No. 04-10158

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE JOHN KACZYNSKI,

Defendant-Appellant,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Garland E. Burrell, Jr.
District Court Case No. CR S-96-259-GEB-GGH

JOINT *AMICI CURIAE* BRIEF OF the FREEDOM TO READ FOUNDATION and the SOCIETY OF AMERICAN ARCHIVISTS, in support of APPELLANT THEODORE JOHN KACZYNSKI and REVERSAL

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I. INTRODUCTION

The researcher's or archivist's stock in trade is original source material. The scholar relies on primary sources to convey a depth of information that copies lack—"quiet paper that whispers its tender message, or groaning, roaring paper that for those of imagination carries its own grief or elation of a vanished hour and day." CARL SANDBURG, LINCOLN COLLECTOR: THE STORY OF OLIVER R. BARRETT'S GREAT PRIVATE COLLECTION 4 (1949). From the librarian's perspective, the purpose of making original documents available is to provide accurate representation of historical evidence; the library acquires and makes available such materials without knowing what specific uses may be made of them by scholars in the future, with as-yet unknown questions and methods. So too for the archivist, who identifies and preserves the vital records of our society for historical investigation and study, with the understanding that the materials' historical or scholarly significance may evolve over time in unforeseen ways. These purposes are thwarted by lack of access to such materials.

But here, the government has exploited a restitutionary lien intended to compensate crime victims to deny public access to such primary sources—without advancing any legitimate purpose cognizable under the First Amendment. What the district court characterizes in this case (without citation to the record) as Kaczynski's "apparent endeavor to extol his criminal celebrity status," Appellant's Excerpts of Record ("ER") 137, the University of Michigan considers an opportunity to add significant original materials to its collection. What the district court dismisses as Kaczynski's efforts to "preserve for posterity some evidence of the evils wrought" by his actions, *id.*, *Amici Curiae* view as no less than the public's First Amendment right of access to culturally and historically significant original documents. The reprehensible nature of a person's crimes does not justify a conclusion that scholars and the public should be denied a chance to study his original papers; indeed, such analysis may help foster greater understanding of a murderer's or a terrorist's motives and behavior and hence facilitate efforts to prevent future crimes and acts of terror.

Because the district court improperly disregarded the public's vital interest in Kaczynski's original documents, and because the government has failed to advance any persuasive countervailing consideration that

would override the public interest, *Amici* urge the Court to reverse and remand with instructions to the district court to frame an order that will permit the original documents to be preserved adequately and made accessible to scholars, researchers, and interested members of the public.

II. STATEMENT OF IDENTITIES OF *AMICI CURIAE*

A. The Freedom to Read Foundation.

The Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

B. The Society of American Archivists.

The Society of American Archivists ("SAA") serves the educational and professional needs of its members, including 4,000 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission the SAA provides services such as continuing education,

publications, annual meetings, and career development opportunities. The SAA also exerts active leadership on significant archival issues by shaping policies and standards, building effective coalitions, and improving public awareness of the value of archives. The SAA serves as an advocate on behalf of archivists on public policy issues which affect archivists' ability to function in a fair, professional, and successful manner.

III. SUMMARY OF ARGUMENT

Theodore J. Kaczynski, convicted of the "Unabomber" crimes, has expressed a desire to donate personal papers confiscated from him by the government to the Joseph Labadie Collection in the University of Michigan's Special Collections Library (the "University"), which has agreed to preserve and provide access to the documents. ER 81, 86; *see also* Labadie Collection Home Page, *available at* http://www.lib.umich.edu/spec-coll/labadie/. To that end, Kaczynski filed a motion for return of property that would have made his original documents—with all the critical and irreplaceable information that only the original documents can transmit—available to the public for inspection and study. The government opposed the motion, and has chosen to seal off

Kaczynski's documents from public view, willing neither to sell nor to permit the donation of the original documents.

The district court ruled that Kaczynski had no standing to assert the public's interest in access to the documents, and that his interests in preserving the documents could not trump the interests of compensating his victims. ER 137. Although *Amici* express no view regarding the competing property interests of Kaczynski, the government, and the prospective beneficiaries of the restitution lien, *Amici* urge reversal of the district court's order. By denying Kaczynski's motion entirely, the district court endorsed the government's improper prevention of public access to Kaczynski's original papers.

