No. 12-___

IN THE

Supreme Court of the United States

ANCIENT COIN COLLECTORS GUILD,
Petitioner,

v.

U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY; COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES DEPARTMENT OF STATE; AND THE ASSISTANT SECRETARY OF STATE, EDUCATION AND CULTURAL AFFAIRS,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C §§ 2601 et seq. imposes significant procedural and substantive constraints on the authority afforded the President to enter into bilateral agreements contemplating import restrictions on cultural goods. Over time, the President's authority has been delegated down to the Assistant Secretary of State, Bureau of Educational and Cultural Affairs ("Assistant Secretary, ECA"). Once an agreement enters force, U.S. Customs and Border Protection ("CBP") promulgates regulations that impose import restrictions on particular types of cultural goods. The questions presented are:

1. Whether "foreign policy concerns" trump the judiciary's obligation to "say what the law is" where the lower court failed to apply this Court's "political question" analysis before affirming the dismissal of a complaint alleging that government decision-makers failed to comply with the CPIA's significant procedural and substantive statutory requirements before imposing import restrictions on cultural goods.

2. Whether judicial review of the preliminary decision-making of the President's sub-delegee, the Assistant Secretary, ECA, and the final agency action of CBP imposing import restrictions on cultural goods is *ultra vires* review, Administrative Procedure Act ("APA") review or some combination thereof, and whether the scope of that review should focus on both substantive and procedural compliance with the governing statute.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Fourth Circuit: petitioner Ancient Coin Collectors Guild and respondents U.S. Customs and Border Protection, Department of Homeland Security; Commissioner, U.S. Customs and Border Protection; United States Department of State; and the Assistant Secretary of State, Education and Cultural Affairs.

CORPORATE DISCLOSURE STATEMENT

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

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The Ancient Coin Collectors Guild respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is available at *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*, 698 F.3d 171 (4th Cir. 2012) and is

reprinted at Petition Appendix ("Pet. App.") 1a-26a. The district court's opinion is available at 801 F. Supp.2d 383 (D. Md. 2011) and is reprinted at Pet. App. 28a-96a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment and opinion on October 22, 2012. (Pet. App. 1a-27a.) On November 13, 2012, the Ancient Coin Collectors Guild filed a petition for rehearing en banc. On December 18, 2012, the Fourth Circuit Court of Appeals denied the petition. (Pet. App. 98a.) This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

Section 706 (2) of the Administrative Procedure Act provides that a reviewing court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law…."

In addition, relevant portions of the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* are set forth in the appendix. (Pet. App. 99a-106a.)

STATEMENT OF THE CASE

1. The Ancient Coin Collectors Guild ("the Guild" or "ACCG"), a nonprofit advocacy group for collectors and the small businesses of the numismatic trade, seeks judicial review of administrative decisions which have drastically limited the ability of coin collectors to lawfully import historical coins of the sort widely available abroad. In particular, the Department of State ("State") and U.S. Customs and Border Protection ("CBP") have restricted the entry of historical coins based on the country of manufacture, whereas Congress explicitly limited restrictions to coins "first discovered" in a particular country, which is completely different. Such overbroad, unfocused restrictions have greatly inhibited ancient coin collecting in the United States.

2. Ancient coins circulated far from where they were made, first as money, and in more recent times as collectibles. (*See* Amended Complaint ¶¶ 13-20; Pet. App. 112a-114a.) Ancient coin collecting has been well established since the Renaissance, with avid collectors in countries as diverse as China and Cyprus, as well as the United States. (*See id.* ¶¶ 17-20; Pet. App. 113a-114a.) Due to their usual modest value and the huge numbers extant, historical coins are typically traded without any provenance information. (*See id.* ¶ 17; Pet. App. 113a-114a.) As a result, it is unreasonable to assume, as the Government now does, that a coin is "stolen" or "illegally exported" merely because it lacks a documentary history. (*See id.* ¶ 18; Pet. App. 114a.)

3. The Guild asked the courts below to rule as a matter of first impression on the construction and application of the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601

et seq. The United States District Court for the District of Maryland's jurisdiction was based on 28 U.S.C. § 1356. The United States Court of Appeals for the Fourth Circuit had jurisdiction over the timely appeal under 28 U.S.C. § 1291.

4. The CPIA was intended by its sponsors to be the definitive statement of U.S. policy regarding the importation of archaeological and ethnological materials.[1] In 1983, Congress passed the CPIA to enact the 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") into U.S. law. Broadly speaking, the 1970 UNESCO Convention contemplates that governments will enter into "memorandums of understanding" ("MOUs") to help enforce each other's export controls on archaeological and ethnological artifacts. However, the U.S. Senate only ratified the 1970 UNESCO Convention subject to reservations intended to preserve the "independent judgment" of the United States regarding "the need and scope of import controls." S. Rep. No. 97-564, at 6 (1982).

5. The CPIA seeks to balance the national interest in promoting the international exchange of cultural materials with the competing interest of foreign

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[1] The CPIA was informed by the thinking of the U.S. delegation to UNESCO and by the views of Prof. Paul M. Bator, whose *Essay on the International Trade in Art*, 34 Stan. L. Rev. 275 (1982), remains the most thorough and balanced examination of the different perspectives on the antiquities trade. *See also Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 Syracuse J. Int'l L. & Com. 97 (1976).

nations in protecting their national patrimony, and the archaeological interest in protecting stratigraphic context from illegal or unscientific excavation. In setting this statutory balance after a decade of consideration, Congress decided against giving the President unbridled authority and instead imposed significant procedural and substantive constraints on that authority which were intended to result in narrowly tailored restrictions limited to archaeological material first discovered within a specific 1970 UNESCO Convention state party.

6. Relevant here, the CPIA makes the President's authority to enter into MOUs contemplating import restrictions contingent upon:

- A specific request that "must be accompanied by a written statement of facts known to the [1970 UNESCO Convention] State Party." CPIA, 19 U.S.C. § 2602 (a) (3);
- Specific findings that: (a) any restricted archaeological artifacts were "first discovered within" and are "subject to export control" by the State Party seeking restrictions (*Id.* § 2601 (2) (C)); (b) any restricted archaeological artifacts are of "cultural significance" (*Id.* § 2601 (2) (C) (i) (I)); (c) less drastic remedies than import restrictions are unavailable (*Id.* § 2602 (a) (1) (C) (ii)); and (d) any restrictions are part of a "concerted international response" of other State Parties to the 1970 UNESCO Convention. *Id.* § 2602 (a) (1) (C) (i).[2]

[2] Congress has accordingly limited the President's power through a "contingency format delegation." As a scholar has explained,

7. Moreover, the CPIA set up a panel of experts, the Cultural Property Advisory Committee ("CPAC"), to assist the President in his decision-making. *See id.* § 2605 *et seq*. CPAC is comprised of eleven (11) members appointed to renewable three-year terms, including experts and members of the general public. *Id.* § 2605 (b). The CPIA also contemplates that the President will not treat CPAC's recommendations lightly. Under the CPIA, 19 U.S.C. § 2602 (g) (2), if the President enters into or extends a MOU, he is required to report to Congress. That report must: (a) describe the actions taken; (b) indicate whether there were any differences between those actions and CPAC's recommendations; and (c) state, if so, the reasons for those differences. *Id.*

8. The CPIA also contains limitations on CBP's authority to promulgate regulations imposing import restrictions. In particular, if import restrictions are recommended, CBP must designate the material restricted by type or classification, making certain that the list is sufficiently specific and precise to ensure that the restrictions are *only applied* to the material

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> These statutes, stemming from the early days of the Republic, grant the President power conditioned on his determination that certain events have transpired. . . . While these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President. To determine whether the President's exercise of power under such a contingency delegation is valid requires review of the satisfaction of the condition or contingency. Simply, if the stated condition or contingency is not satisfied, there is no justification for the exercise of statutory power.

Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 Vand. L. Rev. 1171, 1174-75 (2009) ("Stack").

covered by any agreement to impose import restrictions. *Id.* § 2604 (1). Congress also contemplated that CPAC would guide CBP in preparing such "designated lists" of material subject to import restrictions. As the Senate Report indicates, "the Advisory Committee … is expected to contribute heavily to the composition of the list." S. Rep. No. 97-564, at 8 (1982).

9. All these provisions were added to the CPIA as a legislative compromise to assuage the concerns of museums, collectors and dealers in cultural goods. *See* Stephen K. Urice & Andrew Adler, *Resolving the Disjunction Between Cultural Property Policy and the Law: A Call for Reform*, 64 Rutgers L. Rev. 117, 140 (Fall 2011) ("Urice and Adler")("[B]ecause Congress considered such import restrictions to be 'drastic' measures, especially for a country committed to open borders and free trade, Congress ensured that they could be imposed only if exacting criteria were satisfied.").

10. As Mark Feldman, State's former Deputy Legal Adviser, has also recently stated,

> There is not space here to detail the negotiations that ultimately lead [sic] to the [C]CPIA. In brief, antiquity dealers and their supporters, including Senator Daniel Moynihan, had serious objections to the implementing legislation submitted to Congress by the State Department, and numerous changes had to be made to meet their concerns….
>
> ….
>
> Ultimately a grand bargain was achieved in Congress that imposed *significant procedural*

> *and substantive constraints* on Executive authority to enter bilateral agreements….
>
> The main safeguards established by Congress to protect the public interest from excessive interference with the movement of cultural property were (1) the formation of a formal Cultural Property Advisory Committee ("CPAC") expected to represent the conflicting interests of the American stakeholders directly affected, and (2) statutory prohibition of import controls, other than emergency controls, unless "applied in concert" with those nations individually having a significant import trade in the material concerned.[3]

Mark B. Feldman, *The UNESCO Convention on Cultural Property: A Drafter's Perspective*, A.B.A. Art & Cultural Heritage Law Newsletter 1, 5-6 (Summer 2010) ("Feldman") (emphasis added).

11. Congress treats import restrictions as a trade issue, not a foreign policy, issue. In passing the CPIA, Congress exercised its exclusive power to regulate foreign commerce under U.S. Const. art. I, § 8.

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[3] Below, the Guild specifically alleged that no other country places import restrictions on ancient coins like those now imposed on American collectors and the small businesses of the numismatic trade. (Amended Complaint ¶¶ 44, 62, 135 (j); Pet. App. 120a-121a, 125a, 143a.) The Guild also cited Feldman's representation to Congress that "this legislation and ratification of the convention would not have any immediate effect on coins and it is hard for me to imagine a case where we would need to deal with coins except in the most unusual circumstances." *Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the H. Subcomm. on Trade of the Comm. On Ways and Means*, 96th Cong. 8 (1979) (placed in the record below at Joint Appendix ("JA") 250).

The CPIA was incorporated into a miscellaneous trade bill, and its oversight falls within the jurisdiction of Congress' trade subcommittees. (Amended Complaint ¶¶ 25-26; Pet. App. 115a-116a.)

12. After a series of Government reorganizations, the Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State ("Assistant Secretary, ECA") was delegated Presidential authority and CBP took over the authority to promulgate import restrictions by regulations from the U.S. Treasury. *ACCG*, 698 F.3d at 176; Pet. App.7a.

13. For some twenty-five (25) years, historical coins were exempted from import restrictions imposed under the CPIA. In 2007 and 2009, however, State and CBP changed course and first imposed import restrictions on "coins of Cypriot type[4]" and "coins" "from China." (Amended Complaint ¶¶ 74, 84; Pet. App. 128a, 131a.) As a result, undocumented ancient Cypriot or Chinese coins became subject to detention, seizure and repatriation as "potentially looted" state property, despite the fact that such coins were, and still are, widely sold worldwide and avidly collected in both Cyprus and China. (*Id.* ¶¶ 35-36, 89-90; Pet. App. 119a, 133a-134a.)

14. Subsequent analysis of Freedom of Information Act ("FOIA") and open source documents raised serious questions whether State and CBP complied with the CPIA in changing existing precedent against import restrictions on coins. (*Id.* ¶¶ 37-90; Pet. App. 119a-134a.) Moreover, CPAC's former Chairman, Jay Kislak, stated under oath that the State Depart-

[4] The government had previously exempted Cypriot coins from restrictions. (Amended Complaint ¶¶ 37, 40; Pet. App. 119a-120a.)

ment authorized import restrictions on Cypriot coins against CPAC's recommendations, and then misled the Congress and the public about it in a press release and § 2202 (g) (2) report.[5] (*Id.* ¶ 85; Pet. App. 131a-132a.)

15. As a result, the Guild decided to import twenty-three (23) ancient Cypriot and Chinese coins worth $275.00 to test the regulations in court. (*Id.* ¶91; Pet. App. 134a.) The commercial invoice that accompanied the coins reflected the seller's lack of knowledge about the coins' provenance. While the invoice identified the coins as being minted in either Cyprus or China, it also indicated that each had "No recorded provenance. Find spot unknown." (*Id.* ¶ 93; Pet. App. 134a.) Although CBP then seized the coins, the government never instituted a forfeiture action. Accordingly, after waiting some ten (10) months, the Guild followed the direction of this Court in *United States v. $8,850*, 461 U.S. 555, 569 (1983), and instituted its own action to compel the filing of a forfeiture action or the return of its property. (Amended Complaint ¶¶ 94-101; Pet. App. 134a-135a.)

16. In its Amended Complaint, the Guild alleged that the government: (1) confused "cultural significance" with "archaeological significance" with regard to objects that exist in multiples, like coins; (2) ignored evidence that Cypriot and Chinese coins circulated widely beyond their place of manufacture such that the "first discovery requirement" could not be met; (3) ignored or misapplied the CPIA's requirements that less drastic measures such as treasure trove laws or regulation of metal detectors be insti-

[5] Kislak's declaration and its exhibits are also found in the record below at JA 208-243.

tuted before imposing restrictions; (4) ignored or misapplied the CPIA's "concerted international response requirement;" and (5) wrongfully imposed import restrictions on coins without regard to their find spots. (*See id.* ¶¶ 29, 35-36, 44-45, 62, 120-45, 170-77; Pet. App. 117a, 119a, 120a-121a, 125a, 139a-147a, 152a-154a.)

17. Moreover, the Guild also alleged that bias and/or prejudgment and/or *ex parte* contact marred the decision-making: (1) State staff worked behind-the-scenes with members of the archaeological lobby to orchestrate a change in existing precedent exempting coins from import restrictions; (2) State staff added coins to the Chinese import restrictions without a formal request from Chinese officials to do so; (3) after CPAC rebuffed a last-minute effort to add import restrictions on Cypriot coins, then State Undersecretary Nicholas Burns ordered such import restrictions anyway as a "thank you" to Greek and Cypriot-American advocacy groups which had given him an award; (4) Assistant Secretary, ECA Dina Powell did not recuse herself from approving the 2007 extension of the MOU with Cyprus after she had accepted a new position with an international financial institution that likely had business interests with Cyprus; (5) when she made this decision, State employees provided Powell with a false choice of either renewing the current MOU and adding new restrictions on coins or ending all restrictions; and (6) State then misled Congress and the public about CPAC's true recommendations against import restrictions on coins. (*See id.* ¶¶ 37-90, 120-37; Pet. App. 119a-134a, 139a-145a.)

18. After briefing and oral argument, the district court dismissed this action without allowing any dis-

covery, prompting an appeal.[6] On appeal, the Guild requested that the circuit court uphold three basic principles: (1) that the district court had the authority to review the actions of the Assistant Secretary, ECA under the doctrine of "non-statutory" or *ultra vires* review; (2) that the district court had the authority under the Administrative Procedure Act ("APA") to review the "final agency action" of CBP imposing import restrictions on particular types of coins; and (3) that any import restrictions on coins must be written to comply with the plain meaning of the CPIA, so that they are based on the coin's find spot rather than its place of production. The court of appeals declined to do so, instead holding that anything but the most cursory review of the Federal Register and the district court opinion for procedural compliance "would draw the judicial system too heavily and intimately into negotiations between the Department of State and foreign countries." 698 F.3d at 175, 179-80; Pet. App. 3a, 13a-15a.[7]

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[6] The district court took judicial notice of a limited number of public documents, but never allowed the Guild to create a record to support its allegations. *See* 801 F. Supp. 2d at 383 n. 3; Pet. App. 44a-45a.

[7] The circuit court states that Congress can amend the law if dissatisfied. 698 F.3d at 184, Pet. App. 23a. However, the CPIA was the product of a decade-long legislative effort, and if a court will not apply its provisions as written, any amendment, even if passed, will be rendered just as meaningless. Moreover, while in theory Congress has other tools to check the bureaucracy, the power of the purse means little in an era of continuing funding resolutions and even Congressional inquiries for basic information are often met with stonewalling. *See* Urice and Adler, *supra*, at 147 ("This lack of transparency itself borders on lawlessness; for example, the State Department recently denied a congressman's written request for two CPAC reports, even

19. Six (6) educational, trade and advocacy groups having an interest in coin collecting or more generally in the legitimate exchange of cultural goods supported the Guild in its appeal as *amici.*

20. After the Fourth Circuit denied a petition for en banc review on December 18, 2012 (Pet. App. 98a.), the Guild filed this timely petition for certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition because the lower court's ruling ignores this Court's test for "political questions" and is directly at odds with case law in sister circuits. Moreover, review of this case will provide the Court with a vehicle to clarify its own prior rulings about the scope of judicial review of presidential action and agency decision-making. As such, the Court should grant certiorari to secure and maintain the applicability of its prior decisions, to resolve conflicts among federal courts of appeals, and to decide important questions of federal law regarding the form and scope of judicial review for

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though the [C]CPIA requires the submission of those very reports to Congress.").

Although the circuit court also states that the Guild can challenge seizure and detention of articles in a forfeiture proceeding, the lower court suggests that the government has already met any burden it may have to establish forfeiture, meaning that the Guild will have no defense to the repatriation of its coins to their supposed countries of origin, Cyprus and China, other than a declaration that these coins left those countries before restrictions were imposed. *ACCG*, 698 F.3d at 175, 177, 185; Pet. App. 3a, 7a-8a, 25a.) *See also* 19 U.S.C. §§ 2606, 2609. As a practical matter, particularly for items worth as little as the coins at issue, this is far easier said than done. (Amended Complaint ¶¶ 17-18, Pet. App. 113a-114a.)

decisions involving presidential authority. Finally, certiorari is also warranted because the refusal of the courts below to allow for judicial review dishonors the statutory intent and adversely impacts the continuing interests of American museums, collectors and the trade in the legitimate exchange of cultural artifacts.

I. The Court Should Confirm that the "Political Question Test" is Mandatory Where Foreign Policy Considerations are Raised and Further Clarify the Nature of this Test.

The Court should grant certiorari because the Fourth Circuit's failure to apply the "political question" test conflicts with this Court's precedent and that of its sister circuits. Moreover, review of this case will also allow the Court to answer open questions concerning how that test should be applied.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, "one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because of the interplay between the statute and the conduct of the Nation's foreign relations." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986).

Yet the court of appeals failed to acknowledge, much less apply, the "political question" analysis enunciated in *Baker v. Carr*, 369 U.S. 186, 209-17 (1962), to ascertain whether "foreign policy considerations" trump a court's duty to construe statutes.

Japan Whaling Ass'n., 478 U.S. at 229-30.[8] That formulation calls for "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in a specific case, and the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12.

Below, the Guild argued that all the *Baker* factors support judicial review of this matter. The "particular question" raised in the Amended Complaint is quite narrow. It *is not* whether State is empowered to enter into MOUs. It *is* whether the Government has promulgated and has applied import restrictions on coins in compliance with governing law. Until the controversial decisions to impose import restrictions on ancient Cypriot and Chinese coins, the government exempted such cultural goods from restriction. Courts are well suited to determine whether the CPIA was followed in changing this precedent. The government has never explained how a court decision to strike down or to limit import restrictions on coins widely collected in both Cyprus and China will have *any* negative consequences on our foreign relations. This matter is thus well within the competence of a court to handle. Indeed, judicial review under either an *ultra vires* basis or the APA asks far less of any court than the CPIA asks of lay members of CPAC.

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[8] The district court never reached this issue below. 801 F. Supp.2d at 404 n. 19; Pet. App. 66a. On appeal, the government generally argued that foreign policy considerations supported an affirmance, but never addressed the "political question" test. In reply, the Guild cited *Baker v. Carr, Japan Whaling* and related cases and again referenced *Japan Whaling* at oral argument. (*See* Guild's Reply Brief (Document No. 51 below) at 14-18.)

The circuit court's failure to perform any particularized analysis based upon the precise legal issues before the court (i.e., whether State and CBP decision-makers complied with the CPIA in authorizing and promulgating regulations imposing import restrictions on particular types of ancient coins) places the Fourth Circuit's decision-making squarely at odds with that of this Court and the majority of its sister federal appeals courts. In particular, the District of Columbia, Second, Third, Fifth, Eighth, Ninth and Eleventh Circuits have all applied the "political question" analysis found in *Baker v. Carr* whenever it has been alleged that "foreign policy considerations" trump a court's obligation to "say what the law is." *See El-Shifa Pharmaceutical Industries Company v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("Similarly, that a case may involve the conduct of foreign affairs does not necessarily prevent a court from determining whether the Executive has exceeded the scope of prescribed statutory authority or failed to obey the prohibition of a statute or treaty."), *cert. denied*, 131 S. Ct. 997 (2011); *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 377 (2nd Cir. 2006)("The instant dispute appears to revolve around the proper interpretation of a treaty (the Vienna Convention on Diplomatic Relations) and the application of that treaty to these facts. The Supreme Court has made clear that such a controversy is well within the competence and authority of the federal courts and is not a non-justiciable political question."), *cert. granted*, 549 U.S. 1177, *aff'd.* 551 U.S. 193 (2007); *Khouzam v. Attorney General of the United States*, 549 F.3d 235, 249-50 (3rd Cir. 2008) ("The Government urges that we must refrain from exercising jurisdiction under the political question doctrine, pre-

dominantly because of the Executive's unique role in foreign relations. We disagree."); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 949-51 (5th Cir. 2011) (noting that *Japan Whaling* concerned compliance with law), *cert. denied*, 132 S. Ct. 367 (2011); *Romer v. Carlucci*, 847 F.2d 445, 461-63 (8th Cir. 1988) (en banc) (remand to district court on question of statutory interpretation regarding environmental impact statement for missile deployment); *Jewel v. NSA*, 673 F.3d 902, 912 (9th Cir. 2011) (plaintiff can sue over constitutional and statutory claims despite national security overtones); *Hopson v. Krebs*, 622 F.2d 1375, 1379-80 (9th Cir. 1980) (*Baker* assumes courts can interpret statutes); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 n. 12 (11th Cir. 2004)("[T]he judiciary is not interfering with foreign relations or showing a lack of respect to the executive when it interprets an international agreement and follows its terms."). Under the circumstances, the Court can and should grant certiorari to secure and maintain the applicability of its decisions by bringing the Fourth Circuit and the other circuits that have not applied this test into line with the decisions of this Court.

