Case 11-2012

In The

# United States Court of Appeals

## For The Fourth Circuit

ANCIENT COIN COLLECTORS GUILD,
*Plaintiff – Appellant*,
v.
U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY; COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES DEPARTMENT OF STATE; ASSISTANT SECRETARY OF STATE, Educational and Cultural Affairs,
*Defendants – Appellees*.

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

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**BRIEF OF AMICUS CURIAE**
**PROFESSIONAL NUMISMATISTS GUILD, INC.**
**IN SUPPORT OF APPELLANT ANCIENT COIN COLLECTORS GUILD**
**AND REVERSAL OF DISTRICT COURT ORDER OF DISMISSAL**

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## Rule 26.1 Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and Fourth Cir. Rule 26.1, amicus curiae Professional Numismatists Guild, Inc. ("PNG") submits this corporate disclosure statement.

(a) PNG is organized as a non-profit corporation and is not a publicly-held corporation or a publicly held entity.

(b) PNG has no parent company and no publicly-held company has a 10% or greater ownership in PNG.

(c) No publicly held company has a direct financial interest in the outcome of this litigation.

(d) No other publicly held legal entity has a direct financial interest in the outcome of this litigation.

(e) PNG is a trade association but does not have corporate members. No member's stock or equity value will be affected by the outcome of this proceeding, and PNG is not pursuing any corporate member's interest.

## Rule 29(c)(5) 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 PNG, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 11-2012

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|---|---|
| ANCIENT COIN COLLECTORS GUILD, Plaintiffs, | : |
| v. | : |
| UNITED STATES CUSTOMS AND BORDER PROTECTION et al., | : |
| Defendants. | : |

**BRIEF OF AMICUS CURIAE PROFESSIONAL NUMISMATISTS GUILD, INC.**

The Professional Numismatists Guild ("PNG") respectfully submits this *amicus curiae* brief to the Court.

## PNG's Interest in these Proceedings

PNG is the leading association of rare coin dealers and auction houses in the United States, and was incorporated in 1955 as a non-profit organization under section 501(c)(6) of the Internal Revenue Code. PNG's 300+ members include nearly all major U.S.-based specialists in rare coins as well as some non-U.S. dealers who do business in the U.S.

PNG members buy coins outside the U.S., either directly on buying trips abroad or from non-U.S. sources. Americans have collected and traded in coins for a long time, and coin dealers in particular have enjoyed the rights accorded to most other commercial actors to import their lawfully-purchased items into the U.S. irrespective of the views of any prior owners of those items. Even after passage of the Convention on Cultural Property Implementation Act ("CPIA"), PNG members imported coins without unnecessary hindrance or delay, it being well understood that coins in international trade are rarely the types of "plunder" that the CPIA was meant to deter.

The District Court decision in this case changes the rules, endorsing a radical departure by U.S. Customs from the CPIA regime. Under the District Court's interpretation of the CPIA, dealers would be required to prove where and when coins were originally "found" or else forfeit those coins to foreign governments. This is an impossible burden on dealers because coins typically come without documentation of their original "find spots", as the Government itself recognized while the CPIA was being debated in Congress. For all intents and purposes, very few coins claimed by foreign governments would ever qualify for entry given the district court's interpretation of the law. PNG, therefore, is supporting reversal of the district court and proper adherence to the CPIA.

## Summary of Argument

PNG is concerned about 10 words in the Convention on Cultural Property Implementation Act of 1983 (CPIA), prohibiting U.S. Customs from restricting importation of an item at a foreign country's request unless the item is **"first discovered within, and is subject to export control by"**, that country. The District Court found that unprovenanced coins which may have originated from China and Cyprus in ancient times are presumed to have been "first discovered within" and "subject to export control by" those countries for purposes of the CPIA. (Op. at 34, JA 460). That interpretation expands the CPIA's application far beyond that intended by Congress, and in doing so creates uncertainty among anyone wishing to import older coins to the United States.

The CPIA was designed to create a support system for countries attempting to protect and preserve their cultural property from looting and unauthorized export by denying looters a market in the United States. PNG supports those goals, and also supports the clear guidelines provided by the CPIA to market participants on the one hand, and to U.S. Customs on the other. But the District Court's interpretation of the CPIA allows U.S. Customs to seize ancient coins without any evidence whatsoever that those coins were "first discovered" within a foreign country subject to looting under the CPIA framework, or were "subject to export control" by that country. Rather, the importer is faced with the burden of proving

that these are *not* the case. Applying the CPIA in such a manner places an impossible burden upon U.S. dealers, and a presumption that a foreign country has superior right to coins lawfully purchased by U.S. citizens.