Amici's fundamental view is that the original documents should be preserved and made accessible to scholars, researchers, and the general public, and that the First Amendment precludes irrational and arbitrary government action that could needlessly result in the destruction or deterioration of the papers and denial of public access.[1] *Amici* take no

[1] Appellant's Excerpts of Record do not contain a detailed description of Kaczynski's documents, but the government's list of evidence seized from Kaczynski's cabin includes approximately 30 references to documents, binders, books, and pamphlets, ER 10–71, as well as a seven-page list of

position on whether this objective is best attained by allowing an acquisition of the papers by the Labadie Collection, a disposition to the National Archives or similar public facility, or a sale to a library, museum, or private collector who would preserve them and make the papers publicly accessible.

IV. ARGUMENT

A. The Public Has a First Amendment Right To Receive the Information Conveyed Only by Kaczynski's Original Documents.

1. Kaczynski's original writings have intrinsic historical and scholarly value that photocopies lack.

The government fails to recognize that there is important, if intangible and sometimes indescribable, information transmitted by an original document: "Every written record, be it a note in the files, be it the manuscript of a literary or scientific work, stabilises the content expressed in it. . . . Hand written manuscripts, whose different chronological phases can be apparent through the different colours of the ink, can be sufficient for this." Angelika Menne-Haritz & Nils Brübach, *The Intrinsic Value of*

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books, papers, and maps, ER 72–79. *Amici* understand from discussions with counsel for Kaczynski that within the government's collection are Kaczynski's handwritten journals and letters, perhaps numbering in the hundreds of handwritten pages.

Archive and Library Material, at http://www.uni-marburg.de/archivschule/intrinsengl.html at 4 (Oct. 5, 2004).

Access to the unique information conveyed only by original documents is of particular concern to archivists and librarians such as *Amici*.[2] For example, the Council on Library and Information Resources created a task force to address urgent concerns regarding the value inherent in original research materials, finding that:

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[2] *Amici* do not argue that in *every* instance a reproduction of an original document is unacceptable for scholarly purposes. Indeed, for original documents produced mechanically (*e.g.*, newspapers and other mass-produced materials) or business and agency records, an archivist or librarian may prefer microfilm for storage and space-preservation purposes. However, for personal, handwritten papers—particularly those with indicia of social or historical significance—there is no substitute for examining the originals themselves. For such documents, the qualities unique to an original manuscript serve as a benchmark for authenticity. For example, we know whether the content of a photograph or photocopy is complete or accurate only by comparing it with an original. These qualities also provide insight into the mind of the writer and the circumstances of his writing:

> The ordering of pages in files of loose sheets, the bindings, the pencil notes of one author in the book of another, which was in his library; all these features are clues which give testimony to those who can interpret them about physical context and causality. This testimony is non-verbal and depends solely on appearance. This makes it direct and authentic but also dependent on the understanding of the person looking at it.

> The library preservation community has agreed on certain cardinal features of physical objects that warrant preservation in their original formats. These features are[:] age[;] evidential value[;] aesthetic value[;] scarcity[;] associational value[;] market value[;] exhibition value[.] Objective criteria or established practice determine many of these features, and the criteria vary little among libraries. They are, in short, best practice.

Council on Library and Information Resources, *The Evidence in Hand: Report of the Task Force on the Artifact in Library Collections* (Nov. 2001), *at* http://www.clir.org/pubs/reports/pub103/section2.html. Notably, "manuscripts . . . that exist only in few or single copies," such as Kaczynski's handwritten manuscripts, "are often crucially important for research and teaching; at the same time, there is little debate about their value as physical objects[,]" and "their value is not seriously contested in the libraries that have responsibility for them." *Id.* The U.S. National Archives & Records Administration points out that "[t]he archivist"—and not other parts of the government—"is responsible for determining which records have intrinsic value." National Archives & Records Administration, *Intrinsic Value in Archival Material*, Staff Information Paper, Staff Information Paper Number 21 (1982), *at*

Menne-Haritz & Brübach, *supra* at 8.

http://www.archives.gov/research_room/alic/reference_desk/archives_resources/archival_material_intrinsic_value.html.

