No. 02-35996

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN; C. LORING BRACE;
GEORGE W. GILL; C. LANCE HAYNES, JR.;
RICHARD U. JANTZ; DOUGLAS W. OWSLEY;
DENNIS J. STANFORD; and D. GENTRY STEELE,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, et al.,
Defendants,

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; NEZ PIERCE 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, Case No. D.C. No. 96-148l JE)
Honorable John Jelderks, Magistrate Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES ROBSON BONNICHSEN, *ET AL.*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Pacific Legal Foundation (PLF) submits the following Brief *Amicus Curiae* in Support of Plaintiffs/Appellees. This brief is filed with the consent of all parties.

Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, and individual freedom. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and Alaska. PLF attorneys actively engage in research and litigation over a broad spectrum of public interest issues nationwide, and frequently appear as *amicus curiae* in cases before federal and state courts. PLF submits this brief because it believes its public policy perspective and extensive litigation experience involving issues of administrative law, and the First Amendment, will provide an additional viewpoint concerning the issues presented. PLF attorneys have participated in numerous First Amendment cases, including *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (1999); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *cert. granted*, 123 S. Ct. 817 (2003), and in numerous cases involving administrative law, including *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); and *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229 (9th Cir.

2001).

STATEMENT OF THE CASE

This case began in 1996, when a group of boating enthusiasts discovered a skeleton (the "Kennewick Man") beside a riverbed near Kennewick, Washington. It proved to be over 9000 years old, rousing the curiosity of scientists who had believed immigration to North America was more recent. But under the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001, *et seq.*, a skeleton related to a modern Native American tribe, or "culturally affiliated" with a tribe, must be turned over to that tribe for burial. Citing NAGPRA, the Umatilla, Yakima, and Colville tribes demanded that the government prohibit scientific examination of Kennewick Man, *Bonnichsen v. Dep't. of the Army*, 969 F. Supp. 628, 631 (D. Or. 1997) ("hereafter *Bonnichsen I*"). The Plaintiff scientists sued, alleging, *inter alia*, that there was no evidence Kennewick Man was a member of, or was culturally affiliated with, any modern tribe, and that the Secretary's determination violated the scientists' First Amendment right to research. *Id.* at 646-48.

Pending the trial Court's decision, the Army Corps of Engineers placed the bones in storage. The Court later found that political manipulation of the lawsuit began soon afterwards. On orders from "the White House," the Army Corps of Engineers prohibited all DNA testing, and dumped 1,000 tons of rock on the discovery site,

ensuring that no more bones or artifacts would be unearthed. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1125-26 (D. Or. 2002) ("*Bonnichsen II*"). The Army also allowed Indians to perform rituals over the bones, contaminating them with foreign DNA. *Id* at 1123. After the ceremonies, some were taken and buried. *Id.* at 1123. The bones were badly handled—some bones were kept in a paper sack, and the femurs disappeared only to be found, five *years* later, in a cardboard box in the coroner's office. *Id.* The Department of the Interior, taking the case over from the Army, engaged in numerous meetings and communications with the Indian tribes, while preparing for the litigation. *Id.* at 1133. For these and other reasons, the District Court concluded that the Department's "approach throughout this litigation . . . has been marked by an appearance of bias." *Id.*

The District Court rejected the Secretary's determination that Kennewick Man was a Native American, and was "culturally affiliated" with modern tribes. That determination had been based *solely* on the age of the bones, and the fact that they were found in American soil. The Court held that the facts did "not support a finding that Kennewick Man is related to *any* particular identifiable group or culture," *id.* at 1138 (emphasis added), and that defining "Native American" to include "people or objects with no relationship to present-day American Indians" would be absurd. *Id.* at 1136. Because the Secretary's interpretation of "Native American" was not reasonable or longstanding, the Court held that it did not warrant deference under

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Further, that decision was arbitrary and capricious. Because the Court therefore reversed the Secretary's determination on statutory grounds, it did not need to address the Plaintiffs' constitutional arguments.

