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No. XXXX

In the Supreme Court of the United States

EDWARD WILLIAMSON,
PETITIONER

v.

CHACO NATION OF THE CHACO INDIAN RESERVATION, DEPAULIA
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM: G
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QUESTIONS PRESENTED

1. Must human remains bear some relationship to a *presently existing* tribe, people, or culture in order to be "Native American" under the Native American Graves Protection and Repatriation Act ("NAGPRA") and therefore be subject to its ownership provisions?

2. Does transferring ownership of objects found on private property to an Indian tribe under NAGPRA violate the Takings Clause of the Fifth Amendment of the United States Constitution where: (1) the transfer is based solely on the tribe's geographical connection to the privately held land; (2) NAGPRA fails to articulate any public purpose served by the transfer; and (3) the owner of the private property receives no compensation as a result of the transfer?

OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Twelfth Circuit, reversing the decision of the district court, is not reported. *Chaco Nation of the Chaco Indian Reservation v. Williamson*, No. 12-1953 (12th Cir. Nov. 14, 2012). The order and opinion of the United States District Court for the Northern District of DePaulia, holding that the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq., does not vest control of the disposition of the "Harper Man" in the Chaco Nation and that the vesting of funerary objects associated with Native American humans remains, which were removed from land owned in fee simple by Dr. Edward Williamson, would constitute an unconstitutional taking of property under the Fifth Amendment, is reported. *Chaco Nation of the Chaco Indian Reservation v. Williamson*, 311 F. Supp. 3d 1983 (N.D. Dep. 2011).

JURISDICTION

The judgment of the United States Court of Appeals for the Twelfth Circuit was entered on November 14. 2012. On November

15, 2012, this Court granted Petitioner's writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATUTORY PROVISION

The Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq., requiring federal agencies and institutions receiving federal funding to return Native American human remains, funerary and sacred objects, and objects of cultural patrimony to lineal descendants or culturally affiliated Indian tribes, is reproduced in the Appendix of this brief.

STATEMENT OF THE CASE

This case concerns the lawful scope of the Native American Graves Protection and Repatriation Act ("NAGPRA"), Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. § 3001 et seq.). The facts of this case demonstrate that over-broad application of the statute will result in transfers of human remains and cultural objects neither anticipated nor intended by Congress in framing the statute.

Petitioner, Dr. Edward Williamson ("Dr. Williamson"), a retired professor of ethnobiology at DePaulia University and a member of the National Academy of Sciences, is the owner in fee simple of Harper Springs Ranch—eighty acres of land, bounded on the east by the Abiquiu River, which has been in possession of the Williamson family since 1900. *Chaco Nation of the Chaco Indian Reservation v. Williamson*, No. 12-1953, slip op. at 3 (12th Cir. Nov. 14, 2012). Harper Springs Ranch is one of several non-Indian owned allotments located within the exterior boundaries of the present-day Chaco Indian Reservation and situated over 1,100 miles from the historical territories of the Respondent, the Chaco Nation of the Chaco Indian Reservation, Depaulia ("Chaco Nation"). *Id.* at 2-3.

In August 2008, flooding of the Abiquiu River created two twenty-foot vertical escarpments ("Site I" and "Site II") on the eastern boundary of Dr. Williamson's land. *Id.* at 3. While surveying the damage, Dr. Williamson discovered human remains embedded in the resulting sediment deposits at both sites, which

were accompanied by two intact vessels ("jars") at Site II. *Id.* at 3-4. Concerned about the imminent threat of further flooding and heavy rain, Williamson removed the *ex situ* remains and jars to his house for protection. *Id.* at 4.

After his discovery, Dr. Williamson promptly notified the President of the Chaco Nation, and in full compliance with DePaulia Stat. §862.05(4), contacted the local police, who transferred the objects to the district medical examiner for analysis. *Id.* The medical examiner determined that the objects were not of recent origin and enlisted the assistance of Dr. Christie Toth, an anthropologist at the local university, for further dating and identification. *Id.*

Dr. Toth concluded that the human remains at Site II are Native American, and identified the jars as Fancy IIIc1b Ware, a rare form of pottery belonging to the Early Riverine Horizon of Late DePaulian Culture (A.D. 1300-1500). *Id.* In recent auctions, jars of this type have sold for over $8,000 each—a price that will be easily commanded by the Harper Springs Ranch jars, which are fully intact vessels, painted inside and out. *Id.* at 4 n.4. Dr. Toth also determined that the remains found at Site I, the so-called "Harper Man,"[1] are approximately 14,000 years old, making it the oldest and best-preserved human skeleton older than 8,000 years ever discovered in the Americas. *Id.* at 5. Several of its physical features – including the face and skull – differ from those of modern American Indians. *Id.*

In January 2009, the Chaco Nation requested that Dr. Williamson transfer to the tribe the jars and both sets of human remains discovered on his land, although the Chaco Nation concedes that it is not culturally affiliated with either the human remains or the jars. *Id.* at 6 & n.7. While Dr. Williamson agreed to transfer the Native American remains from Site II, he declined to convey the "Harper Man" and the jars. *Id.* at 6. As a result, the Chaco Nation filed the present action in the U.S. District Court for the Northern District of DePaulia under section 15 of NAGPRA, 25 U.S.C. § 3013, alleging that Dr. Williamson had violated

1. The human remains discovered at Site II have come to be called the "Harper Man," a term which is adopted in this brief, as in the proceedings of the Twelfth Circuit Court of Appeals below.

section 3 of NAGPRA, 25 U.S.C. § 3002 by retaining the "Harper Man" and the jars. *Id.*

The Chaco Nation requested that the district court compel Dr. Williamson to make the transfer by issuing an order to enforce the ownership or control provisions of section 3(a)(2)(a) of NAGPRA, 25 U.S.C. § 3002 (a)(2)(A). *Id.* On cross-motions for summary judgment, the district court denied both requests, holding: first, that NAGPRA does not vest in the Chaco Nation control of the 14,000 year old "Harper Man" because NAGPRA's ownership provisions apply only to human remains which bear some relationship to a *presently existing* tribe, people or culture; and, second, that vesting control in the Chaco Nation of the jars, removed from land owned in fee simple by Dr. Williamson, would constitute an unconstitutional taking of property under the Fifth Amendment. *Id.* at 6-7. On November 14, 2012, the United States Court of Appeals for the Twelfth Circuit reversed this decision as to both holdings. *Id.* at 7.

Dr. Williamson appeals the decision of the Twelfth Circuit and presents two questions to this Court.