In addition to confirming that lower courts *must* apply a "political question" analysis whenever there is an effort to dismiss a case on "foreign policy grounds," the Court can also use this matter to answer open questions about the exact character of that test. Recently, in *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012), the Court disagreed with the District of Columbia Circuit's application of the *Baker v. Carr* test, and, therefore, vacated and remanded a dismissal of a case holding that a passport application raised a non-justiciable political question regarding Jerusalem's political status. However, as Justice

Sotomayor observed in concurrence, "*Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication." *Id.* at 1431. Taking up this case will thus also allow the Court to clarify not only that the "political question test" applies whenever "foreign policy concerns" are raised, but the exact nature of that test.

II. The Court Should Clarify Whether *Ultra Vires* or APA Standards of Review Apply to Subdelegations from the President that are Translated into a Final Agency Action.

The Court should also grant certiorari to clarify its own precedent concerning standards of judicial review involving legislative grants of presidential authority. Here, presidential authority has been delegated down to the Assistant Secretary, ECA, but the "final agency action" actually imposing import restrictions on particular types of coins is statutorily that of another agency, CBP. That raises the question whether the proper standard of review is non-statutory *ultra vires* review, review under the APA or a combination of both.

This issue was extensively briefed before the district court. The government, relying primarily on *Franklin v. Massachusetts*, 505 U.S. 788 (1992), argued that the Guild's claims were not justiciable because the Assistant Secretary, ECA was the President's delegee and the President is not an agency within the meaning of the APA. *See also Dalton v. Specter*, 511 U.S. 462, *reh'g denied*, 512 U.S. 1247 (1994). In response, the Guild, citing *Bennett*

v. Spear, 520 U.S. 154, 178 (1997), argued that *Franklin* was not applicable because MOUs did not mention the word "coin" and the only "final agency action" with a "direct and appreciable" impact on the ability of the Guild to import coins was that of CBP and not that of the President's subdelegee at State.

Alternatively, based on *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003) and progeny, the Guild argued that the Assistant's Secretary, ECA's actions, even if not subject to APA review, were subject to "non-statutory" or *ultra vires* review because the CPIA contains significant substantive and procedural constraints on the President's authority. As the Court in *Mountain States Legal Foundation* explained,

> A somewhat different case is presented . . . when the authorizing statute or another statute places discernible limits on the President's discretion. Judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did "not at all limit" the discretion of the President. . . . Courts remain obligated to determine whether statutory restrictions have been violated.

Mountain States Legal Found., 306 F.3d at 1136; *compare with Dalton*, 511 U.S. at 476 (base closure statute at issue does "not at all limit" the Executive's discretion where he is asked to accept or reject a recommendation; hence, "no question of law is raised" in reviewing his decision).

Confronted with this quandary, the district court first noted that there is a distinct lack of appellate

authority to guide courts in a situation where an agency acts pursuant to delegated presidential authority. *ACCG*, 801 F. Supp. 2d at 402; Pet. App. 61a-64a. Nonetheless, it then held that the APA review was not applicable to any of State's decision-making because the Assistant Secretary, ECA, acting under presidential authority, would not be considered an agency for purposes of the APA. *Id.* at 403-404; Pet. App. 65a-67a. Later, the district court also held that CBP's actions were not reviewable either under the APA because they derived from State's actions. *Id.* at 413; Pet. App. 86a-87a.

While the district court then agreed with the Guild that the CPIA's limitations on executive discretion made judicial review appropriate, the district court only undertook what purported to be *ultra vires* review of compliance with the CPIA with respect to two discrete issues, to the exclusion of all others, most notably the "concerted international response" requirement, before dismissing the case without allowing for any discovery.[9] *Id.* at 405-411; Pet. App. 68a-81a.

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[9] The district court largely focused on these two discrete issues (the "first discovery requirement" and the failure of China to ask for import restrictions on coins) apparently because they attracted academic attention. 801 F. Supp.2d at 405-410; Pet. App. 70a-79a; Urice and Adler, *supra.* at 154-59 (final published version of article shared with district court). In contrast, the district court ignored the Guild's allegation that no other country places import restrictions on ancient coins like those now imposed on American collectors and the small businesses of the numismatic trade. (Amended Complaint ¶¶ 44, 62, 135 (j), Pet. App. 120a-121a, 125a, 143a; *See also* Transcript of Motions Hearing Before District Court (Feb. 14, 2011) at 28: 6-11; JA 278 (below) ("If you allow this matter to go forward, Your Honor, we will be able to put on evidence that no other

On appeal, the Guild requested the circuit court to hold: (1) that the district court had the authority to review the actions of the Assistant Secretary, ECA under the doctrine of "non-statutory" or *ultra vires* review; and (2) that the district court had the authority to review the "final agency action" of CBP imposing import restrictions on particular types of coins based on their place of production rather than their find spot under the APA. Instead, the court of appeals suggested that anything but the most cursory review of State's procedural compliance with the CPIA, based largely on the government's own recitation of that process found in the Federal Register, "would draw the judicial system too heavily and intimately into negotiations between the Department of State and foreign countries." *ACCG*, 698 F.3d at 175, 179-80; Pet. App. 3a, 13a-15a.

Assuming the Court agrees that "foreign policy considerations" do not automatically trump judicial review, this case could provide the Court with a vehicle to address whether its prior holdings in *Franklin* and *Dalton* nonetheless allow for *ultra vires* review where the authorizing statute places discernible limitations on the President's authority,[10] and

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country has similar restrictions as the United States has put on Cypriot coins, none, zero. Therefore, the concerted international response cannot be met.").)

[10] The circuit court suggests that the CPIA grants the President "broad discretion" in an effort to help justify its ruling. *ACCG*, 698 F.3d at 179; Pet. App. 12a. However, as noted above, State's own former Deputy Legal Adviser has instead characterized the CPIA as placing "significant procedural and substantive constraints on Executive authority." *See* Feldman, *supra*, at 5-6; *accord* Urice and Adler, *supra*, at 140 ("exacting criteria" for import restrictions); *ACCG*, 801 F. Supp. 2d at 406; Pet. App. 69a ("discernible limits" on executive discretion).

indeed whether *Franklin's* and *Dalton's* restrictions on APA review apply at all where there is a sub-delegation of Presidential authority and/or where the "final agency action" is not of the President's sub-delegee, but that of another agency, here CBP.

III. The Court Should Clarify the Scope of *Ultra Vires* Review.

Certiorari should also be granted to clarify the scope of *ultra vires* review. The district court did not allow the Guild any discovery or the ability to offer any evidence before it engaged in what purported to be *ultra vires* review. *ACCG*, 801 F. Supp. 2d 405-411; Pet. App. 68a-81a. On appeal, the circuit court suggested that State's and CBP's actions pass muster merely because the Federal Register recounted all the necessary procedural steps before import restrictions were announced. *ACCG*, 698 F.3d at 179-80; Pet. App. 13a-15a. Indeed, in so doing, the circuit court went so far to assume CPAC supported restrictions on Cypriot coins despite the sworn statement to the contrary of CPAC's Chairman quoted in the Amended Complaint and included in the record below. *Compare id.* at 179; Pet. App. 12a ("The federal judiciary has not been generally empowered…to overrule CPAC in its conclusion that import restrictions on coins were necessary to protect the cultural patrimon[y] of Cyprus…") with Amended Complaint ¶ 85; Pet. App. 131a-132a (Jay Kislak's sworn statement that "I believe it is absolutely false to suggest … that the State Department's decision to extend import restrictions to ancient coins was consistent with CPAC's recommendations.").[11]

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[11] The Guild cited the Kislak Declaration in its opening brief and at oral argument. (*See* Guild's Corrected Opening Brief

The circuit court's sole focus on procedural compliance is also erroneous as a matter of law because Congress placed both *significant procedural and substantive constraints on executive authority*. Feldman, *supra*, at 5-6. Indeed, the CPIA's "contingency format" delegation is hinged upon substantive fact finding. *Compare* CPIA, 19 U.S.C. §§ 2601-2602 *with* Stack, *supra* note 2, at 1174-75 ("To determine whether the President's exercise of power under such a contingency delegation is valid requires review of the satisfaction of the condition or contingency. Simply, if the stated condition or contingency is not satisfied, there is no justification for the exercise of statutory power."). In any event, even if judicial review of "procedure" were the only issue before the courts, the circuit court also glossed over the Guild's allegations that such procedures were marred by bias and/or prejudgment and/or *ex parte* contact in its haste to affirm the dismissal of the Guild's action. (*See* Amended Complaint ¶¶ 37-90, 120-37; Pet. App. 119a-134a, 139a-145a.)

Moreover, the District of Columbia, First and Second Circuits do not appear to hold that *ultra vires*

(Document No. 58 below) at 12.) The lower courts also assumed that CBP merely followed State's directions on what particular coins to place on the designated lists, but that assumption is not based on the record and, indeed the Guild sought discovery on this particular issue. *Compare ACCG*, 698 F.3d at 184; Pet. App. 23a ("We also agree with the district court that CBP did not violate the APA because it merely promulgated regulations at the behest of State and in full compliance with the CPIA.") *with* Guild's Corrected Opening Brief (Document No. 58 below) at 19 ("Such discovery is especially warranted on this particular issue. Pre-litigation State itself proclaimed to both Congress and the public that CBP was the lead agency responsible for the decision to impose import restrictions on certain coin types."). (*Accord* Amended Complaint ¶ 79; Pet. App. 129a-130a.)

review is as limited as the Fourth Circuit suggests. "The basic premise behind non-statutory review is that, even after passage of the APA, some residuum of power remained with the District Court to review agency action that is *ultra vires.*" *Rhode Island Dep't of Env. Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002). In conducting *ultra vires* review, "[c]ourts can defer to the exercise of administrative discretion…, but they cannot abdicate their responsibility to insure compliance with congressional directives setting the limits on that discretion." *Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1173 (D.C. Cir. 1995) (citations omitted). *Accord Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003).

As another circuit court has explained,

> [T]he "ultra vires standard" requires the reviewing court to ascertain the scope of the acting officials' statutory authority and determine whether the officials' action conformed with that authority. Such authority may be broad or narrow depending on the language employed in the empowering legislation. Similar to the role the courts play in interpreting contracts, the courts' role in applying the "ultra vires" standard is limited to examining the four corners of the statute that gives the officials the power to act and determining whether the officials have complied with the statute's language….
>
> ….
>
> Even after the court concludes the Secretary conformed to his legislative grant of authority, the court may still consider the manner in which he exercised that authority. Such a considera-

> tion requires the reviewing court to determine whether the Secretary acted arbitrarily, capriciously, or in bad faith. The purpose of such an inquiry, however, is not to determine whether the Secretary conformed to his statutory authority, but rather whether he *abused* his authority.

United States v. 16.03 Acres of Land, 26 F.3d 349, 355-56 (2nd Cir. 1994), *cert. denied sub nom. Nelson v. Dep't of Interior*, 513 U.S. 1110 (1995). *Accord Aid Ass'n for Lutherans*, 321 F.3d at 1174 ("An agency construction cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of the statute or because the agency's construction is utterly unreasonable and hence impermissible.").

More fundamentally, *16.03 Acres of Land* establishes that the CPIA's provisions must be analogized to those of a contract, and that there must be some further factual inquiry into whether the Assistant Secretary, ECA, breached her obligations under that law. 26 F.3d at 355-56. Here, the Guild alleged that the Assistant Secretary, ECA, violated her statutory authority and that serious abuses of the government's authority help explain these violations. (*See* Amended Complaint ¶¶ 29-30, 44, 62, 75, 85, 120-31, 135, 138-45, 170-77; Pet. App. 117a, 120a-121a, 125a, 128a-129a, 131a-132a, 139a-147a, 152a-154a.) The Guild, has, therefore, stated a claim that should have gone forward on the merits and a grant of certiorari is warranted not only to correct the Fourth Circuit's exceptionally limited conception of *ultra vires* review, but also to clarify the issue for other circuit courts that have yet not addressed the issue.

IV. Refusal of the Courts to Undertake Judicial Review of Overbroad Import Restrictions Harms American Museums, Collectors, and Small Businesses Engaged in the International Exchange of Cultural Goods.

Ancient coins have been avidly traded without provenance information since the Renaissance. (*See* Amended Complaint ¶¶ 17-20; Pet. App. 113a-114a.) Accordingly, the Guild imported $275.00 worth of ancient coins to test whether the government complied with the stringent procedural and substantive constraints found in the CPIA before imposing unprecedented and difficult, if not impossible to comply with, documentation requirements on the import of common ancient coins of the sort collected worldwide. In so doing, the Guild acted on behalf of untold numbers of collectors and small businesses of the numismatic trade that have been severely impacted by import restrictions on the coins they avidly collect, but who could never themselves afford to fund such a legal contest, much less the defense of a forfeiture action, particularly one involving coins worth such a typically trivial sum.

If anything, these issues have only become more pressing, particularly for coin collectors. Initially, import restrictions were imposed on behalf of poor, third world countries, and on narrow ranges of artifacts. After three decades, however, import restrictions are now in place on behalf of "First World" E.U. members like Italy, Cyprus and Greece, superpowers like China, and on ever greater categories of artifacts, including most recently further broad restrictions on ancient coins that were imposed while

lower courts were still considering the Guild's test case.[12]

Archeologists unalterably opposed to private collecting may applaud these developments[13], but past CPAC members associated with the museum, trade, and art communities have stated publicly that State has disregarded the criteria established by law and cloaked its operations in secrecy to hide an abuse of power.[14] Moreover, these import restrictions do not

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[12] State and CBP have imposed import restrictions on behalf of fourteen (14) UNESCO state parties. *See* Bureau of Educational and Cultural Affairs Cultural Property Protection, *Guide to Cultural Property Import Restrictions Currently Imposed by the United States of America* (available at http://eca.state.gov/files/bureau/chart-of-import-restrictions.pdf) (last visited Jan. 28, 2013). While this case was pending before the lower courts, State and CBP imposed new import restrictions on ancient coins struck in Italy and Greece, again based on their place of production rather than their find spot. *See* 76 Fed. Reg. 3012, 3013 (Jan. 19, 2011) (Italian import restrictions); 76 Fed. Reg. 74691, 74693 (Dec. 1, 2011) (Greek import restrictions). Prior to this action, ancient coins struck in Italy had been twice exempted from restrictions. (Amended Complaint ¶¶ 38-39, 47, 52 (Pet. App. 119a-120a, 122a-123a.)

[13] *See generally* C. Luke, *U.S. Policy, Cultural Heritage, and U.S. Borders*, 19 Int'l J. Cul. Prop. 175, 177 (2012) ("The restitution of objects offers a channel for positive diplomatic exchange….").

[14] Past CPAC Chair Jay Kislak and other former CPAC members have questioned the reasons for State Department's secrecy at a public forum. Transcript of Seminar, The Cultural Property Act: Is it Working? (Mar. 21, 2011) ("CPRI Seminar") at 27:20-30:7; 43:20-44:9; JA 359-362; 375-76 below) (available at http://www.cprinst.org/Home/issues/transcript---cultural-property-implementation-act-is-it-working) (last visited Jan. 28, 2013). In addition, Kislak and other former CPAC members expressed the following serious concerns about how the State Department administers the CPIA: (1) conducting CPAC votes using short-

just restrict the entry of cultural goods; they also provide a predicate for detention, seizure and forfeiture of artifacts on designated lists and even possible criminal sanctions.[15]

Accordingly, six (6) educational, trade and advocacy groups interested in coin collecting and more generally in the legitimate international exchange of

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ened versions of required findings (CPRI Seminar at 30:8-17; 51:4-52:8, JA 362, 383-84.); (2) refusing to allow CPAC members to review their own CPAC reports such that they cannot even verify if their recommendations were accurately reported to the decision-maker (*Id.* at 49:1-14, JA 381.); (3) relying upon evidence of historic looting rather than evidence of present-day looting to conclude that a source country's cultural patrimony was in jeopardy (*Id.* at 30:19-21, JA 362.); (4) requiring only minimal self-help efforts and evidence of cultural exchange to justify ever broader restrictions. (*Id.* at 30:21-31:10; 58:5-18, JA 362-63, 390.); (5) unilaterally changing restrictions from "emergency" to "regular" ones though different standards apply without making the required findings or seeking CPAC's recommendations (*Id.* at 32:3-33:1, JA 364-65.); (6) ignoring CPAC's recommendations with regard to coins (*Id.* at 45:17-46:15, JA 377-78.); and (7) packing CPAC slots meant for representatives of other stakeholders with representatives of the archaeological community (*Id.* at 46: 12-15; 50:4-20; 83:4-84:7, JA 378, 382, 415-16.).

[15] Import restrictions have also served as a convenient predicate to justify last minute demands for proof that cultural goods to be auctioned *in the United States* were imported legally sometime in the past. (CPRI Seminar at 72:17 to 74:9, JA 404-06 below.) Since 2007, the government has repatriated more than 6,600 cultural artifacts to their supposed countries of origin based on violations of the CPIA and other, related customs statutes. *See Transfer Ceremony Clears Way for Looted Ancient Vessel to be Returned to Italy*, Immigration and Customs Enforcement Press Release (Jan. 8, 2013)(available at http://www.ice.gov/news/releases/1301/130108toledo.htm#) (last visited Jan. 28, 2013). As such, they have a *real impact on real small businesses, museums and collectors.*

cultural goods also supported the Guild below as *amici* for the simple, sound, and serious reason that overbroad import restrictions imposed in disregard of the CPIA's significant procedural and substantive requirements have already gravely damaged the interests of museums, collectors and the trade in the legitimate international exchange of cultural goods. The importance of these issues to the continued access of American citizens and institutions to ancient coins and other artifacts as "hands-on" mediums of cultural exchange and understanding also argue for this Court to take this matter up to ensure the balance Congress sought to achieve in passing the CPIA is not irretrievably lost.

CONCLUSION

The lower courts have effectively excused State and CBP from any scrutiny despite well-founded allegations import restrictions on historical coins were imposed without regard for the significant procedural and substantive constraints found in the CPIA. Accordingly, the Guild respectfully requests that the Court grant certiorari, not only to decide important questions of federal law regarding the form and scope of judicial review, but also to ensure that federal regulators themselves are bound by the rule of law.

Respectfully submitted,

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February 12, 2013

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 10/22/2012]

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No. 11-2012

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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.

———

AMERICAN COMMITTEE FOR CULTURAL POLICY; ANCIENT COINS FOR EDUCATION, INC.; INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART; INTERNATIONAL ASSOCIATION OF PROFESSIONAL NUMISMATISTS; PROFESSIONAL NUMISMATISTS GUILD, INC.; THE AMERICAN NUMISMATIC ASSOCIATION,
Amici Supporting Appellant.

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Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge.
(1:10-cv-00322-CCB)

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Argued: September 19, 2012
Decided: October 22, 2012

Before WILKINSON and THACKER, Circuit Judges, and Michael F. URBANSKI, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Thacker and Judge Urbanski joined.

COUNSEL

ARGUED: Peter Karl Tompa, BAILEY & EHRENBERG, PLLC, Washington, D.C., for Appellant. Samantha Lee Chaifetz, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: Jason Ehrenberg, BAILEY & EHRENBERG, PLLC, Washington, D.C., for Appellant. Tony West, Assistant Attorney General, Beth S. Brinkmann, Deputy Assistant Attorney General, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellees. Richard B. Rogers, RICHARD B. ROGERS PLC, Alexandria, Virginia, for American Committee for Cultural Policy and International Association of Dealers in Ancient Art, Amici Supporting Appellant. Michael McCullough, MICHAEL MCCULLOUGH, LLC, Brooklyn, New York, for International Association of Professional Numismatists, The American Numismatic Association, and Ancient Coins for Education, Inc., Amici Supporting Appellant. Armen R. Vartian, LAW OFFICES OF ARMEN

R. VARTIAN, Manhattan Beach, California, for Professional Numismatists Guild, Inc., Amicus Supporting Appellant.

OPINION

WILKINSON, Circuit Judge:

The Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601-2613, provides a mechanism by which foreign countries can request that the United States enact import restrictions on certain articles of cultural significance to prevent their looting and illegal sale. In challenging the seizure of coins that it attempted to import, the Ancient Coin Collectors Guild (the "Guild") asks us to engage in a searching review of the government's implementation of CPIA import restrictions on Chinese and Cypriot cultural property.

Accepting such an invitation, however, would draw the judicial system too heavily and intimately into negotiations between the Department of State and foreign countries, injecting the courts into an area of law covered by statutorily conferred executive discretion and congressional oversight. Such judicial interference would be especially problematic because Congress has already prescribed civil forfeiture as a vehicle through which importers can challenge the seizure and detention of articles allegedly covered by CPIA restrictions. Here, forfeiture proceedings were placed on hold pending the outcome of this litigation, and the Guild may still pursue various forfeiture defenses to obtain release of the articles it attempted to import. We therefore affirm the judgment of the district court.

I.

A.

In the fall of 1970, the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") held a conference in Paris where its member states fashioned an international system to protect articles of cultural significance from "the dangers of theft, clandestine excavation, and illicit export." Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property pmbl., Nov. 14, 1970, 823 U.N.T.S. 231. The product of this conference was the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention"). *Id*. Pursuant to Article 9 of the Convention, a "State Party" can request that other signatories take steps to protect the requesting state's cultural property from theft and illicit export, such steps to include import and/or export controls. *Id*. art. 9. The Convention defines the term "cultural property" to include an array of items "of importance for archaeology, prehistory, history, literature, art or science." *Id*. art. 1.

The U.S. Senate "unanimously gave its advice and consent to ratification in 1972," subject to several reservations, one of which indicated that the Convention was not self-executing. S. Rep. 97-564, at 21 (1982). To implement the Convention domestically, Congress passed the CPIA ten years later in 1982, and President Reagan signed it into law in 1983. Convention on Cultural Property Implementation Act, Pub. L. 97 446, tit. III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601-2613).

B.

The CPIA allows the U.S. government to place import restrictions on designated articles of cultural property at the request of another Convention party. The process commences when a Convention party submits a written request to the United States seeking assistance in protecting its cultural property. 19 U.S.C. § 2602(a)(1), (a)(3). Upon receipt of the request, the President must "publish notification of the request . . . in the Federal Register" and submit the request and supporting statements to the Cultural Property Advisory Committee ("CPAC"). *Id*. § 2602(f).

CPAC is an eleven-member committee appointed by the President that includes representatives of museums; "experts in the fields of archaeology, anthropology, ethnology, or related areas"; "experts in the international sale of archaeological, ethnological, and other cultural property"; and representatives "of the general public." *Id*. § 2605(b)(1). CPAC reviews a request for import restrictions and issues a report to the President indicating whether such restrictions are advisable. *Id*. § 2605(f). As part of its report, CPAC must state whether: (1) "the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials"; (2) "the State Party has taken measures consistent with the Convention to protect its cultural patrimony"; (3) import restrictions "would be of substantial benefit in deter-ring a serious situation of pillage"; (4) "remedies less drastic than" import restrictions are available; and (5) import restrictions are "consistent with the general interest of the international community in the interchange of cultural

property among nations for scientific, cultural, and educational purposes." *Id*. § 2602(a)(1).