SUMMARY OF ARGUMENT

The court below correctly held that the Secretary's determination that the "Kennewick Man" bones were "Native American" does not qualify for *Chevron* deference. Such deference is appropriate only where a statute is ambiguous. Here, the statutory language was not ambiguous, because the term "Native American" in its ordinary use does not refer to peoples on the North American continent nearly nine thousand years ago. Further, even if the statute were ambiguous, the Secretary's determination that it was meant to include such ancient remains was unreasonable and reached beyond Congress's intent in enacting the statute. Thus *Chevron* deference is inappropriate in this case. *MCI Telecommunications v. AT&T*, 512 U.S. 218, 229 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear").

More fundamentally, the threat to scientific research implicit in this case implicates the First Amendment's protections for the right to access research materials in the government's possession. The Secretary's politically-motivated decision

threatens to prevent scientists from examining this priceless archaeological treasure forever. While scientific research does not receive the same protection accorded political speech or literature, the Supreme Court has acknowledged that it deserves some increased protection under the First Amendment. NAGPRA allows the Secretary of Interior to entirely foreclose scientific access to information. Courts therefore should not defer to the Secretary's decisions, but should apply an independent and heightened scrutiny.

I

THE SECRETARY'S DECISION THAT THE SKELETON IS "NATIVE AMERICAN" WAS NOT REASONABLE, AND THEREFORE DID NOT WARRANT *CHEVRON* DEFERENCE

The Secretary of Interior determined that Kennewick Man was "Native American" after defining the term "Native American" to refer to any human remains found in the United States, which predate the arrival of Europeans. *See Bonnichsen II*, 217 F. Supp. 2d at 1134-35. The Secretary argued that the trial court should defer to this definition under *Chevron*.

Under *Chevron*, a court defers to an administrative agency's interpretation of a statute only when Congress's intent is ambiguous. 467 U.S. at 842-43. If Congress has "directly spoken to the precise question at issue . . . that is the end of the matter." *Id.* at 842. It is important to address the question of ambiguity first, because

regulatory agencies might otherwise interpret their own statutes in ways which expand the scope of their authority beyond Congress's intent. *See, e.g.*, *MCI*, 512 U.S. at 234; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

To ensure that regulatory agencies stay within the boundaries Congress sets, a reviewing court "should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132. Thus the District Court correctly interpreted the term "Native American" within the context of NAGPRA. The term 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). This use of present tense indicates that Congress did not intend all objects predating the arrival of Columbus to be classified *ipso facto* as "Native American." This is consistent with the common dictionary definition of the term "Native American": "An American Indian." *See* Merriam Webster's Collegiate Dictionary 772 (10th ed. 2001); Webster's III New Riverside Dictionary 458 (rev. ed. 1996). This accords with the usual cultural connotation of the term "Native American." *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 Calif. L. Rev. 1231, 1263-64 (Oct. 1994) ("the category is primarily a socially-constructed one"). Further, it accords with the purpose of NAGPRA: to protect and repatriate the remains of *modern* tribes which have suffered wrongs in the past.

Since the term "Native American" is not ambiguous, the Secretary's interpretation does not warrant *Chevron* deference. However, even if the term were ambiguous, deference would not be appropriate, because the Secretary's interpretation is not reasonable. The phrase "Native American" is not commonly used to refer to people living on the North American continent immediately after the Ice Age, but rather to the people found by the European settlers who arrived in North America in the 15th century. The Secretary's determination would lead to the extreme and absurd result that all pre-Columbian skeletons, including those of Viking explorers, who probably reached North America in the Eleventh Century (*see* Heather Pringle, *Hints of Frequent Pre-Columbian Contacts*, 288 Science 783 (May 5, 2000), 2000 WL 11164349), would also be classified as "Native American"! Since the Secretary's interpretation of "Native American" to refer to all objects[1] predating 1492 runs counter to NAGPRA's plain text, runs counter to the common intendment of the language, and leads to absurd results, that interpretation cannot be "reasonable" for purposes of *Chevron* deference.

