere in their motion do Defendants explicitly reference § 3005(a)(1) or § 3005(a)(4). Instead, Defendants only generally cite § 3005(a) and obfuscate the specific statutory provision pursuant to which Winnebago made its repatriation request.

falsely suggest that § 3005(a)(1) is the sole provision that governs the repatriation of human remains. Defendants thus suggest that *all* repatriations are limited to human remains that are part of inventoried holdings or collections, ignoring § 3005(a)(4) entirely.

B. Defendants fail to address the plain language of 25 U.S.C. § 3005(a)(4) and Winnebago's argument that it is entitled to repatriation pursuant to it.

Defendants' argument ignores, or fails to recognize, that § 3005(a) contemplates multiple circumstances under which human remains can be repatriated; these circumstances are delineated in both § 3005(a)(1) and § 3005(a)(4). Section § 3005(a)(4) provides for repatriation where remains are not necessarily part of a holding or collection:

Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory[.]

Id. § 3005(a)(4) (emphasis added). Section 3005(a)(4) contemplates repatriations occurring under two scenarios distinct from repatriations occurring under § 3005(a)(1). First, § 3005(a)(4) contemplates repatriation where a federal agency or museum has not established the cultural affiliation of Native American human remains and funerary objects pursuant to an inventory. *Id.* Nothing in the plain language of this scenario requires the remains or objects be part of a holding or collection. This first scenario simply allows for repatriation in situations where an inventory was not created to establish the cultural affiliation of remains or objects in the possession or control of a federal agency or museum.

The second scenario in § 3005(a)(4) contemplates repatriation where a federal agency or museum did not include Native American human remains in any inventory. *Id.* The plain language of this provision does not require that the remains or objects be part of a holding or collection either. This scenario simply pertains to situations where an inventory was created but

the remains or objects in question were not included in the inventory (*e.g.*, where a federal agency or museum purposefully excluded such remains from an inventory).

Defendants' argument is premised on the assertion that repatriation applies only to human remains that have been inventoried. Def.'s Mot. 8-15. This inventory requirement, Defendants assert, proves that the remains must be part of a holding or collection, since the inventory provision applies only to holdings and collections. *Id.* Yet, as discussed above, both scenarios described in § 3005(a)(4) specifically allow for repatriation of human remains that are not in inventories. This refutes Defendants' assertion that § 3005(a) requires human remains be in a holding or collection to be eligible for repatriation. In fact, § 3005(a)(4) contemplates the exact opposite, that human remains or cultural items must simply be in the possession or control of a federal agency or museum to be subject to repatriation.

Samuel's and Edward's remains are undisputedly Native American human remains, are in Defendants' possession and control, and are culturally affiliated with Winnebago. Winnebago requested repatriation of them pursuant to § 3005(a)(4), which requires Defendants to expeditiously repatriate the remains. Despite Winnebago establishing its right to repatriate Samuel and Edward, Defendants denied Winnebago's request. Winnebago has stated plausible allegations which, if true, entitle it to the declaratory and injunctive relief necessary to enjoin Defendants to repatriate Samuel and Edward to Winnebago, pursuant to NAGPRA. On this basis alone, Defendants' motion fails.

II. Winnebago sufficiently alleged that the remains at Carlisle Cemetery constitute a "holding or collection" subject to NAGPRA.

Even if Defendants are correct that repatriation applies only to Native American human remains that are part of a museum's or federal agency's holding or collection, Samuel and Edward must nevertheless be repatriated, as the remains at Carlisle Cemetery constitute a

holding or collection. Between the ordinary meanings of the terms “holding” and “collection,” application of the Indian canons of construction, Defendants’ own conduct and treatment of the remains, and the legislative history and congressional intent of NAGPRA, it is clear that the remains at Carlisle Cemetery constitute a holding or collection. Consistent with the lenient pleading standard in Rule 8 and the requirement to construe all reasonable inferences in favor of the plaintiff, Winnebago has pled a plausible claim for relief under this alternative theory.

A. The remains at Carlisle Cemetery fit the ordinary meanings of “holding” and “collection,” and such interpretations are supported by the Indian canons.

NAGPRA does not define “holding or collection.” *See* 25 U.S.C. § 3001. Generally, when a statute does not define a term, courts give the term its ordinary meaning. *See United States v. Young*, 989 F.3d 254, 259 (4th Cir. 2021). Here, however, since NAGPRA implicates Tribal rights and interests, the standard principles of statutory interpretation are supplemented by the Indian canons of construction. *See Montana v. Blackfeet Indian Tribe*, 471 U.S. 759, 766 (1985) (acknowledging “that the standard principles of statutory construction do not have their usual force in cases involving Indian law.”). The Court’s interpretation of NAGPRA and the term holding or collection are governed by the Indian canons of construction. *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 76 (1992) (“In interpreting NAGPRA, it is critical to remember that it must be liberally construed as remedial legislation to benefit the class for whom it was enacted.”).

The Indian canons are binding rules for interpreting statutes, like NAGPRA, that implicate Tribal rights and interests. The canons “are rooted in the unique trust relationship between the United States and the Indians.” *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985). Indeed, NAGPRA itself states that it “reflects the unique relationship

between the Federal Government and Indian tribes[.]” 25 U.S.C. § 3010. The Indian canons provide that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Oneida Cnty.* 470 U.S. at 247 (citation omitted); *see Fox v. Portico Realty Servs. Office*, 739 F. Supp. 2d. 912, 922 (E.D. Va. 2010) (“[A]s a general matter, statutes must be construed in favor of Native Americans[.]”). Thus, while Winnebago and Defendants interpret the definitions of the terms holding and collection differently, the Indian canons require the Court to construe the definitions favorable to Indian Tribes.

Defendants construe the dictionary definitions of holding and collection as narrowly as possible to argue that the remains at Carlisle Cemetery do not meet the ordinary meaning given to these terms. *See* Def.’s Mot. 15-16. According to Defendants, “these definitions capture the everyday sense that a ‘collection’ is an *accumulation of things* for science, culture, or curiosity, and a ‘holding’ is an *accumulation of assets*.” *Id.* at 16 (emphasis in original). Defendants submit that these “terms naturally apply to a museum’s or federal agency’s inventory of previously excavated remains[.]” but not “to burials in a cemetery.” *Id.*⁶ Defendants, however, do not provide any analysis or explain how exactly the remains at Carlisle Cemetery do not satisfy these definitions. Instead, Defendants simply proclaim it to be so. This is unsurprising, as even a cursory examination of the ordinary meanings of holding and collection confirms that the remains at Carlisle Cemetery fit neatly.

“Holding” is defined as “property (such as land or securities) owned” and “something that holds[.]” *Holding*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam->

⁶ Defendants are afforded no deference in interpreting NAGPRA. *Accord N.C. Dep’t of Env’t. Quality v. Fed. Energy Regulatory Comm’n*, 3 F.4th 655, 666-67 (4th Cir. 2021) (“Because FERC does not administer the Clean Water Act, *we owe no deference to its interpretation of § 401.*”) (emphasis added, citations omitted); *see* 25. U.S.C. § 3011.

[webster.com/dictionary/holding](https://www.merriam-webster.com/dictionary/holding). Defendants assert that the remains at Carlisle Cemetery cannot be a holding because the remains buried there are not “an accumulation of assets,” Def.’s Mot. 16, (emphasis removed), *i.e.*, “property.” A cemetery is, by its very nature, “something that holds” human remains. Moreover, Defendants’ constrained interpretation belies the facts, namely that Defendants exercise complete control over the remains at Carlisle Cemetery today and historically. This is perhaps most strongly evidenced in their unilateral imposition of the Office of Army Cemeteries (“OAC”) Disinterment and Return Process specific to Carlisle Cemetery, *see* Compl. ¶¶ 131, 134-58, by which they arbitrarily dictate the removal and disposition of remains.

“Collection” is defined as “something collected[.]” such as “an accumulation of objects gathered for study, comparison, or exhibition or as a hobby[.]” and a “group [or] aggregate[.]” such as “a collection of symptoms.” *Collection*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/collections>. Defendants submit that the remains at Carlisle Cemetery do not constitute a collection because they are not “an accumulation of things[.]” Def.’s Mot. 16 (emphasis removed). Defendants’ unduly narrow view is not supported by the dictionary definitions, particularly when construed liberally in favor of Winnebago, and considered in light of the factual circumstances surrounding Defendants’ treatment of the remains and the Indian canons. “Accumulate” is defined as “to gather[.]” *Accumulate*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/accumulate>. An “object” is defined as “something material that may be perceived by the senses[.]” *Object*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/objects>. Human remains are undoubtedly objects, and the remains at Carlisle Cemetery have been, in the most literal sense, gathered or grouped. This is tragically demonstrated when, in 1927,

Defendants dug up the remains, gathered them together, put them into small boxes, and reburied them in what is now Carlisle Cemetery. Compl. ¶¶ 62-63, 202. Defendants now label them as “INDIANS WHO DIED WHILE ATTENDING THE CARLISLE INDIAN SCHOOL.” Compl. ¶ 202. As described more fully *infra* Section II.B, Defendants treat Carlisle Cemetery as a holding or collection.

The remains at Carlisle Cemetery clearly fit the ordinary meaning of both holding and collection, especially when these terms are construed liberally in favor of Winnebago and all ambiguities are resolved in favor of Winnebago.

B. Winnebago’s interpretation of holding or collection is supported by the history of Carlisle and how Defendants have treated and managed the remains historically and in the present day.

How Samuel and Edward came to be buried at Carlisle Cemetery, Defendants’ historical treatment of the remains buried at Carlisle Cemetery, and Defendants’ current management of the Cemetery support Winnebago’s interpretation that the Cemetery is a holding or collection. Unsurprisingly, Defendants do not address the historical circumstances surrounding Samuel’s and Edward’s deaths, their initial burials, and their subsequent disinterment and reburials at Carlisle Cemetery. Nor do Defendants address how they currently manage the Cemetery as a museum exhibit and tourist attraction. Instead, they simply assert that the remains cannot be a holding or collection because they are buried in a cemetery. Defendants claim that cemeteries, including Carlisle Cemetery, are where “we commemorate and honor the dead.” Def.’s Mot. 16. But Defendants have never, and do not now, honor Samuel and Edward at Carlisle Cemetery. Instead, Defendants’ historical and contemporary actions demonstrate that Defendants hold the remains at Carlisle Cemetery out as a holding or collection.

As Winnebago recounted in its complaint, how the collection of Native American human remains ended up at the Carlisle Cemetery begins with the history of the Carlisle Indian School. *See* Compl. ¶¶ 25-78. Carlisle Indian School was a model for 408 other institutions around the country whose goal was “destroying tribal identity and assimilating Indians into broader society.” *Haaland v. Brackeen*, 599 U.S. 255, 298-99 (2023) (Gorsuch, J., concurring) (citations omitted). As Carlisle’s founder, U.S. Army Captain Richard Henry Pratt, described Carlisle’s mission: “All the Indian there is in the race should be dead. Kill the Indian in him, and save the man.” *Id.* at 299 (cleaned up). Naturally, Indian Tribes and families resisted sending their children to these boarding schools. *Id.* Undeterred, Congress authorized the Department of the Interior to starve Tribal communities until they gave up their children. *Id.* When this failed, the government “sometimes resorted to abduction.” *Id.* (citation omitted). The federal government’s literal kidnapping of children into the federal boarding school program is well-documented. *See, e.g.,* Wambdi A. Was’tesWinyan, *Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision*, 47 MICHELL HAMLIN L. REV. 640, 660 (2021).⁷

Children’s tenures at federal Indian boarding schools were brutal. *See Brackeen*, 599 U.S. at 300-01 (Gorsuch, J., concurring) (describing the horrific conditions and rampant sexual, physical, and emotional abuse at Indian boarding schools); *see also* U.S. DEP’T OF INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 8, 56-57, 59-63 (May 2022), available at https://www.bia.gov/sites/default/files/dup/inlinefiles/bsi_investigative_report_may_2022_508.pdf. As a result of the harsh and abusive conditions, many children, like

⁷ *See also* Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian County*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 63 (2016); Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 891 (2017).

Samuel and Edward, died during and because of their tenure at federal Indian boarding schools.

