RUSHING, Circuit Judge, dissenting:

This case presents a novel question of statutory interpretation: Does the Native American Graves Protection and Repatriation Act require the federal government to dig up the graves of deceased Native Americans buried in federal cemeteries? The majority says yes. I disagree.

I.

During the late nineteenth century and into the twentieth, museum collectors and the federal government engaged in widespread desecration of Indian graves, unearthing the remains of deceased Native Americans and objects buried with them for purposes of scientific study, museum exhibition, and indefinite storage. *See Thorpe v. Borough of Thorpe*, 770 F.3d 255, 260 (3d Cir. 2014). This "looting and plundering of Native American burial grounds and the theft of cultural artifacts from Native American tribes . . . continued to pour salt into the many wounds that have been inflicted on Native Americans throughout the history of the United States." *Id.*

Congress responded swiftly after learning from the Secretary of the Smithsonian that "of the 34,000 remains in the Institution's collection, approximately 42.5% of the specimens were the remains of North American Indians." *Id.* The 101st Congress provided for the return of Native American human remains and associated funeral objects in the "possession or control of the Smithsonian Institution" and created a procedure for their inventory, identification, and repatriation. National Museum of the American Indian Act, Pub. L. 101-185 §§ 11, 12, 103 Stat. 1336, 1343 (1989) (codified at 20 U.S.C. § 80q *et seq.*).

But Congress wanted to go further than just the Smithsonian. After consulting with tribes and other stakeholders in the scientific and museum community, the same Congress later passed the Native American Graves Protection and Repatriation Act (NAGPRA) to provide for similar redress beyond the Smithsonian in a law "modeled after" the first one. *Thorpe*, 770 F.3d at 261; *see* NAGPRA, Pub. L. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 *et seq.*, 18 U.S.C. § 1170). The Act covers "Federal agenc[ies]"—defined as "any department, agency, or instrumentality of the United States" other than "the Smithsonian Institution"—and "museum[s]"—defined as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items." NAGPRA § 2(4), (8). Under the statute, "cultural items" include "human remains," associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. *Id.* § 2(3).

As its name suggests, the Native American Graves Protection and Repatriation Act aims at two central purposes: graves protection and repatriation. Both are important to this case.

A.

The "graves protection" part of the Act applies to Native American human remains and objects on "Federal or tribal lands" as of "the date of [NAGPRA's] enactment." *Id.* § 3(a), (c), (d).

The "intentional removal . . . or excavation of Native American cultural items," which include human remains and objects, from "Federal or tribal lands for purposes of discovery, study, or removal of such items" is unlawful unless certain criteria are met. *Id.*

§ 3(c). Those criteria include tribal consultation and proof thereof, appropriate disposition of the removed items, and acquisition of a "permit issued under section 4 of the Archaeological Resources Protection Act of 1979." *Id.* § 3(c)(1)–(4) (citing Pub. L. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. § 470aa *et seq.*)).

As for the "inadvertent discovery" of such items, "[a]ny person who knows, or has reason to know" that he or she has "discovered Native American cultural items on Federal . . . lands" after the enactment of NAGPRA must notify the federal official with management authority over those lands. *Id.* § 3(d)(1). And "[i]f the discovery occurred in connection with an activity," like construction or mining, for example, the person must "cease the activity in the area of the discovery[and] make a reasonable effort to protect the items discovered." *Id.*

The Act provides detailed rules for the disposition of cultural items "excavated or discovered" on federal lands "after the date of enactment." *Id.* § 3(a). For human remains, priority goes to "the lineal descendants of the Native American" and then to "the Indian tribe . . . which has the closest cultural affiliation with such remains" or, if the cultural affiliation cannot be reasonably ascertained, the tribe that "aboriginally occup[ied] the area" where the remains were discovered, unless "a different tribe has a stronger cultural relationship with the remains." *Id.*

B.

The "repatriation" part of the Act provides for the inventory and return of human remains and other cultural items in holdings and collections of federal agencies and federally funded museums. *See id.* §§ 5, 6, 7.