Ancient coins, because of their inherent transience, are an especially poor place to convert the CPIA from a law discouraging present-day looting into a device to assist foreign countries to gather all the coins that their ancestors may have manufactured and sent abroad in ancient times, and preventing Americans from trading in, collecting, and enjoying those coins. This Court should resist any urge to go beyond Congress' careful compromise, and should enforce the CPIA in accordance with the 10 key words.

**I – The Words "First Discovered Within and Subject to the Export Control of the State Party" Severely Limit the CPIA's Scope.**

Among the CPIA's many requirements is that a covered object be "[an] object of archaeological or ethnological material . . . which was first discovered within, and is subject to export control by, the State Party." 19 U.S.C. §2601(2)(C). The District Court presumed that *all* Chinese coins are "first discovered within" China, by defining "discovered" to mean "originated" or "manufactured". (Op. at 34, JA 460). Therefore, it found all Chinese coins are subject to CPIA seizures unless the importer can prove otherwise, *i.e.*, that either: 1) the objects somehow originated outside of China; or 2) the individual had permission to take the objects out of China, thereby allowing import into the U.S. under 19 U.S.C. §2606, which

permits importers to prove through documentary evidence that the goods in question were exported legally. *Id.*

The District Court's interpretation of §2601 is flawed for a number of reasons. First, it imposes a definition of "discovered" at odds with Congress' other use of that same word in the very same section of the CPIA, namely in requiring that an "object of archaeological interest [must have been] normally *discovered* as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater." 19 U.S.C. §2601(2)(C)(i)(III)(emphasis added).

Applying the District Court's definition of "discovered", §2601(2)(C)(i)(III) would be interpreted to read: "normally *originated* as a result of scientific excavation..." Such a requirement could not possibly have been intended. "A standard principle of statutory construction provides that identical words and phrases within the same statute should be given the same meaning." *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007). Clearly, Congress intended "discovered" to refer to where an object – such as a coin – is found, not where it was manufactured.[1] Therefore, there can be no

[1] *See* S. Rep. 97-564, 23, 1982 WL 25142, "'Archaeological material' includes any object . . . which normally has been discovered through scientific excavation, clandestine or accidental digging, or exploration on land or under water. Archaeological objects are usually found underground or under water, or are discovered through excavation, digging, or exploration."

presumption that a coin that was originally minted in China was "discovered" there for CPIA purposes.

Second, the District Court ignores the words "subject to export control by," which demonstrate beyond any doubt that Congress meant to include only coins discovered within the requesting foreign country (and in modern times[2]), because by definition only such coins could be subject to that country's export controls. For example, if Cypriot coins are unearthed in a field in France, the CPIA cannot restrict importation of such coins into the U.S. because Cyprus had no right to restrict the exportation of the coins from France. Assuming that Congress "says in statute what it means and means in statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992), the District Court's interpretation is contrary to the CPIA's plain meaning.

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[2] The District Court seemingly did not reach the issue of whether "first discovered within" means first discovered *within modern times*. (Op. at 33, JA 459). Congress must have so meant the provision, however, because it would be impossible to trace the path of these coins from ancient times. Moreover, as the CPIA applies only to coins subject to "export control by the State Party," Congress could not be referring to some long-ago nation of origin but rather the modern-day country which is not only party to the Convention the CPIA was implementing but is also requesting the return of its cultural property. Finally, the "subject to export control" requirement directly follows the "find-spot" requirement within the same sentence. Therefore, lacking indication to the contrary, the export control requirement should carry the same temporal elements as the find-spot requirement. Because the find-spot requirement applies to when the object was "first discovered" in modern times, the object must have been subject to the export control of the requesting State Party at the time it was removed from the country, in modern times, after the "first discovery". Any argument that the CPIA covers coins which left their country of origin decades or centuries ago would also have to face Congress' clear statement in ratifying the Convention that the U.S. would recognize only removals which took place after the Convention's entry into force. See Part IIa, *infra*.

Third, the District Court interpreted §2601 as placing the burden on coin importers to prove that their coins should be *excluded* from the CPIA by analogy to the §2606 "legal export" exception, rather than requiring the requesting country (alone or through U.S. Customs) to prove that the coins are *included* in the first place. But §2601 defines the scope of the CPIA itself, consistent with the general purposes articulated by Congress, and §2606 is irrelevant to that determination. It makes perfect sense under §2606 to require importers to come forward with evidence if the requesting country has already established that a coin (a) was discovered there; (b) was subject to that country's export control; and (c) was unlawfully exported. If the requesting country were not required to make at least a *prima facie* case with respect to those three facts, there would have been no need for the §2606 "exception".

Finally, and perhaps most importantly, the District Court's interpretation of §2601's "10 words" essentially writes them out of the statute altogether. Had Congress excluded the "first discovery" and "subject to export control" requirements, the CPIA would define covered archaeological material as "any object of archaeological interest . . . to the State Party." This is precisely how the District Court determined this provision should be read. But it is not the courts' role to delete language from a statute, and this Court should not do so.

