No. 18-____

IN THE

Supreme Court of the United States

ANCIENT COIN COLLECTORS GUILD,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from the civil forfeiture of ancient Cypriot and Chinese coins under the Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601-2613. The coins are of types that appear on "designated lists" subject to import restrictions. Congress limited the reach of such import restrictions to archaeological objects "first discovered within" and "subject to export control by" a specific State Party to the 1970 UNESCO Convention, and further placed the burden of proof on the Government to establish that such designated material was listed in accordance with these criteria. 19 U.S.C. §§ 2601, 2604, 2610. Congress also ensured such import restrictions are entirely prospective. They only apply to designated archaeological material illicitly exported from the State Party after the effective date of the implementing regulations. *Id.* § 2606. The questions presented are:

1. Did the courts below violate the Guild's 5th Amendment Due Process Rights when they authorized the forfeiture of the Guild's private property without any showing that the Guild's coins were illicitly exported from Cyprus or China after the effective date of import restrictions?

2. In a civil forfeiture action implicating the Guild's 5th Amendment Due Process Rights, did a prior decision upholding import restrictions under a highly deferential *ultra vires* standard of review "foreclose" consideration of legislative history, judicial admissions, and other information relevant to the Government's burden of proof?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Fourth Circuit: petitioner Ancient Coin Collectors Guild and respondent United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the petitioner is not a subsidiary of a publicly-owned corporation and no publicly-owned corporation has a financial interest in the outcome of the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The Ancient Coin Collectors Guild ("the Guild" or "ACCG") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is available at *United States v. Ancient Coin Collectors Guild,* 899 F.3d 295 (4th Cir. 2018) and is reprinted at Petition Appendix ("Pet. App.") 40a-94a. The District Court's opinion is available at *United States v. 3 Knife Shaped Coins,* 246 F. Supp.3d 1102 (D. Md. 2017) and is reprinted at Petition Appendix ("Pet. App.") 1a-38a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment and opinion on August 7, 2018. (Pet. App. 40a-96a.) On September 17, 2018, the Guild filed a petition for rehearing and rehearing *en banc*. On October 5, 2018, the Fourth Circuit Court of Appeals denied the petition. (Pet. App.97a-98a.) The District Court had jurisdiction over an action commenced by the United States under 28 U.S.C. § 1345, for forfeiture under 28 U.S.C. § 1355 (a) as well as the forfeiture provisions of the Cultural Property Implementation Act ("CPIA") 19 U.S.C. §§ 2601, 2609. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation."

Relevant portions of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the UNESCO Convention"), the CPIA, 19 C.F.R. § 12.104, and 19 U.S.C. § 1615 are set forth in the appendix. (Pet. App. 99a-129a.)

STATEMENT OF THE CASE

1. The CPIA only authorizes import restrictions on archaeological objects "first discovered within" and "subject to export control by" signatories to the UNESCO Convention that are illicitly exported after the effective date of implementing regulations. 19 U.S.C. §§ 2601, 2604, 2606. While Congress granted U.S. Customs and Border Protection ("CBP") broad discretion to detain artifacts on "designated lists" for investigation, importers may contest any seizure in Court, and forfeiture is only proper where the Government proves by expert testimony or other admissible evidence that the objects were illicitly exported from the State Party after the effective date of the regulations. 19 U.S.C. §§ 2606, 2610.

2. Here, the courts below instead sanctioned a taking of the Guild's coins solely based on the showing that they were of types found on "designated lists" in implementing regulations. *3 Knife Shaped Coins,* 246 F. Supp. 3d at 1114-1115; Pet. App. 18a-20a; *Ancient Coin Collectors Guild,* 899 F.3d at 317; Pet. App. 74a-75a. Both courts predicated their analysis on an earlier ruling rendered in an entirely different context. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection* ("*ACCG v. CBP*"), 698 F.3d 171 (4th Cir. 2012). That case dispensed with the Guild's

challenge to the State Department's controversial decisions to impose import restrictions on Cypriot and Chinese coins under a highly deferential *ultra vires* standard of review. *Id.* The Guild respectfully submits that *ACCG v. CBP* must be considered *dicta,* and not binding precedent, for purposes of ruling on the burden of proof in a forfeiture proceeding where 5th Amendment Takings and Due Process rights are at stake.

3. The Guild, a nonprofit advocacy group for collectors and the small businesses of the numismatic trade, files this Petition for Certiorari so that its constitutional claims related to the Government's burden of proof in a forfeiture action will be considered. Even though the Guild raised these claims in its Amended Answer, and pursued them on summary judgment and on appeal, the Fourth Circuit never addressed these claims on the merits. That leaves this Court to provide redress for these constitutional claims that arise every time the Government seeks to forfeit cultural goods under the CPIA.

The CPIA

4. The Guild's 5th Amendment Due Process claims are firmly grounded in the policy choices Congress made in the CPIA to balance the national interest in promoting the international exchange of cultural materials with the competing interests of foreign nations in protecting their national patrimony, and of archaeologists seeking to protect stratigraphic context from illegal or unscientific excavations. As part of that effort, Congress deliberately eschewed broad embargos on imports of cultural goods in favor of targeted, prospective import restrictions.

5. The CPIA implements the UNESCO Convention into law subject to the "independent judgment" of the

U.S. "regarding the need and scope of import controls." S. Rep. No. 97-564, at 6 (1982). The UNESCO Convention only authorizes repatriation of artifacts found within the national territory of a UNESCO State Party and therefore subject to its export control. UNESCO Convention, Art. 4 (b), (Pet. App. 99a.).

6. In keeping with the UNESCO Convention, CPIA import restrictions only apply to artifacts illicitly removed from a specific country seeking U.S. assistance. Consistent with our own "presumption against retroactivity," CPIA import restrictions are also entirely prospective. *See* Antonin Scalia and Bryan A. Garner, Reading Law: An Interpretation of Legal Texts 261 (Thomson/West 2012). These key limiting provisions of location and timing that distinguish CPIA import restrictions from broad embargoes are emphasized throughout the statute.

7. The CPIA narrowly defines "archaeological material of the State Party" as an "object of archaeological interest" "which was first discovered within, and is subject to export control, by the State Party." 19 U.S.C. § 2601 (2). "Designated archaeological material" is simply a subset of this larger universe of "archaeological material of the State Party." It is that "archaeological material of the State Party" that is specifically "covered by an agreement" entered into force with the United States. *Id.* § 2601 (7). Any such designated archaeological material must further be "listed by regulation under section 2604 of this title." *Id.*

8. The Cultural Property Advisory Committee ("CPAC") recommends to the President (or more accurately, his designee, now the Assistant Secretary of State, Bureau of Educational and Cultural Affairs ("ECA")) whether to enter into cultural property agree-

ments (also known as Memorandums of Understanding ("MOUs")) with other UNESCO State parties. *Id.* § 2605.

9. If CPAC recommends an agreement or a renewal after making a series of required findings under §§ 2602, 2603, CPAC prepares a report which includes a listing of "archaeological . . . . material of the State Party, specified by type or such other classification as the Committee deems appropriate, which should be covered . . ." *Id.* § 2605 (f) (4) (b). Thus, Congress again assumes that only cultural property that can be explicitly traced back to a specific State Party will be covered by such agreements.

10. The Executive Branch is to take CPAC's recommendations seriously. Under 19 U.S.C. § 2602 (g) (2), the President or his designee must report to Congress about any differences between CPAC's recommendations and the decision-making and the reasons for any differences.

11. The CPIA's enforcement provisions reinforce these same limiting principles meant to focus any import restrictions based on CPAC's recommendations. In particular, Congress emphasized the "first discovery" requirement both when regulations to implement cultural property agreements are written and in all cases where the Government seeks to forfeit "designated archaeological material of the State Party."

12. CPIA § 2604 states that the Treasury Department (now CBP) may list such material by type or other appropriate classification, but each listing made under this section *shall be* sufficiently specific and precise to insure that (1) the import restrictions under Section 2606 of this title are applied *only* to the archaeological . . . material covered by the agreement . . .; and (2) fair notice is given to importers and

other persons as to what material is subject to such restrictions." *Id.* § 2604 (emphasis added). The word "only" highlights the requirement that "designated archaeological material" must be only that covered by the agreement, i.e., "first discovered within" and "subject to export control by, the State Party." *Id.* § 2601 (2) (A), (C). The word "shall" emphasizes the mandatory nature of this Congressional directive; there is no discretion allowed.

13. Congress could have, but did not, embargo all designated archaeological material imported into the U.S. after the effective date of the regulations. Instead, import restrictions only apply to "designated" objects *exported from the State Party after the designation of such material. Id.* § 2606. This fundamental distinction ensures import restrictions are entirely prospective and do not impact lawful cultural exchange of like material already circulating in the international art market. It also reemphasizes that designated archaeological material must be traced back to an illicit removal from a State Party.

14. These underlying requirements are so important that Congress also departed from the usual burden of proof in customs forfeiture cases, and instead assigned the burden to the Government in CPIA actions. Title 19 U.S.C. § 1615 sets forth the burden of proof generally applicable in forfeiture proceedings in customs matters. Under that provision, after the government establishes "probable cause," the burden of proof then shifts to the claimant. In contrast, §§ 2606, 2609 and 2610 are CPIA specific. Section 2606 proscribes the import of "designated archaeological material" that is exported from an applicable UNESCO State Party after the effective date of governing regulations. It also includes a "safe harbor" provision of "satisfactory

evidence" an importer may present to CBP to avoid seizure of "designated" archaeological material. Section 2609 states, "All provisions of law relating to seizure, forfeiture, and condemnation for violation of customs laws shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as provisions of law are applicable to, and not inconsistent with, the provisions of this chapter."

15. Section 2610's "Evidentiary Requirements" set forth the Government's burden of proof in forfeiture proceedings under the CPIA. Section 2610 requires the Government to establish that any "designated archaeological material" was "listed in accordance with Section 2604." As set forth above, § 2604 in turn assumes that "the import restrictions" "are applied *only* to the archaeological material covered by the agreement," i.e., here that such archaeological material was "first discovered within" and "subject to the export control" of China or Cyprus. *Id.* § 2601 (2) (emphasis added). Moreover, § 2606 ensures that CPIA restrictions only apply prospectively. ***Thus, whatever discretion CBP may have in "designating" "archaeological material," Congress has imposed an explicit, independent obligation on the courts to ensure that such "designated" archaeological material was illicitly exported from the State Party after the date import restrictions were imposed before private property may be forfeited.***

Import Restrictions on Coins

16. No import restrictions were imposed on ancient coins for some twenty-five (25) years after the CPIA came into law. This is not surprising. Ancient coins are items of commerce making it difficult for modern nation states to claim them as their "cultural

property."[1] They are widely collected, including in countries like China and Cyprus. Indeed, Mark Feldman, the State Department Deputy Legal Adviser, represented to Congress that "it would be hard . . . to imagine a case" where coins would be restricted under what would become the CPIA. *Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the H. Subcomm. on Trade of the Comm. on Ways and Means,* 96th Cong. 8 (1979) (placed in the record below at Joint Appendix ("JA") at 1095).

17. CBP first imposed import restrictions on certain coins of Cypriot type, effective July 16, 2007. 72 Fed. Reg. 38,470—38,474 (July 13, 2007).[2] Subsequently, this "precedent" was used to justify import restrictions on coins from China, effective January 16, 2009. 74 Fed. Reg. 2,838-2,844 (Jan. 16, 2009).

18. The Guild's analysis of Freedom of Information Act ("FOIA") and open source documents strongly suggested that conflicts of interest, the rejection of CPAC's recommendations, and efforts to mislead Congress and the public about CPAC's true recommendations in official government reports marred the decision to impose import restrictions on Cypriot coins. Significantly, CPAC's former Chairman, Jay Kislak, stated under oath in a declaration filed in FOIA litigation that the State Department authorized

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[1] *See* Expert Report of Douglas Mudd (Aug. 20, 2015) (noting that Chinese and Cypriot coins of types the Government seized circulated outside of these countries in quantity); Pet. App. 157a-163a.

[2] Prior to this action, ancient coins struck in Cyprus had been exempted once from such import restrictions, and ancient coins struck in Italy had been twice exempted from restrictions. 66 Fed. Reg. 7399 (Jan. 23, 2001) (Italy); 67 Fed. Reg. 47447 (July 19, 2006) (Cyprus); 71 Fed. Reg. 3000 (Jan. 19, 2006) (Italy).

import restrictions on Cypriot coins against CPAC's recommendations, and also misled the Congress and the public about it in a § 2602 (g) report and press release. (Pet. App. 141a-147a.)

19. Given its serious concerns about the integrity of the process, the Guild, acting on behalf of coin collectors and the small businesses of the numismatic trade, decided to test the regulations in Court. To establish a "live controversy" for standing purposes, the Guild purchased $275.00 worth of "unprovenanced" Cypriot and Chinese coins of a sort typically found on the market from a well-established dealer in the United Kingdom to be imported into the United States through the "port" of Baltimore, Md. The commercial invoice that accompanied the coins reflected the seller's lack of information about the coins' provenance. While the invoice identified the coins as being minted in either Cyprus or China, it also indicated that each had "No recorded provenance. Find spot unknown." (JA 1037 below.)

Prior Litigation

20. On their arrival to Baltimore, Md. in April 2009, the Government detained and then seized the Guild's coins, based upon 19 U.S.C. § 2606 and 19 C.F.R. §12.104. (JA1172-79 below). After waiting for the Government to file a forfeiture action for some ten (10) months, the Guild filed its own Declaratory Judgment ("DJ") Action seeking to compel the Government to file a forfeiture action and to test Government regulations imposing import restrictions on coins. At the Government's request, the District Court placed any forfeiture action on hold. As a result, the DJ action focused almost exclusively on whether the Government's decision to impose import restrictions on coins was subject to judicial review under the Administrative

Procedure Act ("APA") or, alternatively, under the doctrine of "non-statutory" or *ultra vires* review.[3] The District Court acknowledged that "Congress only authorized the imposition of import restrictions on objects that were 'first discovered within, and [are] subject to the export control by the State Party.'" *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection (ACCG v. CBP)*, 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011). Nonetheless, the District Court declined to conduct the judicial review the Guild requested, and instead dismissed the Guild's action, prompting an appeal.

21. In its first appeal, the Guild requested that the Fourth Circuit uphold three basic principles: (1) that the District Court had the authority to undertake a thoroughgoing *ultra vires* review of the Assistant Secretary, ECA's actions; (2) that the District Court had the authority under the APA to review the "final agency action" of CBP imposing import restrictions on particular types of coins; and (3) that any import restrictions on coins must be written to comply with the plain meaning of the CPIA, so that they are based on the coin's find spot rather than its place of production. Although the Appeals Court also recognized that the Government was only entitled to restrict articles of "archaeological interest" "first discovered within" and "subject to export control" by the specific UNESCO State party, the Court treated government decision-making like a "political question" when it held that anything but the most cursory review of State Department actions[4] "would draw the

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[3] The Guild also raised First and Fifth Amendment claims unrelated to this forfeiture action.

[4] In *ACCG v. CBP,* the Guild had argued *ultra vires* review required the Court to construe a statute like a contact, and

judicial system too heavily and intimately into negotiations between the Department of State and foreign countries." 698 F.3d at 175, 179-81 (4th Cir. 2012).

22. As to the Guild's third assignment of error, the Appeals Court also rejected what it characterized as the Guild's argument that the Government "acted *ultra vires* by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were 'first discovered within' China or Cyprus." *ACCG v. CBP,* 698 F.3d at 182. However, in so doing, the Appellate Court ignored the Kislak Declaration and wrongly assumed that CPAC agreed with the Government's decision-making. According to the Appeals Court, "CPAC and the Assistant Secretary did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by "type" – but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of *China and Cyprus. 74 Fed. Reg. 2,839-42 (Chinese coins)*; *72 Fed. Reg. 38,470-73 (Cypriot coins)*." *Id.* at 182.[5]

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determine whether the decision-maker complied substantively with statutory provisions. *See United States v. 16.03 Acres of Land,* 26 F.3d 349, 355-56 (2nd Cir. 1994), *cert. denied sub nom. Nelson v. Dep't of Interior,* 413 U.S. 1110 (1995). In contrast, the Fourth Circuit limited its *ultra vires* review to consideration whether the State Department complied with the CPIA's procedures based largely on a cursory review of the Federal Register and the District Court's opinion. 695 F.3d at 175, 179-80.

[5] The Appeals Court should not have "found facts" about what CPAC concluded at all. In an appeal of a grant of a motion to dismiss, it is the factual allegations of the Guild's Complaint—which referenced Mr. Kislak's declaration-- that should have controlled. In any event, it is unclear where the Fourth Circuit's

23. Based on this serious misapprehension of CPAC's recommendations, the Appeals Court then affirmed the District Court's decision, but only predicated on the assumption that "the basics of due process require that the Guild be given a chance to contest the Government's detention of its property" in a timely forfeiture action. 698 F.3d at 185. The Guild filed a Petition for Rehearing *en Banc* that argued that the Fourth Circuit had treated the Government's decision-making as a political question without applying the Supreme Court's test for such questions, that the Panel had erroneously undertaken an overly limited version of *ultra vires* review, and that the Panel had ignored the Kislak Declaration. *ACCG v. CBP,* Appellate ECF No. 67. The Fourth Circuit denied that Petition for Rehearing and this Court also denied certiorari. *ACCG v. CBP,* Appellate ECF No. 69; 568 U.S. 1251 (2013).

The Forfeiture Action and Present Appeal

24. After the DJ Action concluded, the Government finally brought this forfeiture action. (JA9-16 below.) In that action, the Government never contended the Guild's coins were "looted" or "smuggled." Nevertheless, relying heavily on the Fourth Circuit's *ACCG v. CBP* decision,[6] the District Court held that the Government made out its *prima facie* case in its forfeiture complaint, struck the Guild's Amended Answer *sua sponte,* and

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"generally found" standard originated. CPAC could never have adopted such a standard because it rejected import restrictions on Cypriot coins and was subsequently not allowed to make any recommendations about Chinese coins. (Pet. App. 141a-156a.)

[6] The District Court considered the decision *dicta* as to the forfeiture action, but binding as to statutory construction. 246 F. Supp. 3d at 1109 n.5; Pet. App. 9a n. 5.

precluded any meaningful discovery before forfeiting fifteen (15) of the Guild's coins to the Government. 246 F. Supp.3d at 1109-1124; Pet. App. 8a-38a. In so doing, the District Court rejected the Guild's 5th Amendment Due Process arguments in summary fashion. 246 F. Supp. 3d at 1123; Pet. App. 36a-38a. First, the District Court denied altering the CPIA's burden of proof to the Guild's detriment, but failed to address the legislative history, Government admissions and other evidence provided in support of the Guild's arguments. 246 F. Supp. 3d at 1123; Pet. App. 36a-37a. Second, the District Court held that a conflict between the wording of the CPIA and 19 C.F.R. § 12.104 (a) did not raise constitutional fair notice issues given the clarity of the designated lists. 246 F. Supp. 3d at 1123; Pet. App. 37a-38a. An appeal followed.

25. The Guild's appeal focused on 5th Amendment issues arising out of the Government's burden of proof in CPIA forfeiture actions as well as the Guild's required showing on rebuttal. Only those issues concerning the Government's initial burden of proof are relevant here.

26. The Guild has consistently maintained that the Government must establish for its *prima facie* case that an archaeological object: (1) is of a type that appears on the designated list; (2) that was first discovered within and hence was subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after those restrictions were granted. 19 U.S.C. §§ 2606, 2609, and 2610, incorporating §§ 2601, 2604. The Guild based its analysis on the rules of statutory construction (including the

"rule of lenity"[7]), CPIA and other civil forfeiture case law[8], a statement about the burden of proof Mr. Feldman made as State's CPIA point person,[9] and

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[7] The "rule of lenity" requires a more "defendant friendly" construction be adopted for an ambiguous provision in the absence of contrary legislative history. *United States v. 1,399,313.74 in United States Currency*, 591 F. Supp. 2d 365, 371 n. 36 (S.D.N.Y.2008). *Accord United States v. Santos*, 553 U.S. 597, 515 (2007); *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 819 (3d Cir. 1994) (civil forfeiture context); *United States v. One Big Six Wheel*, 987 F. Supp. 169, 179-183 (E.D.N.Y. 1997), *aff'd*, 166 F.3d 498 (2d Cir. 1999). *See also* Scalia and Garner, *supra.* § 49 at 296-302.

[8] In its papers, the Guild cited substantial civil forfeiture case law (including two CPIA cases) where the government had established its *prima facie* case with expert testimony. Appellate ECF No. 14 at 23, 37-38, *citing United States v. Eighteenth Century Peruvian Oil,* 597 F. Supp. 2d 618 (E.D. Va. 2009); *United States v. An Original Manuscript Dated November 19, 1778 Bearing the Signature of Junipero Sera,* 1999 U.S. Dist. LEXIS 1859 (S.D.N.Y. Feb. 22, 1999).

[9] During the legislative process, Mr. Feldman allayed concerns about what ultimately became CPIA as follows:

> Now, if I may pass for a moment to the question of procedures and burdens of proof, which is the area of one of the great improvements in the bill . . . . The Government must show both that it [the artifact] fits in the proscribed category and that it comes from the country making the agreement. So the burden of proof of provenance is on the Government . . . . This means in a significant number of cases it will not be possible to require an object's return.
>
> . . . .
>
> The only country that would have the right to claim such an object under the bill is the country where it was first discovered. It would have to be established that the object was removed from the country of origin after the date of the regulation.

Government admissions about the burden of proof and use of expert testimony made in the DJ action. (*See* Pet. App. 138a-140a (Government Admission in DJ Action.).)

27. The Guild also detailed its Fifth Amendment Due Process arguments in its briefs. First, Fifth Amendment due process precludes altering the burden of proof Congress assigned to the Government to the Guild's detriment. (Appellate ECF No. 14 at 16-17; Appellate ECF No. 27 at 13-16, Pet. App. 167a-168a; 176a-179a.). In other words, the District Court could not assume that the Government made out the second and third elements of its *prima facie* case solely based on the presumption these determinations were made as part of the process of "designating" like types of archaeological objects for restrictions. *See id.* Second, the "fair notice" provision found in 19 U.S.C. § 2604 (2) and due process also preclude seizure and forfeiture based 19 C.F.R. § 12.104, a regulation which contradicts the wording of the CPIA. (Appellate ECF No. 14 at 31-32; Appellate ECF No. 27 at 16-17, Pet. App. 173a-174a; 179a-180a.). Finally, the Guild argued that *ACCG v. CBP* was *dicta* for purposes of construing the burden of proof in a CPIA forfeiture action under 19 U.S.C. § 2610, and, in any case, the

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Statement of Deputy Legal Adviser Mark Feldman, in *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* 4 Syracuse J. Int'l L. & Com. 97 1976-1977 at 129-130, JA 1097-98 below. While Mr. Feldman appears to have been specifically speaking about H.R. 14171 (June 3, 1976), the burden of proof he describes is consistent with that found in CPIA, 19 U.S.C. §§ 2606, 2610, incorporating §§ 2601, 2604. In other words, these fundamental requirements did not change in the legislation that passed into law.

constitutional claims at issue also meant that the decision was not binding. (Appellate ECF No. 14 at 21-22, 27-29; Appellate ECF No. 27 at n.1, 17-18, Pet. App.169a-173a; 180a-181a.) Given this constitutional context, the Guild argued the District Court should have acknowledged that both the Kislak Declaration and another declaration of former CPAC member Robert Korver demonstrated that the Appeals Court in the DJ action made demonstrably erroneous factual assumptions about CPAC's recommendations that led to its determination that Cypriot and Chinese coins were properly designated. (Appellate ECF No. 14 at 27-31; Appellate ECF No. 27 at 10-13, 17-18, Pet. App. 169a-173a; 180a-181a. The Guild also pointed to additional evidence that the decision-making was marred by evidence of cronyism and conflicts of interest, which again suggested that the *ACCG v. CBP* should not bind the Court in a forfeiture proceeding which raised 5th Amendment Takings and Due Process concerns. (Appellate ECF No. 14 at 29-30; Pet. App. 171a-173a.)

28. The Fourth Circuit nonetheless affirmed the District Court's decision. 899 F.3d 295; Pet. App. 40a. In so doing, the Court furthered the ***false narrative*** that CPAC determined where Cypriot and Chinese coins were "first discovered" based on where they are "generally found" to justify its holding that the Government need not establish the first discovery element with regard to particular imported archaeological material. 899 F.3d at 314; Pet. App. 68a. The Fourth Circuit also dispensed with the Guild's argument that the Government must show that its coins were illicitly exported from Cyprus and China after the effective date of import restrictions. 899 F.3d at 316-317; Pet. App. 72a-74a. According to the Court, once coins were "properly designated," it was no longer

necessary for the government to produce information about "provenance or export status." *Id.*

29. The Fourth Circuit never addressed the substance of the Guild's constitutional claims or whether it was proper for the Court to rely on the flawed reasoning found in *ACCG v. CBP* where such constitutional claims had been raised. Instead, the Court claimed that the Guild had "abandoned" these constitutional claims even though the Guild raised them its Amended Answer, in its District Court and Appellate briefs, at oral argument, and in three notices of supplemental authority. *Compare* 899 F.3d at 311 n. 13; Pet. App. 69a n. 13 *with* Appellate ECF No.14 at 16-17; Appellate ECF No. 27 at 13-16, Appellate ECF No.14 at 21-22, 27-29; Appellate ECF No. 27at 5 at n.1, 17-18, Pet. App. 167a-168a; 176a-179a; 169a-174a; 180-181a.

30. The Guild again asked the Fourth Circuit to address its constitutional claims at issue here in a Petition for Rehearing and Rehearing *en Banc*, but the Appeals Court denied that Petition. (Appellate ECF Nos. 51, 53; Pet. App. 97a-98a) The Court also denied a Motion to Stay the Mandate under 28 U.S.C. § 1355 (c), a provision meant to protect the rights of forfeiture defendants to pursue an appeal. (Appellate ECF No. 56.) However, at the Guild's request, the District Court continued a stay of the forfeiture pending resolution of the Guild's Petition for Certiorari. (District Court ECF No. 103.)

31. This Petition for Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Courts below sanctioned a violation of the Guild's 5th Amendment Due Process rights when they authorized the forfeiture of the Guild's private property without requiring the Government to make any showing that the Guild's coins were illicitly exported from Cyprus or China after the effective date of import restrictions. Despite the Guild detailing how its constitutional rights were violated in its Amended Answer, in its papers on summary judgment, in its appellate briefs, at oral argument, and in notices of supplemental authority, the Appeals Court never addressed the Guild's primary constitutional claims on the merits, and, indeed, the Fourth Circuit—despite the record before it—went so far as to claim that the Guild had "abandoned" these constitutional arguments. 899 F.3d at 311 n. 13; Pet. App. 69a n. 13.

The Supreme Court should grant the petition because the lower courts' rulings are directly at odds with case law in sister circuits that 5th Amendment constitutional claims take priority over judicial deference based on political question doctrine. Moreover, review of this case will provide the Court with a vehicle to clarify its own prior rulings about what evidence must be considered in reviewing constitutional claims. As such, the Court should grant certiorari to secure and maintain the applicability of its prior decisions, to resolve conflicts between federal courts of appeals, and to decide important questions of federal law regarding the form and scope of judicial review for decisions involving presidential authority.

Certiorari is also warranted because the refusal of the Fourth Circuit Court of Appeals to consider the Guild's constitutional claims dishonors the statutory intent and adversely impacts the continuing interests

of American museums, collectors and the trade in the legitimate exchange of cultural artifacts. Alternatively, the Court should order a summary remand under its supervisory authority so that the constitutional questions the Guild raised will be specifically addressed, particularly with regard to what evidence must be considered when a forfeiture claimant raises constitutional due process claims.

I. The Court Should Confirm that Due Process Precludes Altering the Burden of Proof Established by Congress in a Civil Forfeiture Action.

The underlying assumption of the courts below that the Guild's coins were illicitly exported from Cyprus or China after the effective date of import restrictions because they are of "designated" or "listed" types should have no place where, as here, the Guild has asserted 5th Amendment Takings and Due Process claims. (*See* Second Amended Answer, Second and Eighth Affirmative Defenses, Pet. App. 134a, 136a.) A forfeiture action is an entirely different sort of animal than the DJ action that established the precedent for the Fourth Circuit's forfeiture decision. Where the State threatens private property, constitutional rights come to the fore that trump any claim that "foreign policy concerns" somehow excuse the government from explicitly establishing each element of its *prima facie* case for forfeiture.

The Court should grant certiorari because the Fourth Circuit's decision to place expediency for law enforcement and deference to executive branch decision-making over the Guild's constitutional rights conflicts with the law in other circuits. Moreover, review of this case will allow this Court to determine whether it was proper to assume that elements of

the Government's *prima facie* case for forfeiture may be met based on a rule making process that by its very nature could not have addressed any particulars concerning from where and when the Guild's coins were exported.

The Fourth Circuit reasoned that its earlier *ACCG v. CBP* decision, predicated on a very narrow form of *ultra vires* review of government decision-making, "foreclosed" the Guild's argument that the government failed to make out every element of its *prima facie* case. 899 F. 3d at 314-316, Pet. App. at 69a-74a.

In contrast, courts in the D.C. Circuit, and the Second, Third and Seventh Circuits have recognized that 5th Amendment Due Process claims like the Guild raised must be adjudicated even where, as here, other challenges to underlying regulations may not be subject to full judicial review.[10] *See Bancoult v. McNamara,* 445 F.3d 427, 435 (D.C. Cir. 2006) ("[C]laims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions. [A] challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President could be justiciable, even if other challenges to the policy or its implementation might be barred.") (internal quotations and citations omitted.); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 934 (D.C. Cir. 1988) ("[T]he Supreme Court has

[10] It is highly likely other such conflicts between 5th Amendment Takings and Due Process rights and regulatory decision-making are not reported because the courts, like those here, simply glossed over these arguments, leaving no record of these claims in their decisions.

repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."); *Olegario v. United States,* 629 F. 2d 204, 223 (2nd Cir. 1980) (court holds naturalization claim of former member of the armed forces of the Commonwealth of the Philippines based on Fifth Amendment equal protection claim not barred under political question doctrine but nonetheless fails on the merits); *Khouzam v. AG of the United States,* 549 F.3d 235, 249-253 (3rd Cir. 2008) (political question doctrine does not preclude Court from deciding Fifth Amendment Due Process claim); *Clancy v. Geithner,* 559 F.3d 595, 604-605 (7th Cir. 2008) (Court considers 5th Amendment challenge to OFAC travel ban to Iraq).

The Fourth Circuit's decision also raises serious questions about whether some constitutional rights are more important than others. In its appellate briefing, at oral argument, and in notices of supplemental authority, the Guild cited the Fourth Circuit's *en banc* decisions in *International Refugee Assistance Project v. Trump,* 883 F.3d 233 (4th Cir. 2018) and 857 F.3d 554 (4th Cir. 2017), to support its request that its 5th Amendment Constitutional challenge be considered. (*See* Appellate ECF No. 14 at 27; Pet. App. 169a; Appellate ECF No. 27 at 18; Pet. App. 181a.) Yet, the Fourth Circuit failed to mention, much less distinguish the Trump travel ban cases. Nor did the Court address this Court's *Zivotofsky v. Clinton,* 566 U.S. 189 (2012) decision. *Zivotofsky* teaches that courts must assess any "foreign policy" considerations impacting justiciability solely with regard to the issues directly before the Court. *Id.* at 194-202. The Guild had argued that "foreign policy considerations" did not preclude requiring the government to make out each element of its *prima facie* case, particularly where the Guild's loss of its property rights are at stake. (Appellate ECF

No. 14 at 27 at n. 9; Pet. App. 169a at n. 9; Appellate ECF No. 27 at 18 at n.8; Pet. App. 181a at n.8.)