If, after receipt of the report, the President agrees with CPAC that import restrictions are advisable and formally determines that the aforementioned circumstances exist, he may enter into an agreement, referred to as an "Article 9 agreement" or a "memorandum of understanding," with the requesting state to apply such restrictions. *Id*. § 2602(a), (f). The President must then provide to Congress the text of the agreement and a description of the import restrictions imposed. *Id*. § 2602(g). If the President disagrees with the CPAC recommendation and takes a different action or takes no action at all, he must submit a report to Congress indicating the reasons for his deviation from the CPAC recommendation. *Id*.

The scope of import restrictions enacted pursuant to the CPIA is limited by § 2601. Most relevant here, the statute limits import restrictions to "archaeological or ethnological material of the State Party" and defines that term to mean any object of archaeological or ethnological interest that "was first discovered within, and is subject to export control by, the State Party" requesting import restrictions. *Id*. § 2601(2). The Secretary of the Treasury—who was responsible for U.S. Customs at the time the CPIA was enacted—can promulgate regulations that list restricted articles "by type or other appropriate classification," so long as "each listing made . . . shall be sufficiently specific and precise to insure that (1) the import restrictions . . . are applied only to the archaeological and ethnological material covered by the agreement" and "(2) fair notice is given to importers and other persons as to what material is subject to such restrictions." *Id*. § 2604. Any article that meets

the aforementioned definition of "archaeological or ethnological material of the State Party" may be restricted.

Although the statute confers CPIA functions upon the President and the Secretary of the Treasury, government reorganizations and various delegations of authority now leave CPIA authority in the hands of the Assistant Secretary of State for Educational and Cultural Affairs (the "Assistant Secretary") and U.S. Customs and Border Protection ("CBP"). *E.g.*, Exec. Order 12,555; 68 Fed. Reg. 10,627; 65 Fed. Reg. 53,795. The Assistant Secretary, an officer of the U.S. Department of State ("State"), is responsible for communicating with other parties to the Convention and for filing the necessary determinations and reports, 65 Fed. Reg. 53,795, and CBP, a unit of the U.S. Department of Homeland Security, is responsible for promulgating regulations that enact appropriate import restrictions, Exec. Order 12,555; 68 Fed. Reg. 10,627. CBP also enforces the restrictions at ports of entry. 19 C.F.R. § 12.104i.

If an article is covered by CPIA import restrictions, it may not be brought into the United States unless (1) it is accompanied by formal documentation certifying that it was lawfully exported from the country that has requested the import restrictions, 19 U.S.C. § 2606(a); (2) there is "satisfactory evidence" that the article was exported from the State Party at least ten years before it arrived in the United States and the importer owned it for less than one year before it arrived in the United States, *id*. § 2606(b)(2)(A); or (3) there is "satisfactory evidence" that the article was exported from the State Party before the import restrictions took effect, *id*. § 2606(b)(2)(B). Section 2606 defines "satisfactory evidence" to include a

"declaration[] under oath by the importer, or the person for whose account the material is imported, stating that, to the best of his knowledge," the article is eligible for import under one of the aforementioned exemptions. *Id*. § 2606(c). If the date of export from the State Party is not known, a statement expressing "belief" that the article meets one of the exemptions may suffice. *Id*. § 2606(c)(1)(B), (c)(2)(B).

If, at the port of entry, CBP officers initially determine that an article is not eligible for import into the United States, they may seize the article. 19 U.S.C. § 2609(a). If the importer fails to subsequently demonstrate that the article may be lawfully imported, CBP may then refer the matter to the United States Attorney's Office to commence a forfeiture action. 19 U.S.C. §§ 1610, 2609. While the CPIA imposes no requirement that the government commence forfeiture proceedings, the Fifth Amendment Due Process Clause does impose such a requirement. *See Degen v. United States*, 517 U.S. 820, 822 (1996).

C.

1.

In September 1998, Cyprus formally requested that the United States impose import restrictions on "certain categories of archaeological and/or ethnological material the pillage of which, it is alleged, jeopardizes the national cultural patrimony of Cyprus." 63 Fed. Reg. 49,154. The United States Information Agency ("USIA"), at that time responsible for taking action under the CPIA, Exec. Order 12,555, promptly published notice of the Cypriot request in the Federal Register and referred the matter to CPAC for review, 63 Fed. Reg. 49,154-55. The emergency provisions of the CPIA allow for the application of import

restrictions on a temporary basis while the United States and the requesting state negotiate a permanent agreement under the standard CPIA framework. 19 U.S.C. § 2603. Finding the situation in Cyprus to be an urgent one, CPAC recommended that the United States apply emergency import restrictions on certain archaeological and ethnological articles from Cyprus. 64 Fed. Reg. 17,530. In 1999, USIA formally determined such action was necessary, and the U.S. Customs Service then imposed the restrictions. Id. No coins appeared on the initial list of restricted items. *Id*. at 17,530-31.

In 2002, the United States and Cyprus signed an Article 9 agreement under the standard, non-emergency provisions of the CPIA. 67 Fed. Reg. 47,447. This agreement was amended in 2006, 71 Fed. Reg. 51,724-25, and extended via diplomatic note in 2007, 72 Fed. Reg. 38,470-71. The Assistant Secretary published notice of the proposed extension in the Federal Register, 71 Fed. Reg. 71,015-16, and she "review[ed] the findings and recommendations" of CPAC in concluding that the amendment and extension were necessary. 72 Fed. Reg. 38,471. Following the 2007 extension, CBP promulgated an amended list of articles subject to import restrictions. *Id*. at 38,471-73. This list did include certain "Coins of Cypriot Types," and restrictions on these coins took effect shortly after the list was published in the Federal Register. *Id*. at 38,473.

2.

In May 2004, China formally requested that the United States impose import restrictions on a number of categories of "Chinese archaeological material from the Paleolithic to the Qing Dynasty." 69 Fed. Reg. 53,970. The Assistant Secretary promptly pub-

lished notice of the request in the Federal Register, *id*., and referred the request to CPAC for review. CPAC recommended imposing import restrictions. Upon receipt of the CPAC report, the Assistant Secretary formally determined that import restrictions were justified under the CPIA, and in January 2009, the United States and China entered into an Article 9 agreement to restrict import of the cultural property under consideration. 74 Fed. Reg. 2,839. Several days after the agreement was concluded, CBP promulgated a list of articles subject to CPIA restrictions, including certain coins of Chinese types. *Id*. at 2,842. Restrictions on these coins took effect shortly after the list was published in the Federal Register. *Id*. at 2,839.

D.

In April 2009, after the aforementioned import restrictions had taken effect, the Guild purchased twenty-three ancient Chinese and Cypriot coins from a numismatic dealer in London. According to documentation provided by the dealer, "each coin was minted in Cyprus or China"; "each coin had no recorded provenance"; and for each coin, the "find spot" was "unknown." *Ancient Coin Collectors Guild* ("*ACCG*") *v. U.S. Customs & Border Protec*tion, 801 F. Supp. 2d 383, 394 (D. Md. 2011) (internal quotation marks omitted).

On April 15, 2009, the Guild attempted to bring the coins into the United States via air cargo. CBP detained the coins for alleged violations of the CPIA and associated regulations and indicated that the coins would be released if the Guild provided evidence that each was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more

than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect. However, (and perhaps in an effort to establish a test case), the Guild declined to provide CBP with the necessary documentation.

After waiting several months for the government to institute forfeiture proceedings, the Guild brought this action against, *inter alia*, U.S. Customs and Border Protection and the U.S. Department of State, alleging that the actions of both agencies were *ultra vires*, in violation of the Administrative Procedure Act, and in violation of the First and Fifth Amendments to the United States Constitution. Following a hearing, the district court granted in full the government's motion to dismiss.

The court dismissed the APA claims against State, holding that State was not an "agency" for purposes of the APA because, in making the challenged decisions that established the relevant import restrictions, it was acting as the President's delegee and exercising power expressly granted to the President by statute. The court also dismissed the APA claims against CBP, holding that CBP merely complied with valid regulations promulgated at the behest of State.

As to the *ultra vires* claims, the court held that neither State nor CBP exceeded its authority under the CPIA or any other relevant statute. The constitutional claims were also held to be without merit: the government's delay in instituting forfeiture proceedings did not constitute a violation of due process, and "even assuming without deciding that the inscriptions on ancient coins constitute expression [under the First Amendment], the import restrictions satisfy the requirements of *United States v. O'Brien*, 391

U.S. 367 (1968)." *ACCG*, 801 F. Supp. 2d at 411. This appeal followed.

II.

The Guild asks this court to engage in a searching review of the State Department's conclusions that (1) import restrictions on coins were requested by China and Cyprus, (2) the restricted articles were part of each state's respective cultural patrimony, and (3) the restrictions were necessary to protect each state's respective cultural patrimony. As outlined above,

> Congress set out an elaborate statutory scheme for promulgating import restrictions on culturally sensitive items and gave the Executive Branch broad discretion in negotiating Article 9 agreements with foreign states. *See* 19 U.S.C. § 2602(a). Congress itself retained oversight of the CPIA process, *id*. § 2602(g), and placed significant responsibility in the hands of CPAC, a body composed of experts in the fields of archaeology and ethnology, *id*. § 2605. Congress also provided forfeiture procedures through which importers could challenge any seizures made pursuant to the CPIA. *Id*. § 2609.

The conclusions to be drawn from the entirety of this statutory scheme are clear. The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage, to overrule CPAC in its conclusion that import restrictions on coins were necessary to protect the cultural patrimonies of Cyprus and China, or to challenge Congress in its decision to channel CPIA disputes through forfeiture proceedings. Mindful of the deference owed the political

branches under the statute, we consider the Guild's arguments.

A.

The Guild contends that the State Department acted *ultra vires* when it imposed import restrictions on certain Cypriot and Chinese coins. Our review under the *ultra vires* standard is necessarily narrow. We may not dictate how government goes about its business but only whether a public entity "has acted within the bounds of its authority or overstepped them." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (D.C. Cir. 2010) (Brown, J., concurring in the judgment). Government action is *ultra vires* if the agency or other government entity "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *see also U.S. Dep't of Interior v. 16.03 Acres of Land*, 26 F.3d 349, 355 (2d Cir. 1994).

The statute, as noted, involves a sensitive area of foreign affairs where Congress itself has delegated the Executive Branch significant discretion. Given that approach, a searching substantive review of the State Department's diplomatic negotiations or CPAC's application of its archaeological expertise would be singularly inappropriate in this forum. And the record itself leaves no room for an *ultra vires* challenge on any other basis.

As the district court noted, there is no question that the State Department complied with CPIA procedures when it placed import restrictions on Chinese coins:

- In May 2004, China formally requested that the United States impose import restrictions on certain categories of cultural property. 69 Fed. Reg. 53,970.
- The Assistant Secretary promptly published notice of the request in the Federal Register, id., and published a public summary of the request on the State Department's website.
- The Assistant Secretary referred the Chinese request to CPAC, and CPAC issued a report recommending import restrictions on certain categories of Chinese cultural property. *ACCG*, 801 F. Supp. 2d at 393.
- Based on CPAC's report, the Assistant Secretary determined that: (1) "the cultural patrimony of China is in jeopardy from the pillage of irreplaceable archaeological materials representing China's cultural heritage"; (2) "the Chinese government has taken measures consistent with the Convention to protect its cultural patrimony"; (3) "import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available"; and (4) "the application of import restrictions . . . is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes." 74 Fed. Reg. 2,839.
- The Assistant Secretary followed CPAC's recommendation, and the United States con-

cluded an Article 9 agreement with China in January 2009. *Id*.

- The Assistant Secretary reported to Congress the text of the agreement and a description of the import restrictions to be imposed under it.
- CBP published in the Federal Register a list of items subject to CPIA import restrictions, including coins of certain Chinese types. *Id*. at 2,839-43.

Before CBP enforced any import restrictions on Chinese coins, each of the CPIA's requirements was satisfied with respect to those coins. The district court similarly found that the State Department complied with the statutory requirements in placing import restrictions on Cypriot coins.

B.

Notwithstanding the above, the Guild argues that the State Department and CBP ran off the rails by enacting import restrictions on Chinese coins without following the procedures required by the CPIA. The Guild alleges two distinct violations of the statute. First, the Guild argues that the State

Department imposed restrictions on Chinese coins even though China did not mention coins in its May 2004 request. In making this argument, however, the Guild seeks to add a provision to the statute that is simply not there, namely a requirement that a request under Article 9 include "a detailed accounting of every item eventually covered by an Article 9 agreement." *ACCG*, 801 F. Supp. 2d at 410.

The CPIA requires that a State Party (here China) formally request assistance from the United States in protecting its cultural patrimony, 19 U.S.C

§ 2602(a)(1), (a)(3), but the request need not include a comprehensive list of all the items that might later be found appropriate for inclusion in a negotiated Article 9 agreement. Were the federal judiciary to require a State Party to include such a list, we would be placing burdens that Congress nowhere mentioned upon China, Cyprus, and every other foreign country that sought this country's assistance in protecting its own cultural heritage. We would be drawn into preliminary negotiations between the State Department and foreign countries in a far more detailed manner than the CPIA contemplated. This is the very intervention into sensitive diplomatic matters that we have earlier emphasized is not permissible, and we decline to require from China more than the statute itself does.

Second, the Guild contends that the State Department's notice in the Federal Register was defective because it did not mention that China requested restrictions on coins. Once again, the Guild effectively seeks to have us impose a requirement that does not appear in the CPIA, this time that the State Department "publish verbatim the list of items requested to be restricted." *ACCG*, 801 F. Supp. 2d at 410.

The statute merely requires that the State Department publish "notification of the request" in the Federal Register, 19 U.S.C. § 2602(f)(1), not an exhaustive description of its terms. To scrutinize the adequacy of the State Department's publication and require a verbatim publication of a foreign request would involve the judiciary in the very early stages of the CPIA process and place upon the State Department a burden that Congress did not intend. Requiring the Department of State to reveal every

detail of a request made by a foreign government through confidential diplomatic channels runs afoul of the admonition that such revelations may "compromise the Government's negotiating objectives or bargaining positions on the negotiations of any agreement authorized by [the CPIA]." 19 U.S.C. § 2605(h). Because Congress required that the Department of State simply publish "notification of the request" by a State Party, we decline to accept the Guild's suggestion that we require more from State Department's notice in the Federal Register.

In sum, each of the Guild's arguments with respect to State's procedural compliance would have us add encumbrances to the CPIA, ultimately placing additional burdens on foreign governments and State Department officials negotiating Article 9 agreements with those governments. It is true that at the conclusion of negotiations and upon the reaching of an Article 9 agreement with the foreign government in question, CBP must publish a list of import restrictions by type in the Federal Register. *Id*. § 2604. CBP complied with that requirement here. 74 Fed. Reg. 2,839-2,842. But the detail required by the statute at the conclusion of the process is altogether different from the level of detail required before negotiations between our country and another nation have even so much as begun.

Congress sought to strike a balance here between the need for notice and transparency on the one hand, and the need for confidentiality in sensitive matters of diplomacy on the other. Likewise in balance is the aim of having the CPIA process move forward with some modicum of efficiency while still providing both proper notice of the restrictions and procedural recourse for those who are subject to

them. It is clear that deviation from the provisions of the statute runs every risk of throwing this balance out of kilter in an area where traditional competencies and constitutional allocations of authority have counseled reluctance on the part of the judiciary to intervene. The Guild asks us to do just that, and we decline its invitation.

C.

Section 2601 narrows the universe of articles that may be subjected to import restrictions under the CPIA. Only an object of archaeological or ethnological interest "which was first discovered within, and is subject to export control by" the requesting state may be restricted. 19 U.S.C. § 2601(2). The Guild alleges that State and CBP acted *ultra vires* by placing import restrictions on all coins of certain types without demonstrating that all coins of those types were "first discovered within" China or Cyprus. Guild Br. at 21-22. According to the Guild, the government and the district court effectively read the "first discovered" requirement out of the statute. *Id*. at 24.

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

Here, CBP published detailed lists of restricted types from both China and Cyprus. The requests categorize the restricted articles by material (e.g.,

"Bronze," "Iron"), then by category (e.g., "Coins," "Sculpture"), then by time period, and finally by specific "type." E.g., 74 Fed. Reg. 2,842; 72 Fed. Reg. 38,473. One Cypriot coin type, for example, was described as follows: "III. Metal, D. Coins of Cypriot Types, 3. Provincial and local issues of the Roman period from c. 30 B.C. to 235 A.D. Often these have a bust or head on one side and the image of a temple (the temple of Aphrodite at Palaipaphos) or statue (statue of Zeus Salaminios) on the other." 72 Fed. Reg. 38,472-73.

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). Among the members of CPAC are three "experts in the fields of archaeology, anthropology, ethnology, or related areas" and three "experts in the international sale of archaeological, ethnological, and other cultural property." 19 U.S.C. § 2605(b)(1). Plaintiffs have given us no reason to question CPAC's conclusion, as adopted by State, as to where the types of cultural property at issue were discovered. To the contrary, it was hardly illogical for CPAC to conclude that, absent evidence suggesting otherwise, Chinese and Cypriot coins were first discovered in those two countries and form part of each nation's cultural heritage.

As the district court noted, "the CPIA anticipates that there may be some archaeological objects without precisely documented provenance and export rec-

ords." *ACCG*, 801 F. Supp. 2d at 408. In those cases, the statute expressly provides that CBP may seize the articles at the border: "If the [importer] of any designated archaeological or ethnological material is unable to present to the customs officer" the required documentation, the "officer concerned shall refuse to release the material from customs custody . . . until such documentation or evidence is filed with such officer." 19 U.S.C. § 2606(b). In short, CBP need not demonstrate that the articles are restricted; rather, the statute "expressly places the burden on importers to prove that they are importable." *ACCG*, 801 F. Supp. 2d at 408.

This conclusion is borne out by § 2606, which states that once archaeological or ethnological material has been designated by "type" and included in the list of restricted articles, it may not be imported into the United States without specific documentation showing that it is eligible for import. 19 U.S.C. § 2606. Such documentation must show that the article in question was either (1) lawfully exported from its respective state while CPIA restrictions were in effect; (2) exported from its respective state more than ten years before it arrived in the United States; or (3) exported from its respective state before CPIA restrictions went into effect. *Id*. In other words, the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten years before the date of import.

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

III.

We now turn to the Guild's claims under the Administrative Procedure Act. The Guild alleges that State violated the APA by, *inter alia*, making decisions influenced by "bias and/or prejudgment and/or *ex parte* contact." Am. Compl. ¶ 135; *see also ACCG*, 801 F. Supp. 2d at 401. It also alleges that CBP violated the APA by promulgating import restrictions on Cypriot and Chinese coins and by seizing those coins despite the fact that they were not covered by the CPIA. Am. Compl. ¶ 102, 117; *see also ACCG*, 801 F. Supp. 2d at 413 14.

The district court held that the APA did not apply to State's actions because State was acting at the behest of the President and was therefore not an "agency" for APA purposes. *ACCG*, 801 F. Supp. 2d at 403-04. On appeal, the government argues that even if State were an "agency," the APA's provisions would still not apply to it because agency action on behalf of the President in foreign affairs is covered by the exemption for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Chi. & S. Air Lines*

v. Waterman S.S. Corp., 333 U.S. 103, 111-12 (1948); *see also Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975).

We have emphasized throughout the restricted scope of judicial review when it comes to the statutory discretion Congress has conferred upon the Executive Branch in carrying out the international obligations of the United States under the Convention. These cautions are nowhere more pertinent than where this nation's protection and recognition of another's cultural patrimony is involved. Congress recognized that the CPIA "is important to our foreign relations, including our international cultural relations," and it enacted the statute to ensure that the United States did not become an illegal market for foreign cultural property, a development that would have "severely strain[ed] our relations with the countries of origin, which often include close allies." S. Rep. 97-564, at 23 (1982).

The standard for review under the APA is a familiar one: a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706. Under the APA, the scope of our review is narrow, and we may not "substitute [our own] judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Even were we to assume that State was fully subject to the APA, none of its actions were remotely arbitrary or capricious.

Here, Congress laid out specific procedures for State to follow in concluding Article 9 agreements

and imposing import restrictions on covered articles. As discussed above, the Department of State fulfilled each of those statutory requirements and, in doing so, put the Guild on notice that import restrictions were in effect. For the reasons set forth at length in the previous section, the governmental actions challenged herein did not run afoul of any APA standard or otherwise transgress enacted law.

We also agree with the district court that CBP did not violate the APA because it merely promulgated regulations at the behest of State and in full compliance with the CPIA. *See ACCG*, 801 F. Supp. 2d at 413-14. When CBP received instructions from State to promulgate the regulations, it was entirely reasonable for CBP to follow those instructions, given its statutory obligation to do so. 19 U.S.C. § 2612 (indicating that CBP "*shall* prescribe such rules and regulations as are necessary and appropriate to carry out the provisions of [the CPIA]" (emphasis added)).

Congress did not provide comprehensive instruction on how to convert the terms of an Article 9 agreement into CBP regulations. If Congress is dissatisfied with the method of conversion, or for that matter with any aspect of the CPIA process, it has only to amend the law. For though Congress channeled plaintiffs' particularized challenges toward forfeiture proceedings, it retained significant oversight authority of its own to ensure that State and CBP are complying with the statute. *See id*. § 2602(g) (requiring the President to "submit a report to Congress" describing any actions taken under the CPIA and any deviations from CPAC's recommendations). If Congress disapproves of State's decisions, corrective mechanisms are available: Congress can hold hearings on State's actions, request documents from

State, or reassess appropriations to the responsible parties. But reformation of the statute does not lie with this proceeding.*

IV.

It may fairly be acknowledged that the Guild and its sup-porting amici are not without a point. Coins are portable objects. They are minted in the main to be circulated. Although rare specimens may remain largely in the hands of collectors, restrictions on "the antiquities market" risk the impairment of "a medium of cultural exchange and education." *See* Br. for Am. Comm. for Cultural Policy & Int'l Ass'n of Dealers in Ancient Art as *Amici Curiae* at 1.

But that is not the whole story. The often worn and mysterious beauty of ancient coins renders them invaluable cultural artifacts, helpful not only in dating archaeological finds but in revealing how distant civilizations once conducted their civic and commercial life. Whether coins (or sculptures or pottery) should be exempted from coverage as cultural

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* The Guild also argues that the restrictions herein challenged violate the First Amendment. We find this claim to be without merit for the reasons set forth by the district court. *See ACCG*, 801 F. Supp. 2d at 411-12. As that court noted, "the imposition of import restrictions is within the constitutional power of the Government"; the restrictions "further an important or substantial governmental interest, namely combating the pillage of archaeological or ethnological materials where that pillage, and the resulting illegal trade, threatens the cultural patrimony of other countries"; "the government's interest in combating the pillage of archaeological materials is unrelated to the suppression of free expression"; and the statute's exceptions and exemptions reveal a narrowly tailored law where any "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the government's interest in combating the pillage of protected materials." *Id*.

property presents a lively policy debate, but the tension is resolved for us through the medium of law. The definition of covered properties is general in character, *see* 19 U.S.C. § 2601(2) (defining "archaeological or ethnological material of the State Party"), and it is not within our province to denote discrete exceptions.

