

RECORD NO. 11-2012

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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,  
Education 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 AMICI CURIAE INTERNATIONAL ASSOCIATION OF  
PROFESSIONAL NUMISMATISTS, THE AMERICAN NUMISMATIC  
ASSOCIATION, ANCIENT COINS FOR EDUCATION, INC.**

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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 International Association of Professional Numismatists states as follows:

1. The International Association of Professional Numismatists is a non-profit international organization established within the terms of points 60 to 72 of the Swiss Civil Code.
2. The International Association of Professional Numismatists has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.
3. The International Association of Professional Numismatists 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 International Association of Professional Numismatists 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 American Numismatic Association states as follows:
  5. The American Numismatic Association is a federally chartered non-profit educational organization.
  6. The American Numismatic Association has no parent corporation, and no publicly-held corporation owns 10 percent or more of the Association's stock.
  7. The American Numismatic Association 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 American Numismatic Association is not 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* Ancient Coins for Education, Inc. states as follows:

9. The Ancient Coins for Education, Inc. is a Pennsylvania not-for-profit corporation and is tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

10. The Ancient Coins for Education, Inc. has no parent corporation, and no publicly-held corporation owns 10 percent or more of the company's stock.

11. The Ancient Coins for Education, 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.

12. The Ancient Coins for Education, Inc. is not 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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## **QUESTION PRESENTED**

Whether the State Department and Assistant Secretary exceeded their authority under the Convention on Cultural Property Implementation Act in listing and restricting the importation of ancient coins from Cyprus and China without establishing that such coins are only “first discovered within” those countries.

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## GLOSSARY OF TERMS

**ACCG-** Ancient Coin Collector Guild's

**Assistant Secretary-** Assistant Secretary of State for Educational and Cultural Affairs

**CBP-** United States Customs and Border Protection

**China-** People's Republic of China

**Congress-** United States Congress

**CPAC-** Cultural Property Advisory Committee

**CPIA-** Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 *et seq.*

**Cyprus-** Republic of Cyprus

**District Court-** The United States District Court for the District of Maryland

**State Department-** United States Department of State

**US-** United States of America

## **IDENTITY OF AMICI CURIAE**

The International Association of Professional Numismatists (IAPN), the American Numismatic Association (ANA), and Ancient Coins for Education, Inc. (ACE) (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 IAPN is a non-profit organization of the leading international numismatic firms founded in 1951 and based in Brussels, Belgium. The objectives of the IAPN are the development of a healthy and prosperous numismatic trade conducted according to the highest standards of business ethics and commercial practice. The ANA is a nonprofit educational organization based in Colorado Springs, Colorado and is dedicated to educating and encouraging people to study and collect money and related items. With nearly 33,000 members, the ANA serves the academic community, collectors and the general public with an interest in numismatics. ACE was founded as an all-volunteer, not-for-profit, charitable educational organization to receive donations of ancient coins from private collectors and dealers and distribute them along with scholastic materials, on-line help, and in-person visits from numismatists, to interested schools and educational venues of all types. ACE, in its ninth years of existence, has put well over 50,000 genuine ancient coins in the hands of nearly

35,000 students and teachers in approximately 550 school classes and educational venues throughout the United States.

### **STATEMENT OF AMICI CURIAE'S INTEREST IN CASE**

This case presents an important question of whether the State Department and Assistant Secretary are limited to imposing import restrictions under the CPIA to archaeological materials only “first discovered with” in the State Party making the request.

The District Court decided that State Department and Assistant Secretary did not exceed their authority under the CPIA in listing and restricting the importation of ancient coins from Cyprus and China without establishing that such coins are only “first discovered within” those countries. The *amici curiae* believe the State Department and Assistant Secretary did exceeded their authority under the CPIA in listing and restricting the importation of ancient coins from Cyprus and China without establishing that such coins are only “first discovered within” those countries. Therefore, *amici curiae* believe the District Court’s decision should be reverse and remanded for further proceedings consistent with the plain meaning of the “first discovered within” requirement.

## **STATEMENT OF AMICI CURIAE'S AUTHORITY TO FILE BRIEF**

Counsel for *amici curiae* contacted counsel for Appellant and Appellees to inquire whether they would consent to the filing of this brief. Counsel for Appellant granted such consent, but counsel for Appellees declined. Accordingly, *amici curiae* have submitted a motion for leave to file this brief.