While this Court ultimately vacated the Fourth Circuit's *International Refugee Assistance Project* decisions (*See* 138 S. Ct. 6265 (2017) and 138 S. Ct. 2710 (2018)), in a companion case this Court rejected any claim that Presidential decision-making was unreviewable for 1st Amendment violations, and instead determined after a careful consideration of the entire record before it that the President had acted within his delegated authority. *Trump v. Hawaii,* 138 S. Ct. 2392, 2407-2415 (2018). The Guild also respectfully requests that the Court grant certiorari to address the fundamental question whether courts must consider 5th Amendment Takings and Due Process related claims as carefully as other constitutional claims, i.e., must 5th Amendment rights be as jealously guarded as others? The Guild argues for such equal treatment of all constitutional claims.

II. The Court Should Clarify What Legal Principles and Evidence Must Be Considered When a Constitutional Question is Raised.

Below, the Guild supported its analysis of the CPIA's burden of proof with reference to: (1) the rules of statutory construction; (2) legislative history; (3) contemporaneous statements of Mr. Feldman, a high-ranking State Department lawyer; (4) representations the Government previously made to the District Court about the burden of proof in a CPIA forfeiture action; (5) sworn statements from presidential appointees on CPAC and other evidence that demonstrate that the *ACCG v. CBP* Court was wrong about CPAC's recommendations and whether the decision to impose import restrictions on coins was made in good faith;

and (6) a recent Congressional statute that limited the reach of CPIA emergency import restrictions to items "unlawfully removed from Syria" after the effective date. (Appellate ECF No. 14 at 16-32; Appellate ECF No. 27 at 3-20.) Neither the District nor the Fourth Circuit Appellate Court ever distinguished these legal principles and evidence, much less acknowledged them in their opinions. Instead, despite the Guild's plea that the *ACCG v. CBP* opinion was dicta for purposes of establishing the burden of proof in a CPIA forfeiture action, both the District and Fourth Circuit Courts concluded that the *ACCG v. CBP* opinion "foreclosed" consideration of the Guild's arguments. 246 F. Supp. 3d at 1121-1123; Pet. App. 33a-38a; 899 F.3d at 314-316; Pet. App. 67a-74a.

Under the circumstance, certiorari should also be granted to clarify which of the following legal principles and evidence a court must consider when a constitutional claim is raised:

- Rules of Statutory Construction: Below, the Guild argued the *ACCG v. CBP* decision was dicta with regard to burden of proof issues for the simple reason that 19 U.S.C. § 2610 and its "evidentiary requirements" for a CPIA forfeiture action were not before that Court because at the government's request any forfeiture had been put on hold. The Guild also cited "the plain meaning doctrine," the requirement that every word and provision is to be given effect, and the "rule of lenity" in support of its arguments that the District Court had misconstrued the burden of proof. (*See* Appellate ECF No. 27 at 8-11.) The Guild argued that allowing forfeiture solely based on the identification of coins as being of types found on a designated list

based on where such coins are "generally found" is statutorily insufficient and thereby violates due process. (*Id.* at 10.) Only archaeological material "specifically found" in a particular State Party can also be "subject to export control by" the same State Party. (*Id.* citing 19 U.S.C. §§ 2602, 2604, and 2610.) Moreover, the relevant "time" trigger is the date of export from the State party, not the date of import into the United States. (*Id.* at 11, citing 19 U.S.C. § 2606.) Hence, neither the Government nor the Court can simply assume that just because archaeological material is of a type on the designated list imported after the date import restrictions were imposed that such material was necessarily exported from the State Party after that same date. (*Id.*)

- Legislative History and Contemporaneous Statements/Admissions about the Burden of Proof: The Guild also requested the Court to consider contemporaneous statements of Mark Feldman, who served as the State Department Deputy Legal Adviser and point person on both the UNESCO Convention and the CPIA. In the first statement, Feldman represented to Congress that "it would be hard . . . to imagine a case" where coins would be restricted under what would become the CPIA. *Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the H. Subcomm. on Trade of the Comm. on Ways and Means,* 96th Cong. 8 (1979) (placed in the record below at JA1095). In the second, Mr. Feldman allayed concerns about the burden of proof in what ultimately became CPIA. He stated, "The Government must show both that it [the artifact] fits in the proscribed category and

that it comes from the country making the agreement. So the burden of proof of provenance is on the Government . . . . This means in a significant number of cases it will not be possible to require an object's return . . . . The only country that would have the right to claim such an object under the bill is the country where it was first discovered. It would have to be established that the object was removed from the country of origin after the date of the regulation." Statement of Deputy Legal Adviser Mark Feldman, in *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* 4 Syracuse J. Int'l L. & Com. 97 1976-1977 at 129-130; JA 1097-98 below.

- Judicial Admissions: The Guild also presented evidence of several admissions the Government made in *ACCG v. CBP* as part of its successful effort to convince the District Court to dismiss the DJ action. In the most significant, the Government stated, "[T]he question of place of first discovery of any particular objects that are imported, or attempted to be imported, into the United States is relevant only once the import restrictions have been found valid and the government has moved to forfeit particular objects that are imported or attempted to be imported." (Pet. App. 139a.) Furthermore, in this statement, the Government also acknowledged that it typically establishes its *prima facie* case through the use of expert testimony. (*Id.* at 140a.)

- Recent Congressional Action: Recent import restrictions imposed under statute in response to looting associated with Syria's civil war take pains to limit otherwise breathtakingly broad restrictions to artifacts "unlawfully removed from Syria on or after March 15, 2011." 81 Fed. Reg. 53916-53921 (Aug. 15, 2016). Notably, the date in question—set forth by statute—relates to the date the Syrian civil war began, and not when the restrictions were implemented. In contrast, CPIA restrictions are not retroactive, i.e., they apply to artifacts exported from a State Party after the date restrictions are announced in the Federal Register. *See* 19 U.S.C. § 2606.
- Documentation to Correct a False Narrative: The Guild also presented the Declarations of two former CPAC members, former Chairman Jay Kislak, and former Trade Representative Robert Korver, and other documents to correct the State Department's false narrative—perpetuated by the Fourth Circuit—that that CPAC approved import restrictions on Cypriot and Chinese coins, that its recommendations were based on where such coins were "typically first discovered" and that the State Department indisputably acted in good faith. 899 F.3d at 314; Pet. App. 68a. In fact: (1) CPAC recommended against import restrictions on Cypriot coins and was not allowed to make any recommendations on Chinese coins; (2) the State Department misled the Congress and public about CPAC's true recommendations on Cypriot coins in official documentation; and (3) there was a conflict of interest because the State Department Assistant Secretary, ECA, who imposed import restrictions on Cypriot coins

only did so after accepting a high-paying job at Goldman Sachs where she was recruited by and worked directly for the spouse of a prominent campaigner for import restrictions on cultural goods, including ancient coins. (*See* Declaration of Jay Kislak (April 20, 2009), Pet. App. 141a-147a; Declaration of Robert Korver (May 22, 2016), Pet. App. 153a-156a; Glenn Kessler, *Top Ranking Arab American Is Leaving State for Wall Street,* The Washington Post (May 2, 2007) (JA1305-06 below); William D. Cohan, *Rogers Shuns Goldman Glare to Amass Power While Outlasting CEOs,* Bloomberg (Sept. 11, 2011) (JA1335-47 below); Archaeological Institute of America, About the AIA, 2015-2016 Committees (JA1350-151 below); Action Memo for Assistant Secretary Powell (May 29, 2007), Pet. App. 164a-165a; Appellate ECF No. 14; at 29-31; Pet. App. 171a-173a.

III. Alternatively, the Court Should Order a Summary Remand.

Alternatively, the Guild requests the Court to exercise its supervisory power and order a summary remand to require the Fourth Circuit to consider the Guild's constitutional claims in the first instance. In its appeal, the Guild asked the Fourth Circuit to consider, among other issues, the following three assignments of error:

> 1. Did the District Court violate the Guild's 5th Amendment due process rights by excusing the government from making out important elements of its *prima facie* case for forfeiture based on *dicta* from an earlier decision rendered in an entirely different

> context where the Guild was not defending its private property rights?
>
> 2. Given the Guild's 5th Amendment constitutional claims, could the District Court simply assume that that the Guild's coins were illicitly exported from Cyprus or China after the effective date of import restrictions based on the appearance of like coin types on "designated lists" of restricted items, particularly where the Guild presented evidence strongly suggesting that serious substantive and procedural irregularities marred the underlying decisions to impose import restrictions?
>
> 3. Did the District Court sanction violations of the Guild's 5th Amendment due process rights where it held that government regulations that conflict with the CPIA's requirements nonetheless provided the Guild with fair notice of conduct that is forbidden or required?

(Appellate ECF No. 14 at 1-2.) The Guild raised the first and second arguments before the District Court in its Second Amended Answer and on summary judgment, but neither the Government nor the District Court ever addressed them completely. (*See* Second Amended Answer, Second and Eighth Affirmative Defenses, Pet. App. 134a, 136a; District Court ECF No. 72-1 at 35-36; District Court ECF No 77 at 13-19; 246 F. Supp. 3d at 1123: Pet. App. 36a-38a.) As for the third, the District Court adopted the Government's argument that the clarity of the designated lists satisfied any notice requirement, but failed to consider fully the constitutional due process aspects of the Guild's claims. 246 F. Supp. 3d at 1123; Pet. App. 37a-38a.

On appeal, the Guild raised the same constitutional issues, which the Government again simply ignored. (Appellate ECF No. 14 at 16-17, 27-32; Appellate ECF No. 27 at 13-18; Pet. App. 167a-180a.) The Court affirmed, holding that the *ACCG v. CBP* opinion "foreclosed" the Guild's statutory arguments. 899 F.3d at 314-316; Pet. App. 69a-74a. The Fourth Circuit never addressed the first and second assignments of error that raised constitutional concerns about any finding that the courts were bound by the *ACCG v. CBP* decision. As to the third, the Panel again rejected the Guild's fair notice argument based on a conflict between the CBP regulation cited in the detention and seizure notices and the CPIA, and instead held that clarity of the designated lists (which are different) satisfied any constitutional claims. 899 F.3d at 320-323; Pet. App. 82a-86a.

Instead of holding that the Government conceded the first two assignments of error, the Fourth Circuit justified failing to address them because

> [T]he Guild provided no more than brief, conclusory statements that its constitutional rights were contravened. We are satisfied to reject the unsupported constitutional arguments due to insufficient briefing and lack of merit.

899 F.3d at 311 n. 13; Pet. App. 63a n. 13. This was incorrect. The Guild specifically addressed the first assignment of error in its Opening Brief ("OB") (Appellate ECF No. 14 at 16-17; Pet. App. 167a-168a), and in its Reply Brief ("RB") (Appellate ECF No. 27 at 13-16; Pet. App. 176a-179a). The second assignment of error was specifically addressed in the OB (Appellate ECF No. 14 at 27-31; Pet. App. 169a-174a), and in the RB (Appellate ECF No. 14 at 17-18; 180a-181a). The

Guild also filed three (3) notices of supplemental authority relevant to the second assignment of error. *See* Appellate ECF Nos. 31, 42, and 48. The Guild's briefing included citations to relevant case law. Counsel also discussed both issues at oral argument. This argument completely distinguishes the situation here from the facts in the cases the Fourth Circuit cited, *Canady v. Crestar Mort. Corp.,* 109 F.3d 969, 973-974 (4th Cir. 1997) (issue raised in notice of appeal not briefed at all); *Bronson v. Swenson,* 500 F.3d 1099, 1104-1105 (10th Cir. 2007) (constitutional claim not addressed in opening brief). If the Court does not accept this case for argument, the Guild alternatively requests that the Court remand this matter with an order directing that the Fourth Circuit address Guild's 5th Amendment Due Process claims on the merits.

IV. The Decisions Below Harm American Museums, Collectors, and Small Businesses Engaged in the International Exchange of Cultural Goods.

The Guild has acted on behalf of untold numbers of collectors and small businesses of the numismatic trade that have been severely impacted by import restrictions on the coins they avidly collect, but who could never themselves afford to fund such a legal contest, much less the defense of a forfeiture action, particularly one involving coins worth such a typically trivial sum.

Amicus support before the Fourth Circuit attests to the public importance of these issues. If anything, these issues have only become more pressing, particularly for coin collectors. Initially, import restrictions were imposed on behalf of poor, third world countries, and on narrow ranges of artifacts. After over three decades, however, import restrictions are now in place

on behalf of "First World" E.U. members like Bulgaria, Cyprus, Greece, and Italy, superpowers like China, and on ever more frequently overlapping categories of artifacts, including most recently further broad restrictions on ancient coins that were imposed while either the DJ action or this forfeiture action have been pending.[11]

These import restrictions do not just restrict the entry of cultural goods. As demonstrated here, they have also provided license to the authorities to detain, seize and forfeit any artifacts of a type found on

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[11] State and CBP have currently imposed CPIA import restrictions on behalf of seventeen (17) UNESCO state parties: (1) Belize; (2) Bolivia; (3) Bulgaria; (4) Cambodia; (5) China; (6) Colombia; (7) Cyprus; (8) Egypt; (9) El Salvador; (10) Greece; (11) Guatemala; (12) Honduras; (13) Italy; (14) Libya; (15) Mali; (16) Nicaragua, and (17) Peru. *See* Bureau of Educational and Cultural Affairs, U.S. State Department, *Cultural Property Agreements* (available at https://app.box.com/s/hvzq1u7s0uyeds zsbck9ltiurgjfni5e/file/335001553866) (last visited November 6, 2018). Moreover, additional emergency import restrictions have been imposed on archaeological and ethnological materials from Iraq and Syria pursuant to statute. *Id.* While the DJ Action and this forfeiture case regarding Cypriot and Chinese coins have been pending, State and CBP have imposed additional import restrictions on ancient coins from Bulgaria, Egypt, Greece, Iraq, Italy, Libya, and Syria. *See* 79 Fed. Reg. 2781, 2783 (Jan. 16, 2014) (Bulgarian import restrictions); 81 Fed. Reg. 87805, 87807-87808 (Dec. 5, 2016) (Egyptian import restrictions); 76 Fed. Reg. 74691, 74693 (Dec. 1, 2011) (Greek import restrictions); 73 Fed. Reg. 23334, 23338 (April 3, 2008) (Iraqi import restrictions); 76 Fed. Reg. 3012, 3013 (Jan. 19, 2011) (Italian import restrictions); 83 Fed. Reg. 31654, 31656 (July 9, 2018) (Libyan import restrictions); 81 Fed. Reg. 53916, 53918 (Aug. 15, 2016) (Syrian import restrictions).

designated lists—all too often at the behest of nationalistic and/or authoritarian foreign governments.[12]

Accordingly, six (6) educational, trade and advocacy groups interested in coin collecting and more generally in the legitimate international exchange of cultural goods supported the Guild below as *amici* for the simple, sound, and serious reason that overbroad enforcement of overlapping import restrictions performed in disregard of the Congress' directions have already gravely damaged the interests of museums, collectors and the trade in the legitimate international exchange of cultural goods.

The importance of these issues to the continued access of American citizens and institutions to ancient coins and other artifacts as "hands-on" mediums of cultural exchange and understanding also argue for this Court to take this matter up to ensure the focus on prospective, targeted import restrictions Congress sought to ensure in drafting the CPIA is not irretrievably lost.

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[12] Since 2007, the Government has repatriated more than 11,000 cultural artifacts to their supposed countries of origin based on alleged violations of the CPIA and other, related customs statutes. *See ICE, DOJ Return Historic Christopher Columbus Letter to Spain,* Immigration and Customs Enforcement Press Release (June 6, 2018) (available at https://www.ice.gov/features/cpaa) (last visited October 19, 2018). Upon information and belief, the Government has forfeited most of these cultural artifacts after the owner abandons the property or defaults given the high costs of legal services and the potential for criminal liability that arises from litigating these claims. As such, they have a *real impact on real small businesses, museums and collectors.*

CONCLUSION

The decisions below collapse any meaningful distinctions among detentions, seizures and forfeitures and between *ultra vires* and constitutional review. Furthermore, they have effectively rewritten prospective, targeted CPIA import restrictions into broad embargoes on all archaeological objects of types found on designated lists. *Amicus* support before the Fourth Circuit attests to the public importance of these issues. Accordingly, the Guild respectfully requests that the Court grant certiorari to decide important constitutional questions about the burden of proof in a civil forfeiture case. Alternatively, the Guild respectfully requests the Court to remand this matter to the Fourth Circuit in the interests of justice and order that Court to address the Guild's constitutional claims.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 03/31/17]

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Civil No. CCB-13-1183

———

UNITED STATES,

v.

3 KNIFE-SHAPED COINS, *et al.*

———

MEMORANDUM

This action is a civil forfeiture proceeding brought by the United States (the "government") under the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2601 *et seq.* The defendant property consists of three knife-shaped Chinese coins, 12 other Chinese coins, and seven Cypriot coins. The Ancient Coin Collectors Guild (the "Guild") has filed a claim of interest in the property. Now pending are the Guild's motion for summary judgment as to the coins numbered 1-22 on the stipulated coin documentation list,[1] (ECF No. 72), and the government's cross-motion for summary judgment as to the coins numbered 1-6, 12-13, and 16-22, (ECF No. 76). The motions have been

[1] The parties have stipulated to a coin documentation list that assigns each coin a number and identifies it by description and weight. (Stipulation Related to Images of Defendant Property, Ex. A, ECF No. 73-1 ("Coin Documentation Materials").) The coins were weighed and photographed alongside their assigned numbers by a mutually agreeable conservator in July 2015. (*See id.*)

fully briefed, and no hearing is necessary to their resolution. *See* Local Rule 105.6. For the reasons explained below, the Guild's motion will be granted as to coins 7-11 and 14-15 and denied as to coins 1-6, 12-13, and 16-22. The government's cross-motion will be granted as to coins 1-6, 12-13, and 16-22.

BACKGROUND

In 1970, the United States became a signatory to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention"). Nov. 14, 1970, 823 U.N.T.S. 231. The purpose of the Convention was to protect cultural property from "the dangers of theft, clandestine excavation, and illicit export." *Id.* pmbl. The Convention defines the term "cultural property" to mean "property which . . . is specifically designated by each State as being of importance for archaeology, pre-history, history, literature, art or science." *Id.* art. 1. Under Article 9 of the Convention, any signatory to the Convention ("State Party") can request that another State Party take measures to protect its cultural property "from pillage," including by imposing import and export controls. *Id.* art. 9.

Congress enacted the CPIA to implement the Convention, which was not self-executing. Convention on Cultural Property Implementation Act, Pub. L. 97-446, tit. III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-2613). The CPIA authorizes the president to impose import restrictions on certain items of cultural property at the request of a State Party. 19 U.S.C. § 2602. When a State Party makes a request, the president must "publish notification of the request . . . in the Federal Register" and submit information regarding the request to the Cultural Property Advisory

Committee ("CPAC").[2] *Id.* § 2602(f). CPAC is an 11-person committee, appointed by the president, whose members include "experts in the fields of archaeology, anthropology, ethnology, or related areas"; "experts in the international sale of archaeological, ethnological, and other cultural property"; representatives of the interests of museums; and representatives of "the interest of the general public." *Id.* § 2605(b)(1).

After CPAC receives notice of a request from the president, it is responsible for conducting an investigation and review to determine whether import restrictions are warranted. *Id.* § 2605(f))(1); *see id.* § 2602(a)(1). CPAC then issues a report to Congress and the president that contains the results of this investigation and review, along with certain other findings and its recommendation regarding whether the United States should enter into an agreement or memorandum of understanding to implement Article 9 ("Article 9 agreement") with the State Party. *Id.* § 2605(f)(1). When CPAC recommends entering into an Article 9 agreement, its report also sets forth the types of material that should be covered. *Id.* § 2605(f)(4). After receiving this report, the president determines whether to enter into such an agreement. *Id.* §§ 2602(a),(f). The existence of an Article 9 agreement is a prerequisite to the

[2] The text of the statute assigns CPIA functions to either the president or Secretary of the Treasury, but delegated authority currently lies with the Assistant Secretary of State for Educational and Cultural Affairs and U.S. Customs and Border Protection ("CBP"), an agency within the U.S. Department of Homeland Security. *E.g.,* Exec. Order 12,555; 68 Fed. Reg. 10,627; 65 Fed. Reg. 53,795. CBP is responsible for promulgating regulations regarding import restrictions under the CPIA, Exec. Order 12,555; 68 Fed. Reg. 10,627, as well as enforcing import restrictions at ports of entry, 19 C.F.R. § 12.104i.

imposition of import restrictions under the CPIA. *See id.* § 2604.

The United States has Article 9 agreements with both Cyprus and China. It entered into an agreement with Cyprus in 2002, 67 Fed. Reg. 47,447, following a period of emergency import restrictions, 64 Fed. Reg. 17,529. This agreement was amended in 2006, 71 Fed. Reg. 51,724-25, and extended in 2007, 72 Fed. Reg. 38,470-71. After the 2007 extension, CBP promulgated an amended list of material subject to the import restrictions ("designated list"). *Id.* at 38,471 73. This list included the following:

> D. Coins of Cypriot Types
>
> Coins of Cypriot types made of gold, silver, and bronze including but not limited to:
>
> 1. Issues of the ancient kingdoms of Amathus, Kition, Kourion, Idalion, Lapethos, Marion, Paphos, Soli, and Salamis dating from the end of the 6th century B.C. to 332 B.C.
>
> 2. Issues of the Hellenistic period, such as those of Paphos, Salamis, and Kition from 332 B.C. to c. 30 B.C.
>
> 3. Provincial and local issues of the Roman period from c. 30 B.C. to 235 A.D. Often these have a bust or head on one side and the image of a temple (the Temple of Aphrodite at Palaipaphos) or statue (statue of Zeus Salaminios) on the other.

Id. at 38,473.

The United States and China entered into an Article 9 agreement in January 2009. 74 Fed. Reg. 2,839. CBP then promulgated a list of articles subject to CPIA restrictions, which included the following:

3. Coins.

a. Zhou Media of Exchange and Toolshaped Coins: Early media of exchange include bronze spades, bronze knives, and cowrie shells. During the 6th century BC, flat, simplified, and standardized cast bronze versions of spades appear and these constitute China's first coins. Other coin shapes appear in bronze including knives and cowrie shells. These early coins may bear inscriptions.

b. Later, tool-shaped coins began to be replaced by disc-shaped ones which are also cast in bronze and marked with inscriptions. These coins have a central round or square hole.

c. Qin: In the reign of Qin Shi Huangdi (221-210 BC) the square-holed round coins become the norm. The new Qin coin is inscribed simply with its weight, expressed in two Chinese characters ban liang. These are written in small seal script and are placed symmetrically to the right and left of the central hole.

d. Han through Sui: Inscriptions become longer, and may indicate that inscribed object is a coin, its value in relation to other coins, or its size. Later, the period of issue, name of the mint, and numerals representing dates may also appear on obverse or reverse. A new script, clerical (lishu), comes into use in the Jin.

e. Tang: The clerical script becomes the norm until 959, when coins with regular script (kaishu) also begin to be issued.

Id. at 2,842.

In April 2009, the Guild purchased 23 ancient Chinese and Cypriot coins from Spink, a numismatic dealer in London. (*See* Mot. Summary Judgment, Ex. 5, ECF No. 72-5 ("Tompa Dec."), Ex. N (Spink invoice).)[3] According to the Spink invoice, each coin was minted in Cyprus or China, had "[n]o recorded provenance," and had a "[f]ind spot" that was "unknown." (*Id.*) Pursuant to the parties' stipulation, the Chinese coins are numbered 1-15, and the Cypriot coins are numbered 16-22. (Coin Documentation Materials at 2.)

Later that month, the Guild imported the coins to the United States via a commercial flight from London to Baltimore. (*See* Tompa Dec., Ex. S (shipping and entry documents).) CBP detained the property at the time of entry for alleged violations of the CPIA and its implementing regulations. (*See id.*, Exs. P-R (CBP notices of detention and seizure).)

After months passed without the initiation of forfeiture proceedings, the Guild brought an action against, *inter alia,* the U.S. Department of State and CBP. *See Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, Civil No. CCB-10-322 ("declaratory judgment action"). The Guild alleged that the actions of both defendants violated the Administrative Procedure Act ("APA"), were *ultra vires*, and violated the First and Fifth Amendments to the United States Constitution. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 801 F. Supp. 2d 383, 399 (D. Md. 2011). The government filed a motion to dismiss, which this court granted. *Id.* at 418. Regarding the APA claims, the court held that the actions of the

[3] Both parties acknowledge an unexplained discrepancy between the number of coins listed in the dealer's invoice, 23, and the number currently in CBP's possession, 22.

State Department were not reviewable under the APA. *Id.* at 404. Regarding the *ultra vires* claims, the court concluded that "the import restrictions on Chinese and Cypriot coins, which have the effect of barring the importation of coins with unknown find spots, do not exceed the State Department's authority under the CPIA." *Id.* at 409. The court also dismissed the APA and *ultra vires* claims against CBP, reasoning that CBP had merely carried out its statutory duty to promulgate and enforce regulations under the CPIA. *Id.* at 413-414. Finally, the court held that none of the constitutional claims had merit. *Id.* at 411-12, 414.

The Guild appealed, and the Fourth Circuit affirmed in October 2012. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171, 175 (4th Cir. 2012) ("Fourth Circuit opinion"). As relevant here, the Fourth Circuit held that the State Department and CBP had not "acted *ultra vires* by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were 'first discovered within' China or Cyprus." *Id.* at 181-82. The opinion explained:

> As an initial matter, the CPIA is clear that defendants may designate items by "type or other appropriate classification" when establishing import restrictions. 19 U.S.C. § 2604. State and CBP are under no obligation to list restricted items with more specificity than the statute commands, and they are certainly not required to impose restrictions on a coin-by-coin basis. Such a requirement would make the statutory scheme utterly unworkable in practice.

Id. at 182. Ultimately, the court concluded that

> CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604, and CBP has detained them, in accordance with 19 U.S.C. § 2606. The detention was lawful as an initial matter, and the Guild had an opportunity at the time of detention to present evidence that the coins were subject to one of the CPIA exemptions. As explained above, the Guild need not have documented every movement of its coins since ancient times. To comply with § 2606, the Guild need demonstrate only that the Cypriot coins left Cyprus prior to 2007 and that the Chinese coins left China prior to 2009. It never so much as attempted to do so.

Id. at 183 (internal citations omitted). The Guild filed a petition for certiorari with the Supreme Court, which was denied. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection Agency*, 133 S. Ct. 1645 (2013).

The government initiated this forfeiture action on April 22, 2013, (Compl., ECF No. 1), and the Guild filed a claim of interest in the defendant property, (Claim for Property, ECF No. 3). This court issued memorandum opinions on June 3, 2014, (ECF Nos. 22-23) ("June 3rd decision") and February 11, 2016, (ECF No. 63) ("February 11th decision"). Those opinions clarified the scope of the litigation and made various preliminary rulings.

In the June 3rd decision, which granted the government's motion to strike the Guild's answer,[4] the

[4] The court construed the government's motion to strike as directed at the Guild's amended answer. (Memorandum of June 3, 2014, ECF No. 22, at 2.)

court observed that "it is abundantly clear that [the Guild] seeks to expand the scope of this forfeiture action well beyond the limits set by the Fourth Circuit in its controlling opinion." (Memorandum of June 3, 2014, at 1.) It clarified that "[t]he Fourth Circuit's opinion forecloses any further challenge to the validity of the regulations." *Id.* Quoting from dicta in the Fourth Circuit opinion,[5] the court identified the following burden-shifting framework as applicable in CPIA forfeiture proceedings:

> Under the CPIA, the government bears the initial burden in forfeiture of establishing that the coins have been "listed in accordance with section 2604," 19 U.S.C. § 2610, which is to say that they have been listed "by type or other appropriate classification" in a manner that gives "fair notice . . . to importers," *id.* § 2604. If the government meets its burden, the Guild must then demonstrate that its coins are not subject to forfeiture in order to prevail. *See id.* § 1615.

(*Id.* (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 185).)

The court explained that the importer bears the burden to show that

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[5] As the Guild observes, the Fourth Circuit's discussion of the anticipated forfeiture action is dicta. There is substantial overlap, however, between the CPIA provisions interpreted in that action and those that must be interpreted here. *See, e.g.*, 19 U.S.C. §§ 2601, 2604, 2606. To the extent that the Fourth Circuit's interpretation of the statute constitutes part of its holding, it is binding on this court. Where it constitutes dicta, this court cites to it for the soundness of its reasoning, not for any precedential effect.

> the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect.[6]

(Memorandum of June 3, 2014, at 1-2 (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 183).)

In the February 11th decision, which resolved several discovery-related motions, the court concluded that the Guild "seeks discovery not relevant to the issues the court will have to decide in this forfeiture action." (Memorandum and Order of February 11, 2016, ECF No. 63, at 1.) Specifically, the court denied the Guild the discovery it sought from State Department officials, noting that "[i]t is unlikely that the export control status of the coins under foreign law will be a proper defense in this forfeiture action." (*Id.*) The court also declined to allow "general discovery from the government about the circulation of Cypriot and Chinese coins." (*Id.* at 2.) It left open the possibility, however, that the Guild could rely on expert testimony to prove that "*these specific* coins were exported from

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[6] This excerpt is a quotation from a section of the Fourth Circuit opinion discussing the requirements of 19 U.S.C. § 2606. There is a minor discrepancy in the second potential showing: the Fourth Circuit uses the phrase "more than ten years before it arrived in the United States," whereas the corresponding provision, § 2606(b)(2)(A), uses "not less than ten years before." Similarly, in the third potential showing, the Fourth Circuit uses "before CPIA restrictions went into effect," whereas § 2606(b)(2)(B) uses "on or before the date on which such material was designated." Because these discrepancies do not affect the Guild's claims, the court quotes this language without alteration.

their respective States before CPIA restrictions went into effect." (*Id.* at 1-2 (emphasis added).)

Now pending are the Guild's motion and the government's cross-motion for summary judgment.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no *genuine* dispute as to any *material* fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphases added). "A dispute is genuine if 'a reasonable jury could return a verdict for the nonmoving party.'" *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012)). "A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Accordingly, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Anderson*, 477 U.S. at 247-48. The court must view the evidence in the light most favorable to the nonmoving party, *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam), and draw all reasonable inferences in that party's favor, *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citations omitted); *see also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015). At the same time, the court must "prevent factually unsupported claims and defenses from proceeding to trial." *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 526 (4th Cir. 2003) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993)).

ANALYSIS[7]

In this action, the United States alleges that the defendant property "is subject to forfeiture pursuant to 19 U.S.C. § 2609 because it was imported in violation of 19 U.S.C. § 2606 and 19 C.F.R. § 12.104a(b), in that [it] comprises archaeological material of China and Cyprus that is listed in 19 C.F.R. § 12.104g, and . . . [the Guild] failed to present the documentation required by Section 2606(b) within 90 days of the detention of such property by a customs officer." (Compl. ¶ 17.) The court considers, first, whether the government has satisfied its initial burden to show that the property has been "listed in accordance with section 2604." (Memorandum of June 3, 2014, at 1 (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 185)); *see United States v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618, 623 (E.D. Va. 2009). If so, "the burden of proof . . . shifts to [the Guild] to establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or to establish an applicable affirmative defense." *Peruvian Oil*, 597 F. Supp. 2d at 623. The government is entitled to summary judgment if the Guild fails to rebut its initial showing. *See id.*

I. Statutory Framework[8]

Section 2609 of the CPIA, the cause of action for this forfeiture proceeding, provides that "[a]ny designated archaeological or ethnological material . . . which is

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[7] In considering the Guild's motion for summary judgment, the court has reviewed the notices of supplemental authority submitted on February 16, 2017, (ECF No. 81), and March 20, 2017, (ECF No. 82).

[8] CBP has promulgated regulations implementing the CPIA, which are codified at 19 C.F.R. §§ 12.104-12.104i.

imported into the United States in violation of section 2606 . . . shall be subject to seizure and forfeiture." 19 U.S.C. § 2609(a). Section 2606 makes it unlawful to import "[any] designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 . . . unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party." *Id.* § 2606(a). "Designated archaeological or ethnological material" is a term of art defined in the CPIA. As relevant here, it includes "any archaeological . . . material of the State Party" which is "covered by an agreement under this chapter" and "listed by regulation under section 2604." *Id.* § 2601(7).