We emphasize that our decision does not leave the Guild without a remedy. At oral argument and in its brief, the government represented that it will bring a forfeiture action under the statutory scheme once this litigation has concluded, Gov't Br. at 43. There, it hardly need be said, the basics of due process require that the Guild be given a chance to contest the government's detention of its property.

In a timely forfeiture proceeding, the Guild can press a particularized challenge to the government's assertion that the twenty-three coins are covered by import restrictions. Under the CPIA, the government bears the initial burden in forfeiture of establishing that the coins have been "listed in accordance with section 2604," 19 U.S.C. § 2610, which is to say that they have been listed "by type or other appropriate classification" in a manner that gives "fair notice . . . to importers," *id*. § 2604. If the government meets its burden, the Guild must then demonstrate that its coins are not subject to forfeiture in order to prevail. *See id*. § 1615.

We obviously express no view on how the forfeiture process will unfold. We simply conclude that this suit seeks to have the judiciary assume a role that the statute does not intend for us to assume. We have reviewed the Guild's various claims and find them to

be without merit. The district court faithfully interpreted the CPIA, and its judgment is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 22, 2012]

No. 11-2012
(1:10-cv-00322-CCB)

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.

AMERICAN COMMITTEE FOR CULTURAL POLICY; ANCIENT COINS FOR EDUCATION, INC.; INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART; INTERNATIONAL ASSOCIATION OF PROFESSIONAL NUMISMATISTS; PROFESSIONAL NUMISMATISTS GUILD, INC.; THE AMERICAN NUMISMATIC ASSOCIATION,
Amici Supporting Appellant.

JUDGMENT

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

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

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 08/08/11]

Civil Action No. CCB-10-322

ANCIENT COIN COLLECTORS GUILD

v.

U.S. CUSTOMS AND BORDER PROTECTION,
DEPARTMENT OF HOMELAND SECURITY, *et al*.,

MEMORANDUM

This action arises out of the seizure of twenty-three ancient Cypriot and Chinese coins that the Ancient Coin Collectors Guild ("ACCG") purchased from a coin dealer in London and imported to the United States. Following the seizure, ACCG filed this action "to test the legality" of import restrictions imposed on certain ancient Cypriot and Chinese coins. ACCG sued the U.S. Customs and Border Protection ("Customs"), the Commissioner of Customs and Border Protection ("Commissioner of Customs" or "Commissioner"), the U.S. Department of State ("State"), and the Assistant Secretary of State for Educational and Cultural Affairs ("Assistant Secretary for ECA") (collectively, "the defendants" or "the government"), alleging violations of the Administrative Procedure Act ("APA"), the International Emergency Economic Powers Act ("IEEPA"), the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), and the First and Fifth Amendments to the U.S. Constitution. ACCG

also alleges that the defendant acted "*ultra vir*es," and seeks relief in the form of a declaratory judgment, an injunction, and a writ of mandamus. Pending before this court is a motion to dismiss or, in the alternative, for summary judgment, filed by the defendants. For the reasons discussed below, the government's motion will be granted.

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I. BACKGROUND

A. The Cultural Property Convention and the CPIA

In 1970, the United States became a signatory to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (the "Cultural Property Convention" or "Convention"), November 14, 1970, 823 U.N.T.S. 231. Article 9 of the Convention provides:

> 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. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

The Senate gave its unanimous advice and consent to the Convention in 1972, subject to one reservation and six understandings. *See* 118 Cong. Rec. 27,924-25 (1972) (ratifying the Convention but reserving the right "to determine whether or not to impose export controls over cultural property"). As a non-self-executing treaty, the Convention required implementing legislation before it became enforceable U.S. law. Congress enacted such legislation through the Convention on Cultural Property Implementation Act (CPIA) in 1983. Pub. L. 97-446, Title III 96 Stat. 2350 (1983) (codified at 19 U.S.C. § 2601 *et seq*.).

The CPIA, among other things, defined the term "archaeological or ethnological materials," which the Convention left undefined, thereby specifying which types of material may be subject to U.S. import restrictions:

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

19 U.S.C. § 2601(2). The regulations at issue here treat ancient coins as objects "of archaeological interest," and ACCG does not dispute this characterization. Accordingly, an ancient coin or category of coins may be subject to an import restriction only if it "(I) is of cultural significance; (II) is at least two hundred and fifty years old; and (III) was normally discovered as a result of scientific excavation, clandestine or

accidental digging, or exploration on land or under water." *Id*. § 2601(2)(i).

The CPIA also established a mechanism through which the U.S. would comply with its obligations under Article 9 of the Convention. That mechanism is triggered when a state party to the Convention requests that the U.S. impose measures under Article 9 to protect the requesting country's "cultural patrimony." 19 U.S.C. § 2602(a)(1). Upon receiving such a request, the President must (1) publish notification of the request in the Federal Register and (2) submit to the Cultural Property Advisory Committee (CPAC) "such information . . . as is appropriate to enable the Committee to carry out its duties." *Id*. § 2602(f)(1)-(2). The CPAC, which was established by the CPIA, is a committee of eleven individuals, including two persons "representing the interests of museums," three "experts in the fields of archaeology, anthropology, ethnology, or related areas," three "experts in the international sale of archaeological, ethnological, and other cultural property," and three persons who "represent the interest of the general public." *Id*. § 2605(a)-(b). The CPAC must "undertake an investigation" and prepare a report setting forth

> (A) the results of such investigation and review;
>
> (B) its findings as to the nations individually having a significant import trade in the relevant material; and
>
> (C) its recommendation, together with the reasons therefor, as to whether an agreement should be entered into under section 303(a) with respect to the State Party.

Id. § 2605(f)(1). If the CPAC recommends that the President enter into an agreement to implement

Article 9 (an "Article 9 agreement"), its report must also set forth

> (A) such terms and conditions which it considers necessary and appropriate to include within such agreement, or apply with respect to such implementation, for purposes of carrying out the intent of the Convention; and
>
> (B) such archaeological or ethnological material of the State Party, specified by type or such other classification as the Committee deems appropriate, which should be covered by such agreement or action.

Id. § 2605(f)(4). The CPAC must then submit its report to the President and to Congress. *Id*. §§ 2605(f)(6); 2602(f)(3)(B).

Upon receiving the CPAC report, the President "determines" whether the requirements of 19 U.S.C. § 2602(a)(1) have been met. Those requirements are the following:

> (A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;
>
> (B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;
>
> (C) that—,
>
> ii. the application of the import restrictions set forth in section 307 [19 U.S.C. § 2606] with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within

a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

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

(D) that the application of the import restrictions . . . is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes . . .

Id. § 2602(a)(1). In making those determinations, the President must "consider . . . [the CPAC's] views and recommendations." *Id*. § 2602(f)(3). The President must then also determine whether other countries with a "significant import trade" in the affected materials would apply import restrictions "in concert" with the United States (or that such restrictions "are not essential to deter a serious situation of pillage"). *Id*. § 2602(c). If these requirements have been met, then the President may enter into an Article 9 agreement with the requesting state party. *Id*. § 2602(a)(2). The Article 9 agreement must designate which "archaeological or ethnological material" will be protected by import restrictions. *Id*. §§ 2601(7); 2602(a)(2). In negotiating the agreement, the President must "[e]ndeavor to obtain the commitment" of the requesting state party to permit the exchange of archaeological and ethnological materials "under circumstances in which such exchange does not jeopardize its cultural patrimony." *Id*. § 2602(a)(4).

After the agreement enters into force, the CPIA requires that the Secretary of the Treasury, in consultation with the Director of the United States Information Agency, "promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement." *Id*. § 2604. Each listing must be "sufficiently specific and precise to insure that (1) the import restrictions under section 307 are applied only to the archaeological and ethnological material covered by the agreement or emergency action; and (2) fair notice is given to importers and other persons as to what material is subject to such restrictions." *Id*.; *see also id.* § 2601(7)(B) (providing that materials are not "designated archaeological or ethnological material"—and thus cannot be subject to import restrictions, *see id*. § 2606(a)—until they are "listed by regulation under [§ 2604]").

Once the Secretary of the Treasury promulgates a list of the designated materials, then the materials may not be imported into the United States unless "the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party," *id*. § 2606(a), or if the importer provides "satisfactory evidence that such material was exported from the State Party"

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

(B) on or before the date on which such material was designated under section 305.

Id. § 2606(b). If Customs discovers materials being imported in violation of CPIA import restrictions, it "shall refuse to release the material . . . until such documentation or evidence is filed." *Id*. "If such documentation or evidence is not presented within ninety days after the date on which such material is refused release from customs custody, or such longer period as may be allowed by the Secretary for good cause shown, the material shall be subject to seizure and forfeiture." *Id*.

In addition, the CPIA authorizes the President, without negotiating an Article 9 agreement, to impose temporary import restrictions if the President determines that any of the following "emergency condition[s]" applies:

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

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

(3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions,

19 U.S.C. § 2603(a), and if the implementation of import restrictions "on a temporary basis would, in whole or in part, reduce the incentive for such pillage, dismantling, dispersal or fragmentation." *Id*. As with non-emergency restrictions, the President must "consider the views and recommendations" of the CPAC in deciding whether to impose emergency import restrictions. *Id*. § 2603(c)(2). Emergency restrictions imposed under § 2603 may not be applied for more than five years, though the President may extend the period for an additional three years "if the President determines [after consulting with the CPAC] that the emergency condition continues to apply." *Id*. § 2603(c)(3).

Finally, the CPIA imposes an additional reporting requirement on the President. Upon entering an Article 9 agreement or imposing emergency import restrictions, the President must submit a report to Congress with a description of the action, differences (if any) between such action and the recommendations of the CPAC, and the reasons for those differences. *Id*. § 2602(g).

After Congress enacted the CPIA, President Reagan delegated his responsibilities under the statute to three officials: the Secretary of State, the Secretary of the Treasury, and the Director of the United States Information Agency (USIA). *See* Exec. Order No. 12,555, 51 Fed. Reg. 8475 (Mar. 10, 1986). The Secretary of State was responsible for negotiating Article 9 agreements and developing reports for Congress; the Secretary of the Treasury was responsible for imposing emergency import restrictions and suspending non-emergency import restrictions; the Director of the USIA was responsible for deciding whether to enter, extend and/or suspend Article 9

agreements or impose emergency import restrictions, as well as making the factual determinations underlying those decisions, publishing notice of Article 9 requests, submitting information to the CPAC and receiving its reports, and deciding whether particular CPAC proceedings should be publicized. *Id*. The President did not reserve any authority over imposition of import restrictions under the CPIA. *See id*.; *cf*. *Sisseton-Wahpeton Oyate v. U.S. Dept. of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009) (describing Executive Order 13337, 69 Fed. Reg. 25,299 (April 30, 2004), which reserved with the President the authority to determine whether to issue a presidential permit for a cross-border oil pipeline in the event any of certain designated officials were to disagree with the initial determination made by the Secretary of State). In 1998, § 1312(a) of the Foreign Affairs Agencies Consolidation Act of 1998 transferred all functions of the Director of the USIA to the Secretary of State. Pub. L. 105-277, Div. G, Subdiv. A (codified at 22 U.S.C. § 6532). In 1999, Secretary of State Albright delegated her authority under Executive Order 12,555 to the Under Secretary of State for Public Diplomacy and Public Affairs. *See* Department of State Delegation of Authority No. 234, 64 Fed. Reg. 56,014 (Oct. 15, 1999), § 1(a)(6). In 2000, the Under Secretary delegated that authority, including the authority to make the necessary threshold determinations under 19 U.S.C. §§ 2602 and 2603, to the Assistant Secretary for ECA. Department of State Delegation of Authority No. 236-3, 65 Fed. Reg. 53,795 (Aug. 28, 2000). In 2003, the President withdrew the CPIA authority that had been delegated to the Secretary of the Treasury, and transferred that authority to the Secretary of Homeland Security. Exec. Order No. 13,296 § 44, 68 Fed. Reg. 10,618,

10,627 (Mar. 5, 2003). The authority of the Secretary of Homeland Security under the CPIA is delegated to Customs and Border Protection. Thus, as of March 2003, the President's authority under the CPIA was held by the Secretary of Homeland Security and the Assistant Secretary for ECA.

The CPIA entrusts to the Secretary of the Treasury the authority to determine how import restrictions will be enforced once an archaeological or ethnological item appears on a designated list. 19 U.S.C. § 2612. The regulations governing the enforcement of import restrictions are codified at 19 C.F.R. §§ 12.104-12.104j, and are enforced by "appropriate customs officers." *Id*. § 12.104i. The regulations flesh out the enforcement scheme mandated by the CPIA, such as by explaining the required form that a certificate from a state party must take. *See id*. § 12.104c(a).

B. The import restrictions on Cypriot coins

On September 4, 1998, the USIA received a request from Cyprus that the U.S. impose import restrictions on certain Byzantine ethnological material from Cyprus. *See* Notice of Receipt of Cultural Property Request From the Government of the Republic of Cyprus, 63 Fed. Reg. 49,154 (Sept. 14, 1998). Pursuant to the emergency provisions of the CPIA, the U.S. Customs Service imposed emergency import restrictions on "[e]cclesiastical and ritual ethnological material from Cyprus representing the Byzantine period dating from approximately the 4th century A.D. through the 15th century A.D." Import Restrictions Imposed On Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus, 64 Fed. Reg. 17,529, 17,530 (April 12, 1999). In 2002, following bilateral negotiations between the United States and

Cyprus, the two countries entered into a Memorandum of Understanding pursuant to Article 9 of the Cultural Property Convention ("2002 Cyprus MOU"). *See* Import Restrictions Imposed On Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed. Reg. 47,447 (July 19, 2002). In 2003, the President extended the emergency import restrictions that had originally been imposed in 1999. *See* Extension of Emergency Import Restrictions Imposed on Ethnological Material from Cyprus, 68 Fed. Reg. 51,903 (Aug. 29, 2003). In August 2006, the U.S. and Cyprus amended the 2002 MOU to include the materials protected by the emergency restrictions. *See* Import Restrictions on Byzantine Ecclesiastical and Ritual Ethnological Material from Cyprus, 71 Fed. Reg. 51,724 (Aug. 31, 2006). None of these Cypriot import restrictions applied to coins.

In December 2006, the State Department announced that Cyprus had requested an extension of the 2002 MOU. *See* Notice of Proposal, 71 Fed. Reg. 71,015 (Dec. 7, 2006).[1] On May 30, 2007, the Assistant Secretary for ECA agreed to extend the import restrictions. *See* Extension of Import Restrictions, 72 Fed. Reg. 38,470, 38,471 (July 13, 2007).[2] On July 6,

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[1] In full, the notice was entitled "Notice of Proposal to Extend the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning the Imposition of Import Restrictions on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Materials."

[2] In full, the final rule was entitled "Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material From Cyprus."

2007, through an exchange of diplomatic notes, the United States and Cyprus amended and extended the agreement to impose restrictions on all cultural property encompassed in the amended MOU for an additional five years. *Id*.; *see also* Diplomatic Note from the U.S. Department of State to the Embassy of Cyprus in Washington, D.C., July 3, 2007 (Pl.'s Ex. A, Ex. 2); Diplomatic Note from the Embassy of Cyprus in Washington, D.C., to the U.S. Department of State, July 6, 2007 (Pl.'s Ex. A, Ex. 2). Customs and Border Protection then promulgated an amended Designated List of restricted archaeological and ethnological materials. 72 Fed. Reg. at 38,471-73. The list included the following:

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

Id. at 38,473. The restriction on the importation of designated Cypriot coins went into effect on July 16, 2007. *Id*. at 38,470.

C. The import restrictions on Chinese coins

On May 27, 2004, the State Department received a request from China pursuant to Article 9 of the Convention that the U.S. impose import restrictions on Chinese archaeological material from the Paleolithic period to the Qing Dynasty. *See* Notice of Receipt of Cultural Property Request from the Government of the People's Republic of China, 69 Fed. Reg. 53,970 (Sept. 3, 2004). In July 2005, according to the government, CPAC issued a report on the request, recommending the imposition of import restrictions. (Defs.' Mem. at 16.). On May 13, 2008, the Assistant Secretary for ECA determined that the requirements of 19 U.S.C. § 2602(a)(1) had been met with respect to the Chinese request. *See* Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2,838, 2,839 (Jan. 16, 2009). On January 14, 2009, the United States and China entered an Article 9 agreement to restrict the importation of certain archaeological materials from the Paleolithic period through the Tang dynasty. *Id*. On January 16, 2009, DHS and Treasury published a Designated List, which included the following types of bronze coins:

> 3. Coins.
>
> a. Zhou Media of Exchange and Toolshaped Coins: Early media of exchange include bronze spades, bronze knives, and cowrie shells. During the 6th century BC, flat, simplified, and standardized cast bronze versions of spades appear and these constitute China's first coins. Other coin shapes appear in bronze including knives and cowrie shells. These early coins may bear inscriptions.

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

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

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

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

Id. at 2,842. The restriction on the importation of designated Chinese coins went into effect on January 16, 2009. Id. at 2,839.

D. The importation and seizure of ACCG's coins

In April 2009, ACCG purchased twenty-three ancient Chinese and Cypriot coins from Spink, a coin dealer in London. The invoice that accompanied the coins included a "[s]chedule of contents." (Spink Invoice RT00052205, Defs.' Mem., Ex. 1, at 5.)[3] The

[3] When a court considers a motion to dismiss, it may consider documents not attached to the complaint, without converting a

schedule indicated that each coin was minted in Cyprus or China, that each coin had "[n]o recorded provenance," and that for each, the "[f]ind spot" was "unknown." (*Id.*)[4] On April 15, 2009, ACCG imported the coins via a flight from London to Baltimore. (*Id.* at 4.) Customs detained the coins for alleged violations of 19 U.S.C. § 2606 and 19 CFR § 12.104. (*Id.* at 1-2.) It issued a Notice of Detention, which stated that its reason for detention was "[t]o allow for determination of import eligibility and/or requirements." (Notice of Detention, Defs.' Mem., Ex. 1, at 1.) On May 13, 2009, counsel for ACCG wrote to Customs formally objecting to the detention of the coins. (Letter from Peter Tompa to Eric Alexander, U.S. Customs and Border Protection (May 13, 2009), Defs.' Mem., Ex. 1, at 8.)

On May 15, 2009, Customs amended the Notice of Detention to specifically request that ACCG present "[c]ertification or evidence in accordance with 19 CFR

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motion to dismiss into one for summary judgment, "if the document was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity." *CACI Int'l, Inc. v. St. Paul Fire and Marine Ins.* Co., 566 F.3d 150, 154 (4th Cir. 2009). Here, the parties have relied on documents attached to the amended complaint and various of their briefs. The parties have not challenged the authenticity of any of them. Accordingly, the court will consider the exhibits submitted by the parties in deciding the motion to dismiss.

[4] The schedule listed a total of 23 items, valued at $275. (Defs.' Mem., Ex. 1, at 5.) An example of a Chinese coin listed is "(1) China, Zhou Dynasty spade shaped coin ca. 400 BC. Broken. No recorded provenance. Find spot unknown. FMV $10.00." (*Id.*) An example of a Cypriot coin listed is "(1) Cyprus AE 28mm. Augustus, 27 BC - AD 14. Head of Augustus right / CA within laurel wreath. No recorded provenance, Find spot unknown. FMV $58.00." (*Id.*)

12.104c." (Notice of Detention Amended, Defs.' Mem., Ex. 1, at 2.) On May 27, 2009, ACCG disclaimed any ability to present such evidence. (Letter from Peter Tompa to Eric Alexander, U.S. Customs and Border Protection (May 27, 2009), Defs.' Mem., Ex. 1, at 10 ("[A]s the coins—like the vast majority in circulation in the collector market—have no known ownership history, ACCG cannot say if they were first found in the ground of either China or Cyprus[.] . . . Accordingly, no certification or evidence under 19 CFR 12.104c is possible.").) On July 20, 2009, Customs seized the coins, and informed ACCG of the seizure on August 26, 2009. (Letter from Paula Rigby, Fines, Penalties & Forfeitures Officer, U.S. Customs and Border Protection, to Ancient Coin Collectors Guild (Aug. 26, 2009), Defs.' Mem., Ex. 1, at 29-35.) On September 8, 2009, counsel for ACCG wrote to Customs to formally claim the coins, to assert its intention to contest the forfeiture of the coins in the event Customs sought forfeiture, and to provide evidence of a customs bond to secure a forfeiture action. (Letter from Peter Tompa to Paula Rigby (Sept. 8, 2009), Defs.' Mem., Ex. 1, at 45.)

In addition, ACCG alleges that on March 15, 2010, ACCG's Executive Director was searched by uniformed Customs officers on his return to the United States from England. (Am. Compl. ¶ 102.) According to ACCG, "ACCG's Executive Director reasonably believes he was placed on a 'watch list' due to ACCG's decision to import coins of Cypriot and Chinese type for purposes of this test case." (*Id*.)

E. ACCG's concurrent FOIA action

Beginning in 2004, ACCG has sought access through FOIA to certain documents related to import restrictions on ancient coins from Cyprus, China and

Italy. *See Ancient Coin Collectors Guild v. U.S. Dep't of State*, 673 F. Supp. 2d 1, 2 (D.D.C. 2009). Between July 30, 2004, and October 11, 2007, ACCG made eight FOIA requests. *Id*. In response to these requests, the government conducted multiple searches, which resulted in 128 responsive documents. *Id*. Of these documents, the government released 70 documents in full and 39 documents in part, and withheld 19 documents in full. *Id*. On November 15, 2007, ACCG sued in the U.S. District Court for the District of Columbia to compel the government to produce the withheld documents. On November 20, 2009, the district court granted the government's motion for summary judgment, holding that the documents ACCG sought were protected by one or more FOIA exemptions. *Id*. at 4-7.

On April 15, 2011, the D.C. Circuit largely upheld the district court's decision. *See Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504 (D.C. Cir. 2011). The court held that the State Department's withholding of documents under FOIA Exemptions 1 and 5 was proper, as was part of its withholding under Exemption 3. *Id*. at 509. The court reversed solely with respect to the Department's withholding of one set of documents—a series of emails exchanged between a professor of archaeology and an employee of the Bureau of Education and Cultural Affairs. *See* 641 F.3d at 511.