SUMMARY OF THE ARGUMENT

Both challenges to the request of the Chaco Nation, for an order compelling Dr. Williamson, to transfer control of the "Harper Man" and jars under section 3(a)(2)(a) of NAGPRA, 25 U.S.C. § 3002 (a)(2)(A) (2006), require this Court to reverse the decision of the United States Court of Appeals for the Twelfth Circuit.

First, the decision should be reversed because NAGPRA's ownership provisions apply only to "Native American" human remains, which, under the statutory definition, must bear some relationship to a *presently existing* Indian tribe. Under NAGPRA, "Native American" is defined as "of, or relating to, a tribe, people or culture that *is indigenous* to the United States." 25 U.S.C. § 3001(9) (emphasis added). Neither NAGPRA nor its implementing regulations define the phrase "is indigenous." However, in *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), the Ninth Circuit—the only circuit court other than the Twelfth Circuit Court of Appeals to consider this question—interpreted the phrase "is indigenous" as requiring a relationship to a *presently existing*

Indian tribe. This Court should adopt the reasoning of the Ninth Circuit and reject the Twelfth Circuit's contrary construction for two reasons. First, the principles of statutory interpretation require that the definition of "Native American" be construed as relating to a *presently existing* Indian tribe. The plain meaning of the statutory language, particularly the use of the present tense, reveal a Congressional intent to limit the reach of NAGPRA's ownership provisions and, contrary to the reasoning of the Twelfth Circuit, such a circumscribed definition neither leads to absurdities, nor renders other provisions of the statute null. Second, such an interpretation is consistent with the purposes underlying NAGPRA's enactment.

Second, the decision should be reversed because without just compensation, vesting ownership in the Chaco Nation of the valuable jars removed from Dr. Williamson's property violates the Takings Clause of the Fifth Amendment. Under the common law of finds, Dr. Williamson has a substantive, protected property interest in the jars—an interest severable from an interest in the associated human remains, because a burial including human remains and associated funerary objects is not a unified *res* for purposes of NAGPRA. Consequently, under this Court's Fifth Amendment jurisprudence, transferring ownership of the jars constitutes an unconstitutional taking for two reasons: first, NAGPRA does not articulate a public purpose served by the taking; and, second, even if NAGPRA serves a public purpose, without just compensation, transferring ownership of the jars violates the Fifth Amendment. For these reasons, Dr. Williamson submits that the Twelfth Circuit erred in reversing the decision of the district court and respectfully requests that this Court reverse the decision of the Twelfth Circuit.

ARGUMENT

THIS COURT SHOULD REVERSE THE TWELFTH CIRCUIT'S DECISION BECAUSE THE PLAIN MEANING AND PURPOSE OF NAGPRA'S OWNERSHIP PROVISIONS REQUIRE A CIRCUMSCRIBED DEFINITION OF "NATIVE AMERICAN" AND BECAUSE WITHOUT JUST COMPENSATION, VESTING OWNERSHIP IN THE CHACO NATION OF THE JARS REMOVED FROM DR. WILLIAMSON'S PROPERTY VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The over-broad interpretation of NAGPRA adopted in the decision of the Twelfth Circuit Court of Appeals exceeds the plain meaning and purpose of the statute, and contravenes the Fifth Amendment of the U.S. Constitution. In pertinent part, NAGPRA provides for the disposition of "Native American" human remains and cultural objects "excavated or discovered on Federal or tribal lands after November 16, 1990." 25 U.S.C. § 3001(a). Dr. Williamson does not dispute that for purposes of the statute, the "Harper Man" and jars were discovered on "tribal land."[2] Nonetheless, Dr. Williamson contests vesting control of these items in the Chaco Nation for two independent reasons.

First, NAGPRA's ownership provisions do not apply to the "Harper Man" because these remains are not "Native American" under the statutory definition, which requires that human remains bear some relationship to a *presently existing* Indian tribe to fall within NAGPRA's purview. The plain meaning of the statutory language, principles of statutory interpretation, and Congressional intent in enacting NAGPRA demand this construction. Second, because vesting control of the jars in the Chaco Nation would constitute an uncompensated taking of Dr. Williamson's property in violation of the Fifth Amendment, NAGPRA's ownership provisions, 25 U.S.C. § 3002(3), do not apply to these objects. Under this Court's jurisprudence, transferring ownership of the jars without just compensation violates the Fifth Amendment

2. NAGPRA defines "tribal land" as including "all lands within the exterior boundaries of any Indian reservation." 25 U.S.C. § 3001(15)(A).

because Dr. Williamson has a constitutionally protected property interest in the jars—an interest derived from the common law of finds which is severable from any interest in the associated human remains—and because NAGPRA does not articulate a public purpose served by the transfer.

A. NAGPRA Does Not Vest Control of the "Harper Man" in the Chaco Nation Because the Statute's Ownership Provisions Apply Only to Human Remains Which Bear Some Relationship to a Presently Existing Tribe, People or Culture

The Twelfth Circuit erred in holding that NAGPRA's ownership provisions apply to the culturally unidentifiable, 14,000 year old remains of the "Harper Man," *Chaco Nation of the Chaco Indian Reservation v. Williamson*, No. 12-1953, slip op. at 6-7 (12th Cir. Nov. 14, 2012) (construing 25 U.S.C. § 3001(9) (2006)), because these remains, which bear no relationship to a *presently existing* Indian tribe are not "Native American" under section 2(9) of NAGPRA, 25 U.S.C. § 3001(9). NAGPRA defines "Native American" as "of, or relating to, a tribe, people or culture that *is indigenous* to the United States." 25 U.S.C. § 3001(9). Neither the statute nor its implementing regulations further define the phrase "is indigenous," however, in *Bonnichsen*, the Ninth Circuit interpreted the phrase "as requiring a relationship to a *presently existing* Indian tribe." 367 F.3d at 875, 877-78. This Court should adopt the reasoning of the Ninth Circuit and reject the Twelfth Circuit's contrary construction for two reasons. First, applying the principles of statutory interpretation to this phrase, Congressional intent to circumscribe the reach of NAGPRA's ownership provisions to human remains relating to a *presently existing* tribe is clear. This construction flows from plain meaning of the language, particularly the use of the present tense, and neither leads to absurdities nor renders null other provisions of NAGPRA. Second, because NAGPRA was enacted to protect the interests, dignity, and traditions of modern American Indians, the circumscribed definition furthers the purposes of NAGPRA, while allowing for the pursuit of governmental interests otherwise precluded by an over-broad interpretation.

1. The principles of statutory interpretation require a circumscribed definition of "Native American"

In construing statutory language, it is well established that this Court begins with the language of the statute itself. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (collecting cases). In doing so, this Court "presume[s] that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Accordingly, absent Congressional intent to the contrary, courts "give the words of a statute their ordinary, contemporary, common meaning." *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979).