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[1] Tribal claimants persist in viewing Kennewick Man as a relative or family member. While such a view is understandable in light of the historical and religious background of Indian tribes, there simply must come a time at which a skeleton stops being a relative and becomes an artifact. If there is not such a point, all archaeology must come to an end. While in most cases arising from nineteenth century graverobbing, this point will not have been reached, a skeleton which is five times older than Julius Caesar simply *must* be beyond that point.

The court below noted that the Secretary's interpretation was not longstanding, but was instead devised during litigation, without the opportunity of comment by the scientists, and after a variety of procedural irregularities on the Secretary's part which strongly suggest that political influences were brought to bear on the case. *Bonnichsen II*, 217 F. Supp. 2d at 1134-35. While the absence of comment, and the failure to abide by regular procedures is not dispositive of *Chevron*'s applicability, it weighs heavily against deference. *See United States v. Mead Corp.*, 533 U.S. 218, 231 (2001); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986). So does the apparent interference by the executive branch. The agency interpretation must be reasonable, and avoid reaching beyond the intent of the statute in question to results which make no sense, which are not "logically consistent with the language of the regulation . . . [or do not] serve[] a permissible regulatory function." *Rollins Envtl. Servs., Inc. v. United States EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991); *see also Puerto Rico Sun Oil Co. v. United States EPA*, 8 F.3d 73, 77 (1st Cir. 1993). An agency's power to interpret statutes "must not be confused with the power to rewrite." *Pettibone Corp. v. United States*, 34 F.3d 536, 541 (7th Cir. 1994). Classifying the remains as Native American, apparently in satisfaction of demands from the White House, is not "reasonable," lacks a rational basis, and does not warrant deference under *Chevron*.

II

THE FIRST AMENDMENT REQUIRES COURTS TO USE HEIGHTENED SCRUTINY WHEN REVIEWING GOVERNMENT DECISIONS TO REPATRIATE REMAINS UNDER NAGPRA

The District Court applied an "arbitrariness" standard of review under the Administrative Procedures Act, finding that the Secretary's determination that Kennewick Man was a "Native American" under NAGPRA was not reasonable, because it was based solely on the age of the bones and the fact that they were found on land where the tribal claimants live—which is an insufficient link to any one of the present-day tribes. *Bonnichsen II*, 217 F. Supp. 2d at 1137.

Although this conclusion was correct, this Court should provide lower courts with guidance that, in future cases, they should apply a higher standard of scrutiny to the Secretary's decision to "repatriate" artifacts, because that determination will foreclose scientists' ability to study them, and absolutely bar the scientists' access to such information. A decision to repatriate would be inconsistent with the First Amendment interest in open access to information as well as with the stated purposes of the Archaeological Resource Protection Act, 16 U.S.C. § 470aa(b) ("to secure, for the present and future benefit of the American people, the protection of archaeological resources and . . . to foster increased cooperation and exchange of information

between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data").

Courts reviewing the Secretary's determinations under NAGPRA should require that the Secretary's decision be justified by clear and compelling evidence, rather than merely a rational evidentiary basis. This standard would protect the rights of the public in accessing important archaeological information, but would not impose so severe a burden as to prevent the government from serving NAGPRA's important purposes: preventing graverobbing and similar abuses. *See Bonnichsen I*, 969 F. Supp. at 649.

