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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

"Everyone is entitled to his own opinion, but not his own facts."

Quote attributed to the Hon. Daniel Patrick Moynihan, the "father" of the Cultural Property Implementation Act ("CPIA"), 19 U.S.C. § 2601 *et seq.* (*See* http://en.wikiquote.org/wiki/Daniel_Patrick_Moynihan (last visited Sept. 18, 2017).)

Our U.S. Constitution's due process clause requires the government to make out each element of its *prima facie* case before private property may be forfeited. It is the responsibility of Congress—not the Courts or the bureaucracy—to define the government's proofs. Under CPIA, 19 U.S.C. §§ 2601, 2604, 2610, Congress only authorized the government to seek forfeiture of archaeological and ethnological objects of "designated" types "first discovered within" and "subject to export control by" specific countries granted import restrictions. Even then, the government must also demonstrate that those particular objects left those specific countries after the effective date of U.S. import regulations. *Id.* §§ 2606, 2610. The relevant trigger for forfeiture is the object's export from a UNESCO State Party, not its import into the United States. This important distinction assures that any import restrictions are entirely prospective, and do not impact the legitimate trade in objects of like types already circulating in the international marketplace.

Here, instead of holding it strictly to its proofs, the District Court concluded that the government made out its *prima facie* case merely by showing that the objects were of "designated" types exported from the State Party at some indeterminate date before their import into the United States. (Memorandum, dated March 31, 2017 ("March 31st SJ Mem.") at 14, JA 1376.) In so doing, the District Court ignored important limitations on the government's ability to forfeit private property. According to the District Court's way of thinking, private property may be forfeited based on the assumption that the government considered whether archaeological objects were "first discovered within" a specific country as part of the process of "designating" the objects for import restrictions in the first place. (*Id.* at 13 n. 9, JA 1375.)

Notwithstanding the government's claims here, the decision in *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012) (*"ACCG v. CBP"* or "the DJ action"), which was rendered in an entirely different context, cannot be construed to excuse the government of its constitutional and statutory burden in a forfeiture action. Indeed, the *ACCG v. CBP* Court itself understood that it could "express no view how the forfeiture process will unfold." *Id.* at 185. So, yes, while *ACCG v. CBP* may have effectively recognized the government's rights to its "opinion" that coins may be

"designated" for import restrictions under the CPIA, that cannot foreclose the Ancient Coin Collectors Guild ("the Guild") from contesting the facts the government relies upon to establish its *prima facie* case or preclude the Guild from offering its own facts in the form of expert testimony and circumstantial evidence to defend its property from forfeiture. Accordingly, the Guild respectfully requests the Court to reverse the District Court's rulings and instead order that judgment be entered on its behalf, that its property be returned, and that it be awarded all reasonable attorney's fees and costs.

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.

In its opening brief, the Guild demonstrated for a *prima facie* case for forfeiture under the CPIA, the government must prove by a preponderance of the evidence that an object of archaeological interest: (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 the object was illegally removed from the State Party after those import restrictions were imposed. 19 U.S.C. § 2610, incorporating §§ 2601, 2604, 2606. (Guild's Opening Brief at 21.)

The Guild supported its analysis with reference to the CPIA's plain meaning, the Fifth Amendment due process clause of the U.S. Constitution, applicable case law, the rules of statutory construction, legislative history, sworn statements from Presidential appointees on the Cultural Property Advisory Committee ("CPAC"), a high-ranking State Department lawyer's views about how a CPIA forfeiture action would unfold, representations the government previously made to the District Court about the burden of proof in a forfeiture action, and 1970 UNESCO Convention provisions confirming the limited reach of that instrument. (*Id.* at 16-32.) All this evidence confirms that the government must still make out every element of its *prima facie* case even assuming the underlying import restrictions are "valid." (*Id.*) The Guild further explained that while certain of the Guild's coins were of types that appeared on the "designated lists" for China and Cyprus, the government had failed to produce any other evidence or testimony, including expert testimony, to make out the remaining elements of its *prima facie* case for forfeiture. (*See id.* at 12-13, 26.)

In opposition, the government fails to address the Guild's statutory and due process arguments on the merits. Instead, the government's lengthy sixty-eight (68) page brief focuses almost exclusively on the claim that the Guild seeks to "relitigat[e] the validity of the CPIA and the designated list of coins subject to

forfeiture."[1] (Opposition brief at 9.) As set forth in our opening brief and below, the Guild has no such intention. The Guild's due process arguments are firmly grounded in the CPIA itself. They merely aim to hold the government strictly to its proofs, a goal the Guild shares with six (6) amici which include our nation's largest coin collector organization, two (2) numismatic trade associations, and three (3) other educational and advocacy groups. Indeed, the Guild's views largely mirror the government's own prior representations about how a CPIA forfeiture proceeding should unfold. (Guild's Opening Brief at 24-25.)