The inventory provision requires agencies and museums which have "possession or control over holdings or collections of Native American human remains and associated funerary objects" to compile an itemized list of such remains or objects and, "to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item." *Id.* § 5(a), (e). The inventories and identifications must be made available to a review committee, conducted in consultation with the tribes and, unless an extension was obtained, had to be completed within five years of NAGPRA's enactment. *Id.* § 5(b), (c). There is also a slightly less onerous inventory requirement for other categories of cultural items. *See id.* § 6 ("summary for unassociated funerary objects, sacred objects, and cultural patrimony").

Repatriation procedures differ depending on how the remains or objects are identified. For those whose cultural affiliation is identified on an inventory, the agency or museum will have provided notice to the tribe and must "expeditiously return" such remains and objects "upon the request of a known lineal descendant of the Native American or of the tribe." *Id.* § 7(a)(1), (2); *see id.* § 5(d). Where the cultural affiliation of human remains and funerary objects has not been established in an inventory or those items "are not included upon any such inventory," the agency or museum must "expeditiously return[]" them when the requesting tribe shows "cultural affiliation by a preponderance of the evidence." *Id.* § 7(a)(4). The Act also sets standards for the return of other categories of cultural items when an agency or museum has not ascertained the item's cultural affiliation. *See id.* § 7(a)(5) (pertaining to "sacred objects and objects of cultural patrimony").

Only in narrow circumstances may an agency or museum refuse to repatriate an item upon request of a lineal descendant or tribe. NAGPRA recognizes a "right of possession" exception, which applies when an agency or museum can prove that it obtained the items in question "with the voluntary consent of an individual or group that had authority of alienation." *Id.* §§ 2(13), 7(c). "Right of possession" is a defense against repatriation for "unassociated funerary objects, sacred objects or objects of cultural patrimony." *Id.* § 7(c). But it is not a defense to the repatriation of human remains and associated funerary objects. *See id.* The only exception to the repatriation of human remains and associated funerary objects is for "scientific study," which allows a temporary delay in repatriation when "such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States." *Id.* § 7(b).

As applied to human remains, the right of possession is relevant only as a defense to criminal liability. Under NAGPRA's criminal provision, anyone who "knowingly sells, purchases, uses for profit, or transports for sale or profit" "the human remains of a Native American without the right of possession to those remains" or "any Native American cultural items obtained in violation of" the Act is subject to a fine and prison time. *Id.* § 4 (codified as amended at 18 U.S.C. § 1170). A right of possession to Native American human remains attaches only for "[t]he original acquisition" of remains "which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe." *Id.* § 2(13).

No provision of NAGPRA directs the federal government to disinter buried human remains. At the same time, the Act does not limit any agency's authority to "return or repatriate Native American cultural items," including human remains, "to Indian tribes." *Id.* § 11(1)(A).

II.

The Winnebago Tribe of Nebraska wants the United States Army to return to the tribe the mortal remains of two Winnebago boys, Edward and Samuel, who died at the Carlisle Indian Industrial School and were buried at the Carlisle Indian Cemetery on Army property in Pennsylvania.[1] Edward and Samuel were buried on federal land before Congress passed NAGPRA and they remain buried there today. Under NAGPRA, then, their graves are protected from excavation. So how does the majority conclude that NAGPRA requires the Army to exhume their bodies? It does so by interpreting "holdings or collections" to include all graveyards on federal land. The statute's language and structure refute that interpretation.

A.

The majority's primary holding is that cemeteries are "holdings or collections" of human remains subject to NAGPRA's inventory and repatriation requirements. I disagree.

[1] The Army has offered to disinter and return both boys pursuant to the procedures of Army Regulation 290-5. At least 32 other Carlisle students have been repatriated through that process. According to the complaint, however, the Winnebago Tribe finds that process insufficient and wants repatriation through NAGPRA.