The photocopied form alters the information carried in the original expression itself, not simply its channel of communication; expression through photocopies is neither identical to, nor interchangeable with, expression through originals: "An image conversion in analogue form, such as film or paper copy, cannot, however, reproduce certain kinds of evidence given by the [document's] external formal features." Menne-Haritz & Brübach, *supra*, at 6. "There seems to be something paradoxical about a reproduction of a genuine, unique artifact, whether it is a painting, a manuscript, or a funerary figure. The truth, the certainty, the authenticity seem to inhere in the original." J.H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 346 (Mar. 1989). Historical theorist Walter Benjamin has used the term "aura" to describe this quality of authenticity that inheres in an original work of art but does not pass into a reproduction. WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction, in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 223 (Hannah Arendt, ed., Harry Zohn, trans., 1968).

Researchers in different fields focus on a variety of aspects of an original manuscript, not only upon that content which can be captured in a photocopy. For example, a researcher might wish to study the original paper or ink used for chemical residues, color, texture, or three-dimensional aspects of handwriting. Indeed, the authenticity and evidentiary value of primary sources "permit scholars to reconstruct and understand the past, interpret the national character, and set the record straight about events and personalities often shrouded in mystery and steeped in controversy." National Library of Congress, *Collecting, Preserving and Researching History: A Peek into the Library of Congress Manuscript Division, at* http://lcweb2.loc.gov/ammem/mcchtml/special.html (Oct. 15, 2004).

Even accurate reproductions of personal, handwritten papers necessarily lack the information that cannot be captured in a photocopy, as well as the historical significance and provenance of the originals:

> The deductions made from context about the provenance of a text is such an obvious cultural skill in the employment of language, and so also of documents, that it does not have to be specially learnt or explained. The loss of the physical contexts, and therefore the aid they give in interpreting and understanding a text, as can happen when texts are digitalised, makes their importance particularly clear.

Menne-Haritz & Brübach, *supra* at 4. Walter Benjamin has described the historical aspects of an original that "determine the history to which it was subject throughout the time of its existence. This includes the changes which it may have suffered in physical condition over the years . . . ." BENJAMIN, *supra*, at 222. Similarly, the Modern Language Association of America, although it supports efforts to make reproductions of original documents in microfilm and electronic form, has emphasized the uniqueness of original documents: "All objects purporting to present the same text—whether finished manuscripts, first editions, later printings, or photocopies—are separate records with their own characteristics; they all carry different information, even if the words and punctuation are indeed identical, since each one reflects a different historical moment." Modern Language Association of America, *Statement on the Significance of Primary Records*, PROFESSION 95, at 27 (1995).

2. The public has a First Amendment right to receive the unique information transmitted solely by Kaczynski's original documents.

Amici and the public in general have a First Amendment right to receive the information transmitted only by Kaczynski's original documents. The freedom of expression guaranteed by the First

Amendment "protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982)); *see also United States v. Richey*, 924 F.2d 857, 860 (9th Cir. 1991) ("'By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information.'") (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n,* 475 U.S. 1, 8 (1986)). The Ninth Circuit has recognized this right as one that *must* be considered whenever the protection of First Amendment rights are at stake. *Richey*, 924 F.2d at 860 ("The public's interest must indeed be considered in *any* first amendment calculus.") (emphasis added). Similarly, Justice Brennan noted that the right to receive information is well established as an "inherent corollary" of the right of free speech that "follows ineluctably" from a speaker's right to express ideas: "The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it." *Pico*, 457 U.S. at 866–67 (internal quotations and citations omitted).

To preserve the public's right to receive information, the Constitution guarantees a penumbra of rights in addition to those few the First Amendment explicitly articulates. For example, while noting that while "the First Amendment contains no specific guarantee of access to publications[,]" Justice Brennan stated that nonetheless, "the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

The full Court has endorsed this notion. *See, e.g., Griswold v. Conn.*, 381 U.S. 479, 482–83 (1965) (citing collection of First Amendment "peripheral rights," without which "specific rights would be less secure"); *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957) (finding freedom of the university community: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made."); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature,

and necessarily protects the right to receive it.") (citations omitted); *Meyer v. Neb.*, 262 U.S. 390, 399–400 (1923) (finding right to study as one chooses: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.").[3]

Even when balancing such important interests as national security, illegal searches, and the right to privacy, the Supreme Court has protected the public's First Amendment rights to receive, read, and publish information. For example, in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), the Court protected the public's right to receive

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[3] Moreover, the freedom of the press applies to academics' access to primary sources as research materials. Like journalists, scholars gather and disseminate information:

> As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.

Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998). When scholars publish their work, they function as part of the press. *Bonnichsen v. United States, Dept. of the Army*, 969 F. Supp. 628, 647 n.17 (D. Or. 1997).

information from a purloined, classified study on the United States' decision-making regarding the Vietnam War by protecting the right of the press to publish the study. Similarly, the Court permitted publication of the fruits of illegal wiretaps, noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Bartnicki v. Vopper*, 532 U.S. 514, 516 (2001).

As established by these precedents, the public's right to study Kaczynski's original papers is ill served by the government's apparent intent to keep those papers in mothballs for perpetuity. *See Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002) ("Without the right to receive information and ideas, the protection of speech under the United States . . . Constitution[] would be meaningless. . . . Everyone must be permitted to discover and consider the full range of expression and ideas available in our 'marketplace of ideas.'"); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.").

3. The public's right of access to Kaczynski's original documents is not vindicated by access to copies.

An acquisition of the original documents by the University or other qualified recipient, whether by purchase or gift, would permit scholars and the public to study Kaczynski's papers in their *original* form. Seemingly ignorant of the significance of these original source materials, the government claims that it has already provided Kaczynski with an accurate and complete copy of his writings and does not object to the donation of those copies. Government's Objections to Magistrate Judge's Findings & Recommendations 9, 10 (filed Jan. 30, 2004) [hereinafter "Objections"]. However, various sections of the copy have been shown to be illegible, and hence incomplete and inaccurate. ER 122, 124–30.

In any case, even Kaczynski's possession of perfect copies would deny the public the benefits of receiving the full spectrum of information contained in the original documents. From the scholar's perspective, a copy inevitably lacks critical information: "An image conversion in analogue form, such as film or paper copy, cannot, however, reproduce certain kinds of evidence given by the [document's] external formal features." Menne-Haritz & Brübach, *supra*, at 6. Accordingly, the First

Amendment right implicated by the government's actions in this case is not merely the right of access to those fragments of information that can be extracted from photocopies of Kaczynski's documents; rather, it is the right of access to the original papers themselves. *See Lamont*, 381 U.S. at 305; *see also id.* at 309 (Brennan, J., concurring) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. . . . [W]e cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one.").

The government's actions in this case create the risk that such information will be lost to the public forever. "Much cultural property has been destroyed for political and religious reasons. As with politics, so with religion: What is useful and acceptable is encouraged, preserved, and exploited. What is uncongenial is discouraged and repressed." Merryman, *supra*, 77 CAL. L. REV. at 352. Moreover, "[a]n artifact that cannot inform, either because of hoarding or destruction, is not an artifact, it is merely an object. . . . Historically, controlling access to information has been a way to control people, socially and politically." Cindy Alberts Carson, *Raiders of the Lost Scrolls: The Right of Scholarly Access to the Contents of Historic Documents*, 16 MICH. J. INT'L L. 299, 316–17 (1995)

The government may believe it foolish to insist on preservation and accessibility of original documents when legible copies are often permitted for evidentiary purposes. But this ignores the distinct First Amendment point that certain original documents, such as Kaczynski's papers, have independent, intrinsic, and historical value and should be preserved and made accessible to scholars and researchers. The customary acceptability of legible copies in many contexts does not support an argument that such copies are acceptable in all contexts. Indeed, even in the context of grand-jury subpoenas, which may involve mundane records of no particular value as originals, the Department of Justice demands the production of original documents. Thus, its operating manual provides that in preparing subpoenas, the applicable definitions should provide that "[t]he term 'documents' means originals unless otherwise specified . . . ." Antitrust Grand Jury Practice Manual, Vol. 1, at III-154 (1991), *available at* http://www.usdoj.gov/atr/public/guidelines/part1ch3.pdf.

Here, the government's reliance on Kaczynski's possession of copies of his documents—incomplete and inaccurate ones, no less—effectively prevents the public from receiving all of the unique information transmittable only through Kaczynski's original source documents.