In applying these principles to NAGPRA's definition of "Native American," this Court must conclude that the plain meaning of the provision requires some relationship to a *presently existing* Indian tribe. NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that *is indigenous* to the United States." 25 U.S.C. § 3001 (2006). Although the phrase "is indigenous" is not further defined in NAGPRA or its implementing regulations, Congressional use of the present tense elucidates the provision's meaning. This Court has repeatedly held that Congressional use of the present tense is significant in interpreting statutory language. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); *see also Carr v. United States*, 130 S. Ct. 2229 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"). In particular, this Court has reasoned that where "Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987), the chosen verb tense reveals a specific intent to exclude the past, *see Carr*, 130 S. Ct. at 2234. Consequently, in defining "Native American" as relating to an Indian tribe that *is indigenous*, the provision should be read as excluding tribes, peoples or cultures that *were* once indigenous to the United States, but are *no longer* in existence.

The Ninth Circuit—the only circuit court other than the Twelfth Circuit to construe this provision—came to the same conclusion in *Bonnichsen*, holding that NAGPRA's ownership provisions did not apply to the remains of the so-called "Kennewick Man," a 9,000 year old, culturally unidentifiable skeleton discovered near Kennewick, Washington, because the statutory definition of "Native American" requires that the remains bear some relationship to a *presently existing* Indian tribe. 367 F.3d at 869. In so holding, the Ninth Circuit concluded that Congressional use of the present tense, as well as the "ordinary [and] natural meaning" of the phrase "is indigenous," clearly demonstrated that "Congress was referring to *presently existing* Indian tribes" in defining "Native American" for purposes of NAGPRA. *Id.* at 875.

This interpretation is further supported when this provision is considered within the broader context of the statute. The distinction between past and present is important to many of the NAGPRA's provisions. For example, "cultural affiliation" is defined as "a relationship . . . which can be reasonably traced historically or prehistorically between a *present day* Indian tribe . . . and an identifiable *earlier group*." 25 U.S.C. § 3001(2) (emphasis added). Additionally, NAGPRA defines sacred objects" as "specific ceremonial objects needed . . . for the practice of traditional Native American religions by their *present day* adherents." 25 U.S.C. § 3001(3)(c) (emphasis added). These and other provisions indicate that in enacting NAGPRA, where Congress intended to recognize *past* groups in addition to *present day* Indian tribes, it did so explicitly.

By contrast, where Congress intended to refer only to presently existing groups in the context of NAGPRA, Congress merely used the present tense. Thus, NAGPRA defines "Native American" as relating to an Indian tribe which "is indigenous" to the United States, 25 U.S.C. § 3001(9), and defines "Indian tribe" as "any tribe, band, nation . . . which *is recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3001(7) (emphasis added). Both provisions deliberately employ the present tense, and to avoid incongruities, these neighboring verbs should be similarly construed. Accordingly, because the Chaco Nation contends that "is indigenous" should be construed as including

tribes that *were once but are no longer* in existence, following this logic "is recognized" must similarly be construed as applying to those tribes that *were once but are no longer* recognized as eligible for special programs and services. *See Carr*, 130 S. Ct. at 2237 (applying the same logic in construing Congressional use of the present tense in the Sex Offender Registration and Notification Act, Pub. L. 109-248, 120 Stat. 590). Such a construction would deprive *presently* existing groups of their status as "Indian tribes" under the statute, limiting NAGPRA's reach only to those groups that once were, but no longer are recognized by the U.S. government as Indians. Such a construction of the definition of "Indian tribes" would be nonsensical given that NAGPRA's purpose is "to benefit modern American Indians." *See Bonnichsen*, 367 F.3d at 876 ("NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains.") (citing H.R.Rep. No. 101–877, 1990 U.S.C.C.A.N. 4367, 4369). Because such a reading of the present tense in the phrase "is recognized" does not accord with the purposes of the statute, and because Congress presumably employed the same verb tense for the same purpose in neighboring definitional provisions, it similarly must be presumed that the Chaco Nation's interpretation of "is indigenous" cannot be sustained with respect to the definition of "Native American."

Furthermore, in NAGPRA's language, where Congress wished to signify a people existing prior to the formation of the United States, Congress did so explicitly. For example, "Native Hawaiian" is defined in NAGPRA as "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 25 U.S.C. § 3001(10). By contrast, the statute defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous *to the United States*." 25 U.S.C. § 3001(9) (emphasis added). Thus in defining "Native Hawaiians," Congress intentionally and expressly included aboriginal peoples predating the formation of the union, but did not do so in defining "Native American." This Court has held that rejection of readily available linguistic alternatives is significant in interpreting Congressional

intent. *See Gwaltney,* 484 U.S. at 57. Consequently, the phrase "is indigenous to the United States" cannot be reasonably be construed as referring to a people who inhabited the territory that is now the United States millennia prior to its formation. Further, if "Native American" were interpreted as including tribes who once existed in the territory that is now the United States prior to its formation, then the term "Native Hawaiian" would be redundant and unnecessary, since the groups referred to would already be included under the statute. Consequently, as the Twelfth Circuit noted, such a construction is untenable, as "statutes must be construed so that no word or clause is rendered surplusage or null." *Williamson*, No. 12-1953, slip op. at 11 (citing *Hohn v. United States*, 524 U.S. 236, 249 (1998)).

For all of these reasons, NAGPRA "*unambiguously* requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American." *Bonnichsen*, 367 F.3d at 875 (emphasis added). A mere claim of ambiguity does not *ipso facto* render the statute ambiguous. Accordingly, the Twelfth Circuit's reliance on the Indian canon of construction, whereby statutes passed for the benefit of Indian tribes are "to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians," *Williamson*, No. 12-1953, slip op. at 12 (quoting *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 396 (1976)), is misplaced. While Congress undeniably enacted NAGPRA to benefit Native Americans, "the Indian canon of construction cannot be used to contradict an unambiguous statute." *Cherokee Nation of Oklahoma v. United States*, 73 Fed. Cl. 467, 478 (Fed. Cl. 2006). Furthermore, the purpose of resolving ambiguous provisions liberally in favor of the Indians is "to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* (quoting *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003)). Protecting the graves of individuals bearing no relationship to a presently existing tribe, people, or culture does not advance this purpose, since tribes no longer in existence have no independence or sovereignty to protect. Finally, even if the statute were ambiguous, the Indian canon of construction would not necessarily *require* a broad interpretation of the statute. The canon requires interpretation "liberally in favor of the Indians."

Id. But a liberal interpretation does not dispose of other principles of statutory interpretation; it merely grants them less interpretive weight. Here, the cumulative persuasiveness of the traditional principles, even under a liberal interpretation, strongly suggests a circumscribed construction of the statutory definition of "Native American."