Closer scrutiny would also effectuate Congress's intent in enacting NAGPRA, which was to balance the need for protecting the sanctity of Indian remains with legitimate scientific interests. *See Na Iwi O Na Kapuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1415-16 (D. Haw. 1995) ("[NAGPRA's] legislative history also emphasizes the importance of ensuring access to available information on Native Hawaiian and Native American remains because of the 'need to learn for the future from the past.' "). It would also serve the courts' duty, often called "constitutional fact review," to increase scrutiny when an administrative decision infringes on First Amendment rights. Finally, it would avoid cases, like this one, in which political pressures have been exerted to infringe on legitimate scientific endeavors. *See Bonnichsen II*, 217 F. Supp. 2d at 1125-26, 1132.

A. The First Amendment Was Intended to Protect the Rights of Discovery

The First Amendment embodies the premise that information is valuable and should not be subject to arbitrary political control. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 n.10 (1986) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Moreover, the framers saw intellectual advancement, particularly science, as vital to American institutions. *See generally* I. Bernard Cohen, *Science and the Founding Fathers* (1995). Noting the "immensity in every branch of science [that] yet remains to be discovered," Thomas Jefferson wrote that "[t]o preserve the freedom of the human mind then & freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will, & speak as we think, the condition of man will proceed in improvement." *Letter to William Green Munford, in Jefferson: Writings* 1062, 1065-66 (M. Peterson ed., 1984).[2]

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[2] Among his many other accomplishments, Jefferson was the first American archaeologist, and oversaw the excavation of numerous American Indian skeletons on his property in Virginia. *See* Alf J. Mapp, Jr., *Thomas Jefferson: A Strange Case of Mistaken Identity* 166-67 (1989).

The Framers saw freedom of expression not just as a way to keep government under the watchful eye of democracy, but also as vital to discovery and progress. The Continental Congress wrote that "[t]he importance of [the 'freedom of the press'] consists, besides *the advancement of truth, science, morality, and arts in general*, in its diffusion of liberal sentiments on the administration of Government . . . ." *Continental Congress to the Inhabitants of the Province of Quebec*, Oct. 26, 1774, *in* 5 *The Founders' Constitution* 62 (P. Kurland & R. Lerner eds., 1987) (emphasis added). The First Amendment is the clearest instance of the founders' conviction that open access to information is an essential part of free government.

B. The Supreme Court Has Held That the First Amendment Protects, to a Limited Degree, the Right of Access to Information in the Government's Possession

The Supreme Court has held that the First Amendment protects more than just the right to express one's ideas. It also protects the right to receive ideas. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citing cases); *Board of Education v. Pico*, 457 U.S. 853, 866-67 (1982). This right is particularly important where, as here, the information is in the government's possession. In *Pico*, for instance, the Court held that government schools may not remove books from the shelves of a school library in an attempt to prevent students from gaining access to them. The Court did hold, however, that the school could

remove books from the curriculum. *Id.* at 869. Thus, although the right to receive ideas does not impose an absolute duty for government to furnish information, it does impose a greater burden on government to *justify blocking public access* to information in its possession.[3] The First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . . That right may not constitutionally be abridged either by Congress or by [regulatory agencies]." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

In an earlier stage of this case, the District Court noted that the right to access information has been protected in a variety of contexts. *See Bonnichsen I*, 969 F. Supp. at 645-48. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court noted that

> the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of

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[3] The plurality opinion in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), suggests that the government may close off *all* access to information in its possession, without violating the First Amendment. However, as the Court below noted, the plurality opinion's dicta has little precedential value. *Bonnichsen I*, 969 F. Supp. at 647 n.16. Moreover, the continuing validity of the plurality opinion in *Houchins* is suspect. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 582-83 (1980) (Stevens, J., concurring); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 873-74 (9th Cir. 2002); *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 960 F.2d 105, 109 n.2 (9th Cir. 1992).

inquiry, freedom of thought, and freedom to teach . . . .