The D.C. Circuit also held that § 2605(i)(1) qualifies as an Exemption 3 withholding statute. *Id*. That section prohibits disclosure of any information "submitted in confidence by the private sector to officers or employees of the United States or to the Committee in connection with the responsibilities of the Committee." 19 U.S.C. § 2605(i)(1). State relied

solely on § 2605(i)(1) in withholding only one set of documents—a series of emails exchanged between a professor of archaeology and an employee of the Bureau of Education and Cultural Affairs. *See* 641 F.3d at 511. The court remanded to permit State to provide "additional reasons for its belief" that the professor's comments were made in confidence. *Id*.

The proceedings before the district court concerning the withholding of those emails are currently pending.

F. This lawsuit

On February 11, 2010, ACCG brought the instant lawsuit against Customs, the Commissioner of Customs, the State Department, and the Assistant Secretary of State. After the government filed a motion to dismiss or, in the alternative, for summary judgment, ACCG filed an amended complaint on July 15, 2010. In its ten-count amended complaint, ACCG alleges that the actions of both the State Department and Customs in connection with the import of Cypriot and Chinese type coins were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *see* 5 U.S.C. § 706(2)(A), violated the CPIA, IEEPA,[5] and the First Amendment to the U.S.

[5] In its amended complaint, ACCG alleges that the import restrictions violate the Berman Amendment of 1988, which amended IEEPA to exclude "informational materials" from the statute's requirements, and the Free Trade in Ideas Amendment, which reiterated that the Berman Amendment applied to all information, whether or not the information existed in tangible form at the time of a particular transaction. Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 2502(a), 102 Stat. 1107, 1371 (1988) (Berman Amendment); Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. 103-236, § 525, 108 Stat. 382, 474 (1994) (Free

Constitution. In addition, ACCG alleges that Customs violated its Fifth Amendment rights by seizing the coins without filing a forfeiture action, and violated its First Amendment rights by allegedly placing Spink and the Executive Director of ACCG on a "watch list." (Am. Compl. ¶ 117.)

In response to the amended complaint, the government filed an "Opposition to Plaintiff's Amended Complaint," which this court recharacterized as a renewed motion to dismiss. ACCG responded, the government replied, and ACCG filed a surreply. By correspondence, the court raised a question of subject matter jurisdiction with counsel, who submitted additional briefs addressing the issue. The court held oral argument on February 14, 2011. The government filed a supplemental brief providing "supplemental post-hearing clarifications." ACCG then moved to strike the government's supplemental brief, and filed its own "provisional response."[6]

II. SUBJECT MATTER JURISDICTION

Neither party has contested this court's subject matter jurisdiction over this action. Nonetheless, because a defect in subject matter jurisdiction cannot be waived by the parties, the court must satisfy itself that it has jurisdiction. *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004).

Trade in Ideas Amendment). Because both of those statutes amended IEEPA, the court will refer to both claims as arising under IEEPA.

[6] Both of the post-hearing supplemental filings have been considered, and ACCG has shown no prejudice. Therefore, ACCG's motion to strike will be denied.

The question of this court's subject matter jurisdiction concerns the relationship between two jurisdictional statutes: 28 U.S.C. §§ 1356 and 1581(i). 28 U.S.C. § 1356 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of *any seizure* under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(emphasis added). The basis for ACCG's challenge to the import restrictions is the seizure of the coins it sought to import from London.[7] Moreover, the Court of International Trade ("CIT") does not have jurisdiction over this case under 28 U.S.C. § 1582, and thus the carve-out under § 1356 does not divest this court of jurisdiction.[8] A separate section of Title 28, how-

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[7] A "seizure" occurs for these purposes when the government "takes control of the merchandise, and may ultimately institute forfeiture proceedings." *R.J.F. Fabrics, Inc. v. United States*, 651 F. Supp. 1431, 1433 (Ct. Int'l Trade 1986). This is in contrast to an "exclusion," which occurs when Customs "den[ies] entry into the customs territory of the United States." *Id*. With an exclusion, "[t]he importer may then dispose of the goods as he chooses." *Id*.; *see also Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc*., 240 F.3d 832, 836 (9th Cir. 2001) ("This dichotomy between district court and CIT jurisdiction creates a much-litigated distinction between parties who challenge a *seizure* of goods (who may sue in district court) and parties who challenge a denial of a protest of *exclusion* of goods (who may challenge the denial only in the CIT).") (emphases in original). Here, the parties do not dispute that ACCG's coins were seized, not excluded.

[8] 28 U.S.C. § 1582 provides:

ever, confers "exclusive jurisdiction" on the CIT, a specialized Article III court, over

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for-. . .
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . .

28 U.S.C. § 1581(i).[9] If the CIT has "exclusive jurisdiction" under § 1581(i), then it would follow that this court does not have jurisdiction.

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—
>
> (1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
>
> (3) to recover customs duties.

This action was not commenced by the United States, and therefore does not arise under § 1582.

[9] The CIT's jurisdiction under 28 U.S.C. § 1581 is "subject to the exception set forth in subsection (j) of this section." Subsection (j) provides, "The Court of International Trade shall not have jurisdiction of any civil action arising under [19 U.S.C. § 1305]." This action does not arise under 19 U.S.C. § 1305, and therefore § 1581(j)'s exclusion to the CIT's jurisdiction is not

Although the language of 28 U.S.C. § 1581(i)(3)-(4) could be read to confer on the CIT exclusive jurisdiction over this action, this court concludes that § 1581(i) does not divest it of jurisdiction in favor of the CIT, for several reasons. First, Congress's decision to limit the carve-out in § 1356 to "matters within the jurisdiction of the Court of International Trade under section 1582," rather than also under §§ 1581, 1583 and 1584, reveals a congressional intent to retain district court jurisdiction in seizure cases that would otherwise fall under CIT jurisdiction under those sections. Congress created the CIT in 1980 and conferred jurisdiction upon it through 28 U.S.C. §§ 1581-84. *See* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980). In the same statute, it amended 28 U.S.C. § 1356 to insert the last phrase of the section, transferring from the district courts to the CIT jurisdiction under § 1582. *Id*. § 506. The fact that the amendment of § 1356 was contemporaneous with the enactment of § 1581 is evidence that Congress intended for the district courts to retain jurisdiction over cases such as this one.

Second, the CIT has held that its jurisdiction under § 1581(i) is "residual, meaning it 'may only be invoked when other available avenues of jurisdiction

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relevant here. Moreover, a different subsection of § 1581 confers "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). ACCG did not lodge a protest of Customs' actions under 19 U.S.C. § 1515, and therefore does not "contest the denial of a protest." Moreover, "[i]t is well established . . . that the [CIT] lacks jurisdiction under § 1581(a) to review a seizure of goods by Customs." *H&H Wholesale Servs, Inc. v. United States*, 437 F. Supp. 2d 1335, 1340 (Ct. Int'l Trade 2006). Thus the exclusivity of CIT jurisdiction under § 1581(a) does not divest this court of jurisdiction

are manifestly inadequate or it is necessary to avoid extraordinary and unjustified delays caused by requiring the exhaustion of administrative remedies.'" *CDCOM (U.S.A.) Int'l, Inc. v. United States*, 963 F. Supp. 1214, 1218 (Ct. Int'l Trade 1997) (quoting *Milin Indus., Inc. v. United St*ates, 691 F. Supp. 1454, 1456 (Ct. Int'l Trade 1988)). Accordingly, if a party has "meaningful opportunities for protest" of a Customs action, it must exhaust those opportunities *before* § 1581(i) becomes available as a basis for CIT jurisdiction. Id. at 1218; *see also R.J.F. Fabrics*, 651 F. Supp. at 1434 ("A party must exhaust meaningful opportunities for protest instead of resorting to § 1581(i) as a jurisdictional basis."). That conclusion does not apply here, because the question is not whether ACCG has exhausted administrative remedies, but rather whether, assuming that ACCG has exhausted administrative remedies, the CIT would have jurisdiction over this action. Moreover, other CIT cases addressing the adequacy of "other available avenues of jurisdiction" have analyzed whether other avenues of *CIT* jurisdiction were adequate, not whether a district court would have jurisdiction and whether that "avenue[] of jurisdiction" would be adequate. *See, e.g., Pac Fung Feather Co., Ltd. v. United States*, 911 F. Supp. 529, 533-34 (Ct. Int'l Trade 1995) (holding that the CIT had jurisdiction under §§ 1581(i)(3) and (4) to consider an "arbitrary and capricious" challenge to Customs regulations because other sections of § 1581 were inadequate), *aff'd* 111 F.3d 114 (Fed. Cir. 1997); *Norcal/Crosetti Foods, Inc. v. U.S. Customs Serv.*, 731 F. Supp. 510, 517 (Ct. Int'l Trade 1990) (holding that the CIT had jurisdiction under § 1581(i)(4) because the case "concern[ed] administration and enforcement of the international trade laws" and because "no other

subsection of § 1581 would allow plaintiff to invoke this Court's jurisdiction").

The parties have not cited and the court has not found a case addressing whether, if a district court has jurisdiction over a challenge to a government seizure, and because jurisdiction under § 1581(i) is residual, the district court, not the CIT, has jurisdiction over the action. Nonetheless, the "residual" nature of the CIT's jurisdiction under § 1581(i) provides further evidence that this case is properly before this court. The parties have developed a record and fully briefed the issues. The issues of judicial review of agency action are of the type typically considered by the district courts, not the type of specialized trade issues that are peculiarly within the expertise of the CIT. In short, resolution of the case in this court is not "manifestly inadequate" and would not cause "extraordinary and unjustified delays." *See CDCOM (U.S.A.) Int'l*, 963 F. Supp. at 1218.

Third, the Supreme Court has held that the CIT's jurisdiction does not extend to "every suit against the Government challenging customs-related laws and regulations." *Kmart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988) (emphasis in original). Although the specific holding in *Kmart* does not resolve the tension between 28 U.S.C. §§ 1356 and 1581(i) on the facts of this case, it provides further evidence that Congress did not intend to strip the district courts of jurisdiction over challenges of the type ACCG has brought here.

For these reasons, the court has jurisdiction under 28 U.S.C. § 1356, and § 1581(i) does not divest it of jurisdiction in favor of the CIT.[10]

III. STANDARD OF REVIEW

The government has moved to dismiss or, in the alternative, for summary judgment. "[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (internal quotation marks and alterations omitted) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). When ruling on such a motion, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). "Even though the requirements for pleading a proper complaint are substantially aimed at assuring that the defendant be given adequate notice of the nature of a claim being made against him, they also provide criteria for defining issues for trial and for early disposition of inappropriate complaints." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009).

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[10] Because the court concludes that the CIT does not have exclusive jurisdiction under § 1581(i) in any event, the court need not decide whether the import restrictions constitute a "governmental," rather than a private, restriction on imports, *see Kmart Corp.*, 485 U.S. at 185; whether the Customs regulations impose an "embargo" or "quantitative restriction[]" on imports, *see* 28 U.S.C. § 1581(i)(3); whether ancient coins are "merchandise," *see id.*; or whether the restrictions were imposed "for reasons other than the protection of the public health or safety." *See id.*

To survive a motion to dismiss, the factual allegations of a complaint "must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). Thus, the plaintiff's obligation is to set forth sufficiently the "grounds of his entitlement to relief," offering more than "labels and conclusions." *Id*. (internal quotation marks and alterations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

IV. ACCG'S CHALLENGE TO THE IMPORT RESTRICTIONS

ACCG challenges the actions of two agencies, the State Department and Customs and Border Protection, and two officials, the Assistant Secretary of State for Educational and Cultural Affairs and the Commissioner of Customs. It argues that by imposing import restrictions on Cypriot and Chinese coins, those agencies and officials violated the APA and the Constitution, and exceeded their authority under the CPIA. The court will first consider ACCG's challenge to the actions of the State Department and the Assistant Secretary, and then turn to the challenge to the actions of Customs and the Commissioner. In challenging the actions of the State Department and the Assistant Secretary, ACCG argues that it is entitled to judicial review under the APA, under "nonstatutory review" of *ultra vires* actions (Am. Compl. ¶¶ 170-77), and under the court's "inherent equitable

powers to remedy constitutional violations." (*Id*. ¶¶ 112, 118.)

The question of the validity of these actions is squarely before this court. As noted above, when the government seeks the forfeiture of cultural property subject to import restrictions under the CPIA, the initial burden is on the government to show that the material "has been listed by the Secretary" of the Treasury (or his delegate) on a designated list. 19 U.S.C. § 2610(1).[11] To meet its burden here, the government relies on the invoice that accompanied ACCG's coins when they were shipped from London. (*See* Defs.' Mem. at 4-5.) For each coin, the invoice provided the place of origin, the approximate date of origin, and a description. (Defs.' Mem., Ex. 1, at 5.)

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[11] At least one court has held, and the parties here agree, that this burden requires the government to show "probable cause" to believe the property is subject to forfeiture. *See United States v. An Original Manuscript Dated November 19, 1778*, No. 96 Civ. 6221(LAP), 1999 WL 97894, *5 (S.D.N.Y. Feb. 22, 1999); Defs.' Mem. at 4; Pl.'s Surreply at 6. The "probable cause" standard is provided by 19 U.S.C. § 1615, which applies in forfeiture actions "under the provisions of any law relating to the collection of duties on imports or tonnage." This court need not decide whether the burden imposed on the government by 19 U.S.C. § 2610(1) is synonymous with, or incorporates, the "probable cause" standard in § 1615, because there is no dispute that ACCG's coins appeared on a designated list. Moreover, although CAFRA altered the burden of proof in certain forfeiture actions, *see* 18 U.S.C. § 983(c) ("In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property . . . the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture."), the statute does not apply to seizures pursuant to "the Tariff Act of 1930 or any other provision of law codified in title 19," *id*. § 983(i)(2)(A), and therefore does not apply here.

The invoice also stated, for each coin, "No recorded provenance" and "Find spot unknown." (*Id*.) This invoice was sufficient to satisfy the government's burden of showing that the coins were among those "listed by the Secretary" on the designated lists for China and Cyprus. The burden then shifted to ACCG to show that the coins were legally importable. 19 U.S.C. § 2606. By letter, ACCG expressly disclaimed any ability to make such a showing. (Defs.' Mem., Ex. 1, at 10.) Indeed, ACCG does not argue that its coins are not "of Cypriot types made of gold, silver, [or] bronze," 72 Fed. Reg. at 38,473, or among the Chinese coins described on the designated list for China, 74 Fed. Reg. at 2,842. Therefore, there is no dispute that ACCG's coins appeared on a designated list. Rather, the parties' principal dispute is over whether the defendants had authority under the CPIA to restrict the importation of those coins.[12]

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[12] The clarity and specificity of the invoice renders this case distinguishable from *United States v. Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d 618 (E.D. Va. 2009) and *An Original Manuscript*, 1999 WL 97894 at *1. In *Eighteenth Century Peruvian Oil*, the government sought the forfeiture of two paintings it alleged were produced in Peru and appeared on a designated list pursuant to a Memorandum of Understanding with Peru. 597 F. Supp. 2d at 621-22. The claimant disputed the origin, asserting that the paintings were produced in Bolivia. *Id*. at 623. Accordingly, the government needed other evidence to show that the paintings appeared on the designated list for Peru. To do so, it relied on the reports of three art experts, each of whom stated that the paintings originated in Peru. *Id*. Similarly, Original Manuscript involved a manuscript that was alleged to have been stolen from a museum in Mexico City. 1999 WL 97894 at *2. The government sought the forfeiture of the manuscript under 19 U.S.C. § 2610(2), under which the government's initial burden, rather than showing the material was "listed by the Secretary," *id*. § 2610(1), is to show the article was

A. Judicial Review of State Department Actions

1. APA Review

Section 706(2) of the APA provides that a reviewing court

> shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law . . . .

5 U.S.C. § 706(2). ACCG alleges that the actions of the State Department and the Assistant Secretary that culminated in the promulgation of import restrictions on Chinese and Cypriot coins violated

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"documented as appertaining to the inventory" of a foreign museum and "was stolen from such institution" after a certain date. *Id*. § 2610(2). Because the claimant asserted that the painting had been "disbursed" by the museum rather than stolen, the government needed other evidence to show the painting was stolen. 1999 WL 97894 at *2. To do so, it relied on a statement that a matching description appeared in the museum's records from 1993 and the manuscript later was missing from the museum's collection. *Id*. at *6. Here, the government did not need to rely on the types of evidence relied on in those cases because the invoice alone was sufficient to show that ACCG's coins were among those listed on the designated lists for China and Cyprus.

one or more subsections of § 706(2) because State "failed to provide a reasoned explanation for its departure from prior agency precedent" (Am. Compl. ¶ 123), failed "to report to Congress about this departure from both prior agency practice and the recommendations of [CPAC]" (*id*. ¶ 130), was influenced by "bias, and/or prejudgment and/or *ex parte* contact" (*id*. ¶ 135), misallocated the burden of proof for seizing imported coins in violation of the CPIA (*id*. ¶¶ 141-43), violated IEEPA by imposing import restrictions on materials protected by the First Amendment (*id*. ¶¶ 153-54), and violated the First and Fifth Amendments by imposing import restrictions that are vague and overbroad, are content-based prior restraints on speech, and burden ACCG's "Fifth Amendment liberty collecting and trading in informational materials." (*Id*. ¶¶ 160-67.)[13] The government argues that the actions of the State Department and the Assistant Secretary are not reviewable under the APA because they were acting pursuant to delegated presidential authority, and the President is not an "agency" for APA purposes. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

Under the CPIA, Congress assigned to the President various responsibilities, from publishing notice of a state party request, 19 U.S.C. § 2602(f)(1), to determining whether factual prerequisites for entering an Article 9 agreement have been met, *id*. § 2602(a)(1); from negotiating and entering into an Article 9 agreement with the requesting state party,

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[13] Although AGGC alleges that the defendants' actions were arbitrary and capricious for other reasons as well, the alleged violations listed above are those arguably attributable to the State Department. The alleged violations arguably attributable to Customs will be discussed below.

id. § 2602(a)(2), to submitting a report to Congress with a description of particular import restrictions. *Id*. § 2602(g). As detailed above, the President has since delegated the responsibilities relevant here to the Assistant Secretary. ACCG seeks APA review of several of these actions. Judicial review under the APA, however, is only available with respect to "agency" actions. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). The President is not an "agency" within the meaning of the APA. Franklin, 505 U.S. at 801. As the Supreme Court explained:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Id. at 800-801. Thus, presidential actions "are not reviewable for abuse of discretion under the APA." *Id*. at 801.

Here, ACCG challenges actions by the State Department and Assistant Secretary, not actions directly undertaken by the President. The State Department and Assistant Secretary's authority to impose import restrictions on Cypriot and Chinese coins, however, derives from the President's authority under the CPIA. This raises the following question: does the bar on APA review of actions by the

President extend to the actions of agencies when they act under a delegation of presidential authority? In other words, does an agency cease to be an "agency" for APA purposes when it acts pursuant to delegated presidential authority, rather than pursuant to authority conferred directly to the agency by statute?[14] Neither the Supreme Court nor, apparently, any Court of Appeals has addressed this question directly.[15] Three district courts have held that where

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[14] A different question would be raised if the State Department's actions on behalf of the President were merely "ceremonial or ministerial." *Franklin*, 505 U.S. at 800. In that scenario, agency action that preceded the State Department's action would still be reviewable as "final agency action"; the ceremonial or ministerial task assigned to the President would not defeat the finality of the preceding agency action. *Id*. Here, ACCG does not, and could not, argue that the actions assigned to the President under the CPIA are merely "ceremonial or ministerial." Accordingly, the discussion of "ceremonial or ministerial" presidential actions in *Franklin* has no bearing here.

[15] Although the issue arose before the D.C. Circuit in *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), the court found it unnecessary to address it. The district court had held that actions of the Forest Service in managing Grand Sequoia National Monument were not "agency" actions, and thus not reviewable under the APA, because the Forest Service was "merely carrying out directives of the President." *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001). On appeal, the D.C. Circuit concluded that it did not need to address whether the Forest Service's actions were unreviewable presidential actions because the plaintiffs did not "identify these foresters' acts with sufficient specificity to state a claim." *Tulare County*, 306 F.3d at 1143. Moreover, although the Ninth Circuit addressed the issue in *Jensen v. National Marine Fisheries Service*, 512 F.2d 1189, 1191 (9th Cir. 1975), the case predates Franklin, and in any event the court analyzed the issue principally as a question of whether the political question

an agency acts on behalf of the President, those acts remain those of the President for APA purposes; they do not become reviewable as actions of an "agency." *See Natural Resources Defense Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009) ("*NRDC*") (holding that because the State Department, in deciding whether to issue presidential permits for cross-border oil pipelines, was "acting solely on behalf of the President," its actions were those of the President and thus were unreviewable under the APA); *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1082 (holding that when the State Department issues an environmental impact statement under authority delegated by the President, its actions "are presidential in nature, and therefore, do not confer upon the plaintiffs a private right of action under the APA"); *Tulare County*, 185 F. Supp. 2d at 28-29 (holding that because the Forest Service, in managing Grand Sequoia National Monument pursuant to a presidential proclamation, was "merely carrying out directives of the President," its actions were not reviewable under the APA). One district court has disagreed with those courts, holding instead that the State Department's issuance of a presidential permit for a cross-border oil pipeline constitutes "agency" action reviewable under the APA. *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010).[16]

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doctrine rendered the case non-justiciable, not whether the Secretary of State is an "agency" for purposes of the APA. *Id*.

[16] The government seeks to distinguish *Sierra Club* by arguing that the issuance of the permit and the corresponding preparation of an environmental impact statement there involved not only the State Department, but also other government agencies, such as the Corps of Engineers, which indisputably were "agencies" acting pursuant to their own statutory authority, not pursuant to authority delegated by the

Of those four cases, however, three involved delegations of authority the President derived solely, or at least primarily, from his inherent constitutional authority over foreign affairs, rather than authority the President derived from a statute. *See Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1081 ("[T]he President has the sole authority to allow oil pipeline border crossings under his inherent constitutional authority to conduct foreign affairs."); *IRDC*, 658 F. Supp. 2d at 109; *Sierra Club*, 689 F. Supp. 2d. at 1163.[17] Although the issues that arise in those two contexts largely overlap, they are not identical. In this case, the President's authority to negotiate and implement cultural property import restrictions derives at least primarily from a statute, the CPIA.[18]

President. In contrast, the government argues, here the State Department was acting solely on the basis of delegated presidential authority. The *Sierra Club* court did not, however, analyze the issue in those terms. Rather, it expressly held that the State Department's actions were reviewable as "final agency action," even though the Department was acting pursuant to delegated presidential authority. 689 F. Supp. 2d at 1157. Moreover, the court expressly stated that it was declining to follow the reasoning of the courts in NRDC and *Sisseton-Wahpeton Oyate*. *Id*. at 1157 n.3.

[17] In *Tulare County*, the President's authority derived from the Antiquities Act, which authorized the President, "in his discretion," to designate federal land as national monuments. 185 F. Supp. 2d at 21.