Carlisle Indian School itself led to the deaths of at least 179 children before it was closed.

Compl. ¶ 55. The legacy of the forcible taking of children to Carlisle Indian School is inextricably intertwined with why the remains are now buried at Carlisle Cemetery.

The injustices did not end with the children's deaths. When children died, Carlisle officials did not inform their families or Indian Tribes and originally buried them on the School's grounds, at the "Indian burial ground," without their families' or Indian Tribes' consent. *Id.* ¶¶ 56-57. After Carlisle Indian School closed, the federal government let the Indian burial ground fall into a state of disrepair and many of the grave markers rotted away. *Id.* ¶ 61. In 1926, the Army wanted to expand the Army War College, and saw the Indian burial ground as "an obstacle to the expansion of the post." *Id.* In 1927, the Army, again without informing or seeking consent of families or Indian Tribes, dug up the remains at the Indian burial ground and moved them to their current location, at Carlisle Cemetery. *Id.* ¶ 65. This work was hasty and disorganized. *Id.* ¶¶ 65-71.

As set forth in Winnebago's Complaint, when Samuel and Edward died, the Army never provided notice of their deaths to the boys' families or Winnebago. *Id.* ¶¶ 40-41, 45-46. The Army also never sought the consent of Samuel's and Edward's families or Winnebago to bury them at Carlisle. Nor did the Army seek the families' or Winnebago's consent to disinter and rebury them in 1927. In fact, the Army never provided notice of Samuel's and Edward's deaths, burials, disinterments, or reburials to their families or Winnebago. The boys were not buried according to Winnebago beliefs, customs, and practices,⁸ and their headstones misspell

⁸ See *Native American Grave and Burial Protection Act (Repatriation): Hearing on S. 1021 and S. 1980 before Select Comm. on Indian Affs.*, 101 Cong. at 51 (1990) (statement of Walter Echo-

“Winnebago.” Compl. ¶¶ 11, 72-73. Accordingly, Samuel’s and Edward’s spirits remain lost and unable to rest, as they have been waiting to come for nearly 125 years. *Id.* ¶ 12. While Defendants claim they honor the dead at Carlisle Cemetery just as they would at any cemetery, they conveniently ignore this history.

The injustices have not ended, as Defendants continue to exploit the remains at Carlisle Cemetery for educational, exhibitive, interpretive, preservation, public benefit, and any other purposes they deem fit. *See* 43 C.F.R. § 10.2. Defendants conduct tours of the Carlisle Barracks, which focus on its history as a federal Indian boarding school. Compl. ¶ 201. The Cemetery is one of the stops on these tours. *Id.* ¶ 202. Defendants exhibit the Cemetery to whitewash the history of Carlisle, as explained in detail in Winnebago’s Complaint. *See id.* ¶¶ 200-14. Defendants’ website for the Carlisle Cemetery describes the Cemetery as “[s]mall, *orderly and historical*, the Carlisle Cemetery *offers visitors a glimpse into the unique past of the United States and Native American history.*” *Id.* ¶ 207. Defendants’ website invites visitors to seek further information in a “Digital Resource Center” hosted by Dickinson College. *Id.* ¶ 213. This Digital Resource Center is a repository of documents related to Carlisle and describes Carlisle and the Cemetery “as a source of study for students and scholars around the globe.” *Welcome, DICKINSON COLL.*, <https://carlisleindian.dickinson.edu/> (last visited June 6, 2024). Indeed, an archival research report commissioned by Defendants specifically describes the Cemetery “as a repository for the remains of Indian school students.” Compl. ¶ 204. The nature and extent of Defendants’ exploitation of the remains in this manner is some of the most compelling evidence that they do not regard them as part of an ordinary cemetery.

Hawk) (“[NAGPRA] allows Indians and Native people to bury their dead under specified repatriation guidelines and procedures.”).

While Defendants operate thirty cemeteries across the United States, Carlisle Cemetery has always been managed differently. *Id.* ¶¶ 209-10, 215-22. The Cemetery is held out as an exhibit on tours, used for educational and research purposes, and used to tell Defendants’ whitewashed version of history. Defendants use and display the remains at Carlisle Cemetery as a “holding or collection,” and have done so for many years.

C. The new regulatory definition of holding or collection does not support Defendants’ interpretation.

Defendants attempt to argue that the National Park Service’s (“NPS”) newly codified regulatory definition of “holding or collection” affirms Defendants’ interpretation of those terms. Def.’s Mot. 16. When Defendants denied Winnebago’s repatriation request on December 11, 2023, the NPS’s regulations *did not* define “holding or collection.” *See* 43 C.F.R. § 10.2 (2023). The current regulatory definition was codified in January 2024. *See* 88 Fed. Reg. 86,452 (Dec. 13, 2023) (setting effective date as January 12, 2024). Whether the new regulations apply to this case is immaterial, as the new regulatory definition supports Winnebago’s interpretation.

The NPS now defines holding or collection as “an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including: (1) Academic interest; (2) Accession; (3) Catalog; (4) Comparison; (5) Conservation; (6) Education; (7) Examination; (8) Exhibition; (9) Forensic purposes; (10) Interpretation; (11) Preservation; (12) Public benefit; (13) Research; (14) Scientific interest; or (15) Study.” 43 C.F.R. § 10.2 (“holding or collection”). In defining the term for the first time, the NPS construed holding or collection broadly and intended this list to be non-exhaustive. *See* 87 Fed. Reg. 63,202, 63,212 (Oct. 18, 2023) (“While the proposed definition includes a wide variety of purposes, a holding or collection under this proposed rule would not be limited to only these purposes.”).

As described in the Complaint and *supra* Section II.B, Defendants actively manage Carlisle Cemetery for educational, exhibitive, interpretative, preservation, and public benefit purposes. Defendants use the Carlisle Cemetery as an exhibit on tours, for educational and research purposes, and to tell the Defendants' slanted view of history. Considering this, the new and expansive regulatory definition of "holding or collection" offers Defendants no help. Instead, the new regulatory definition supports Winnebago's interpretation, especially when interpreted consistent with the Indian canons. *See United States v. Smith*, 925 F.3d 410, 419 (9th Cir. 2019) (citation omitted) (noting that the Indian canons apply to statutes and regulations).

D. Determining that the remains at Carlisle Cemetery constitute a holding or collection is consistent with NAGPRA's legislative history and purpose and Congress's intent.

Defendants claim that interpreting holding or collection to encompass the remains at Carlisle Cemetery is contrary to Congress's intent in passing NAGPRA and the statute's purpose. Def.'s Mot. 22-26. Nothing could be further from the truth. "NAGPRA is, first and foremost, human rights legislation" Trope & Echo-Hawk, *supra* at 59. During the Senate Select Committee on Indian Affairs' hearing on NAGPRA, Senator Daniel K. Inouye stated: "In light of the important role that death and burial rights play in Native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century." *Hearing on S. 1021 and S. 1980*, 101 Cong. at 2 (statement of Sen. Inouye). The overriding purpose of NAGPRA is to protect Native American burial sites and return Native American human remains held by museums and federal agencies to their Indian Tribes for proper burials. Requiring Defendants to comply with their repatriation obligations at Carlisle Cemetery only furthers the purpose of NAGPRA and the intent of Congress.

Defendants cannot exempt themselves from NAGPRA's repatriation obligations. When Congress debated NAGPRA, the Army's past conduct was front and center of its concerns. The legislative record is replete with discussions about the Army's abhorrent history of grave robbing, collecting, and desecrating Native American human remains and burial sites. Compl. ¶¶ 84-88. Holding Defendants accountable to repatriate children who were forcibly taken by the Army and who died because of their time at Carlisle Indian School, who were then buried on the school grounds without their families' and Indian Tribes' consent, and then dug up and reburied in their current place without their families' and Indian Tribes' consent is perfectly consistent with the purpose and intent of NAGPRA. *See Hearing on S. 1021 and S. 1980*, 101 Cong. at 51 (statement of Echo-Hawk).

Defendants assert that applying the repatriation provisions to Carlisle Cemetery is inconsistent with the purposes of NAGPRA because NAGPRA is intended to protect graves. To be sure, one of the main purposes of NAGPRA is to protect Native American graves, *see* 25 U.S.C. § 3002; 18 U.S.C. § 1170. But the protection of Native American graves cannot be used as a pretext to deny Indian Tribes their right to repatriate their ancestors. The graves protection provision of NAGPRA was intended to prevent grave robbing, looting, and the trafficking of Native American human remains. *See Hearing on S. 1021 and S. 1980*, 101 Cong. at 52 (statement of Echo-Hawk) ("Today, as we all know, Federal land managers and Indian Tribes are beset with illicit grave robbing and interstate trafficking of booty from Indian graves."); S. Rep. No. 101-473, at 3 (1990) ("Additional testimony was received from witnesses which indicated that tribal and Federal officials have been unable to prevent continued looting of Native American graves and the sale of these objects by unscrupulous collectors."). NAGPRA is equally concerned with repatriating Native American human remains held by federal agencies and

museums to their culturally affiliated Indian Tribes. 25 U.S.C. § 3005. Defendants cannot seriously contend that repatriating the children buried at the Carlisle Cemetery to their Indian Tribes is tantamount to grave robbing, looting, or desecration.

Defendants' restrictive interpretations of NAGPRA would yield absurd results. Under Defendants' contention that remains in the ground are not subject to repatriation, museums and federal agencies could evade their repatriation obligations by simply burying any Native American human remains and other cultural items they did not want to return. NAGPRA was enacted to ensure remains were returned to where they belong so they could be buried according to appropriate Tribal customs and traditions. Any interpretation of NAGPRA that would allow evasion of these repatriation requirements is out of step with NAGPRA and the Indian law canons that must be applied to interpret it.

Repatriation "is core to the notion of [Tribal] sovereignty." *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (citation, quotation marks omitted). Samuel and Edward have been waiting to return home for nearly 125 years. Compl. ¶ 12. Their spirits remain lost and unable to rest. *Id.* Winnebago seeks the return of Samuel's and Edward's remains to give them proper Winnebago burials consistent with the purpose of repatriation under NAGPRA. It is up to Winnebago, and not Defendants, to determine how best to care for and protect Samuel and Edward.

III. None of the cases Defendants rely on support their argument that NAGPRA's repatriation provisions do not apply to remains in the ground.

Defendants rely on three out-of-Circuit cases to support their argument that NAGPRA's repatriation provisions do not apply to Native American human remains in the ground and that remains in the ground cannot be a "holding or collection." Def.'s Mot. 12-21. Besides the fact that these cases are not binding on this Court, Defendants misrepresent their holdings.

Furthermore, the cases are clearly distinguishable. In the end, Defendants fail to identify any case that supports their position that the Native American human remains buried in Carlisle Cemetery do not constitute a “holding or collection” and that those remains are not subject to NAGPRA’s repatriation provisions.

A. *Hawk v. Danforth* and *Geronimo v. Obama* do not support Defendants’ position.

Defendants cite *Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114 (E.D. Wis. Aug. 17, 2006), and *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010), in support of their argument that remains in the ground are not holdings or collections, arguing that these cases hold that NAGPRA’s repatriation provisions do apply to Native American human remains in the ground. Def.’s Mot. 12-13. These cases do not support what Defendants suggest. Moreover, these cases concern the application of § 3002, *not* § 3005, and are therefore easily distinguishable. Neither *Hawk* nor *Geronimo* are relevant here.

In *Hawk*, an unreported case from the United States District Court for the Eastern District of Wisconsin, a *pro se* plaintiff sued the Chairman of the Oneida Tribe of Indians of Wisconsin, seeking to compel the defendant to *find* the remains of the plaintiff’s ancestors allegedly buried underneath a Tribal parking lot. 2006 WL 6928114, at *1-2. Importantly, the plaintiff did not know whether any remains were actually buried underneath the parking lot. *Id.* As a threshold issue, the court questioned whether NAGPRA applied to the Oneida Tribe because it is neither a museum nor a federal agency. *Id.* at *1. Even if the Oneida Tribe was subject to NAGPRA, the court concluded that NAGPRA does not require anyone to “excavate an area *in order to find* remains or other artifacts.” *Id.* at 2 (emphasis added).

