Nos. 02-35994 & 02-35996

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN, C. LORING BRACE, GEORGE W. GILL, C. VANCE HAYNES, JR., RICHARD L. JANTZ, DOUGLAS W. OWSLEY, DENNIS J. STANFORD and D. GENTRY STEELE,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellants,
and
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NEZ PERCE TRIBE, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
For the District of Oregon
Honorable U.S. Magistrate Judge John Jelderks

TRIBES' PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION, ISSUES PRESENTED ON REHEARING *EN BANC*, AND RULE 35(b) STATEMENT OF COUNSEL

Rehearing by the full Court is necessary because this case of first impression presents national questions of exceptional importance concerning the balance that Congress struck between the spiritual beliefs of Indian tribes and the limits of academic exploitation of the dead. The 9200 year-old "Native American" human remains of the "Kennewick Man" (or "Ancient One" as he is known to the Tribes) are an unwitting pawn in this struggle over our past and the applicability of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*

The panel has emasculated NAGPRA by rewriting the definition of "Native American," the threshold determination necessary to trigger the application of the statute, and ultimately collapsing the core provisions of NAGPRA: the determinations of "Native American" and "cultural affiliation." This foray into the domain of the legislature has muddled the precision of Congress' statutory scheme, frustrating NAGPRA's application.

The panel has also created different standards governing NAGPRA's applicability in this Circuit from the rest of the Nation, thereby obstructing the repatriation of "Native American cultural items," and causing rampant uncertainty as to the statute's application. *Id.* §§ 3001(3), 3002, 3005. National uniformity is of paramount importance for NAGPRA's repatriation program. NAGPRA applies

to cultural items found on federal and tribal lands, and to all federal agencies and museums receiving federal funds, except the Smithsonian, within the United States. *Id.* §§ 3001(4)-(5), (15). As a result of NAGPRA's broad reach, hundreds of thousands of "Native American cultural items" have been returned to their tribal homes since 1990. Last year alone, 710 notices of inventory completion were filed by museums, accounting for 27,863 human remains and 564,726 associated funerary objects; 263 notices of intent to repatriate were filed accounting for 77,587 unassociated funerary objects, 1185 sacred objects, and 267 objects of cultural patrimony; and 36 notices of intended disposition of cultural items were filed accounting for 108 human remains, 586 funerary objects, and 5 objects of cultural patrimony. *National NAGPRA FY03 Annual Report* ("Annual Report") at 2, 4, *available at*, http://www.cr.nps.gov/nagpra/DOCUMENTS/NNReport 0310.pdf.

The future of these and other repatriations have been cast into doubt by the panel's sweeping and disruptive opinion narrowing the statute's applicability. The panel's study requirements within their new definition also makes compliance with NAGPRA's provisions for notifying tribes of discoveries and providing for the protection of remains before land disturbing activities continue within thirty days of discovery nearly impossible. 25 U.S.C. § 3002(d)(1); 43 C.F.R. §§ 10.4, 10.5(b). The panel has erroneously restricted NAGPRA's programs by

overlooking and misapprehending statutory issues in 25 U.S.C. § 3001 *et seq.* and 18 U.S.C. § 1170:

A. The panel radically narrowed NAGPRA's two-step process for determining whether remains are "Native American" and share "cultural affiliation" with tribes.

B. The panel has rendered superfluous portions of NAGPRA's "ownership" provision, as well as portions of the statute concerning "unclaimed" and "unidentifiable" "Native American" remains.

C. The panel misapprehended the terms Congress chose to define "Native American" and failed to give effect to each term Congress chose.

D. The panel has rendered unconstitutionally vague NAGPRA's criminal provision prohibiting the trafficking of "Native American" cultural items.

These serious and egregious legal and factual errors must not be allowed to stand, because of the great injustice done to Indian people, and the harmful effects of this precedent. The Tribes ask this Court to grant *en banc* rehearing, vacate the panel's decision, and reinstate DOI's decision, or at minimum, remand the matter to the agency with instructions.

