

Case No. 12-17489

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**TIMOTHY WHITE, ROBERT L. BETTINGER, and  
MARGARET SCHOENINGER,**

Plaintiffs-Appellants

vs.

**UNIVERSITY OF CALIFORNIA, et al.,**

Defendants-Appellees

---

Appeal from the United States District Court  
for the Northern District of California  
Honorable Richard Seeborg, Judge Presiding  
Northern District of California No. C 12-01978 RS

---

**BRIEF OF *AMICUS CURIAE*  
AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS  
IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING *EN BANC*  
AND REVERSAL OF DISTRICT COURT'S DISMISSAL OF THE CASE**

---

Edgar N. James, D.C. Bar No. 333013  
Ryan E. Griffin, D.C. Bar No. 1007078  
JAMES & HOFFMAN, P.C.  
1130 Connecticut Avenue, N.W., Suite 950  
Washington, D.C. 20036  
(202) 496-0500  
(202) 496-0555 (fax)

Attorneys for *Amicus Curiae* American Association of Physical Anthropologists

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), *Amicus Curiae* American Association of Physical Anthropologists (AAPA), a non-profit corporation organized in the state of Kansas, states that it has no parent corporation, nor does any publicly held corporation have any ownership interest in the AAPA.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT .....i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE .....1

ARGUMENT .....2

CONCLUSION.....6

CERTIFICATE OF COMPLIANCE.....7

CERTIFICATE OF SERVICE .....8

## TABLE OF AUTHORITIES

### Cases

<i>Bonnichsen v. United States</i> , 367 F.3d 864 (9th Cir. 2004) .....	2, 3, 4, 5
<i>Na Iwi O Na Kupuna O Mokapu v. Dalton</i> , 894 F. Supp. 1397 (D. Haw. 1995) .....	4

### Statutes

Native American Graves Protection and Repatriation Act	
25 U.S.C. §§ 3001 <i>et seq.</i> .....	1
25 U.S.C. § 3001 (9) .....	2
25 U.S.C. § 3002(a)(2)(A) .....	5

### Rules

Fed. R. App. P. 29(c)(5) .....	1
--------------------------------	---

## INTEREST OF AMICUS CURIAE

The American Association of Physical Anthropologists (“AAPA”) is a preeminent international organization of more than 1,700 biological anthropologists from academic and scientific institutions in the United States and around the world.<sup>1</sup> Biological anthropologists investigate human and primate evolution and adaptations, skeletal shape and function, genetics, and disease in both past and present peoples, including through the analysis of remains such as those at issue in this case.

AAPA and its members have both a longstanding involvement with the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001 *et seq.*, and an acute interest in its proper application regarding the La Jolla remains at issue in the instant action. The AAPA was actively involved in the drafting and passage of NAGPRA, along with a broad coalition of Native American and scientific groups. Two former AAPA presidents, Drs. Phillip Walker and Dennis O'Rourke, sat or currently sit on the NAGPRA Review Committee, and AAPA members have been involved in implementing NAGPRA regulations at numerous prestigious museums and institutions. The AAPA has previously written

---

<sup>1</sup> The AAPA files this *amicus* brief by leave of the Court per its September 11, 2014 Order (ECF No. 58). No counsel for any party authored this brief in whole or in part, and no person or entity, other than the AAPA, made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

to the Chancellor of the University of California San Diego in August 2012 urging the University to permit scientific study of the La Jolla human remains prior to disposition to any tribe and underscoring the importance of that study.

*Amicus* AAPA believe that by affirming the district court's dismissal of this case, the panel majority frustrated the accommodation of tribal and scientific interests contemplated by NAGPRA. They therefore submit this brief to highlight the exceptional importance to scientists, Native Americans, and the general public alike of the proper procedure for determining the disposition of the La Jolla remains.