A collection is an "accumulation of objects gathered for study, comparison, or exhibition." Maj. Op. 13 (quoting *Collection*, 3 Oxford English Dictionary 478 (2d ed. 1989); Webster's Ninth New Collegiate Dictionary 259 (1988)). "Holding" has many broad definitions, but the plural "holdings" indicates "any property that is owned or possessed."[2] Webster's Third New International Dictionary 1079 (1986); *see also* Black's Law Dictionary 731 (6th ed. 1990) ("general term for property . . . owned by a person or corporation"). Perhaps most relevant for a statute like this one addressing museums and institutions of higher education, "holdings" means "the entire *collection* of books, periodicals, and other materials in a library." Random House Dictionary of the English Language 911 (2d ed. 1987) (emphasis added); Webster's Third New International Dictionary 1079 (1986) (providing usage example of "the [holding]s of American libraries").

The majority correctly discerns that, in the context of NAGPRA's inventory provision, "holdings or collections" must refer to "something intentionally or purposefully

[2] Of course, the common law has long recognized that human remains are not property that can be owned by another person, although the living may have rights of control and disposition over them. *See* 2 William Blackstone, Commentaries *429 ("[T]hough the heir has a property in the monuments and escutcheons of his ancestors, yet he had none in their bodies or ashes."); *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) ("It is commonly said, being repeated from the early cases in England, where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse."). NAGPRA itself carefully observes this distinction. For example, the Act consistently refers to "ownership *or control of* Native American cultural items," which term includes both human remains and objects. NAGPRA § 3(a) (emphasis added). And the Act recognizes that tribes may "relinquish[] *control* over any Native American human remains, or *title to* or control over any funerary object." *Id.* §§ 2(3), 3(e) (emphasis added).

accumulated," not merely something in the agency's possession or control. Maj. Op. 13; *see* NAGPRA § 5(a). A distinguishing feature of "holdings or collections," then, is the purpose for which the items were gathered together—a purpose like "study, comparison, or exhibition." *Collection*, 3 Oxford English Dictionary 478 (2d ed. 1989); Webster's Ninth New Collegiate Dictionary 259 (1988).

As a linguistic matter, therefore, the district court was correct that a cemetery does not fit within a natural reading of the phrase "holdings or collections of Native American human remains." NAGPRA § 5(a); *see Winnebago Tribe of Neb. v. Dep't of the Army*, No. 1:24-cv-00078, 2024 WL 3884194, at *2 (E.D. Va. Aug. 20, 2024) ("Both terms apply naturally to a museum or federal agency's inventory of previously excavated remains; neither term applies naturally to graves in a cemetery."). A cemetery is not an accumulation of human remains gathered for study, comparison, or exhibition.[3] The bodies of Edward and Samuel were not buried at Carlisle Cemetery as an archive or to be stored for future examination, like a museum might do. Rather, to the extent that the mortal remains of the deceased were intentionally gathered at all, they were gathered for burial in the cemetery for the purpose of giving them a place of final rest. As the only other court of appeals to address this statutory language has reasoned, NAGPRA's text implies "that a museum is holding or collecting the remains for the purposes of display or study, as

[3] The Winnebago Tribe's alternative argument that the remains of Samuel and Edward are exhibited because the Carlisle Cemetery is a stop on the Army War College tour and features a plaque acknowledging that Carlisle students are buried there is unavailing because it is the land and the plaque that are exhibited, not any human remains.

opposed to serving as an original burial site."[4] *Thorpe*, 770 F.3d at 266. This commonsense conclusion flows from the ordinary meaning of the relevant statutory terms.

The majority faults the district court for drawing a "location-specific" distinction regarding the meaning of "holdings or collections" because the court found that excavated human remains in a museum exhibit are covered but remains interred in a cemetery are not. Maj. Op. 14–15. That is not the distinction the district court made. Rather, its conclusion that a cemetery is not a "collection" of human remains was a *purpose* distinction, not a locational one. To take the majority's example, an assortment of coins that a person sweeps up and dumps in his landfill on the back forty is not a "collection" of coins, whereas the same assortment of coins placed in protective sleeves and stored on the shelf is. *See* Maj. Op. 15. The location of the items affects whether they are a "collection" only to the extent that it reflects the purpose for their accumulation. While the person who throws away the