II. ARGUMENT

A. The Panel Rewrote the Definition of "Native American" and Collapsed the "Native American" and "Cultural Affiliation" Determinations.

To be considered "Native American" for purposes of NAGPRA, the panel held that human remains must:

> "share[] special and significant genetic or cultural features with presently existing indigenous tribes, peoples or cultures."[1]

Slip Op. at 1608. This holding is at odds with the plain language of NAGPRA. Congress defined "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). The precise question for this Court is whether Congress intended to limit the scope of "Native American" to remains that have a "significant genetic" relationship with "presently existing" tribes.[2] The answer must be no.

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[1] The panel's definition varies throughout the Opinion, none of which comports with Congress' definition in NAGPRA. Other formulations include: (1) "some relationship to a *presently existing* tribe, people, or culture;" Slip Op. at 1596, 1597 (emphasis in original); (2) "a significant relationship to a *presently existing* tribe, people, or culture;" *id.* at 1600 (emphasis in original); (3) "special and significant genetic or cultural relationship to some presently existing indigenous tribe, people or culture;" *id.* at 1603; and (4) seeking "cultural continuity between Kennewick Man and modern Indians." *Id.* at 1604, 1606.

[2] In another perversion of Congress' terminology, the panel defined "presently existing" as extant since 1789, when the United States Constitution was

NAGPRA requires two distinct inquires: (1) determining the statute's applicability (*i.e.*, whether remains are "Native American") and (2) determining the disposition of the "Native American" remains (*i.e.*, whether there is "cultural affiliation"). Remains must be both "Native American" and culturally affiliated for ownership to transfer to a tribal clamant.[3]

First, to trigger the statute, the land management agency or museum must determine whether remains are "Native American." Congress defined "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the

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signed. Slip Op. at 1602. Under the panel's definition, no remains older than 215 years could be "Native American" under NAGPRA. This restricted reading is irreconcilable with Congress' intent that NAGPRA apply to "prehistoric" remains. Tribes' ER 40-41, 64.

[3] The panel misunderstood that NAGPRA does not transfer title to "Native American" remains that are not "culturally affiliated" with present day tribes. Slip Op. at 1598, 1604 n.21. The panel was concerned that remains of a tribe "that had ceased to exist thousands of years before the remains were found" could be "Native American." *Id.* at 1601. Why not? While such remains could be "Native American," they would not be culturally affiliated because "cultural affiliation" can only be with "present day" tribes. 25 U.S.C. § 3001(2). An "extinct" tribe cannot be a claimant for "cultural affiliation" purposes. As a result, the "Native American" remains could be studied under NAGPRA. *C.f.* Slip Op. at 1604 n.21. Appellees' studies were prevented here because the Kennewick remains are both "Native American" and culturally affiliated with the Tribes, not because the remains are "Native American."

United States."[4] 25 U.S.C. § 3001(9) (emphasis added). Second, and only if remains are "Native American," the agency or museum conducts additional studies to test "cultural affiliation" between the "Native American" remains and tribal claimants. *Id.* § 3002(a). "Cultural affiliation" is "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group." *Id.* § 3001(2) (emphasis added).

In stark contrast to the panel's reformulated definition, Congress' definition of "Native American" does not reference "special or significant genetic or cultural features," a "presently existing" tribe, nor require any demonstrated relationship. However, these terms and concepts are part of the statutory definition of "cultural affiliation." *Id.* A comparison between NAGPRA's language and the panel's new definition demonstrates that the panel radically rewrote the definition of "Native American" by importing the relationship test and "present day" requirements from NAGPRA's "cultural affiliation" determination.

The panel was not free to read into the "Native American" definition terms that are not there. In construing "Native American," this Court "must be guided by

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[4] Interior chose a temporal and spatial test (pre-European and found in an area now part of the United States) to apply Congress' definition. 43 C.F.R. § 10.2(d); ER 2, 10.

the nature of the statute as well as the legislative intent for its enactment," and not rewrite the statute as it sees fit. *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). The panel lacked authority to rewrite NAGPRA simply because it determined the statute is susceptible of improvement. *Lewis v. McAdam*, 762 F.2d 800, 804 (9th Cir. 1985).