"Partial or biased access to information may be as misleading and damaging as no access at all." Carson, *supra*, 16 MICH. J. INT'L L. at 317.

4. The government's suppression of Kaczynski's original papers strengthens the public's claim of access.

The public's right to receive information must be even more closely guarded when the government considers the information unpopular or inappropriate for study. Expression that may be considered politically, intellectually, or morally offensive is not less worthy of First Amendment protection. *Richey*, 924 F.2d at 859 (discussing United States Supreme Court cases protecting expressions such as flag-burning and nude dancing); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56 (1988) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citation omitted).

The government's position in this case is driven by its strong distaste for the idea that Kaczynski's papers may be presented or perceived as political protest: "Kaczynski's real motivation appears to be to justify his crimes as 'social protest,' rather than cold blooded murder of innocents, by causing the United States [to] put its imprimatur on his characterization by sending the documents to a social protest library collection." Objections at

9, n.5. Accordingly, the government has demonstrated its intent to preclude meaningful public access to the information contained only within Kaczynski's original papers. *See* ER 113 ("[L]urking in the background is the United States' seeming implicit desire to remove Kaczynski's ideas from the public view in whole or in part.").

But it is not for the government to decide how and when the public may interpret Kaczynski's writings. The First Amendment bars the state from deciding what historians and scholars may study, as well as how the public may interpret Kaczynski's papers. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

However one might view Kaczynski's actions, his original papers are subject to a restitution order under which the government may either sell the papers for Kaczynski's account or permit their donation to the University or other suitable archive or library. But the government is *not* free to deny public access to the documents for no apparent reason other than the abhorrence of Kaczynski's crimes. *Amici* do not disagree that

Kaczynski's actions were reprehensible, or that fair minds might consider his writings unpalatable as well. But the public nevertheless has a strong interest in understanding Kaczynski's perspectives on the problems of his time and his reactions to social conditions—all the more so since his actions, which from his viewpoint were actions of social protest, took a form that the public needs urgently to be able to understand and counteract.

The Department of Homeland Security itself recognizes the critical importance of understanding the behavioral and social aspects of terrorism. It recently announced a $12 million grant to finance an academic center to study the subject. *See Department of Homeland Security Announces $12 Million Funding for Social and Behavioral Scientists to Study Terrorism*, (July 6, 2004) *available at* http://www.dhs.gov/dhspublic/display?theme=27&content=3807; *see also* Mark Glassman, *The Nation; Psychology's Black Hole: The Mind of a Terrorist*, N.Y. TIMES, WEEK IN REVIEW, Jul. 18, 2004, at 4 ("A $12 million grant from the department [of Homeland Security] will finance an academic center to study the behavioral and social aspects of terrorism. The goal is to attract a group of researchers yearning to find out . . . what makes terrorists tick . . . ."). Similarly, the Archivist of the United States

has described the importance of access to archival records during the recent "D.C. sniper" investigation. *See* John W. Carlin, Archivist of the U.S., 2003 State of the Archives Address, (Dec. 3, 2002) *available at* http://www.archives.gov/about_us/archivists_speeches/speech_12-3-02.html.

Having demonstrated its compelling interest in such research, would the government rest content with mere copies of a terrorist's writings, or would it want the original papers, as archivists and librarians such as *Amici* do? The government's contrary notion here that criminals should be denied "psychic" rewards by denying scholars access to their papers is absurd; if accepted, it would undermine the government's and the public's important interest in better understanding the behavior of terrorists.[4]

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[4] One could imagine any number of notorious historical figures whose original writings would be unavailable for study and analysis if the government's current position were the historical norm. Would it have been better to seal off or destroy the works of John Brown, Adolf Hitler, or Lieutenant William Calley to prevent the authors from reaping any "psychic" benefit from the publication and study of their writings? Similarly, would the government be more prepared to prevent crime and terrorism if hindered by an inability to study the personal papers of Randy Weaver, Timothy McVeigh, or more recently, Abu Musab al-Zarqawi?

B. The Government Has Articulated No Legitimate Constitutional Reason To Withhold Kaczynski's Original Papers.

1. The government's shifting positions demonstrate that it has no legitimate reason to retain Kaczynski's original papers.