Contrary to the Twelfth Circuit's conclusions, this circumscribed definition of "Native American" does not lead to absurd results. According to the Twelfth Circuit, if the definition of "Native American" requires a relationship to some *presently existing* Indian tribe, "Native American-ness becomes mutable – one day you're in, and the next day you're out . . . We consider that result to be absurd." *Williamson*, No. 12-1953, slip op. at 11. While it might seem illogical if the "mere passage of time" could alter whether an individual was or was not Native American, this argument sidesteps the actual issue before this Court. As noted in the dissenting opinion below, what is at stake is not "whether the human remains of Harper Man *are* Native American," but rather, whether those remains are "Native American *for purposes of NAGPRA*." *Williamson*, No. 12-1953, slip op. at 20 (Lemoncelli, J., dissenting). While "Native American" is used colloquially to denote genetic, cultural, ethnic, religious and other arguably immutable characteristics and relationships of the sort which seem to have concerned the Twelfth Circuit, consideration of any of these *extra-statutory* definitions is fundamentally at odds with the principles of statutory interpretation. Whether the definition for a word provided in a statute to explain the scope of that word's meaning within the statute accords with other meanings for that term beyond the statute is irrelevant to the judicial project of statutory construction.

That human remains which are today "Native American," by virtue of their affiliation with a presently existing tribe indigenous to the United States, might not be "Native American" in 14,000 years is in perfect accordance with both language and logic. The passage of time, by its capacity to change relations, may alter the applicability of terms to their objects. For example, a woman may be described as "married," but the passage of time and the death of her spouse will alter the applicability of this term to that same woman. The woman is one day married; the next she is not. So too

might time alter the applicability of the term "Native American" to human remains for purposes of NAGPRA, as tribes cease to exist over time. Nevertheless, the Twelfth Circuit concludes –without argument – that the applicability of "Native American" to a tribe, people, or culture is not the sort of thing that changes over time, as a straightforward interpretation of the statute would imply.

Neither does requiring a relationship to some *presently existing* Indian tribe render NAGPRA's provisions concerning "culturally unidentifiable human remains" null, as the Twelfth Circuit resolved. *Williamson*, No. 12-1953, slip op. at 12 (concluding that "if only remains with a relationship to a presently-existing tribe would qualify as 'Native American,' there would be no such thing as 'culturally unidentifiable human remains'"). This conclusion misinterprets the plain meaning of the statute. NAGPRA mandates a two-part inquiry when determining whether human remains or cultural objects are subject to its provisions: (1) "whether the human remains are Native American within the meaning of NAGPRA;" and, (2) "if they are, then the requirements of NAGPRA attach, and an inquiry into the allocation of ownership or control is conducted." *Id.* at 8-9 (citing *Bonnichsen*, 367 F.3d at 875). Consequently, it is possible that human remains can be "Native American" for purposes of the statute, but not readily identifiable as belonging to any *particular* tribe.

The provisions concerning the disposition of "culturally unidentifiable human remains" confirm that Congress anticipated, and in fact provided for, just this scenario. For example, NAGPRA provides for the formation of a federal committee to review the statute's implementation, with responsibilities that include "reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items." 25 U.S.C. § 3006(c)(3)-(5). This provision reveals the fact that Congress foresaw that determining the *specific* cultural affiliation of Native American human remains or objects might be disputed or not readily achieved—and empowered a review committee to make decisions in unclear cases. Similarly, NAGPRA provides that "if the cultural affiliation of the objects *cannot be reasonably ascertained* and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal

land of some Indian tribe," then those objects belong to the tribe which aboriginally occupied that land, if "such tribe states a claim for such remains or objects." 25 U.S.C. § 3002(a)(2)(C). It is evident from these and similar provisions that Congress used the term "culturally unidentifiable human remains" to refer to those remains which, though Native American have not been or cannot be readily shown to belong to a *particular* tribe. For all of these reasons, applying the principles of interpretation to the plain language of statute requires a relationship to some *presently existing* Indian tribe to be considered "Native American" for purposes of NAGPRA.

2. Construing "Native American" broadly does not accord with the purposes of NAGPRA

Second, a broad interpretation of "Native American" is neither required by NAGPRA nor in accordance with its purposes. NAGPRA was enacted "to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death." *Bonnichsen*, 367 F.3d at 876. The statute was intended "to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains." *Id.* (citing H.R. Rep. No. 101–877 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369). It is thus evident that "Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them." *Id.* Nevertheless, the Chaco Nation would give "Native American status to any remains found within the United States regardless of age and regardless of lack of connection to existing indigenous tribes." *Id.* Such an aim is not supported by NAGPRA.

While the broad interpretation of "Native American" espoused by the Chaco Nation would also serve the purpose of NAGPRA—insofar as to benefit all tribes that have ever been indigenous to the United States would certainly also benefit those that are *presently* indigenous—such an all-encompassing interpretation of NAGPRA's purpose is at odds with the statute's language. For example, NAGPRA's text explicitly acknowledges another interest

in human remains and objects possessed by federal agencies and institutions such as museums: "culturally affiliated Native American cultural items . . . shall [be expeditiously returned] . . . *unless* such items are indispensable for completion of a specific scientific study, the outcome of which would be a major benefit to the United States." 25 U.S.C. § 3005(5)(b). This provision qualifies the statutory standard for repatriation of items owned by Federal agencies or museums. While this provision does not apply to the remains of the "Harper Man," because these remains are not in the possession of a Federal agency or institution receiving federal funding—the provision nonetheless illustrates that the statute anticipates other interests, such as a science, which are at odds with the over-broad interpretation of "Native American" advanced by the Chaco Nation.

Finally, the Harper Man is so temporally and biologically removed from modern American Indians that it cannot be "Native American" within the sense of the statute. NAGPRA, enacted for the interests of modern-day American Indian descendants and their ancestors, *Bonnichsen*, 367 F.3d at 876, provides for the proper ownership of "Native American" human remains. 25 U.S.C. § 3002(a). Yet Harper Man "attracted attention because some of its physical features—such as the shape of the face and skull—*differed* from those of modern American Indians." *Williamson*, No. 12-1953, slip op. at 5 (emphasis added). In other words, Harper Man is so temporally removed from modern American Indians, in whose interests NAGPRA was enacted, as to possess salient biological and structural distinctions. Such a person can hardly be called an "ancestor" to modern American Indians in the sense of the statute. *See Bonnichsen*, 367 F.3d at 879 ("Human remains that are 8,340 to 9,200 years old and that bear only incidental genetic resemblance to modern-day American Indians, along with incidental genetic resemblance to other peoples, cannot be said to be the Indians' 'ancestors' within Congress's meaning"). Yet according to the Twelfth Circuit, *any* prior inhabitant of what is presently the territory of the United States would be an ancestor to the modern Native Americans. This would not serve the purposes of NAGPRA. *See id.* ("Congress enacted NAGPRA to give American Indians control over the remains of *their genetic* and *cultural forbearers*, not over the remains of people bearing no

special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.") (emphasis added).