## **RULE 29(C)(5) STATEMENT**

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* states that this brief was written by the counsel for *amici curiae* and neither party's counsel authored the brief in whole or in part. Neither a party to this case nor a party's counsel contributed money that was intended to fund preparation or submission of this brief, and no other person aside from amicus curiae and their members contributed money for said purpose.

## **SUMMARY OF ARGUMENT**

The Amici Curiae are deeply concerned with the District Court's failure to find that the State Department and Assistant Secretary exceeded their authority under the CPIA by listing and restricting the importation of ancient coins from Cyprus and China without establishing that such coins are only "first discovered within" those countries. The international trade, collecting and study of ancient coins will be severely impacted if this court does not require the District Court to

enforce the plain meaning of the “first discovered within” requirement of the CPIA.

The CPIA does not recognize a “moral right” in favor of modern States to objects that originate in ancient cultures and the “first discovered within” requirement is the only valid basis for public policy in this arena. The “first discovered within” requirement limits import restrictions to those objects which are only known to be discovered in the State Party. The District Court was incorrect in assuming that the “first discovery within” requirement is obviated by a lack of information about the object being imported. Furthermore, the District Court was incorrect in assuming that because objects can be listed by “type” instead of a particular “form” that the “first discovered within” requirement is negated. The CPIA’s core purpose is to deter looting subject to certain mechanisms within the statute and the statutory construction should not be overridden by general intent.

## **ARGUMENT**

### **I. THE STATE DEPARTMENT AND ASSISTANT SECRETARY EXCEEDED THEIR AUTHORITY UNDER THE CPIA.**

#### **A. The CPIA does not recognize a “moral right” in favor of modern States to objects that originate in ancient cultures.**

A “moral right” of ownership to an archaeological object would establish a modern State’s title to the object based upon a cultural affinity between the modern

State and the ancient culture in which the object was created. The CPIA does not recognize such a “moral right” and only authorizes the President to designate archaeological materials subject to import restrictions if those materials were “first discovered within, and . . . subject to export control by” the requesting State Party<sup>1</sup>. The legislative history of the CPIA makes clear that Congress sought to limit claims by State Parties to cultural objects in the United States:

The [Senate Finance] Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries, and these other countries should have the benefit of knowing what minimum showing is required to obtain the full range of U.S. cooperation authorized by this bill.<sup>2</sup>

Absent Congress’ requirement that objects be restricted only if “first discovered within” the State Party, the only other means of testing a foreign government’s claim to an object would be its “moral right” based upon cultural affinity. The United States’ standing as a society assembled of immigrants from all world cultures would argue against granting such rights in this context. Therefore, the “first discovered within” requirement remains the only valid basis for public policy in this arena and is the cornerstone of the CPIA’s import restriction provision.

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<sup>1</sup> 19 U.S.C. § 2601(2).

<sup>2</sup> See S. Rep. No. 97-564, at 6, JA 127.

The CPIA contemplates that State Parties will initiate any request to the United States for import restrictions and that such requests can only relate to cultural objects upon which the State Party has dominion and has already promulgated export controls<sup>3</sup>. In practice, archaeological objects may have been created in ancient times inside or outside of the modern-day borders of a State Party seeking import restrictions under the CPIA. Likewise, archaeological objects which circulated in ancient times may or may not have any cultural relevance to the cultural history of the State Party seeking the restrictions. The primary nexus required by the CPIA between the State Party and the archeological objects being restricted is that the objects be “first discovered within” the State Party. The question of whether the objects are “subject to export controls by” the State Party is then a derivative concern. Therefore, the Memorandum of Understanding (“MOU”) with Cyprus under which the ACCG’s coins were detained must only restrict materials “first discovered within” Cyprus, not similar materials discovered elsewhere in the Eastern Mediterranean region. Likewise, the MOU with China used to restrict the ACCG’s coins must only relate to materials “first discovered within” China and not in other countries in Southeast Asia.

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<sup>3</sup> 19 U.S.C. § 2602(a) and § 2601(2)(C).