[18] The President's authority is "at least primarily," rather than "solely," derived from the CPIA because, conceivably, even absent the CPIA the President would have some authority to negotiate treaties concerning cultural property, pursuant to the President's inherent constitutional authority over foreign affairs. To the extent the source of the President's authority bears on the availability of judicial review under the APA, it is important to recognize that the President's authority in a

Nonetheless, the State Department and Assistant Secretary were acting on behalf of the President, and therefore their actions are not reviewable under the APA. That conclusion is particularly justified here, because the Department and Assistant Secretary were acting in the realm of foreign affairs. The Court's conclusion in *Franklin* that the President's actions are not reviewable under the APA was premised on "the separation of powers and the unique constitutional position of the President." 505 U.S. 788 at 800. Although agencies, such as the State Department here, occupy a different "constitutional position" than does the President, when those agencies act on behalf of the President, the separation of powers concerns ordinarily apply with full force—especially in an area as sensitive and complex as foreign affairs. As with respect to almost any international agreement, the decision whether to enter an Article 9 agreement with a particular country does not occur in a foreign policy vacuum. The decision necessarily will involve a variety of considerations beyond those set out in the CPIA, including the broader relationship between the United States and the requesting country and the potential impact of such an agreement on the United States's relationships with other countries. Those considerations exist regardless of who ultimately negotiates and enters the agreement, the President or the Assistant Secretary on the President's behalf. Furthermore, by lodging primary responsibility for imposing cultural

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particular area can be derived from a combination of statutory and constitutional sources. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-88 (1952) (looking first to statutes, and then to the Constitution, to determine whether the President was authorized to seize the steel mills).

property import restrictions with the President, rather than with an agency, Congress likely recognized these separation-of-powers concerns. While the parties have not pointed to a conclusive explanation in the CPIA's legislative history, Congress likely concluded that deference to the President was appropriate given the foreign policy considerations inherent in deciding whether to impose import restrictions.[19] For these reasons, actions taken pursuant to delegated presidential authority under the CPIA will not be held subject to review under the APA.

ACCG also argues that even if the actions of the State Department and Assistant Secretary were not agency action reviewable under the APA, the promulgation of the designated lists by Customs rendered the State Department actions reviewable. The parties agree that judicial review under the APA requires "final agency action," that Customs is an "agency" for APA purposes, and that its actions were "final." Moreover, so long as there is "final agency action" presented for review, intermediate agency actions that culminated in that final action are also reviewable. 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). But § 704 only renders intermediate actions reviewable if those actions, in addi-

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[19] To be clear, the court is not concluding that judicial review is impliedly precluded by statute under 5 U.S.C. § 701(a)(1). Although Congress's decision to assign responsibility to the President for most responsibilities under the CPIA, along with the foreign affairs implications of imposing import restrictions, strongly indicate such preclusion, the court need not reach the issue because review is otherwise precluded for the reasons discussed above.

tion to the final action, were those of an "agency." For the reasons discussed above, the actions of the State Department and the Assistant Secretary were not those of an "agency."[20] Therefore, the reviewability of Customs' actions does not render reviewable the actions of the State Department or the Assistant Secretary.

For these reasons, to the extent ACCG challenges the actions of the State Department and the Assistant Secretary, those actions are not reviewable under the APA, and ACCG has failed to state a claim on which relief can be granted.[21]

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[20] There is a separate line of cases interpreting the term "agency" under FOIA. *See, e.g.*, *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996); *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993). Although the issues overlap somewhat, particularly because the APA's definition of "agency" largely overlaps with FOIA's definition of the term, those cases are distinguishable because the concerns underlying FOIA determinations are different from those underlying Franklin.

[21] Because the court concludes that APA review is not available because the State Department was acting on behalf of the President, who is not an "agency" for APA purposes, it does not reach the defendants' alternative arguments for why APA review is unavailable, namely that the State Department's actions are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), that the State Department's actions are exempt from the APA as part of the "foreign affairs function of the United States," *id*. § 553, and that the ACCG has not shown that "there is no other adequate remedy in a court" as required by § 704. The court also need not resolve the parties' dispute about whether the State Department's negotiation of article 9 agreements constituted "final" actions for APA purposes, because irrespective of whether the conclusion of those agreements was "final," it was not "agency" action.

2. *Ultra vires* review

As an alternative to judicial review under the APA, ACCG seeks judicial review under "nonstatutory" or "*ultra vires*" review. Under the purview of *ultra vires* review, it alleges that the State Department and Assistant Secretary acted beyond the scope of their authority under the CPIA for two principal reasons. First, it argues that because the CPIA authorizes restrictions on the importation of items "first discovered within" a requesting state, and because the restrictions here apply to all coins of certain Chinese and Cypriot types without requiring the government to prove that particular coins were "discovered" within the requesting state, the restrictions are not authorized by the CPIA. Second, it argues that the State Department and the Assistant Secretary imposed restrictions on Chinese coins without a request from China to do so, despite the fact that such a request is required under the CPIA. (*Id*. ¶ 135.)

In *Dalton v. Specter*, a lawsuit to enjoin the closing of a Naval shipyard, the Supreme Court "assume[d] for the sake of argument" that even if the APA does not establish judicial review of presidential actions, "some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." 511 U.S. at 474. That assumption, however, did not provide the plaintiffs in *Dalton* the judicial review they sought. The Court held that because the statute in question "[did] not at all limit the President's discretion," *id*. at 476, and because "longstanding authority" holds that judicial review to determine whether the President complied with a statutory mandate "is not available when the statute in question commits the decision to the dis-

cretion of the President," judicial review was unavailable. *Id*. at 474-75.[22]

"A somewhat different case is presented, however, where the authorizing statute or another statute places discernible limits on the President's discretion." *Mountain States Legal Found*., 306 F.3d at 1136. In other words, "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996); *see also id*. at 1331 n.5 (explaining why *Dalton*'s limited bar to judicial review of presidential actions does not "repudiate *Marbury v. Madison*"). Even if a statute does not provide for judicial review, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id*. at 1328 (citing *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988)).

The CPIA, unlike the statute in *Dalton*, provides discernible limits on the President's discretion.[23]

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[22] This bar on non-APA reviewability is similar to the APA's bar on reviewability where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Just as judicial review of agency action is unavailable under the APA when there is "no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *ultra vires* review of presidential action is unavailable when there are no "discernible [statutory] limits on the President's discretion." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

[23] The President may impose import restrictions, but only if "the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials," "the State Party has taken measures consistent with the Convention

Even where *ultra vires* judicial review is available, however, the scope of that review is limited. Notably for the purposes of this case, *ultra vires* review does not include the full scope of review applied by courts in "arbitrary and capricious" challenges under the APA, such as whether an agency "cogently explain[ed] why it has exercised its discretion in a given manner." *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1993). Rather, *ultra vires* review is limited to whether the President has violated the Constitution, the statute under which the challenged action was taken, or other statutes, or did not have statutory authority to take a particular action. *Mountain States Legal Found.*, 306 F.3d at 1136; *Tulare County*, 306 F.3d at 1138.

Thus, this court will proceed to consider whether the State Department and Assistant Secretary exceeded their authority under the CPIA.

i. The "first discovered" requirement

ACCG first alleges that the State Department and the Assistant Secretary's actions were *ultra vires* because the regulations imposing the import restrictions do not require the government to prove that a particular coin was discovered in the modern countries of China or Cyprus before it may seize the coin. (*See* Am. Compl. ¶¶ 173-74.) ACCG argues that

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to protect its cultural patrimony," import restrictions "would be of substantial benefit in deterring a serious situation of pillage," "remedies less drastic . . . are not available," and the imposition of import restrictions "is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes." 19 U.S.C. § 2602(a)(1).

many ancient coins, including those produced in Cyprus and China, circulated widely in the ancient world. Cypriot coins were used in international trade and thus circulated beyond the island's shores, and empires such as the Persian and Roman empires produced coins on Cyprus that were indistinguishable from coins produced outside of Cyprus. Similarly, coins produced in China circulated widely, and other countries in Asia copied the design of Chinese coins.[24]

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[24] ACCG describes its historical argument in detail in its amended complaint:

> 14. Western coinage originated in Asia Minor sometime around the 7th c. B.C. This innovation soon spread to the Greek mainland and islands like Cyprus. The first true Cypriot coins date from the late 6th c. B.C., when various Cypriot kingdoms began to issue coin types derived from designs on coins from the East that had arrived on Cyprus in trade. Subsequently, the Persian Empire, Alexander the Great, the Ptolemaic Kingdom and the Romans struck coins on the Island, which were often indistinguishable from coins struck at their other imperial mints. Because Cyprus is located on an important trade route, coins minted in Cyprus circulated widely around the Mediterranean region and even as far away as Afghanistan. Accordingly, it is impossible to determine a Cypriot coin's find spot merely from identifying it as being made at a Cypriot mint.
>
> 15. Coinage began in China in the late 7th or early 6th c. B.C. The earliest money was cast into the form of spades, knives or cowry shells. Ultimately, by around 221 B.C., a round bronze coin marked with Chinese characters referencing values and issuing authorities and featuring a square center hole became standardized. These "cash" coins were produced in immense numbers from roughly 221 B.C. to 1912 A.D. This type was widely emulated from Central Asia to Japan, with similar types being cast in Vietnam as late as 1933.

Given the wide circulation of Cypriot and Chinese coins in ancient times, ACCG argues, only a subset of those coins remained in Cyprus or China. As a result, in modern times, such coins are regularly "discovered" in many different countries.

The CPIA, as noted above, only authorizes the President to designate archaeological materials as subject to import restrictions if those materials were "first discovered within, and . . . subject to export control by" the requesting state party. 19 U.S.C. § 2601(2). Given the wide circulation of ancient Cypriot and Chinese coins, ACCG argues, the President does not have authority under the CPIA to restrict all of certain types of Cypriot and Chinese coins without requiring the government to prove that they were "discovered within" Cyprus or China in modern times. Moreover, according to ACCG, although the statute does not require that the coins be discovered in the requesting country *in modern times*, the requirement is implied in the use of the term "discovered." "[M]erely identifying coins by country of origin is statutorily insufficient," ACCG argues, "for if this were all that were required, Congress would have emphasized the place of 'production' rather than the place of 'discovery.'" (Pl.'s Surreply at 6 (quoting

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16. The circulation patterns of Chinese cash coins were equally wide, with such coins being exported in quantity from the Fifth to Tenth Centuries to East Africa, the Persian Gulf, India, Ceylon, Burma, Thailand, Vietnam, Malaya, the Philippines, Sumatra, Java and Borneo. Later on, Chinese immigrants even took such coins with them to the United States. Accordingly, it also is impossible to determine a Chinese coin's find spot merely from identifying it as being made at a Chinese mint.

(Am. Compl. ¶¶ 14-16.)

Stephen Urice & Andrew Adler, *Unveiling the Executive Branch's Extralegal Cultural Policy 34* (Miami Law Research Paper Series August 12, 2010)).)[25]

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[25] In a related argument, ACCG correctly observes that 19 C.F.R. § 12.104, the regulation governing the enforcement of the CPIA, conflicts in an important respect with the CPIA. As stated above, the CPIA defines "archaeological or ethnological material of the State Party" as:

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

19 U.S.C. § 2601(2). The last phrase modifies all three preceding subsections. That is, irrespective of whether an object is "of archaeological interest," "of ethnological interest," or a fragment of such an object, the object must have been "first discovered within" and "subject to export control by" the country requesting import restrictions. As indicated above, § 2601(2) then continues with more detailed definitions of "archaeological interest" and "ethnological interest." The C.F.R. section defines "archaeological or ethnological material of the State Party" as:

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

19 C.F.R. § 12.104(a). In the regulation, the phrase "which was first discovered within, and is subject to export control by, the State Party" modifies only the third type of object subject to the definition, namely "fragment[s] or part[s]" of objects. Therein lies the conflict with the CPIA.

Congress only authorized the imposition of import restrictions on objects that were "first discovered within, and [are] subject to export control by the State Party." Under the

For each designated type of coin, assuming an importer does not have a "certification or other documentation" from the state party that "exportation was not in violation of the laws of the State Party," 19 U.S.C. § 2606(a), coins could fall into one of three categories, depending on whether there is documentation of where a coin was discovered, known as its "find spot": (1) coins that are proven to have been discovered in modern-day China or Cyprus, (2) coins that are proven to have been discovered somewhere other than China or Cyprus, and (3) coins for which the "find spot" is unknown. ACCG concedes that the State Department has authority to prohibit the importation of coins in the first category. The government concedes that it does not have authority to prohibit coins in the second category. The parties' dispute is limited to whether the State Department has authority under the CPIA to prohibit the importation of coins with unknown "find spots," as the State Department has done here. For example, one

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regulations, that requirement seems to apply only to the importation of a "fragment or part" of an object of archaeological or ethnological interest. This appears to have been an oversight in the drafting, or codification, of the original regulations in 1985, and has persisted in the C.F.R. ever since. See Interim Customs Regulations Amendments Concerning Convention on Cultural Property Implementation Act, 50 Fed. Reg. 26,193 (June 25, 1985).

Nonetheless, the court need not decide whether the conflict between 19 U.S.C. § 2601(2) and 19 C.F.R. § 12.104(a) requires that the regulation be set aside, because the government concedes that the "first discovered within" requirement applies to all CPIA import restrictions. Therefore, for the purposes of this case, it is unnecessary for this court to decide whether 19 C.F.R. § 12.104(a) violates the APA or exceeds the statutory authority of Customs, the Department of Homeland Security, or the Treasury Department.

category of coins on the designated list is gold coins issued by the Cypriot kingdom of Amathus. *See* 72 Fed. Reg. at 38,473. This category of coins thereby became "designated archaeological or ethnological material." *See* 19 U.S.C. § 2601(7). An importer wishing to import a gold Amathus coin would have to present either a certification by Cyprus that the coin did not violate Cyprus's export laws, *id*. § 2606(b)(1), or a declaration under oath that the coin was exported from Cyprus prior to 2007, when the category of coins was added to the designated list. *Id*. § 2606(b)(2)(B).[26] Accordingly, if there is no record of when and where the coin was discovered, or of when it was exported from Cyprus, then importation of the coin is prohibited. This result, ACCG argues, violates the "first discovered" requirement in the CPIA.

ACCG's argument misses the mark, for three principal reasons. First, the 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

[26] In this example, § 2606(b)(2)(A), which provides an importer with the option to show that the object was exported from Cyprus ten or more years before entering the U.S., would not come into play, because Cypriot coins were added to the designated list for the first time in July 2007, less than ten years ago.

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.

Second, the CPIA anticipates that some categories of materials will be designated "by type or other appropriate classification." *Id*. § 2604. 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 prohibit all coins of particular types, rather than only coins with proven find spots in China or Cyprus.

Third, interpreting 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, pre-

sumably, 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.[27]

For these reasons, the import restrictions on Chinese and Cypriot coins, which have the effect of barring the importation of coins with unknown find spots, do not exceed the State Department's authority under the CPIA.[28] ACCG's request to find the State

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[27] Moreover, ACCG's argument, if taken to its logical conclusion, could bring into question the import restrictions on every, or almost every, item on the designated lists. (*See* Transcript of Motions Hearing (Feb. 14, 2011), ECF No. 35, at 21-22.)

[28] Arguably, the question whether the State Department's regulations are valid under the APA could be seen as a Chevron question. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Aid Assoc. for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1176 (D.C. Cir. 2003) (employing the Chevron analysis in deciding whether the Postal Service acted *ultra vires* when it adopted regulations concerning non-profit reduced-rate postage and interpreted the statutory term "coverage" to mean "type of insurance," such as life or health insurance, rather than as "the inclusion or exclusion of specific risks"). Under *Chevron* Step One, the question would be whether the "first discovered within" requirement in the CPIA "permits or clearly excludes the possibility of" barring the importation of coins with unknown find spots. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 Va. L. Rev. 611, 611 (2009). If the CPIA permits the possibility of the Department's interpretation, under Step Two the question would be whether that interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see* Bamberger & Strauss, Chevron's *Two Steps*, *supra*, at 623-24 ("Step Two analysis considers whether agencies have permis-

Department and Assistant Secretary's actions *ultra vires* on this basis will be dismissed.

ii. Chinese request for import restrictions

As its second *ultra vires* claim, ACCG alleges that the State Department and the Assistant Secretary exceeded their authority under the CPIA because they imposed restrictions on Chinese coins without a request from China to do. As noted above, the CPIA only authorizes the President (and by extension the State Department) to impose import restrictions "after request is made to the United States under article 9 of the Convention by any State Party." 19 U.S.C. § 2602(a)(1). Although at the motion-to-dismiss stage the court must "accept the well-pled allegations of the complaint as true," *Ibarra*, 120 F.3d at 474, the court may also take judicial notice of public records. *Papasan v. Allain*, 478 U.S. 265, 269 n. 1 (1986); *Secretary of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1222 (D.C. Cir. 1993). Moreover, the contents of the Federal Register are the type of public records subject to judicial notice. 44 U.S.C. § 1507.

Here, the State Department published in the Federal Register a notice that it had received a request on May 27, 2004 from China to impose import restrictions on certain "Chinese archaeological material from the Paleolithic to the Qing Dynasty." 69 Fed. Reg. at 53,970. This request eventually led to the negotiation of a memorandum of understanding

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sibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning."). The parties have not analyzed the question in *Chevron* terms, however, and therefore neither will the court.

and the promulgation of a designated list that included coins. 74 Fed. Reg. at 2,842. Although the September 2004 notice does not specifically state that China's request included coins, the CPIA does not require that a state party's initial request include a detailed accounting of every item eventually covered by an Article 9 agreement. Nor does the CPIA require that the State Department publish verbatim the list of items requested to be restricted. Rather, it simply requires that a State Party make a "request . . . to the United States under article 9 of the Convention," 19 U.S.C § 2602(a)(1), and "publish notification of the request . . . in the *Federal Register*." *Id*. § 2602(f)(1). The notice published in the September 3, 2004, Federal Register demonstrates that such a request was made. Accordingly, the State Department did not initiate the process to impose import restrictions without a request having been made by China.

ACCG's claim to the contrary will be dismissed.

iii. ACCG's other ultra vires claims

ACCG also alleges that the defendants acted *ultra vires* because they violated the First and Fifth Amendments to the Constitution, as well as IEEPA, and because the decisions to impose import restrictions were "based on bias and/or prejudgment and/or *ex parte* contact." The constitutional claims are considered separately below. The IEEPA claim is easily rejected. IEEPA authorizes the President to impose sanctions in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701(a). The Berman Amendment and the Free

Trade in Ideas Amendment exempt informational materials from import restrictions imposed under IEEPA. *See* § 1702(b) ("The authority granted to the President *by this section* does not include the authority to regulate . . . the importation . . . of any information or informational materials.") (emphasis added). The government does not assert that its authority to seize the ACCG's coins in any way derived from IEEPA. Rather, the authority of State and Customs to impose import restrictions and then seize the coins derived from the CPIA. The informational materials exemption under IEEPA, therefore, is irrelevant to the scope of their authority under the CPIA.

Moreover, ACCG's claim that the import restrictions were "based on bias and/or prejudgment and/or *ex parte* contact" is beyond the scope of *ultra vires* review. As stated above, *ultra vires* review is limited to claims that the President has exceeded his authority under a particular statute, has violated another statute, or has violated the Constitution. *Mountain States*, 306 F.3d at 1136. ACCG's bias claim is not an allegation of *ultra vires* action. Rather, it is merely a restatement of its claim for arbitrary and capricious review under the APA. *Ultra vires* review, however, does not encompass the type of relatively searching review courts apply under arbitrary and capricious review of agency action. Accordingly, to the extent the Ninth Cause of Action alleges that the import restrictions were *ultra vires* based on the Berman Amendment and the Free Trade in Ideas Amendment to IEEPA, or because they were "based on bias and/or prejudgment and/or *ex parte* contact," those claims will be dismissed.

For these reasons, ACCG is not entitled to a declaration that the State Department and the Assistant Secretary's actions were *ultra vires*. The plaintiff's Ninth Cause of Action, insofar as it is brought against the State Department and the Assistant Secretary, will be dismissed.

3. Constitutional review

In addition to arguing that the State Department's actions violated the APA and were *ultra vires*, ACCG argues that the Department violated the First Amendment. ACCG argues that irrespective of the availability of judicial review under the APA or for *ultra vires* actions, the State Department and the Assistant Secretary's actions are reviewable under this court's "inherent equitable powers to remedy constitutional violations." (Am. Compl. ¶¶ 112, 118.) Indeed, while judicial review is unavailable under the APA, and the State Department and Assistant Secretary did not act *ultra vires*, that does not dispose of ACCG's constitutional claims, because "the President's actions may still be reviewed for constitutionality." *Franklin*, 505 U.S. at 801 (citing *Webster v. Doe*, 486 U.S. 592, 603-605 (1988); *Youngstown Sheet & Tube Co. v. S*awyer, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

ACCG argues that the import restrictions on Cypriot and Chinese coins violate the First Amendment because they are "a content-based restriction on protected speech that is not narrowly tailored to serve a compelling government interest." (Pl.'s Opp'n at 25; *see also* Am. Compl. ¶ 160.) ACCG argues that "inscription and motif" on an ancient coin constitute "information or speech" because they communicate "the ethos of a people, the means by which the ancient society expressed that ethos, and the individ-

ual expression of the coin maker." (Pl.'s Opp'n at 26.) Accordingly, ACCG argues, the import restrictions are content-based restrictions on speech that receive strict scrutiny. (*Id*. at 27.)

This claim fails because, even assuming without deciding that the inscriptions on ancient coins constitute expression, the import restrictions satisfy the requirements of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*,

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. The CPIA and the import restrictions at issue here satisfy this test.

First, it is undisputed that the imposition of import restrictions is "within the constitutional power of the Government." Second, the restrictions further "an important or substantial governmental interest," namely combating "the pillage of archaeological or ethnological materials" where that pillage, and the resulting illegal trade, threatens the "cultural patrimony" of other countries. 19 U.S.C. § 2602(a)(1)(A). See also Preamble, Cultural Property Convention (describing the purposes of the Convention). By entering the Convention and implementing it through the CPIA, the President and Congress demonstrated their understanding that the pillage of archaeological materials, whether in the United States or abroad,

constitutes a substantial threat that warrants a concerted international response. Indeed, the ACCG does not argue that the government's interest in deterring such pillage is not "important or substantial."

Third, the government's interest in combating the pillage of archaeological materials is "unrelated to the suppression of free expression." Even if ancient coins convey information about ancient societies, the government's interest in combating the pillage of archaeological materials is unrelated to the suppression of the flow of that information.