Unlike in *Hawk*, it is undisputed that Samuel’s and Edward’s remains are located at Carlisle Cemetery. Winnebago has not asked Defendants to search for Samuel’s and Edward’s

remains; instead, Winnebago simply seeks their repatriation from Carlisle Cemetery. *Hawk*'s commentary on the excavation of an area to look for *potential* burial sites is thus irrelevant. Moreover, *Hawk* does not address the applicability of NAGPRA's repatriation provisions to buried human remains, nor whether such remains are holdings or collections. Instead, *Hawk* concerned only the applicability of NAGPRA's inadvertent discovery and intentional excavation provisions. *Hawk* fails to support Defendants' position that the human remains buried at Carlisle Cemetery are not subject to repatriation under § 3005 and are not part of a holding or collection.

Similarly, in *Geronimo*, plaintiffs claiming to be descendants of legendary Apache warrior Geronimo sought an order pursuant to § 3002 requiring the defendants to return Geronimo's remains. 725 F. Supp. 2d at 183-84. However, in their complaint, the plaintiffs only alleged that Geronimo's remains "*may be or may have been* in the possession, or control of defendants." Compl. ¶ 45, *Geronimo v. Obama*, No. 1:09-cv-00303-RWR (D.D.C. filed Fed. 17, 2009) (emphasis added). The *Geronimo* plaintiffs, like the plaintiff in *Hawk*, did not know where the remains were buried (or if they were buried at all) and sought to use NAGPRA to compel the defendants to find the potential burial sites. *See id.* ¶ 43. The United States District Court for the District of Columbia dismissed the complaint for failure to allege final agency action under the Administrative Procedure Act and failure to identify a waiver of the defendants' sovereign immunity. 725 F. Supp. 2d at 186. Defendants' reliance on *Geronimo* is based on a single footnote where the court mused that NAGPRA does not require federal agencies "to engage in an intentional excavation of *possible* burial sites." *Id.* at 187 n.4 (emphasis added).

Geronimo, like *Hawk*, does not address the issues raised in this case. The *Geronimo* plaintiffs' claim arose under § 3002, *not* § 3005, and they did not allege that Geronimo's remains were buried or even in the defendants' possession or control. As such, the court did not discuss

whether human remains in the ground are subject to NAGPRA's repatriation provisions or constitute holdings or collections. It is undisputed that Samuel and Edward are located at Carlisle Cemetery and under Defendants' possession and control. Winnebago does not seek an order compelling Defendants to find Samuel's and Edward's burial sites.

Defendants misleadingly claim that their interpretation of *Geronimo* aligns with the Department of Interior's ("DOI") interpretation. Def.'s Mot. 27. Defendants state that DOI interprets *Geronimo* as holding that NAGPRA does not "require excavation." *Id.* This is incorrect. Instead, in its 2022 notice of proposed rulemaking for its recent update to NAGPRA's implementing regulations, the NPS noted that *Geronimo* simply states that "NAGPRA does not require a Federal agency to engage in an intentional excavation of *possible burial sites* [.]" 87 Fed. Reg. at 63,205 (emphasis added, citation omitted). This is consistent with *Geronimo*'s passing footnote stating as much. Moreover, the NPS recognized "the NAGPRA process as a possible method for repatriation of some Native American children[.]" from federally-controlled boarding schools. *Id.* Accordingly, as with *Hawk*, *Geronimo* is irrelevant and does not support Defendants' position.

B. Defendants' reliance on *Thorpe v. Borough of Thorpe* is misplaced.

Defendants attempt to rely on *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), to argue that NAGPRA's repatriation provision does not apply to Native American human remains in the ground, specifically in cemeteries. Def.'s Mot. 15-22. Defendants also rely on *Thorpe* to argue that extending NAGPRA to apply to Carlisle Cemetery would lead to absurd results that are inconsistent with the purpose and intent of Congress. *Id.*, at 15-26. Defendants fundamentally mischaracterize the holding in *Thorpe* and fail to grasp the key factual differences that distinguish *Thorpe* and this case.

Thorpe concerned what the United States Court of Appeals for the Third Circuit characterized as an attempt at “resolving a family dispute by applying NAGPRA[.]” *Id.* at 257. When Jim Thorpe—a Native American man and legendary multi-sport Olympic champion—died in 1953, his third wife buried him in Jim Thorpe, Pennsylvania (“the Borough”), over the objection of some of his children. *Id.* at 257-58. Following the enactment of NAGPRA, Thorpe’s son and second wife requested the Borough repatriate Thorpe to them so he could be buried at his home in Oklahoma. The Borough refused and the plaintiffs sued, alleging the Borough violated NAGPRA’s repatriation provision. *Id.* at 258. The case turned on whether NAGPRA should apply to remains that were buried in their intended final resting place by someone with legal authority (*i.e.*, Thorpe’s third wife) to make that decision. *Id.* at 266.

The Third Circuit reasoned that NAGPRA was not applicable because Thorpe’s “remains [were] located at their final resting place and ha[d] not been disturbed.” *Id.* The court concluded that removing Thorpe’s remains from his “intended final resting place” would not have been consistent with Congress’s intent in enacting NAGPRA as there was “nowhere for Thorpe to be ‘returned’ to.” *Id.* The court reached this conclusion, *not* by finding that NAGPRA’s repatriation provision did not apply to Thorpe, but by finding that “the Borough [wa]s not a ‘museum’ as intended by NAGPRA.” *Id.* 263. While the court found the Borough met the plain meaning of “museum” as defined by NAGPRA (25 U.S.C. § 3001(8)), it reasoned that the Borough was not required to repatriate Thorpe because applying NAGPRA’s repatriation provisions in this specific instance would be inconsistent with the Act, as such a result would disregard “the clearly

expressed wishes of Thorpe's wife by ordering his body to be exhumed and his remains delivered to John Thorpe." *Thorpe*, 770 F.3d at 257.⁹

Defendants jump to infer that *Thorpe* holds § 3003 and § 3005 do not apply to human remains buried in cemeteries. But this is a gross mischaracterization of the holding. The Fourth Circuit declined to interpret NAGPRA in a way that would allow disinterment of Thorpe's remains because it deemed Thorpe's remains were in their final resting place. The Fourth Circuit further stated that because the Borough was not a museum, it was not required to comply with NAGPRA's inventory and repatriation requirements. *Id.* at 263. The Fourth Circuit *did not* hold that § 3003 or § 3005 generally do not apply to remains in the ground or buried in cemeteries.¹⁰ *Thorpe's* actual holding cannot be extrapolated to the present facts.

Unlike Thorpe's remains, neither Winnebago nor Samuel's and Edward's families consented to their burials, disinterment, and reburials at Carlisle. Carlisle Cemetery was never intended to be the boys' final resting place. Samuel and Edward were first buried in the Indian burial ground without notice to or consent of their families or Winnebago. Compl. ¶¶ 36-47. The Army then, to make way for a parking lot, excavated the boys' remains and reburied them in their current location at the Carlisle Cemetery. *Id.* ¶ 211. The Army never provided Winnebago or the boys' families notice or sought their consent to disinter and rebury the boys. In *Thorpe*, the

⁹ Centering its decision on the holding that it would be absurd to find that the Borough was a museum, even though it met the plain meaning of the statutory definition, rather than flatly stating that § 3005 did not apply outright, strongly suggests that the Fourth Circuit understood NAGPRA's repatriation provisions to generally apply to human remains in the ground.

¹⁰ Indeed, at no point in the litigation did any party—including the Borough—argue that § 3005 was not generally applicable to Thorpe simply because he was buried in a cemetery. The court and the parties agreed that Thorpe's remains were Native American human remains that were possessed and controlled by the Borough. *Thorpe*, 770 F.3d at 262.

parties did not dispute that Thorpe's third wife had the legal authority to decide that the Borough would be Thorpe's final resting place. 770 F.3d at 258.

Defendants also misconstrue NAGPRA's purpose in their discussion of *Thorpe*. Defendants state that NAGPRA's purpose is to protect Native American graves, not to unearth them. Def.'s Mot. 19. This characterization is misleading. *Thorpe* recognized Congress's overall purpose in enacting NAGPRA was "to correct past abuses to, and guarantee protection for" Native American human remains and cultural items. 770 F.3d at 259-60. To this end, NAGPRA "was passed with two main objectives[,] one of which was to protect Native American burial sites, and the other of which was to create a process for repatriation of Native American remains held by agencies and museums. *Id.* at 260. The court observed the long history of looting and plundering Native American burial sites that created the need for the dual purposes of graves protection and repatriation. *Id.* at 259-261. In the case of Carlisle, repatriation is appropriate and consistent with NAGPRA's intent because Carlisle Cemetery is not Samuel's and Edward's final resting place. Their exhumation and repatriation to Winnebago is not grave robbing or looting. Instead, the factual differences between Thorpe's burial and Samuel's and Edward's burials underscore that *Thorpe* does not apply as Defendants suggest.

Defendants also rely on *Thorpe* to suggest that finding Carlisle Cemetery constitutes a holding or collection would lead to absurd results whereby hundreds or thousands of cemeteries across the United States would suddenly become subject to NAGPRA's repatriation provisions, even where "the original burials were performed at the request of the decedents or their kin." Def.'s Mot. 20-21. This is a gross overstatement. NAGPRA's definition of Native American human remains and repatriation provisions foreclose Defendants' parade of horrors.

Only “Native American human remains” are subject to NAGPRA’s repatriation provisions and the repatriation provisions only apply to federal agencies and museums. The regulations in place at the time Winnebago filed its repatriation request confirm that this term does not include remains that were “freely given,” such as remains buried with the consent of family or kin. *See* 43 C.F.R. § 10.2(d)(1) (2023). Likewise, the current regulatory definition of human remains “does not include human remains to which a museum or Federal agency can prove it has a right of possession.” 43 C.F.R. § 10.2. Indeed, NAGPRA affirms that its repatriation provisions do not apply to human remains that were “otherwise obtained with full knowledge and consent of the next of kin.” 25 U.S.C. § 3001(13). Accordingly, like in *Thorpe*, if a family member or next of kin makes a lawful decision to bury an individual in a cemetery, NAGPRA’s repatriation provision would not apply. This conforms with the intent of NAGPRA and the plain text of the statute and its implementing regulations.

Finally, Defendants suggest that if cemeteries associated with federal Indian boarding schools were subject to NAGPRA, it would be costly and burdensome for federal agencies to comply with the NAGPRA’s repatriation provisions. This assertion fails to garner sympathy, as the United States made Indian Tribes pay for the federal Indian boarding school system in the first place. *See Brackeen*, 599 U.S. at 301 (Gorsuch, J., concurring) (“Adding insult to injury, the United States stuck Tribes with a bill for these programs.”). Moreover, if cost is to be considered a factor in determining whether any museum or federal agency must comply with NAGPRA, that is a policy determination that can only be addressed by Congress, not the courts. *See Becerra v. San Carlos Apache Tribe*, No. 23-250, 2024 WL 2853107, at *10 (U.S. June 6, 2024) (“[C]omplaints about costs are the domain of Congress, not [] Court[s].”). In sum, *Hawk*,

Geronimo, and *Thorpe* do not support Defendants' position that § 3005 (and § 3003) does not apply to Native American human remains buried at Carlisle Cemetery.

IV. Defendants are not doing the “right thing” by refusing to comply with NAGPRA.

Defendants cannot claim to honor Samuel and Edward while simultaneously refusing to repatriate their remains pursuant to federal law. To Winnebago, the repatriation of Samuel's and Edward's remains is not simply about their return, but also the manner in which they are returned. Under NAGPRA, Winnebago has clear rights and a formulaic process to bring Samuel and Edward home that includes safeguards to ensure Defendants' compliance. Under the OAC Disinterment and Return Process, Winnebago lacks everything Indian Tribes fought successfully to have codified in NAGPRA and its implementing regulations. Winnebago brought this action to bring its children home and vindicate Indian Tribes' long fought for rights in the repatriation of their relatives' remains to their proper resting places.