**B. The “first discovered within” requirement of the CPIA limits import restrictions to those objects which are only known to be discovered in the State Party.**

The correct statutory interpretation of the “first discovered within” rule is to require the State Department and the Assistant Secretary to list archaeological materials that, based on the archaeological record, are only known to be found within the State Party seeking the MOU. Section 2604 of the CPIA specifically requires the State Department and Assistant Secretary to list objects “sufficiently specific and precise to insure that...the import restrictions under section 2606 of this title are applied only to the archeological and ethnological material covered by the agreement...” The listing of objects know to be discovered in multiple countries would restrict the importation of objects without any singular nexus to the State Party making the request and would not satisfy the requirements of specificity and precision in section 2604. CPAC is the advisory body established under the CPIA with the expertise to determine if any object subject to a request is only “first discovered within “ the State Party.<sup>4</sup> In the event a State Party requests an MOU covering archeological objects that are known to be “first discovered within” multiple countries, then those objects must be excluded from the MOU by CPAC. The MOU’s with China and Cyprus are legally defective because they include coins that are not only “first discovered within” Cyprus and China.

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<sup>4</sup> 19 U.S.C. § 2605.

Furthermore, CBP's regulations require an importer to state on their commercial invoice the "country of origin" of the merchandise being imported<sup>5</sup>. The CPIA contains no provision amending the CBP laws and regulations to require an importer to declare the "country of discovery" of imported objects, and for good reason: the CPIA does not require an importer to make such a determination. In this case, the country of origin rules required ACCG to state the "country of manufacture, production, or growth" of the coins<sup>6</sup>. ACCG believed at the time of importation, based upon scholarly research, that the imported coins were forms known to have been manufactured in ancient times in the geographic territories now within the modern-day borders of the countries of Cyprus and China<sup>7</sup>. It would be incorrect, and extra-legal in this case, for CBP to assume that ACCG's origin statement equates to a discovery statement. In fact, these standards are exceptionally different. ACCG admitted that it had no actual evidence that the coins were discovered in Cyprus and China, and, likewise, had no scholarly evidence to establish that the coins could only have been discovered in Cyprus and

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<sup>5</sup> 19 C.F.R. § 141.86(a)(10).

<sup>6</sup> 19 C.F.R. § 134.1(b).

<sup>7</sup> Amended Complaint ¶ 93, JA 159.

China<sup>8</sup>; actually, the scholarly evidence showed no single country of likely discovery for the coins<sup>9</sup>.

The State Department and Assistant Secretary are given the burden of establishing the singularity of modern discovery of archaeological objects in the State Party seeking import restrictions, to which the State Department and Assistant Secretary have no scholarly evidence to support their assertions in this case. CBP's assumptions in this case render the "first discovered within" requirement irrelevant because they conflate the country of origin rules with the discovery requirement in order to construct a single rule to satisfy the CPIA's burden. Moreover, CBP's burden of probable cause in the seizure and forfeiture case of these coins can only be met if CBP can show evidence that the coins were actually (based on documentary evidence) or could only have been (based on scholarly evidence) "first discovered within" Cyprus and China<sup>10</sup>.

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<sup>8</sup> *Id.* ¶¶ 14-18, JA 140-141.

<sup>9</sup> *Id.*

<sup>10</sup> 19 U.S.C. § 2609(a); 19 U.S.C. § 1615; *see also*, *United States v. THE PAINTING KNOWN AS "LE MARCHÉ"*, 648 F.3d 84, at pp. 95-96 (2d Cir. 2011).

**C. The District Court was incorrect in assuming that the “first discovery within” requirement is obviated by a lack of information about the object being imported.**

The District Court concluded that:

[T]he subsection imposing the ‘first discovered’ requirement, 19 U.S.C. § 2601(2), is silent on how the government must establish, in the absence of a documented find spot, whether a particular object ‘was first discovered within, and is subject to export control by, the State Party.’ Moreover, the CPIA anticipates that there may be some archaeological objects without precisely documented provenance and export records and prohibits the importation of those objects. Section 2606(b)-(c) of the CPIA provides that if an importer is ‘unable to present’ a certification from the state party or the ‘satisfactory evidence’ described above for a particular coin, the coin ‘shall be subject to seizure and forfeiture.’ 19 U.S.C. § 2606(b)-(c). Thus for objects without documentation of where and when they were discovered, the CPIA expressly places the burden on importers to prove that they are importable, and prohibits the importation of those objects if they cannot meet that burden.<sup>11</sup>