The panel's "Native American" definition dramatically shrinks the set of "cultural items" available for repatriation under NAGPRA and creates a circular vortex of reasoning from which there is no escape. Remains are now not "Native American" unless potentially destructive studies go forward to prove they are genetically and culturally related to presently existing tribes. Slip Op. at 1608. However, agencies and museums dealing with remains cannot comply with Congress' intent to consider the concerns of Indian tribes in conducting these studies unless NAGPRA applies. *See* ER 34, 36, 42 (S. Rep. No. 101-473 at 2, 4, 10 (1990)). NAGPRA cannot apply unless the remains are "Native American." The simple temporal and geographic threshold inquiry is gone. *See* Slip Op. at 1599.

In other words, tribes must now consent to studies to prove remains are "Native American" in order to trigger the statute to have the right to stop the studies. *Id.* at 1587 n.8. Congress could not have intended such an absurd result. *See Na Iwi O Na Kapuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995)

(finding that Congress sought to foster the goal of efficient repatriation); ER 44 ("The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains . . ."); 25 U.S.C. § 3003(b)(2) (stating inventory provisions "shall not be construed to be an authorization for the initiation of new scientific studies").

B. The Panel Has Rendered Superfluous Portions of NAGPRA's "Ownership" Provision and Provisions Concerning "Unclaimed" and "Unidentifiable" "Native American" Remains

Congress established two separate inquiries under NAGPRA. Collapsing the two determinations,[5] the panel radically restricted Congress' requirements for proving "ownership" under section 3002.[6]

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[5] The lip service paid to NAGPRA's two inquiries fails to rectify the panel's error. The panel attempted to distinguish between a "general finding [of a] significant relationship to a presently existing 'tribe'" for "Native American" and a "more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe" for "cultural affiliation." Slip Op. at 1599 (emphasis added). Neither "relationship" test is found in the words of the statute. 25 U.S.C. §§ 3001(2), (9); 3002(a).

[6] The panel committed two fundamental errors concerning the 22,000 page record. First, the panel misused evidence in the record. Section IV of the panel's decision purports to "address the Secretary's determination that the Kennewick Man's remains are Native American, as defined by NAGPRA." Slip Op. at 1603. However, the panel never considered the Secretary's evidence that the remains are "Native American." *See id.* at 1590; ER 10-15. Instead, the panel solely reviewed the Secretary's oral traditional evidence of "cultural affiliation." *Id.* at 1605-07; ER 3-9. Second, the panel applied the wrong standard of review to consider the

The panel held that "cultural affiliation" requires a "more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe." Slip Op. at 1599 (emphasis added). This is not the "ownership" standard under Section 3002. Not only is it unclear what a "more specific finding" might be, the panel has written-out three provisions of Section 3002.

Section 3002(a) returns remains to (1) "lineal descendants," or (2) when "lineal descendants cannot be ascertained," to the (A) tribe on whose land the remains were discovered, (B) the tribe with the "closest cultural affiliation," or (C) if cultural affiliation "cannot reasonably be ascertained," to the tribe (1) "recognized as aboriginally occupying the area" or (2) the tribe with the "strongest demonstrated relationship" with the remains as shown by a "preponderance of the evidence." 25 U.S.C. § 3002(a)(1)-(2)(C)(2). The panel's arbitrary limitation to "lineal descendants" or "a specific Indian tribe" eviscerates sections 3002(a)(2)(B) ("closest cultural affiliation"), 3002(a)(C)(1) ("aboriginal lands"), and

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"Native American" evidence. The panel erroneously applied the "preponderance of the evidence" standard to the "Native American" determination. Slip Op. 1604 n.20. A "preponderance of the evidence" is only required under sections 3002(a)(2)(C)(2) and 3005(a)(4). The panel should have reviewed the evidence supporting the "Native American" determination under the more lenient "substantial evidence" standard of the Administrative Procedures Act. Substantial evidence is "more than a mere scintilla but less than a preponderance." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (emphasis added).