[1] Notwithstanding the government's claims, the *ACCG v. CBP* decision provides no basis for issue preclusion in a forfeiture context. The District Court belatedly recognized, "As the Guild observes, the Fourth Circuit's discussion of the anticipated forfeiture action is dicta." (March 31st SJ Mem. at 7 n. 5, JA 1369.) Moreover, the government previously represented that the "first discovery issue" could be litigated in a forfeiture action even if the applicable regulations were found to be "valid" in the Guild's declaratory judgment action. (JA 1216.) Those regulations were not adjudged valid *per se.* Rather, the Fourth Circuit only held that "foreign policy considerations" made the Guild's declaratory judgment action aimed at striking down such regulations "non-justiciable." *ACCG v. CBP*, 698 F.3d at 179-185. The Court then indicated that the proper venue to contest the government's seizure was a forfeiture action. *Id.* at 185. In any event, the government has failed to plead or prove the elements of "collateral estoppel" *See Westmoreland and Coal Co., Inc. v. Sharpe*, 692 F.3d 317, 331 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2852 (2013). Nor does "law of the case" apply. *See Pepper v. United States*, 562 U.S. 476, 506 (2012) ("[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.") (citations and quotations omitted). This is, of course, an entirely different case, one where the government previously represented that the Guild would be allowed to litigate the "first discovery issue." (JA 1216.) In any case, "The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003).

1. CPIA Section 2606 Emphasizes Time-Based Limits on Forfeiture that the Government failed to Establish.

The District Court has held once the government establishes that archaeological objects are of types found on a "designated list," the *only* relevant CPIA section is 2606 ("Import Restrictions") and its provisions setting forth "satisfactory evidence" for legal import of "designated" archaeological material.[2] (Memorandum, dated March 31, 2017 ("March 31st SJ Mem.") at 15-20, JA 1377-82.)

Even a cursory reading of Section 2606, however, indicates that any "import restrictions" only apply to archaeological or ethnological material *that is exported … from the State Party after the designation of such material under section 2604*…." 19 U.S.C. § 2606. So, even when read in isolation, this provision emphasizes important limitations on the government's ability to forfeit private property. Moreover, here the government *never alleged or produced* any evidence to suggest that the coins in question were illicitly exported from Cyprus or China after the date they were "designated" in import regulations. For that reason alone, the Guild should have been granted summary judgment. (Guild's Opening Brief at 26;

[2] The Court should also note Congress *did not include* as part of this "satisfactory evidence" a provision allowing an importer to demonstrate that an archaeological object of a designated type was "first discovered" outside the specific country for which import restrictions was granted. This again suggests "first discovery" is part of the government's *prima facie* case.

Verified Complaint for Forfeiture ("Forfeiture Complaint") ¶¶ 14-15 (February 22, 2013) (only alleging the Guild's coins were imported after the dates they were "designated.").

2. The Court Should Not Undermine the CPIA's Carefully Crafted Statutory Scheme.

The CPIA's carefully crafted statutory scheme meant to focus import restrictions and to protect the legitimate trade should not be undermined based on a misunderstanding of the CPAC's views and judicial deference afforded in an entirely different context that did not raise the same due process concerns as at issue here.

The Guild's Opening Brief has already established three (3) fundamental problems with the assertion that the government need only establish that the coins it seized are of types that appear on a designated list to make out a case for forfeiture:

1. Such an assertion depends on a misreading of the CPIA and its provisions relating to the burden of proof in a forfeiture action. (Guild's Opening Brief at 16-25.);
2. Such an assertion depends on a fundamental misunderstanding of CPAC's views (*Id.* at 9 n.3 and 20-31.); and
3. Such an assertion depends on granting the government exceptional deference where such deference cannot trump the due process rights afforded by Congress in a CPIA forfeiture action. (*Id.* at 27-32.)

Each concern merits further discussion here despite the government's failure to address these points in its opposition brief.

(a) The CPIA's Plain Meaning Focuses Restrictions and Protects Legitimate Trade.

The government's brief relies almost exclusively on the *ACCG v. CBP* opinion for its current views about the government's *prima facie case* in a forfeiture action. (Opposition Brief at 29-33.) However, that decision's dicta about the CPIA's burden of proof under 19 U.S.C. § 2610 omits any reference to Section 2604's incorporated requirement that import restrictions must "be applied only to the archaeological … material covered by the agreement," i.e., that the material was "first discovered within" and "subject to export control by" China or Cyprus. *Ancient Coin Collectors Guild*, 698 F.3d at 185.