Section 2604 provides that, "[a]fter any agreement enters into force under section 2602 . . . , the Secretary [of the Treasury], in consultation with the Secretary of State, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement." *Id.* § 2604. Material may be listed by type, but "each listing made under this section shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2606 . . . are applied only to the archaeological and ethnological material covered by the agreement . . . ; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions." *Id.*

Under § 2606, the importer must present one of three kinds of documentation to the customs officer at the time of making entry to the United States: (1) "the certificate or other documentation of the State Party" described in § 2606(a), *id.* § 2606(b)(1); (2) "satisfactory

evidence" that the article was exported from the State Party at least 10 years before it arrived in the United States and that the importer owned it for a year or less before it arrived in the United States, *id.* § 2606(b)(2)(A); and (3) "satisfactory evidence" that the article was exported from the State Party on or before the date the import restrictions took effect, *id.* § 2606(b)(2)(B). "Satisfactory evidence" means the specific types of sworn declarations and statements described in § 2606(c). *Id.* § 2606(c). If the importer fails to present such documentation, the customs officer "shall refuse to release the material," starting a 90-day clock. *Id.* § 2606(b). The importer must produce the required documentation during that period; if it does not, the material becomes "subject to seizure and forfeiture." *Id.*; *see id.* § 2609(a).

Forfeiture proceedings under the CPIA are governed by a combination of CPIA provisions and generally applicable statutes. Section 2609 provides that "[a]ll provisions of law relating to seizure, forfeiture, and condemnation for violation of the customs laws shall apply to seizures and forfeitures [under the CPIA], insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of this chapter." *Id.* § 2609(a). Most civil forfeiture proceedings fall under the Civil Asset Forfeiture Reform Act ("CAFRA"), 18 U.S.C. § 983, which applies to "all civil forfeitures under federal law unless the particular forfeiture statute is specifically exempted in 18 U.S.C. § 983(i)(2)." *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005); *see also* 18 U.S.C. § 983(i)(1)-(2)(A). Because 18 U.S.C. § 983(i)(2)(A) "specifically exempt[s]" provisions codified in Title 19, however, CAFRA does not apply to forfeiture proceedings brought under the CPIA. *Peruvian Oil*, 597 F. Supp. 2d at 622. The applicable statute is therefore 19

U.S.C. § 1615, which sets out the burden of proof in actions "brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage." Under this statute, the burden of proof in customs actions lies with the claimant, provided that the government has shown probable cause for the forfeiture. 19 U.S.C. § 1615. Congress partially altered this burden for forfeiture proceedings brought under the CPIA, providing that, "[n]otwithstanding the provisions of section 1615 . . . , the United States shall establish . . . in the case of any material subject to the provisions of section 2606 . . . , that the material has been listed by the Secretary [of the Treasury] in accordance with section 2604." *Id.* § 2610. Thus, the government bears the initial burden in CPIA forfeiture proceedings.

II. Burden of Proof in Forfeiture Proceedings Under the CPIA

This court laid out the applicable burden-shifting framework in its June 3rd decision. That decision, quoting from the Fourth Circuit's discussion of the anticipated forfeiture action, explained:

> Under the CPIA, the government bears the initial burden in forfeiture of establishing that [material subject to § 2606 has] been "listed in accordance with section 2604," 19 U.S.C. § 2610, which is to say that [it has] been listed "by type or other appropriate classification" in a manner that gives "fair notice . . . to importers," *id.* § 2604. If the government meets its burden, the [claimant] must then demonstrate that its [property is] not subject to forfeiture in order to prevail. *See id.* § 1615.

(Memorandum of June 3, 2014, at 1 (quoting *Ancient Coin Collectors Guild*, 698 F.3d 171 at 185).)

This framework is consistent with the district court's approach in *United States v. Eighteenth Century Peruvian Oil*, which appears to be the sole decision regarding CPIA forfeiture proceedings based on violation of 19 U.S.C. § 2606. In *Peruvian Oil*, the district court determined the proper burden-shifting framework in a CPIA forfeiture action by "reading . . . together" 19 U.S.C. § 1615, the general statute, and 19 U.S.C. § 2610, a section of the CPIA. It reasoned:

> The generally-applicable burden-shifting statute in Title 19 provides that, in all forfeiture actions brought against "any . . . merchandise[ ] or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage . . . the burden of proof shall lie upon [the] claimant." 19 U.S.C. § 1615.
>
> Within CPIA, however, Congress expressly stated that, "[n]otwithstanding the provisions of [19 U.S.C. § 1615], in any forfeiture proceeding brought under [CPIA]" where the property "is claimed by any person, the United States shall establish" that property subject to 19 U.S.C. § 2606 "has been listed by the Secretary in accordance with [19 U.S.C. § 2604]." 19 U.S.C. § 2610(1).
>
> [I]t thus appears that 19 U.S.C. § 2610 places the initial burden on the Government to show that CPIA applies. After that is accomplished, 19 U.S.C. § 1615 places the burden of proof in the remainder of the action on the claimant. *See An Original Manuscript Dated November*

> *19, 1779*, 1999 WL 97894, *4 (S.D.N.Y. Feb. 22, 1999) ("Congress plainly directs the court to treat a CPIA forfeiture as any other forfeiture except that the burden of proof is initially on the government, not on the claimant.").
>
> Thus, in a CPIA forfeiture action, the United States bears the initial burden to show that the seized property is listed in accordance with 19 U.S.C. § 2604 and properly subject to the import restrictions of 19 U.S.C. § 2606.[9]

Peruvian Oil, 597 F. Supp. 2d at 622-23 (alterations in original).

Phrased differently, the government carries the initial burden to show that the property is "designated [archaeological] material exported from a State that is a party to the UNESCO Convention and a bilateral agreement with the United States." *Id.* at 623 (citing 19 U.S.C. §§ 2606, 2604, 2602). "Once the Government makes this initial showing, the burden of proof then

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[9] The *Peruvian Oil* standard differs from the one articulated in this court's June 3rd decision in that it makes explicit the requirement that the property must be "properly subject to the import restrictions of 19 U.S.C. § 2606." Because material becomes subject to § 2606 at the time it is "listed in accordance with section 2604," however, that requirement is incorporated under either standard. *See* 19 U.S.C. §§ 2601(7), 2604, 2606, 2610. In any case, as the Fourth Circuit has held and the Guild's expert has acknowledged, § 2606 applies here. *Ancient Coin Collectors Guild*, 698 F.3d at 183 (holding the "CBP has detained [the coins], in accordance with 19 U.S.C. § 2606" and that "[t]he detention was lawful as an initial matter"); (Mot. Summary Judgment, Ex. 4, ECF No. 72-4 (declaration of Michael McCullough), at 5-6 (explaining that "[t]he coins we [*sic*] invoiced by Spink and shipped to the United States from the United Kingdom where they were seized by [CBP] because the coins are a type that are subject to import restrictions under the [CPIA]").)

shifts to Claimant to establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or to establish an applicable affirmative defense." *Peruvian Oil*, 597 F. Supp. 2d at 623.

III. Motion and Cross-Motion for Summary Judgment

The Guild raises three arguments in support of its motion for summary judgment. First, it contends that it has rebutted the government's initial showing, if any, through the submission of expert testimony. Second, with respect to coins 7-11 and 14-15, the Guild asserts that the burden never shifted to it because government failed to make out a prima facie case. Third, the Guild asks the court to reconsider its prior rulings on issues related to burden of proof and fair notice. The government responds that it has satisfied its initial burden; that it is in the process of returning coins 7-11 and 14-15, which will moot the Guild's arguments with respect to those coins; and that the court should not reconsider its previous rulings, which were correct. Further, the government contends that it is entitled to summary judgment as to coins 1-6, 12-13, and 16-22 because the Guild has not established a valid exception or defense to forfeiture. It does not seek summary judgment as to coins 7-11 and 14-15.

A. Government's Initial Burden

As discussed above, the government has the initial burden to show that property subject to 19 U.S.C. § 2606 is "listed in accordance with section 2604." (*See* Memorandum of June 3, 2014, at 1 (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 185)); *see also* 19 U.S.C. § 2610. Section 2604 provides that, after an Article 9 agreement enters into force, "the Secretary . . . shall by regulation promulgate (and

when appropriate shall revise) a list of archaeological or ethnological material of the State Party covered by the agreement." 19 U.S.C. § 2604. This listing "shall be sufficiently specific and precise to insure that (1) the import restrictions under section 2606 . . . are applied only to the archaeological and ethnological material covered by the agreement . . . ; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions." *Id.* It is perfectly proper, however, for the regulations to list restricted material "by type or other appropriate classification." *See id.*

The Fourth Circuit previously held that "CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604." *Ancient Coin Collectors Guild*, 698 F.3d at 183. CBP promulgated designated lists for coins of Cypriot type and coins from China in CBP Dec. 12-13 and CBP Dec. 09-03, extended by CBP Dec. 14-02, respectively. 19 C.F.R. § 12.104g(a). There is no dispute that China and Cyprus are "State Parties" under the CPIA, *see* 19 C.F.R. § 12.104b, nor does the Guild deny that the United States has entered into an Article 9 agreement with each under § 2602. The only issue, then, is whether each of the 22 coins falls into the "type or other classification" of material included in the designated lists.

The starting point for this inquiry is the Spink invoice, which the parties agree accurately describes the coins at issue.[10] As this court previously acknowledged, the government may rely on the invoice alone

[10] As noted, there is an unexplained discrepancy between the number of coins listed in the Spink invoice and the number of coins in CBP's possession, but the parties do not dispute the accuracy of the descriptions in the invoice.

where its "clarity and specificity" are sufficient to determine that a particular coin is covered by the designated list. *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 400 n.12. In reviewing the parties' claims, the court also has considered the stipulated coin documentation materials, which contain descriptions and photographs of the coins, and the Guild's responses to the government's request for admissions, among other documents.

Regarding coins 1-6, 12-13, and 16-22, the court finds that the government has satisfied its initial burden to show that the coins are of restricted types.[11] Indeed, the Guild admitted in response to the government's request for admissions that coins 1-6 and 12-13 are of types that appear on the designated list for coins from China and that coins 16-22 are of types that appear on the designated list for coins of Cypriot type. (Tompa Dec., Ex. H, ¶¶ 2-3.)

Regarding coins 7-11 and 14-15, the Guild contends that "the government has failed to establish its minimal burden to show that certain Chinese coins have been restricted at all."[12] (Mem. Mot. Summary

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[11] The Guild does not appear to contest that the government has made the required showing with respect to coins 1-6, 12-13, and 16-22, except insofar as it asks the court to reconsider its prior rulings.

[12] The government's most recent filing states that it is "no longer pursuing the forfeiture of coins 7--11 and 14--15" and is in the process of returning those coins to the Guild. (*See* Reply Cross-Mot. Summary Judgment, ECF No. 78, at 2 n.1.) Because the government argued in its cross-motion that the Guild was not entitled to summary judgment, however, and because the Guild's claims have not yet been mooted by return of the coins, the court will consider whether the government has established a prima facie case.

Judgment, ECF No. 72-1, at 15.) The Guild did not concede in response to the government's request for admissions that these particular coins are of types that appear on the designated list for China. Rather, it stated that it was "unable to admit or deny whether [the coins] are of types that appear on the Chinese designated list" because it "ha[d] no working knowledge of the Chinese language." (Tompa Dec., Ex. H, ¶ 2.) The court agrees that the relevant documents, including the Spink invoice, are insufficient to establish that coins 7-11 and 14-15 are of types that appear on the Chinese designated list. Because the government has not produced a Chinese language expert or provided any other evidence showing that the coins are of restricted types, the court finds that the government has failed to satisfy its initial burden regarding coins 7-11 and 14-15.

The government's arguments to the contrary are unavailing. In its cross-motion, the government contends that the Guild is not entitled to summary judgment because it "offered no evidence to identify [coins 7-11 and 14-15] as not appearing on the designated list, and thus failed to rebut the government's initial showing regarding these coins." (Mem. Cross-Mot. Summary Judgment, ECF No. 76-1, at 22.) This description mischaracterizes the parties' respective burdens of proof. The initial burden lies with the government to show that the coins have been "listed . . . in accordance with section 2604," not with the claimant to prove that they have not. 19 U.S.C. § 2610. As the government has provided no evidence to establish that the coins are of types that appear on the designated list, there was no "initial showing" for the Guild to rebut.

Alternatively, the government asserts that it is in the process of returning the coins to the Guild and that

the Guild's arguments with respect to those coins "will soon be moot." (Cross-Mot. Summary Judgment, ECF No. 76, at 1.) Although the government had begun the return process at the time it filed its cross-motion in August 2016, that process does not appear to have concluded. (*See* Letter from Peter Tompa, ECF No. 79; Letter from Molissa Farber, ECF No. 80.) In a letter dated January 3, 2017, the Guild informed the court that "the parties have not been able to agree about the conditions for the return of the coins" and renewed its request for summary judgment as to all of the coins. (Letter from Peter Tompa at 1.) The government replied the following day, requesting that "the Court refrain from ruling as to coins 7-11 and 14-15 while the parties continue to work towards the return of these seven coins." (Letter from Molissa Farber at 2.)

Given the divergent positions of the parties, the court sees no reason to delay ruling on the Guild's pending request for summary judgment as to coins 7-11 and 14-15. The government has failed to carry its initial burden, and the Guild is entitled to judgment as a matter of law. Moreover, although the return process has been ongoing for more than seven months, it has not resulted in the return of the coins to the Guild. Thus, the court will grant the Guild's motion for summary judgment as to coins 7-11 and 14-15.[13]

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[13] Although the Guild has not filed a separate motion for attorneys' fees and costs, it has stated its intention to seek them in its motion for summary judgment and reply. (*See* Mot. Summary Judgment, ECF No. 72, at 1; Reply Mot. Summary Judgment, ECF No. 77, at 5 n.3.) Because the Guild has provided no argument or supporting documentation that would allow the court to resolve this matter, the court does not construe these statements as constituting a pending motion for attorneys' fees and costs. The Guild may file a motion for attorneys' fees and

B. Guild's Burden on Rebuttal

As discussed above, the government has made out a prima facie case with respect to coins 1-6, 12-13, and 16-22. The burden therefore shifts to the Guild "to establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or to establish an applicable affirmative defense." *Peruvian Oil*, 597 F. Supp. 2d at 623.

The CPIA places the burden on the importer to provide specific documentation, either at the time of entry or during the 90-day period following the customs officer's refusal to release the material, showing that designated archaeological material is "eligible for import" to the United States. *Ancient Coin Collectors Guild*, 698 F.3d at 182 (citing 19 U.S.C. § 2606). Section 2606 sets out these documentation requirements in subsections (a) and (b).

Section 2606(a), titled "Documentation of lawful exportation," provides:

> No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

19 U.S.C. § 2606(a).

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costs as to any claims on which it has prevailed, citing appropriate authority.

Section 2606(b), titled "Customs action in absence of documentation," authorizes the government to "refuse to release the material," and ultimately seize it and initiate forfeiture proceedings, if the importer is unable to present one of the following forms of documentation:

- "the certificate or other documentation of the State Party required under subsection (a) of this section," *id.* § 2606(b)(1);
- "satisfactory evidence that such material was exported from the State Party . . . not less than ten years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before that date of entry," *id.* § 2606(b)(2)(A); or
- "satisfactory evidence that such material was exported from the State Party . . . on or before the date on which such material was designated under section 2604 of this title," *id.* § 2606(b)(2)(B).

See also id. § 2606(c) (defining "satisfactory evidence" to mean certain kinds of sworn declarations and statements).

In the declaratory judgment action, the Fourth Circuit summarized the requirements of § 2606 as follows:

> Such documentation must show that the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from

> its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect.

Ancient Coin Collectors Guild, 698 F.3d at 182-83 (citing 19 U.S.C. § 2606). The June 3rd decision quoted this language, and the Guild has used it as a road map for its showing on rebuttal. (*See* Mem. Mot. Summary Judgment at 14 ("The Court's June 3, 2014 Order governs this matter."); 15-16 (stating that expert testimony will show that the defendant property was "exported from its respective state before CPIA restrictions went into effect"); 15 (stating that expert testimony will show that the defendant property was "lawfully exported from its respective state while CPIA restrictions were in effect").)

The Guild has admitted that it cannot provide the documentation specified in § 2606. (Mot. Prot. Order, Ex. 4, ECF No. 48-5 (May 27, 2009, letter from Peter Tompa).) Instead, in order to satisfy its burden, it relies on the expert testimony of Douglas Mudd, a numismatic expert, and Michael McCullough, an expert in the international trade of cultural artifacts. (Mem. Mot. Summary Judgment at 15; *see* Mot. Summary Judgment, Ex. 3, ECF No. 72-3 ("Mudd Dec."); Mot. Summary Judgment, Ex. 4, ECF No. 72-4 ("McCullough Dec.").) The Guild offers Mudd's testimony to prove, by a preponderance of the evidence, that the coins were "exported from [their] respective state before CPIA restrictions went into effect." (Mem. Mot. Summary Judgment at 15-16 (quoting Memorandum of June 3, 2014, at 2).) It offers McCullough's testimony to prove, as a matter of law, that the Cypriot coins were "lawfully exported from [their] respective state while CPIA restrictions were in

effect," (*id.* at 15), and to raise an issue of material fact as to whether the Chinese coins were "lawfully exported from [their] respective state while CPIA restrictions were in effect," (Reply Mot. Summary Judgment at 28 n.15).

The parties dispute whether the Guild may rely on scholarly evidence to rebut the government's prima facie case. According to the Guild, such evidence is permissible because the applicable provision, 19 U.S.C. § 1615, "contemplates that a claimant in a court case will be able to use any admissible evidence or testimony to rebut any presumption that an article is subject to forfeiture." (Mem. Mot. Summary Judgment at 25.) The government's position is that § 1615 does not control because "19 U.S.C. §§ 2602, 2604, and 2606 specify the evidence permitted in a forfeiture case under the CPIA." (Mem. Cross-Mot. Summary Judgment at 16 n.4.) Section 2609 provides that a general statute like § 1615 applies only to the extent that it is "not inconsistent with" the CPIA. 19 U.S.C. § 2609(a).

The court's previous rulings do not resolve this dispute. In discussing the "burden . . . on the importer," the June 3rd decision quoted from the Fourth Circuit's summary of the documentation required under § 2606, but it did not address whether forfeiture claimants may rely on other kinds of evidence. (*See* Memorandum of June 3, 2014, at 1-2.) The February 11th decision also left the question open. (*See* Memorandum and Order of February 11, 2016, at 1-2 (explaining that the court was "not at this point ruling that expert testimony can have no role in th[e] determination").

Here, it is not necessary for the court to comprehensively delimit the boundaries of these competing provisions because the government is entitled to judgment as a matter of law regardless of which

evidentiary standard applies. If claimants in CPIA forfeiture actions are limited to the forms of documentation specified in § 2606, the Guild—which has conceded that it cannot provide such documentation—has failed to satisfy its burden to rebut the government's prima facie case. If, on the other hand, § 1615 permits courts to consider scholarly evidence, the court still must look to the substantive law to determine whether the proffered expert testimony establishes the Guild's entitlement to summary judgment or raises a disputed issue of material fact. Neither the Mudd nor McCullough testimony supports the Guild's claims.

The proffered testimony of Douglas Mudd, which relates to the circulation of Chinese and Cypriot coins in general, does not constitute the kind of particularized evidence contemplated in this court's February 11th decision. (*See id.* at 1 (denying the Guild "general discovery from the government about the circulation of Cypriot and Chinese coins" and explaining that the Guild could offer evidence that "*these specific* coins were exported from their respective states before CPIA restrictions went into effect") (emphasis added).) The Guild offers Mudd's testimony to show that it is "more probable than not that the Spink coins left Cyprus and China hundreds or thousands of years ago as currency, or decades ago as collectables," (Mem. Mot. Summary Judgment at 19), but it identifies no authority for the position that a CPIA forfeiture claimant may rebut the government's prima facie case with general evidence regarding a *type* of restricted material. Indeed, this approach runs contrary to the logic of the CPIA, which entrusts decisions about whether a certain type of material should be restricted to specific executive-branch officials, advised by CPAC, 19 U.S.C. §§ 2602, 2605, and provides forfeiture proceedings as the forum for importers to contest the

applicability of the restrictions to specific articles of property, *id.* § 2609. Nothing in the CPIA suggests that Congress intended for courts to weigh the determinations implicit in the designated lists against testimony from claimants' experts regarding a particular type of restricted material. On the contrary, the CPIA provision governing seizure and forfeiture precludes the parties from relying on provisions of law that would undermine the function of the designated lists. *See* 19 U.S.C. § 2609(a) (providing that general forfeiture laws apply "insofar as [they] are . . . not inconsistent with[ ] the provisions of [the CPIA]").

The proffered testimony of the Guild's other expert, Michael McCullough, also fails to rebut the government's initial showing. The Guild offers this testimony to establish that "the export of the Cypriot coins at issue from the U.K. was a legal export under E.U. and Cypriot law that satisfies the requirements of the CPIA."[14] (Mem. Mot. Summary Judgment at 19.) Because the relevant foreign export controls apply to each of the coins at issue, McCullough's evidence, unlike Mudd's, is sufficiently particularized to the defendant property. It does not support the Guild's case, however, because the lawfulness of an export from the United Kingdom under EU and Cypriot law has no bearing on whether the defendant property was "lawfully exported from its respective state while CPIA restrictions were in effect."

As noted, the requirement that material be "lawfully exported from its respective state while CPIA

[14] The Guild is moving for summary judgment as to only the Cypriot, not Chinese, coins on the basis that they were lawfully exported from their respective state while the CPIA restrictions were in effect.

restrictions were in effect" comes from the Fourth Circuit's discussion of § 2606, which this court quoted in its June 3rd decision. (*See* Memorandum of June 3, 2014, at 2 (quoting *Ancient Coin Collectors Guild*, 698 F.3d at 183).) This language corresponds to § 2606(a), which prohibits the import of material restricted at the time of its export from the State Party "unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of [its] laws." 19 U.S.C. § 2606(a). Under § 2606(b), "the certificate or other documentation of the State Party" is one of the three forms of documentation an importer may present, either at the time of entry or during the 90-day detention period, to establish that its property is not "subject to seizure and forfeiture." *Id.* § 2606(b).

Viewed in this context, it is clear that the proffered testimony regarding foreign export controls does not show that the Cypriot coins were "lawfully exported from [their] respective state while CPIA restrictions were in effect." Subject to an exception that does not apply here,[15] the drafters of the CPIA provided only one way for an importer to show that the export of restricted material from a State Party was lawful: by producing a certificate or other documentation from

[15] Under § 2606(b)(2)(A), the importer may show that its property is eligible for import by providing satisfactory evidence that the material was exported from the State Party at least 10 years before the date of entry and that the importer owned it for a year or less before the date of entry. 19 U.S.C. § 2606(b)(2)(A). Because the import restrictions on Chinese and Cypriot coins are less than 10 years old, however, such a showing would not operate as an exception here. *See id.* § 2606(a) (certification requirement applies only to designated material exported from the State Party while restrictions were in effect).

the State Party.[16] *See id.* §§ 2606(a),(b)(1). There is no room for expert testimony on this point. This conclusion follows from the structure as well as the language of § 2606. *Compare id.* § 2606(a) (placing a positive restriction on the kinds of material that "may be imported into the United States") with *id.* § 2606(b) (imposing a documentation requirement on importers to avoid the detention and seizure of property). By contrast, if the Guild is correct that the "satisfactory evidence" limitation does not apply to a forfeiture claimant seeking to show that its property was "exported from its respective state [at least 10] years before it arrived in the United States," *see id.* § 2606(b)(2)(A), or "exported from its respective state [on or] before [the date] CPIA restrictions went into effect," *see id.* § 2606(b)(2)(B), it is possible that—depending on the circumstances of the case—relevant and sufficiently particularized expert testimony could play a role.

Although the Guild identifies the language of the June 3rd decision as the basis for McCullough's proffered testimony, it does not ground its claim that the coins were "lawfully exported from [their] respective state while CPIA restrictions were in effect" in the source of that language, § 2606. Rather, it points to a separate provision, § 2601(2), as the relevant authority. Section 2601(2), located in the definitions section of the CPIA, provides that "archaeological or ethnological

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[16] As noted, the importer may show that current import restrictions do not apply to an article by providing satisfactory evidence that the material was exported from the State Party on or before the date the restrictions went into effect. *Id.* § 2606(b)(2)(B). In that case, no certificate or other documentation from the State Party would be required, since § 2606(a) applies only to material exported from the State Party while applicable restrictions were in effect.

material of the State Party" is material that, *inter alia*, "was first discovered within" and "is subject to export control by" the State Party. *Id.* § 2601(2). According to the Guild, the restricted types of Cypriot coins are not "subject to export control by" the State Party, and therefore do not qualify for designation under § 2604, because the export of such material is authorized by the relevant EU, UK, and Cypriot laws. In other words, the Guild contests whether these types of coins should have been included in the designated lists in the first place. The Fourth Circuit opinion forecloses this line of argument. *Ancient Coin Collectors*, 698 F.3d at 181-83.

In the alternative, McCullough's testimony fails because it purports to show that the coins were "lawfully exported" from the United Kingdom, rather than Cyprus. Under the CPIA, the relevant export is the original export from the State Party, not any subsequent export to a third country, even if the latter is the export that brought the material to the United States. 19 U.S.C. § 2606(a) (prohibiting the import of "designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604"). As the Fourth Circuit opinion makes clear, the terms "State Party" and "respective state" refer to "the country that has requested the import restrictions." *Ancient Coin Collectors Guild*, 698 F.3d at 176-77; *id.* at 183 ("To comply with § 2606, the Guild need demonstrate only that the Cypriot coins left Cyprus prior to 2007 and that the Chinese coins left China prior to 2009."). Because Cyprus, not the UK, is the "State Party" or "respective state," the Guild cannot satisfy its burden by demonstrating that "the export of the Cypriot coins at issue from the U.K. was a legal

export under E.U. and Cypriot law."[17] (*See* Mem. Motion Summary Judgment at 19.)

The court also must consider whether McCullough's proffered testimony as to the Chinese coins creates an issue of material fact that defeats the government's motion for summary judgment. McCullough's report concludes that, because China's cultural property laws do not apply in Hong Kong, any Chinese coins that were exported from Hong Kong, rather than from a mainland Chinese port, "could have been lawfully exported from China while the CPIA restrictions were in effect." (McCullough Dec. at 6.) This evidence suffers from both of the defects discussed above. First, it offers general conclusions that apply to an entire category of material—here, ancient Chinese coins exported from Hong Kong—without providing any evidence that the coins at issue were of that type.[18] McCullough simply notes that the coins "*could* have been lawfully exported" from Hong Kong, and, "if they . . . were," his legal analysis would apply. (*Id.* at 6 (emphasis added).) Without some further link between the defendant property and McCullough's legal conclusions, his proffered testimony is not sufficiently particular to rebut the government's prima facie case. Second, as discussed above, demonstrated compliance with foreign export control laws is not a substitute for showing that restricted material was lawfully exported from the State Party under § 2606(a). Here, the Guild has not provided the required

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[17] Because the McCullough testimony fails to satisfy the Guild's burden for multiple, independent reasons, the court declines the Guild's invitation to consider the effect of EU member status on the lawfulness of an export from Cyprus or the UK.

[18] McCullough's analysis may be deficient for other reasons as well. The court does not address its merits.

certificate or other documentation issued by the State Party; instead, McCullough suggests that the court should treat the export itself as proof of lawfulness. (*Id.* at 9 ("The export from Hong Kong would be sufficient proof to show legal export as required by the CPIA and the June 3rd Order.").) This approach is not consistent with the requirements of the CPIA.

In summary, even if 19 U.S.C. § 1615 provides the applicable evidentiary standard and authorizes the Guild to rely on scholarly evidence, that scholarly evidence must be particularized to the coins at issue and either establish that the Guild is entitled to judgment as a matter of law or raise a disputed issue of material fact. The Mudd testimony and McCullough testimony regarding the Chinese coins are insufficiently particularized, and the McCullough testimony regarding both the Cypriot and Chinese coins fails as a matter of law. The Guild has provided no other evidence or argument that "establish[es], by a preponderance of the evidence, that the property is not subject to forfeiture, or . . . establish[es] an applicable affirmative defense." *See Peruvian Oil*, 597 F. Supp. 2d at 623. Accordingly, the government is entitled to summary judgment as to coins 1-6, 12-13, and 16-22. *See id.*

C. Guild's Request for Reconsideration

Finally, the Guild requests that this court reconsider its prior rulings related to the burden of proof and fair notice. Specifically, the Guild asks the court to adopt the following analysis regarding the government's initial burden:

> [T]o make out a *prima facie* case for forfeiture under the CPIA, the government must establish that an object of archaeological interest: (1) is of a type that appears on the designated

> list; (2) was first discovered within and subject to the export control of the UNESCO State Party for which restrictions were granted; and (3) that it was illegally removed from the State Party after those restrictions were granted.

(Mem. Mot. Summary Judgment at 33.)

The Guild's primary claim is that the plain meaning and legislative history of the CPIA require the government to prove, before the burden shifts to the Guild, that each coin is of a type that appears on the designated list and "was first discovered within" and "is subject to export control by" Cyprus or China. To the extent that this argument challenges the validity of the regulations, which incorporate the "first discovered within" and "subject to export control by" requirements at the designated list stage, *see* 19 U.S.C. §§ 2601(2), 2601(7), 2604, it is foreclosed by the Fourth Circuit opinion, *Ancient Coin Collectors Guild*, 698 F.3d at 181-83. To the extent that it relates to aspects of the CPIA's forfeiture procedures that were not before the Fourth Circuit, the Guild misreads the statute, and its argument misses the mark.

The Guild's argument appears to conflate two terms defined in the CPIA: "archaeological . . . material of the State Party" ("archaeological material of the State Party") and "designated archaeological . . . material" ("designated archaeological material"). "Archaeological material of the State Party" is "any object of archaeological interest . . . which was first discovered within, and is subject to export control by, the State Party." 19 U.S.C. § 2601(2). "Designated archaeological material" is "any archaeological . . . material of the State Party" which is "covered by an agreement under this chapter" and "listed by regulation under section 2604." *Id.*

§ 2601(7). Only "designated" material is subject to import restrictions under § 2606 and potentially "subject to seizure and forfeiture" under § 2609.[19] *Id.* §§ 2606(a), 2609(a).

The Guild's source for the "first discovered within" and "subject to export control by" requirements is the reference to "archaeological material of the State Party" in § 2604, which provides that "the Secretary . . . shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement." *Id.* § 2604. Rather than supporting the Guild's arguments, however, this provision illustrates the distinction between "archaeological material of the State Party" and "designated archaeological material." "Archaeological material of the State Party" includes all material that *may* be restricted by CBP pursuant to an applicable agreement, whereas "designated archaeological material" is the subset that *has* been restricted through the process of creating or amending a designated list. *See id.* §§ 2601, 2604. By asserting that the government must prove in every forfeiture action that "designated archaeological material" does, in fact, constitute "archaeological material of the State Party,"

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[19] Section 2606 prohibits the import of "*designated* archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under [19 U.S.C. § 2604] . . . unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party." 19 U.S.C. § 2606(a) (emphasis added). Section 2609, the cause of action for this forfeiture proceeding, provides that "[a]ny *designated* archaeological or ethnological material . . . which is imported into the United States in violation of section 2606 . . . shall be subject to seizure and forfeiture." *Id.* § 2609(a) (emphasis added).

the Guild seeks to impose a burden on the government that the CPIA does not: the requirement to prove, as part of its initial showing, that the decisions incorporated into its underlying regulations are sound. The Fourth Circuit's opinion forecloses this line of argument. *Ancient Coin Collectors Guild*, 693 F.3d at 182 ("According to the Guild, the government and the district court effectively read the 'first discovered' requirement out of the statute. We are not persuaded." (internal citation omitted)); (*see also* Memorandum of June 3, 2014, at 2 ("The Guild suggests that the government will be required to establish that the coins were 'first discovered within' and 'subject to the export control' of either Cyprus or China. The Guild is not correct. This argument also is foreclosed by the Fourth Circuit's opinion.") (internal citations omitted).) Further, nothing in the statute or legislative history supports the Guild's proposal to substitute one defined term, "archaeological material of the State Party," for another, "designated archaeological material," in §§ 2606 and 2609.[20] The court declines the Guild's invitation to rewrite the statute in this way.