For these reasons, this Court should reverse the decision of the Twelfth Circuit because a circumscribed interpretation of "Native American" under NAGPRA, whereby "Native American" means "[bearing] some relationship to a *presently existing* tribe, people, or culture," is not only required by the principles of statutory interpretation, but also best accords with NAGPRA's purpose.

B. Without Just Compensation, Vesting Ownership of the Jars Removed From Dr. Williamson's Property Violates the Fifth Amendment Takings Clause

The Twelfth Circuit also erred in holding that vesting ownership in the Chaco Nation of the jars found on Dr. Williamson's property was permissible under the Takings Clause of the Fifth Amendment. Although Congress has the authority to regulate affairs between the Federal government and Native American tribes, Congress cannot exercise that authority in a way which violates other Constitutional rights, including the Fifth Amendment's guarantee that the government will not take private property for a public use without just compensation. Without just compensation, vesting ownership in the jars found embedded in Dr. Williamson's property violates this prohibition for three reasons. First, under the common law of finds, Dr. Williamson has a protected property interest in the jars, while the Chaco Nation has no such interest. Second, Dr. Williamson's interest in the jars is severable from an interest in the associated remains. Third, because Dr. Williamson has a protected interest in the jars, physical appropriation of these objects, without serving a public purpose and without just compensation, is an unconstitutional "taking" under this Court's Fifth Amendment jurisprudence. For these reasons, this Court should hold that vesting ownership of the associated jars in the Chaco Nation is an unconstitutional taking of property, and accordingly, under 43 C.F.R. § 10.2(f)(2)(iv), the actions authorized by NAGPRA do not apply to Dr. Williamson's land with respect to these objects.

1. Under the common law of finds, Dr. Williamson has a protected interest in the jars superior to any interest claimed by the Chaco Nation

Vesting control in the Chaco Nation of the associated jars infringes on Dr. Williamson's constitutionally protected property interest in those objects. This Court has held that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). If state law or some other source creates a substantive property interest, whether this right "rises to the level of a constitutionally protected property interest," *Williamson*, No. 12-1953, at 14, is determined by federal constitutional law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

In the American common law tradition, it is well established under the so-called "law of finds" that Dr. Williamson has a substantive property interest in the jars which he discovered embedded in his own land. The American common law of finds provides for the disposition of unclaimed, previously owned personal property depending on the circumstances of the object's loss. Patty Gerstenblith, *Common Law, Statutory Law and the Disposition of Archaeological Resources in the United States*, Art & Cultural Heritage Law Newsletter (Art & Cultural Heritage Law Committee), Winter 2012, at 8. The law of finds traditionally divided personal property into five categories, one of which—"embedded property"—is applicable to the case at hand, giving rise to a substantive, constitutionally protected property interest in the jars discovered on Dr. Williamson's property.[3]

Dr. Williamson has a Fifth Amendment interest in the jars because under the common-law of finds, property embedded in the

3. The other categories are: (1) lost property; (2) mislaid property; (3) treasure troves; and (4) abandoned property. These categories are not applicable to the case at hand. *See* Gerstenblith, *supra*, at 8–9, 10; *Williamson*, No. 12-1953, at 17.

soil belongs to the *owner of the real property* where it is found. Embedded property—"property not made of gold, silver, or their paper equivalents, found buried or embedded in the ground"—has the "greatest relevance to archaeological objects" like the jars. *See id.* at 9 (citing *Allred v. Biegel*, 240 Mo. App. 818 (1949) (holding that a Native American canoe was embedded property, which therefore belonged to the owner of the real property in which it was found)). Under common-law traditions, ownership of embedded property accrues to the owner of the real property in which the object is embedded. *Id.*; *Williamson*, No. 12-1953, at 26 (Lemoncelli, J., dissenting) ("absent a true owner, property embedded in the soil . . . belongs to the owner of the *locus in quo*."). Consequently, under the common law of finds, Dr. Williamson has a protected interest in the associated jars because they were discovered embedded in his property. *See In re Search and Seizure of Shivers*, 890 F. Supp. 613, 615 (E.D. Tex. 1995) ("[A]bandoned property embedded in the soil belongs to the owner of the soil."); *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (citing *Bishop v. Ellsworth*, 234 N.E.2d 49 (Ill. App. Ct. 1968); *Flax v. Monticello Realty Co.*, 39 S.E.2d 308 (Va. 1946)); *Schley v. Couch*, 284 S.W.2d 333 (Tex. 1955)); *see also* Jennifer R. Richman, *NAGPRA: Constitutionally Adequate?*, *in Legal Perspectives on Cultural Resources* 216, 220 (Jennifer R. Richman & Marion P. Forsyth eds. 2004) (arguing that a buried object "would likely be classified as embedded property, with ownership assigned to the owner of the real property in which the personal property is embedded," giving rise to a Fifth Amendment property interest, qualifying as a taking under NAGPRA).

Further, Dr. Williamson's substantive property interest is prior to any such interest that can be claimed by the Chaco Nation. At no point has the Chaco Nation claimed to be the *true owner* of the jars, nor is there any evidence supporting such an assertion. *Williamson*, No. 12-11953, slip op. at 27 (Lemoncelli, J., dissenting) ("[T]he Chaco Nation is not the true owner of the two ceramic vessels embedded in Williamson's land."). Thus, NAGPRA supplies the only possible source that can provide the Chaco Nation with an interest in the jars. NAGPRA provides for the disposition of funerary objects associated with a Native

American burial discovered on tribal lands, such as the jars, according to a hierarchy of interests. The statute recognizes a primary interest in the lineal descendants of the Native American human remains with which the objects are associated. 25 U.S.C. § 3002(a)(1). There is no evidence in the record that the Chaco Nation or any of its tribal members are lineal descendants of the Native American buried at Site II, nor has the Chaco Nation or any other individual made any such claim.