The District Court mistakenly reverses the succession of events in the statutory scheme that would lead to sections 2606(b)-(c) being invoked. The requirements in sections 2606(b)-(c), by definition, can only apply to archaeological objects that were “first discovered within” the State Party. In addition, the Court’s reasoning ignores the actual requirements in sections 2606(b)-(c). Section 2606(b)(1) applies to objects for which the importer has actual knowledge of the export from the State Party. Section 2606(b)(2) applies to objects for which the importer does not have actual knowledge of the export from the State Party. Section 2606(c)(2)(A) defines

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<sup>11</sup> District Court Opinion at p. 35, JA 461.

the “satisfactory evidence” supporting the admissibility of the object under section 2606(b)(2)(B) as a statement from the importer 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.” This declaration assumes the imported material was “first discovered within” the State Party (because only such objects can be subject to import restriction) and only requires the importer to certify that the material was exported prior to a certain date<sup>12</sup>. As a matter of fact and practice, importers rely on the record of the object’s existence outside the State Party to satisfy this requirement. If the importer possessed actual knowledge of the date and manner of export from the State Party then admissibility would be determined under sections 2606(b)(1). An importer would rarely know where an object was discovered in modern times and sections 2606(b)(2)(B) and 2606(c)(2)(A) allow the importer to rely on information without actual knowledge of the State Party’s interest in the object, if there ever was one. Since the requirements of section 2606(b)(2)(B) and corollary definition under sections 2606(c)(2) allow the importer to rely on an object’s history outside of the State Party prior to the date of the MOU, this would argue against drawing a parallel between sections 2606(b)-

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<sup>12</sup> If Congress was actually requiring an importer to certify in section 2606(c)(2)(A) that an object was “first discovered within” the State Party then the wording would read “to the best of his knowledge, the material was first discovered within the State Party and was exported from the State Party on or before the date such material was designated under section 2604.”

(c) and the “first discovered within” requirement which is exclusively an intra-State Party determination. In essence, the District Court would allow the State Department and the Assistant Secretary to impose import restrictions on behalf of a State Party without a singular determination of “first discovery within,” thus forcing importers to make declarations upon objects with no basis to believe the objects were “first discovered within” the State Party. Congress did not intend to shift the burden of establishing “first discovered within” to the importer in sections 2606(b)-(c)<sup>13</sup>; rather, Congress intended to provide the importer with a limited exemption from import restrictions placed upon a group of objects known to be only “first discovered within” the State Party.

**D. The District Court was incorrect in assuming that because objects can be listed by “type” instead of a particular “form” that the “first discovered within” requirement is negated.**

The District Court states that:

[T]he CPIA anticipates that some categories of materials will be designated ‘by type or other appropriate classification.’ Congress apparently recognized that sometimes neither the requesting country nor the U.S. government will have enough information to list particular items with greater specificity than its ‘type.’ This language further demonstrates that the State Department would not have exceeded its authority under the CPIA by directing Customs to

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<sup>13</sup> If the burden of establishing “first discovered within” really does shift to the importer for objects without known find spots then an importer should be able to remove an object from the import restrictions based upon his/her belief that “the material was not first discovered within and never exported from the State Party.”

prohibit all coins of particular types, rather than only coins with proven find spots in China or Cyprus.<sup>14</sup>

The District Court identified that the CPIA permits the State Department and Assistant Secretary to list objects by “type<sup>15</sup>” because certain specific “forms” of objects may be unknown, and deduced that this grant of authority somehow obviates the “first discovered within” requirement. It does not. There is nothing in the CPIA to support this reasoning; the “first discovered within” requirement applies equally to “types” as it does to specific “forms” of objects. If certain “types” of objects are listed due to their similarity to certain “forms” known to originate within a certain ancient culture, then it is reasonable to conclude, if based upon scholarly evidence, that those “types” also originate in that ancient culture. The “first discovered within” requirement would still require the State Department and Assistant Secretary to determine that those “types” could only be “first discovered within” the State Party. This determination could be made through the same inference between “types” and “forms” that established the association between the objects and the ancient culture, provided such determination is consistent with the scholarly evidence at hand and establishes singular “first discovered within” the State Party of the known “forms.”