The Guild raises two separate Fifth Amendment due process arguments. First, it argues that the court has violated due process principles by altering the burden of proof assigned by Congress. Second, it contends that the regulations failed to provide "fair notice" regarding what was prohibited. The language of the statute and the Fourth Circuit opinion defeat both arguments.

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[20] The Guild asserts that its proposed requirements are consistent with the Convention and laws of Cyprus and China. Where such requirements are not authorized by the CPIA, however, this consistency does not support the Guild's claims.

First, as explained above, the burden-shifting framework in CPIA forfeiture actions is governed by a combination of generally applicable laws and provisions of the CPIA. Reading 19 U.S.C. § 1615 and 19 U.S.C. § 2610 together, Congress placed the initial burden on the government and the burden of rebuttal on the claimant. In forfeiture actions involving material subject to § 2606, the government must establish "that the material has been listed . . . in accordance with section 2604." 19 U.S.C. § 2610. The burden then transfers to the claimant to rebut the government's prima facie case. *Peruvian Oil*, 597 F. Supp. 2d at 622-23 (citing 19 U.S.C. § 1615). Because this analysis gives effect to, rather than altering, the burden-shifting framework created by Congress, the Guild has not raised a valid due process claim.

Second, the Guild argues that the regulations fail to provide it with "fair notice" of what is prohibited. In a CPIA forfeiture action, the relevant regulations are the designated lists. *See* 19 U.S.C. §§ 2606, 2609. The Fourth Circuit previously concluded that the designated lists satisfy 19 U.S.C. § 2604's "fair notice" requirement, holding that "CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604." *Ancient Coin Collectors Guild*, 698 F.3d at 183; *see* 19 U.S.C. § 2604 (requiring that the designated lists "be sufficiently specific and precise to insure that . . . fair notice is given to importers and other persons as to what material is subject to such restrictions"). The Guild does not appear to argue that the alleged due process violations arise from a lack of specificity or precision in the designated lists. Rather, the Guild grounds its "fair notice" claim in the premise that 19 C.F.R. § 12.104 conflicts with the "first discovered within" and "subject to export control by" requirements of the CPIA. As discussed above,

however, the provisions of the CPIA that govern this action—including §§ 2606, 2609, and 2610—relate to whether a given type of material *has* been added to a designated list, not whether it should have been. Thus, for purposes of this forfeiture action, it does not appear that a conflict involving the "first discovered within" and "subject to export control by" requirements would deprive the Guild of fair notice, so long as the designated lists included sufficiently specific and precise descriptions of the types of items subject to forfeiture. Further, to the extent that the Guild seeks to relitigate its challenge to the validity of the regulations in the form of a due process claim, that argument is inappropriate here.[21]

CONCLUSION

For the reasons stated above, the Guild's motion will be granted as to coins 7-11 and 14-15 and denied as to coins 1-6, 12-13, and 16-22. The government's cross-motion will be granted as to coins 1-6, 12-13, and 16-22. A separate order follows.

3/31/17
Date

/S/
Catherine C. Blake
United States District Judge

[21] Although the Guild is correct that "[a] forfeiture action is an entirely different sort of animal [from] a declaratory judgment action," (*see* Reply Mot. Summary Judgment at 18), that distinction does not save its "fair notice" claim. The Fourth Circuit's interpretation of § 2604 constituted part of its holding, not dicta, and it applies squarely to the Guild's theory here. *See Ancient Coin Collectors Guild*, 698 F.3d at 181-82.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 03/31/17]

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Civil No. CCB-13-1183

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UNITED STATES,

v.

3 KNIFE-SHAPED COINS, *et al.*

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. The claimant's motion for summary judgment (ECF No. 72) is GRANTED as to coins 7-11 and 14-15 and DENIED as to coins 1-6, 12-13, and 16-22;

2. The government's cross-motion for summary judgment (ECF No. 76) is GRANTED as to coins 1-6, 12-13, and 16-22;

3. The Clerk shall CLOSE this case; and

4. The Clerk shall SEND copies of this Order and the accompanying Memorandum to counsel of record.

3/31/17
Date

/S/
Catherine C. Blake
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 08/07/2018]

No. 17-1625

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANCIENT COIN COLLECTORS GUILD,
Claimant-Appellant,

v.

3 KNIFE-SHAPED COINS; 7 CYPRIOT COINS;
5 OTHER CHINESE COINS,
Defendants.

PROFESSIONAL NUMISMATISTS GUILD, INC;
AMERICAN NUMISMATIC ASSOCIATION;
INTERNATIONAL ASSOCIATION OF PROFESSIONAL
NUMISMATISTS; ASSOCIATION OF DEALERS AND
COLLECTORS OF ANCIENT AND ETHNOGRAPHIC
ART; COMMITTEE FOR CULTURAL POLICY, INC.;
GLOBAL HERITAGE ALLIANCE,
Amici Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (1:13-cv-01183-CCB)

Argued: March 22, 2018
Decided: August 7, 2018

Before KING, AGEE, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Agee and Judge Thacker joined.

ARGUED: Peter Karl Tompa, BAILEY & EHRENBERG, PLLC, Washington, D.C., for Appellant. Molissa Heather Farber, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. ON BRIEF: Jason H. Ehrenberg, BAILEY & EHRENBERG, PLLC, Washington, D.C., for Appellant. Stephen M. Schenning, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. Armen R. Vartian, LAW OFFICES OF ARMEN R. VARTIAN, Manhattan Beach, California, for Amici Professional Numismatists Guild, Inc., American Numismatic Association, and International Association of Professional Numismatists. Michael McCullough, MICHAEL MCCULLOUGH LLC, Brooklyn, New York, for Amici Association of Dealers and Collectors of Ancient and Ethnographic Art, Committee for Cultural Policy, Inc., and Global Heritage Alliance.

KING, Circuit Judge:

This appeal is pursued by the Ancient Coin Collectors Guild (the "Guild") from the judgment in the District of Maryland ordering forfeiture to the United States of seven ancient Cypriot coins and eight ancient Chinese coins, which were imported into this country by the Guild. Incorporated within its challenge to the propriety of the district court's summary judgment

decision, the Guild contests the court's treatment of the Guild's expert evidence, the striking of one of its pleadings, and the denial of its requests for additional discovery. As explained below, we reject each of the contentions of error, including several that are foreclosed by our previous decision in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection,* 698 F.3d 171 (4th Cir. 2012) ("*Ancient Coin I*"). Accordingly, we affirm the judgment.

I.

A.

1.

On November 14, 1970, the United States became a signatory, i.e., a State Party, to an international treaty developed primarily by the United Nations – the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership and Cultural Property (the "Treaty"). *See* 823 U.N.T.S. 231. The Treaty was designed to eradicate the clandestine excavation and illicit trade of "cultural property," that is, property "specifically designated by each State [Party] as being of importance for archaeology, prehistory, history, literature, art or science." *Id.* art. 1(e). Cultural property includes "antiquities more than one hundred years old, such as . . . coins." *Id.* Article 9 of the Treaty provides that when a State Party determines that its "cultural patrimony is in jeopardy," it may call upon other State Parties to take action, including through the imposition of import restrictions. *Id.* art. 9.

In 1983, Congress enacted a public law entitled the Convention on Cultural Property Implementation Act (the "CPIA"), which formally implemented the Treaty. *See* Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified

at 19 U.S.C. §§ 2601-2613). Pursuant thereto, if another State Party wants the United States to impose import restrictions on its cultural property, that State Party first must make a formal written request. *See* 19 U.S.C. § 2602(a)(3). By that request, the State Party must claim, inter alia, that its cultural patrimony is in jeopardy, that the imposition of import restrictions would deter "a serious situation of pillage," and that "less dramatic" alternatives are unavailable. *Id.* § 2602(a)(1)(A)-(C). After publishing notice of the request but prior to any further action, the CPIA requires the President to forward the State Party's request to a statutory committee – the Cultural Property Advisory Committee ("CPAC" or the "Committee") – for review and recommendations. *Id.* § 2602(f)(1)-(2).[1]

CPAC is an eleven-member Committee appointed by the President and comprised of experts and stakeholders in "the international exchange of archaeological and ethnological materials." *See* 19 U.S.C. § 2605(b)(2)(A). Upon receiving notice of a State Party's request to impose import restrictions, the Committee is required to conduct an investigation and prepare a report detailing whether import restrictions are warranted. *Id.* § 2605(f)(1). The report must be detailed, specifying by type or classification the materials that should be subjected to import restrictions. *Id.* § 2605(f)(4)(B).

The President is required to consider the CPAC report before taking any action on a State Party's request. *See* 19 U.S.C. § 2602(f)(3). If the President is then convinced that import restrictions are warranted,

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[1] Although the CPIA explicitly vests the President with a number of responsibilities arising thereunder, the President has delegated much of that authority to the Department of State. *See* Exec. Order No. 12555, 51 Fed. Reg. 8475 (Mar. 10, 1986).

he can enter into an agreement – called a Memorandum of Understanding (an "MOU") – restricting the importation of "archaeological or ethnological materials of the State Party." *Id.* § 2602(a)-(b). As relevant here, the CPIA defines the term "archaeological or ethnological material of the State Party" as an object of archaeological or ethnological interest, or any fragment or part thereof, "which was first discovered within, and is subject to export control by, the State Party." *Id.* § 2601(2).

After entering into an MOU, the CPIA requires the President to report to Congress, notifying it of the President's action. *See* 19 U.S.C. § 2602(g)(1)-(2). The President's report to Congress should explain "the differences (if any) between such action and the views and recommendations contained in any [CPAC] report," and provide "the reasons for any such difference." *Id.* § 2602(g)(2).

2.

Upon the President's agreement to an MOU, the Secretary of Homeland Security, in consultation with the Secretary of State, is obliged to promulgate a regulation – or "designated list" – identifying the archaeological or ethnological materials covered by the MOU. *See* 19 U.S.C. § 2604.[2] Restricted materials may

[2] When the CPIA was adopted, the Department of the Treasury was responsible for promulgating regulations governing compliance with Article 9. *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, §§ 302(8), 305, 96 Stat. 2350, 2351, 2355 (1983) (codified at 19 U.S.C. §§ 2601(8), 2604). In 2003, however, the Secretary of the Treasury issued a directive delegating that authority to the Department of Homeland Security. *See* Delegations of Authority, 68 Fed. Reg. 51,868 (Aug. 28, 2003). The Department of Homeland Security now carries out

be listed therein "by type or other appropriate classification." *Id.* Each designated list, however, must be "sufficiently specific and precise" to ensure that (1) "the import restrictions . . . are applied only to the archaeological and ethnological material covered by the [MOU]" and (2) "fair notice is given to importers . . . as to what material is subject to such restrictions." *Id.*

Section 2606 of Title 19 governs the enforcement of the import restrictions contained in the designated lists that have been promulgated. Pursuant thereto, it is unlawful to import "designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604." *See* 19 U.S.C. § 2606(a). "Designated archaeological or ethnological material" is a term of art in the CPIA, and is not to be confused with the term "archaeological or ethnological material of the State Party." *Compare* 19 U.S.C. § 2601(2) (defining "archaeological or ethnological material"), *with* 19 U.S.C. § 2601(7) (defining "designated archaeological or ethnological material"). As relevant here, designated archaeological or ethnological material includes "any archaeological . . . material of the State Party" which is "covered by an [MOU]" and "listed by regulation under section 2604." *Id.* § 2601(7).

The CPIA authorizes the importation of designated archaeological or ethnological material into the United States, but only when the importer can satisfy – at the time of entry – at least one of three evidentiary requirements. *See* 19 U.S.C. § 2606(b). First, under

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those responsibilities through one of its agencies, Customs and Border Protection.

§ 2606(b)(1), the importer can present to Customs and Border Protection ("Customs") a "certificate or other documentation" from the State Party that requested the restrictions, certifying that the designated material was exported in compliance with that State Party's laws.[3] Second, pursuant to § 2606(b)(2)(A), the importer can present Customs with "satisfactory evidence" demonstrating that the designated material was exported from the State Party at least ten years before it arrived in the United States.[4] Third, under § 2606(b)(2)(B), the importer can present "satisfactory evidence" to Customs proving that the designated material was exported from the State Party "on or before the date" the material became subject to import restrictions. Under the second and third requirements, that is, pursuant to § 2606(b)(2)(A) and § 2606(b)(2)(B), the term "satisfactory evidence" means a declaration from the importer, plus a statement from the seller, attesting that the designated material was imported in compliance with one of those two provisions. *Id.* § 2606(c)(1)-(2).[5]

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[3] Section 2606(a) defines the "certificate or other documentation" required under § 2606(b)(1). Pursuant thereto, designated archaeological or ethnological material cannot be imported into the United States "unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party." *See* 19 U.S.C. § 2606(a).

[4] Section 2606(b)(2)(A) also requires the importer to present "satisfactory evidence" that the importer did not "acquire[] an interest, directly or indirectly, in such material more than one year before the date of entry."

[5] The "satisfactory evidence" requirement of § 2606(b)(2)(A) has three components. First, it requires a declaration by the importer stating that, to the best of his knowledge, "the material was exported from the State Party not less than ten years before

If an importer fails to submit any of the documentation specified in § 2606 when designated material enters the United States, Customs officials are directed to "refuse to release the material from customs custody." *See* 19 U.S.C. § 2606(b). The importer then has ninety days to file with Customs either the required certificate or satisfactory evidence demonstrating that the designated material was lawfully exported from the State Party. *Id.* If the importer fails to do so, the designated material is subject to seizure and forfeiture to the United States. *Id.* § 2609(b).

B.

1.

The Guild is a non-profit organization dedicated to protecting the interests of numismatists, particularly

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the date of entry into the United States." *See* 19 U.S.C. § 2606(c)(1)(A)(i). Second, the importer must submit a declaration stating that he did not acquire an interest in the designated material "more than one year before the date of entry of the material." *Id.* § 2606(c)(1)(A)(ii). Third, the individual who sold the material must provide a statement identifying "the date, or, if not known, his belief, that the material was exported from the State Party not less than ten years before the date of entry into the United States, and the reasons on which the statement is based." *Id.* § 2606(c)(1)(B).

On the other hand, § 2606(b)(2)(B)'s "satisfactory evidence" requirement has only two components. First, the importer must submit a declaration which states that, to the best of his knowledge, "the material was exported from the State Party on or before the date such material was designated under [section 2604]." *See* 19 U.S.C. § 2606(c)(2)(A). Second, the individual that sold the designated material must submit a statement which identifies the "date, or if not known, his belief, that the material was exported from the State Party on or before the date such material was designated under [section 2604], and the reasons on which the statement is based." *Id.* § 2606(c)(2)(B).

those individuals who specialize in the collection of ancient coins.[6] The Guild's director, Wayne Sayles, founded the organization in 2004 in an effort to preempt the imposition of CPIA restrictions on ancient coins. Sayles and the Guild opposed such restrictions for two primary reasons. First, they rejected the notion that coins should be considered part of a country's cultural patrimony. More specifically, they read the CPIA to limit the concept of cultural patrimony to those items "first discovered within" a particular State Party's borders. *See* 19 U.S.C. § 2601(2). Because most ancient coins have no known locus of discovery – also called a "find spot" – and many coins have been subject to decades, if not centuries, of international circulation, Sayles and the Guild believed that it would be specious to assert that broad categories of coins belonged to a particular country.

Second, Sayles and the Guild feared that coin collectors would be unable to comply with the CPIA's evidentiary requirements for importation. For example, they asserted that it would be difficult for an importer to obtain a certificate from a foreign country – that is, the certificate required by 19 U.S.C. § 2606(b)(1) – demonstrating that a particular coin had been lawfully exported. In a similar vein, they believed that importers would be unable to satisfy the "provenance" requirements of § 2606(b)(2). According to Sayles, a "huge majority" of collectible ancient coins have no provenance – or record of ownership – because "there's never been any desire really among collectors of ancient coins to maintain provenance of a coin that

[6] Numismatics has been defined as the "study or collection of coins, paper currency, and medals." *Numismatics*, New Oxford American Dictionary (2d ed. 2005).

they bought for 10 or 15 or $20." *See* J.A. 664.[7] Sayles and the Guild ultimately believed that if coins became legitimate targets of CPIA restrictions, it would "destroy ancient coin collecting." *Id.* at 665.

Beginning in 2004, the Guild engaged in a lobbying campaign to thwart efforts by governments to impose import restrictions on ancient coins. The Guild, however, was unsuccessful in that endeavor. In 2007, the U.S. Department of State (the "State Department") agreed to a request by the Cypriot government to impose import restrictions on ancient Cypriot coins, including those minted during Cyprus's Hellenistic and Roman eras. Pursuant to the resulting Cypriot MOU, Customs promulgated a regulation – that is, the "Cypriot Designated List" – identifying the ancient Cypriot coins that are subject to import restrictions.[8] Two years later, in January 2009, the State Department entered into a separate MOU with China. Pursuant thereto, the United States agreed to impose import restrictions on Chinese coins minted during the Zhou through the Tang Dynasties, a period of approximately 2,000 years. Consistent with the Chinese

[7] Citations herein to "J.A.__" refer to the contents of the Joint Appendix filed by the parties in this appeal.

[8] The Cypriot Designated List restricted gold, silver, and bronze coins of Cypriot type, including but not limited to issues of certain ancient Cypriot kingdoms dating from the end of the 6th century B.C. to 332 B.C., issues of the Hellenistic period from 332 B.C. to approximately 30 B.C., and provincial and local issues of the Roman period from around 30 B.C. to 235 A.D. *See* Extension of Import Restrictions, 72 Fed. Reg. 38,470, 38,471 (July 13, 2007) (codified at 19 C.F.R. § 12.104g(a)).

MOU, Customs promulgated a "Chinese Designated List," specifying the restricted materials.[9]

The Guild opposed the Cypriot and Chinese MOUs, believing that State Department officials had acted in bad faith in adopting the import restrictions. That belief was bolstered by what the Guild perceived as failures of government officials to comply with the CPIA. To remedy those perceived failures, the Guild sought to have its grievances heard and resolved in the courts. The Guild therefore decided to manufacture litigation by deliberately importing restricted ancient Cypriot and Chinese coins into the United States. Once the coins were detained, the Guild planned to |sue the federal agencies and officials responsible for imposing and enforcing the import restrictions. The Guild, however, was initially unsuccessful in its efforts to induce Customs to detain various imported coins. The Guild therefore enlisted the help of a British coin dealer, Spink & Son. Using the Cypriot and Chinese Designated Lists for guidance, Spink and the Guild located twenty-three Cypriot and Chinese coins that they considered likely to be detained by Customs.

On April 15, 2009, Spink shipped the Cypriot and Chinese coins from London to Baltimore on a commercial airline flight. To support the Guild's scheme, Spink attached an invoice to the coin shipment that was designed to alert the Customs officers and result in detention of the coins. The Spink invoice specified

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[9] The Chinese Designated List restricted the importation of tool- and disc-shaped coins from the Zhou Dynasty, coins of the "ban liang" variety from the Qin Dynasty, coins dating from the Han through the Sui Dynasties, and coins deriving from the Tang Dynasty. *See* Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2838, 2842 (Jan. 16, 2009) (codified at 19 C.F.R. § 12.104g(a)).

that the shipment contained twenty-three coins, including seven coins derived from Cyprus's Hellenistic and Roman eras (the "ancient Cypriot coins"); nine coins – two of which were knife-shaped – derived from China's Zhou, Han, and Western Han dynasties (the "ancient Chinese coins"); and seven other Chinese coins that were unattributed to a particular era or dynasty (the "unattributed Chinese coins").[10] The invoice also reflected that each coin had "[n]o recorded provenance" and that each coin's "find spot" was "unknown." *See* J.A. 1164.

2.

On April 24, 2009, Customs officers in Baltimore detained Spink's shipment of coins. The Spink invoice identified the Guild as the recipient of the coin shipment. Customs therefore issued the Guild a Notice of Detention, which specified its reason for detaining the coins as "Cultural Property Import Restrictions per [19 U.S.C. § 2606]." *See* J.A. 1172. The Notice of Detention requested that the Guild supply Customs with a "Certificate or evidence" demonstrating that the coins were being imported into the United States in compliance with the CPIA. *Id.*

In May 2009, the Guild's lawyer filed a response to the Notice of Detention with Customs, objecting to the seizure and detention of the coin shipment. By that response, the Guild contended that the "State Department promulgated the underlying regulations in an arbitrary and capricious manner and/or contrary

[10] The Spink invoice reflects that two of the ancient Chinese coins were knife-shaped, and one was a spade-shaped coin. The invoice thus differs from the allegations contained within the forfeiture complaint, which mentions three knife-shaped coins. That discrepancy, however, is immaterial to this appeal.

to law." *See* J.A. 186. The Guild further asserted that – based on its reading of the CPIA – Customs officers were required to "trace the coins in question back to either China or Cyprus before they [could] be properly detained." *Id.* Finally, the Guild maintained that it was impossible to provide Customs with the requested certification or satisfactory evidence, and that the Guild wished to have its "views [tested] in [c]ourt." *Id.* at 187.

Nearly a year later, on February 11, 2010, the Guild filed a civil action in the District of Maryland, naming as defendants the State Department, Customs, and two government officials. The Guild's complaint challenged the detention of the Spink coin shipment and alleged that the government had violated the Administrative Procedures Act (the "APA"), as well as the Guild's First and Fifth Amendment rights. The Guild also contended that the defendants had exceeded their authority – that is, acted *ultra vires* – by imposing import restrictions on Cypriot and Chinese coins.

By Memorandum Opinion of August 8, 2011, the district court dismissed the Guild's claims. *See Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383 (D. Md. 2011). As relevant here, the court ruled that the State Department's actions were not reviewable in federal court under the APA. The court further determined that the State Department had not exceeded its authority under the CPIA by effectively "barring the importation of coins with unknown find spots." *Id.* at 409. The court also ruled that Customs had neither violated the APA nor acted *ultra vires* by carrying out its duty to promulgate and enforce the Cypriot and Chinese Designated Lists. Finally, the court concluded that the Guild's constitutional claims were meritless.

3.

By our *Ancient Coin I* decision of October 22, 2012, we affirmed the district court's dismissal of the Guild's complaint. *See* 698 F.3d 171 (4th Cir. 2012). Our colleague Judge Wilkinson, writing for a unanimous panel, ruled that the State Department had not exceeded its authority when it agreed to impose import restrictions on Cypriot and Chinese coins. *Id.* at 179-81. More specifically, the *Ancient Coin I* decision carefully examined the State Department's activities leading to the promulgation of the Chinese Designated List and concluded that "there is no question that the State Department complied with CPIA procedures when it placed import restrictions on Chinese coins." *Id.* at 179. The decision deemed it unnecessary to conduct a similar analysis of the Cypriot Designated List, explaining that the "district court similarly found that the State Department complied with the statutory requirements in placing import restrictions on Cypriot coins." *Id.* at 180.

Our *Ancient Coin I* decision also rejected the Guild's contention that the defendants had acted *ultra vires* by imposing import restrictions on, and later detaining, the collection of coins that were not necessarily "first discovered within" Cyprus and China. *See* 698 F.3d at 181-82 (quoting 19 U.S.C. § 2601(2)). In so ruling, we recognized that it was the duty of the State Department and CPAC to determine where certain materials were first discovered before placing them on a designated list. *Id.*

After ruling that the State Department and Customs had properly interpreted and applied the CPIA, the *Ancient Coin I* decision explained that the Guild would be entitled in a forfeiture proceeding to "press a particularized challenge to the government's assertion

that the twenty-three coins are covered by import restrictions." *See* 698 F.3d at 185. The decision also explained the burden-shifting framework applicable in a forfeiture proceeding conducted pursuant to the CPIA. In such a proceeding, the government would bear the burden of establishing that the ancient coins had been "listed in accordance with [19 U.S.C. § 2604]." *Id.* (quoting 19 U.S.C. § 2610). In other words, the coins must have been "listed 'by type or other appropriate classification' in a manner that gives 'fair notice . . . to importers.'" *Id.* (quoting 19 U.S.C. § 2604). If the government satisfied its evidentiary burden in the forfeiture proceeding, "the Guild must then demonstrate that its coins are not subject to forfeiture in order to prevail." *Id.* (citing 19 U.S.C. § 1615).

C.

1.

On April 22, 2013, the government filed in the District of Maryland the complaint that underlies this appeal, seeking forfeiture to the United States of the ancient Cypriot and Chinese coins. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. Apr. 22, 2013), ECF No. 1 (the "Complaint").[11] The Complaint alleges that the defendant coins "compris[e] archaeological material of China and Cyprus that is listed . . . as property subject to such import restrictions." *Id.* at 4. The Complaint makes clear that the importer failed to supply the Customs

[11] Before filing its Complaint, the government discovered that there was a discrepancy between the number of coins identified in the Spink invoice – twenty-three – and the number of coins detained by Customs – twenty-two. The discrepancy relates to the number of ancient Chinese coins and is not pertinent in this appeal.

officers with CPIA-compliant evidence. For example, the Complaint alleges that neither Cyprus nor China issued certificates or documentation confirming that the coins' exportation was not in violation of their laws. The district court thus issued a warrant for arrest in rem for the seized coins. The Guild promptly filed a Claim of Interest in the defendant coins, pursuant to Supplemental Admiralty and Maritime Claims Rule G(5)(A) of the Federal Rules of Civil Procedure.

In June 2013, the Guild answered the Complaint, interposing twelve affirmative defenses and demanding a jury trial. In the process, the government moved to strike portions of the Guild's answer, contending that several of the Guild's responses – including affirmative defenses – sought to relitigate issues that were resolved by the *Ancient Coin I* decision. While the government's motion to strike was pending, the Guild amended its answer, identifying additional affirmative defenses and seeking to counter the motion to strike. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. Sept. 27, 2013), ECF No. 13 (the "Amended Answer").

By Opinion and Order of June 3, 2014, the district court granted the government's motion to strike, applying it to the Amended Answer. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. June 3, 2014), ECF Nos. 22 & 23 (the "Strike Opinion" and "Strike Order," respectively). In so ruling, the court observed that "much of the [Amended Answer] and most if not all of the affirmative defenses seek to relitigate issues concerning the validity of the regulations and the government's decision to impose import restrictions on certain Cypriot and Chinese coins." *See* Strike Opinion 2. The court stressed that

the *Ancient Coin I* decision "forecloses any further challenge to the validity of the regulations." *Id.* at 1.

Eight months after the district court struck the Amended Answer, the Guild filed a newly amended answer. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. Feb. 25, 2015), ECF No. 36 (the "Second Amended Answer"). In its Second Amended Answer, the Guild removed portions of its previous answer that had sought to relitigate *Ancient Coin I*. Despite those changes, the government moved to strike the Second Amended Answer. Although it noted that there "appear[ed] to be valid challenges to portions of the [Second Amended Answer]," the court denied the government's motion. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183, at 2 (D. Md. Feb. 11, 2016), ECF No. 63. Thus, the Second Amended Answer became the Guild's operative responsive pleading for the remainder of the forfeiture action.

2.

The parties began conducting discovery in March 2015, and several discovery issues were thereafter contested. In August 2015, the Guild sought to test the sufficiency of the government's objections to certain requests for admissions. The Guild had requested, for example, that the government admit that, under the CPIA, it is only authorized to impose restrictions on objects of archaeological interest of a specific State Party "first discovered within" and "subject to the export control" of that State Party. *See* J.A. 172. The government objected, arguing that the Guild was seeking to expand the scope of the forfeiture action beyond the limitations imposed by the *Ancient Coin I* decision.

The Guild sought the depositions of two State Department officials, Andrew Cohen and Maria Kouroupas, along with the deposition of a Department-designated witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure. The Rule 30(b)(6) deposition sought information concerning eleven subjects, including the circulation patterns of Cypriot and Chinese coins; European Union and Chinese export control laws for cultural goods, including coins; and the drafting and meaning of the Cypriot and Chinese Designated Lists. In September 2015, the government requested a protective order barring the depositions of the State Department officials and substantially narrowing the Rule 30(b)(6) deposition. Thereafter, in October 2015, the Guild sought to compel responses to thirteen of its document requests and two sets of interrogatories, which related to the circulation of Cypriot and Chinese coins, foreign export control laws, and the drafting of the Cypriot and Chinese Designated Lists.

By Order of February 11, 2016, after considering the arguments of counsel, the district court ruled on the discovery motions. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. Feb. 11, 2016), ECF No. 63 (the "Discovery Order"). In its Discovery Order, the court denied most of the Guild's discovery requests and granted the government's request for a protective order. The court primarily concluded that the Guild was seeking discovery on issues that were irrelevant to the forfeiture proceedings. *Id.* at 1-2 (emphasizing that it was "unlikely that the export control status of the coins under foreign law will be a proper defense in this forfeiture action"). The court also deemed most of the discovery sought from the State Department officials to be improper, explaining that it was "not so much factual as legal." *Id.* at 1.

The Discovery Order also addressed the Guild's repeated endeavors to pursue its contention that the government was obliged to prove "first discovery" as part of its prima facie forfeiture case. The district court concluded that the Guild's position in that regard was foreclosed by *Ancient Coin I*, but suggested that the Guild might be able to rebut a prima facie forfeiture case by demonstrating that "these specific coins were exported from their respective States before CPIA restrictions went into effect." *See* Discovery Order 1. The court also suggested that it might consider some expert testimony in that respect as pertinent.

In response to the Discovery Order, the Guild secured two experts. It retained an expert in numismatics, Douglas Mudd, and an expert in the international exchange of cultural artifacts, Michael McCullough. In his expert report, Mudd opined that based upon the mass circulation of Cypriot and Chinese coins outside modern borders, "it is impossible to assert that all such coins without provenance should be regarded as illegally exported cultural property." *See* J.A. 1040. McCullough opined in his expert report that, after assessing the applicable laws and regulations, "the export of [the] Cypriot coins at issue from the United Kingdom was a legal export under European Union and hence Cypriot law" that should satisfy the CPIA's evidentiary requirements. *Id.* at 1052. McCullough also opined that "the Chinese coins at issue could have been exported from China's Free Port of Hong Kong legally without an export certificate." *Id.*

Notably, the Guild made several significant admissions during the course of the discovery proceedings. For example, it acknowledged that the seven ancient Cypriot coins identified in the Complaint appeared on the Cypriot Designated List. The Guild also admitted

that the eight ancient Chinese coins identified in the forfeiture complaint appeared on the Chinese Designated List. Finally, the Guild admitted that it had "knowingly" and "purposefully" sought to import those fifteen coins into the United States, with full awareness that the ancient Cypriot coins and the ancient Chinese coins identified on the Spink invoice were subject to import restrictions imposed by the United States. *See* J.A. 1280. The Guild denied, however, knowing that the seven unattributed Chinese coins named as defendants in the Complaint were subject to import restrictions.

3.

After the close of discovery, the parties filed cross-motions for summary judgment. On March 31, 2017, the district court issued its decision resolving the parties' motions. *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. Mar. 31, 2017), ECF No. 83 (the "Forfeiture Opinion"). In conducting its forfeiture analysis, the court adhered to the burden-shifting framework identified in the *Ancient Coin I* decision. Pursuant thereto, the government was obliged to carry the initial burden of showing that the coins were "listed in accordance with section 2604." *See* Forfeiture Opinion 15 (quoting *Ancient Coin I*, 698 F.3d at 185). However, the court concluded that the *Ancient Coin I* decision had already determined that the government had properly promulgated the Cypriot and Chinese Designated Lists, in accordance with § 2604 of Title 19. Thus, the government's remaining burden in the forfeiture proceedings was to prove that "each of the 22 coins falls into the 'type or other classification' of material included in the designated lists." *Id.* at 15.