As detailed thoroughly in Winnebago's Complaint, the OAC Disinterment and Return Process deprives Winnebago of many rights Congress guaranteed under NAGPRA and is an arbitrarily modified version of Defendants' normal process for the disinterment and return of military servicemembers codified in Army regulations. *See* Compl. ¶¶ 134-58. While Defendants do not contend with the flaws of the OAC Disinterment and Return Process at all in their motion, Winnebago reemphasizes the inadequacies of the OAC Disinterment and Return Process compared to NAGPRA here. Glaringly, unlike NAGPRA, the OAC Disinterment and Return Process does not allow Indian Tribes to make requests for the return of culturally affiliated human remains. Furthermore, it does not require Defendants to return remains, and it does not include a timeline for when remains must be returned or establish legal mechanisms to hold Defendants accountable, among other deficiencies.

Winnebago made its repatriation request pursuant to § 3005(a)(4) because Defendants never developed an inventory of the remains in their possession and control. Under § 3005(a)(4) only Indian Tribes can request repatriation of culturally affiliated human remains. 25 U.S.C. § 3005(a)(4).¹¹ This is not the case under the OAC Disinterment and Return Process. The disinterment and return of individuals buried at Army cemeteries is generally governed by Army Regulation (“AR”) 290-5, § 3-7, available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31366-AR_290-5-001-WEB-2.pdf. Defendants arbitrarily restrict who can request the return of human remains from Carlisle Cemetery, prohibiting Indian Tribes from making a request. Compare Compl. Ex. 8, at 2, with AR 290-5, § 3-7(b). Under the OAC Disinterment and Return Process, only the “closest living relative” can make such a request. Compl. Ex. 8, at 2. This term is not defined. See *id.*¹² Defendants require the closest living relative sign an affidavit attesting under oath that they are the closest living relative. *Id.* Defendants then require a second affidavit by someone who can attest to the fact that the individual is in fact the closest living relative. *Id.* These affidavits are challenging if not impossible to attest to in Winnebago’s case, as with other Indian Tribes, because many buried at Carlisle Cemetery died over 100 years ago as children. Compl. ¶ 100.¹³ NAGPRA was passed to address coercion of this kind.

¹¹ Lineal descendants can request the repatriation of human remains only if their cultural affiliation has been established in an inventory. See 25 U.S.C. § 3005(a)(1); Cf. 25 U.S.C. § 3005(a)(4).

¹² AR 290-5, however, defines “close living relatives” as a “widow or widower; parents; adult brothers and sisters; and natural and adopted children[.]” AR 295-5, § 3-7(b)(1). Samuel and Edward died over 100 years ago; they did not have spouses or children, and their parents and siblings no longer alive. No one alive today meets this definition.

¹³ Defendants suggest there may be an issue of “prudential ripeness and the absence of justiciable final agency action” based on potential living relatives. Def.’s Mot. 6, n.5. This is inapposite, as Winnebago’s claim rests on § 3005(a)(4), which concerns the right of Indian Tribes to request repatriation and is not contingent upon anything related to “living relatives.” And Defendants’ denial of Winnebago’s repatriation request constitutes final agency action. See 43 C.F.R. § 10.1(b)(3) (2023).

Further, under NAGPRA and its implementing regulations, federal agencies are required to repatriate human remains upon receipt of a valid repatriation request and are bound by specific repatriation timelines. *See* 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.10(g)-(h); 43 C.F.R. § 10.10(b)(2) (2023). Likewise, NAGPRA provides a private right of action to hold federal agencies and museums accountable when they refuse to comply with the Act. *See* 25 U.S.C. § 3013. The OAC Disinterment and Return Process lacks those protections, as it does not include an affirmative duty to return remains, or any timelines for responding to requests for the repatriation of remains or returning remains. This means that those requesting the return of remains from Carlisle Cemetery are left to Defendants' whims. This lack of accountability and structure is contrary to Congress's intent in enacting a clear framework and clear procedures in NAGPRA.

Through NAGPRA, Congress recognized the challenges in the repatriation of Native American human remains of those who died generations ago and sought to avoid the barriers now posed by the OAC Disinterment and Return Process. NAGPRA, and not the OAC Disinterment and Return Process, ensures that Native American human remains, like those of Samuel and Edward, are returned home in a structured and culturally appropriate manner.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

DATED: June 7, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WINNEBAGO TRIBE OF NEBRASKA, a
federally recognized Indian Tribe,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
ARMY; UNITED STATES DEPARTMENT
OF THE ARMY, OFFICE OF ARMY
CEMETERIES; CHRISTINE E.
WORMUTH,
KAREN DURHAM-AGUILERA, RENE A. C.
YATES, Lieutenant Colonel PRISCELLA A.
NOHLE, in their official capacities,
Defendants.

1:24-cv-78 - CMH-IDD

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Plaintiff and *Amici* speak forcefully about the injustices done by the Native American boarding school system. As we have stated, this is a matter of national shame. For the victims' kin, and for members of the affected Tribes, it is also no doubt a matter of heartache. But the tragic history of that system does not license this Court to rewrite NAGPRA, which is what Plaintiff and *Amici* are asking the Court to do. Congress sought in NAGPRA to accomplish two goals: (1) to end the looting of Native American gravesites (and provide for the return of Native American remains later unearthed); and (2) to require museums and Federal agencies to document and repatriate their collections of Native American cultural items. NAGPRA's language and legislative history plainly focus on those two goals, and nowhere suggest an intent to require the exhumation of existing gravesites. Plaintiff's (and *Amici's*) attempts to show otherwise are unsuccessful.

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SUMMARY

Plaintiff is correct that those portions of our moving papers discussing 25 U.S.C. § 3005 focused on § 3005(a)(1) and did not examine § 3005(a)(4). But the latter subsection does not rescue the Complaint. The language and context of subsection 3005(a)(4) shows that it, like subsection 3005(a)(1), is concerned with artifact collections, not with gravesites. And Plaintiff's reading of subsection 3005(a)(4) requires the implausible conclusion that Congress intended to require the "expeditious" exhumation of thousands of gravesites without even a hint, either in the language or the history of the statute, that that was what Congress had in mind.

Plaintiff also fails in its argument that a cemetery is a "holding or collection." The ordinary meanings of those words do not apply to cemeteries. Also, NAGPRA's history and implementing regulations confirm that Section 3005's requirements do not apply to cemeteries. And all efforts to save an untenable statutory interpretation by invoking interpretive rules (*i.e.*, the laxness of FRCP 8's pleading requirements, the rule that motions to dismiss require an open-minded reading of factual allegations, and the Indian canon of statutory construction) are simply not up to the task. The statute does not say what Plaintiff wants it to say.

Plaintiff's efforts to minimize the decisions in *Geronimo v. Obama*, 725 F. Supp. 2d 182 (D.D.C. 2010), *Hawk v. Danforth*, No. 06-C-223, 2006 WL 6928114 (E.D. Wis. Aug. 17, 2006), and *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), are also unavailing. Plaintiff is certainly correct that none of these cases is a close factual match, and that none is controlling.

We never suggested otherwise. But all three cases -- the only cases that have addressed the question -- concluded that NAGPRA's repatriation requirements do not apply to buried remains.

Taken together, the cases bear heavily here. Plaintiff's Complaint should be dismissed.

ARGUMENT

A. Section 3005(a)(4) Does Not Require Exhumation of Gravesites

Each of the two counts in Plaintiff's Complaint asserts that the remains at issue are part of a "holding or collection" as required by NAGPRA subsection 3005(a)(1). Complaint ¶¶ 256, 271, ECF No. 1 ("Compl."). Thus, as Plaintiff correctly notes, our moving papers focused (in part) on that requirement, rather than on the provisions of subsection 3005(a)(4). But a claim based on subsection 3005(a)(4) fares no better than a claim based on subsection 3005(a)(1), and for many of the same reasons.

Subsection 3005(a)(4) provides:

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.—

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to [25 U.S.C. § 3003], or the summary pursuant to [§ 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

With respect to human remains, the subsection applies to those:

1. That are listed on a Section 3003 inventory, but whose cultural affiliation has not been established;
2. That are listed on a Section 3004 summary, but whose cultural affiliation has not been established; or

3. That “are not included upon any such inventory.”

In all cases, where a requesting Tribe can demonstrate cultural affiliation (by any of the various means allowed), the subsection requires that “upon request and pursuant to subsections (b) and (e) . . . such Native American human remains and funerary objects shall be expeditiously returned.” As Plaintiff acknowledges, these requirements only apply to “remains and objects possessed or controlled by federal agencies and museums.” *Id.* But this language does not, as Plaintiff posits, extend beyond remains in holdings or collections.

1. Plaintiff misreads the language of Subsection 3005(a)(4)

Plaintiff argues that the remains at Carlisle are “possessed or controlled” by the Army; that they constitute “remains . . . not included upon any such inventory” within the meaning of the Act; and that they therefore should be “expeditiously returned” to a requesting Tribe that can make a showing of cultural affiliation. For four reasons, Plaintiff’s reading is untenable.¹

First, the statute’s plain language illustrates that Congress intended “remains . . . not included upon any such inventory” to mean remains in a holding or collection. For one, Congress’s use of the phrase “not included upon” encompasses the possibility that the remains could be included on an inventory. And as we have explained, the inventory requirement applies only to holdings and collections. Defs.’ Mem. at 9-15. Had Congress intended to create (as Plaintiff posits) a repatriation requirement apart from that which applies to holdings and

¹ Plaintiff also briefly argues that the remains at Carlisle constitute cultural items whose cultural affiliation “has not been established in an inventory prepared pursuant to section 3003.” Pl.’s Resp. in Opp’n to Defs.’ Mot. to Dismiss, ECF No. 35 at 8 (“Pl.’s Opp’n”). But as we have explained, that language presupposes that the items are subject to the Section 3003 inventory requirements, and the Section 3003 inventory requirements only apply to holdings or collections. Defs.’ Mem. in Supp. of Mot. to Dismiss, ECF No. 31 at 16-17 (“Defs.’ Mem.”).

collections, it would have said “remains . . . not *subject to* any such inventory.” But that is not what Congress said. Further, the context of Section 3005(a)(4) is relevant. *See Dubin v. United States*, 143 S. Ct. 1557, 1566 (2023). A “court’s examination of statutory language is guided not by a single sentence or phrase, but by the provisions of the whole law, as well as its object and policy.” *Wright v. Angelone*, 944 F. Supp. 460, 466 (E.D. Va. 1996) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). Here, subsection (a)(4) is ordered after (a)(1) and (a)(2), which address repatriation of items for which cultural affiliation is established *via* the inventory and summary processes in Sections 3003 and 3004. Read in that context, it is clear Section 3005(a)(4) is continuing to legislate regarding remains and funerary objects covered by Section 3003 and Section 3004. And Sections 3003 and 3004 only apply to “holdings or collections.” 25 U.S.C. §§ 3003(a), 3004(a).

Plaintiff’s reading, by contrast, assumes (without any contextual support) that Congress intended to hide in one phrase of Section 3005(a)(4) an all-encompassing requirement to return any remains “possessed or controlled” by a federal agency regardless of the Section’s or the Act’s other provisions. But Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). A much plainer and sensical reading is that, in referencing “remains . . . not included upon any such inventory,” Congress was simply referring to remains in “holdings or collections” that did not get captured in a Section 3003 inventory.

And it makes perfect sense that Congress would legislate to address “remains . . . not included upon” an inventory of a holding or collection. There are several situations under the statutory scheme in which disinterred remains in a holding or collection would not end up on a Section 3003 inventory. The first would be remains discovered after 1990 and therefore subject

to Section 3002, not Section 3003. Another would involve a holding or collection whose owner has simply not complied with the inventory requirement. Some state museums or agencies may be unaware that their holdings include Native American remains or artifacts, or be unaware of the requirements of Section 3003. A third scenario would involve owners of a holding or collection who have not completed an inventory. The statute allows five years to do so and empowers the Secretary of the Interior to extend this grace period further. 25 U.S.C. §§ 3003(b)(1)(B), (c). And Plaintiff notes a fourth possibility -- where an inventory was created but, for whatever reasons, particular cultural items were not included or were overlooked. Opposition at 8-9. In short, it is much more likely Congress intended the subject phrase in Section 3005(a)(4) to fill gaps in the inventory-linked repatriation process for holdings and collections than to create a separate, all-encompassing requirement outside of that process.