[4] That case concerned the final repose of legendary athlete Jim Thorpe, himself a Carlisle School alumnus. Thorpe's father sent him to Carlisle when he was 16 years old, and there Thorpe became a college football all-American under famed coach Glenn "Pop" Warner. *See Jim Thorpe*, Pro Football Hall of Fame, https://www.profootballhof.com/players/jim-thorpe [https://perma.cc/856K-9Q9E]; Rusty Glessner, *Visiting the Jim Thorpe Memorial in Carbon County*, PA Bucket List, https://pabucketlist.com/visiting-the-jim-thorpe-memorial-in-carbon-county/ [https://perma.cc/M3M7-8EG2]. After Carlisle, Thorpe won two Olympic gold medals (in decathlon and pentathlon) before playing professional baseball and professional football, eventually becoming the first president of the National Football League.

After his death, Thorpe's widow arranged for him to be buried at a memorial park dedicated to his legacy in the Borough of Thorpe, Pennsylvania, which renamed itself in his honor. Thorpe's children sued, seeking to have his remains repatriated to Oklahoma under NAGPRA. The Third Circuit rejected their argument as "clearly absurd" and "contrary to Congress's intent to protect Native American burial sites." *Thorpe*, 770 F.3d at 266.

coins "intentionally and affirmatively" gathered them for the purpose of tossing them out, Maj. Op. 14, that is not the kind of purpose that can turn the wayward coins into a "collection."

Rather than limiting "holdings or collections" to their definitional purposes like study, comparison, and exhibition, the majority expands the phrase so far as to conclude that "obtain[ing]" items for "*any* purpose will do—including the laying to rest of human remains in a cemetery" with the intent that they never again be disturbed. Maj. Op. 16. In other words, the majority finds that Carlisle Cemetery is the Army's "human remains collection" because the departed were "intentionally or purposefully accumulated" there for burial in a final resting place. Maj. Op. 13. The same reasoning necessarily applies to Arlington National Cemetery and every other graveyard. Even putting aside "insensitiv[ity]," Maj. Op. 13 n.3, it is simply not natural English to refer to a cemetery as the landowner's "corpse collection." The purpose of burying human remains in a cemetery is to lay them to rest; that is not a purpose of a collector and so does not qualify cemeteries as "holdings or collections" subject to NAGPRA's inventory and repatriation provisions.

In addition to the plain meaning of the text, NAGPRA's statutory context also demonstrates that the majority's broad interpretation of "holdings or collections" to include buried human remains is incorrect. The Act differentiates between "holdings or collections" of exhumed remains and objects on the one hand and remains still buried in graves on the other. In Section 3, NAGPRA imposes a detailed set of obligations and rules to protect graves and to govern the treatment and control of Native American human remains "excavated or discovered" on federal lands after the Act's enactment. NAGPRA

§ 3. In Sections 5 and 7, the statute imposes a different set of obligations to inventory and repatriate Native American human remains and funerary objects that have previously been exhumed and exist in museum or agency holdings or collections. *Id.* §§ 5, 7.

The different words Congress used to refer to these two categories of human remains is instructive. When referring to interred human remains in NAGPRA, Congress spoke of "excavation" and "removal," indicating that those remains must be disinterred from their resting place before anything further can be done with them. *Id.* § 3(c); *see id*. § 3(a) ("excavated or discovered"), (c)(1) ("excavated or removed"), (c)(2) ("excavated or removed"), (d)(2) ("excavated or removed"). When Congress referred to human remains in agency or museum holdings or collections, it used verbs like "possess" and "return." *See id.* §§ 5(a), 7. Not once does NAGPRA use "possess" or "return" in the context of an agency's relationship to buried remains. Rather, the remains must be "excavated," "exhumed," or "removed" from their resting place in order to be "possess[ed]" or returned. *Id.* §§ 2(13), 3; *see Thorpe*, 770 F.3d at 266 ("NAGPRA requires that remains be 'returned.' This assumes that the human remains were moved from their intended final resting place." (citation omitted)). Conversely, nothing in the inventory or repatriation provisions refers to "removal" or "excavation" of human remains in holdings or collections—the words are not used. NAGPRA §§ 5, 6, 7. But if buried remains were included in "holdings or collections," excavation would be a necessary step toward fulfilling the agency's or museum's obligations.