Fourth, even if the import restrictions incidentally restrict the ability of coin collectors in the United States to access the information conveyed by ancient coins, that restriction is "no greater than is essential" to combat the pillage of those coins. ACCG seems to argue that the restriction is "greater than is essential" because it allows the government to prohibit the importation of coins without a known find spot, rather than limiting restrictions to coins that are proven to have been pillaged. The Convention and CPIA, however, illustrate that countries are in agreement that restricting the importation of particular types of coins, and thereby decreasing demand for those coins, is necessary to combat the trade in looted coins. Thus, even if the restrictions are in some sense over-inclusive because they prohibit the importation of coins that entered the market permissibly, the restrictions are not greater than is essential to deter pillage.

In fact, the CPIA, in anticipation of some First Amendment concerns, requires that import restrictions be "consistent with the general interest of the international community in the interchange of

cultural property among nations for scientific, cultural, and educational purposes." 19 U.S.C. § 2602(a)(1)(D). To that end, it exempts certain material and articles that would otherwise be subject to import restrictions, such as certain items that have been held by museums in the United States for at least three years, *id*. § 2611(2), as well as certain items for "temporary exhibition or display." *Id*. § 2611(1). Moreover, while the import restrictions prohibit the importation and possession of protected coins, they do not prohibit coin collectors from learning the information contained in the inscriptions and motifs on those coins. Although there may be some information that collectors can acquire only by inspecting original coins, much of the information that ACCG argues is communicated through coins is available from descriptions, photographs or other reproductions of those coins. Therefore, "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of" the government's interest in combating the pillage of protected materials.

For these reasons, 19 CFR §12.104a and the designated lists are not impermissible content-based restrictions on speech.[29]

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[29] ACCG also argues that 19 CFR §12.104a and the designated lists are unconstitutionally overbroad. (Pl.'s Opp'n at 29.) "[A] law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)). For the reasons discussed above, the application of the import restrictions to Cypriot and Chinese coins is not unconstitutional. Because it does not allege any other unconstitutional applications of the CPIA, its

For the foregoing reasons, the amended complaint fails to state a cause of action on which relief can be granted with respect to the State Department and the Assistant Secretary of State. The claims against them will be dismissed, and they will be dismissed as defendants in this action.

B. Judicial Review of Customs Actions

In addition to challenging the actions of the State Department and the Assistant Secretary of State for ECA, ACCG challenges the actions of Customs and Border Protection and the Commissioner of Customs. ACCG alleges that the agency and the Commissioner violated the APA and the Constitution, and exceeded their statutory authority, based on three alleged actions: (1) the promulgation of designated lists that included Cypriot and Chinese coins, (2) the seizure of ACCG's coins based on those import restrictions, and (3) the placement of ACCG's Executive Director on a "'watch list' due to ACCG's decision to import coins of Cypriot and Chinese type for purposes of this test case." (Am. Compl. ¶¶ 102, 117; *see also* Pl.'s Opp'n at 21-22.) ACCG argues that the promulgation of the designated lists and the seizure of the coins based on those regulations violated the APA, IEEPA and the

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overbreadth argument fails. ACCG also alleged in its amended complaint that the State Department and Assistant Secretary acted unconstitutionally because they imposed import restrictions that (1) are a "prior restraint on protected speech" in violation of the First Amendment (Am. Compl. ¶ 161), (2) are "unconstitutionally vague," also in violation of the First Amendment (Am. Compl. ¶ 162), and (3) "restrict and burden plaintiffs' Fifth Amendment liberty collecting and trading in informational materials in the United States." (Am. Compl. ¶ 167.) They do not press these allegations against the State Department and Assistant Secretary in their briefs, and so the court will consider them abandoned.

First and Fifth Amendments to the U.S. Constitution, and were *ultra vires*. ACCG alleges that the alleged placement of the executive director on a watch list violates the First Amendment.

1. APA Review

AGGC seeks judicial review under the APA of two actions by Customs: the promulgation of designated lists that included Chinese and Cypriot coins, and the seizure of ACCG's coins based on those regulations.[30] Unlike the actions discussed above, for which Congress assigned responsibility to the President, Congress conferred the authority for promulgating the designated lists on the Secretary of the Treasury, 19 U.S.C. § 2604, whose authority under the statute was later transferred to the Secretary of Homeland Security and delegated to Customs. 68 Fed. Reg. at 10,627. Thus, the bar on APA judicial review of the actions of the State Department, which are unreviewable under the APA as actions pursuant to delegated presidential authority, does not apply to the actions of Customs.

ACCG alleges that the promulgation of the designated lists by Customs was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." *See* 5 U.S.C. § 706(A)-(D). ACCG's specific

[30] ACCG also alleges that Customs violated the APA because it seized its coins without filing a complaint for forfeiture, in violation of the Fifth Amendment. (*See* Am. Compl. ¶ 107.) That claim will be discussed in the section on constitutional claims below.

factual allegations against Customs are somewhat unclear, because it does not clearly distinguish, in its amended complaint or in its briefs, between the actions of State and Customs. Because at this stage the court must construe the allegations in the light most favorable to ACCG, the court will assume that any claim for which ACCG does not specify whether it is brought against State or Customs is brought at least against Customs.

Nonetheless, ACCG does not allege any actions arguably attributable to Customs that would violate the APA and therefore does not state a claim under the APA on which relief can be granted. The categories of materials subject to CPIA import restrictions are set by the State Department and the requesting state party in the applicable Article 9 agreements. Once the State Department decides to include particular materials in an Article 9 agreement, Customs' authority is limited to promulgating the "list of the archaeological or ethnological material of the State Party covered by the agreement." 19 U.S.C. § 2604. Of the governmental actions challenged by ACCG, all of those preceding and including the negotiation of Article 9 agreements are the responsibility of the State Department, and thus are unreviewable under the APA. ACCG does not allege that Customs unilaterally added coins to the designated lists. Indeed, it acknowledges that the decisions to include coins in the Cypriot and Chinese designated lists were made by the State Department, not by Customs. Moreover, any allegation that Customs unilaterally imposed restrictions on coins would contradict ACCG's entire challenge to the State Department's actions. Thus ACCG's claims that Customs violated the APA by including coins on the designated lists will be dismissed.

2. Ultra vires review

In its Ninth Cause of Action, for judicial review of *ultra vires* actions, ACCG does not distinguish between its claims against the State Department and Assistant Secretary and those against Customs and the Commissioner. (*See* Am. Compl. ¶¶ 170-77.) To the extent its claim pertains to the process culminating in the decision to include Cypriot and Chinese coins in the Article 9 agreements, it is discussed above in the context of the actions of the State Department and Assistant Secretary. To the extent ACCG aims its *ultra vires* claim against actions taken by Customs and the Commissioner, the claim parallels ACCG's APA claim and will be dismissed for the reasons stated above.

3. Constitutional review

In addition to arguing that Customs violated the APA and acted *ultra vires*, ACCG argues that Customs violated the First and Fifth Amendments to the U.S. Constitution. ACCG's claim that restricting the importation of coins violates the First Amendment is discussed above. In addition, ACCG has raised two constitutional claims concerning the actions of Customs and the Commissioner: that they violated its Fifth Amendment rights by taking its coins without promptly initiating forfeiture proceedings, and that they violated its First Amendment rights by allegedly placing ACCG's Executive Director on a "watch list."

i. Delay in filing forfeiture action

ACCG imported the coins on April 15, 2009. Customs detained the coins and, in its May 15, 2009 amended Notice of Detention, requested that ACCG present the certification or "satisfactory evidence"

required by the CPIA and corresponding regulations. After ACCG disclaimed any ability to provide the certification or evidence requested, Customs seized the coins on July 20, 2009. ACCG formally contested the seizure on September 8, 2009. ACCG filed this action on February 11, 2010. Thus approximately three months passed between detention and seizure, another seven months passed before ACCG filed this lawsuit, and another eighteen months have passed while this case has been pending, all without a forfeiture action filed. ACCG argues that the government's delay in filing a forfeiture action violates the Due Process Clause of the Fifth Amendment. (*See* First and Second Causes of Action, Am. Compl. ¶¶ 107, 110-13.) ACCG obviously does not, however, seek dismissal of this action; rather, it requests that this court order the government to file a forfeiture action, and then consolidate it with this action. (Pl.'s Surreply at 11-12.) The government responds that the delay before ACCG filed this lawsuit was not unconstitutionally long, and the delay since it filed this lawsuit should not count against it because "the only reason that the government has not filed a civil forfeiture complaint is because of the pendency of the instant lawsuit." (Defs.' Reply at 11.)

The test for determining whether a delay in initiating forfeiture proceedings violates the Fifth Amendment is the same as the speedy trial analysis under the Sixth Amendment. *United States v. Eight Thousand Eight Hundred And Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 564 (1983). That test requires the court to balance four factors: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id*. "[N]one of these factors is a necessary or sufficient condition for finding unreasonable

delay." *Id*. at 565. "Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case." *Id*. ACCG's due process claim thus raises two issues: First, does the delay thus far violate ACCG's due process rights; in other words, if the government were to file its forfeiture action now, would the action be dismissed based on the Fifth Amendment? Second, if the delay thus far does not violate the Fifth Amendment, would further delay render forfeiture unconstitutional?

With respect to the first issue, in balancing the factors listed above, the court concludes that the delay does not violate ACCG's due process rights. The length of the delay since ACCG's coins were seized has been substantial, and ACCG promptly asserted a claim to the coins. The length of delay and ACCG's assertion of its right thus cut towards a finding that the delay is unconstitutional. The other two factors, however—the reason for the delay and prejudice to ACCG—outweigh the length of delay and the claimant's assertion of its right. For all but five months of the time since the coins were seized, this case has been pending, involving extensive briefing and an oral argument on the government's motion to dismiss. The government has not filed a separate forfeiture action during that time because ACCG already had the federal forum it sought for review of the validity of the import restrictions. If the government were to file a separate action, the parties would have to litigate, and the court would have to adjudicate, the same issues in two cases at once. Accordingly, the reason for most of the delay cuts against a finding that the delay is unconstitutional.

Moreover, ACCG has made clear that its primary purpose in importing the coins at issue and then challenging their seizure was to challenge the validity of the import restrictions in federal court. Apparently it originally envisioned challenging the restrictions by filing a motion to dismiss in a forfeiture action. When several months went by without a forfeiture action having been filed, it filed this action seeking judicial review of the import restrictions. The government then filed its motion to dismiss, requiring this court to determine the reviewability (and, to the extent judicial review is available, the validity) of the import restrictions. Whereas in most delayed forfeiture cases a claimant is prejudiced because the government retains the claimant's property, ACCG does not claim any prejudice from the government's continued custody over the coins. Indeed, ACCG seeks neither a dismissal of this case nor an order precluding the government from initiating a forfeiture proceeding. Although it may have suffered some prejudice in the initial few months when it was awaiting the filing of a forfeiture action, and expended some resources filing this action that it would not have expended defending a forfeiture action, the fact that ACCG has succeeded in bringing the import restrictions before a federal court for review mitigates any such prejudice. Therefore, the delay thus far does not violate ACCG's due process rights.

For these reasons, the court will dismiss without prejudice the First and Second Causes of Action in ACCG's Amended Complaint.

ii. "Watch list" claim

ACCG claims that Customs violated the First Amendment when it placed ACCG's Executive Direc-

tor on a "'watch list' due to ACCG's decision to import coins of Cypriot and Chinese type for purposes of this test case." (Am. Compl. ¶¶ 102, 117; *see also* Pl.'s Opp'n at 21 22.) The director's belief that he was placed on a watch list is "[b]ased on his interactions with Customs at the time as well as Customs' detention of Spink's property." (Am. Compl. ¶ 117.) By placing the director on a watch list, ACCG argues, Customs was retaliating against ACCG for filing this lawsuit, and "retaliation for filing a lawsuit is prohibited by the First Amendment protections of free speech and access to the courts." (Pl.'s Opp'n at 22.)

Customs argues that this claim should be dismissed for failure to exhaust administrative remedies. Congress required that the Department of Homeland Security "establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by [TSA], [CBP], or any other office or component of [DHS]." 49 U.S.C. § 44926(a). DHS has established such a program, which is called the Traveler Redress Inquiry Program (TRIP). *See Scherfen v. U.S. Dep't of Homeland Sec.*, No. 3:CV-08-1554, 2010 WL 456784, *6 (M.D. Pa. Feb. 2, 2010) (describing the program). Customs argues that ACCG and/or its executive director must exhaust the remedies available through TRIP before seeking relief in this court, and therefore ACCG's claim should be dismissed.

When a party seeks judicial review of an agency decision, the party is generally required to "exhaust prescribed administrative remedies before seeking relief from the federal courts." *Volvo GM Heavy Truck Corp. v. U.S. Dept. of Labor*, 118 F.3d 205, 209

(4th Cir. 1997). Non-jurisdictional exhaustion, the type of exhaustion at issue here, *see Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004), "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Volvo GM Heavy Truck Corp*., 118 F.3d at 209 (citing *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992)). The exhaustion requirement "provides an agency with an opportunity to correct its own mistakes with respect to programs it administers before it is haled into federal court" and also "serves to prevent piecemeal appeals." *Id*. (internal quotation marks and citations omitted).

A plaintiff challenging an agency's actions is excused from exhausting such remedies only if "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *McCarthy*, 503 U.S. at 146; *see also Volvo GM Heavy Truck Corp*., 118 F.3d at 209 ("In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.") Courts have excused plaintiffs from exhausting administrative remedies where, for example, (1) there are "no facts in dispute," *Avocados Plus*, 370 F.3d at 1247 (citing *McKart v. United States*, 395 U.S. 185, 198 n.15 (1969)); (2) "the disputed issue [is] outside the agency's expertise," *id*. (citing *McKart*, 395 U.S. at 197-98); (3) "the agency may not have the authority to change its decision in a way that would satisfy the challenger's objections," *id*. (citing *McCarthy*, 503 U.S. at 147-48); (4) "requiring resort to the administrative process may prejudice the litigants' court action," *id*. (citing *McCarthy*, 503

U.S. at 146-47); or (5) the administrative process "may be inadequate because of agency bias." *Id*. (citing *McCarthy*, 503 U.S. at 148-49).

ACCG does not argue that any of these exceptions to the exhaustion requirement apply. Rather, it argues that because its allegations concern its own "First Amendment protections of free speech and access to the courts," it should not be required to exhaust the TRIP mechanism. (Pl.'s Opp'n at 22.) This theory does not fall within one of the previously recognized exceptions to the exhaustion requirement. Moreover, ACCG does not provide any reason why its interests in "immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *McCarthy*, 503 U.S. at 146.

For these reasons, the constitutional claims against Customs and the Commissioner will be dismissed.

4. CAFRA

The Tenth Cause of Action in ACCG's amended complaint alleges that by failing to initiate forfeiture proceedings within ninety days of ACCG's submission of a claim for the seized coins, Customs violated CAFRA, 18 U.S.C. § 983(a)(3)(A). That subsection requires that for certain types of forfeiture cases, the government must file a complaint for forfeiture within ninety days of the filing of a claim for the seized property. *Id*. If it does not file a complaint for forfeiture within ninety days, and cannot show "good cause" or "agreement of the parties," it must return the property to the claimant pending the filing of a complaint. *Id*. As a remedy, ACCG seeks an order to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). CAFRA, how-

ever, does not apply to seizures pursuant to "the Tariff Act of 1930 or any other provision of law codified in title 19." 18 U.S.C. § 983(i)(2)(A). The CPIA is codified in title 19, and thus forfeiture actions under the CPIA are not subject to CAFRA's 90 day deadline. Rather, delay in the filing of CPIA forfeiture actions is governed by the constitutional standard, discussed above.

Nonetheless, ACCG argues that its CAFRA claim remains viable because the government "darkly hint[s] that the coins in question may in fact be 'stolen' cultural patrimony of another country subject to the National Stolen Property Act" ("NSPA"), 18 U.S.C. §§ 2314 15. (Pl.'s Opp'n at 20.) It argues that because a claim under the NSPA could trigger forfeiture under 18 U.S.C. § 545, which is subject to CAFRA, its CAFRA claim remains viable. The claim should only be dismissed, ACCG argues, if the government will "unequivocally disavow any claim that ACCG's coins were 'stolen.'" (Pl.'s Opp'n at 20.) The government has not, however, sought forfeiture under the NSPA. If it were to do so, then CAFRA would apply, and the government would have to show "good cause" for why the ninety-day deadline should not apply. But the court need not decide whether there is "good cause" for the delay, because the government's authority to seek forfeiture under the CPIA exists irrespective of whether the government would have authority to seek forfeiture under the NSPA. Therefore, the Tenth Cause of Action will be dismissed.

5. Mandamus

In addition to seeking a declaratory judgment and an injunction based on the alleged violations of the Constitution, the CPIA, and other statutes, ACCG

seeks a writ of mandamus ordering Customs to return the coins and to remove ACCG or Spinks from a watch list. Mandamus is an extraordinary remedy, and is available only if a plaintiff has "exhausted all other avenues of relief," and if the defendant owes the plaintiff "a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). With respect to the watch list allegation, ACCG has not exhausted all avenues for relief, and with respect to neither allegation has it shown that Customs owes ACCG a "clear nondiscretionary duty." To demonstrate a clear, nondiscretionary duty, a plaintiff must show that "(1) the plaintiff's claim is clear and certain; (2) the defendant official's duty to act is ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994) (internal quotation marks omitted); *see also Asare v. Ferro*, 999 F. Supp. 657, 659 (D. Md. 1998). A government official's duty is "ministerial" if "the law prescribes and defines a duty to be performed with such precision as to leave nothing to the exercise of discretion or judgment." *Asare*, 999 F. Supp. at 659 n.6. ACCG has not shown that Customs has a clear, nondiscretionary duty to return the coins. Therefore, its claim seeking a writ of mandamus will be dismissed.

V. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss will be granted. The plaintiff's motion to strike the government's supplemental brief will be denied. A separate Order follows.

Aug. 8, 2011
Date

/s/
Catherine C. Blake
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 08/08/11]

Civil Action No. CCB-10-322

ANCIENT COIN COLLECTORS GUILD

v.

U.S. CUSTOMS AND BORDER PROTECTION,
DEPARTMENT OF HOMELAND SECURITY, *et al*.,

ORDER

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

1. the defendants' renewed motion to dismiss (ECF No. 20) is GRANTED;
2. the plaintiff's motion to strike (ECF No. 37) is DENIED;
3. this case is dismissed; and
4. the Clerk shall CLOSE this case.

Aug. 8, 2011
Date

/s/
Catherine C. Blake
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed December 18, 2012]

———

No. 11-2012
(1:10-cv-00322-CCB)

———

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.

———

AMERICAN COMMITTEE FOR CULTURAL POLICY; ANCIENT COINS FOR EDUCATION, INC.; INTERNATIONAL ASSOCIATION OF DEALERS IN ANCIENT ART; INTERNATIONAL ASSOCIATION OF PROFESSIONAL NUMISMATISTS; PROFESSIONAL NUMISMATISTS GUILD, INC.; THE AMERICAN NUMISMATIC ASSOCIATION,
Amici Supporting Appellant.

———

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX F

RELEVANT PORTIONS OF THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT, 19 U.S.C. §§ 2601-2613

19 U.S.C. § 2601 provides:

> (2) The term "archaeological or ethnological material of the State Party" means—
>
> (A) any object of archaeological interest;
>
> (B) any object of ethnological interest; or
>
> (C) any fragment or part of any object referred to in subparagraph (A) or (B);
>
> which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph—
>
> (i) no object may be considered to be an object of archaeological interest unless such object—
>
> (I) is of cultural significance;
>
> (II) is at least two hundred and fifty years old; and
>
> (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.
>
> . . .
>
> (3) The term "Committee" means the Cultural Property Advisory Committee established under section 2605 of this title.

19 U.S.C. § 2602 provides:

> (a) Agreement authority
>
> (1) In general

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

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

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

(C) that—

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

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

(D) that the application of the import restrictions set forth in section 2606 of this title in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes;

the President may, subject to the provisions of this chapter, take the actions described in paragraph (2).

(2) Authority of President

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

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

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

(3) Requests

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

. . .

(c) Restrictions on entering into agreements

(1) In general

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

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

. . .

(g) Information on Presidential action

(1) In general

In any case in which the President—

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

(B) applies import restrictions under section 2603 of this title,

the President shall, promptly after taking such action, submit a report to the Congress.

(2) Report

The report under paragraph (1) shall contain—

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

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

(C) the reasons for any such difference. . . .

19 U.S.C. § 2604 provides:

After any agreement enters into force under section 2602 of this title, or emergency action is taken under section 2603 of this title, the Secretary, in consultation with the Secretary of State, shall by

regulation promulgate (and when appropriate shall revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action. The Secretary may list such material by type or other appropriate classification, but each listing made under this section shall be sufficiently specific and precise to insure that

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

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

19 U.S.C. § 2605 provides:

(a) Establishment

There is established the Cultural Property Advisory Committee.

(b) Membership

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

(A) Two members representing the interests of museums.

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

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

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

. . .

(f) Reports by Committee

(1) The Committee shall, with respect to each request of a State Party referred to in section 2602 (a) of this title, undertake an investigation and review with respect to matters referred to in section 2602 (a) (2) of this title as they relate to the State Party or the request and shall prepare a report setting forth—

(A) the results of such investigation and review;

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

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

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

. . .

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

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

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

(5) If any member of the Committee disagrees with respect to any matter in any report prepared under this subsection, such member may prepare a statement setting forth the reasons for such disagreement and such statement shall be appended to, and considered a part of, the report.

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

19 U.S.C. § 2606 provides:

(a) Documentation of lawful exportation

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

(b) Customs action in absence of documentation

If the consignee of any designated archaeological or ethnological material is unable to present to the

customs officer concerned at the time of making entry of such material—

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

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

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

(B) on or before the date on which such material was designated under section 2604 of this title,

the customs officer concerned shall refuse to release the material from customs custody and send it to a bonded warehouse or store to be held at the risk and expense of the consignee, notwithstanding any other provision of law, until such documentation or evidence is filed with such officer. If such documentation or evidence is not presented within ninety days after the date on which such material is refused release from customs custody, or such longer period as may be allowed by the Secretary for good cause shown, the material shall be subject to seizure and forfeiture. The presentation of such documentation or evidence shall not bar subsequent action under section 2609 of this title.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed 07/15/10]

———

Civil No. 1:10-cv-00322-CCB

———

ANCIENT COIN COLLECTORS GUILD,
Plaintiff,

v.

U.S. CUSTOMS AND BORDER PROTECTION,
DEPARTMENT OF HOMELAND SECURITY, *et al*.,
Defendants.