In the Forfeiture Opinion, the district court ruled that the government had satisfied its burden with respect to the seven ancient Cypriot coins and the eight ancient Chinese coins. As the court explained, the Spink invoice and the Guild's own admissions established that the fifteen coins were of "restricted types." *See* Forfeiture Opinion 16. By contrast, neither the government nor the Guild introduced any evidence establishing that the seven unattributed Chinese coins matched the materials on the Chinese Designated List. The court therefore awarded summary judgment to the Guild as to the seven unattributed Chinese coins.

With regard to the fifteen contested Cypriot and Chinese coins, the Forfeiture Opinion explained that the burden shifted to the Guild to rebut the government's initial showing. The Guild thus had "to [either] establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or . . . establish an applicable affirmative defense." *See* Forfeiture Opinion 18 (quoting *United States v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618, 623 (E.D. Va. 2009)). In order to satisfy that burden, the Guild sought to utilize its expert evidence. The government objected, however, arguing that the Guild was confined by statute to the three forms of documentation specified in § 2606(b)(1)-(2) – which the Guild conceded it could not produce.

The district court then declined to rule on the propriety of the Guild's use of its expert evidence, explaining that the government was entitled to judgment as a matter of law regardless of whether Mudd's and McCullough's opinions were proper CPIA evidence. As the court explained, Mudd's expert testimony – which the Guild relied on to prove that it was "more probable

than not that the Spink coins left Cyprus and China hundreds or thousands of years ago as currency, or decades ago as collectables" – was insufficiently particularized to the defendant coins to rebut the government's prima facie case. *See* Forfeiture Opinion 22. In so ruling, the court emphasized that the Guild had identified "no authority for the position that a CPIA forfeiture claimant may rebut the government's prima facie case with general evidence regarding a *type* of restricted material." *Id.* The court emphasized that Mudd's expert evidence was essentially an effort to second-guess the State Department's and CPAC's decision to impose import restrictions on certain ancient coins. As such, the court determined that the expert opinions of Mudd failed to create an issue of material fact, and the court refused to sanction the Guild's effort to "undermine the function of the designated lists." *Id.*

The district court also concluded that McCullough's expert testimony was deficient for a number of reasons. First, the court explained that McCullough's expert evidence – which was offered to show that the defendant coins had been lawfully exported from their respective State Parties – was not in the form contemplated by the CPIA. To demonstrate compliance with a State Party's laws, the CPIA requires a certificate or other documentation "from the State Party" that had requested the import restrictions. *See* Forfeiture Opinion 23-24 (citing § 2601(a), (b)(1)). However, the Guild offered neither a certificate nor other documentation from Cyprus or China. Second, the Forfeiture Opinion observed that McCullough's testimony suggested that the Cypriot coins were lawfully exported from the United Kingdom, rather than from Cyprus. But the CPIA directs that evidence of a lawful export must come from the country that requested the import

restriction, in this case Cyprus. Third, the court emphasized that McCullough's opinions suggested only that the Chinese coins "*could* have been lawfully exported" from China – not that they actually *had* been lawfully exported from China. *Id.* at 26-27 (emphasis original). That evidence thus suffered from a lack of particularity and was incongruous with the CPIA requirements. Based upon those shortcomings, the district court ruled that the Guild was unable to rebut the government's prima facie case for forfeiture.

Finally, the Forfeiture Opinion rejected the Guild's due process claims, as well as the Guild's request that the district court reconsider several earlier rulings. The district court characterized the Guild's two due process claims as impermissible efforts to relitigate issues that we resolved five years earlier in the *Ancient Coin I* decision. Regardless of the previous litigation, the court explained that the Guild's constitutional claims lacked merit. The court thus awarded summary judgment to the government as to the fifteen ancient coins, that is, the seven Cypriot and eight Chinese coins.

The Guild has timely appealed the judgment of forfeiture of the fifteen coins to the United States. We possess jurisdiction pursuant to 28 U.S.C. § 1291.[12]

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[12] Cabined within a footnote in its opening appellate brief, the Guild suggests that this Court may lack jurisdiction. The Guild asserts that the district court's rulings "raise the specter that CPIA forfeiture actions fall under the Court of International Trade's 'embargo jurisdiction.'" *See* Br. of Appellant 16 n.4. Relying only on a single law review article, the Guild maintains that the "embargo jurisdiction . . . would divest this Court's jurisdiction." *Id.* In its brief's statement of jurisdiction, however, the Guild contends that there was jurisdiction in the district court and that jurisdiction exists in this Court. We agree that the

II.

The Guild challenges the district court's judgment on multiple grounds. First, the Guild contends that the court erred in the Forfeiture Opinion by failing to require the government to prove all the elements of its forfeiture case. Second, the Guild argues that the court abused its discretion in the Forfeiture Opinion when it rejected the Guild's expert evidence. Third, the Guild maintains that the court erred in ruling that the Guild had not been deprived of its right to fair notice of the ancient coins that were subject to import restrictions imposed by the government. Fourth, the Guild maintains that, in the Discovery Order, the court abused its discretion by declining to authorize several discovery requests. Fifth, the Guild argues that the court abused its discretion in the Strike Opinion and Order by striking certain affirmative defenses and other aspects of the Guild's Amended Answer. Notably, the Guild supports its third and fifth contentions with constitutional arguments.[13]

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district court possessed jurisdiction over the forfeiture proceedings under 28 U.S.C. §§ 1355(a), 1356, and that we possess final order jurisdiction pursuant to 28 U.S.C. § 1291. Therefore, insofar as the Guild pursues a jurisdictional challenge, we reject it.

[13] Although the Guild characterizes each of its contentions of error as a violation of the Guild's constitutional rights, substantive constitutional arguments underpin only its third and fifth contentions. With respect to the other contentions of error, the Guild provides no more than brief, conclusory statements that its constitutional rights were contravened. We are satisfied to reject the unsupported constitutional arguments due to insufficient briefing and lack of merit. *See Canady v. Crestar Mortg. Corp.*, 109 F.3d 969, 973-74 (4th Cir. 1997) (ruling that issue raised but not briefed was waived); *see also Bronson v. Swensen*, 500 F.3d 1099, 1104-05 (10th Cir. 2007) (recognizing that appellants forfeited constitutional argument by inadequate briefing).

We review de novo a district court's award of summary judgment, "viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the nonmoving party." *See Woollard v. Gallagher*, 712 F.3d 865, 873 (4th Cir. 2013). An award of summary judgment is only appropriate if the record demonstrates that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). The applicable standard of review for an evidentiary ruling is the abuse of discretion standard. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-41 (1997). We will also review a decision to strike a party's pleadings – or portions thereof – for an abuse of discretion. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 702 (4th Cir. 2007) (en banc); *see also Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003). Because a constitutional question is a legal issue, we review the district court's ruling de novo. *See United States v. Dinkins*, 691 F.3d 358, 382 (4th Cir. 2012).

III.

Before specifically addressing the Guild's appellate contentions, some background concerning federal forfeiture proceedings is warranted. Most civil forfeiture actions in the federal courts are governed by provisions of the Civil Asset Forfeiture Reform Act (the "CAFRA"). *See* 18 U.S.C. § 983. Pursuant thereto, the government has the initial burden to establish "by a preponderance of the evidence that the [disputed] property is subject to forfeiture." *Id.* § 983(i)(2). Section 983(i)(2) of Title 18, however, excludes certain other statutory provisions from CAFRA's application, including all forfeiture proceedings conducted under Title 19, in which the CPIA has been codified. *Id.* § 983(i)(2)(A).

Forfeiture proceedings arising under the CPIA are thus governed by § 1615 of Title 19.

Although § 1615 places the initial burden of proof in Title 19 forfeiture proceedings on the *claimants* of the disputed goods, § 2610 – which governs CPIA forfeiture proceedings – places the initial burden of proof on the government.[14] The parties disagree, however, on what the government must demonstrate to carry its burden.

With that legal landscape in mind, we turn to an assessment of the Guild's various contentions of error.

A.

In its initial appellate contention, the Guild maintains that the district court erred in failing to require the government to prove two essential elements of its prima facie forfeiture case. According to the Guild, the government was obliged to prove that the ancient Cypriot and Chinese coins were (1) first discovered within and hence subject to the export control of the State Party for which restrictions were granted ("first discovery"); and (2) illegally removed from the State Party's control after those restrictions were granted ("illegal removal"). *See* Br. of Appellant 21. The Guild

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[14] Section 2610 of Title 19, which places the burden of proof on the government in these proceedings, specifically provides as follows:

> Notwithstanding the provisions of [§ 1615], in any forfeiture proceeding brought under [the CPIA] in which the material or article, as the case may be, is claimed by any person, *the United States shall establish* . . . in the case of any material subject to the provisions of [§ 2606], that the material has been listed . . . in accordance with [§ 2604].

19 U.S.C. § 2610 (emphasis added).

contends that the government has not and cannot satisfy either of those requirements.

The government counters that it had to prove – pursuant to § 2610 – only that a particular seized item was "listed in accordance with section 2604." *See* Br. of Appellee 46 (quoting 19 U.S.C. § 2610). It argues that to be "listed in accordance with section 2604" has only two requirements, namely that the seized material has been (1) listed by type or other appropriate classification, and (2) listed in a manner that gives fair notice to importers. The government asserts that it satisfied each of those requirements, and thus proved that the fifteen coins were "listed in accordance with section 2604."

As explained below, we reject the Guild's contentions with respect to the first discovery and illegal removal elements. We agree that the district court properly determined that the government had satisfied its burden with respect to the fifteen ancient Cypriot and Chinese coins at issue in these forfeiture proceedings.

1.

The Guild premises its contention that the government must satisfy the first discovery element upon two assertions about the CPIA – but only one of those assertions is accurate. The Guild correctly stresses that, under the CPIA, the executive branch can only impose restrictions on archaeological or ethnological material that was first discovered within the State Party that requested the restrictions, i.e., the State Party's cultural patrimony. The Guild is incorrect, however, in asserting that the government must prove the first discovery element at every stage of the CPIA process – initially in the promulgation of

the designated lists, then in the detention of the restricted items by Customs, and again as part of establishing a prima facie forfeiture case.

The Guild wrongly conflates two statutory terms of art used in the CPIA – "archaeological . . . material of the State Party," as defined by 19 U.S.C. § 2601(2), and "designated archaeological . . . material," as defined by § 2601(7). Contrary to the Guild's erroneous reading of the CPIA, the first discovery requirement only delimits what material the executive branch can place on a restricted list. Once the material is properly included on a list, or, in other words, "designated," the government no longer must establish the first discovery element with regard to particular imported material.

The CPIA uses the term "archaeological material of the State Party" – which expressly incorporates the first discovery element emphasized by the Guild – when specifying the duties of officials in creating a designated list of restricted materials. *See* 19 U.S.C. § 2601(2). For example, when CPAC is presented with a request from a State Party to impose import restrictions, CPAC must prepare a report detailing the "archaeological . . . material of the State Party" that should be subject to import restrictions. *Id.* § 2605(f)(4)(B). The President, in turn, is authorized to enter into an MOU that imposes import restrictions on "archaeological . . . material of the State Party" that made such a request. *Id.* § 2602(a)(2). Finally, after an MOU has been entered into, the CPIA requires the appropriate agency to promulgate a regulation listing the "archaeological . . . material of the State Party" that is covered by the MOU. *Id.* § 2604.

In the *Ancient Coin I* litigation, we examined whether the State Department, CPAC, and Customs

had carried out their responsibilities in accordance with the CPIA, and we ruled that those responsibilities were executed properly. *See* 698 F.3d at 181. Our decision explained that the State Department and CPAC had appropriately taken into account where ancient coins were typically "first discovered" before deciding that Cypriot and Chinese coins comprised part of those State Parties' respective cultural patrimonies. *Id.* at 182. Judge Wilkinson's opinion specified:

> CPAC and the Assistant Secretary [of State] did consider where the restricted types may generally be found as part of the review of the Chinese and Cypriot requests. [Customs] listed the articles in question in the Federal Register by "type" – but only after State and CPAC had determined that each type was part of the respective cultural patrimonies of China and Cyprus. . . . Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first discovered in those two countries and form part of each nation's cultural heritage.

Id. Thus, in *Ancient Coin I*, we decided that the government had properly listed the Cypriot and Chinese coins, having satisfied the first discovery element.

To the extent the Guild seeks to revisit the *Ancient Coin I* ruling, we lack any authority to do so. Put succinctly, it is a basic principle of our Court that "one panel cannot overrule a decision issued by another panel." *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc). In that regard, it is also

notable that the Guild unsuccessfully petitioned for rehearing and then for certiorari, all to no avail. With the propriety of the Cypriot and Chinese listings decided in the previous litigation, all that remains in this matter is whether the coins in question constitute "designated archeological material" subject to forfeiture.

As noted, the CPIA uses the defined term "designated archaeological material" – which does not contain the first discovery element – in describing the responsibilities of federal officials *after* import restrictions have gone into effect, i.e., after ancient coins have been placed on a "designated list." *See* 19 U.S.C. § 2601(7). Thus, Customs is tasked with preventing the "designated archaeological . . . material" from entering the United States without adequate documentation. *Id.* § 2606(a). Furthermore, when a determination has been made by Customs that "designated archaeological . . . material" was sought to be imported in violation of § 2606, the government is obliged to initiate an appropriate forfeiture action. *Id.* § 2606(b); *see also id.* § 2609. Finally, during the forfeiture proceedings, the government's initial burden of proof is simply to demonstrate that "material subject to the provisions of section 2606" – that is, designated archaeological material – is listed "in accordance with section 2604." *Id.* § 2610.

The crux of the Guild's incorrect interpretation of the CPIA appears to emanate from the "in accordance with section 2604" language. *See* 19 U.S.C. § 2610(1). In addition to directing the executive branch to promulgate lists of restricted material, § 2604 also imposes minimum drafting standards for those lists. It provides that each listing "shall be sufficiently specific and precise to ensure [both] that [the restrictions] are

applied only to the archeological and ethnological material covered by the agreement" and that importers have fair notice regarding what material is subject to those restrictions. *Id.* § 2604. However, our *Ancient Coin I* decision foreclosed a subsequent challenge to whether Cypriot and Chinese coins were "listed in accordance with section 2604." *See* 698 F.3d at 183 ("Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604 . . . ."). Instead, in the forfeiture proceedings, the government had to demonstrate that the particular coins in question fall under the type described in the listing.

Even absent the rulings in *Ancient Coin I*, however, we do not read § 2610, incorporating § 2604, to require the government to establish first discovery in order to carry its initial burden in a forfeiture action. As explained in *Ancient Coin I*, Congress drafted the CPIA in an effort to balance procedural efficiency with procedural recourse. *See* 698 F.3d at 181. Additionally, we explained in *Ancient Coin I* that second-guessing the executive branch's international negotiations regarding issues of cultural heritage is generally beyond the purview of the federal judiciary. *Id.* at 179. Given that context, we will not engage in "a searching substantive review of . . . diplomatic negotiations or [the] application of [ ] archaeological expertise." *Id.* Therefore, we must read and apply the CPIA in light of that approach.

The second sentence of § 2604 requires the government in a forfeiture action to demonstrate that the listed, restricted material is "covered by" the relevant MOU. The first requirement of that sentence does not oblige the government to establish that the material at issue was "first discovered" within the relevant State Party. To rule otherwise would both necessitate

a "searching substantive review" of international negotiations, which is an inappropriate exercise for the courts, and undermine our controlling construction of the CPIA. *See Ancient Coin I*, 698 F.3d at 179.

Notwithstanding the foregoing, the Guild would have us rule that Congress's use of the term "designated archaeological material" with respect to the designated lists – rather than, for example, the term "archaeological material of the State Party" – was the result of poor drafting. The Guild would also have us rule that Congress actually intended for government officials and the federal courts to treat the two terms as identical. We readily reject that request. It is axiomatic that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) (alterations and internal quotation marks omitted). The CPIA prescribes that "archeological material" refers to what may be listed, and that "designated archeological material" describes what has been listed. This temporal distinction supplies the controlling, meaningful difference between the two terms of art contained within the CPIA.

Here, Congress's use of the term "designated archaeological material" absolves the government from the need to again prove the first discovery element after properly promulgated import restrictions have gone into effect. If that were not the case, the importers – such as the Guild – could always relitigate the State Department's conclusions that certain materials belong to a particular country's cultural patrimony. And that is precisely what the Guild seeks to do

in this forfeiture action. As we recognized in *Ancient Coin I*, however, the determination of where certain types of archaeological materials are typically discovered is beyond the competence of the federal courts. *See* 698 F.3d at 179 ("The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage.").

Consistent with the foregoing, the issue pursued by the Guild regarding first discovery is resolved by the designated lists in the regulations – and need not be relitigated in a forfeiture action. We therefore reject the Guild's contention that the district court erroneously excused the government from proving first discovery as an essential element of its prima facie forfeiture case.

2.

As a part of its initial contention of error, the Guild also maintains that the government failed to establish that the fifteen ancient coins were illegally removed from Cyprus or China. This argument is predicated on the fact that the CPIA does not bar importation of all "designated archaeological or ethnological material," but rather only designated material that has been "exported . . . from the State Party after the designation of such material under section 2604," without "documentation which certifies that such exportation was not in violation of the laws of the State Party." *See* 19 U.S.C. § 2606(a). As with the first discovery requirement, the Guild contends that the government had to prove the illegal removal element as part of its prima facie forfeiture case.

Simply put, we reject the Guild's interpretation of the CPIA on this point. As we explained in *Ancient Coin I*, Congress anticipated efforts to import archaeological material "without precisely documented provenance and export records." *See* 698 F.3d at 182. In those circumstances, the CPIA does not require the *government* to produce evidence establishing the provenance or export status of the archaeological material. Rather, as *Ancient Coin I* recognized, when Customs has determined that the archaeological material "has been designated by 'type' and included in the list of restricted articles," § 2606 "expressly places the burden on importers to prove [the designated material is] importable." *Id.* at 182. The importer can satisfy that burden by presenting to Customs one of the three types of documentation specified in § 2606(b). *Id.* Unless the importer does so, however, Customs must "refuse to release the material from customs custody." *See* 19 U.S.C. § 2606(b).

The Guild maintains that *Ancient Coin I*'s reasoning does not apply because that decision dealt with an importer's burden in the context of a detention of coins, rather than a forfeiture action. There is nothing in the CPIA, however, that supports the notion that the government must establish the provenance of seized material – or more specifically, that the seized material was illegally removed from a specified State Party – in the forfeiture proceedings. The CPIA simply permits the authorities to commence forfeiture proceedings under § 2609 if the importer fails to provide the documentation specified in § 2606(b). *See* 19 U.S.C. § 2606(b). And § 2609 provides that designated archaeological material imported "in violation of" § 2606 is "subject to seizure and forfeiture." *Id.* § 2609. Absent a clear directive from Congress that the government must prove the additional element of illegal removal

in forfeiture proceedings conducted under § 2609 – but not in a § 2606 detention – we must reject the Guild's contention that the government failed to establish a prima facie forfeiture case.

3.

Although we reject the Guild's contentions with respect to first discovery and illegal removal, we recognize that 19 U.S.C. § 2610 imposes a substantial burden on the government in a forfeiture action. Indeed, the CPIA requires a multi-part inquiry before seized material is subject to forfeiture. As a preliminary matter, § 2610 requires the government to show that the seized material is "subject to the provisions of section 2606," i.e., that it is "designated archaeological or ethnological material." That showing requires the seized material to be "covered by an [MOU]" in force in the United States and "listed by regulation under section 2604." *See* 19 U.S.C. § 2601(7)(A)(i), (B). The government must then determine whether the seized material has been "listed in accordance with section 2604." *Id.* § 2610. To be so listed means that the pertinent designated list is "sufficiently specific and precise" to ensure that "the import restrictions under section 2606 . . . are only applied to the archaeological or ethnological material covered by the [MOU]," and that "fair notice is given to importers and other persons as to what material is subject to such restrictions." *Id.* § 2604.

Distilling the statutory requirements, the government must establish the following in order to meet its initial burden in a forfeiture action for material subject to § 2606 of the CPIA: (1) that the material is covered by an MOU, *see* 19 U.S.C. § 2601(7)(A)(i); (2) that the material is "listed by regulation under section 2604," *id.* § 2601(7)(B); and (3) that the listing is

"sufficiently specific and precise" to ensure both that "the import restrictions . . . are only applied to the archeological or ethnological material covered by the [MOU]," and that "fair notice is given to importers and other persons as to what material is subject to such restrictions" *id.* § 2604.

The Forfeiture Opinion properly determined that the government had met its initial burden. The district court therein recognized that the first element of the CPIA forfeiture test was uncontested, i.e., that the seized ancient coins were covered by enforceable MOUs with Cyprus and China. *See* Forfeiture Opinion 15 ("There is no dispute that China and Cyprus are 'State Parties' under the CPIA . . . nor does the Guild deny that the United States has entered into an [MOU] with each under § 2602."). This forfeiture action is also distinguished by the fact that the *Ancient Coin I* decision already dispensed with the third element of the inquiry. More specifically, *Ancient Coin I* preempted further litigation of the validity of the Cypriot and Chinese Designated Lists, ruling that the Cypriot and Chinese coins were listed "in accordance with 19 U.S.C. § 2604." *See* 698 F.3d at 183. The government thus had only to prove the second element – that the Guild's coins were "listed by regulation under section 2604." *See* 19 U.S.C. § 2601(7)(B). And the government established that element. Indeed, the Guild conceded the issue, admitting that the fifteen ancient Cypriot and Chinese coins matched coins on the Cypriot and Chinese Designated Lists.

The Forfeiture Opinion therefore properly concluded that the government had satisfied its initial burden in this case. As a result, the burden shifted to the Guild to prove that the fifteen ancient coins were

somehow not subject to being forfeited to the United States.

B.

In its second contention, the Guild maintains that the Forfeiture Opinion improperly precluded the testimony of its expert witnesses and the circumstantial evidence that could be derived from that testimony. The Guild contends that the district court erroneously required the Guild's expert evidence to be particularized as to the defendant coins. Assuming the particularization requirement, the Guild further argues that the expert opinions of Mudd and McCullough were sufficiently particularized and relevant to the forfeiture proceedings, and rebutted the government's prima facie forfeiture case. The government counters that the court properly addressed and discounted the experts' evidence, relying primarily on the reasoning of the Forfeiture Opinion.

As an initial matter, despite the Guild's characterization to the contrary, the district court did not expressly exclude the opinions of Mudd and McCullough. Instead, the court concluded that the evidence "[ran] contrary to the logic of the CPIA," and conflicted with the Guild's statutorily imposed evidentiary burden in the forfeiture proceedings. *See* Forfeiture Opinion 22. Additionally, the court ruled that the expert evidence was "insufficiently particularized," such that it failed to "rebut the government's initial showing." *Id.* at 23, 27. We discern no abuse of discretion in the district court's treatment of the expert evidence. Further, we agree with the court that the expert evidence failed to create a disputed issue of material fact that rebutted the government's prima facie case.

We review a district court's decision on expert evidence for an abuse of discretion. *See United States v. Chikvashvili*, 859 F.3d 285, 292 (4th Cir. 2017). In evaluating the permissibility of expert evidence, a court assumes a "gatekeeping role," which guarantees that the expert opinions rest "on a reliable foundation and [are] relevant to the task at hand." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The Supreme Court has explained that relevance – or what has been called "fit" – is a precondition for the admissibility of expert testimony, in that the rules of evidence require expert opinions to assist the "the trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 591 (quoting former Fed. R. Evid. 702(a)). In reviewing a trial court's rulings on experts, we are mindful of the Supreme Court's admonition against "applying an overly stringent review . . . [that] fail[s] to give the trial court the deference that is the hallmark of abuse-of-discretion review." *See Joiner*, 522 U.S. at 143. And where a court relies upon expert evidence to determine whether a dispute of material fact exists, we review that determination de novo. *See Dash v. Mayweather*, 731 F.3d 303, 310-11, 316 (4th Cir. 2013). With those principles in mind, we turn to the Guild's contentions with respect to its proposed experts.

1.

The Guild maintains that the district court erroneously required the Guild's experts to present particularized opinions that would prove the fifteen defendant ancient coins were not subject to forfeiture. As the Guild emphasizes, the word "particularized" is not found in the CPIA. Furthermore, the Guild argues that – unlike the government's initial burden of proof – the CPIA does not specify the Guild's burden

on rebuttal. *See* 19 U.S.C. § 2610. Rather, § 2609 provides that "[a]ll provisions of law relating to . . . forfeiture . . . for violation of the customs laws shall apply to seizures and forfeitures incurred . . . under [the CPIA], insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of [the CPIA]." *Id.* § 2609(a). In the Guild's view, its burden was thus governed by § 1615, which "contemplates that a claimant in a court case will be able to use any admissible evidence or testimony to rebut any presumption that an article is subject to forfeiture." *See* Br. of Appellant 36.

Although the Guild's recitation of legal principles may be accurate, we discern no error in the district court's application of a particularization requirement to the Guild's expert evidence. As our *Ancient Coin I* decision explained, the CPIA requires an importer to establish the importability of designated archaeological material by reference to the "article in question." *See* 698 F.3d at 182 (citing 19 U.S.C. § 2606). More specifically, the importer must satisfy one of three statutory requirements – i.e., that the material was either "(1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect." *Id.* at 183.

Consistent with the foregoing, the district court required the Guild to tailor its expert evidence to the articles in question, i.e., the specific Cypriot and Chinese coins that the Guild sought to import. As explained in the Forfeiture Opinion, permitting the Guild to rebut the government's prima facie forfeiture case with generalized evidence about ancient coins

would "run[] contrary to the logic of the CPIA." *See* Forfeiture Opinion 22. More specifically, such expert evidence would not assist the trier of fact in determining when the specific articles in question were exported from the particular State Party. Nor would it tend to prove that the articles were lawfully exported. Rather, generalized evidence could only serve to attack the legitimacy and logic of the pertinent designated lists in the regulations. And in these forfeiture proceedings, the legitimacy of those lists was no longer subject to challenge.

The district court's application of the particularization requirement thus ensured that the Guild's rebuttal expert evidence "fit" the questions presented in the forfeiture proceedings. *See Daubert*, 509 U.S. at 591. And that requirement barred the Guild from using expert evidence to undermine the legitimacy of the designated lists, and relying on evidence that is "inconsistent" with the CPIA. *See* 19 U.S.C. § 2609. The court therefore did not abuse its discretion by requiring the Guild to present expert evidence that was particularized to the fifteen defendant ancient coins.

2.

The Guild also contends that, assuming a "particularized evidence" requirement exists, the district court improperly discounted Mudd's testimony regarding the circulation patterns of ancient Cypriot and Chinese coins. *See* Br. of Appellant 39. In the Guild's view, Mudd's evidence was sufficiently particularized to address the question of whether the Guild's coins had been "exported from their respective states before CPIA restrictions went into effect." *See Ancient Coin I*, 698 F.3d at 183. The Guild also maintains that Mudd's testimony – combined with circumstantial evidence

tending to show that the defendant coins had been exported soon after the import restrictions went into effect – would have been sufficient to rebut the government's prima facie forfeiture case.

We reject the Guild's characterization of Mudd's expert evidence. The record reveals that Mudd simply proffered generalized assertions about Cypriot and Chinese coins. For example, he opined that "it is impossible to pinpoint the site of origin of most Cypriot coins unless they were part of the small minority of pieces that [came] from properly recorded hoard finds." *See* J.A. 1041. With respect to Chinese coins, Mudd reported that "[i]n modern times, Chinese coins have been exported in huge numbers, just as they have been since at least the 7th century." *Id.* at 1040. In short, Mudd's expert evidence was not directed towards resolving the issues in this forfeiture proceeding, namely, determining the provenance and export status of the specific coins imported by the Guild. It instead sought to rehash the Guild's argument that the State Department had acted imprudently when it imposed import restrictions on ancient Cypriot and Chinese coins. But the *Ancient Coin I* decision already disposed of that contention. Therefore, the district court neither abused its discretion by rejecting Mudd's testimony, nor erred by finding that Mudd's testimony failed to rebut the government's initial showing.

3.

In a related contention, the Guild argues that the district court improperly rejected and discounted McCullough's "particularized evidence" about the ancient Cypriot coins. The Guild offered McCullough's opinions to prove that the ancient Cypriot coins had been "lawfully exported from the State Party while the CPIA restrictions were in effect." *See* J.A. 1057.

Specifically, McCullough opined that, based on his analysis of foreign law, "the export of Cypriot coins at issue from the United Kingdom was a legal export under European Union and hence Cypriot law that would satisfy the requirements of the [CPIA]." *Id.*

The government counters by emphasizing that McCullough's testimony would only show that the ancient Cypriot coins had been lawfully exported from the United Kingdom. The district court agreed with that contention and concluded that McCullough's testimony did not show that there was a lawful export "from the State Party" that had requested the restrictions. *See* Forfeiture Opinion 25 ("Under the CPIA, the relevant export is the original export from the State Party, not any subsequent export to a third country, even if the latter is the export that brought the material to the United States."); *see also* 19 U.S.C. § 2606(a). The court thus did not err in deciding that McCullough's opinions were irrelevant – and therefore insufficient to rebut the government's case – in these forfeiture proceedings.

C.

In its third contention of error, the Guild argues that the Customs regulation promulgated and codified at 19 C.F.R. § 12.104 – which governs the enforcement of CPIA import restrictions – irreconcilably conflicts with its statutory parent's requirements, which are found in 19 U.S.C. § 2601(2). And the Guild further argues that this purported conflict deprives an importer of fair notice of those specific items that are subject to the import restrictions.

1.

The purported conflict derives from the "Definitions" section of the CPIA, which defines the term "archaeological or ethnological material of the State Party" as

> (A) any object of archaeological interest;
>
> (B) any object of ethnological interest; or
>
> (C) any fragment or part of any object referred to in subparagraph (A) or (B);
>
> which was first discovered within, and is subject to export control by, the State Party.

See 19 U.S.C. § 2601(2). As shown above, the "first discovered within" language modifies subparagraphs (A), (B), and (C) of § 2601(2). Section 2601(2) appears to explain that objects of archaeological or ethnological interest, or any fragments or parts thereof, must be "first discovered within" the State Party that requested the import restrictions, and were then subject to that Party's export control.

In contrast to the § 2601(2) statutory definition enacted by Congress, the "Definitions" provision in the related regulation, that is, 19 C.F.R. § 12.104(a), does not segregate the words "first discovered within, and is subject to export control by the State Party" from the preceding subparagraphs. The regulation says:

> (a) The term, archaeological or ethnological material of the State Party . . . means —
>
> (1) Any object of archaeological interest. . . .
>
> (2) Any object of ethnological interest. . . .
>
> (3) Any fragment or part of any object referred to in paragraph (a)(1) or (2) of

> this section which was first discovered within, and is subject to export control by the State Party.

See 19 C.F.R. § 12.104.

The Guild argues that the "first discovered within" clause of the regulatory definition therefore applies only to subparagraph (3) of 19 C.F.R. § 12.104(a). According to the Guild, the regulatory provision in § 12.104(a) suggests that fully intact archaeological or ethnological objects – as opposed to fragmented objects – are not subject to the "first discovered within" proviso. On the other hand, the statutory definition in § 2601(2) clearly provides that the "first discovered within" proviso applies to each category of object, regardless of whether an archaeological or ethnological object is fully intact or in fragments.

2.

a.

The Guild presses two arguments in connection with what it perceives as a fatal drafting error. First, it contends that the error in the regulation – § 12.104(a) – deprived the Guild of "fair notice" of those objects that are subject to import restrictions under § 2604. *See* Br. of Appellant 31-32. Simply put, however, that contention misses the mark and must be rejected. Section 2604's fair notice provision applies only to those regulations that "list [archaeological or ethnological] material by type or other appropriate classification," i.e., the designated lists. *See* 19 U.S.C. § 2604. The definitional regulation in § 12.104(a), which the Guild says deprived it of fair notice, is not a designated list. To present a viable fair notice challenge under § 2604, the Guild would need to allege that either the Cypriot Designated List or the Chinese Designated List was

insufficiently "specific and precise" to notify the Guild of what materials, such as ancient coins, were subject to the import restrictions. *See id.* Because no such allegation has been made, the Guild's statutory fair notice claim is fatally defective.

b.