Such statutory shortcuts are wholly inappropriate here where the Guild's due process rights are at stake. The government's claim that it may establish its rights to take the Guild's property merely by demonstrating that the coins that were seized are of types that appear on a "designated list" depends on re-writing a number of important CPIA provisions designed to focus import restrictions and to protect the legitimate trade. (*Compare* Opposition Brief at 29-33 *with* Comparison of Congress' and the Government's Re-Written Version of CPIA, 19 U.S.C. §§ 2601, 2604, 2606, 2609, 2610, Joint Appendix ("JA") 1286-88.) The fact is, however, before any forfeiture, Congress has required the government to establish

not only that "archaeological material of a State Party" is of a type that appears on a designated list, but also that any such objects of "archaeological interest" were "first discovered within" and "subject to the export control by" the applicable State Party and that any such archaeological material was exported from that State Party "after the designation of such material." 19 U.S.C. §§ 2601, 2604, 2606, 2609, 2610. Assuming the government establishes its *prima facie* burden, 19 U.S.C. §§ 1615, 2609, 2610 still allow a claimant to demonstrate by the preponderance of the evidence that its property is not subject to forfeiture. Thus, even if the government can establish that "archaeological material of a State Party" is of a type that appears on a designated list that does not end the inquiry. Rather, the CPIA also imposes important limitations on the government's ability to forfeit cultural goods based on considerations of time and place that apply both to the government's *prima facie* case and any rebuttal.

The Supreme Court has reemphasized time and again that a statute's plain meaning controls. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'"); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445-2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."); *City of Arlington Texas v. Federal*

Communications Comm'n, 569 U.S. 290, 296 (2013) (*quoting Chevron's* "now-canonical formulation," "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress."); *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2528 (2013) ("There are . . . flaws in this reading. . . . The first is it is inconsistent with the provision's plain language…Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."). This plain meaning applies even where it does not further the statute's overall aims or impedes administrative convenience. *Id.* at 2528-29.

In short, before archaeological material may be forfeited there must be some showing that it was both first discovered within a specific UNESCO State Party (making it subject to that country's export control) and that it left that specific UNESCO State Party after the date import restrictions were imposed. Allowing forfeiture solely based the identification of coins as being of types found on a "designated list" supposedly created based on where archaeological material is "generally found" is statutorily insufficient and thereby violates due process. *See ACCG v. CBP*, 698 F.3d at 182 ("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).")[3] Only archeological material "specifically found" in a particular State Party can also be "subject to export control by" that same State Party. 19 U.S.C. §§ 2601, 2604, 2606, and 2610. *Accord* Scalia and Garner, Reading Law: The Interpretation of Legal Texts § 26 at 174 (Thompson/West 2012)("[E]very word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored."). Finally, as set forth above, the relevant "time" trigger is the date of export from that State Party, and *not* the date of import into the United States. 19 U.S.C. § 2606. Hence, neither the government nor the Court can simply assume that just because archaeological material of a type found on a designated list was imported into the United States after the date import restrictions were imposed that such material was necessarily exported from the State Party after that same date.

[3] The *ACCG v. CBP* Court should not have found facts about what CPAC concluded at all. In an appeal of a grant of a motion to dismiss, it was the factual allegations of the Guild's DJ Action Complaint – which set forth the Guild's views about coin circulation and questioned whether CPAC actually recommended import restrictions on coins – that should have controlled. *Robinson v. Am. Honda Motor Corp.*, 551 F.3d 218, 222 (4th Cir. 2009). In any event, it is unclear where this "generally found" standard originated. As set forth in the Guild's Opening Brief, CPAC could never have adopted such a standard because it rejected import restrictions on Cypriot coins and was not allowed to make recommendations about Chinese coins. (Guild's Opening Brief at 9 n. 7 and 29-31.) Moreover, the cited Federal Register notices contain no mention of such a standard either.

(b) CPAC Recommended Against Import Restrictions on Coins.

The declarations of two (2) former CPAC members, Past Chair Jay Kislak and Robert Korver, conclusively establish that State Department officials disregarded CPAC's recommendations against placing import restrictions on Cypriot coins and then misled Congress and the public about their advisory committee's true recommendations. (Guild's Opening Brief at 9 n. 3 and 29-31.) Moreover, Korver goes onto state that despite a statutory mandate, CPAC was allowed no role in deciding whether Chinese coins would be subject to import restrictions. (*Id.* at 30.)