The government's changing and inconsistent positions below demonstrate that it has no legitimate, constitutionally cognizable reason to retain Kaczynski's original papers. In its initial opposition to Kaczynski's motion, the government did not offer to return copies of Kaczynski's documents. Instead, the government argued that Kaczynski had no standing to assert the public's First Amendment interest in receiving the documents, and even denied that the First Amendment was implicated: "The issue here is the right to property, not freedom of speech." Government's Opposition to Motion for Return of Seized Property, at 9 (filed Nov. 10, 2003) [hereinafter "Opposition"].

The magistrate judge disagreed, and identified the fundamental inconsistency in the government's positions:

> Does the United States seek to sell the property, or does it seek to destroy the property after paying into a restitution fund its idea of the non-celebrity value? Or does it simply desire to keep it? These details are never made clear. Finally, lurking in the background is the United States' seeming implicit desire to

> remove Kaczynski's ideas from the public view in whole or in part.

ER 112–13. Accordingly, the magistrate judge ruled that the First Amendment *was* implicated, and that the court "will not permit Kaczynski's ideas to be censored, or otherwise kept from public view, no matter how bogus they may appear to the undersigned or others." *Id.* at 113.

Perhaps chastened by the magistrate judge's ruling, the government changed positions and argued that it already had provided to Kaczynski complete and accurate copies of all the writings it seized . . . ." Objections at 11. This is inaccurate: the government produced to Kaczynski only those documents directly relevant to his criminal defense, and even those have been shown to be incomplete and often illegible. Appellant's Opening Brief at 20; ER 122, 124–30. The public's (and *Amici*'s) interest is in the full and complete collection of Kaczynski's original papers—including those that bear no direct relation to Kaczynski's crimes or defenses.

2. The district court erred in ruling that the government may prevent public access to Kaczynski's original papers to deny Kaczynski any "psychic benefit."

The district court improperly adopted the government's theory that denying Kaczynski's request to donate his original papers served the purpose of preventing Kaczynski from reaping any psychological benefit from his crimes. ER 137 ("[G]ranting his request would aid him in his apparent endeavor to extol his criminal celebrity status . . . ."); Opposition at 9–10 ("As a convicted murderer, Kaczynski has forfeited his right to profit from his crime, whether that profit is monetary or psychic.").

Although the government has a compelling interest in compensating the victims of Kaczynski's crimes, its refusal either to sell or to permit the donation of his original documents does not advance that interest and precludes all public access to those papers. *Amici* do not suggest that the mere fact of Kaczynski's intent to donate his papers secures him that right. Indeed, the government may conceivably sell Kaczynski's documents for whatever value they may command (and offset Kaczynski's restitutionary debt by a corresponding amount), or merely credit Kaczynski's account some nominal amount and send the papers to a government archive with

full public access.[5] In either case, Kaczynski will not dictate the ultimate use and disposition of the papers and will gain no fame incremental to the substantial notoriety his crimes have already created.

But the government's chosen course of action here cannot stand: It may not restrict public access to Kaczynski's original documents simply to prevent Kaczynski from realizing an undocumented, extra-record, and utterly speculative mental or emotional benefit. In *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, the U.S. Supreme Court ruled that the State had a "compelling interest in ensuring that criminals do not profit from their crimes," but struck down the statute at issue for overbreadth even though it provided for financial compensation to a criminal's victims. *Simon & Schuster*, 502 U.S. 105, 117–19 (1991). The government has evidenced precisely the opposite intent here: to hold Kaczynski's documents indefinitely, simultaneously thwarting both the restitutionary purpose of victim compensation and the First Amendment principle of public access. Indeed, the law-review article cited by the

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[5] *Amici* emphasize that, from their perspective, any library or archive that follows acceptable standards of archival preservation and scholarly access is acceptable, whether that facility be the University or some other public or private institution.

district court in support of its ruling actually undermines that ruling: "No matter how much a lawmaker would aspire to prevent emotional profit, emotional profits cannot end without stopping the criminal's speech."[6] Gilbert O'Keefe Greenman, *Son of Simon & Schuster: A "True Crime" Story of Motive, Opportunity, and the First Amendment*, 18 U. HAW. L. REV. 201, 228 (1996).

C. Review of the District Court's Denial of Kaczynski's Motion For Return of Property Should Be Informed by First Amendment Concerns.