Indeed, nothing anywhere in the Act mentions an obligation to excavate or remove buried human remains under any circumstance. Just the opposite. The Act requires that

buried remains stay undisturbed unless and until detailed prerequisites are satisfied. *See id.* § 3(c), (d). NAGPRA's differing treatment of graves versus "holdings or collections" demonstrates that the latter is not so broad as to accommodate the majority's characterization of cemeteries as collections of human remains that an agency or museum has chosen to store "underground" rather than in a "display case."[5] Maj. Op. 20.

B.

Under the majority's interpretation of "holdings or collections," Native American graves in federal cemeteries are uniquely vulnerable to disturbance. The majority attempts to cabin the effects of its construction by asserting that NAGPRA gives the federal government a "right of possession" to human remains voluntarily buried on federal land, with the result that federal agencies may "refuse repatriation of remains buried with the proper consent of a decedent's next-of-kin . . . or tribe." Maj. Op. 21–22. That argument only further demonstrates the error of the majority's construction, in two ways.

First, Congress did not make "right of possession" a defense against repatriation of human remains. Indeed, NAGPRA's repatriation provision is carefully crafted to avoid doing so. The "right of possession" exception to repatriation is located in Section 7(c). It specifies that when a descendant or tribe requests the return of "unassociated funerary

[5] The majority invokes the regulatory definition of "holding or collection" as an accumulation of items for "any" purpose, followed by fifteen specific examples. 43 C.F.R. § 10.2. To the extent that regulation could be interpreted to include the purpose of burying human remains in their final resting place, it would be inconsistent with NAGPRA. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (holding that the proper interpretation of a statute is "the reading the court would have reached if no agency were involved" (internal quotation marks omitted)).

objects, sacred objects or objects of cultural patrimony," the agency or museum shall return the objects unless it can "prove that it has a right of possession to the objects." NAGPRA § 7(c). That list notably does not include human remains or the term "cultural items," which includes human remains among other things. *See Thorpe*, 770 F.3d at 264 n.16 (observing that Section 7(c) "by its terms does not apply to human remains").

The manner in which Section 7(c) interacts with the rest of the repatriation provision makes Congress's intent unmistakable. That provision specifies that unassociated funerary objects, sacred objects, and objects of cultural patrimony must be returned upon request "and pursuant to subsections (b) [the scientific study exception], (c) [the right of possession exception], and (e) [about requestors' competing claims]." NAGPRA § 7(a)(2), (a)(5). By contrast, "human remains and associated funerary objects" must be returned upon request "and pursuant to subsections (b) [the scientific study exception] and (e) [about requestors' competing claims]." *Id.* § 7(a)(1), (a)(4). The two provisions requiring repatriation of human remains conspicuously omit the right of possession exception in subsection (c), making clear that exception does not apply to human remains. Indeed, the phrasing of subsection (a)(4) makes the contrast particularly plain: "Native American human remains and funerary objects" must be returned "upon request and pursuant to subsections (b) and (e), and, in the case of unassociated funerary objects, subsection (c)." *Id.* § 7(a)(4).

Ignoring the statute's specificity, the majority relies instead on a Department of the Interior regulation that "exempt[s] from NAGPRA's repatriation obligations 'human remains to which a museum or Federal agency can prove it has a right of possession.'" Maj. Op. 21–22 (quoting 43 C.F.R. § 10.2). The regulation, however, patently rewrites the

statute to extend the right of possession exception to human remains when Congress clearly chose not to do so. The agency has no authority to overrule Congress's determination that *all* Native American human remains in holdings or collections should be repatriated upon request, subject only to the possibility of delay caused by the scientific study exception. *See* NAGPRA § 13 (authorizing the Secretary of the Interior to promulgate only "regulations to *carry out* this Act," not to amend it (emphasis added)).