3002(a)(C)(2) ("strongest demonstrated relationship"). *Compare id.* § 3002(a) *with* Slip Op. at 1599.

The panel's definition of "Native American" also renders NAGPRA's provisions regarding unclaimed remains (25 U.S.C. § 3002(b)) and culturally unidentifiable remains (25 U.S.C. § 3006(c)(5)) meaningless. Principles of statutory construction preclude interpreting a statute to render part of it meaningless. *Beck v. Prupis*, 529 U.S. 494, 506 (2000).

Section 3002(b) provides that "Native American cultural items not claimed under [Section 3002(a)] shall be disposed of in accordance with regulations." This provision applies when remains are "Native American," but are not claimed because "cultural affiliation" cannot be determined. The panel's definition of "Native American" renders this provision unnecessary because, to be "Native American," remains must share "special and significant genetic or cultural features with presently existing indigenous tribes." Slip Op. at 1608. Thus, there can be no "unclaimed" remains because a relationship with a claimant must exist just to trigger the statute.

Section 3006(c)(5) directs the compilation of "an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains." The panel's definition of "Native American"

forecloses this inventory because, if a museum cannot find a "genetic or cultural" relationship, the remains would not be "Native American" in the first place, and thus, cannot be "culturally unidentifiable." The panel's decision erroneously discards 413 inventories of "culturally unidentifiable" remains that have been logged from 329 museums, and 84 federal agencies since 1990. *Annual Report* at 2.

The panel's sweeping new definition of "Native American" has substantially altered the threshold determination to trigger the statute and will severely curtail future repatriations under the Act as Congress anticipated. *See* Slip Op. at 1602 (asking "precisely what *kind* of a relationship . . . must bear . . .to qualify as Native American") (emphasis in original).

C. The Panel Misapprehended the Importance of the Terms Congress Chose to Define "Native American," Failing to Give Effect to the Whole Statute.

The panel held:

> Congress's use of the present tense [in the "Native American" definition] is significant . . . We conclude that Congress was referring to *presently existing* Indian tribes when it referred to a 'tribe, people or culture *that is* indigenous to the United States.

Slip Op. at 1596-97 (emphasis in original). The panel's construction turns NAGPRA on its head, dramatically foreclosing the statute's applicability to older remains.

1. "Native American" is Not Limited to "Presently Existing" Tribes.

a. Other NAGPRA Provisions Demonstrate Congress' Expansive Intent.

"Native American" is a term of art with a meaning distinct from the way the term is used in common parlance. There is no evidence that Congress confused the statutory term "Native American" with an American Indian. Yet, the panel's reading presumes that Congress was simply being politically correct and defines "Native American" with reference to "Indian tribes." *See* Slip Op. at 1584 n.3, 1596-97. The panel's reasoning elevates the term "is" to talismanic proportions, while ignoring other parts of the statute that refute its reading.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *Russello v. United States*, 464 U.S. 16, 23 (1983). "Native American" is uniquely and broadly defined. For instance, Congress defined "Native American" using the phrase "tribe, people or culture," instead of the more limiting term "Indian tribe," denoting a modern political entity. 25 U.S.C. § 3001(9). Congress separately defined "Indian tribe" and did not use the term within the definition of "Native American," indicating that the two terms are mutually exclusive. *Id.* § 3001(7). The panel ignores this salient distinction and erroneously uses the term Congress omitted: "[w]e conclude that Congress

was referring to presently existing Indian tribes when it referred to 'tribes, people, or culture,'" in the definition of "Native American." Slip Op. at 1596-97 (emphasis added).