Where, as here, no lineal descendants of the Native American human remains can be identified, NAGPRA vests ownership or control either (1) "in the Indian tribe . . . on whose tribal land such objects were discovered," (2) "in the Indian tribe . . . which has the closest cultural affiliation with such [] objects," or (3) "if the *cultural affiliation* of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized . . . as the aboriginal land of some Indian tribe," in the Indian tribe "*recognized as aboriginally occupying the area*" or in a different tribe with a "stronger cultural relationship to the objects." 25 U.S.C. § 3002(a)(2)(A)-(C) (emphasis added). As noted below, "the Chaco Nation concedes that the tribe is not culturally affiliated with either the human remains or the associated funerary objects in question," *Williamson*, No. 12-1953, slip op. 6 n.7, and consequently has no claim to the jars under 25 U.S.C. § 3002(a)(2)(B). Further, there is no indication in the record that the Chaco Indian Reservation is "recognized as the aboriginal land" of either the Chaco Nation or any other Indian tribe so as to create an interest in the jars under 25 U.S.C. § 3002(a)(2)(C). In fact, while the term "aboriginally occupying" is not defined in the statute, the record strongly suggests that under any conventional understanding of the phrase, the Chaco Indian Reservation cannot be understood as the "aboriginal land" of the Chaco Nation, a tribe that "historically . . . lived more than 1,100 miles from the present-day Chaco Indian Reservation." *Williamson*, No. 12-1953, slip op. at 2.

Consequently, the only possible claim that the Chaco Nation can assert as providing an interest in the jars stems from their discovery on Dr. Williamson's private property located within the exterior boundaries of the Chaco Indian Reservation. *See* 25 U.S.C. § 3002(a)(2)(A). While Dr. Williamson concedes that

under NAGPRA, these lands are deemed "tribal land," 25 U.S.C. § 3001(15)(A), nonetheless, as the dissent concluded below, Dr. Williamson's firmly-established, common-law interest in the jars is superior to the Chaco Nation's claim, based purely on physical occupation of the Chaco Indian Reservation since 1854. *Williamson*, No. 12-1953, slip op. at 27 (Lemoncelli, J., dissenting) ("[A]s between Williamson and the Chaco Nation, Williamson's right in this property is superior to that of the Chaco Nation."). NAGPRA's implementing regulations anticipate just this scenario—in which an individual's superior property interest will be constitutionally infringed by vesting ownership in an Indian tribe under NAGPRA—and provide that NAGPRA "will not apply to tribal lands to the extent that any action would result in a taking of property" 43 C.F.R. § 10.2(f)(2)(iv). Accordingly, Dr. Williamson has a constitutionally protected, substantive property interest in the jars which is prior to any possible interest that can be asserted by the Chaco Nation.

2. The jars and the associated human remains are not a legally unified res

Although the Twelfth Circuit recognized that Dr. Williamson had a well-established, common law interest in the jars discovered embedded in his real property, *Williamson*, No. 12-1593, at 14–15, the court nonetheless held that transferring ownership of the jars did not constitute a taking, erroneously concluding that Dr. Williamson's unmistakable interest was not severable from "rights or interest in human remains in the [associated] burial." *Id.* at 16. Because the Twelfth Circuit conflated these severable interests, and because Dr. Williamson does not have an "interest in the Native American human remains of the individual in the burial at Site II," the Twelfth Circuit held that he "likewise does not have any constitutionally protected right or interest in the funerary objects associated with the burial." *Id.* at 18. While Dr. Williamson concedes that he does not have a property interest in the Native American remains associated with the jars found at Site

II,[4] this interest is legally distinct from Dr. Williamson's constitutionally protected, substantive interest in the jars for two reasons: first, there is no basis either in NAGPRA or its implementing regulations for treating human remains and associated funerary objects as a unified *res*; and, second, human remains and associated funerary objects were not considered a unified *res* in the English common law tradition.

First, neither the text of NAGPRA, nor its implementing regulations support the treatment of a burial containing human remains and associated objects as a legally unified *res*. Although the Twelfth Circuit held that "a burial or grave is a unified *res*," *Williamson*, No. 12-1953, at 17–18, under NAGPRA a "burial" is defined only with reference to the *human remains* it contains; the statutory definition omits any mention of objects associated with those remains. 25 U.S.C. § 3001(1) ("Burial site means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, *individual human remains* are deposited."). NAGPRA independently defines "associated funerary objects," 25 U.S.C. § 3001(3)(a), demonstrating that in the *same* section of the statute, where Congress intended to refer to the objects associated with buried human remains it did so. Further, under the statute, human remains and associated burial objects constitute two of five subcategories of "cultural items," each of which is separately defined and receives distinct treatment throughout NAGPRA. *See id.* § 3001(3). These statutory provisions simply do not support an inference that Congress

4. While the common law recognized a "quasi-property right" in next-of-kin of a deceased individual to control disposition of the decedent's remains, *see, e.g.*, *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 460–61 (W. Va. App. 1985); *Long v. Chicago, R.I. & P. RY. Co.*, 15 Okla. 512 (1905); *Foley v. Phelps*, 37 N.Y.S. 471 (1896); *Seals v. H & F, Inc.*, 301 S.W.3d 237 (Tenn. 2010), a right which has been extended to Indian tribes culturally affiliated with the human remains of the decedent, *see Charrier v. Bell*, 496 So.2d 601, 601 (1986), Dr. Williamson concedes that he is not a relative of the decedent or a member of a tribe affiliated with the human remains discovered in Site II, *Williamson*, No. 12-1953, at 6 n.7.

intended human remains and associated objects to be treated as a unified *res* under NAGPRA.[5]

Furthermore, the implementing regulations promulgated by the Secretary of the Interior—the executive agency charged with interpreting the statute—reveal that the Secretary does not consider human remains and associated objects to be a unified *res* under NAGPRA. *See Williamson*, No. 12-1953, at 24–25 (Lemoncelli, J., dissenting). This Court's decision in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), provides the standard of review for statutory interpretations by the agency charged with the statute's enforcement. Under the *Chevron* standard, where a statute clearly addresses "the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002) (quoting *Chevron*, 467 U.S. at 842–43). However, where a statute "is silent or ambiguous", the court "*must sustain the Agency's interpretation* if it is 'based on a permissible construction' of the Act." *Id.* (quoting *Chevron*, 467 U.S. at 842–43) (emphasis added).

Because NAGPRA vests authority in the Secretary of the Interior to enforce its provisions, 25 U.S.C. § 3011, and because the statute does not speak to the "precise question" of whether an individual can have a Fifth Amendment possessory interest in associated funerary objects such that transfer of ownership would constitute a taking, the Secretary's interpretation of the question is entitled to *Chevron* deference.[6] *See Chevron*, 467 U.S. at 844 ("We

5. Although the Twelfth Circuit found support for its treatment of human remains and associated funerary objects in the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470bb(1) (2006), *Williamson*, No. 12-1953, at 18, ARPA's statutory language, like that of NAGPRA, does not support this conclusion. ARPA defines a "grave" as a protected "archaeological resource" for purposes of that statute; the statute independently defines "human skeletal remains" as an "archaeological resource." 16 U.S.C. § 470bb(1). Thus, as under NAGPRA, ARPA treats human remains distinctly from other items in the burial.