Nor is there anything "absurd" about treating human bodies with more respect than objects. Maj. Op. 22 n.9. Congress could, and did, quite rationally decide that human remains in holdings or collections should not be shielded from repatriation no matter how an agency or museum came to possess those remains. While a museum can insist upon its right to own or possess an object—and its right to compensation if the government takes its property—Congress rationally determined that a museum or agency cannot assert a superior right to possess the body of a human being.[6] *See* NAGPRA § 2(13) (defining the

[6] Another clue that the majority is trying to fit a square peg in a round hole comes from NAGPRA's description of the circumstances that create a right of possession to human remains. Under the Act, "[t]he original acquisition of Native American human remains . . . which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official [tribal] governing body . . . is deemed to give right of possession to those remains." NAGPRA § 2(13). Under the majority's interpretation, "otherwise obtained" must be construed to include "obtained for burial." But that meaning is an odd fit with the preceding words in the list—"excavated" and exhumed"—which refer to the exact opposite of burial. *See Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (explaining that the *ejusdem generis* canon "instructs courts to interpret a general or collective term at the end of a list of specific items in light of any common attributes shared by the specific items" (internal quotation marks and brackets omitted)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–115 (2001) (explaining that *ejusdem generis* appropriately applies when interpreting a residual phrase broadly would "fail[] to give independent effect to the statute's enumeration of the specific" items

"right of possession" for items *other than* human remains to include an exception for circumstances when the phrase "so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States").

Second, NAGPRA makes the right of possession a defense to its criminal trafficking provision. *See id.* § 4(a) ("Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American *without the right of possession* to those remains . . . shall be fined in accordance with this title, or imprisoned . . . ." (emphasis added)). In fact, the criminal provision is the only instance where the Act applies the right of possession to human remains. Pursuant to that provision, an individual or entity with the right of possession can sell and use Native American human remains without criminal liability. Under the majority's reasoning, then, Native American families—and only Native American families—who consent to have their deceased

---

preceding the residual phrase in the list). That is yet another indication that the right of possession does not apply to interred human remains.

In response to this concern, the majority notes that this provision also applies to "associated funerary objects," which are "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later." NAGPRA § 2(3)(A); *see* Maj. Op. 22 n.8. The phrase "excavated, exhumed, or otherwise obtained" applies to these objects just as it does to human remains, because these objects are removed from a "burial site," which is any place "below, on, or above the surface of the earth," into which "individual human remains are deposited" as part of a "death rite or ceremony of a culture." NAGPRA § 2(1). Contrary to the majority's assertion, the statutory text does not produce "anomalous results" when read according to this basic principle of sound interpretation. Maj. Op. 22 n.8; *cf.* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 199 (2012) (classifying *ejusdem generis* as a contextual canon which "parallels common usage" of the English language).

relatives buried at Arlington or other qualifying cemeteries are giving the federal government the right of possession to their loved ones' remains. And with the right of possession comes the right to disinter those remains and sell them to a private collector, display them in the Smithsonian, or add them to the archives indefinitely. *That* reversal of NAGPRA is the absurd result.

"Right of possession" doesn't narrow or salvage the majority's interpretation of NAGPRA's repatriation provision; rather, it is another sign that the majority's construction is not what Congress meant.

III.

No party disputes that the bodies of these two Winnebago boys should be returned, they merely dispute how. But there is a wide gulf between finding that "[n]othing in [NAGPRA's] text or purpose forecloses" the return of Edward and Samuel's remains, Maj. Op. 25—which is correct, *see* NAGPRA § 11(1)(A)—and concluding that, under penalty of law, *see id.* § 9, the statute places affirmative legal obligations on all qualifying cemeteries to inventory, exhume, and return the buried dead there laid to rest.

Because the graves of deceased Native Americans buried in federal cemeteries are not subject to NAGPRA's inventory and repatriation provisions, I would affirm the district court's judgment dismissing the Winnebago Tribe's complaint. I respectfully dissent.