Amici's interest in this case is not generated by the procedural aspects of Kaczynski's motion, nor by the property-law disputes between the government and Kaczynski. *Amici* express no view on those issues, but do urge the Court to give careful consideration to the First Amendment

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[6] Under the government's view, there would be no First Amendment value in preserving scholarly access to the originals of documents such as the four-page handwritten letter found in the luggage of suspected hijacker Mohamed Atta, *see* http://news.lp.findlaw.com/hdocs/docs/terrorism/4pageltr.pdf, or the anthrax letters to Tom Brokaw and Senator Daschle, *see* http://news.findlaw.com/hdocs/docs/terrorism/anthraxltrs101601.pdf. At the unfettered discretion of the U.S. Attorney, such documents could be retained indefinitely in the prosecutor's file without adequate archival protection and without public access or study because releasing the originals might provide "psychic" benefit to the authors.

issues presented by *Amici* in the Court's review of the district court's ruling.

This Court would not be the first to ensure that the treatment of seized property be informed by First Amendment concerns. For example, in *Black Hills Institute of Geological Research v. U.S. Department of Justice*, 967 F.2d 1237 (8th Cir. 1992), the court addressed the government's seizure of a rare dinosaur fossil, and whether that seizure "involved a callous disregard for constitutional rights." *Id.* at 1239. The court focused on the fact that the seizure deprived researchers and the public of access to the fossils, so that they could not be viewed, studied, or tested: "The seizure . . . deprives the public and the scientific community from viewing and studying" the materials. *Id.* at 1240. Although the court instructed the district court to "balance the government's interest in retaining the property against the owner's right to get it back," it emphasized the moving party's intentions to make the materials "available to the public and scientific community for display and research." *Id.* The government's rationale for the seizure was found to be unreasonable and inadequate, but it was left to the district court's discretion to determine

"proper conditions and place for storage and custody" of the materials. *Id.* at 1240–41.

Here, the government's paradoxical intent to retain the documents under the authority of the restitution order, while simultaneously refusing to act on that order, accomplishes nothing other than preventing the public and *Amici* from receiving the information transmitted only by the original documents. This Court has emphasized that the government may retain a defendant's property subject to a restitution order only "if that property is *needed* to satisfy the terms of the restitution order." *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993) (emphasis added). The government's unwillingness either to sell or to return—or indeed to do *anything* with—Kaczynski's papers demonstrates no such need here. The government may not foreclose the public's access to Kaczynski's original documents on the basis of a restitution order it has no apparent desire to discharge, nor may the government keep the documents "purely for the sake of keeping them." *Sovereign News Co. v. United States*, 690 F.2d 569, 578 (6th Cir. 1983).

V. CONCLUSION

When the government advances no persuasive claim, and when it enforces a monetary lien not to provide compensation but to vindicate a

punitive interest, its contentions cannot prevail over the legitimate First Amendment rights of scholars and the public. For the foregoing reasons, *Amici Curiae* urge the Court to reverse and remand to the district court with instructions to permit the donation of Kaczynski's original documents to the University or to a similarly suitable library or archive that will permit full public access to the materials.

Dated: October 19, 2004

COOLEY GODWARD LLP

By: _____
Christopher B. Durbin

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(d) AND 32(A)(7)(C), AND CIRCUIT RULE 32-1

I, Christopher B. Durbin, certify that the attached Joint *Amici Curiae* Brief is proportionally spaced, has a typeface of 14 points or more, and contains 5980 words.

Dated: October 19, 2004

Christopher B. Durbin

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing **Joint *Amici Curiae* Brief of the Freedom to Read Foundation and the Society of American Archivists, in support of Appellant Theodore John Kaczynski and Reversal** was served by Federal Express on the following parties in this action:

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I further certify pursuant to Federal Rule of Appellate Procedure 25(2)(A) that an original and 15 copies of the foregoing **Joint *Amici Curiae* Brief of the Freedom to Read Foundation and the Society of American Archivists, in support of Appellant Theodore John Kaczynski and Reversal** were dispatched on October 19, 2004, for delivery by Messenger Courier Service to the Clerk for the United States Court of Appeals of the Ninth Circuit to the following address:

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Dated: October 19, 2004

/s/
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