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<sup>14</sup> District Court Opinion at p. 35, JA 461 (citations omitted).

<sup>15</sup> 19 U.S.C. § 2604.

**E. The CPIA’s core purpose is to deter looting subject to certain mechanisms within the statute and the statutory construction should not be overridden by general intent.**

The District Court states that:

[I]nterpreting the ‘first discovered in’ requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the core purpose of the CPIA, namely to deter looting of cultural property. See 19 U.S.C. § 2602(a)(1)(A) (providing that the first factual prerequisite for import restrictions is that ‘the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party’); see also Cultural Property Convention art. 9 (‘Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected.’) Looted objects are, presumably, extremely unlikely to carry documentation, or at least accurate documentation, of when and where they were discovered and when they were exported from the country in which they were discovered. Congress is therefore unlikely to have intended to limit import restrictions to objects with a documented find spot.<sup>16</sup>

The CPIA’s core purpose is to deter looting subject to certain mechanisms within the statute: a State Party is required to enlist self-help measures by imposing export controls on objects within its domain and in response the US limits the importation of objects subject to those export controls and known to be “first discovered within” the State Party<sup>17</sup>. The general intent of the statute should not obviate these specific statutory requirements. Congress did not require the U.S. government to prove the exact find spot for every specific object being imported. However,

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<sup>16</sup> *Id.* at pp. 35-36, JA 461-462.

<sup>17</sup> See note 1, *supra*.

Congress did require the State Department and Assistant Secretary to only impose import restrictions on objects known to be only “first discovered within” a single State Party. “First discovered within” can be established from scholarly evidence indicating that all known “forms,” and by inference all related “types,” are only known to be “first discovered within” the State Party seeking restrictions.

Thereafter, any “form” or “type” may be restricted from importation without an individual determination of “first discovered within” at the time of importation.

Again, the goal of the CPIA was not to combat the problem of looting by banning the importation of all undocumented objects that originate in an ancient culture with some cultural affinity to the State Party. Instead, Congress chose to restrict the importation of those undocumented objects where the State Party could only have been the possessor of the objects in modern times.

Furthermore, the District Court ignored other means available to foreign governments in seeking the restitution of undocumented objects. CBP has brought many seizure and forfeiture actions against possessors of objects in the United States where there is reason to believe that the objects were stolen from foreign

governments.<sup>18</sup> Likewise, foreign governments have been successful in seeking restitution by bringing private causes of action against possessors of undocumented objects in the U.S.<sup>19</sup> There is no reason to believe Congress intended the CPIA to be the sole means of addressing the problem of undocumented objects entering the United States. The fact that certain objects may have no singular country of first discovery and are excluded from import protection under the CPIA does not mean that there are no avenues available to foreign governments to seek the return of those objects. The District Court should not have been constrained from determining that the State Department and Assistant Secretary exceeded their authority in implementing the MOU's with Cyprus and China because of its belief that there are no other remedies available to foreign government or because those other remedies require a foreign government to produce some evidence of theft.

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<sup>18</sup> Almost all CBP seizure and forfeiture cases concerning cultural property go uncontested by the claimants. For examples of contested claims, see *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); *United States v. Schulz*, 333 F.3d 393 (2d Cir. 2003); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003); *United States v. An Original Manuscript Dated Nov. 19, 1778*, No. 96 Civ. 6221 (LAP), 1999 WL 97894 (S.D.N.Y. Feb. 22, 1999); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

<sup>19</sup> See *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

## CONCLUSION

The State Department and Assistant Secretary exceeded their authority under the CPIA in listing and restricting the importation of ancient coins from Cyprus and China without establishing that such coins are only “first discovered within” those countries. The District Court’s decision should be reverse and remanded for further proceedings consistent with the plain meaning of the “first discovered within” requirement.

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:

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Dated: November 7, 2011

/s/ Michael McCullough  
*Counsel for Amici Curiae*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of November, 2011, 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 7th day of November, 2011, I caused the required number of bound copies of the Brief of Amici Curiae to be hand-filed with the Clerk of the Court.

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