Id. at 482 (citations omitted). *See also Henley v. Wise*, 303 F. Supp. 62, 66 (N.D. In. 1969) ("The first protected area is the right of scholars to do research and advance the state of man's knowledge."). Moreover, science utterly depends on the free exchange of ideas and information. Unlike creative literature, science depends on gathering measurable data, comparing results, openly debating, and confirming or rejecting hypotheses through repeatable experiments. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993); J. Bronowski, *Science and Human Values* 60 (2d ed. 1965) ("Science is the creation of concepts and their exploration in the facts. It has no other test of the concept than its empirical truth to fact . . . not as a dogma but as a process.")

Government's power to stifle scientific inquiry poses a threat to this exploration. As Professor Tribe has noted, "[t]he right to know . . . may include an individual's right to acquire desired information or ideas free of governmental veto, undue hindrance, or unwarranted exposure." Laurence Tribe, *Constitutional Law* 944-45 (2d ed. 1988). The Supreme Court has therefore instituted protections for academic freedom as well as access to government operations. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court noted that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not

merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603; *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.") First Amendment jurisprudence shows a constant bias in favor of discovery and research and against authoritarian suppression of science. *See further Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring). Indeed, the Court has consistently held that the First Amendment protects material which has "serious literary, artistic, political, or *scientific* value." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1399 (2002) (emphasis added). *Reno v. ACLU*, 521 U.S. 844, 862 (1997); *Miller v. California*, 413 U.S. 15, 24 (1973).

Commentators have pointed to some important analogies between First Amendment cases and freedom of scientific inquiry, specifically the right of access to trials, library books, or other information, and protections accorded to commercial speech. These analogies reveal that in some cases, the First Amendment prohibits government from closing off access to information. *See, e.g.,* Cass R. Sunstein, *Government Control of Information*, 74 Cal. L. Rev. 889, 917-18 (1986) ("The first amendment question should . . . [turn] on what sort of justification the government is able to use to support the restriction."); James R. Ferguson, *Scientific Inquiry and the*

First Amendment, 64 Cornell L. Rev. 639 (1979); James R. Ferguson, *Scientific and Technological Expression*, 16 Harv. C.R.-C.L. L. Rev. 519 (1981); John B. Attanasio, *The Genetic Revolution: What Lawyers Don't Know*, 63 N.Y.U.L. Rev. 662, 695-708 (1988). "[R]esearch is so intimately connected with the scientist's goal of generating and communicating information that without protection of this aspect of science, the right to communicate would be meaningless." Richard Delgado, et al., *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 U.C.L.A. L. Rev. 128, 160 (1983).

1. Protections for Scientific Research Have Been Analogized to Trial Access

In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Supreme Court held that the First Amendment protects the public's right of access to criminal trials. Writing for a plurality, Chief Justice Burger held that "[f]ree speech carries with it some freedom to listen . . . . [T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.* at 576 (citations omitted). He also noted that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning" if there is not " 'some protection for seeking out the news' " *Id.* at 566-67 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). In a separate concurring opinion, Justices

Brennan and Marshall held that the First Amendment itself protects the public's right of access to trials. *Id.* at 586. They acknowledged that this right of access was not as strongly protected as the right to disseminate information; nevertheless government decisions to close off public access must meet a higher burden than mere rational relationship standards. *Id.* at 587.

This view was reaffirmed in *Press-Enterprise Co. v. Superior Court of Riverside*, 478 U.S. 1 (1986), where the Court held that only an overriding government interest can justify denying the public access to trials. *Accord El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993) (*per curiam*). In *Press-Enterprise*, the Court emphasized two principles: first, "whether the place and process have historically been open to the press and general public," and second "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8. Because public access to trials had a strong historical background, and because trial fairness depends largely on the public's ability to monitor criminal proceedings, the Court held that "a qualified First Amendment right of access attaches to preliminary hearings . . . [so that] proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 13-14 (internal quotations and citations omitted). This heightened scrutiny permits courts to curtail public access for certain reasons, such as preventing prejudice or protecting

national security, if there are no adequate alternatives to such curtailment. *Id.* (Proceedings cannot be closed unless specific, on-the-record filings demonstrate closure is essential and narrowly tailored).