In the second part of its fair notice contention, the Guild argues that it was unconstitutionally deprived of adequate notice that the Cypriot and Chinese coins were subject to import restrictions. The Fifth Amendment's Due Process Clause, under which this contention is presented, requires that "a party must receive fair notice before being deprived of property." *See United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997). To provide notice that satisfies constitutional due process, a regulation "must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *See United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). As one circuit has aptly explained, a regulation provides fair notice if it is "reasonably comprehensible to people of good faith." *See Gen. Elec. Co. v. Envtl. Prot. Agency*, 53 F.3d 1324, 1330 (D.C. Cir. 1995).

In the context of regulatory provisions, our 1997 decision in *Hoechst Celanese* is instructive. The EPA had pursued an enforcement action against an industrial plant for violations of regulations promulgated under the Clean Air Act. The regulations imposed emissions standards and reporting requirements on emitters of a pollutant called benzene. The plant owner, Hoechst, interposed a due process claim to the enforcement action. Hoechst contended that it was not

subject to the EPA enforcement order because the EPA regulations failed to provide fair notice that Hoechst's plant had to comply with the benzene regulations.

Our *Hoechst Celanese* decision engaged in a fact-intensive inquiry, assessing the due process defense and explaining that it was "crucial to examine the particular situation of the defendant, and whether it lacked reasonable notice." *See* 128 F.3d at 224. That inquiry revealed that, for five years after the benzene regulations went into effect, Hoechst had not been fairly apprised of its obligations under the regulations. We emphasized that the benzene regulations were ambiguous and potentially supported Hoechst's interpretation of the contested regulations. More importantly, we recognized that the Hoechst officials had contacted the state regulators enforcing the benzene regulations seeking to determine whether they were in compliance, and that Hoechst had actually received an inaccurate response. We thus concluded that Hoechst could not be liable for its failure to comply with the benzene regulations during the period it lacked fair notice of its regulatory obligations.

The *Hoechst Celanese* inquiry, however, also revealed that five years after the benzene regulations went into effect, the EPA reached out to Hoechst and informed its officials how the EPA actually interpreted the regulations. That EPA communication provided "unequivocal, actual notice as to how the regulation[s] pertained to that plant's operations." *See* 128 F.3d at 229. Because Hoechst "well understood" that its interpretation and application of the benzene regulations conflicted with the EPA's interpretations, Hoechst was civilly liable for its post-notification violations of the benzene regulations. *Id.* at 227-30.

Like the defendant in *Hoechst Celanese*, the Guild has alleged an ambiguity in the federal regulatory scheme with respect to the defendant ancient coins that could confuse importers dealing with the designated lists. In contrast to Hoechst, however, the Guild has had actual notice – since at least 2007 – that its interpretation of the CPIA regulations is in direct conflict with that of the government. And the Guild has never made a good faith effort to comply with the applicable regulations. In fact, the Guild admits that it "deliberately" and "purposefully" imported the fifteen ancient coins, knowing that they were subject to import restrictions, in seeking to engineer this forfeiture action. *See* J.A. 1280. As such, the Guild cannot credibly claim that it has been unconstitutionally deprived of its property. The Guild simply implemented a scheme designed to knowingly contravene, and subsequently challenge, a federal law that it opposed.

In any event, the Guild's asserted conflict between the statutory definition in 19 U.S.C. § 2601(2) and the regulatory definition in 19 C.F.R. § 12.104(a) fails to make the government's import restriction scheme so vague and ambiguous that a reasonable person would not know which ancient coins are subject to the restrictions. Indeed, the Guild concedes that it used the Cypriot and Chinese Designated Lists as guideposts in deciding which ancient coins were likely to be seized by Customs. The fact that the Guild – with the assistance of Spink – correctly identified the coins subject to the import restrictions, shows beyond peradventure that importers of ordinary intelligence are able to ascertain the conduct that contravenes federal law. In these circumstances, the Guild's due process rights were not violated and that aspect of its fair notice contention must also be rejected.

D.

Fourth, the Guild contends that the district court abused its discretion in declining to approve the Guild's efforts to conduct relevant discovery. In assessing the Guild's discovery arguments, we recognize that a trial court has "wide latitude in controlling discovery" and that discovery rulings are generally not overturned on appeal "absent a showing of clear abuse of discretion." *See Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir. 2003) (citations omitted). That latitude extends to "the manner in which [the court] orders the course and scope of discovery." *See Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986). We have acknowledged that it is "unusual to find an abuse of discretion in discovery matters," and such an abuse will only be identified where discovery restrictions prevent a litigant from "pursuing a [litigation] theory." *Id.* (citations omitted). With that standard in mind, we turn to the Guild's discovery contentions.

1.

The Guild initially maintains that the district court abused its discretion by failing to authorize discovery regarding, inter alia, "the circulation patterns of Cypriot and Chinese coins." *See* Br. of Appellant 34. The Guild argues that evidence regarding the circulation patterns of those coins was relevant to a proper assessment of whether the government had made a prima facie forfeiture case. The Guild also maintains that it was prejudiced by the denial of such discovery, in that the lack of discovery on circulation patterns "hampered the ability of the Guild's experts to issue complete reports." *Id.*

We are constrained to disagree with the Guild. The discovery materials that the Guild sought on circulation patterns could only be relevant if the government was required to prove first discovery as part of its prima facie forfeiture case. And we have already ruled that it did not have to prove first discovery. Assuming, however, that evidence of circulation patterns was somehow relevant to the forfeiture proceedings, the Guild was not prevented from pursuing that theory of defense. The Guild actually hired an expert in numismatics who emphatically maintained that ancient coins should not be considered as part of a country's cultural patrimony due to their historical patterns of circulation. The district court carefully considered that evidentiary submission by the Guild and rejected it. The Guild also fails to explain how its expert's opinions would have differed – or how the court might have made a different ruling – had the Guild obtained additional discovery regarding the circulation patterns of Cypriot and Chinese coins.

2.

The Guild next contends that it was unfairly precluded from essential discovery regarding "why the Guild's coins were detained and seized" and the "factual basis for seizure." *See* Br. of Appellant 34. As a preliminary matter, the Guild makes no effort to explain how the district court's purported error in this regard prejudiced the Guild's defense. Even ignoring that deficiency, however, the record belies the Guild's contention. The court provided the Guild with several opportunities to depose government officials and inquire into the circumstances surrounding the detention of the defendant ancient coins. For example, the Guild was allowed to depose Gerald Stroter, an import specialist who was present when the Guild's coins

were detained, as well as Carlly Luckman, an Assistant Director at Customs, who gave a deposition as a Rule 30(b)(6) witness.

The district court only limited the Guild's access to that discovery after it became clear that the Guild was seeking testimony regarding legal impressions and conclusions from several government officials. As the court explained in denying further discovery under Rule 30(b)(6), "[t]he Guild primarily seeks information concerning the government's legal positions, which is generally beyond the scope of a proper [Rule] 30(b)(6) deposition." *See United States v. 3 Knife-Shaped Coins*, No. 1:13-cv-01183 (D. Md. June 1, 2016), ECF No. 71. In so ruling, the court conformed to the prevailing view of those courts that have dealt with litigants seeking to extract specific legal conclusions from government officials. *See, e.g.*, *ISI Corp. v. United States*, 503 F.2d 558, 559 (9th Cir. 1974) ("[O]pinions, conclusions and reasoning of government officials are not subject to discovery."); *St. Matthew Publ'g, Inc. v. United States*, 41 Fed. Cl. 142, 147 (1998) ("In taking . . . deposition(s), plaintiff shall keep in mind that opinions, conclusions, and reasoning of government officials are not subject to discovery."). Put succinctly, we discern no abuse of discretion in any of the challenged discovery rulings. The Guild's contentions of error with respect to discovery are therefore also rejected.

E.

By its final contention, the Guild maintains that the district court acted improperly by striking the Amended Answer. We have not heretofore explicitly identified the applicable standard of review with respect to a district court's granting of a motion to strike pleadings. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 702 (4th Cir. 2007) (en banc) (concluding

that "district court did not abuse its discretion in *denying* [motions to strike]" (emphasis added)); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (concluding that "the district court did not err in striking the Defendants' purported affirmative defense," but not expressly identifying the applicable standard of review). But several of our sister circuits have applied an abuse of discretion standard. *See, e.g.*, *Delta Consulting Grp., Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009) ("We review a district court's decision to strike for an abuse of discretion and will not disturb a decision that is reasonable and not arbitrary."); *Hatchett*, 330 F.3d at 887 ("We review the grant of a motion to strike a pleading for abuse of discretion."). In applying that standard, the Seventh Circuit explained that it would "not disturb a decision [to strike a counterclaim] that is reasonable and not arbitrary." *See Delta Consulting Grp., Inc.*, 554 F.3d at 1141. Consistent therewith, we are satisfied to apply the abuse of discretion standard on this contention of error.[15]

1.

The Guild contends that the district court erred by striking its Amended Answer under Rule 12(f) of the Federal Rules of Civil Procedure. Pursuant to that provision, a trial court is entitled to strike from a pleading an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *See* Fed. R. Civ. P. 12(f). The Guild maintains that the

[15] The Guild asserts that we should review de novo a district court's striking of a pleading. Supporting that contention, the Guild had provided a citation to our decision in *Waste Management Holdings*. As noted above, however, that decision did not expressly identify the appropriate standard of review for striking a pleading under Rule 12(f). *See* 252 F.3d at 347.

affirmative defenses stricken in this case did not fit within any of Rule 12(f)'s enumerated categories. Furthermore, the Guild argues that Rule 12(f) motions are viewed with disfavor "because striking a portion of a pleading is a drastic remedy." *See Waste Mgmt. Holdings*, 252 F.3d at 347.

Although the striking of a pleading can be a tough remedy, the district court did not abuse its discretion by granting the government's motion. In so ruling, the court was simply adhering to our *Ancient Coin I* decision. We therein acknowledged that, during an ensuing forfeiture proceeding, the Guild could "press a *particularized* challenge to the government's assertion that the twenty-three coins are covered by import restrictions." *See* 698 F.3d at 185 (emphasis added). The portions of the Amended Answer that were stricken by the district court, however, were not particularized to this forfeiture action.

Rather, the stricken allegations sought to resurrect claims that the Guild had already lost in *Ancient Coin I*. For example, the court struck the following affirmative defenses:

- The Guild's defense that the import restrictions were "imposed without regard for the significant procedural and substantive constraints found in . . . CPIA," *see* Amended Answer 7;
- The Guild's defense that the "import restrictions on coins of 'Cypriot type' or 'from China' were the products of bureaucratic bias and/or prejudgment and/or *ex parte* contact," *id.*; and
- The Guild's defense that the government's forfeiture claims were barred by "fraud

> and illegality" based on the fact that "the State Department bureaucracy misled Congress and the public" on the recommendations of CPAC, *id.*

The *Ancient Coin I* decision had resolved those issues by ruling that the State Department and Customs had properly imposed import restrictions on ancient Cypriot and Chinese coins, in compliance with the CPIA. In this forfeiture case, the district court thus lacked the authority to question the validity of our earlier rulings. Similarly, we are bound by the rulings of our earlier panel decision. *See McMellon*, 387 F.3d at 332. Thus, the stricken defenses were not pertinent to this forfeiture action, and the court did not err in striking them.

2.

The Guild also presents its motion to strike contention with a constitutional hue as a violation of its due process rights. Relying on the Supreme Court's decision in *Degen v. United States*, the Guild contends that the ruling on the motion to strike deprived the Guild of the "right of a citizen to defend his property against attack." *See* 517 U.S. 820, 828 (1996). A review of the *Degen* case, however, reveals that the constitutional argument is also without merit.

In *Degen*, the government sought the forfeiture of multiple seized properties suspected of having been purchased with the proceeds of illegal drug transactions. *See* 517 U.S. at 821. Degen, as the claimant, had moved to Switzerland and refused to return to this country to face criminal charges. He did, however, file an answer in the civil forfeiture case. After the government moved to strike Degen's answer, the district court granted the motion to strike and awarded

summary judgment to the government. The court explained that Degen was "not entitled to be heard in the civil forfeiture action because he remained outside the country, unamenable to criminal prosecution." *Id.* at 822.

Although the Ninth Circuit affirmed, the Supreme Court granted certiorari and reversed. *See Degen*, 517 U.S. at 822. Recognizing that the federal courts have "certain inherent authority to protect their proceedings," the Court ruled that the district court had nevertheless overstepped its authority and contravened Degen's due process rights by barring him from claiming and defending his property in the forfeiture action. *Id.* at 822-23. As the Court explained, "the sanction of disentitlement is most severe," and respect for the judicial system is "eroded . . . by too free a recourse to rules foreclosing consideration of claims on the merits." *Id.* at 828.

In stark contrast to the claimant in *Degen*, the Guild has not been disentitled from defending its property in a forfeiture action. In fact, the Guild was not even disentitled from pursuing the affirmative defenses stricken by the district court. In the *Ancient Coin I* litigation, the district court and this Court each considered and rejected the Guild's claims regarding the propriety of the import restrictions imposed on ancient Cypriot and Chinese coins. Having already received two hearty bites at the proverbial apple, the Due Process Clause does not entitle the Guild to a third. The district court's conclusion in the Strike

Opinion and Order thus did not violate the Guild's due process rights.[16]

IV.

Pursuant to the foregoing, we are satisfied to reject each of the Guild's contentions on appeal. We therefore affirm the district court's judgment of forfeiture.

AFFIRMED

[16] The Guild also maintains that we should be willing to revisit *Ancient Coin I* because the Cypriot and Chinese import restrictions were imposed in bad faith. More specifically, the Guild contends that the import restrictions resulted from a conspiracy between State Department officials, the archaeological community, and Goldman Sachs. We are satisfied to decline to revisit *Ancient Coin I* on that basis.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: August 7, 2018]

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No. 17-1625
(1:13-cv-01183-CCB)

———

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANCIENT COIN COLLECTORS GUILD,

Claimant-Appellant,

v.

3 KNIFE-SHAPED COINS; 7 CYPRIOT COINS;
5 OTHER CHINESE COINS,

Defendants.

———

PROFESSIONAL NUMISMATISTS GUILD, INC;
AMERICAN NUMISMATIC ASSOCIATION;
INTERNATIONAL ASSOCIATION OF PROFESSIONAL
NUMISMATISTS; ASSOCIATION OF DEALERS AND
COLLECTORS OF ANCIENT AND ETHNOGRAPHIC ART;
COMMITTEE FOR CULTURAL POLICY, INC.;
GLOBAL HERITAGE ALLIANCE

Amici Supporting Appellant

———

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: October 5, 2018]

No. 17-1625
(1:13-cv-01183-CCB)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANCIENT COIN COLLECTORS GUILD,

Claimant-Appellant,

v.

3 KNIFE-SHAPED COINS; 7 CYPRIOT COINS;
5 OTHER CHINESE COINS,

Defendants.

PROFESSIONAL NUMISMATISTS GUILD, INC;
AMERICAN NUMISMATIC ASSOCIATION; INTERNATIONAL
ASSOCIATION OF PROFESSIONAL NUMISMATISTS;
ASSOCIATION OF DEALERS AND COLLECTORS OF
ANCIENT AND ETHNOGRAPHIC ART; COMMITTEE FOR
CULTURAL POLICY, INC.; GLOBAL HERITAGE ALLIANCE,

Amici Supporting Appellant.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under

Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Agee, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX F

[LOGO] UNESCO

UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 12 October to 14 November 1970, at its sixteenth session,

* * *

Adopts this Convention on the fourteenth day of November 1970.

* * *

Article 3

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

Article 4

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

* * *

(b) cultural property found within the national territory;

* * *

APPENDIX G

19 U.S.C. § 2600
Chapter 14 – Convention on Cultural Property

19 U.S.C. § 2601. Definitions. For purposes of this chapter –

(1) The term "agreement" includes any amendment to, or extension of, any agreement under this chapter that enters into force with respect to the United States.

(2) The term "archaeological or ethnological material of the State Party" means –

(A) any object of archaeological interest;

(B) any object of ethnological interest; or

(C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph –

(i) no object may be considered to be an object of archaeological interest unless such object –

(I) is of cultural significance;

(II) is at least two hundred and fifty years old; and

(III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater; and

(ii) no object may be considered to be an object of ethnological interest unless such object is –

(I) the product of a tribal or nonindustrial society, and

(II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

(3) The term "Committee" means the Cultural Property Advisory Committee established under section 2605 of this title.

(4) The term "consignee" means a consignee as defined in section 1483 of this title.

(5) The term "Convention" means the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property adopted by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its sixteenth session.

(6) The term "cultural property" includes articles described in article 1(a) through (k) of the Convention whether or not any such article is specifically designated as such by any State Party for the purposes of such article.

(7) The term "designated archaeological or ethnological material" means any archaeological or ethnological material of the State Party which –

(A) is –

(i) covered by an agreement under this chapter that enters into force with respect to the United States, or

(ii) subject to emergency action under section 2603 of this title, and

(B) is listed by regulation under section 2604 of this title.

(8) The term "Secretary" means the Secretary of the Treasury or his delegate.

(9) The term "State Party" means any nation which has ratified, accepted, or acceded to the Convention.

(10) The term "United States" includes the several States, the District of Columbia, and any territory or area the foreign relations for which the United States is responsible.

(11) The term "United States citizen" means –

(A) any individual who is a citizen or national of the United States;

(B) any corporation, partnership, association, or other legal entity organized or existing under the laws of the United States or any State; or

(C) any department, agency, or entity of the Federal Government or of any government of any State.

(Pub. L. 97-446, title III, Sec. 302, Jan. 12, 1983, 96 Stat. 2351.)

19 U.S.C. § 2602. Agreements to Implement Article 9 of the Convention

(a) Agreement authority

(1) In general

If the President determines, after request is made to the United States under article 9 of the Convention by any State Party –

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that –

(i) the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions set forth in section 2606 of this title in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes; the President may, subject to the provisions of this chapter, take the actions described in paragraph (2).

(2) Authority of President

For purposes of paragraph (1), the President may enter into –

(A) a bilateral agreement with the State Party to apply the import restrictions set forth in section 2606 of this title to the archaeological or ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party found to exist under paragraph (1)(A); or

(B) a multilateral agreement with the State Party and with one or more other nations (whether or not a State Party) under which the United States will apply such restrictions, and the other nations will apply similar restrictions, with respect to such material.

(3) Requests

A request made to the United States under article 9 of the Convention by a State Party must be accompanied by a written statement of the facts known to the State Party that relate to those matters with respect to which determinations must be made under subparagraphs (A) through (D) of paragraph (1).

(4) Implementation

In implementing this subsection, the President should endeavor to obtain the commitment of the State Party concerned to permit the exchange of its archaeological and ethnological materials under circumstances in which such exchange does not jeopardize its cultural patrimony.

(b) Effective period

The President may not enter into any agreement under subsection (a) of this section which has an effective period beyond the close of the five-year period beginning on the date on which such agreement enters into force with respect to the United States.

(c) Restrictions on entering into agreements

(1) In general

The President may not enter into a bilateral or multilateral agreement authorized by subsection (a) of this section unless the application of the import restrictions set forth in section 2606 of this title with

respect to archaeological or ethnological material of the State Party making a request to the United States under article 9 of the Convention will be applied in concert with similar restrictions implemented, or to be implemented, by those nations (whether or not State Parties) individually having a significant import trade in such material.

(2) Exception to restrictions

Notwithstanding paragraph (1), the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but –

(A) such restrictions are not essential to deter a serious situation of pillage, and

(B) the application of the import restrictions set forth in section 2606 of this title in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage.

(d) Suspension of import restrictions under agreements

If, after an agreement enters into force with respect to the United States, the President determines that a number of parties to the agreement (other than parties described in subsection (c)(2) of this section) having significant import trade in the archaeological and ethnological material covered by the agreement –

(1) have not implemented within a reasonable period of time import restrictions that are similar to those set forth in section 2606 of this title, or

(2) are not implementing such restrictions satisfactorily with the result that no substantial benefit in deterring a serious situation of pillage in the State Party concerned is being obtained, the President shall suspend the implementation of the import restrictions under section 2606 of this title until such time as the nations take appropriate corrective action.

(e) Extension of agreements

The President may extend any agreement that enters into force with respect to the United States for additional periods of not more than five years each if the President determines that –

(1) the factors referred to in subsection (a)(1) of this section which justified the entering into of the agreement still pertain, and

(2) no cause for suspension under subsection (d) of this section exists.

(f) Procedures

If any request described in subsection (a) of this section is made by a State Party, or if the President proposes to extend any agreement under subsection (e) of this section, the President shall –

(1) publish notification of the request or proposal in the Federal Register;

(2) submit to the Committee such information regarding the request or proposal (including, if applicable, information from the State Party with respect to the implementation of emergency action under section 2603 of this title) as is appropriate to enable the Committee to carry out its duties under section 2605(f) of this title; and

(3) consider, in taking action on the request or proposal, the views and recommendations contained in any Committee report –

(A) required under section 2605(f)(1) or (2) of this title, and

(B) submitted to the President before the close of the one-hundred-and-fifty-day period beginning on the day on which the President submitted information on the request or proposal to the Committee under paragraph (2).

(g) Information on Presidential action

(1) In general

In any case in which the President –

(A) enters into or extends an agreement pursuant to subsection (a) or (e) of this section, or

(B) applies import restrictions under section 2603 of this title, the President shall, promptly after taking such action, submit a report to the Congress.

(2) Report

The report under paragraph (1) shall contain –

(A) a description of such action (including the text of any agreement entered into),

(B) the differences (if any) between such action and the views and recommendations contained in any Committee report which the President was required to consider, and

(C) the reasons for any such difference.

(3) Information relating to committee recommendations

If any Committee report required to be considered by the President recommends that an agreement be entered into, but no such agreement is entered into, the President shall submit to the Congress a report which contains the reasons why such agreement was not entered into.

(Pub. L. 97-446, title III, Sec. 303, Jan. 12, 1983, 96 Stat. 2352.)

19 U.S.C. § 2603. Emergency Implementation of Import Restrictions

(a) "Emergency condition" defined

For purposes of this section, the term "emergency condition" means, with respect to any archaeological or ethnological material of any State Party, that such material is—

(1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;

(2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; and application of the import restrictions set forth in section 2606 of this title on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation.

(b) Presidential action

Subject to subsection (c) of this section, if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material.

(c) Limitations

(1) The President may not implement this section with respect to the archaeological or ethnological materials of any State Party unless the State Party has made a request described in section 2602(a) of this title to the United States and has supplied information which supports a determination that an emergency condition exists.

(2) In taking action under subsection (b) of this section with respect to any State Party, the President shall consider the views and recommendations contained in the Committee report required under section 2605(f)(3) of this title if the report is submitted to the President before the close of the ninety-day period beginning on the day on which the President submitted information to the Committee under section 2602(f)(2) of this title on the request of the State Party under section 2602(a) of this title.

(3) No import restrictions set forth in section 2606 of this title may be applied under this section to the archaeological or ethnological materials of any State Party for more than five years after the date on which the request of a State Party under section 2602(a) of this title is made to the United States. This period may be extended by the President for three more years if the President determines that the emergency condition continues to apply with respect to the archaeological or ethnological material. However, before taking

such action, the President shall request and consider, if received within ninety days, a report of the Committee setting forth its recommendations, together with the reasons therefor, as to whether such import restrictions shall be extended.

(4) The import restrictions under this section may continue to apply in whole or in part, if before their expiration under paragraph (3), there has entered into force with respect to the archaeological or ethnological materials an agreement under section 2602 of this title or an agreement with a State Party to which the Senate has given its advice and consent to ratification. Such import restrictions may continue to apply for the duration of the agreement.

(Pub. L. 97-446, title III, Sec. 304, Jan. 12, 1983, 96 Stat. 2354.)

19 U.S.C. § 2604. Designation of Materials Covered by Agreements or Emergency Actions

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, after consultation with the Director of the United States Information Agency, shall by regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that

(1) the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement or emergency action; and

(2) fair notice is given to importers and other persons as to what material is subject to such restrictions.

(Pub. L. 97-446, title III, Sec. 305, Jan. 12, 1983, 96 Stat. 2355.)

19 U.S.C. § 2605. Cultural Property Advisory Committee

(a) Establishment

There is established the Cultural Property Advisory Committee.

(b) Membership

(1) The Committee shall be composed of eleven members appointed by the President as follows:

(A) Two members representing the interests of museums.

(B) Three members who shall be experts in the fields of archaeology, anthropology, ethnology, or related areas.

(C) Three members who shall be experts in the international sale of archaeological, ethnological, and other cultural property.

(D) Three members who shall represent the interest of the general public.

(2) Appointments made under paragraph (1) shall be made in such a manner so as to insure -

(A) fair representation of the various interests of the public sectors and the private sectors in the international exchange of archaeological and ethnological materials, and

(B) that within such sectors, fair representation is accorded to the interests of regional and local institutions and museums.

(3)

(A) Members of the Committee shall be appointed for terms of three years and may be reappointed for one or more terms. With respect to the initial appointments, the President shall select, on a representative basis to the maximum extent practicable, four members to serve three-year terms, four members to serve two-year terms, and the remaining members to serve a one-year term. Thereafter each appointment shall be for a three-year term.

(B)

(i) A vacancy in the Committee shall be filled in the same manner as the original appointment was made and for the unexpired portion of the term, if the vacancy occurred during a term of office. Any member of the Committee may continue to serve as a member of the Committee after the expiration of his term of office until reappointed or until his successor has been appointed.

(ii) The President shall designate a Chairman of the Committee from the members of the Committee.

(c) Expenses

The members of the Committee shall be reimbursed for actual expenses incurred in the performance of duties for the Committee.

(d) Transaction of business

Six of the members of the Committee shall constitute a quorum. All decisions of the Committee shall be by majority vote of the members present and voting.

(e) Staff and administration

(1) The Director of the United States Information Agency shall make available to the Committee such administrative and technical support services and assistance as it may reasonably require to carry out its activities. Upon the request of the Committee, the head of any other Federal agency may detail to the Committee, on a reimbursable basis, any of the personnel of such agency to assist the Committee in carrying out its functions, and provide such information and assistance as the Committee may reasonably require to carry out its activities.

(2) The Committee shall meet at the call of the Director of the United States Information Agency, or when a majority of its members request a meeting in writing.

(f) Reports by Committee

(1) The Committee shall, with respect to each request of a State Party referred to in section 2602(a) of this title, undertake an investigation and review with respect to matters referred to in section 2602(a)(1) of this title as they relate to the State Party or the request and shall prepare a report setting forth –

(A) the results of such investigation and review;

(B) its findings as to the nations individually having a significant import trade in the relevant material; and

(C) its recommendation, together with the reasons therefor, as to whether an agreement should be entered into under section 2602(a) of this title with respect to the State Party.

(2) The Committee shall, with respect to each agreement proposed to be extended by the President under section 2602(e) of this title, prepare a report setting forth its recommendations together with the reasons therefor, as to whether or not the agreement should be extended.

(3) The Committee shall in each case in which the Committee finds that an emergency condition under section 2603 of this title exists prepare a report setting forth its recommendations, together with the reasons therefor, as to whether emergency action under section 2603 of this title should be implemented. If any State Party indicates in its request under section 2602(a) of this title that an emergency condition exists and the Committee finds that such a condition does not exist, the Committee shall prepare a report setting forth the reasons for such finding.

(4) Any report prepared by the Committee which recommends the entering into or the extension of any agreement under section 2602 of this title or the implementation of emergency action under section 2603 of this title shall set forth –

(A) such terms and conditions which it considers necessary and appropriate to include within such agreement, or apply with respect to such implementation, for purposes of carrying out the intent of the Convention; and

(B) such archaeological or ethnological material of the State Party, specified by type or such other classification as the Committee deems appropriate, which should be covered by such agreement or action.

(5) If any member of the Committee disagrees with respect to any matter in any report prepared under

this subsection, such member may prepare a statement setting forth the reasons for such disagreement and such statement shall be appended to, and considered a part of, the report.

(6) The Committee shall submit to the Congress and the President a copy of each report prepared by it under this subsection.

(g) Committee review

(1) In general

The Committee shall undertake a continuing review of the effectiveness of agreements under section 2602 of this title that have entered into force with respect to the United States, and of emergency action implemented under section 2603 of this title.

(2) Action by Committee

If the Committee finds, as a result of such review, that –

(A) cause exists for suspending, under section 2602(d) of this title, the import restrictions imposed under an agreement;

(B) any agreement or emergency action is not achieving the purposes for which entered into or implemented; or

(C) changes are required to this chapter in order to implement fully the obligations of the United States under the Convention; the Committee may submit a report to the Congress and the President setting forth its recommendations for suspending such import restrictions or for improving the effectiveness of any such agreement or emergency action or this chapter.

(h) Federal Advisory Committee Act

The provisions of the Federal Advisory Committee Act (Public Law 92-463; 5 U.S.C. Appendix) shall apply to the Committee except that the requirements of subsections (a) and (b) of section 10 and section 11 of such Act (relating to open meetings, public notice, public participation, and public availability of documents) shall not apply to the Committee, whenever and to the extent it is determined by the President or his designee that the disclosure of matters involved in the Committee's proceedings would compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by this chapter.

(i) Confidential information

(1) In general

Any information (including trade secrets and commercial or financial information which is privileged or confidential) submitted in confidence by the private sector to officers or employees of the United States or to the Committee in connection with the responsibilities of the Committee shall not be disclosed to any person other than to –

(A) officers and employees of the United States designated by the Director of the United States Information Agency;

(B) members of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate who are designated by the chairman of either such Committee and members of the staff of either such Committee designated by the chairman for use in connection with negotiation of agreements or other activities authorized by this chapter; and

(C) the Committee established under this chapter.

(2) Governmental information

Information submitted in confidence by officers or employees of the United States to the Committee shall not be disclosed other than in accordance with rules issued by the Director of the United States Information Agency, after consultation with the Committee. Such rules shall define the categories of information which require restricted or confidential handling by such Committee considering the extent to which public disclosure of such information can reasonably be expected to prejudice the interests of the United States. Such rules shall, to the maximum extent feasible, permit meaningful consultations by Committee members with persons affected by proposed agreements authorized by this chapter.

(j) No authority to negotiate

Nothing contained in this section shall be construed to authorize or to permit any individual (not otherwise authorized or permitted) to participate directly in any negotiation of any agreement authorized by this chapter.

(Pub. L. 97-446, title III, Sec. 306, Jan. 12, 1983, 96 Stat. 2356; Pub. L. 100-204, title III, Sec. 307(a), (b), Dec. 22, 1987, 101 Stat. 1380.)

19 U.S.C. § 2606. Import Restrictions

(a) Documentation of lawful exportation

No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title may be imported into the United States

unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

(b) Customs action in absence of documentation

If the consignee of any designated archaeological or ethnological material is unable to present to the customs officer concerned at the time of making entry of such material –

(1) the certificate or other documentation of the State Party required under subsection (a) of this section; or

(2) satisfactory evidence that such material was exported from the State Party –

(A) not less than ten years before the date of such entry and that neither the person for whose account the material is imported (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before that date of entry, or

(B) on or before the date on which such material was designated under section 2604 of this title, the customs officer concerned shall refuse to release the material from customs custody and send it to a bonded warehouse or store to be held at the risk and expense of the consignee, notwithstanding any other provision of law, until such documentation or evidence is filed with such officer. If such documentation or evidence is not presented within ninety days after the date on which such material is refused release from customs custody, or such longer period as may be allowed by the Secretary for good cause shown, the material shall be subject to seizure and forfeiture. The presentation

of such documentation or evidence shall not bar subsequent action under section 2609 of this title.

(c) Definition of satisfactory evidence The term – satisfactory evidence‖ means –

(1) for purposes of subsection (b)(2)(A) of this section –

(A) one or more declarations under oath by the importer, or the person for whose account the material is imported, stating that, to the best of his knowledge –

(i) the material was exported from the State Party not less than ten years before the date of entry into the United States, and

(ii) neither such importer or person (or any related person) contracted for or acquired an interest, directly or indirectly, in such material more than one year before the date of entry of the material; and

(B) a statement provided by the consignor, or person who sold the material to the importer, which states the date, or, if not known, his belief, that the material was exported from the State Party not less than ten years before the date of entry into the United States, and the reasons on which the statement is based; and

(2) for purposes of subsection (b)(2)(B) of this section –

(A) one or more declarations under oath by the importer or the person for whose account the material is to be imported, stating that, to the best of his knowledge, the material was exported from the State Party on or before the date such material was designated under section 2604 of this title, and

(B) a statement by the consignor or person who sold the material to the importer which states the date, or if not known, his belief, that the material was exported from the State Party on or before the date such material was designated under section 2604 of this title, and the reasons on which the statement is based.