Rather than fess up, however, the government gratuitously belittles the Guild's well-founded concerns that also prompted these Presidential appointees to speak so forthrightly.[4] (Opposition Brief at 64-66.) As set forth in the Guild's Opening Brief, the CPIA contemplates that CPAC will have an important role in

[4] If anything, the Guild's concerns about cronyism and conflicts of interest have only grown. Since its DJ action was dismissed, the Guild learned that Assistant Secretary of State Dina Powell, who decided to impose import restrictions on Cypriot coins *after accepting a high paying job at Goldman Sachs*, was recruited there by and worked for the spouse of a current Archaeological Institute of America Trustee and member of its "Cultural Heritage Policy Committee." (Guild's Opening Brief at 30.) Ms. Powell currently serves as a top Trump Administration aide. *See* Eliza Relman, *How Goldman Sachs Legend Dina Powell Became Trump's National Security Star*, Business Insider (Aug. 10, 2017) http://www.businessinsider.com/dina-powell-trump-national-security-goldman-sachs-photos-bio-2017-8/#in-april-2017-powell-said-she-attributes-her-career-success-to-not-overplanning-its-just-taking-that-leap-of-faith-16 (last visited Sept. 16, 2017).

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:

[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 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

[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).

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]

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

[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 194-196. 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.

the government itself previously acknowledged its burdens and the likely need for expert testimony in a prior representation to the District Court. (JA 1215-17.)

The government must establish some nexus between the property to be forfeited and the forbidden activity defined by the statute. *United States v. $506,231 in United States Currency*, 125 F.3d 442, 451-52 (7th Cir. 1997). Expecting the government to do so with expert testimony is hardly novel. *See United States v. 328 "Quintales" of Green Coffee Beans*, 21 F. Supp. 3d 122, 129 (D. P.R. 2013) (government's and claimant's experts contest the origin of coffee beans); *United States v. One Tyrannosaurs Bataar Skeleton*, 2012 U.S. Dist. LEXIS 165153*4 (S.D.N.Y. November 14, 2012) (government uses expert testimony to establish that Bataar skeleton almost certainly came from the Nemegt Formation in Mongolia and was most likely excavated between 1995 and 2005); *United States v. Three Burmese Statues*, 2008 U.S. Dist. LEXIS 48474*7 (W.D. N.C. June 24, 2008) (government's experts identify statues as Burmese); *United States v. Eighteenth Century Peruvian Oil on Canvass*, 597 F. Supp. 2d 618, 623 (E.D. Va. 2009) (CPIA case; government experts state painting originated in Peru). Indeed, as set forth above, the government itself acknowledged the need for such expert testimony in its prior representation to this Court. (JA 1217.)

Here, because the government's fact witnesses could not clearly explain the rationale for the detention and seizure of the Guild's coins (Guild's Opening Brief

at 12-14.), the government's failure to name any experts (much less depose the Guild's experts) should be fatal to the government's case. As set forth more fully above and in the Guild's Opening Brief, merely establishing the coins the government seized are of types on the designated list is statutorily insufficient. Even assuming import restrictions are "valid," the government must also establish that the subject property was "first discovered within" and hence "subject to export control by" a particular UNESCO State Party and that the property left that country after the date import restrictions were imposed. The government simply failed to do so here and hence the Guild should have been granted summary judgment.

B. The District Court Violated the Guild's Procedural Due Process Rights.

1. The District Court Improperly Struck the Guild's Amended Answer *Sua Sponte*.

The government disputes the Guild's proposed standard of review, but can find no precise precedent for good reason--- it is highly unusual to strike an answer in its entirety *sua sponte*, more so in the context of a forfeiture action. The District Court evidently struck the Guild's Amended Answer because portions questioned whether the underlying decision-making was performed in good faith. (Memorandum, dated June 3, 2014 ("June 3rd Mem."), JA 105-06.) However, the government itself "opened the door" to the issue in its forfeiture complaint. (*See* Forfeiture Complaint ¶ 8 (alleging the government acted "consistent [with] the procedures of the CPIA"), JA11.) Moreover, as set forth in the Guild's Opening

Brief at 29-31, given the Guild's due process claims, the issues the Guild raised about bad faith decision-making should have been considered before the District Court assumed that the government made out its *prima facie* case solely based on the fact the defendant coins were of types that appear on the "designated lists" for Cypriot and Chinese import restrictions.