Second, by its own terms, a tribe's request for return under of Section 3005(a)(4) is subject to Section 3005(b). That subsection provides:

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

Subsection (b) further supports the idea that Congress intended the subject phrase in subsection 3005(a)(4), like subsection 3005(a)(1), to apply only to holdings or collections.

Subsection (b) creates an exception to the repatriation requirement with respect to “items [that] are indispensable for completion of a specific scientific study. . .” 25 U.S.C. § 3005(b).

The scientific value of cultural items *held in a museum collection* is likely to be known, or is at

least knowable. The same cannot be said for buried remains. Whether any particular gravesite at the Carlisle cemetery, for example, is of interest to a “specific scientific study” cannot ordinarily be known before the remains are disinterred and examined. Additionally, the required showing that the remains are indispensable for the “completion” of a “specific” scientific study requires that the study in question already be under way. It is difficult to imagine how this could be true with respect to remains that are still buried. Indeed, probably the most famous of all NAGPRA cases, involving the 9000-year-old “Kennewick Man,” highlights this very dichotomy.

In *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), interested Tribes wanted Kennewick Man’s remains returned to the ground, for religious reasons. 367 F.3d at 870 n.8.² The scientific community wanted to retain access, for purposes of “scientific inquiry to advance knowledge of distant times.” *Id.* at 869. *Bonnichsen* illustrates the fact that scientific study and continued internment are incompatible. Applying subsection 3005(b) – and thus, also, subsection 3005(a)(4) – to buried remains, therefore doesn’t make sense. In other words, the language of subsection (b) shows that Congress had in mind remains that have already been disinterred and are thus subject to study.

Third, Congress’s use of the word “expeditiously” also supports a conclusion that Congress intended that the phrase “remains . . . not included on any such inventory” apply only to holdings or collections that are subject to the Act’s inventory requirements (and not to remains in the ground). Subsections 3005(a)(1) and 3005(a)(4) both require, with respect to remains

² After initial analysis had suggested Kennewick Man’s uncommonly ancient provenance, his skeletal remains were removed to the Smithsonian Museum of Natural History in Washington for further study. *Id.* at 870.

subject to their provisions, that the agency or museum possessing those remains “shall expeditiously return” them to the affiliated Tribe. The same “expeditious” return requirement is set out in subsections 3005(a)(2), 3005(a)(5), and 3005(b). To use that term -- “expeditiously” -- to refer to the exhumation and reburial of human remains is incongruous. This is an act to be performed not with haste, but with solemnity. If Congress intended in these sections to require exhumation and reburial, we would expect them to say as much and thereby dignify the process. The overarching goal of NAGRPA, after all, is to restore dignity to remains that have been, historically, deplorably disrespected. As just one illustration, if Congress intended to require exhumations, surely it would have directed that Tribal representatives, including religious dignitaries, be permitted to attend. That is what the Army is doing at Carlisle. Compl. Ex. 7, ECF No. 1-8.

Finally, the practical implications of Plaintiff’s reading of subsection 3005(a)(4) refutes that reading. The Section refers to remains that are “not included” in a Section 3003 “inventory.” If that is not limited to remains that are *subject to* the Act’s inventory requirements (albeit not, or not yet, inventoried), then the Section refers to all Native American remains currently resting in almost 200 federally controlled cemeteries throughout the country. *See* Defs.’ Mem., ECF No. 31 at 23-25. Further, if subsection 3005(a)(4) is unlimited by any connection to the “holding or collection” language of Section 3003, the repatriation language of subsection 3005(a)(4) would apply not only to federally controlled cemeteries. It would also apply to Native American gravesites located anywhere on federal land -- such as national parks and preserves -- including gravesites created according to the decedent’s wishes and according to Tribal beliefs. To read this one phrase in this one subsection of the Act as imposing requirements that would dwarf all

of the requirements that the Act *explicitly* imposes on the Federal Government is simply not tenable. Particularly so given that neither the Act, nor its legislative history, mentions the exhumation of existing graves. Plaintiff's reading thus violates "the most fundamental guide to statutory construction -- common sense." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989). Subsection 3005(a)(4), like subsection 3005(a)(1), applies to remains in holdings or collections.

2. The regulations confirm that Plaintiff misreads the language of Subsection 3005(a)(4)

The Department of the Interior's regulations implementing NAGPRA further undercut Plaintiff's proffered reading of subsection 3005(a)(4).

a. The 2024 regulations govern

Plaintiff continues to cite the Interior Department's prior implementing regulations, which were superseded in January 2024. *See, e.g.*, Pl.'s Opp'n at 17. Elsewhere, Plaintiff cites to the current regulations (*id.* at 30) or argues that the difference is "immaterial." *Id.* at 17. But it is the current regulations that are relevant to the statutory interpretation question here. As we have noted, applying revised regulations creates no retroactivity concerns where the new regulations are interpretive. Defs.' Mem. at 17-18; *see also Little Co. of Mary Hosp. & Health Care Centers v. Shalala*, 994 F. Supp. 950, 957 (N.D. Ill. 1998), *aff'd*, 165 F.3d 1162 (7th Cir. 1999) ("agency rules that merely interpret or clarify, as opposed to effecting a substantive change in, existing law are properly applicable to disputes that arose before they were promulgated" (*citing Pope v. Shalala*, 998 F.2d 473, 482-86 (7th Cir. 1993)); *A.U., ex rel. N.U. v. Roane Cnty. Bd. of Educ.*, 501 F. Supp. 2d 1134, 1144 (E.D. Tenn. 2007)). Also, Plaintiff is seeking prospective –

declaratory and injunctive – relief. The Fourth Circuit has held that an order granting such relief with respect to superseded regulations must be vacated as moot. *Phillips v. McLaughlin*, 854 F.2d 673, 674 (4th Cir. 1988) (“Because the district court's decision is based upon an interpretation of a regulation which has been superseded so far as the plaintiff class is concerned and plaintiffs have requested only prospective relief, we vacate the decision of the district court and remand with instructions to dismiss this action as moot.”) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 & n.2 (1950)). The 2024 regulations (43 C.F.R. Part 10 (effective January 12, 2024)) apply.

b. The regulations confirm that NAGPRA’s repatriation requirements only apply to holdings or collections

We have shown that the most reasonable construction of the repatriation requirements in Section 3005(a) (subparts (1) and (4) alike) is that those requirements only apply to remains that are subject to the Act’s inventory requirements. In other words, the repatriation requirements only apply to “holdings or collections.” Interior’s regulations confirm that reading. Section 10.1(b)(1) of the regulations provides:

(1) These regulations require certain actions by:

- (i) Any institution or State or local government agency (including any institution of higher learning) within the United States that receives Federal funds and has possession or control of a holding or collection;
- (ii) Any Federal agency that has possession or control of a holding or collection or that has responsibilities on Federal or Tribal lands;
- (iii) Indian Tribes on Tribal lands in Alaska and the continental United States; and
- (iv) The State of Hawai‘i Department of Hawaiian Home Lands (DHHL) on Tribal lands in Hawai‘i.

43 CFR § 10.1(b)(1) (2023). As relevant here, the regulations state that NAGPRA applies to “[a]ny Federal agency that has possession or control of a holding or collection”³ If the remains or artifacts in question are not part of a “holding or collection,” the statute’s repatriation provisions do not apply. As we confirm in section (B) below, the contents of the Carlisle cemetery (or of any cemetery) do not comprise a holding or collection.

Particularly when read in the context of NAGPRA as a whole, we believe that Section 3005(a) plainly does not apply to cemeteries. Nothing in the statute (or for that matter its voluminous legislative history) states or suggests that disinterment of buried remains is part of the Act’s repatriation mandate. Given the wording of Section 3005, as discussed above and in our moving papers, analysis ends there. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (footnote omitted). But if the Court finds the Act ambiguous on this point, the Department of the Interior’s interpretation is owed substantial deference. We have made this point before, Defs.’ Mem. at 31-32, and Plaintiff does not argue otherwise.⁴

Accordingly, if the Court finds that Section 3005 is ambiguous as to whether its

³ The second clause in subsection 10.1(b)(1)(ii) (“Any Federal agency . . . *that has responsibilities on Federal or Tribal lands*”) (emphasis added) relates to the requirements of NAGPRA Section 3002, which sets out detailed responsibilities and rights with respect to Native American cultural items unearthed on Federal or Tribal land after NAGPRA’s passage. 25 U.S.C. § 3002.

⁴ Plaintiff argues that the Army’s interpretation of NAGPRA is not entitled to deference, but does not deny that Interior’s interpretation is. Pl.’s Opp’n at 11 n.6. And Plaintiff has not challenged Interior’s regulations.

repatriation requirements apply to buried remains, Interior's regulatory determination that those requirements only apply to holdings or collections resolves the ambiguity.

B. The Remains at Carlisle are not a "Holding or Collection"

Because subsections 3005(a)(1) and (a)(4) apply only to "holdings or collections," our motion turns on whether the Carlisle cemetery is a "holding" or a "collection." As we have explained, the answer is "no." Nothing in Plaintiff's response demonstrates a different conclusion.

1. Rules prescribing a liberal reading of the complaint are irrelevant

Plaintiff first turns to procedure in an effort to rebut our statutory argument. Plaintiff invokes two rules: (1) that complaints are to be liberally construed under the lenient pleading requirement of Fed. R. Civ. P. 8; and (2) that on a motion to dismiss, all factual allegations are accepted as true. Pl.'s Opp'n at 4, 10 (referring to the "the lenient pleading standard in Rule 8 and the requirement to construe all reasonable inferences in favor of the plaintiff"). But those rules are of no assistance where, as here, the issue presented is a question of law. The relevant facts are undisputed; the dispositive fact is that the remains at issue are in the ground. Resolution of Defendants' motion turns solely on the legal question whether NAGPRA Section 3005 requires repatriation of buried remains, and "[t]he court need not . . . accept [the complaint's] conclusions of law." *Est. of Alcalde v. Deaton Specialty Hosp. Home, Inc.*, 133 F. Supp. 2d 702, 705 (D. Md. 2001). Liberally construing the complaint can thus have no bearing on the motion. The Fourth Circuit recently emphasized this point in *Jones v. U.S. Merit Sys. Prot. Bd.*, No. 23-1328, 2024 WL 2855029 (4th Cir. June 6, 2024). There the court acknowledged that, on a

dismissal motion, the court must “accept all well-pleaded allegations in the complaint as true and draw all inferences in the plaintiff’s favor.” 2024 WL 2855029, at *10 n.14 (quoting *Langford v. Joyner*, 62 F.4th 122, 124 (4th Cir. 2023)). But the court went on to hold that where a motion to dismiss challenges the plaintiff’s legal theory, the issue is one of law and the complaint is entitled to no special solicitude: “A judge’s job on a motion to dismiss is to determine whether the legal theory or theories supporting a complaint are correct, not whether they are merely plausible.” 2024 WL 2855029, at *10 n.4 (quoting Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. Pa. L. Rev. 473, 483 (2010)). Because Plaintiff’s legal theory here is incorrect, dismissal is mandated, and a liberal reading of the complaint cannot save it.

2. The ordinary meaning of the words “holding or collection” do not apply to buried remains

Plaintiff has not meaningfully challenged the fact that the ordinary meaning of the expression “holding or collection” does not apply to the contents of a grave. Indeed, the materials Plaintiff cites argue in our favor. Plaintiff cites an online dictionary that defines a “holding” (partly) as “property (such as land or securities) owned.” Pl.’s Opp’n at 11 (citing MERRIAM-WEBSTER DICTIONARY ONLINE, available at <https://www.merriam-webster.com/dictionary/holding>, last visited June 21, 2024). Fair enough: human remains are rarely if ever thought of as “property.” *See, e.g., Meagher v. Driscoll*, 99 Mass. 281, 284 (1868); *Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 26 (Ga. 1905); *Snyder v. Snyder*, 60 How. Pr. 368 (Sup. Ct. NY 1880); 2 William Blackstone, *Commentaries*, 429). *Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 387 A.2d 244, 246 n.2 (Md. 1978); *Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936).

