RECORD NO. 17-1625

In The
United States Court of Appeals
For The Fourth Circuit

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 *AMICI CURIAE* THE ASSOCIATION OF DEALERS & COLLECTORS OF ANCIENT & ETHNOGRAPHIC ART, COMMITTEE FOR CULTURAL POLICY, INC. AND GLOBAL HERITAGE ALLIANCE IN SUPPORT OF APPELLANT AND REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, amicus curiae the Association of Dealers & Collectors of Ancient & Ethnographic Art states as follows:

1. The Association of Dealers & Collectors of Ancient & Ethnographic Art is a Virginia not-for-profit corporation and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

2. The Association of Dealers & Collectors of Ancient & Ethnographic Art has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.

3. The Association of Dealers & Collectors of Ancient & Ethnographic Art is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation and has been advised by Appellant that no publicly-held corporation has such an interest.

4. The Association of Dealers & Collectors of Ancient & Ethnographic Art is a trade association and knows of no publicly-held member whose stock or equity value could be affected substantially by the outcome of this proceeding.

Also pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, amicus curiae the Committee for Cultural Policy states as follows:

5. The Committee for Cultural Policy, Inc. is a Delaware not-for-profit corporation and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

6. The Committee for Cultural Policy, Inc. has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.

7. The Committee for Cultural Policy, Inc. is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation and has been advised by Appellant that no publicly-held corporation has such an interest.

8. The Committee for Cultural Policy, Inc. knows of no publicly-held member whose stock or equity value could be affected substantially by the outcome of this proceeding.

Also pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, amicus curiae the Global Heritage Alliance states as follows:

9. The Global Heritage Alliance is a Delaware not-for-profit corporation and is tax-exempt under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended.

10. The Global Heritage Alliance has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.

11. The Global Heritage Alliance is not aware of any publicly-held corporation that has a direct financial interest in the outcome of this litigation and has been advised by Appellant that no publicly-held corporation has such an interest.

12. The Global Heritage Alliance is a trade association and knows of no publicly-held member whose stock or equity value could be affected substantially by the outcome of this proceeding.

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INTEREST OF AMICI CURIAE

The Association of Dealers & Collectors of Ancient & Ethnographic Art ("the ADCAEA"), Committee for Cultural Policy, Inc. ("the CCP"), and Global Heritage Alliance ("the GHA") (collectively, "Amici Curiae") have a profound interest in this case because the international trade of ancient coins is an essential part of the research, study and understanding of world history. The ADCAEA is an organization dedicated to providing resources, education, networking, and support to advance the responsible and legal trading and collecting of ancient and ethnographic art. The CCP is a think tank formed to address an urgent public need– to reform US cultural policy. In 2013, the CCP published a White Paper, A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property, the first strategic review of policy from a museum and collector perspective, and sponsors academic conferences and symposia to bring educational programs on cultural policy to the public. The GHA is an advocacy organization representing the interests of collectors, museums, and the antiquities trade.

The ADCAEA, the CCP, and the GHA file this *amici curiae* brief with the consent of all parties in accordance with Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

RULE 29(a)(4)(E) STATEMENT OF INDEPENDENCE FROM PARTIES

(A) No party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and

(C) No person — other than The Association of Dealers & Collectors of Ancient & Ethnographic Art, the Committee for Cultural Policy, Inc., the Global Heritage Alliance, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The Amici Curiae are deeply concerned with the District Court's violation of the Ancient Coin Collector's Guild's ("ACCG") due process rights by failing to require the government to make out its *prima facie* case for forfeiture by demonstrating that the seized coins were "first discovered within" and "subject to the export control" of China or Cyprus. The Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601 *et seq.*, only authorizes the detention, seizure, and forfeiture of "designated" objects of archeological interest "first discovered within" and "subject to export control" of a State Party. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606.

ARGUMENT

I. THE DISTRICT COURT MISINTERPRETED THE GOVERNMENT'S BURDEN OF PROOF UNDER THE CPIA.

A. Congress only Authorized the Forfeiture of "Designated" Archeological Materials "First Discovered Within" and "Subject to Export Control" of a State Party.

The CPIA creates a mechanism whereby the President's Cultural Property Advisory Committee ("CPAC") can recommend that the Executive Branch impose import restrictions on categories of designated "archeological and ethnological materials" originating from a "State Party" to the 1970 UNESCO Convention. "Archaeological material" must be "first discovered within" and "subject to the export control" of a particular State Party. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606. If the CPAC determines that certain specified conditions are satisfied, those import restrictions are stated in bilateral memorandum of understanding between the United States and the State Party. After publication in the Federal Register, designated materials may be lawfully imported only if the importer provides an export certificate from that State Party or "satisfactory evidence" (as defined) establishing that the material was exported from the State Party prior to the date of publication. Thus, the CPIA only allows the government to seize and forfeit designated materials that are "first discovered within" and "subject to the export control" of a particular State Party and that satisfy the other definitions and conditions of the CPIA. This ensures that the import restrictions are

prospective in nature, specific to, and reflect the conditions obtaining in, a particular State Party, and do not impede the lawful cultural exchange of objects already circulating in the international art market.

Pursuant to 19 U.S.C. § 2606, import restrictions only apply to "designated archaeological material" exported "after the designation of such material under section 2604." "Designated archaeological material" means "archaeological material…of a State Party" that is "covered by an agreement that enters into force with respect to the United States" that is "listed by regulation under Section 2604…." 19 U.S.C. § 2601(7).

"Designated archaeological material" is a subset of a larger universe of "archaeological material" "of the State Party" that has not been "designated." Such "designated archaeological material" must still meet the requirements of "archaeological material" "of the State Party." Specifically, it must still be 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)(A)(C). This "first discovery" requirement is derived from the 1970 UNESCO Convention's own limited reach to objects "found within national territory" of a State Party. *See* 1970 UNESCO Convention, Art. 4.