6. In *Bonnichsen*, the Ninth Circuit recently held that the Secretary's interpretation of the definition of "Native American" was not entitled to *Chevron* deference, because the court found that the Secretary's interpretation contradicted the definition provided by the statute. 367 F.3d at 877; *see*

have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

Implementing regulations and accompanying commentary reveal that under the Secretary's interpretation human remains and associated burial goods are *not* a unified *res*. For example, the Secretary promulgated 43 C.F.R. § 10.11(c), which provides for *mandatory* disposition of culturally unidentifiable human remains, but *discretionary* disposition of *objects* associated with the culturally unidentifiable human remains. *Compare* 43 C.F.R. § 10.11(c)(1) ("A museum or Federal agency that is unable to prove that it has a right of possession . . . to culturally identifiable human remains *must offer* to transfer control . . . .") *and* 43 C.F.R. § 10.11(c)(4) ("A museum or Federal agency *may* also transfer control of funerary objects that are associated with culturally unidentifiable human remains."). In announcing this rule, the Secretary provided commentary explaining the distinct treatment of human remains and associated objects:

> In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress *did not indicate the same intent* regarding culturally unidentifiable associated funerary objects. Mandatory disposition for this category of items *raises right of possession and takings issues* that are not clearly resolved in the statute or the legislative history. American common law generally recognizes that human remains cannot be owned.

Chevron, 467 U.S. at 842–43 ("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."). By contrast, Congress has not unambiguously expressed its intent on the question of whether transfer of control or ownership in associated funerary objects would constitute a taking under the Fifth Amendment; consequently, the Secretary's interpretation on *this* question is entitled to *Chevron* deference.

> The common law regarding associated funerary objects that are not culturally identifiable is not well established . . . Considering the lack of precedent in the common law and Congress' direction to develop a process only with respect to culturally unidentifiable human remains, the Secretary does not consider it appropriate to make the provision to transfer culturally unidentifiable associated funerary objects mandatory.

75 Fed. Reg. 12, 378, 12,398 (Mar. 15, 2010) (emphasis added). Both the regulation and commentary demonstrate that the Secretary has interpreted NAGPRA's provisions as applying *differently* to culturally unaffiliated human remains and to the associated funerary objects. Under this interpretation, human remains and associated funerary objects are clearly not a unified *res* for purposes of NAGPRA. Because the Secretary's interpretation is entitled to *Chevron* deference, this Court "must sustain the Agency's interpretation," *Chevron*, 467 U.S. at 842–43, and, accordingly, must not treat human remains and associated objects as a unified *res*.

Second, in addition to the fact that neither the statute nor its implementing regulations support the Twelfth Circuit's theory that human remains and associated burial objects are a unified *res*, common law tradition similarly provides no support for treating human remains and associated objects as a legally unified *res*.[7] American common law tradition derives from English common law, and at English common law, burial objects were considered property severable from the human remains with which they were buried.[8] *See Williamson*, No. 12-1953, slip op. at 25–26. For

7. *But see*, Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine after* Lucas, 13 St. Thomas L. Rev. 65, 99–100 (2000) (arguing that at common law human remains and often associated grave goods were not property).

8. By contrast, in the French common law tradition, burial objects were not considered either treasure or abandoned property and were not subject to ownership claims by finders. *See Charrier*, 496 So. 2d at 605 (construing French common law in determining a NAGPRA claim). For this reason the

example, in the English common law, "a person who removed the corpse from the grave was guilty of a larceny of *things buried with the corpse* but not [the corpse]." Hugh Y. Bernard, *The Law of Death and Disposal of the Dead* 16 (1979) (emphasis added).

In concluding otherwise, the Twelfth Circuit relied extensively on the reasoning of the court in *Charrier v. Bell*, 496 So.2d 601, 601 (1986). In doing so the Twelfth Circuit erred; the reasoning of the Court of Appeals for the First Circuit of Louisiana in *Charrier* is not relevant because Louisiana is unique among American jurisdictions in drawing its occupancy law from French, rather than English common law. *See Charrier*, 496 So.2d at 605. Unlike the Anglo-American tradition, at French common law, burial objects were not considered either treasure or abandoned property and were not subject to ownership claims by finders. *See id.* (construing French common law in determining a NAGPRA claim). For this reason the reasoning of the court in *Charrier* is not applicable to the case at hand.

The Twelfth Circuit was also mistaken in relying on maritime/admiralty law. The treatment of a shipwreck as a unified *res* under maritime/admiralty law is neither relevant to the inquiry at hand, nor does it provide support for the Twelfth Circuit's holding. *See Williamson*, No. 12-1953, slip op. at 18 n.13 (arguing that the maritime law treatment of shipwrecks as a unified res supports the holding that human remains and associated funerary objects are a unified *res*). While maritime/admiralty law generally treats the whole shipwreck as a legally unified *res*, *see California v. Deep Sea Research, Inc.*, 523 U.S. 491, 499–500 (1998), this principle applies to *property* found on a sunken vessel. Maritime law almost universally contains special and distinct provisions for the treatment and disposition of *human remains* discovered on shipwrecks, clearly indicating that human remains are *not* considered property for purposes of the *res*. *See, e.g.*, Jason R. Harris, *The Protection of Sunken Warships As Gravesites at Sea*, 7 Ocean & Coastal L.J. 75, 122–25 (2001) (discussing provisions in U.S. and international law concerning the treatment of human

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Charrier court's reasoning is not applicable to the case at hand; Louisiana is unique among American jurisdictions in drawing its occupancy law from French, rather than English common law. *See id.* at 605.

remains discovered in sunken warships). Accordingly, there is no basis in common law, or in NAGPRA's text and implementing regulations for concluding that human remains and associated funerary objects are a unified *res*. For these reasons, this Court should find that human remains and the associated funerary objects are not a legally unified *res*, and consequently, that Dr. Williamson's well established interest in the jars found at Site II is severable from an interest in the human remains associated with those objects.