Plaintiff cites the same dictionary's definition of "collection" as (in part) "something collected[,]" such as "an accumulation of objects gathered for study, comparison, or exhibition or as a hobby." Pl.'s Opp'n at 12 (citing MERRIAM-WEBSTER DICTIONARY ONLINE, available at <https://www.merriam-webster.com/dictionary/collections> (last visited June 21, 2024)). We again agree that the quoted definition is telling. When the deceased are laid to rest, *no one* regards the remains as things for "study," "comparison," or "exhibition." Interment is no one's "hobby." Plaintiff accuses the Army of using the Carlisle cemetery as a degrading and misleading attraction. Pl.'s Opp'n at 13, 16, 17, 18. We deny that accusation; visitors to the base are informed about the cemetery's history in an entirely respectful way. But the accusation itself underscores the point that, in normal usage, a cemetery is *not* regarded as a "collection" for exhibit.⁵ And "[i]n the absence of a definition from Congress, we accord words in a statute their ordinary, contemporary, common meaning." *United States v. Midgett*, 198 F.3d 143, 145-46 (4th Cir. 1999) (internal citation and quotation marks omitted). Plaintiff agrees. Pl.'s Opp'n at 10 ("Generally, when a statute does not define a term, courts give the term its ordinary meaning" (citing *United States v. Young*, 989 F.3d 254, 259 (4th Cir. 2021))).⁶

⁵ Plaintiff and *Amici* also speak at length of the shameful history of boarding schools such as that at Carlisle and the regrettable way the remains at Carlisle were, historically, treated. Pl.'s Opp'n at 13-17; Amicus in Supp. of Pl.'s Resp. in Opp'n to Defs.' Mot. to Dismiss, ECF No. 38-1 at 6-12, 16 ("Amicus"). But that history does not change the meaning of the Act's words, and there is no suggestion in the language or legislative history of NAGPRA that Congress was contemplating the history of the Carlisle school (or of any other such school) in drafting and enacting the statute.

⁶ Plaintiff argues that, under this reading, "museums and federal agencies could evade their repatriation obligations by simply burying any Native American human remains and other cultural items they did not want to return." Pl.'s Opp'n at 20. Plaintiff's lawsuit raises weighty and solemn matters, but this particular argument is unserious. Any museum attempting such a ruse would be in blatant violation of its obligations because any holdings or collections subject to

3. The Indian canon of construction does not authorize the Court to rewrite the statute or ignore its purpose

Plaintiff invokes the Indian canon of construction in support of its reading of “holding or collection.” Pl.’s Opp’n at 10-13. There are three answers to this argument.

First, the Indian canon of construction is only available to resolve ambiguities; if there is no ambiguity, the canon does not apply. *Koi Nation of N. California v. U.S. Dep’t of Interior*, 361 F. Supp. 3d 14, 49 (D.D.C. 2019), *appeal dismissed sub nom. Koi Nation of N. California v. U.S. Dep’t of the Interior*, No. 19-5069, 2019 WL 5394631 (D.C. Cir. Oct. 3, 2019) (“[t]he Indian canon of construction ‘applies only to statutes that are . . . ambiguous’” (quoting *Ho-Chunk, Inc. v. Sessions*, 894 F.3d 365, 369 n.4 (D.C. Cir. 2018))). “The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist.” *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *see also Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) (“we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean”).⁷

Thus if, as we argue, the words “holding or collection” are plainly inapplicable to the contents of gravesites, the canon is not relevant.

the inventory requirement of Section 3002 are subject to the repatriation requirements of Section 3005.

⁷ Plaintiff and *Amici* describe what they regard as inadequacies in the repatriation procedures that the Army has adopted. Pl.’s Opp’n at 28-30; *Amicus* at 9, 10-14. This is not the forum for that discussion, except to note that if such inadequacies exist (which the Army denies) they would not empower the Court to rewrite NAGPRA in an effort to remedy problems that the Act does not address. Even under the Indian canon, that is a step too far. *Confederated Bands of Ute Indians*, 330 U.S. at 179.

Second, as we argue above and in our moving papers, any ambiguity in the expression “holding or collection” is removed by Interior’s regulations. Plaintiff has not challenged Interior’s regulations. Plaintiff (Pl.’s Opp’n at 17) notes that the regulatory definition offers a large and non-exhaustive list of the purposes to which a “holding or collection” may be put, but does not refute the facts that: (a) the purposes listed are *all* appropriately applicable to a museum collection, and *not* to the contents of a cemetery; and (b) that the definition is in all respects confined to the term “accumulation” which, as we argue (Defs.’ Mem. at 12-14), does not naturally apply to a cemetery.

Third, even if the Indian canon were implicated, “any interpretation must remain faithful to a statute’s context and purpose.” *Fox v. Portico Reality Servs. Off.*, 739 F. Supp. 2d 912, 922 (E.D. Va. 2010). The purpose of NAGPRA is twofold: (a) to prohibit grave-robbing (18 U.S.C § 1170) and carefully regulate future Native grave disinterments (Section 3002); and (b) to require the return of skeletal remains and associated cultural artifacts in holdings or collections (Section 3005). *Thorpe*, 770 F.3d at 262 (summarizing this twofold purpose). Insofar as NAGPRA is concerned with remains in the ground, the Act requires that they be left there, or that, if removed, the removal be subject to strict requirements. That is why any interpretation of NAGPRA as *requiring* disinterments “has the Act backwards.” *Hawk*, 2006 WL 6928114, at *2. That is why such a reading “would thwart the obvious purpose of the statute.” *Thorpe*, 770 F.3d at 264. And that is why Plaintiff’s reading is contrary to the Act’s “context and purpose,” a problem that the Indian canon cannot overcome. *Fox*, 739 F. Supp. 2d at 922.⁸

⁸ Plaintiff makes the obvious point that a respectful disinterment for purposes of repatriation is not the same thing as grave-robbing. Pl.’s Opp’n at 20. But we do not suggest that when

C. The Decisions in *Hawk*, *Geronimo*, and *Thorpe* Confirm that NAGPRA Does Not Mandate Disinterment

Plaintiff devotes most of its pages to distinguishing *Hawk*, *Geronimo*, and *Thorpe*. Pl.’s Opp’n at 21-28. Because Plaintiff’s arguments do not diminish the significance of those decisions, our response will be brief.

Much of what Plaintiff says about *Hawk* is true. Plaintiff might also have pointed out that *Hawk* was a *pro se* case in which the plaintiff did not respond to the motion to dismiss. 2006 WL 6928114 at *1. But Plaintiff can’t change the fact that *Hawk* was a case, like this one, in which the plaintiff was concerned about ancestors buried on defendant’s property and asserted that NAGPRA required defendants to “care for the grave sites” and “provid[e] proper burials.” *Id.* And while the court specifically cited to Section 3002, not Section 3005, the court’s conclusion was that “the Act” does not apply “to remains that may be still buried.” *Id.* at *2.

As Plaintiff notes, *Geronimo*, like *Hawk*, was a case where the plaintiff did not know exactly where the remains at issue were buried. But that is not what animated the court’s discussion of NAGPRA. True, the court notes that plaintiffs there “cite to no provision of NAGPRA that requires a federal agency to engage in an intentional excavation of possible burial sites.” But in its next breath (and citing *Hawk*), the court noted that “the plaintiffs do not point to any authority interpreting this or any other section of NAGPRA as requiring an intentional excavation.” *Geronimo*, 725 F. Supp. 2d at 187 n.4. The point was not the grave’s uncertain location. The problem was “intentional excavation.” That is hardly “irrelevant” to Plaintiff’s case

Congress prohibited grave-robbing it also intended to prohibit respectful disinterments. Instead, we observe that the Act nowhere *requires* respectful disinterments.

here, which seeks to compel intentional excavation. Pl.'s Opp'n at 23. And like plaintiffs in *Geronimo*, Plaintiff here cites no authority finding that NAGPRA requires such a thing.

As with *Hawk* and *Geronimo*, Plaintiff is correct that *Thorpe* is a factually different case from this one. And the precise legal issue the court decided – whether the Borough was a “museum” – is not present here. But as we discussed at some length, *Thorpe* remains instructive because of the court's careful and lengthy explanation of why NAGPRA cannot be used to compel disinterment – and why doing so would be totally at odds with the Act's purposes. We won't repeat that discussion here.

But we will note that Plaintiff is wrong in asserting that the inter-family dispute that gave rise to the *Thorpe* litigation is irrelevant here. Where intentional disinterments have occurred, Section 3002 carefully lays out a hierarchy designed to prevent disputes as to who has rights to the remains at issue. NAGPRA does not contain a similar hierarchy to identify those with rights to require and direct disinterments if Section 3005 can, in fact, be construed to require them. That is another reason why Section 3005 cannot be so construed.

While they are not, as Plaintiff takes pains to point out, controlling precedents, *Hawk*, *Geronimo*, and *Thorpe* all stand for the proposition that NAGPRA does not compel disinterments. No case says otherwise.

CONCLUSION

For the foregoing reasons Plaintiff's complaint should be dismissed with prejudice.

CERTIFICATE OF SERVICE

I hereby certify that I will today file the foregoing using the court's electronic filing system, which will cause service upon all counsel of record.

/s/ Peter Kryn Dykema
Peter Kryn Dykema

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Winnebago Tribe of Nebraska,

Plaintiff,

v.

Department of the Army,
et al.,

Defendants.

Civil Action No. 1:24-cv-78

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendants' Motion to Dismiss.

Two boys, Samuel and Edward, died in 1895 and 1899, respectively, while attending the Carlisle Indian School and were buried on the school's grounds. When the school closed in 1918, Defendant U.S. Army assumed control of the school's former grounds, and today, Samuel and Edward's remains are buried at the Carlisle Post Cemetery. In October 2023, Winnebago sent the Army a letter, alleging the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013, requires the Army to disinter and repatriate the boys' remains to the tribe. The Army responded in December, asserting NAGPRA does not compel disinterment but suggesting the Office of Army Cemeteries' Disinterment and Return Process could facilitate the disinterment and return of the boys' remains. Winnebago

responded by filing this suit on January 17, 2024. Here, Winnebago alleges the Army's refusal violated NAGPRA and seeks declaratory relief stating the Army is subject to NAGPRA and injunctive relief compelling the Army to repatriate the boys' remains.

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion to dismiss tests a complaint's sufficiency. Nadendla v. WakeMed, 24 F.4th 299, 304 (4th Cir. 2022). In considering such a motion, the Court accepts as true all well-pleaded factual allegations and views the complaint in a light most favorable to the plaintiff. Walters v. McMahan, 684 F.3d 435, 439 (4th Cir. 2012) (citing Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)). The Court does not, however, accord such deference to plaintiffs' legal conclusions. Id. "A complaint that lacks sufficient factual allegations or fails to identify a cognizable legal theory" will not survive a Rule 12(b)(6) motion. Greer v. Gen. Dynamics Info. Tech., Inc., 808 F. App'x 191, 193 (4th Cir. 2020).

Winnebago argues § 3005(a)(4) of NAGPRA compels the Army to disinter and repatriate Samuel and Edwards' remains. That subsection provides:

(a) Repatriation of Native American Human Remains and Objects Possessed or Controlled by Federal Agencies and Museums

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to [25 U.S.C. § 3003], or the summary pursuant to [§ 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

§ 3005(a)(4). Accordingly, with respect to human remains "possessed or controlled" by federal agencies and museums, § 3005(a)(4) applies in three circumstances: (1) a § 3003 inventory lists the remains, but their cultural affiliation has not been established (2) a § 3004 summary lists the remains, but their cultural affiliation has not been established, or (3) the remains "are not included upon any such inventory." If any of these three circumstances apply and a requesting tribe can sufficiently demonstrate affiliation, then, "upon request and pursuant to subsections (b) and (e) . . . , such Native American human remains and funerary objects shall be expeditiously returned" § 3005(a)(4).

Winnebago argues that because the remains at Carlisle are "possessed or controlled" by the Army and constitute "remains . . . not included upon any such inventory" under § 3003, the remains should be "expeditiously returned" to a requesting Tribe

that can make a showing of cultural affiliation. Winnebago's interpretation of NAGPRA, however, overreads the Act's reach.