Congress took special care to emphasize this "first discovery" requirement both when Customs and Border Protection ("CBP") writes regulations to

implement cultural property agreements and in all cases where the government seeks to forfeit such "designated archaeological material of the State Party." Section 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." 19 U.S.C. § 2604 (emphasis added).

The word "only" emphasizes the requirement that "designated archaeological material" must be only that material covered by the bilateral memorandum of understanding, i.e., "first discovered within" and "subject to export control by, the State Party." 19 U.S.C. § 2601(2)(A)(C). The word "shall" emphasizes the mandatory nature of this Congressional directive.

These limiting definitions are so important that Congress also altered the usual burden of proof in customs cases to apply them to the government's burden of proof in a CPIA forfeiture action. Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 11-2 (iii) at 456 n. 16 (Juris 2013). In any such forfeiture action, 19 U.S.C. § 2610 directs the District Court to place the burden squarely on the government to establish that any "designated archaeological material" was

"listed in accordance with Section 2604." As set forth above, Section 2604 in turn assumes that "the import restrictions" "are applied *only* to the archaeological and ethnological 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. 19 U.S.C. § 2601(2)(A)(C) (emphasis added). Thus, whatever discretion may be afforded to CBP in "designating" "archaeological material," Congress has imposed an independent obligation on the courts to ensure that such "designated" archaeological material was illicitly exported from the State Party.

Accordingly, to 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 hence was subject to the export control of the State Party for which restrictions were granted; and (3) was illegally removed from the State Party after those restrictions were granted. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606.

B. The District Court's Rulings Excusing the Government from Establishing Important Elements of its *Prima Facie* Case was an Error.

In upholding dismissal of the ACCG's Declaratory Judgment Action, this Court was careful to "express no view how the forfeiture process will unfold." 698 F.3d at 185. At the outset of this forfeiture action, however, the District Court struck the ACCG's amended answer *sua sponte* based on dicta from this Court's

decision that misquotes the applicable statutory provision in § 2604. (See June 3rd Mem., at 1, JA 105-06.) This Court, in dicta, described the government's burden of proof under 19 U.S.C. § 2610 (which incorporates Section 2604) and omitted any reference to Section 2604's requirement that import restrictions may only be applied to archaeological material covered by a bilateral memorandum of understanding, i.e., material that was "first discovered within" and "subject to export control by" China or Cyprus. Unfortunately, this Court's mischaracterization of the burden carried over to the District Court's analysis of the statutory language, which in turn led the District Court to hold that the government had made out its *prima facie* case at the outset of this litigation merely by alleging in the Forfeiture Complaint that the seized coins were of "listed" types. (See June 3rd Mem. at 1, JA 105 quoting *ACCG v. CBP*, 698 F.3d at 185.)

On summary judgment, the District Court belatedly acknowledged, "[a]s the Guild observes, the Fourth Circuit's discussion of the anticipated forfeiture action is dicta." (March 31st SJ Mem. at 7 n. 5.) Despite initially quoting § 2604 accurately, the District Court then cited the same misquote, this time asserting that it is "consistent with the District Court's approach in *United States v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618 (E.D. Va. 2009), which appears to be the sole decision regarding CPIA forfeiture proceedings based on the violation of 19 U.S.C. § 2606." (March 31st SJ Mem. at 10-13.) Thereafter, the District Court

mis-applied *Peruvian Oil's* requirement that the government show that the defendant property is "properly subject to import restrictions of 19 U.S.C. § 2606" (March 31st SJ Mem. at 13 n. 9.) by finding that the process of "listing" in itself satisfies that requirement. (*Id.*[1])

In *Peruvian Oil*, the government went well beyond relying on the "listing" itself and proffered the reports of three (3) expert witnesses, "two of which clearly state the opinion that the Defendant Paintings originated in Peru.[2]" 597 F. Supp. 2d at 623. Here, in contrast, the government simply relied on the "listing" itself in conjunction with the Spink invoice, even though that invoice denied any knowledge of the provenance or find spot of the coins in question.

Earlier, this Court was unwilling to undertake judicial review of executive department decisions to impose import restrictions on coins. However, in the context of this forfeiture action where private property may be taken from its

[1] The District Court mistakenly cited the undersigned counsel's expert opinion as supportive of its analysis. I was merely making assumptions based on the June 3rd Mem. as a predicate for my own, unrelated opinion. (*See* March 31st Mem. at 13 n. 9.)

[2] The term "first discovered within" has a narrower meaning for objects of "archaeological interest" at issue in this case than for objects of "ethnological interest." Objects of "archaeological interest" must be "normally discovered as a result of scientific excavation, clandestine or accidental digging or exploration on land or underwater." *See* 19 U.S.C. § 2601(2). In contrast, the *Peruvian Oil* case involved an ethnographic artifact, so "first discovery" did not include this additional qualification that relates to objects of "archaeological interest."

owner, Congress has explicitly directed the courts to ensure that any such "archaeological material of the State Party" is not only "listed" but that such material has been "listed" "in accordance with section 2604," *i.e.*, "first discovered within, and subject to export control by" a specific State party. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606.

CONCLUSION

The District Court violated the ACCG's due process rights by failing to require the government to make out its prima facie case for forfeiture by demonstrating that the seized coins were "first discovered within" and "subject to the export control" of China or Cyprus. The District Court's decision should be reversed and remanded for further proceedings consistent with the plain meaning of the "first discovered within" and "subject to export control" requirements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: July 12, 2017

/s/ Michael McCullough
Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of July, 2017, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 12th day of July, 2017, I caused the required copy of the Brief of *Amici Curiae* to be hand filed with the Clerk of the court.

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