3. Transferring ownership of the jars without compensation and without Congressional articulation of a public purpose is an unconstitutional taking

Since Dr. Williamson has a substantive property interest in the jars, vesting ownership of these objects in the Chaco Nation is an unconstitutional taking under the Fifth Amendment to the U.S. Constitution. Although the Indian Commerce Clause authorizes Congress to regulate affairs between the Federal government and Native American tribes,[9] "including the authority to enact statutes for the benefit of Indians, such as those protecting Native American graves," Congress cannot exercise this power in a way which "effect[s] an uncompensated taking of private property." *Williamson*, No. 12-1953, slip op. at 8. The Takings Clause of the Fifth Amendment requires that the government justly compensate individuals whose "private property [is] taken for public use," U.S. Const. amend V, in order to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Vesting ownership of the jars in the Chaco Nation flies in the face of this constitutional protection for three reasons: first, under this Court's jurisprudence, physical appropriation of personal property under NAGPRA is clearly a taking; second, this taking does not serve a

9. Article I, section 3, clause 8 grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. I, § 8, cl. 3.

Congressionally articulated public purpose; and, third, even if NAGPRA does serve a public purpose, NAGPRA contains no compensation provision to "just[ly] compensate" Dr. Williamson for the loss of his valuable property.

First, transferring ownership of the jars is the "quintessential form of 'taking'": physical appropriation of tangible property. Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does It Subject Museums To An Unconstitutional "Taking"?*, 6 Hofstra Prop. L. J. 1, 8 (1993). It is well established by this Court that the Takings Clause is implicated "[w]here the government authorizes a physical occupation of property . . . ." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). While vesting ownership of the jars constitutes a physical appropriation of chattels, rather than the occupation of real property, the fundamental principle articulated in this Court's takings jurisprudence nonetheless applies: "When the *character* of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking. . . ." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (internal quotations and citations omitted). This Court has also held that a government action constitutes a "taking" where it requires that the property owner "sacrifice *all* economically beneficial uses" for the property. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *see also Andrus v. Allard*, 444 U.S. 51, 66 (1979) (applying this destruction of value theory to personal property). Because transferring ownership of the jars would "*eliminate their value* to the prior possessor," Dr. Williamson, vesting ownership of the valuable jars in the Chaco Nation also constitutes a taking under this "destruction of value" theory. *See* Hurtado, *supra*, at 14 (emphasis added). Consequently, transferring ownership or control of the associated objects from Dr. Williamson to the Chaco Nation is clearly a "taking" for purposes of the Fifth Amendment. *See* Hurtado, *supra*, at 14.

Second, vesting ownership of the jars in the Chaco Nation is a taking that does not serve any public purpose articulated by Congress in NAGPRA. While this Court gives considerable deference to legislative determinations that a taking satisfies a public purpose, *see, e.g.*, *Berman v. Parker,* 348 U.S. 26, 32 (1954); *Kelo v. City of New London*, 545 U.S. 469, 480 (2005),

even where legislation transfers property ownership from one private party to another, *see Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42 (1984) (upholding a Hawaii statute requiring the transfer of real property from private owners to other private parties), this Court has always required that the legislature at a minimum *articulate* the public purpose being served, *see Berman*, 348 U.S. at 32 (articulating a standard of deference to legislative determinations that a taking serves a public purpose "*when the legislature has spoken*") (emphasis added).

In this case, NAGPRA utterly fails to pronounce a public purpose and lacks any findings to support such a claim. The Department of Justice ("DOJ") expressed this very concern in a letter to the House of Representatives prior to NAGPRA's enactment, stating that while "courts generally will defer to Congress' determination of what constitutes a 'public use' . . . Congress has inserted no findings in [NAGPRA] to explain how the transfer of protected objects . . . to Native American tribes will advance the public good." *See* Letter from the Dep't of Justice to Morris K. Udall [hereinafter "Letter"] (Sept. 17, 1990), *available at* http://archnet.asu.edu/topical/crm/usdocs/nagpra11.htm. The DOJ admonished Congress that the absence of such findings could pose legal issues under the Takings Clause, stating, "[s]hould Congress wish to reach private property through these bills, it would be advisable that such findings be included." *Id.* Congress disregarded this warning, and NAGPRA was enacted without including a *single* finding that the statute serves a public purpose. While NAGPRA may in fact serve many important public purposes,[10] the utter failure of Congress to speak to any of these purposes in the text does not survive even the minimal, deferential scrutiny of this Court's takings jurisprudence.

10. For example, proponents of NAGPRA have emphasized that the statute is first and foremost, a civil rights measure designed to rectify centuries of civil rights abuses against "America's first citizens"—a goal that unquestionably serves an invaluable public purpose. Richman, *supra*, at 220; Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History, in The Future of the Past* 9, 22 (Tamara L. Bray, ed. 2001). Whether or not the statute serves such a purpose, however, is irrelevant for purposes of this Court's Fifth Amendment jurisprudence absent any legislative articulation.

Third, even if this Court determines that NAGPRA does serve a public purpose, transferring ownership of the jars is nonetheless an unconstitutional taking because NAGPRA does not contain any compensation provisions to "just[ly] compensate" Dr. Williamson for the seizure of his personal property. Even when it is permissible for the government to take private property for public use, the Constitution mandates payment of "that just compensation which the Fifth Amendment exacts as the price of a taking." *Berman*, 348 U.S. at 36. NAGPRA provides for no such compensation in the event that ownership of private property is transferred to an Indian tribe from an individual, a museum or any other institution covered by the statute. Prior to NAGPRA's enactment, the DOJ also informed Congress that the absence of such compensation provisions was constitutionally problematic under the Fifth Amendment. *See* Letter, *supra*. While alternative compensation procedures exist for private museums affected by NAGPRA (*see id.*), no such avenues exist to compensate Dr. Williamson for the loss of the jars in the event of an ownership transfer—jars valued at over $8,000 each at recent auctions. Accordingly, vesting ownership in the Chaco Nation of the jars discovered embedded in Dr. Williamson's property, without just compensation and without a legislative articulation of public purpose justifying the act, is an unconstitutional taking under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner Williamson respectfully requests that this Court reverse the decision of the Court of Appeals for the Twelfth Circuit and find that: (1) under NAGPRA, "Native American" human remains must bear some relationship to a *presently existing* tribe, people or culture; and (2) vesting ownership of the jars removed from Dr. Williamson's property without just compensation violates the Fifth Amendment.

Respectfully submitted,

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Attorneys for Petitioner

Team: G*
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* DePaul University College of Law hosts the annual National Cultural Heritage Moot Court Competition. In recognition of the excellence of the competitors, the *Journal of Art, Technology and Intellectual Property Law* is pleased to present the 2013 winning brief from the University of Michigan Law School Team. The team members are: Austin E. Anderson, University of Michigan Law School, J.D. Candidate, Dec. 2014; Kelly E. Fabian, University of Michigan Law School, J.D. Candidate, May 2015; Stephanie M. Goldfarb, University of Michigan Law School, J.D. Candidate, May 2014. Please note that the Table of Contents, Table of Authorities, and Appendix were omitted.