As the court below noted, there is a strong analogy between the press' right of access to trials or books, and the plaintiff scientists' right to access the "information" that exists in the form of Kennewick Man. *See Bonnichsen I*, 969 F. Supp. at 646-47. In all of these situations, the information involved is in the government's "possession," and the Constitution requires close scrutiny of government's power to close off access to prevent it from being exercised in the service of impermissible goals. In *Pico*, the government blocked access to information in an impermissible attempt "to deny respondents access to ideas with which petitioners disagreed . . . ." 457 U.S. at 871. Here, political pressures were brought to bear to prevent the scientists' access to this information. *See Bonnichsen II*, 217 F. Supp. 2d at 1133-34. *Cf. Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("[I]n the area of free expression . . . unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.")

Like all First Amendment rights, the right of access to trials is not absolute, and may be limited when those limits are narrowly tailored and serve an important government interest. So, too, recognition of the First Amendment's protection for scientific discovery would not absolutely prohibit limits on such discovery, for

example, to protect national security. *Cf. United States v. Edler Industries, Inc.*, 579 F.2d 516, 520 (9th Cir. 1978). But such protection would require the court to "balance First Amendment rights against governmental regulatory interests." *Kleindienst*, 408 U.S. at 765. That balancing requires the government to meet a higher burden than the deference accorded under either *Chevron* or the Administrative Procedures Act.

2. Protections for Scientific Research Have Been Analogized to Commercial Speech

Another analogy to freedom of scientific inquiry is the right of commercial speech. The Court has held that commercial speech may be limited in certain cases, but that these limits are subject to intermediate scrutiny. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996). The danger presented by a government with power to choose when to allow the public access to information has impelled the Court to require a greater showing from the government when regulating the dissemination of commercial speech. As the Court explained in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976):

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information . . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

So, too, the freedom of scientific investigation serves important social goals of discovery and progress. Even if the First Amendment protects primarily speech related to democratic decisionmaking, the central role of science in twenty-first century public debate puts a similar value on protecting scientific discovery.

Consistently with these analogies, the First Amendment requires the government to bear a heavier burden to justify its decision to limit access to information. *See American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 451 n. 21 (E.D. Pa. 2002) (First Amendment right to access information prohibits government from requiring libraries to install Internet filtering devices). Heightened scrutiny does not necessarily forbid government from regulating. *See, e.g., Turner Broadcasting System, Inc. v. FCC.*, 520 U.S. 180 (1997). But it does require government to reach beyond mere rational relationship. *See, e.g., Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (concerns of efficient prison administration met high standards of scrutiny required by government prohibition of access to information). "[T]he conclusion that some technical data may be banned on a lesser showing of harm does not imply that the government has license to ban scientific information whenever it chooses. It must still meet a considerable burden, as the commercial speech cases suggest." Sunstein, *supra*, at 911. That burden is manifested by reviewing courts in the form of increased scrutiny of administrative determinations when those determinations infringe on First

Amendment interests.

C. There Is Substantial Precedent for Applying Heightened Scrutiny

While the Administrative Procedures Act provides that decisions by an administrator should be upheld so long as they are not arbitrary and capricious, *see Bonnichsen II,* 217 F. Supp. 2d at 1131, there are circumstances in which courts will apply closer scrutiny to administrative decisions. Ronald M. Revin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 48 n.271 (Oct. 1985). These are primarily cases where the administrative decision threatens the exercise of First Amendment rights. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (internal quotation marks and citations omitted)); *Porter v. Heckler*, 780 F.2d 920, 923 (11th Cir. 1986); *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1327 (N.D. Cal. 1984), *rev'd on other grounds*, 473 U.S. 305 (1985) ("it is appropriate to give a potential intrusion on First Amendment rights particular scrutiny where . . . the government may be attempting to chill the exercise of First Amendment rights because the exercise of

those rights would adversely affect certain of the government's own interests."); *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1117-18 (D.C. Cir. 1969) (deference not accorded Secret Service determinations when they threatened First Amendment rights).