2. The District Court Precluded Relevant Discovery.

The District Court only allowed very limited discovery focused on how – but not why – the Guild's coins were detained and seized. (Memorandum and Order, dated Feb. 11, 2016 ("Feb. 11th Mem."), JA 486-487 and Order dated June 1, 2016 ("June 1st Order"), JA 1039.) The Guild appealed the District Court's rulings drastically limiting its discovery because they were predicated on a highly constricted view about the Guild's rights to defend its property from forfeiture. (Guild's Opening Brief at 34.) In its Opposition, the government makes the preposterous claim the Guild's discovery requests were properly denied because they solely related to "the Guild's argument that the defendant property does not belong on the designated lists at all." (Opposition Brief at 37.) In fact, as set forth in the Guild's opening brief and in charts at JA 478-85, the Guild's discovery was relevant not only to whether the government made out its *prima facie* case, but also to whether the Guild could rebut that case under the parameters set forth in the District Court's own June 3rd Memorandum. (Guild's Opening Brief at 34.) As

for the so-called "legal discovery" (Opposition Brief at 41.), it simply related to the government's views on whether it would honor European Union export controls. If the Guild is correct about its rights to defend its property from forfeiture, it must also follow that the District Court erred in limiting the Guild's discovery requests so drastically.

3. The District Court Precluded Relevant Expert Testimony and Ignored Circumstantial Evidence on Rebuttal.

In reliance of the Court's June 3rd Mem. (JA 105-06.) and a subsequent scheduling order providing for expert discovery (JA 135), the Guild spent considerable time and money hiring qualified experts to follow the District Court's road map. Specifically, the Guild proffered the testimony of Michael McCullough, an expert in the international trade of cultural artifacts, and of Douglas Mudd, a numismatic expert, to address these issues. (*See* McCullough Dec., JA 1052-72 and Mudd Dec., JA 1035-51.) This expert testimony establishes that the defendant property was either "lawfully exported from its respective state while CPIA restrictions were in effect" as a matter of law or demonstrates by a preponderance of the evidence that it was "exported from its respective state before CPIA restrictions went into effect." (*See* June 3rd Mem. at 2, JA 106.)

Nevertheless, the District Court "moved the goal posts" and on summary judgment added a new "particularization" requirement not found in provisions related to the burden of proof in a forfeiture action (19 U.S.C. §§ 1615, 2610), but

rather based on a provision (19 U.S.C. § 2606) setting forth the "satisfactory evidence" an importer may present to avoid the seizure of his property *pre-litigation*. (March 31st SJ Mem. at 18-27, JA 1380-89.) The Guild's Opening Brief takes great pains to explain how the District Court's views are inconsistent with the "preponderance of the evidence" standard for rebuttal envisioned under the CPIA's statutory scheme as well as the "rule of lenity." (Guild's Opening Brief at 35-39.) The Guild then explains that even if a need for "particularized evidence" exists, the Guild's expert's testimony met such a requirement on rebuttal. (*Id.* at 39-47.)

In response, the government merely reiterates its prior claims about the supposed need for particularized testimony. (Opposition at 51-58.) In the process, the government wrongly suggests *One Tyrannosaurus Bataar Skeleton* is a CPIA case (it is not), and then goes onto once again mischaracterize Messrs. Mudd's and McCullough's testimony. (*Id.*) In so doing, the government fails to address: (1) Mudd's opinion not just about "coin circulation" but also about the immense quantity of Cypriot and Chinese coins outside of these countries as of the date of restrictions; (2) how Mudd's opinion combines with other, circumstantial evidence to show by a preponderance of evidence that the Guild's coins were "exported from [their] respective state before CPIA restrictions went into effect;" and (3) that McCullough's opinion does not apply to all "designated" Cypriot

coins, but only to those exported from Cyprus through another European Union member state to establish alternatively that the coins were "lawfully exported from [their] respective state while CPIA restrictions were in effect." (Guild's Opening Brief at 39-47.) In short, even assuming the government made out its *prima facie* case, the Guild rebutted that case under the "preponderance of evidence" standard applicable to the CPIA and other civil litigation.

CONCLUSION

The Guild respectfully requests the Court to reverse the District Court's rulings against the Guild, and instead order that judgment be entered on its behalf, that its property be returned, and that it be awarded all reasonable attorney's fees and costs under the Civil Asset Forfeiture Reform Act, 28 U.S.C. § 2465(b).

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Respectfully submitted,

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Dated: September 28, 2017

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I hereby certify that on this 28th day of September, 2017, I caused this Reply Brief of Appellant 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 28th day of September, 2017, I caused the required copy of the Reply Brief of Appellant to be hand filed with the Clerk of the court.

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