(d) Related persons

For purposes of subsections (b) and (c) of this section, a person shall be treated as a related person to an importer, or to a person for whose account material is imported, if such person –

(1) is a member of the same family as the importer or person of account, including, but not limited to, membership as a brother or sister (whether by whole or half blood), spouse, ancestor, or lineal descendant;

(2) is a partner or associate with the importer or person of account in any partnership, association, or other venture; or

(3) is a corporation or other legal entity in which the importer or person of account directly or indirectly owns, controls, or holds power to vote 20 percent or more of the outstanding voting stock or shares in the entity.

(Pub. L. 97-446, title III, Sec. 307, Jan. 12, 1983, 96 Stat. 2358.)

19 U.S.C. § 2607. Stolen Cultural Property

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date

of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

(Pub. L. 97-446, title III, Sec. 308, Jan. 12, 1983, 96 Stat. 2360.)

19 U.S.C. § 2608. Temporary Disposition of Materials and Articles Subject to this Chapter

Pending a final determination as to whether any archaeological or ethnological material, or any article of cultural property, has been imported into the United States in violation of section 2606 of this title or section 2607 of this title, the Secretary shall, upon application by any museum or other cultural or scientific institution in the United States which is open to the public, permit such material or article to be retained at such institution if he finds that –

(1) sufficient safeguards will be taken by the institution for the protection of such material or article; and

(2) sufficient bond is posted by the institution to ensure its return to the Secretary.

(Pub. L. 97-446, title III, Sec. 309, Jan. 12, 1983, 96 Stat. 2360.)

19 U.S.C. § 2609. Seizure and Forfeiture

(a) In general

Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of section 2606 of this title or section 2607 of this title shall be subject to seizure and forfeiture. All provisions of law relating to seizure, forfeiture, and condemnation for violation of the customs laws shall

apply to seizures and forfeitures incurred, or alleged to have been incurred, under this chapter, insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of this chapter.

(b) Archaeological and ethnological material

Any designated archaeological or ethnological material which is imported into the United States in violation of section 2606 of this title and which is forfeited to the United States under this chapter shall –

(1) first be offered for return to the State Party;

(2) if not returned to the State Party, be returned to a claimant with respect to whom the material was forfeited if that claimant establishes –

(A) valid title to the material,

(B) that the claimant is a bona fide purchaser for value of the material; or

(3) if not returned to the State Party under paragraph (1) or to a claimant under paragraph

(2), be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

No return of material may be made under paragraph (1) or (2) unless the State Party or claimant, as the case may be, bears the expenses incurred incident to the return and delivery, and complies with such other requirements relating to the return as the Secretary shall prescribe.

(c) Articles of cultural property

(1) In any action for forfeiture under this section regarding an article of cultural property imported into the United States in violation of section 2607 of this title, if the claimant establishes valid title to the

article, under applicable law, as against the institution from which the article was stolen, forfeiture shall not be decreed unless the State Party to which the article is to be returned pays the claimant just compensation for the article. In any action for forfeiture under this section where the claimant does not establish such title but establishes that it purchased the article for value without knowledge or reason to believe it was stolen, forfeiture shall not be decreed unless –

(A) the State Party to which the article is to be returned pays the claimant an amount equal to the amount which the claimant paid for the article, or

(B) the United States establishes that such State Party, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from an institution in the United States without requiring the payment of compensation.

(2) Any article of cultural property which is imported into the United States in violation of section 2607 of this title and which is forfeited to the United States under this chapter shall –

(A) first be offered for return to the State Party in whose territory is situated the institution referred to in section 2607 of this title and shall be returned if that State Party bears the expenses incident to such return and delivery and complies with such other requirements relating to the return as the Secretary prescribes; or

(B) if not returned to such State Party, be disposed of in the manner prescribed by law for articles forfeited for violation of the customs laws.

(Pub. L. 97-446, title III, Sec. 310, Jan. 12, 1983, 96 Stat. 2360.)

19 U.S.C. § 2610. Evidentiary Requirements

Notwithstanding the provisions of section 1615 of this title, in any forfeiture proceeding brought under this chapter in which the material or article, as the case may be, is claimed by any person, the United States shall establish –

(1) in the case of any material subject to the provisions of section 2606 of this title, that the material has been listed by the Secretary in accordance with section 2604 of this title; and

(2) in the case of any article subject to section 2607 of this title, that the article –

(A) is documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in a State Party, and

(B) was stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party concerned, whichever date is later.

(Pub. L. 97-446, title III, Sec. 311, Jan. 12, 1983, 96 Stat. 2361.)

19 U.S.C. § 2611. Certain Material and Articles Exempt from this Chapter

The provisions of this chapter shall not apply to –

(1) any archaeological or ethnological material or any article of cultural property which is imported into the United States for temporary exhibition or display if such material or article is immune from seizure under judicial process pursuant to section 2459 of title 22; or

(2) any designated archaeological or ethnological material or any article of cultural property imported into the United States if such material or article –

(A) has been held in the United States for a period of not less than three consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of this chapter, but only if –

(i) the acquisition of such material or article has been reported in a publication of such institution, any regularly published newspaper or periodical with a circulation of at least fifty thousand, or a periodical or exhibition catalog which is concerned with the type of article or materials sought to be exempted from this chapter,

(ii) such material or article has been exhibited to the public for a period or periods aggregating at least one year during such three-year period, or

(iii) such article or material has been cataloged and the catalog material made available upon request to the public for at least two years during such three-year period;

(B) if subparagraph (A) does not apply, has been within the United States for a period of not less than ten consecutive years and has been exhibited for not less than five years during such period in a recognized museum or religious or secular monument or similar institution in the United States open to the public; or

(C) if subparagraphs (A) and (B) do not apply, has been within the United States for a period of not less than ten consecutive years and the State Party

concerned has received or should have received during such period fair notice (through such adequate and accessible publication, or other means, as the Secretary shall by regulation prescribe) of its location within the United States; and

(D) if none of the preceding subparagraphs apply, has been within the United States for a period of not less than twenty consecutive years and the claimant establishes that it purchased the material or article for value without knowledge or reason to believe that it was imported in violation of law.

(Pub. L. 97-446, title III, Sec. 312, Jan. 12, 1983, 96 Stat. 2362.)

19 U.S.C. § 2612. Regulations

The Secretary shall prescribe such rules and regulations as are necessary and appropriate to carry out the provisions of this chapter.

(Pub. L. 97-446, title III, Sec. 313, Jan. 12, 1983, 96 Stat. 2363.)

19 U.S.C. § 2613. Enforcement

In the customs territory of the United States, and in the Virgin Islands, the provisions of this chapter shall be enforced by appropriate customs officers. In any other territory or area within the United States, but not within such customs territory or the Virgin Islands, such provisions shall be enforced by such persons as may be designated by the President.

(Pub. L. 97-446, title III, Sec. 314, Jan. 12, 1983, 96 Stat. 2363.)

APPENDIX H

FEDERAL REGULATIONS

Title 19. Customs Duties

Cultural Property

SOURCE: Sections 12.104 through 12.104i issued by T.D. 86-52, 51 FR 6907. Feb. 27, 1986, unless otherwise noted.

§ 12.104 Definitions.

For purposes of §§12.104 through 12.104:

(a) The term, *archaeological or ethnological material of the State Party* to the 1970 UNESCO Convention means –

(1) Any object of archaeological interest. No object may be considered to be an object of archaeological interest unless such subject –

(i) Is of cultural significance;

(ii) Is at least 250 years old; and

(iii) Was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water or in addition to paragraphs (a)(1) (i) and (ii) of this section.

(iv) Meets such standards as are generally acceptable as archaeological such as, but not limited to, artifacts, buildings, parts of buildings, or decorative elements. without regard to whether the particular objects are discovered by exploration or excavation;

(2) Any object of ethnological interest. No object may be considered to be an object of ethnological interest unless such object –

(i) is the product of a tribal or nonindustrial society, and

(ii) Is important to the cultural heritage of a people because of its distinctive charactenstics, comparative rarity, or its contribution to the knowledge of the origins, development or history of that people;

(3) Any fragment or part of any object referred to in paragraph (a) (1) or (2) of this section which was first discovered within, and is subject to export control by the State Party.

* * *

APPENDIX I

* * *

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel, vehicle, or aircraft, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

[Filed 02/25/15]

Civil No. CCB-13-1183

UNITED STATES OF AMERICA,

Plaintiff,

v.

THREE KNIFE-SHAPED COINS, TWELVE CHINESE COINS, AND SEVEN CYPRIOT COINS,

Defendants.

SECOND AMENDED ANSWER TO
VERIFIED COMPLAINT FOR FORTEITURE

Pursuant to leave granted in the Court's letter to counsel dated February 12, 2015, Claimant, the Ancient Coin Collectors Guild[1] (the "Guild" or "Claimant"), as and for its Second Amended Answer in the above-referenced action, responds, upon information and belief, to each numbered paragraph of the Verified Complaint for Forfeiture (the "Complaint") of Plaintiff United States of America ("Plaintiff' or the "Government") as follows:

---

[1] The Guild is a nonprofit 501(c)(4) organization. It has twenty-two (22) affiliate member organizations and advocates for the interests of thousands of ancient coin collectors and hundreds of small businesses of the numismatic trade. Its website can be found at http://www.accg.us/home.aspx.

NATURE OF THE ACTION

1. The Guild admits that Plaintiff seeks to invoke the jurisdiction of the Court under the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2601 *et seq.* and its implementing regulations, but Claimant otherwise denies the existence of facts giving rise to the claims alleged in the Complaint.

THE DEFENDANTS *IN REM*

2. The Guild admits that the defendant property is a packet of ancient coins, but notes there is a discrepancy between the number of coins listed on the commercial invoice accompanying the shipment of coins the Guild imported and the number of coins subject to forfeiture. Claimant is therefore without knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 2 of the Complaint.

3. The Guild admits that it imported the defendant property and that the defendant property was detained and seized on or about the dates alleged, but is without knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 3 of the Complaint.

JURISDICTION AND VENUE

4. The Guild admits that the cited provisions of the U.S. Code purport to grant this Court jurisdiction over the defendant property. However, the Court of International Trade also has "embargo jurisdiction" that may supersede that jurisdiction. The Guild submits that, depending on legal rulings that have been or may be made, the restrictions at issue may be said to constitute an embargo on all Cypriot and Chinese coins on the designated lists and the Court of International Trade may have proper jurisdiction.

5. The Guild admits that the cited provisions of the U.S. Code purport to grant this Court jurisdiction over the defendant property. However, the Court of International Trade also has "embargo jurisdiction" that may supersede that jurisdiction. The Guild submits that, depending on legal rulings that have been or may be made, the restrictions at issue may be said to constitute an embargo on all Cypriot and Chinese coins on the designated lists and the Court of International Trade may have proper jurisdiction.

6. The Guild admits that venue is proper under the cited provisions of the U.S. Code. However, the Court of International Trade also has "embargo jurisdiction" that may supersede the jurisdiction of this Court. The Guild submits that, depending on legal rulings that have been or may be made, the restrictions at issue may be said to constitute an embargo on all Cypriot and Chinese coins on the designated lists and the Court of International Trade may have proper venue.

BASIS FOR FORFEITURE

7. Admitted.

8. Admitted.

9. Denied.

10. Admitted.

11. Admitted in part and denied in part. Claimant admits that the cited provisions of U.S. Code set forth documentation importers may produce to avoid seizure of their cultural goods pre-litigation, but states that for purposes of this forfeiture action that the Guild is entitled to contest the government's *prima facie* case with scholarly and other evidence showing that the import was lawful.

12. Denied.

13. Admitted in part and denied in part. Claimant admits all the Cypriot coins it imported are types listed as property subject to import restrictions, but denies that all the Chinese coins it imported are so listed. Claimant also denies that coins in trade are "archaeological material" under European Union ("E.U.") law binding on the Republic of Cyprus.

14. Admitted.

15. Admitted.

16. The Guild is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 16 of the Complaint.

17. Admitted in part and denied in part. The Claimant admits the Plaintiff seeks forfeiture of the defendant property under the cited provisions of the U.S. Code and otherwise seeks to assert various claims against Defendants *in rem,* but denies any allegation that the defendant property is properly subject to forfeiture.

FACTS

18. Admitted in part and denied in part. The Guild admits that on or about April 16, 2009, U.S. Customs and Border Protection ("CBP") officers detained the defendant property after the Guild's Customs broker explained to them that the Guild was importing ancient Cypriot and Chinese coins, but denies any suggestion that the Guild was trying to hide what was being imported.

19. The Guild admits that an invoice found with the defendant property listed each coin as having "no recorded provenance" and listed the "find spot" for each coin as "unknown," but denies the remaining

allegations contained in paragraph 19 of the Complaint.

20. Admitted.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Due Process Clause of the Fifth Amendment precludes any effort to alter the burden of proof established by Congress and thereby prejudice the Claimant's rights to defend its property from forfeiture. Plaintiff's claims are barred in whole or in part because the government has not made out *a prima facie* case for forfeiture under 19 U.S.C. § 2610, which must be read in conjunction with §§ 2601, 2604. Those provisions require the government to establish that the defendant property was "first discovered within" and "subject to the export control" of either Cyprus or China before any burden shifts to Claimant.

THIRD AFFIRMATIVE DEFENSE

Even assuming the government has made out *a prima facie* case for forfeiture, Plaintiff's claims are barred in whole or in part because Claimant will

proffer scholarly evidence that will show by a preponderance of the evidence that the defendant property was exported from Cyprus or China before CPIA restrictions went into effect.

FOURTH AFFIRMATIVE DEFENSE

To the extent any Cypriot coins at issue were exported from Cyprus after the date CPIA restrictions went into effect, Plaintiff's claims are barred in whole or in part because import restrictions do not apply to cultural goods where they are not subject to "export control." 19 U.S.C. § 2601 (2). E.U. law binding on the Republic of Cyprus does not consider ancient coins in trade to be "archaeological objects" subject to export control, thereby making any import of the defendant property into the U.S. after the date restrictions went into effect still

FIFTH AFFIRMATIVE DEFENSE

To the extent any Cypriot coins at issue were exported from Cyprus after the date CPIA restrictions went into effect, Plaintiff's claims are barred in whole or in part because import restrictions do not apply to cultural goods that are not subject to "export control." 19 U.S.C. § 2601 (2). The export of such coins from the United Kingdom complied with E.U. law binding on the Republic of Cyprus, thereby making any import into the U.S. after the date of restrictions went into effect still lawful.

SIXTH AFFIRMATIVE DEFENSE

To the extent any Chinese coins at issue were exported from China after the date CPIA restrictions went into effect, Plaintiff's claims are barred in whole or in part because import restrictions do not apply to cultural goods that are not subject to "export control."

19 U.S.C. § 2601 (2). Any export of such coins from China more probably than not came through the People Republic of China's Special Administrative Regions of Hong Kong or Macao. Exports of ancient coins from both Hong Kong and Macao are not subject to controls, thereby making any import into the U.S. after the date of restrictions went into effect from these two free ports still lawful.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part because the government has not verified through the use of expert opinion whether each Chinese coin seized is of a type that appears on the designated list for China.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs claims are barred in whole or in part because regulations barring import of "coins of Cypriot type" or coins "from China" fail to provide the importer fair notice of the conduct that is forbidden or required under 19 U.S.C. §§ 2601, 2604 and 2610.

NINTH AFFIRMATIVE DEFENSE

Claimant intends to rely upon such other and further defenses as may become apparent during the pendency of this action, and reserves the right to seek to amend this Answer further to assert such defenses.

GENERAL DENIAL

The allegations of the Complaint not previously addressed in this Answer are hereby generally denied.

JURY DEMAND

The Guild respectfully demands a jury trial in this action.

WHEREFORE, the Guild requests that this Court:

1. Dismiss the Complaint in its entirety or enter judgment in Claimant's favor;

2. Deny all relief requested by Plaintiff;

3. Award Claimant its reasonable attorney's fees, costs and expenses incurred in litigating this action and the prior declaratory judgment action which was brought to enforce Claimant's rights to a judicial hearing; and

4. Grant Claimant such further relief as is just, warranted and proper under the circumstances.

Dated: February 25, 2015

Respectfully submitted,

/s/ Peter K. Tompa

Jason H. Ehrenberg (#16481)
Peter K. Tompa (#18673)
BAILEY & EHRENBERG PLLC
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pkt@becounsel.com

Attorneys for the Ancient Coin Collectors Guild

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 04/01/11]

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Case No. 1:10-cv-0322-CCB

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ANCIENT COIN COLLECTORS GUILD,

Plaintiff,

v.

U.S. CUSTOMS AND BORDER PROTECTION,
Department of Homeland Security, et al.

Defendants.

———

DEFENDANTS' SUPPLEMENTAL POST-HEARING CLARIFICATIONS REGARDING DELEGATED AUTHORITY, APA CONSIDERATIONS WITH RECENT FOURTH CIRCUIT DEVELOPMENT, ANCIENT COINS DISCOVERED WITHIN MODERN BOUNDARIES, AND REPORTS TO CONGRESS UNDER THE CULTURAL PROPERTY IMPLEMENTATION ACT

The Defendants offer the following brief submission in order to clarify their position on some issues that arose during the hearing in *ACCG v. US. Customs and Border Protection. et al.,* held on February 14, 2011. In particular, the Defendants submit that this litigation should be considered in the context of two distinct questions: 1) whether the regulation imposing import restrictions on ancient coins is valid, and 2) whether the import restrictions apply to the particular coins

that ACCG attempted to import into the United States.

The second question is reached only if the Court first finds that the regulation itself is valid, and is most properly addressed in a subsequent forfeiture proceeding.

* * *

D. "First Discovered Within" as Defined by the CPIA

The Defendants further wish to clarify that import restrictions can only apply to objects that fit within one of the categories of the designated list, that were discovered within the modern boundaries of the State with which the MOU has been concluded, and that are subject to the export controls of that State. The Defendants have never suggested otherwise. See Def's Reply at p. 9. The CPIA itself defines "archaeological or ethnological material", in part, as:

> (C) ... any object ... which was first discovered within, and is subject to export control by, the State Party [that is, the country with which the United States has entered into an MOU or bilateral agreement.]

19 U.S.C. § 2501(2)(C). However, the question of place of discovery of any particular objects that are imported, or attempted to be imported, into the United States is relevant only once the import restrictions have been found to be valid and the government has moved to forfeit particular objects that arc imported or attempted to be imported.

E. Prospective Forfeiture Action

If the Court determines that the import restrictions are valid, then the forfeiture action can proceed. While

it is premature to analyze such an action at this ‘me, it is possible to outline the procedural aspects of forfeiture.

The procedural aspects particular to forfeiture under the CPIA are well laid out in *U.S v. Eighteenth Century Peruvian Oil on Canvas Painting,* 597 F. Supp. 2d 618, 622-23 (E.D. VA 2009). The court stated, “in a CPIA forfeiture action, the United States bears the initial burden to show that the seized property is listed in accordance with 19 U.S.C. § 2604 and properly subject to the import restrictions of 19 U.S.C. § 2606. Once the Government makes this initial showing, the burden of proof then shifts to the Claimant to establish, by a preponderance of the evidence, that the property is not subject to forfeiture, or to establish any applicable affirmative defense.” Id. at 623.

The court then explained in greater detail that the government establishes its *prima facie* case by demonstrating that the materials at issue appear on the designated list and were exported from a State that has a bilateral agreement with the United States. In that case, the government established these facts, in part, through the use of expert testimony (including an affidavit submitted by a U.S. Department of Justice attorney). However, exactly what level of expert testimony is required should be considered in the forfeiture proceeding, keeping in mind that the government must meet its burden only by the standard of probable cause. Once the government makes its *prima facie* case, the burden shifts to the importer to rebut this evidence or to establish that it is entitled to an affirmative statutory exemption by a preponderance of the evidence.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 07-2074 (RJL)

ANCIENT COIN COLLECTORS GUILD et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE,

Defendant.

DECLARATION OF JAY I. KISLAK

1. I was appointed by President George W. Bush to serve as the Chairman of the United States Cultural Property Advisory Committee ("CPAC"). I served in that capacity from 2003 to 2008. During that period, CPAC reviewed among others applications by the People's Republic of China for new import restrictions on cultural artifacts and requests made by the Republic of Italy and the Republic of Cyprus for the extension of then current restrictions.

2. As Chairman of CPAC, I became generally familiar with the operation of U.S. law related to the imposition of import restrictions on cultural artifacts, including the Convention on Cultural Property Implementation Act ("CPIA").

3. CPAC was constituted under the CPIA to recommend an informed balance between efforts to control

looting at archeological sites and the legitimate international exchange of cultural artifacts.

4. The U.S. Department of State Bureau of Educational and Cultural Affair's Cultural Heritage Center acts as CPAC's secretariat. During my tenure as Chairman of CPAC, I became concerned about the secretive operations of the Cultural Heritage Center and its lack of transparency in processing requests for import restrictions made on behalf of foreign states. I believe this lack of transparency has hampered the ability of museums, private parties and others to make useful presentations to CPAC. I also believe that this lack of transparency has also hampered the ability of CPAC to provide recommendations to the executive branch about the best way to balance efforts to control looting at archeological sites against the legitimate international exchange of cultural artifacts.

5. I believe that the release of details of foreign requests for import restrictions could promote transparency and allow CPAC to be better able to make recommendations. I also believe that the release of CPAC's reports in full could also promote the same goals. I do not believe that release of this material after a decision has been made will discourage CPAC members from discussing the merits of each case. To the contrary, release of CPAC reports will allow interested parties to frame their arguments more effectively when import restrictions come up for renewal every five (5) years. In addition, release of this documentation will also promote the accountability of Cultural Heritage Center Staff to both CPAC and the public at large.

6. Release of more details about the Chinese, Italian and Cypriot requests at the time the requests were made could have encouraged better informed

public comment about the requests at CPAC's public sessions. Now that decisions on the Chinese request and the Italian and Cypriot renewal have been made, I fail to see any reason why this material should be withheld from the public any longer.

7. I am told that Section 303 (g) of the CPIA requires the State Department to report to Congress any differences between CPAC's recommendations and the State Department's ultimate decision to impose import restrictions. In this regard, the release of the most recent CPAC report related to Cyprus and its discussion about coins could clarify misleading information contained in official State Department documents.

8. I specifically recall the Cypriot request that then current import restrictions on other cultural artifacts be extended to coins was a matter of great public controversy. CPAC considered the question specifically and I recall a special vote being taken on this particular issue.

9. With that in mind, I have reviewed both an official State Department Press Release and a State Department report made pursuant to CPIA Section 303 (g) about the MOU with Cyprus. Copies of these documents have been attached to this declaration as Exhibits I and 2. I believe it is absolutely false to suggest in those materials that the State Department's decision to extend import restrictions to ancient coins was consistent with CPAC's recommendations. The full release of CPAC's recommendations with regard to coins could be in the public interest because it should clarify misleading information contained in official State Department documents.

10. I have read this statement and everything in it is true, accurate, and correct to the best of my knowledge. I have had the chance to make any corrections, additions, or deletions that I desire.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief. 28 U.S.C. § 1746.

Jay I. Kislak

Dated: April 20, 2009 Jay I. Kislak

APPENDIX M

Exhibit 1 to Kislak Declaration

[Filed 04/24/2009]

Civil No. 07-2074 (RJL)

ANCIENT COIN COLLECTORS GUILD, et al.,

v.

UNITED STATES DEPARTMENT OF STATE

Media Note
Office of the Spokesman
Washington, DC

July 20, 2007

U.S. and Cyprus Extend Agreement to Protect Archaeological and = Ethnological Heritage of Cyprus

Under Secretary of State for =olitical Affairs R. =icholas Burns and Ambassador of Cyprus to the United States Andreas =akouris held a ceremonial exchange of diplomatic notes today signifying =he extension of the Memorandum of Understanding (MOU) that protects =he rich archaeological and ethnological heritage of Cyprus. The MOU. which =ntered into force in 2002, is extended for an additional five years, effective July 16, 2007. Its continuation reflects the strong commitment of =he United States to help safeguard Cypriot heritage and offers the opportunity far ongoing cooperation to reduce further pillage, =hereby increasing opportunities for scientific study of intact sites. It =Ise illustrates the strength of US.-Cyprus bilateral relations.

The MOU enables the Department of Homeland Security (OHS) to =ontinue import restrictions on pm-Classical and Classical archaeological =bjects and Byzantine period ecclesiastical and ritual ethnological =Medal unless accompanied by an export permit issued by Cyprus. The =esignated list of categories of material restricted from import into the =nited States, has been published in the *Federal Register* DHS. =BR>

Byzantine ritual and ecclesiastical ethnological material such =s Icons, mosaics and frescos - ranging in date from approximately he 4th century A.D. through approximately the 15th century A.D. =llustrate the high degree of artistic achievement in Cyprus and include some of =he finest pieces of Byzantine art ever produced. The rich =rchaeological heritage of Cyprus illustrates the interaction of the island's =nhabitants with neighboring societies, while maintaining a uniquely Cypriot character. Much of the history of the island from the 8th =iliennium B.C. to approximately 330 A.D. can be understood only from =rchaeological remains, because historical texts are very rare.

With the extension of this MOU, OHS amended the designated list of restricted categories to include ancient coins of Cypriot types =roduced from the end of the 6th century B.C. to 235 A.D. Coins, = significant and inseparable part of the archaeological record of =he island, are especially valuable to understanding the history of =yprus.

This extension of the MOU is consistent with the recommendation =f the Cultural Property Advisory Committee, which is administered by the =ureau for Educational and Cultural Affairs. The MOU, the Designated =ist, and other information may be found at http://exchange=.state.gov/culprop/cyfactpc.html.

2007/615

APPENDIX N

Exhibit 2 to Kislak Declaration

[Filed 04/24/2009]

Civil No. 07-2074 (RJL)

ANCIENT COIN COLLECTORS GUILD, et al.,

v.

UNITED STATES DEPARTMENT OF STATE.

[SEAL]
United States Department of State
Washington, D.C. 20520
www.state.gov

AUG 29 2007

Dear Madam Speaker:

Pursuant to the requirement of section 303(g) of the Convention on Cultural Property Implementation Act, 19 U.S.C. 2602(g) ("the Act"), the Department is reporting actions taken to extend the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru"; and, to extend the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning the Imposition of Import Restrictions on Pre-Classical

and Classical Archaeological Objects and Byzantine Ecclesiastical and Ritual Ethnological Material."

These actions were taken pursuant to Presidential authorities conferred by the Act that were vested in the Secretary of State pursuant to E.O. 12555 of March 10, 1986 and the Foreign Affairs Reform and Restructuring Act of 1998. Delegation of Authority Nos. 234 (October 1, 1999) and 236-2 (May 8, 2000) further delegated these authorities to the Under Secretary for Public Diplomacy and Public Affairs and the Assistant Secretary for Educational and Cultural Affairs, respectively.

As provided by the Act and Article 9 of the 1970 UNESCO Convention on the illicit transfer of cultural property, Peru and Cyprus requested assistance from the United States to reduce the incentive for pillage of archaeological and ethnological material putting their cultural heritage in jeopardy. With respect to Peru, an MOU setting forth import restrictions first entered into force on June 9, 1997, for five years, and was extended in 2002 for an additional five years. With respect to Cyprus, an MOU setting forth import restrictions entered into force on July 16, 2002, for five years, and was amended in 2006 to include

The Honorable
Nancy Pelosi,
Speaker of the House of Representatives.

Byzantine material which, up to that time, had been under emergency protection. The Cultural Property Advisory Committee ("the Committee") reviewed the proposals to extend each MOU for an additional five years. After considering the findings and recommendations of the Committee, and pursuant to the requirements of section 303 of the Act with respect to

determinations to be made before extending or entering into an agreement with a State Party to impose import restrictions, final determinations were made to extend both MOUs. The Department exchanged diplomatic notes with each country in MOUs.

In fulfillment of the reporting requirement, I am pleased to forward copies of these notes extending and amending the MOUs with Peru and Cyprus, and the *Federal Register* notices promulgated by the Department of Homeland Security which is responsible for implementation of corresponding import restrictions. The Federal Register notice for Cyprus was amended by the Department of Homeland Security, in consultation with the Department of State, to include coins of Cypriot types which are also vulnerable to archaeological looting.

Sincerely,

/s/ Jeffrey T. Bergner
Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure; As stated.

[SEAL]
United States Department of State
Washington, DC 20520
www.state.gov

AUG 29 2007

Dear Mr. President:

Pursuant to the requirement of section 303(g) of the Convention on Cultural Property Implementation Act, 19 U.S.C. 2602(g) ("the Act"), the Department is reporting actions taken to extend the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru"; and, to extend the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning the Imposition of Import Restrictions on Pre-Classical and Classical Archaeological Objects and Byzantine Ecclesiastical and Ritual Ethnological Material."

These actions were taken pursuant to Presidential authorities conferred by the Act that were vested in the Secretary of State pursuant to E.O. 12555 of March 10, 1986 and the Foreign Affairs Reform and Restructuring Act of 1998. Delegation of Authority Nos.- 234.(October 1, .1999) and 236-2 (May 8, 2000) further delegated these authorities to the Under Secretary for Public Diplomacy and Public Affairs and the Assistant Secretary for Educational and Cultural Affairs, respectively.

As provided by the Act and Article 9 of the 1970 UNESCO Convention on the illicit transfer of cultural

property, Peru and Cyprus requested assistance from the United States to reduce the incentive for pillage of archaeological and ethnological material putting their cultural heritage in jeopardy, With respect to Peru, an MOU setting forth import restrictions first entered into force on June 9, 1997, for five years, and was extended in 2002 for an additional five years. With respect to Cyprus, an MOU setting forth import restrictions entered into force on July 16, 2002, for five years, and was amended in 2006 to include

The Honorable
Richard B. Cheney,
President of the Senate.

Byzantine material which, up to that time, had been under emergency protection. The Cultural Property Advisory Committee ("the Committee") reviewed the proposals to extend each MOU for an additional five years. After considering the findings and recommendations of the Committee, and pursuant to the requirements of section 303 of the Act with respect to determinations to be made before extending or entering into an agreement with a State Party to impose import restrictions, final determinations were made to extend both MOUs. The Department exchanged diplomatic notes with each country in order to effectuate the MOUs.

In fulfillment of the reporting requirement, I am pleased to forward copies of these notes extending and amending the MOUs with Peru and Cyprus, and the *Federal Register* notices promulgated by the Department of Homeland Security which is responsible for implementation of corresponding import restrictions. The Federal Register notice for Cyprus was amended by the Department of Homeland security, in consultation with the Department of State, to include coins of

Cypriot types which are also vulnerable to archaeological looting.

Sincerely,

/s/ Jeffrey T. Bergner
Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure: As stated.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No.: CCB-13-1183

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THREE KNIFE-SHAPED COINS, TWELVE CHINESE COINS, AND SEVEN CYPRIOT COINS,

Defendants.

DECLARATION OF ROBERT KORVER

1. I was appointed by President George W. Bush to serve as an expert in the international sale of cultural property on the United States Cultural Property Advisory Committee ("CPAC"). I served in that capacity from 2003 to 2009. During that period, CPAC reviewed applications by the People's Republic of China for new import restrictions on cultural artifacts and requests made by the Republic of Italy and the Republic of Cyprus for the extension of then current restrictions.