First, § 3005(a)(4) applies to human remains in a holding or collection—not to all remains possessed or controlled by a federal agency. A court's examination of statutory language is guided not by a single sentence or phrase, but by the provisions of the whole law, as well as its object and policy. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). In NAGPRA, subsection (a)(4) follows (a)(1) and (a)(2). Subsections (a)(1) and (a)(2) address repatriation when the inventory and summary processes set out sections 3003 and 3004 establish an item's cultural affiliation. In context, § 3005(a)(4) continues to concern remains and funerary objects covered by sections 3003 and 3004—sections that apply only to "holdings or collections." §§ 3003(a), 3004(a).

Winnebago, disregarding § 3005(a)(4)'s context within NAGPRA, submits Congress hid a far-reaching requirement in § 3005(a)(4) to return any remains "possessed or controlled" by a federal agency. But Congress does not "hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). A plainer reading of § 3005(a)(4) is that, in referencing "remains . . . not included upon any such inventory," Congress referred to remains in "holdings or collections" that a § 3003 inventory or a § 3004 summary did not capture—not remains *not subject* to a § 3003 inventory or a §

3004 summary. The practical implications of Winnebago's proposed interpretation also refute their reading. If § 3005(a)(4) is untethered to § 3003's "holding or collection" language, § 3005(a)(4) could compel exhumation of tribal graves anywhere on federal land—including those created according to the decedent's wishes or tribal custom. This requirement would dwarf all others NAGPRA explicitly imposes on federal agencies—an untenable reading particularly as neither NAGPRA nor its legislative history contemplates the compulsory disinterment of existing graves.

Having found § 3005(a)(4) applies only to remains in a holding or collection, § 3005(a)(4) does not apply to the graves at the Carlisle Post Cemetery because a cemetery is neither a holding nor collection under NAGPRA. "When a word is not defined by statute, [courts] normally construe it in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993). The Merriam-Webster online dictionary defines a "collection" as "an accumulation of objects gathered for study, comparison, or exhibition or as a hobby." Collection, <https://www.merriam-webster.com/dictionary/collection> (last visited July 30, 2024). The examples given are collections of poetry, photographs, and baseball cards. Id. A "holding" is defined as "property (such as land or securities) owned—usually used in plural." Holding, <https://www.merriam-webster.com/dictionary/holding> (last visited July 30, 2024).

These definitions capture the ordinary sense that a "collection" is an accumulation of things, and a "holding" is an accumulation of assets. Both terms apply naturally to a museum or federal agency's inventory of previously excavated remains; neither term applies naturally to graves in a cemetery. The U.S. Department of the Interior's implementing regulations are consistent with these plain meanings,¹ and NAGPRA's legislative history further reflects that Congress did not envision applying NAGPRA's repatriation provisions to cemeteries. See 136 Cong. Rec. S17,173-02 (daily ed. Oct. 26, 1990), 1990 WL 165443 (remarks of Sens. McCain and Inouye) (reflecting on "the difficult issue of the repatriation of Native American human remains and funerary objects from museum collections to Indian tribes"); United States v. Hatcher, 560 F.3d 222, 226 (4th Cir. 2009) (Only when "the terms of a statutory provision are ambiguous" may the Court "consider other evidence to interpret the meaning of the provision, including the legislative history").

Lastly, as the Fourth Circuit has not addressed NAGPRA's scope, the Court looks to persuasive authority from our sister circuits. Though Thorpe v. Borough of Thorpe, 770 F.3d 255

¹ The regulations define a "holding or collection" as "an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including: (1) Academic interest; (2) Accession; (3) Catalog; (4) Comparison; (5) Conservation; (6) Education; (7) Examination; (8) Exhibition; (9) Forensic purposes; (10) Interpretation; (11) Preservation; (12) Public benefit; (13) Research; (14) Scientific interest; or (15) Study." 43 C.F.R. § 10.2; see 25 U.S.C. § 3011 (authorizing promulgation of the regulations).

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(3d Cir. 2014), presented a different question, the case similarly addressed NAGPRA's scope. In 1957, Patsy Thorpe buried her husband, the famous athlete Jim Thorpe, in Jim Thorpe, Pennsylvania. Id. at 257. Fifty years later, several of Thorpe's descendants sued the Borough of Thorpe under NAGPRA, seeking to disinter Thorpe's remains for reburial near Thorpe's birthplace in Oklahoma. Id. The issue was whether the Borough was a "museum" under § 3003(a), subject to NAGPRA's inventory and repatriation requirements. Id. at 263. The Third Circuit held it was not. Here, no one questions the Army is a federal agency under § 3003(a), but the Third Circuit's reasoning is instructive. The Third Circuit acknowledged that a "literal application of NAGPRA" would conclude the Borough is a museum, but the court held that result would be "demonstrably at odds with the intentions of [NAGPRA's] drafters." Id. at 264 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). The court observed, "as stated in the House Report, '[t]he purpose of [NAGPRA] is to protect Native American burial sites and the removal of human remains.'" Id. at 265 (quoting H.R. Rep. No. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367). Accordingly, applying the Act to order disinterment would run contrary to Congress's intent to protect Native American burial sites.

Here, the same reasoning counsels against using NAGPRA to compel the Army to disinter Samuel and Edward's remains. Such an

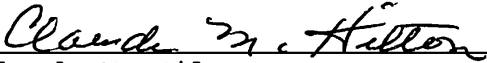
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order would invert a statute designed to respond to the illegal excavation of graves on tribal and Federal lands. NAGPRA's first objective is to protect Native American burial sites and to require excavation of such sites only by permit. While the Court acknowledges Winnebago's interest in possessing Samuel and Edward's remains, the Court will not order the excavation of buried remains where § 3005(a)(4) does not confer such authority.

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

An appropriate Order shall issue.

Alexandria, Virginia
August 20, 2024



Claude M. Hilton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Winnebago Tribe of Nebraska,

Plaintiff,

v.

Department of the Army,
et al.,

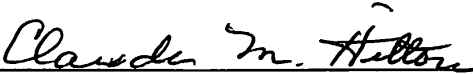
Defendants.

Civil Action No. 1:24-cv-78

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Motion to Dismiss is **GRANTED**, and this case is **DISMISSED**.



CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 20, 2024

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WINNEBAGO TRIBE OF NEBRASKA, A)
FEDERALLY RECOGNIZED INDIAN)
TRIBE,)
PLAINTIFF,)
VS.)
UNITED STATES DEPARTMENT OF)
THE ARMY, *ET AL.*,)
DEFENDANTS.)

1:24-CV-78 CMH/IDD
ALEXANDRIA, VIRGINIA
JULY 12, 2024

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

A P P E A R A N C E S

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United States District Court

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1 (JULY 12, 2024, 11:11 A.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: Civil Action 24-78, *Winnebago*
3 *Tribe of Nebraska versus Department of the Army, et al.*

4 Would counsel please note their appearances for the
5 record.

6 MS. LEVENSON: Good morning, Your Honor. Rebecca
7 Levenson, Assistant United States Attorney for the defendant,
8 U.S. Government. Arguing today is Peter Kryn Dykema from the
9 Department of Justice.

10 THE COURT: All right. Very well. Good morning.

11 MR. DYKEMA: Good morning.

12 MS. WRIGHT: Good morning, Your Honor. Beth Wright.
13 I represent plaintiff, the Winnebago Tribe of Nebraska.

14 THE COURT: Okay.

15 MR. SEARLE: Good morning, Your Honor. Jason Searle,
16 also on behalf of plaintiff.

17 THE COURT: Okay.

18 MS. WERKHEISER: Your Honor, I'm Marion Werkheiser.
19 I'm local counsel for the Winnebago Tribe.

20 THE COURT: All right. Good morning.

21 All right. Counsel, this comes on on your motion.

22 MR. DYKEMA: Yes, Your Honor.

23 **ARGUMENT**

24 MR. DYKEMA: May it please the Court. My name is
25 Peter Kryn Dykema, and it is my privilege today to speak on

1 behalf of the Department of the Army, its instrumentalities and
2 its officers.

3 Your Honor, this case involves the Native American
4 Grave Protection and Repatriation Act. The question is whether
5 that act, NAGPRA, applies to the remains of two young men who
6 were buried at the Carlisle Boarding School about 100 years
7 ago.

8 The question here is not whether the Army, which
9 owns the cemetery in Carlisle, will help the plaintiff, the
10 Winnebago Tribe, with the repatriation and reburial of the
11 boys' remains. The Army has repeatedly assured the tribe that
12 it is ready and willing to do just that and at the Army's
13 expense, under procedures the Army has adopted for precisely
14 that purpose. The plaintiff insists instead that the Army
15 should follow the procedures and requirements of NAGPRA.

16 The question before the Court is this: Do the
17 NAGPRA repatriation requirements plaintiff invokes apply to
18 buried remains?

19 What is NAGPRA? NAGPRA is a law passed in 1990
20 sponsored by Senators McCain and Inouye, two legislators with a
21 lifelong commitment to Native American welfare and dignity.
22 The core concern of law of NAGPRA is grave robbing, past and
23 present. The inspiration of the act was in large part the
24 realization that American museums held collections of Native
25 American bones and burial artifacts numbering in the thousands.

1 Those collections were created in part by grave
2 robbing, inspired partly by the 1906 Antiquities Act which
3 identified Native American bones and artifacts as having
4 anthropological value. They were gathered; sold to museums
5 here and in Europe.

6 When NAGPRA was passed, it sought to accomplish two
7 goals. First, allow tribes to retrieve the remains, the bones
8 and artifacts, held by museums for proper burial in accordance
9 with Native American religious beliefs.

10 Second, the purpose of NAGPRA was to stop future
11 grave robbing by criminalizing grave robbing and by creating
12 procedures to apply when and if Native American remains were
13 disinterred, either intentionally or unintentionally.

14 Plaintiffs invoke the repatriation requirements of
15 NAGPRA. Whether those requirements apply here turns out three
16 questions. Two of those questions involve the statutory term
17 holdings or collections. That is a term that appears
18 repeatedly in the statute which applies to the holdings or
19 collections of museums and agencies.

20 The two questions are these: Are the NAGPRA
21 repatriation requirements limited to holdings or collections of
22 Native American remains?

23 Second, if those requirements -- if those
24 repatriation requirements are limited to holdings and
25 collections, do buried remains, like those at issue here, come

1 within the meaning of that term holdings or collections?

2 The reason plaintiff's suit must be dismissed is
3 the fact that NAGPRA's repatriation requirements in fact only
4 apply to holdings and collections and the fact that buried
5 remains do not constitute holdings or collections.

6 As we've detailed in our papers, which I won't
7 belabor here, those conclusions that only holdings or
8 collections are subject to repatriation and that buried
9 remains, remains in the ground, are not holdings or
10 collections, those conclusions are compelled by the plain
11 language of the statute, by the purpose and structure of the
12 statute, by the legislative history of the statute, and by the
13 Interior Department's implementing regulations.

14 The third of the three questions that our motion
15 presents to the Court is, stepping back, whether NAGPRA under
16 any circumstances requires the exhumation of buried remains.
17 NAGPRA clearly requires the inventorying and repatriation of
18 bones held in museum collections and associated funerary
19 objects. It -- but does it -- does NAGPRA's repatriation
20 requirements apply at all to buried remains?

21 The answer to that is, no, it does not. As we --
22 as we have laid out in our papers, Your Honor, that conclusion
23 is driven by the history and purposes of the statute. The
24 statute -- the legislative history of the statute talks in
25 great detail about the obligations of museums and the

1 collections that they hold. It hardly says a word about
2 cemeteries or graveyards or buried remains.

3 The conclusion that NAGPRA does not require the
4 disinterment of buried remains is also compelled by the
5 implementing regulations. The Department of the Interior has
6 found that.

7 Third, the conclusion that NAGPRA doesn't apply
8 does not require the disinterment of buried remains is
9 compelled by the three cases that address the issue: *Hawk v.*
10 *Danforth*, the *Geronimo* case, and the *Thorpe* decision.