## **ARGUMENT**

NAGPRA allows initial scientific study of human remains to ascertain whether they are, in fact, Native American and subject to the repatriation requirements, and, if so, to establish a connection with a particular federally recognized Native American tribe. *See Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004) (explaining that NAGPRA requires a two-step analysis, the first of which is determining whether remains are "Native American" as defined in § 3001(9) by virtue of being connected to a presently existing tribe or culture, and thus covered by the statute). As an advocate for this statute and administrator of its processes, *amicus* AAPA advocates that all organizations follow the law and its regulations to ensure participation of all stakeholders in decisions concerning the

disposition of remains in order to prevent wrongful repatriation that deprives both the scientific community and any rightful owner of the opportunity for further study and proper burial.

Strict adherence to NAGPRA's requirements is particularly important in this case because the La Jolla remains, excavated from university property in 1976, are exceedingly ancient (approximately 9,000 years old). The extreme rarity of such ancient remains in the Americas renders their scientific study a matter of significant interest to many groups, including the general public, Native Americans, and scientists. Scientific study would provide crucial information concerning the peopling of the New World and potential genetic insights into health risks confronting modern populations and is of major benefit to the citizens of the United States in understanding its prehistory. Such study, moreover, would inform the dialogue among all interested parties and help ensure the disposition of these remains to the rightful owner under the NAGPRA framework.

This Court has previously recognized that an initial determination as to whether ancient remains are "Native American" is central to NAGPRA's statutory scheme. As the Court explained in *Bonnichsen*, a case involving a dispute over another set of ancient remains known as the "Kennewick Man," "Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them." 367 F.3d at 876; *see*

*also Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1415 (D. Haw. 1995) (“Examinations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items.”). The Court concluded that NAGPRA did not apply to the disposition of the Kennewick Man remains and explained its reasoning as follows:

[B]ecause Kennewick Man's remains are *so* old and the information about his era is *so* limited, the record does not permit the Secretary [of the Interior] to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them.

*Bonnichsen*, 367 F.3d at 882.

The AAPA is extremely concerned that the required legal procedures have not been followed in this case to determine if the remains are subject to NAGPRA. The University in this case did not have sufficient evidence to conclude that the La Jolla remains are “Native American” under NAGPRA. There are no indications that the University used any scientific data or methods generally accepted by anthropologists who routinely examine human remains from archaeological and forensic contexts, or obtained expert opinions from anthropologists or any other



credentialed and knowledgeable scientists. In fact, the University denied requests for scientific research on the remains.

Because scientific study has not been allowed in this case, there are at this point no established, trustworthy genetic or morphological indicators connecting the ancient La Jolla remains with *any* modern Native Americans. Without archaeological and biological analyses, we have no way of knowing that the La Jolla remains are, in fact, Native American as legally defined and, therefore, subject to NAGPRA in the first place. *See Bonnichsen*, 367 F.3d at 875. Because these remains were not removed from “tribal lands” as defined in NAGPRA and its regulations, cultural affiliation cannot be assumed on the basis of location. *See* 25 U.S.C. § 3002(a)(2)(A) (providing for ownership of remains by the tribe on whose land the remains were found in instances where the lineal descendants of the remains cannot be ascertained).

Anthropologists like AAPA’s members are the experts at answering questions about ancient human remains. Scientific study could in fact reveal evidence of a connection to a present-day tribe, thereby both making the remains subject to NAGPRA and ensuring that the remains are repatriated to the correct tribe, consistent with the spirit of the legislation and its regulations. In order to achieve that core statutory purpose, the biological evidence must be collected,

analyzed, and weighed with other evidence before a reasoned decision with respect to repatriation can be reached.

### CONCLUSION

For the reasons stated above, the American Association of Physical Anthropologists supports the request of the Appellants for rehearing *en banc* and reversal of the District Court's dismissal of the case.

Respectfully Submitted,

/s/ Edgar N. James

Edgar N. James

Ryan E. Griffin

Attorneys for *Amicus Curiae*  
American Association of  
Physical Anthropologists

Date: September 22, 2014

**Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 1, 319 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains \_\_\_\_\_ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using (*state name and version of word processing program*) Microsoft Word 2010  
(*state font size and name of type style*) 14 pt Times New Roman, *or*

this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program*) \_\_\_\_\_  
with (*state number of characters per inch and name of type style*) \_\_\_\_\_

---

Signature

Attorney for

Date

9th Circuit Case Number(s) 12-17489

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)