2. I have an extensive background in numismatics. I was the Director of Heritage Numismatic Auctions, Inc. from 1996 to 2003, and until 2015 I produced marketing and corporate communications for Heritage Auction Galleries. My previous numismatic experiences include work with the National Numismatic Collections of the Smithsonian Institution, National

Museum Of American History; Auction Director of Bowers & Ruddy Galleries, Inc.; NumusWest, Inc. of Pasadena, CA & Reston, VA, and Alkmaar Associates; Marketing Fellow at the Colonial Williamsburg Foundation; a program manager at the Franklin Mint; and as PC systems manager, director of marketing, and chief editorial writer at Coin Dealer Newsletter Publications.

3. In preparation for making this declaration, I reviewed the following documentation: (1) the Convention on Cultural Property Act, 19 U.S.C. §§ 2601 *et seq.;* (2) The Declaration of Jay Kislak, dated April 20, 2009; (3) The decision of the Fourth Circuit Court of Appeals in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection,* 698 F.3d 171 (4th Cir. 2012); (4) portions of a Transcript of March 21, 2011 Public Forum that I attended entitled, "The Cultural Property Implementation Act: Is it Working?"; (5) the Spink Invoice of Cypriot and Chinese coins that are the subject of this forfeiture action; and (6) the Expert Report of Douglas Mudd, dated August 20, 2015. It is my understanding that pertinent parts of all this material has previously been supplied to the Court in this action and that the Kislak Declaration was placed in the record before the 4th Circuit and specifically referenced in the Guild's opening brief and at oral argument before that Court.

4. As a CPAC member, I became generally familiar with the CPIA and the operation of U.S. law related to the imposition of import restrictions on cultural artifacts.

5. CPAC was constituted under the CPIA to recommend an informed balance between efforts to control looting at archeological sites and the legitimate international exchange of cultural artifacts. As part of its

duties, if CPAC recommends that the United States enter into or extend a current Memorandum of Understanding with a UNESCO State Party, CPAC must also provide advice as to what particular types of archaeological and ethnological artifacts should covered by such an agreement. *See* 19 U.S.C. § 2605 (f) (4) (B). CPAC is then charged with submitting a copy of its report to both the President and Congress (athough it unclear whether Congress receives these recommendations). *See id.* § 2605 (f) (6). In addition, the President (or his delagee) is then in turn to inform the Congress of any differences between the views and recommendations contained CPAC's report and the President's own actions and the reason for any departure from CPAC's recommendations. *See* 19 U.S.C. § 2602 (g) (2).

6. From my review of Mr. Kislak's declaration, the transcript of the public forum and my own personal recollection as a CPAC member when the Committee considered import restrictions on Cypriot coins, I can state unequivocally that CPAC voted against extending import restrictions to ancient coins of Cypriot types and that official documentation that suggests that CPAC supported extending such import restrictions to Cypriot coins is false and misleadingly.

7. I can also state that although the CPIA requires that CPAC be afforded a role to recommend what types of archeological or ethnological material may be subject to restrictions, thereafter CPAC was not afforded the opportunity to make a recommendation as to whether Chinese coins should be placed on any designated list associated with a MOU with the People's Republic of China.

8. Without revealing any details of what information CPAC specifically reviewed, I will note that

given the undisputable facts set forth in the Mudd Expert Report, CPAC could not conclude that Chinese and Cypriot coins of the types at issue here were first discovered within and subject to the export control of those two countries as required under 19 U.S.C. § 2601(2).

9. For these reasons, the Fourth Circuit has made a serious misstatement of fact when it stated that:

> "CPAC and the Assistant Secretary did consider where the restricted types may be generally found as part of the review of the Chinese and Cypriot requests. CBP listed the articles in question in the Federal Register by "type"—but only after State and CPAC had determined each type was part of the respective cultural patrimonies of China and Cyprus.... Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first discovered in those two countries and form part of each nation's cultural heritage." 698 F.3d at 182.

10. I have read this statement and everything in it is true, accurate, and correct to the best of my knowledge. I have had the chance to make any corrections, additions, or deletions that I desire.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief. 28 U.S.C. § 1746.

/s/ Robert Korver

Dated: May 22, 2016 Robert Korver

APPENDIX P

Mr. Peter Karl Tompa
Bailey & Ehrenberg PLLC
1015 18th Street, NW
Suite 204
Washington, DC 20036

Dear Mr. Tompa,

The following report contains my analysis of the historical evidence for the circulation of Chinese and Cypriot coins beyond the modern borders of the areas in which they were issued. I have also attached my CV and a list of my publications and exhibits.

Conclusion

Based on the historical evidence for the mass circulation of ancient Cypriot and Chinese coins outside of the present borders of those nations prior to the 20th century, it is impossible to assert that all such coins without provenance should be regarded as illegally exported cultural property. In the cases of both Cyprus and China, coins of even the smallest denominations have been found outside of their areas of political control both modern and ancient. In the case of China historical evidence records the mass export of coins from an early date (9th-13th centuries) followed by other major exports of coins during the late 19th and early 20th centuries by Chinese emigrants, western archaeologists and collectors. In the case of Cyprus, the fact that ancient Cypriot coins can be found in ancient contexts outside of the island makes it difficult to convincingly assert that coins without documentation that have appeared on the market since 2007 must have come from Cypriot sources. In both cases, the coins in question are common bronze coins of low value that traditionally have not included provenance

precisely because they are common and have a low market value – it was not considered worth the time to maintain or establish provenance.

Analysis

The following is my response to the question of whether the Chinese and Cypriot coins at issue in this case circulated outside the modern borders of these two nations in significant numbers. It will demonstrate that there is ample evidence of the wide circulation of these coins in ancient as well as in modern times, well beyond the areas where they were created in large numbers and prior to the export restrictions placed on them by the respective MOUs. The Spink invoice list in this case has a total of 23 coins – 16 Chinese and 7 Cypriot. I will begin with the Chinese coinage and follow with the coins of Cyprus that appear on the Spink invoice.

In modern times, Chinese coins have been exported in huge numbers, just as they have been since at least the late 7th century. During the late 19th and early 20th centuries many westerners, especially missionaries created collections of Chinese coins which they brought home with them when they returned to their homes. Examples can be found n many major museum collections, including the Smithsonian's National Numismatic Collection and the ANA Edward C. Rochette Money Museum collection. The Spink invoice lists 16 Chinese coins – 7 unattributed pieces and 9 attributed to various periods of Chinese history from the 5th century BC through the 3rd century AD.

Chinese coins of the traditional small round bronze with square hole type (known generically as "cash" coins) served as the model upon which east Asian coins were based for 2000 years. Introduced in the 4th

century BC, they have been found in archaeological contexts throughout the region and beyond, including Australia, the Middle East, Central Asia, South Asia and Africa. [1] The wide distribution of these finds indicates that these coins were traded over vast distances for many centuries. Chinese coins of the Tang dynasty (618-907 AD) became the model for the first coinages issued in Japan, Korea, Vietnam and many other East Asian nations. "Coins" of earlier type, such as the knife and spade pieces in the Spink invoice are also found in contexts outside of China, such as Japan and Korea.[2]

Analysis of finds illustrates that previous to the introduction of native coinage based on the Tang model, these regions commonly used exported Chinese coins of the Wuzhu type introduced by the Han dynasty in 118 BC and issued in huge numbers for over 700 years. Cribb and Potts in their 1996 article "Chinese Coin finds from Arabia and the Arabian Gulf' show clear evidence from a number of coin hoards that during the 12th and 13th centuries Chinese coins dating from as early as the Han dynasty were being exported in long distance trade at a time (during the Song and Yuan dynasties) when Chinese coinage was being replaced at home by paper currency.[3]

This situation, in which Chinese coins of widely varying dates can be found together in hoards, is a

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[1] Eagleton, Catherine & Williams, Jonathan, *Money: A History* (London, The British Museum Press, 2007),135-140.

[2] Hartill, David, Chinese Cast Coins, Trafford Publishing, 2005, 63.

[3] Cribb, J. & Potts, D., "Chinese coin finds from Arabia and the. Arabian Gulf' in. Arabian archaeology and epigraphy, 1996: 7: 108-118.

result of the ancient practice of circulating these coins in "strings" of 100 to 1000 pieces. Since the coinage remained virtually the same in terms of weight and size there was no reason to remove them from circulation. Strings of cash even in the 20th century often included a wide range of coins from many different eras, including a few Han cash pieces. "The main problem for interpretation is the continuing circulation of Chinese coins for centuries after their first issue. For example, a hoard of exported coins buried in Japan before 1368 could contain coins ranging from the late second century BC to the early fourteenth century AD."[4]

Cyprus

The case of the Cypriot coins is quite different in that Cyprus is an island and, since the 2nd millennium BC has been closely integrated into the trade networks of the Eastern Mediterranean. Soon after coins were invented during the 7th century BC in Asia Minor, they began to be issued in Cypriot cities. The Spink invoice includes 7 Cypriot coins – 1 issued by King Ptolemy XIII Auletes (81-58 BC) and the rest issued while Cyprus was part of the Roman Empire.

As stated in an official Cypriot Government document it is impossible to pinpoint the site of origin of most Cypriot coins unless they were part of the small minority of pieces that come from properly recorded hoard finds. Even in cases where hoards have been recorded, Parks points out that the information recorded is often inadequate to identify specific coins – merely recording the issuing authority.[5] The reality of the

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[4] Ibid., 109.

[5] Parks, Danielle, *The Roman Coinage of Cyprus* (Nicosia, Cyprus Numismatic Society, 2004),

situation is that, since Cypriot coins have been circulating outside of Cyprus either in commerce or as part of collections since ancient times, it is impossible to assert that any given unprovenanced Cypriot coin or group of coins is legitimately subject to the MOU restrictions.

As stated by Danielle Parks, coins excavated from settlements and temples in Cyprus *"tend to be of low denominations, the sort that people drop and do not bother to retrieve. These numismatic finds are usually small bronzes, and frequently do not survive in good or even legible condition. Many excavation reports, particularly older or preliminary publications, do not discuss their numismatic evidence at all. Others often mention only the reign to which individual coins date and give no information regarding the mint of origin"*[6] Thus, most of these coins cannot be precisely identified individually or even identified to particular sites at all, suggesting that Cypriot authorities and their approved representatives do not consider the information from common coins within Cyprus contexts valuable enough to record – making the whole question of the cultural importance of the Cypriot coins in this case difficult to support.

During most of the Hellenistic period, the Ptolemaic dynasty of Egypt controlled Cyprus, issuing coins at several mints, especially Paphos and Salamis, for over 250 years. These coins circulated along with other Ptolemaic issues throughout the areas controlled by the Ptolemies including Cyprus, Egypt, Asia Minor and the Levant (modern Syria, Lebanon, Palestine and Israel) and have been discovered in hoards across the region.

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[6] Ibid., 138.

Cypriot coins during the period of Roman Imperial control were issued under the authority of the provincial governors on the same standard as the regular coinage of the empire. As such they were intended meet general local needs, but were also designed to be compatible within the regional trade of the eastern Roman Empire. Thus it is not surprising to find that Cypriot coin finds often consist of large numbers of Imperial Roman and provincial Roman coins from Asia Minor, Syria and the Levant as well as native Cypriot coinage.[7] This pattern applies in the provinces neighboring Cyprus as well, where hoard evidence, though limited, confirms the circulation of Cypriot coins among coins from a similar mix of sources as finds from Cyprus itself.[8]

Sources:

For Chinese coins and circulation:

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[7] Ibid., 140-141.

[8] Ibid., 150-161.

For Cypriot coins and circulation:

Amandry, Michael. *Coinage Production and Monetary Circulation in Roman Cyprus,* Nicosia, Bank of Cyprus Cultural Foundation, 1993

Flourentzos, Pavlos, Amendment to the Cypriot MOU, Appendix II, Coin Collections, Introduction, 5/14/2007, Nicosia, Cyprus, Department of Antiquities

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Scheidel, Walter, *The Monetary Systems of the Han and Roman Empires,* Princeton/Stanford Working Papers in Classics, Version 2.0 February 2008.

Thompson, Margaret, ed. *Inventory of Greek Coin Hoards* (New York, American Numismatic Society, 1973), online at http://coinhoards.org/

Submitted:

Date: 8/20/2015

By: /s/ [Illegible]

APPENDIX Q

UNCLASSIFIED

[SEAL]

UNITED STATES DEPARTMENT OF STATE

RELEASED IN PART B5

Bureau of Educational and Cultural Affairs
Washington, D.C. 20547

www.state.gov

May 29, 2007

ACTION MEMO FOR ASSISTANT SECRETARY POWELL

FROM: ECA – C. Miller Crouch

SUBJECT: Cultural Property: Extension of MOU with Cyprus

Recommendation

That you make the Determinations found at Tab B, relating to extending the cultural property Memorandum of Understanding between the United States and Cyprus for an additional five years. Coins are included in these Determinations. EUR also supports this recommendation (Tab D).

Approved [Illegible] Disapprove _____

Background

On July 16, 2002, the Government of the United States and the Government of Cyprus entered into a five-year Memorandum of Understanding Concerning the Imposition of Import Restrictions on Pre-Classical and Classical Archaeological Objects (MOU). The MOU was amended on August 11, 2006, to include

Byzantine Period Ecclesiastical and Ritual Ethnological Materials that had been protected under separate emergency action that was about to expire (Tab C). The amended MOU expires on July 16, 2007, unless extended. In diplomatic notes dated July and August 2006 (Tab D), the Ministry of Foreign Affairs of Cyprus advised the Embassy of the United States of Cyprus' interest in extending the MOU. In a diplomatic note dated January 19, 2007, Cyprus asked that the Designated List be amended to include coins in the category of metals.

Attachments:

Tab A – Additional Background

Tab B – Determinations

Tab C – MOU

Tab D – EUR Correspondence and Diplomatic Notes

Tab E – Report of the Cultural Property Advisory Committee

APPENDIX R

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 07/05/2017]

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Record No. 17-1625

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ANCIENT COIN COLLECTORS GUILD,

Claimant-Appellant,

v.

3 KNIFE-SHAPED COINS; 7 CYPRIOT COINS;
5 OTHER CHINESE COINS,

Defendants.

———

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MARYLAND AT BALTIMORE

———

BRIEF OF APPELLANT

———

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embargos[4] aimed at repatriating all archaeological material associated with that country's cultural patrimony.

STANDARDS OF REVIEW

The standard of review for decisions to strike pleadings and for grants of summary judgment is *de novo. See Johnson v. Am. Towers, LLC*, 781 F.3d 693, 706-707 (4th Cir. 2015); *Waste Mgm't Holdings, Inc. v. Gilmore*, 252 F.3d 316, 329 (4th Cir. 2001). The standard of review for evidentiary rulings is abuse of discretion, but constitutional questions are reviewed *de novo*. *United States v. Graham*, 796 F.3d 332, 366 (4th Cir. 2015).

ARGUMENT

A. The District Court Violated the Guild's Due Process Rights When It Excused the Government from Making out Important Elements of its *Prima Facie* Case for Forfeiture.

Congress, not the Courts, establishes burdens of proof in forfeiture actions. *See United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989). Here, Congress only authorized the detention, seizure and forfeiture of "designated" objects of archeological interest first discovered within and subject to export control of a specific UNESCO State Party, that are exported from that State Party after the date they were "designated"

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[4] These rulings also raise the specter that CPIA forfeiture actions fall under the Court of International Trade's "embargo jurisdiction" which would divest this Court's jurisdiction. *See* Eric Smithweiss, *A Race to the Courthouse?: Jurisdiction over Customs Admissibility Decisions*, 21 Tul. J. Int'l & Comp. L. 291, 307-308 (Spring 2013).

in regulations. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606. In contrast, the District Court assumed that the government made out its *prima facie* case for forfeiture merely by demonstrating that the coins at issue were of "designated" types exported from the State Party at some indeterminate date before import. (March 31st SJ Mem. at 14, JA 1376.) Such a ruling drastically alters the burden of proof Congress promulgated to the Guild's detriment, and hence, constitutes a *per se* violation of the Guild's due process rights. *See Francis v. Franklin*, 471 U.S. 307, 313-14 (1985) (State may not use evidentiary presumption to relieve government of burden of persuasion on every essential element of its case.); *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979) (same). *Accord Jenkins v. Smith*, 38 F. Supp. 2d 417, 422 (D. Md. 1999) (same), *aff'd sub nom. Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2000).

1. Congress only Authorized the Forfeiture of "Designated" Archeological Material First Discovered Within and Subject to the Export Control of a Specific UNESCO State Party that is Exported after the Date Such Types of Material were "Listed" in Regulations.

Congress imposed important limitations on the government's ability to seize and forfeit cultural goods based on considerations of time and place. Congress could have, but did not, place embargos on the import of designated archaeological material associated with an UNESCO State Party. Instead, Congress mandated that the government could only seize and forfeit designated archaeological material

* * *

4. Due Process Trumps Deference Based Political Question Doctrine.

The District Court's underlying assumption that Guild's coins were illicitly exported from Cyprus or China because they are of "designated" or "listed" types has no place where, as here, the Guild has asserted 5th Amendment constitutional claims. (*See* Second Amended Answer, Second and Eighth Affirmative Defenses, JA 115, 117.) A forfeiture action is an entirely different sort of animal than a declaratory judgment action. Here, constitutional due process claims come to the fore which trump any claim that political question doctrine[9] somehow excuses the government from establishing each element of its *prima facie* case. *See ACCG v. CBP*, 801 F. Supp. 2d at 411. *Accord Internat'l Refugee Assistance Project v. Trump*, 2017 U.S. App. LEXIS 9109, *89 (4th Cir. May 25, 2017) (*en banc*), ("The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution."), *cert. granted* 582 U.S. ___ (2017); *Hawaii v. Trump*, 2017 U.S. App. LEXIS 10356, *46 (9th Cir. June 12, 2017) (per curiam) ("It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie."), *cert. granted* 582 U.S. ___ (2017); *Bancoult*

[9] Even if the Guild did not raise constitutional concerns, a forfeiture action raises far different issues than the Guild's DJ Action. *See Zivotofsky v. Clinton*, 566 U.S. 189 (2012). *Zivotofsky* teaches that Courts must assess any "foreign policy" considerations impacting justiciability solely with regard to the issues directly before the Court. *Id.* at 194-196. Surely, the government cannot seriously maintain that "foreign policy considerations" preclude requiring the government to make out each element of its *prima facie* case, particularly where the Guild's loss of its property rights are at stake.

v. McNamara, 445 F.3d 427, 435 (D.C. Cir. 2006) ("[C]laims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions. [A] challenge to the constitutionality of the manner in which an agency sought to implement an earlier policy pronouncement by the President could be justiciable, even if other challenges to the policy or its implementation might be barred.") (internal quotations and citations omitted.); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934 (D.C. Cir. 1988) ("[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."); *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889, *15-16 (E.D. Va. Feb. 13, 2017) ("Maximum power does not mean absolute power. Every presidential action must still comply with the limits set by Congress' delegation of power and the constraints of the Constitution, including the Bill or Rights."); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 68-69 (D.D.C. 2014) (Court concludes that the political question doctrine does not bar its review of plaintiffs' complaint and that plaintiffs have stated a claim that defendants violated plaintiff's due process rights.); *Aviation and General Ins. Co. v. United States*, 2015 U.S. Claims LEXIS 656, *24-27 (Fed. Cl. May 26, 2015) (Court rejects justiciability challenge to Fifth Amendment taking claim.) Thus, the District Court's rulings based on deference to government decision-making cannot excuse the government from making out all elements of its *prima facie* forfeiture case or providing importers fair notice of conduct forbidden or required.

(a) The District Court Should Have Considered Whether the Designations at Issue Were Made in Good Faith.

The Guild has already established that the mere fact that certain of its coins are of types that appear on the designated list cannot form the sole basis for seizure and forfeiture. Even if such an assumption was proper, however, it must be predicated on good faith decision-making. Here, the District Court ignored the Guild's good faith allegations that the decision-making imposing import restrictions on the coins at issue was made in bad faith. These allegations include:

- State Department Cultural Heritage Center staff worked behind the scenes with members of the Archaeological Institute of America ("AIA") and the Cyprus American Archaeological Research Institute to engineer new import restrictions on ancient coins. (Second Tompa Dec., Ex. A, JA 1293-1304.)
- After CPAC rejected a last minute effort to add import restrictions on coins, advocates for import restrictions redoubled their efforts by taking the matter to Under Secretary of State Nicholas Burns who was to receive an award from a Greek Cypriot lobbying group. (Public Forum, JA 66-70; Kislak Dec., JA1119-54; Korver Dec., JA 1031-34; Second Tompa Dec., Ex. C, JA 1307-11.)
- Burns' deputy wrote to Burns' subordinate, Assistant Secretary of State Dina Powell, the decision-maker, in support of import restrictions on coins one day after Burns received the award. (Second Tompa Dec., Ex. D, JA 1313.)

- Staff only provided Powell with a false choice of either allowing the current agreement with Cyprus to lapse or extending it with new restrictions on coins. (*Id.*, Ex. E, JA 1314-21.)
- At the time Powell made the decision, there was at least an appearance of conflict of interest because she had already accepted a job with Goldman Sachs, an investment bank with business relationships with Greece (and likely Cyprus). (*Id.,* Ex. B, G, JA 1305-06, 1330-34.)
- Powell was recruited by and worked directly for John F.W. Rogers, Goldman's Chief of Staff. Rogers is the spouse of Deborah Lehr, the President of the Antiquities Coalition, an AIA Trustee, and a member of the AIA's "Cultural Heritage Policy Committee." (*Id.,* Ex. H, I, J, K, L, JA 1335-47, 1348-54.)
- In promulgating restrictions on specific coin types in response to Powell's decision restricting coins in general, there was no effort to determine what, if any, particular coins of Cypriot type circulated exclusively within Cyprus. Instead, CBP and State simply conflated where such coins were made with where they are found. (Korver Dec., JA 1331-34; Cypriot Government Admission, JA 57-58.)
- The State Department then misled Congress and the public about CPAC's true recommendations about coins in official government reports. (Kislak Dec., JA 1119-54; Korver Dec., JA 1331-34.)
- With regard to Chinese import restrictions, CPAC was never allowed to consider whether

import restrictions should be imposed on coins. (Korver Dec., JA 1033.)

Given the Guild's 5th Amendment due process claims, the District Court should have considered these allegations before assuming that in "designating" the coins at issue, the government had considered whether such coins were "first discovered within" and were "subject to export control by" Cyprus and China. *Int'l Refugee Assistance Project*, 2014 U.S. App. LEXIS 9109, *85 *quoting McCreary v. ACLU*, 545 U.S. 844, 861 (2005) ("Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and the government purpose is a good deal of the constitutional inquiry.").

B. CBP Regulations and Guidance Do Not Provide Fair Notice of Conduct that is Forbidden or Required.

The Guild is entitled to "fair notice" of conduct that is forbidden or required. *Federal Communications Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). *Accord County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001) ("Due process requires that before a criminal sanction of significant civil or administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible."); *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008) (Government seizure of shark fins improper because neither applicable statute nor regulations provided notice to Defendant that shark fins could be seized from a vessel because it would be considered a fishing boat); *United States v. General Elec. Co. v. United States Environmental Protection*

Agency, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (case relates to environmental regulations concerning the disposal of PCB's; court observes that "fair notice"

Guild's Reply Brief
Begins on Following Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 09/28/2017]

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Record No. 17-1625

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

ANCIENT COIN COLLECTORS GUILD,

Claimant-Appellant,

v.

3 KNIFE-SHAPED COINS; 7 CYPRIOT COINS;
5 OTHER CHINESE COINS,

Defendants.

———

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MARYLAND AT BALTIMORE

———

REPLY BRIEF OF APPELLANT

———

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ensuring that the executive branch preserves the "independent judgment" of the United States regarding "the need and scope of import controls." (Guild's Opening Brief at 4-6.) CPAC's recommendations – including advice to U.S. Customs and Border Protection ("CBP") about the content of designated lists – are not to be taken lightly. (*Id.* at 5.) At a bare minimum, the serious questions the Guild raised about the integrity of the process set forth in its Opening Brief at 29-31 suggest that the government should be strictly held to its proofs before the Guild's property is forfeited.[5]

(c) Due Process Requires the Government to be Put Strictly to its Proofs.

Once again, the government has no response to the serious due process concerns the Guild has raised (Guild's Opening Brief at 16-34.) other than to ignore them, mischaracterize them or to claim that the Fourth Circuit has already decided all the issues. (Opposition Brief at 29-34, 62-64.)

The Guild has raised two (2) related Fifth Amendment due process claims applicable to the government's efforts to forfeit the Guild's coins:

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[5] Although the government may belittle the Guild's concerns about the integrity of the process, the same concerns that prompted two (2) former CPAC members to take the highly unusual step of filing court declarations also encouraged amicus filings in both this case and the DJ Action. Moreover, similar concerns have prompted academic comment about this "disjunction" between government policy and law. *See* Stephen K. Urice & Andrew Adler, *Resolving the Disjunction Between Cultural Property Policy and the Law: A Call for Reform*, 64 Rutgers Law Review 117 (Fall 2011).

1. Due process precludes altering the burden of proof to the Guild's detriment; and
2. Due process also precludes seizure and forfeiture based on regulations and guidance that contradict the plain meaning of the CPIA.

Although the government claims otherwise, holding for the Guild on either of these due process claims could not preclude the State Department from imposing import restrictions on coins or CBP from placing coins on a designated list. By its very nature, a forfeiture action simply cannot be used to seek the same sort of wide-ranging relief the Guild sought in *ACCG v. CBP*. *See* Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 7-14 at 323 (Juris 2013). Rather, ruling for the Guild would simply encourage CBP to do a far better job in enforcing such import restrictions solely on coins that are illicitly removed from countries where they were "first discovered" after the effective date of the regulations, i.e., what the CPIA already requires.[6]

[6] Congress has recently reiterated these limitations on forfeiture of cultural goods. As set forth in the Amicus Brief of the Professional Numismatists Guild, the American Numismatic Association and the International Association of Professional Numismatists at 13, import restrictions imposed under statute in response to looting associated with Syria's civil war take pains to limit otherwise breathtakingly broad restrictions to artifacts "unlawfully removed from Syria on or after March 15, 2011." 81 Fed. Reg. 53916-21 (Aug. 15, 2016). As an aside, the date in question—set forth by statute—relates to the date the Syrian civil war began. In contrast, CPIA restrictions are not retroactive, i.e., they apply to artifacts exported from a State Party after the date restrictions are announced in the Federal Register. *See* 19 U.S.C. § 2606.

(i) Due Process Precludes Altering the Burden of Proof.

The District Court simply glossed over the Guild's primary due process claim. (March 31st SJ Mem. at 30, JA 1392.) The Guild's Second Affirmative Defense[7] states,

> The Due Process Clause of the Fifth Amendment precludes any effort to alter the burden of proof established by Congress and thereby prejudice the Claimant's rights to defend its property from forfeiture. Plaintiff's claims are barred in whole or in part because the government has not made out a *prima facie* case for forfeiture under 19 U.S.C. § 2610, which must be read in conjunction with §§ 2601, 2604. Those provisions require the government to establish that the defendant property was 'first discovered within' and 'subject to the export control' of either Cyprus or China before any burden shifts to Claimant.

(Second Amended Answer, Second Affirmative Defense, JA 115. *See also id.* ¶ 12 (denying government allegations regarding *prima facie* case), JA 113.) The gravamen of this claim is that allowing the government to establish its *prima facie* case merely by showing the defendant coins are of types that appear on the designated list eliminates important time and place limitations on the government's ability to seize and forfeit

[7] Though not strictly "affirmative defenses" as such, the Guild pled these claims clearly so the government would be on notice of the Guild's intention to pursue these arguments in defense of its property. *See generally* Wright & Miller, 5 Fed. Prac. & Proc. § 1274 (2004).

defendant property. (*See supra.*) The effect of this shift is to impose the *probatio diabolica* or devil's proof on coin collectors as most historical coins lack the necessary provenance information for legal import once restricted. (*See* Sayles Dep., 61:2-64:9 (April 12, 2016), JA 661-65.) More importantly for our purpose here, excusing the government from making out each element of its *prima facie* case also alters the burden of proof established by Congress to the detriment of the Guild and similarly situated coin collectors and hence constitutes a *per se* violation of their due process rights. *See Francis v. Franklin*, 471 U.S. 307, 313-14 (1985) (State may not use evidentiary presumption to relieve government of burden of persuasion on every essential element of its case.); *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979) (same). *Accord Jenkins v. Smith*, 38 F. Supp. 2d 417, 422 (D. Md. 1999) (same), *aff'd sub nom. Jenkins v. Hutchinson*, 221 F.3d 679 (4th Cir. 2000).

(ii) Due Process Requires Fair Notice of Conduct Which is Forbidden or Required.

The District Court also glossed over the Guild's fair notice argument. (March 31st SJ Mem. at 30, JA 1392.) The Guild's Eighth Affirmative Defense states,

> Plaintiff's claims are barred in whole or in part because regulations barring import of "coins of Cypriot type" or coins "from China" fail to provide the importer fair notice of the conduct that is forbidden or required under 19 U.S.C. §§ 2601, 2604 and 2610.

(Second Amended Answer, Eighth Affirmative Defense, JA 117. *See also* JA 1159.)

This defense is directed at concerns with 19 C.F.R. § 12.104(a), a regulation that the District Court itself previously determined was contrary to law. *ACCG v. CBP*, 801 F. Supp. 2d 383, 407 n. 25 (D. Md. 2011). The Guild believes that 19 C.F.R. § 12.104(a) fails to provide importers with fair notice as required by both 19 U.S.C. §§ 2601, 2604, 2610 and due process, an issue that was never addressed in the DJ Action because the "government conced[ed] that the 'first discovered within' requirement applies to all CPIA import restrictions." 801 F. Supp. 2d at 407 n. 25. This constitutional claim finds ample precedential support. (Guild's Opening Brief at 31-32.) However, instead of addressing the Guild's claim on the merits, the government first attempts to divert the Court's attention to the clarity of descriptions of coin types on the "designated lists," an issue the Guild does not contest. (Opposition Brief at 62-64.) The government then adopts the circular reasoning of the District Court to the effect that creation of the designated list in itself somehow cures this constitutional fair notice problem. (*Id.*) As set forth in the Guild's Opening Brief at 22-23, such sophistry has no place here where the Guild's private property rights are at stake.

(d) Due Process Trumps Deference Based on Political Question Doctrine.

The government does not address the Guild's due process arguments on the merits for a simple reason. It cannot. A forfeiture action is an entirely different sort of animal than a declaratory judgment action. Here, as set forth in the Guild's opening brief at 27-31, constitutional due process claims come to the fore which trump any claim that political question doctrine somehow excuses the government from establishing

each element of its *prima facie* case or from providing fair notice. *Accord Internat'l Refugee Assistance Project v. Trump*, 857 F.3d 334, 601 (4th Cir. 2017) (*en banc*), ("The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution."), *cert. granted* 137 S. Ct. 2080 (2017). Thus, the *ACCG v. CBP* Court's "hands-off" approach cannot "foreclose" the Guild's Second and Eighth Affirmative Defenses, which set forth its Fifth Amendment Due Process claims.[8]

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[8] In any event, the Guild questions the continued vitality of the *ACCG v. CBP's* hands-off approach in light of the Supreme Court's rulings in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) ("*Zivotofsky I*") (requiring application of the "political question test" where the government raises foreign policy considerations to avoid judicial review) and *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) ("*Zivotofsky II*") (holding that the President's "recognition authority" is exclusive, but recognizing Congress' power to regulate commerce).

Zivotofsky I mandates that any claim that "foreign policy concerns" trump a court's obligations to construe the law must be strictly construed based on a thoroughgoing analysis focusing on the precise issue before the court. *Id.* at 194-96. Here, that precise issue is the burden of proof in a forfeiture action relating to so-called "cultural property" of a sort widely and legally collected here and abroad (including within Cyprus and China). (JA 1102.) It simply strains credulity to even remotely suggest that this issue is a "political question" beyond the decision-making authority of the Court. Similarly, *Zivotofsky II* undercuts any prospective argument that the executive branch may "re-write" the CPIA based on administrative convenience or even "foreign policy" concerns.

3. The Guild is Entitled to Summary Judgment Because the Government Failed to Make Out a *Prima Facie* Case.

The government was given every opportunity to make out all the elements of its *prima facie* case with fact or expert testimony, but failed to do so even though

* * *