11 Now, learned counsel for the tribe will stress that
12 none of those cases is a close factual parallel to what we have
13 here - true. Counsel will stress that none of those cases is a
14 controlling precedent. They're not Fourth Circuit. They're
15 not even Virginia - true. Counsel will stress that none of
16 those cases squarely address the precise legal issue presented
17 here - true. But all three cases, Your Honor, came to the
18 conclusion that NAGPRA doesn't require the exhumation of buried
19 remains, all three, and there is no contrary decision.

20 Finally, Your Honor, decision on our motion has to
21 be guided by a consideration of the practicalities here. There
22 is no mention in the statute, there's no mention in the
23 legislative history of having to -- of forcing -- that the
24 statute's forcing anyone to dig up remains and rebury them. If
25 the plaintiff's reading of the statute, though, is correct,

1 former tribal representatives, including the Chairwoman of the
2 tribe, Victoria Kitcheyan and the Vice Chairman, Isaac Smith.

3 This case is about Winnebago's rights under NAGPRA
4 to bring the remains of its children home. Defendants have not
5 said that they will return remains to the tribe. They will
6 only return the remains to a closest living relative, which is
7 a challenging thing to identify. Defendants argue that this
8 case does not fit under NAGPRA, but NAGPRA ensures exactly what
9 Winnebago seeks here, that the remains of their relatives are
10 returned to them.

11 125 years ago when Samuel and Edward died, they
12 were not returned home to Winnebago or to their families.
13 Instead, Samuel and Edward's remains were buried, exhumed,
14 reburied and exploited, all without consent of the tribe or the
15 families. To defeat defendants' motion to dismiss, Winnebago
16 need only have pled facts sufficient to entitle it to relief on
17 at least one cognizable legal theory.

18 Today I'll make three main points why Winnebago
19 meets this standard and why the Court should deny defendants'
20 motion. These three points refute defendants' overarching
21 legal theory that remains in the ground are not subject to
22 NAGPRA's repatriation provisions.

23 First, the plain language of 3005(a)(4), the
24 repatriation provision to which Winnebago made its request is
25 clear. The only requirement before repatriation can occur is

1 that the human remains be in the possession or control of the
2 federal agency, and that their cultural affiliation be
3 established.

4 Contrary to what defendants say, holding or
5 collection cannot be read into the text as a prerequisite to
6 repatriation. Winnebago defeats the motion on this ground.

7 Second, even if holding or collection is a
8 requirement, the remains at Carlisle cemetery constitute a
9 holding or collection based on how defendants have treated the
10 remains historically and in the present and based on those
11 terms' ordinary meanings.

12 Third, defendants misconstrue *Hawk*, *Geronimo*, and
13 *Thorpe* as no case supports defendants' legal theory that
14 remains in the ground are not subject to repatriation or that
15 remains -- or that federal agencies are not required to
16 disinter human remains to effectuate a valid repatriation
17 request.

18 The purpose of NAGPRA is to empower Indian tribes
19 to seek the return of their children's remains on behalf of
20 their members, and that is what Winnebago seeks here today.

21 Beginning with Winnebago's primary arguments, this
22 motion can easily be decided on the plain language of the
23 statute. NAGPRA's repatriation provisions contemplate multiple
24 repatriation scenarios, each to return remains based on
25 cultural affiliation.

1 Under Section 3005, the repatriation provisions,
2 repatriation Native American human remains can be accomplished
3 by a subject -- Subsection (a)(1) or Subsection (a)(4).
4 Winnebago made its request pursuant to (a)(4).

5 Under the text of (a)(4), there's no requirement
6 that an Indian tribe prove the existence of a holding or
7 collection before the remains can be repatriated. While
8 defendants' motion to dismiss fails to address 3005(a)(4)
9 entirely, they attempt to rescue this omission in their
10 response and raise several arguments why. I'll respond to two
11 of those today.

12 The first is that defendants argue because (a)(4)
13 is structured after (a)(1) and (a)(2), that (a)(4) is
14 continuing to legislate regarding remains subject to an
15 inventory. However, what's important to note is that what
16 connects (a)(1) to (a)(2) to (a)(4) is not the requirements
17 that remains be in a holding or collection, but the requirement
18 that cultural affiliation be established. In (a)(1) and
19 (a)(2), the burden is on the federal agency to establish
20 cultural affiliation, and in (a)(4) the burden is on the Indian
21 tribe.

22 Next, defendants raise the slippery slope argument
23 arguing that NAGPRA's provisions will attach to all federal
24 cemeteries, but that's not the case. NAGPRA only attaches to
25 Native American human remains to which a federal agency does

1 not have right of possession to. That easily prevents NAGPRA's
2 attachment to many federal cemeteries and federal land because
3 it's likely that those who are buried in federal cemeteries
4 have made the decision themselves to be buried there or have
5 had the next of kin decide that decision to be buried there.
6 That's not the case for Samuel and Edward.

7 Turning to Winnebago's second argument, Winnebago
8 has sufficiently alleged that the -- if holding or collection
9 is a prerequisite of repatriation, that these remains are
10 holding or collection. The Court must begin with a statute
11 here, but holding or collection is not defined by the statute,
12 so the Court looks to the ordinary meaning. And based on the
13 ordinary meaning of both holding or collection, these remains
14 meet that standard.

15 Under the ordinary meaning of holding, holding is
16 defined as property. Defendants clearly treat the remains as
17 their property as they exercise complete ownership and control
18 over their remains in a manner that NAGPRA sought to correct.
19 NAGPRA sought to ensure that the rightful owners to the Native
20 American human -- that to clarify that Native American Indian
21 tribes were the rightful owners of the Native American human
22 remains.

23 Second, under the ordinary meaning of collection,
24 collection is something accumulated or an accumulation of
25 objects. It's clear that the way defendants treat the remains

1 at Carlisle cemetery as if they are their collection. The most
2 glaring example is in 1927 when defendants gathered the remains
3 of the children from their burial site, threw them into pine
4 boxes and reburied them at Carlisle cemetery, all without the
5 consent or notice to the tribes or the children's families.

6 Further, defendants use Carlisle cemetery as a stop
7 on their tour to tell a story of Carlisle that's inconsistent
8 with the tribe's version of history.

9 Further, defendants have conducted GPR surveys of
10 the cemetery, and overall defendants have used these remains as
11 a collection based on their Native American identity.

12 It's clear that Carlisle cemetery is no ordinary
13 cemetery, as there was no consent from the tribe or the
14 families for the children to be reburied there after defendants
15 initially dug them up.

16 In enacting NAGPRA, Congress was concerned with the
17 equal treatment of Native American human remains, recognizing
18 that Native American human remains were treated differently and
19 recognizing that when it came to Indian tribes' desires to bury
20 their dead that was ignored. And that is exactly what has
21 happened here today, what has happened here historically, that
22 the -- the desires of the Winnebago Tribe of Nebraska to bury
23 Samuel and Edward have been ignored.

24 Turning to Winnebago's third and final argument,
25 *Hawk, Geronimo, and Thorpe* do not hold that remains in the

1 ground are not subject to NAGPRA's repatriation provisions or
2 that federal agencies are not required to disinter. *Hawk* and
3 *Geronimo* are distinguishable on both the law and the facts. In
4 both cases, plaintiffs sought to use NAGPRA to compel
5 defendants to find potential burial sites. In both cases,
6 neither of the plaintiffs knew where the burial sites were or
7 even knew if the human remains were in the defendants'
8 possession or control. Neither case did the Court address or
9 interpret NAGPRA's repatriation provisions, the provisions that
10 we're here discussing today.

11 Winnebago does not seek the type of relief sought
12 in *Hawk* or *Geronimo*. Instead, Winnebago seeks the return of
13 remains from Carlisle cemetery that defendants do not dispute
14 are in their possession or control.

15 Third, *Thorpe* -- in *Thorpe*, the Court did not hold
16 that the repatriation provisions did not apply to remains in
17 the ground. What the Court said was that it would not make
18 sense to require the disinterment and return of human remains
19 that had been buried in their final resting place with someone
20 who had the legal authority to decide what that final resting
21 place would be.

22 Here, it is plainly clear, and defendants know
23 that, that Winnebago did not make the decision to bury Samuel
24 or Edward at Carlisle cemetery the first time or the second
25 time. *Thorpe* does not bear on this case. Because Winnebago

1 has alleged sufficient facts that is -- that it is entitled to
2 relief on at least one cognizable legal theory, Winnebago
3 respectfully asks this Court to deny defendants' motion.

4 Thank you.

5 THE COURT: All right.

6 MR. DYKEMA: Would the Court like to hear further from
7 the government?

8 THE COURT: If there's anything to tell me, I'll --
9 I'm not inquiring of anything.

10 MR. DYKEMA: Let me speak briefly.

11 **FURTHER ARGUMENT**

12 MR. DYKEMA: The plaintiffs mentioned that the Army
13 regulations focus on the closest living relative. As I
14 understand it from Plaintiff, Winnebago are unhappy in many
15 respects with the procedure that the Army has adopted for
16 dealing with this situation and for helping them repatriate the
17 remains of these two young men. Whether that procedure is
18 adequate or is overly bureaucratic or is precisely right isn't
19 before the Court, but the Army has said repeatedly that it
20 stands willing and able to help them repatriate these boys and
21 at -- and at the Army's expense.

22 Counsel suggested that we are presenting the Court
23 with a parade of horribles in talking about the fact the Army
24 controls 200 cemeteries and millions of acres of national park
25 land. Again, it is not a parade of horribles. Your Honor,

1 we're not suggesting that it's a bad idea. It would be a bad
2 idea for Congress to adopt a statute that would facilitate the
3 return of remains held, that are current in the ground either
4 in federal parks or in -- in cemeteries. Our point just is
5 Congress hasn't passed that statute yet, and NAGPRA is not that
6 statute.

7 Counsel suggested that -- that many of these
8 cemeteries and other places would not come within the scope of
9 the statute because the statute only applies where the owner of
10 the cemetery doesn't have a right of possession. Well, that's
11 true of all remains. And as we've said in our papers and in
12 the -- the cases that we cite at page 14 of our reply brief, a
13 cemetery owner doesn't own the bones, doesn't have control or
14 possession of the bones.

15 In fact, buried remains are not regarded as
16 property under the law. So, the fact is if this statute
17 were -- had been written so as to apply to buried remains, it
18 would apply all across the country to thousands of remains.

19 And again, if Congress wanted to do that, consider
20 for a moment what Congress would have done. They would have
21 required consultation with the relevant tribe. The statutory
22 term they invoke, 3005(a)(4), the statute they invoke says that
23 in the case of these particular remains, to which it applies,
24 the remains would be expeditiously returned. That's all it
25 says.

1 There's no discussion of whether you'd need to
2 consult with the relevant tribe. There's no consideration of
3 whether, when you dig up these remains, tribal representatives
4 and religious dignitaries from the tribe need to be there.
5 There's no consideration of whether there's a demand for
6 repatriation of remains in Shoshone National Park; whether
7 there will be steps taken to make sure that sacred sites are
8 not defiled by the exhumation.

9 Well, if Senator McCain or Senator Inouye were
10 trying to do what plaintiffs are trying to foist onto this
11 statute, they would have considered all those things, and there
12 would be detailed considerations for them.

13 Now, arguments were made about the specific
14 language of 3005(a)(4). Arguments were made about the plain
15 meaning of the words. That's been addressed at some length in
16 the papers.

17 I think it's been well-addressed by both parties.
18 I don't think I can add much to it. We stand on our papers.

19 Thank you, Your Honor.

20 THE COURT: All right.

21 All right. I'm going to look at this a little
22 further. I'll get you-all an answer as quickly as I can.

23 We'll adjourn until Monday morning at 10:00
24 o'clock.

25 THE LAW CLERK: All rise.

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United States District Court for the Eastern District of Virginia

District of Alexandria

Docket Number 1:24-cv-78

Winnebago Tribe of Nebraska,

Plaintiff

v.

Department of the Army,
et al.,

Defendants

)
)
)
)

Notice of Appeal

The Winnebago Tribe of Nebraska (name all parties taking the appeal)*
appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment
entered on August 20, 2024 (state the date the judgment was entered).

(s) /s/ Gregory Werkheiser

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[Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete the Declaration of Inmate Filing and file that declaration along with this Notice of Appeal]

* See Rule 3(c) for permissible ways of identifying appellants.