As the Fifth Circuit has explained, notwithstanding the deferential standard provided for in the Administrative Procedures Act, "we do not give [an administrative agency's] actions the usual deference when reviewing a potential violation of a constitutional right." *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999); *accord*, *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1199 (9th Cir. 1975) ("nothing in the A.P.A. purports to sanction the violation of constitutional rights committed under the guise of the exercise of discretion, or prevents a court from inquiring into and remedying the deprivation").

"Independent judicial judgment is especially appropriate in the First Amendment area. Judicial deference to agency fact-finding and decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment." *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). In cases involving the First Amendment, therefore, "an independent examination of the record will be made," above and beyond simply . . . "ascertaining, in accordance with statute, whether there was substantial evidence to support the [administrative] findings." *Pickering v. Board*

of Educ., 391 U.S. 563, 579 n.2 (1968).

There are two theories as to the application of such heightened "constitutional fact review." *See* Judah A. Shechter, *Note: De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 Colum. L. Rev. 1483 (Nov. 1988).[4] The first theory holds that such heightened review is required by the peculiar importance of the First Amendment. *See Bose*, 466 U.S. at 498 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964)). *See further* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 243 (1985). Since "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," courts "must . . . decide for [them]selves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685-86 (1989). "We review . . . First Amendment claims *de novo* because 'the

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[4] In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Supreme Court noted that "the Court has justified independent federal or appellate review as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor.'" (quoting *Bose*, 466 U.S. at 518 (Rehnquist, J., dissenting)). The case at bar reveals more than ample evidence of such bias on the part of the Secretary. But since NAGPRA cases implicate important First Amendment issues, such heightened review is appropriate even in the absence of evidence of bad faith.

application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.' " *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (citations omitted). Courts routinely protect the right of access to information by heightened scrutiny. Therefore, plaintiff scientists' First Amendment rights in this case require precisely this independent review, rather than the deferential standard generally applied under the Administrative Procedures Act.

The second theory of "constitutional facts" scrutiny holds that such scrutiny is required by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* Paul Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tul. L. Rev. 733, 744-45 (1983) (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring)). In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court held that due process requires the court to balance the private interests implicated, the risk posed by an erroneous determination under the present system, the possible improvement resulting from a new procedure, and the burden on the public of requiring a new procedure.

In cases involving NAGPRA, the interest involved is the right to access unique scientific artifacts: here, a 9,000 year old skeleton that has already caused scientists to revise much of their thinking about the origins of the North American population. An erroneous determination would entirely destroy the opportunity to examine this unique

object. The burden of requiring an increased standard of review would not be severe; NAGPRA was primarily intended to protect Indian tribes' interests in the sanctity of tribal members and relatives, and in cases where skeletons are of recent origin, claimants would be able to satisfy heightened scrutiny. Thus heightened scrutiny would satisfy *Eldridge*'s standards.

Under either of these theories, the threat NAGPRA poses to the plaintiff scientists' right of access to information in the government's possession is sufficiently great to justify heightened scrutiny.

CONCLUSION

The Secretary of Interior's determination that Kennewick Man is a "Native American" was not a reasonable interpretation of NAGPRA's clear language. Further, that determination would prohibit the Plaintiff scientists from researching the skeleton, and therefore intrudes on First Amendment rights. The District Court was correct to apply its independent judgment and the opinion below should be *affirmed*.

DATED: May 28, 2003.

Respectfully submitted,

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I hereby certify that the foregoing brief was filed with the Clerk this 28 th day of May, 2003, via Federal Express. I further certify that two copies of the foregoing brief were served this day via first-class mail, postage prepaid, upon each of the following:

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