Moreover, Congress defined "sacred objects" to require a "present day" relationship, but omitted a similar requirement from the definition of "Native American."[7] *Id.* § 3001(3)(C). Finally, Congress' decision, after careful consideration, to define "Native American" with the more expansive "of, or relating to" markedly departs from the definition of "Native Hawaiian" which requires a relationship to an "individual who is a descendant." *Compare id.* § 3001(9) *with id.* § 3001(10) (emphasis added). This suggests that Congress foreclosed the panel's requirement of a "genetic" relationship to determine "Native American." Slip Op. at 1608. In other words, Congress knew how to require an exacting relationship to an "Indian tribe," but chose not to do so with "Native American."

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[7] The panel's interpretation of "sacred objects" runs afoul of textual analysis. Courts must begin with the express language of the statute to ascertain the meaning Congress intended. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The panel concluded that Congress' definition of "sacred objects" "is consistent with our reading of "Native American;" that is . . . a presently existing" relationship. Slip Op. at 1602 (emphasis added). Instead of starting with the words Congress chose, the panel started with its own definition of "Native American" and compared it to other definitions in the statute to find commonalities.

b. Congress Rejected More Limiting Definitions.

Congress' intent that the statute apply broadly is also evident from the legislation that pre-dated NAGPRA. Congress rejected restrictive definitions of "Native American" that had been contained in four previous bills that would have narrowly defined "Native American" as including only "American Indians . . . Native Alaskans, Native Hawaiians . . . and the descendants of such individuals."[8] The definition Congress ultimately adopted is more expansive, eliminating the term "Indian" as a modifier of "tribe" and eliminating a familial relationship to a present day political entity. 25 U.S.C. § 3001(9). The panel ignored the maxim that where the final version of a statute deletes language contained in an earlier draft, it is presumed that the earlier draft was inconsistent with Congress' ultimate intentions, and erroneously put back in the statute words Congress deliberated left out. *In re Town & Country Home Nursing Serv., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991).

c. The Panel's Definition is at Odds with a Natural Reading of "Native American."

"Statutory language must be read in context [since] a phrase 'gathers meaning from the words around it." *Jones v. G.D. Searle & Co.*, 367 U.S. 303,

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[8] H.R. 1381, 101st Cong. § 5 (1989); H.R. 1646, 101st Cong. § 3(1) (1989) (defining "Native American" as a "member of an Indian tribe"); S. 1021, 101st Cong. § 3(1) (1989); S. 1980, 101st Cong. § 3(1) (1989); H.R. 5237 § 2(11) (1990).

307 (1961). The panel erred by solely focusing on the term "is" in the abstract, rather that seeking the meaning of the entire phrase "tribe, people, or culture that is indigenous." Slip Op. at 1595-96.

"Tribe" means "a political, ethnic, or ancestral division of ancient states and cultures." American Heritage Dictionary at 1909 (3d ed. 1992). "People" means "a body of persons living in the same country." *Id.* at 1341. "Culture" means "patterns, traits, and products . . . of a particular period." *Id.* at 454. "Indigenous" means "originating . . . in an area . . . native." *Id.* at 919. Thus, the natural meaning of the phase "tribe, people, or culture that is indigenous" is more broad than a "genetic" relationship to "presently existing" political entities. Congress was using "Native American" in the way ordinary people in common usage might speak of indigenous peoples, unbounded by time and political designation.

2. "Native American" Applies to "Ancient" Remains.

The panel starkly departed from NAGPRA's purposes when it found that NAGPRA does not apply to "bones of such great antiquity," thereby creating a loophole for museums and federal agencies to avoid complying with NAGPRA. Slip Op. at 1598 n.17. The language of the statute, its legislative history, and its references to the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470cc ("ARPA"), all of which the panel ignored, indicate NAGPRA applies to ancient remains.