## II – These Limits are Consistent with the CPIA's Legislative History.

Congress has a long and clear history of reluctance to permit the CPIA to impose unnecessary restrictions on the trade of archaeological objects.

### a. U.S. Reservations to the Convention on Cultural Property

The U.S. ratified the Convention, but did so with specific restrictions. The U.S. did not consider the treaty self-executing as did other countries, and attached both a reservation and multiple "understandings" to its ratification.[3] For example, objects listed as cultural property under the Convention did not automatically fall within the scope of the CPIA. Congress reserved the right to craft its own definition. With respect to coins in particular, the Convention includes any coin "more than one hundred years old,"[4] while under the CPIA an archeological object such as a coin must be more than 250 years old.

Nowhere is the U.S. attitude toward the Convention more clear – and more relevant to this case – than with respect to Article 13(d) of the Convention, by which each ratifying country agrees to allow fellow countries to "classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property . . . where it has been

[3] The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972) [Hereinafter 1970 Convention].

[4] Article 1(e) of the Convention includes "antiquities more than one hundred years old, such as inscriptions, coins" in the definition of "cultural property." The 1970 Convention, *supra* note 2, art. I. However, the CPIA states "no object may be . . . an object of archaeological interest unless such object . . . is at least two hundred and fifty years old." 19 U.S.C. §2601(2)(C)(i)(II).

exported." The U.S. applied two "understandings" to Article 13(d). First, that it applied only to "objects removed from the country of origin *after* the entry into force of this Convention for the states concerned." *Id.* at Declarations and Reservations, United States of America (emphasis added). Article 13(d) *Id.* at art. XIII(d). Second, that the "facilitate recovery of property" obligation refers to judicial actions in the "requested state" and that "such actions are controlled by the law of the requested State, the requesting State having to submit necessary proofs." *Id.*

Clearly, the U.S. was reserving to itself the right to determine which items should be subject to recovery from U.S. territory, and what "proofs" the foreign country would have to provide in order to obtain that recovery. These limits and others, reflecting the need to balance the Convention's requirements with America's traditional free-trade policies, form the core of the CPIA.

**b. Congress Enacts a Compromise Statute.**

The CPIA was enacted 11 years after the Convention entered into force, and with the purpose of reining in Customs, which by then was assuming all cultural property to be illegally exported cultural property.

> "[T]he CPIA was perhaps finally enacted only because it was perceived as a restraint of sorts on certain customs officers. These officials had deemed all archaeological materials that a foreign country had claimed were stolen to be subject to seizure under the National Stolen Property Act."

Barbara T. Hoffmann, Art and Cultural Heritage: Law, Policy and Practice, 160 (2006). Congress laid out clear parameters for Customs, the same parameters which govern PNG members' purchases of coins overseas, and which should govern this Court in interpreting the CPIA.

Congress was unambiguous: "U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations." S. Rep. 97-564, 25, 1982 WL 25142. The question of unprovenanced coins was specifically addressed in a hearing before the Subcommittee on Trade of the Committee on Ways and Means. "Cultural Property Treaty Legislation," Hearing before the House Subcommittee on Trade of the Committee on Ways and Means, 96th Cong., 1st session on HR 3403 (1979) at 8. The Department of State's Deputy Legal Advisor, Mark B. Feldman, stated:

> [Coins] may well come within the definition but we did not have coins in mind when we addressed this issue. I think as a practical matter, it would not be a serious problem. In most cases, it is impossible to establish the provenance of a particular coin or hoard of coins. Therefore, there would be no reason for the United States, in most cases, to list coins as one of the categories of objects of archaeological or ethnological interest that would be included in the agreement.

*Id.* State was stating the obvious: because it is impossible to establish provenance of coins, a foreign country would not be able to establish claims to particular coins

and there would be no purpose to including coins in the bilateral agreements by which foreign countries request return of archeological objects. This is a plain admission that coins can only be recovered if the foreign country can prove that the objects fell within the scope of the CPIA.

The CPIA, like the Convention, is not a device to gather cultural property from around the world to return to the country in which the object was first manufactured in ancient times, but to prevent modern-day archaeological discoveries from making it into another country after having evaded the efforts of domestic export authorities.

> The governments which have been victimized have been disturbed at the outflow of these objects to foreign lands, and the appearance in the United States of objects has often given rise to outcries and urgent requires for return by other countries. The United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.

S. Rep. 97-564, 22, 1982 WL 25142. The focus in the CPIA is the *return* of items which evaded the requesting country's export regulations, which logically requires someone to have previously established that predicate fact. See Part III, infra.