NAGPRA defines "human remains" within the category of "cultural items." 25 U.S.C. § 3001(3) ("'cultural items' means human remains and –"). "Cultural items" include, *inter alia*, "cultural patrimony," defined as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself." *Id.* § 3001(3)(D). Read together pursuant to the canon *noscitur a sociis*, "a word is known for the company that it keeps," *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 694 (1995), "human remains" includes historical remains of "cultural importance."

This interpretation is buttressed by the language of ARPA, which NAGPRA cites for the authority to issue a permit "for excavation of Native American cultural items." *Id.* § 3002(c) (citing 16 U.S.C. § 470cc). ARPA permits are "for the purpose of furthering archaeological knowledge in the public interest." 16 U.S.C. § 470cc(b)(2). Read together in light of the canon *in pari materia* to give effect to both related statutes, NAGPRA applies to "human remains" that are historical and culturally and archaeologically significant. The panel acknowledges the importance of the remains, but ignores these portions of the statute to effectively give the opposite reading to NAGPRA, permitting only recent and archaeologically unimportant remains to be "Native American." *See* Slip Op. at 1584, 1602.

Legislative history confirms that Congress sought to include ancient remains. Discussing "cultural affiliation," Congress stated "[w]here human

remains . . . are concerned . . . it may be extremely difficult . . . for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record." ER 64 (emphasis added); *see also* ER 40-41. Congress rejected "scientific certainty" and anticipated that "prehistoric remains" would be within NAGPRA's reach. ER 40-41.

The panel erred by divorcing NAGPRA's plain words from the context in which Congress intended them to function. The panel should have concluded that the Kennewick remains are "Native American" because "the term 'human remains' was intended to mean ancient human remains with some sort of cultural or archaeological interest." *Kickapoo Traditional Tribe v. Chacon*, 46 F.Supp.2d. 644, 650 (W.D. Tex. 1999) (emphasis added) (finding NAGPRA inapplicable to recent burial because of NAGPRA's language and ARPA references).

D. The Panel Has Rendered Unconstitutionally Vague NAGPRA's Criminal Provision Prohibiting the Trafficking of "Native American" Cultural Items.

NAGPRA's criminal provision provides: "Whoever knowingly sells, purchases, uses of profit, or transports for sale or profit any Native American cultural items obtained in violation of [NAGPRA] shall be fined . . . imprisoned not more than for one year, or both . . . ." 18 U.S.C. § 1170(b) (emphasis added). This provision is described as the "teeth" of Congress' "statutory mission" to provide "[r]espect for Native human rights." *United States v. Corrow*, 119 F.3d

796, 800 (10th Cir. 1997); *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999) (adopting the reasoning of *Corrow*).

The panel's "Native American" definition renders the criminal provision of NAGPRA unenforceable and unconstitutionally vague. A court must strike down any statute that fails to "sufficiently define the offense so that ordinary people can understand the prohibited conduct." *Tidwell*, 191 F.3d at 979 (internal citation omitted) (holding "cultural patrimony" not unconstitutionally vague). An ordinary person cannot know whether a cultural item "shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures." Slip Op. at 1608. A "pot hunter" would have known whether a cultural item predated European conquest however. Thus, the panel's "Native American" definition makes this provision unconstitutionally vague.

The panel has also made it virtually impossible to prove the requisite *mens rea* in a NAGPRA prosecution. Federal prosecutors must now show that those charged with selling "Native American" cultural items knew of "special and significant genetic or cultural features" and that the remains relate to a "presently existing" tribe. *Id.* This burden frustrates Congress' intent that the criminal penalties "act as a deterrent" to protect federal and tribal lands "from further looting." ER 43.

III. CONCLUSION

By no process of reasoning can the panel's decision be harmonized with NAGPRA. The panel has set agencies in this Circuit adrift into the waters of confusion and it is time to return to the moorings – "Native American" does not require a "genetic" relationship with "presently existing" tribes, and does apply to the ancient remains of the Kennewick Man. For the foregoing reasons, this Court should grant the Tribes petition for rehearing *en banc* and reverse its decision.

Respectfully submitted this 17th day of March, 2004.

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