Congress admonishes the President not to enter into bilateral agreements unless the requesting countries are actively enforcing export restrictions on the same cultural property:

> The President . . . *must* make several determinations prior to concluding such an agreement. . . [T]hese are intended to ensure that the requesting nation is engaged in self-help measure and that U.S. cooperation, in the context of a concerted international effort, will significantly enhance the chances of their success in preventing the pillage.

*Id.* at 25 (emphasis added). This additional requirement further underscores that only objects that evaded export controls in the requesting country are covered by the CPIA.

**III – The Government has the Burden of Proving that Objects are Recoverable Under the CPIA.**

Customs officers must have authority under the CPIA to seize imported items, and in each case someone bears the burden of proving that the items in question are recoverable.

The District Court found that the burden of proof falls upon the importer, by analogy to §2606. (Op. at 35, JA 461). However, to do this, the District Court took the burden of proof language in §2606, which by its terms applies only to situations where the importer rebuts the Government's prima facie showing as to unlawful export from the requesting country, and interpreted it as *eliminating the need for such a prima facie showing* with respect to §2601. Section 2606 does not come into play, and the importer need make no showing at all, if the objects at issue are not covered by the CPIA in the first place because they have not been

"first discovered within" and "subject to export control of", the country requesting them. Someone other than the importer must bear this initial burden.

The District Court held that the Government's only burden is to show that "the material is listed by the Secretary (or delegate) on a designated list."[5] Section 2610 of the CPIA, entitled "Evidentiary Requirements", does require the U.S. Government to make such a showing with respect to any "archeological" items being claimed by a foreign country, which includes older coins such as those in this case. The District Court erred in holding that this was the Government's only burden. Clearly, Customs agents may be expected to follow the lists of items given to them, but nothing in the CPIA authorizes the Executive Branch to enter into agreements or promulgate lists *that reach beyond the scope of the CPIA*.[6] Some coins of the types listed in the Cyprus or China agreements may fall within the CPIA's "first discovered within, and subject to export control by" category. But because not *all* coins will fall into this category, the Government must prove that

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[5] Citing *United States v. An Original Manuscript Dated November 19, 1778*, No. 96 civ. 6221 (LAP), 1999 WL 97894, (S.D.N.Y. Feb. 22, 1999) (the government must "show 'probable cause' to believe the property is subject to forfeiture"), the District Court looks to 19 U.S.C. §2610(1), "that the material has been listed by the Secretary in accordance with section 2604 of this title." (Op. at 22, JA 448).

[6] 19 U.S.C. §2604, "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 . . . are applied only to the archeological and ethnological material covered by the agreement or emergency action." "Archaeological and ethnological material" and "agreement" are both terms defined in 19 U.S.C. §2601, again using the "10 words".

those coins which they wish to seize under any bilateral agreement fall within the scope of the CPIA.

Moreover, the District Court's interpretation is wholly at odds with the U.S. ratification "understanding" regarding Article 13 of the Convention, which states that in order to recover items being imported into the U.S. "the Requesting State [has] to submit necessary proofs". Such "proofs" could not have consisted merely of unspecified lists of items that the requesting country itself unilaterally prepares. Rather, it must relate to some item-specific evidence, sufficient to carry the initial burden of establishing that the particular items at issue were found and unlawfully exported from the requesting country in modern times. It is also contrary to CPIA §2604, which requires that any lists of items give "fair notice … to importers and other persons as to what material is subject to such restrictions". Short of prohibiting importation of any Chinese or Cypriot coin, PNG members do not have fair notice of which items U.S. Customs will seize, because the definitions and burdens of proof in the CPIA are not being observed.

## Conclusion

The CPIA was not intended to create presumptive restrictions against importers, but rather to limit restrictions of any kind unless a foreign country met at least an initial burden of establishing

that the items in question were covered by the CPIA and recoverable thereunder. Without certainty that the CPIA will be interpreted in such a manner, American coin dealers cannot do business overseas, and American dealers and collectors cannot purchase coins from foreign sources.

In this case, the record contains no evidence that the coins being imported by ACCG were "first discovered in" and "subject to export control by" either China or Cyprus. In accordance with the CPIA's clear words and Congress' equally clear intent, U.S. Customs should have allowed the coins to enter.

Dated: November 3, 2011

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 3526 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: November 3, 2011

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 3rd day of November, 2011, I caused this Brief of Amicus Curiae Professional Numismatists Guild, Inc. and the Motion for Leave to File same to be filed by hard copy delivery to the Clerk of the Court, to be followed by electronic filing using the CM/ECF System.

I further certify that on this 3rd day of November, 2011, I caused the required number of bound copies of the Brief of Amicus Curiae Professional Numismatists Guild, Inc. to be served on the parties in this action by their counsel of record below via Overnight Delivery:

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