———

FIRST AMENDED COMPLAINT

Pursuant to Fed. R. Civ. Pro. 15 (a) (1) (B), Plaintiff Ancient Coin Collectors Guild ("Plaintiff" or "ACCG"), by its attorneys, Bailey & Ehrenberg PLLC, files this First Amended Complaint and alleges as follows:

NATURE OF THE ACTION

1. This is an action to recover twenty-three (23) common ancient coins ("the collectors' coins"), and, in so doing, to test the legality of certain import restrictions promulgated by Defendants U.S. Customs and Border Protection ("Customs") and the United States Department of State ("State") designed to bar entry into the United States of ancient coins of Cypriot and Chinese type of the sort widely and freely collected world-wide, including in Cyprus and China. ACCG also requests the Court: (a) to declare that the decision to impose import restrictions on ancient coins of Cypriot type is arbitrary and capri-

cious because, pursuant to applicable law, State failed to disclose to Congress a rational basis for the reason, or reasons, behind State's decision to reject the advice of its own advisory committee and also in departing from prior agency practice; (b) to declare that the decisions to impose import restrictions on ancient coins of both Cypriot and Chinese type are also arbitrary and capricious because they are both contrary to law and the product of bias, prejudgment and *ex parte* contact; and (c) to declare that under the applicable statutes Customs must prove that the Cypriot or Chinese coins at issue were illicitly removed from Cypriot or Chinese find spots before they may be forfeited.

2. This is also a case to vindicate the freedom to trade in informational materials – specifically the right of coin collectors and coin dealers, free from government interference, to trade in ancient coins. It is brought under the First and Fifth Amendments to the United States Constitution and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. (hereinafter "the APA"). In particular this case is about whether the government may dictate the types of coins which may be restricted from importation based upon the country of origin or type of coin in question without regard to their place of discovery. The relief sought is threefold: (a) a declaration that a specific rulemaking by a sub-department of the Department of State – the Bureau of Educational and Cultural Affairs ("ECA") is invalid on constitutional and statutory grounds; (b) a declaration that the specific rulemaking by Customs in 19 CFR §12.104a is overbroad and invalid on constitutional and statutory grounds; and (c) an injunction to end the enforcement of restrictions the Defendants have imposed, by that rulemaking, on importation of ancient coins from Cyprus and China.

Those restrictions have abridged Plaintiff's First Amendment right to engage in protected speech and its Fifth Amendment liberty interest in the trade in informational materials. In addition to their constitutional infirmities, Customs' restrictions on trade in Cypriot and Chinese coins challenged herein are invalid under the APA because they are not rationally related to the exclusive purpose of the statute - the Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 *et seq.* ("the CPIA") under which they were promulgated.

3. As set forth more fully below, ACCG imported the collectors' coins on or about April 15, 2009, Customs detained the collectors' coins on or about April 24, 2009, or some fifteen (15) months ago, and Customs seized the collectors' coins on July 20, 2009, or some twelve (12) months ago. Upon information and belief, as of the date for filing this Complaint, the United States has not filed a forfeiture action against the collectors' coins, which would allow ACCG to contest their seizure in Court. As such, in bringing this action, ACCG also seeks to vindicate one of the foundational principles of American law: that government may not unilaterally deprive its citizens of their property and possessions without promptly affording them the process due as required under our Constitution, statutes and common law.

JURISDICTION AND VENUE

4. This action is brought pursuant to the APA, 5 U.S.C. § 701 *et seq.,* the Declaratory Judgment Act, 28 U.S.C. § 2201, the Mandamus and Venue Act, 28 U.S.C. § 1361, and 42 U.S.C. § 1983 for vindication of rights under the First and Fifth Amendments of the United States Constitution, the CPIA, 19 U.S.C. § 2600 *et seq.*, the Berman Amendment of 1988, 50

U.S.C. app § 5(b)(4) (2000) (hereinafter the Berman Amendment), and the Free Trade in Ideas Act, 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000) (hereinafter "the FTIA"). To the extent the Government threatens forfeiture under the National Stolen Property Act, 18 U.S.C. §§ 2314-2315 or other Customs violations outside of Title 19 of the U.S. Code, ACCG also seeks the protections of the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983.

5. This action also seeks the Court to declare under the APA, the Declaratory Judgment Act, the Mandamus and Venue Act, 42 U.S.C. § 1983, the CPIA, the Berman Amendment and the FTIA that import restrictions imposed on ancient coins of Cypriot and Chinese type are arbitrary, capricious and contrary to law, *ultra vires* or wrongfully applied by Customs to seize coins where there is no proof that they were "first discovered within" the ground either in the Republic of Cyprus ("Cyprus") or the People's Republic of China ("China").

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361; under 5 U.S.C. § 702; and by virtue of its inherent equitable powers.

7. Venue is proper in the United States District Court for the District of Maryland under 28 U.S.C. §§ 1391, 1395.

THE PARTIES

8. Plaintiff ACCG is a Missouri based non-profit corporation committed to promoting the free and independent collecting of coins from antiquity. ACCG strives to achieve its goals through education, political action, and consumer protection. Membership of the ACCG is comprised of collectors and numismatic professionals who care passionately about preserving,

studying and displaying ancient coins from all cultures. ACCG purchased the collectors' coins in London, England, is the legal owner of the collectors' coins, and is entitled to their use and enjoyment. In importing the collectors' coins and contesting their seizure, ACCG is acting on behalf of collectors and the small businesses of the numismatic trade who typically cannot financially afford to contest Customs seizures due to the low value of most ancient coins and the high cost of legal services.

9. Defendant Customs is an agency of the Executive branch of the United States Government within the Department of Homeland Security, having responsibility for enforcing our nation's customs laws. Defendant Customs has statutory authority to both promulgate and to enforce import regulations dealing with the import of cultural artifacts, including import restrictions under the CPIA imposed on ancient coins of Cypriot and Chinese type.

10. Defendant Commissioner of Customs and Border Protection ("Commissioner of Customs") acts as the head of Defendant Customs. Currently, Alain Bersin serves in that role.

11. Defendant State is an agency of the Executive branch of the United States Government sharing responsibility with Defendant Customs over import restrictions under the CPIA.

12. Defendant Assistant Secretary of State (Educational and Cultural Affairs) ("the Assistant Secretary, ECA") heads the ECA, a component of Defendant State. Judith Ann Stewart Stock currently serves in that role. Upon information and belief, Defendant Assistant Secretary, ECA reports to the Under Secretary for Public Diplomacy and Public Affairs, who

acts as the President's designee for entering into cultural agreements ("MOU's") with foreign countries that may contemplate import restrictions on cultural artifacts. Currently, Judith McHale serves in that role. At all relevant times, the Assistant Secretary, ECA acted as the President's designee related to decisions to impose import restrictions on cultural artifacts. As part of the decision making process under the CPIA, the Cultural Property Advisory Committee ("CPAC") makes recommendations to the Assistant Secretary, ECA on a proper balance between efforts to control looting at archaeological sites and the legitimate international exchange of cultural artifacts. Although CPAC is separately constituted under the CPIA, the ECA's Cultural Heritage Center acts as its secretariat.

STATEMENT OF FACTS

Ancient Coins and Ancient Coin Collecting

13. Ancient coins typically depict portraits of rulers, gods and goddesses or other symbols associated with the issuing authority. In addition to acting as money, they also served as the newspapers of their day. Their inscriptions carry religious dedications or references to the ruler. They convey information that the issuing authority hoped would circulate far and wide.

14. Western coinage originated in Asia Minor sometime around the 7th c. B.C. This innovation soon spread to the Greek mainland and islands like Cyprus. The first true Cypriot coins date from the late 6th c. B.C., when various Cypriot kingdoms began to issue coin types derived from designs on coins from the East that had arrived on Cyprus in trade. Subsequently, the Persian Empire, Alexander

the Great, the Ptolemaic Kingdom and the Romans struck coins on the Island, which were often indistinguishable from coins struck at their other imperial mints. Because Cyprus is located on an important trade route, coins minted in Cyprus circulated widely around the Mediterranean region and even as far away as Afghanistan. Accordingly, it is impossible to determine a Cypriot coin's find spot merely from identifying it as being made at a Cypriot mint.

15. Coinage began in China in the late 7th or early 6th c. B.C. The earliest money was cast into the form of spades, knives or cowry shells. Ultimately, by around 221 B.C., a round bronze coin marked with Chinese characters referencing values and issuing authorities and featuring a square center hole became standardized. These "cash" coins were produced in immense numbers from roughly 221 B.C. to 1912 A.D. This type was widely emulated from Central Asia to Japan, with similar types being cast in Vietnam as late as 1933.

16. The circulation patterns of Chinese cash coins were equally wide, with such coins being exported in quantity from the Fifth to Tenth Centuries to East Africa, the Persian Gulf, India, Ceylon, Burma, Thailand, Vietnam, Malaya, the Philippines, Sumatra, Java and Borneo. Later on, Chinese immigrants even took such coins with them to the United States. Accordingly, it also is impossible to determine a Chinese coin's find spot merely from identifying it as being made at a Chinese mint.

17. Historical coins have been traded avidly for at least 500 years as collectibles. Due to their usual modest value and the huge numbers extant, historical coins are typically traded without any provenance

information or documentary history as to where and when they were found.

18. As a result, it is therefore, unreasonable to assume that a coin is "stolen," "illegally exported," or "illegally imported" merely because the holder cannot establish a chain of custody beyond receipt from a reputable source.

19. All coin collectors share a desire to preserve, study and display their coins, which convey information about ancient cultures in their portraiture and inscriptions. Americans have specifically enjoyed collecting ancient coins for generations. President John Quincy Adams was a serious, early American collector of ancient coins. Many other Americans enjoy collecting at least some ancient coins. Such individuals have included Presidents Thomas Jefferson, Theodore Roosevelt, Ronald Reagan and, upon information and belief, William Jefferson Clinton. Though there are some very wealthy collectors, most collectors are of relatively modest means, including educators, members of our armed services and government employees.

20. Collectors in Cyprus, the rest of the European Union (the "EU") and China share the interest of collectors in the United States in collecting ancient coins. On information and belief, such collectors in Cyprus, the rest of the EU and in China also openly enjoy collecting and importing ancient coins without any known provenance information.

The UNESCO Convention and the CPIA

21. In or about 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 UNESCO Convention") was

promulgated. Broadly speaking, the 1970 UNESCO Convention contemplates that governments will enter into agreements to enforce each other's cultural property laws.

22. In 1972, the U.S. Senate ratified the 1970 UNESCO Convention subject to reservations intended to preserve the "independent judgment" of the United States Government as to whether, and as to what extent, to impose import restrictions on cultural artifacts at the behest of State Parties to the 1970 UNESCO Convention.

23. Upon information and belief, the Senate was concerned about foreign governments taking advantage of the 1970 UNESCO Convention to pursue their own cultural nationalistic agendas to the disadvantage of American citizens and institutions.

24. "Cultural Nationalism" is a form of nationalism in which the nation is defined by its shared (inherited) culture. Cultural nationalists hold that artifacts "belong" within the physical boundaries of the nations in which they are found or with which they are typically associated. Cultural nationalist states, like Cyprus, China and Italy, typically claim legal title to all artifacts, including common ones like coins, found in the ground of their territory. On the other hand, such countries, like Cyprus, China and Italy, also encourage their own citizens to possess collections of artifacts of their own cultures, particularly if these citizens reclaim such artifacts from abroad by purchase.

25. The 1970 UNESCO Convention is not self-executing. In 1983, Congress passed the CPIA to enact the 1970 UNESCO Convention. In so doing, Congress incorporated the CPIA into Public Law 97-

446 "An Act to reduce certain duties, to suspend temporarily certain duties, to extend certain existing suspensions of duties, and for other purposes" after the legislation had passed through the trade subcommittees of the Senate Finance Committee and the House Ways and Means Committee.

26. Upon information and belief, the trade subcommittees of the Senate Finance Committee and the House Ways and Means maintain primary oversight responsibility over the CPIA and have had jurisdiction over recent, unsuccessful efforts to amend the legislation.

27. As set forth in the CPIA's legislative history, Congress sought to limit the "Cultural Nationalist" reach of State Party requests under the 1970 UNESCO Convention:

> 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.

See S. Rep. No. 97-564, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4099.

28. The CPIA contemplates that State Parties to the 1970 UNESCO Convention will initiate any request for import restrictions and that such requests

can only relate to artifacts as to which that State Party has already promulgated export controls. CPIA, 19 U.S.C. § 2602 (a) and § 2601 (2) (C).

29. Once such a request is made, the CPIA places certain limitations on the ability of the Defendants to impose import restrictions on cultural artifacts. These include provisions requiring: (a) that the restricted artifacts were "first discovered within" the State Party seeking restrictions (CPIA, 19 U.S.C. § 2601 (2) (C)); (b) that the restricted artifacts are of "cultural significance"(CPIA, 19 U.S.C. § 2601 (2) (C) (i) (I))); (c) that less drastic remedies than import restrictions are unavailable (CPIA, 19 U.S.C. § 2602 (a) (1) (C) (ii)); and (d) that any restrictions are part of a "concerted international response" of other State Parties to the 1970 UNESCO Convention. CPIA, 19 U.S.C. § 2602 (a) (1) (C) (i).

30. As part of exercising this independent judgment under the CPIA, the Assistant Secretary, ECA receives recommendations from CPAC in the form of a report setting forth: (a) the results of its investigation and review; (b) its findings as to the nations individually having a significant trade in the relevant material; and (c) CPAC's recommendation as to whether an agreement should be entered into, together with its reasoning. CPIA, 19 U.S.C. § 2605 (f) (1). In addition, when import restrictions are recommended, the CPAC report must include: (a) any terms and conditions CPAC recommends for such agreements; and (2) a listing of archaeological or ethnological material, specified by type or such other classification as CPAC deems appropriate, which should be covered by any such agreement. CPIA, 19 U.S.C. § 2605 (f) (4).

31. If import restrictions are recommended, Customs must by regulation designate the material restricted, by type or classification, but shall ensure that the list is sufficiently specific and precise to ensure that the material is *only applied* to the material covered by any agreement to impose import restrictions. CPIA, 19 U.S.C. § 2604 (1) (emphasis added).

32. Once imposed, import restrictions under the CPIA bar entry of designated artifacts not accompanied by detailed certifications concerning the artifacts' whereabouts at the time the restrictions were imposed or an export permit from the State Party that requested the restrictions. CPIA, 19 U.S.C. § 2606.

33. In practice, such certifications are difficult to procure, particularly for items of modest value like coins which are typically traded without provenance documentation.

34. The CPIA, by its very terms, also sets forth the procedures that must be followed, before any artifact that has been subject to detention and seizure is forfeited to the government. In pertinent part, according to the CPIA, "Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of section 2606 of this title. . . shall be subject to seizure and forfeiture. All provisions of law relating to seizure, forfeiture and condemnation for violation of customs laws shall apply to seizures and forfeitures incurred, or alleged to have occurred, under this chapter, insofar as such provisions of law are applicable to, and not inconsistent with, the provisions of this chapter." CPIA, 19 U.S.C. § 2609.

35. Upon information and belief, though Cyprus allows imports of cultural artifacts for the enjoyment of Cypriot collectors, Cyprus does not provide export permits for collectors to remove Cypriot artifacts from the country legally.

36. Upon information and belief, though China encourages an extensive internal trade in cultural artifacts for the enjoyment of Chinese collectors and allows imports of those artifacts for the enjoyment of Chinese collectors, China has established a complex system of export controls that govern the export of "cultural relics" based on their assignment into a particular "grade."

Efforts to Extend Import Restrictions to Ancient Coins

37. On or about January 28, 1999, CPAC first considered and later recommended against imposing import restrictions on coins, as part of a larger request for import restrictions on cultural artifacts made by Cyprus, a State Party to the 1970 UNESCO Convention.

38. On or about October 12, 1999, CPAC considered import restrictions on ancient artifacts from Italy, another State Party, including coins. Sometime thereafter, CPAC recommended against restrictions on coins of Italian type. *See* Report of the Cultural Property Advisory Committee on the Request from the Government of Italy Recommending U.S. Import Restrictions on Certain Categories of Archaeological Material (Feb. 7, 2000).

39. On or about January 23, 2001, Defendants adopted CPAC's recommendations and exempted ancient coins from import restrictions imposed on

cultural artifacts from Italy. *See* 66 Fed. Reg. 7399-7402 (Jan. 23, 2001).

40. On or about July 19, 2002, Defendants adopted CPAC's recommendations against import restrictions on coins of Cypriot types. *See* 67 Fed. Reg. 47447-47450 (Import Restrictions Imposed on Pre-Classical and Classical Archaeological Material Originating in Cyprus).

41. On or about May 27, 2004, the United States received a request for import restrictions from China, another State Party to the 1970 UNESCO Convention. The Federal Register Notice did not appear until September 3, 2004. That Federal Register Notice makes mention of import restrictions on several categories of archaeological artifacts, but makes no specific mention of import restrictions on coins. *See* 69 Fed. Reg. 53970 (Sept. 3, 2004).

42. In or about November 2004, ECA's Cultural Heritage Center placed a summary of China's Request for import restrictions on its web site. Unlike the Federal Register notice, the summary indicated that China sought import restrictions on coins, albeit in a one word reference, at the end of an eleven (11) page explanation detailing the need for restrictions to be placed on other artifacts.

43. Upon information and belief based primarily on information received in response to FOIA requests, China never formally requested import restrictions on coins.

44. On February 17, 2005, CPAC conducted a hearing to consider China's request for import restrictions. Upon information and belief, the ACCG and others noted: (a) that ancient Chinese coins are extremely common with individual types known from

numerous examples; (b) that ancient Chinese coins circulated far from China; (c) that demand for Chinese coins in the U.S. is minimal while internal Chinese demand for such items is large; (d) that the Bank of China and other Chinese companies regularly sell large numbers of coins of the sort for which restrictions were requested; (e) that less drastic remedies like the establishment of a "treasure trove" scheme were not considered; (f) that the "concerted international response" requirement had not been met.

45. In prepared testimony, ACCG also stated, "Oddly enough, one of the wealthiest capitalists in China has made a fortune selling Chinese coins - not to collectors, but to tourists. According to a Forbes article, Wang Gang's business associate is the state run Bank of China. He reportedly owns some 500 tons of ancient coins, estimated at about 90 million pieces and representing about 70% of China's supply. It seems ludicrous that the Bank of China would sell genuine ancient Chinese coins to tourists, and then ask the U.S. to restrict these same coins." ACCG Written Testimony, dated February 17, 2005 at 2.

46. Upon information and belief, the Archaeological Institute of America ("AIA") is a nonprofit group that promotes professional archaeology. Upon further information and belief, although the AIA maintains it has some 200,000 members, this figure is derived from the circulation of its magazine, *Archaeology*. In contrast, upon further information and belief, a small number of professional archaeologists – many of whose careers are dependent on excavation permits issued by Cultural Nationalist states like China, Cyprus and Italy—actually govern the AIA and formulate its public stances. Upon

information and belief, according to its pronouncments, all unprovenanced artifacts should be deemed to be "stolen" and repatriated to their supposed countries of origin.

47. On September 8, 2005, CPAC held another hearing to consider the renewal of import restrictions on Italian cultural artifacts. At that hearing, it was unclear whether Italy had requested State to extend import restrictions on coins. It was clear, however, that representatives of the AIA requested CPAC to include coins in any renewal of import restrictions on Italian cultural artifacts.

48. Upon information and belief, the Cyprus American Archaeological Research Institute ("CAARI") is a nonprofit group formed to promote the study of Cypriot archaeology and related disciplines. Upon further information and belief, the careers of many CAARI associated archaeologists are dependent upon the Cypriot Department of Antiquities issuing them excavation permits. Upon further information and belief, CAARI also maintains that all unprovenanced artifacts should be deemed to be "stolen" and repatriated to their supposed countries of origin.

49. In or about November 2005, Dr. Pavlos Flourentzos, Director of the Cyprus Department of Antiquities, visited the United States at the invitation of CAARI and with the support of the U.S. Embassy in Cyprus. During this time, CAARI facilitated a meeting between Flourentzos and employees of ECA's Cultural Heritage Center, including its Executive Director, Maria Kouroupas, and a staff archaeologist. *See* J. Green, *Cyprus Director of Antiquities, Dr. Pavlos Flourentzos, Visits the U.S.,* 31 CAARI News 3 (Winter 2006).

50. Upon information and belief, CAARI has benefited from direct and/or indirect financial and/or material support from State, the Government of Cyprus and Cypriot entities, including the Bank of Cyprus Cultural Foundation.

51. Upon information and belief, the Bank of Cyprus Cultural Foundation was established to rescue the Island's cultural heritage, which the Foundation maintains was pillaged and destroyed by Turkish forces when they occupied the Northern part of the Island. Upon further information and belief, the Bank of Cyprus Cultural Foundation maintains one of the largest collections of ancient coins of Cypriot type within Cyprus. Upon further information and belief, the Bank of Cyprus Cultural Foundation purchases unprovenanced coins on the open market for its collection of the sort now subject to U.S. import restrictions on coins of Cypriot type.

52. On January 19, 2006, State announced a five (5) year renewal of its Memorandum of Understanding (MOU) with Italy relating to cultural artifacts. Once again, Defendants exempted ancient coins struck in Italy from import restrictions.

53. On December 7, 2006, the Federal Register carried a notice indicating that CPAC would conduct a review of the MOU with Cyprus. That notice invited public comment to be submitted no later than January 11, 2007. The Federal Register notice contained no mention of an effort to extend new restrictions to coins. *See* 71 Fed. Reg. 71015-71016 (Dec. 7, 2006).

54. On December 8, 2006, Principal Deputy Assistant Secretary, ECA Miller Crouch indicated in a response to an e-mail inquiry that he "d[id] not

anticipate" that new restrictions on coins would be addressed at CPAC's hearing to consider the renewal of the MOU with Cyprus.

55. On December 14, 2006, two numismatic trade associations filed a request with State to recuse CPAC member Joan Connelly from voting on any last minute effort to impose import restrictions on ancient Cypriot coins. That recusal request noted that Dr. Connelly excavated in Cyprus and had publicly thanked "the Department of Antiquities of Cyprus, its Director, Dr. Demos Christou and the Ministry of Communication and Works, Republic of Cyprus, for granting us the license to excavate on Yeronisos Island."

56. On January 12, 2007, State summarily denied the recusal request.

57. On January 17, 2007, according to a heavily redacted document released in response to a FOIA request, a State ECA Cultural Heritage Center staff archaeologist conferred with the late Dr. Danielle Parks, an archaeologist associated with the CAARI, about the inclusion of coins in the Cypriot request.

58. On January 19, 2007, according to a document released in response to a FOIA request, Cyprus requested State to amend the designated list of artifacts subject to import restriction to include coins of Cypriot type.

59. On January 25, 2007, CPAC conducted a public hearing on the renewal of the MOU with Cyprus. At that hearing, CPAC Chairman Jay Kislak announced that he had learned that Cyprus had requested that State amend the designated list of Cypriot artifacts subject to import restrictions to include coins of Cypriot type.

60. Upon information and belief, at that same hearing, neither Cypriot authorities nor members of the archaeological community could point to any material change of fact justifying a change in the exemption from import restrictions on Cypriot coins.

61. On January 26, 2007, in response to complaints about the lack of public notice for the inclusion of coins in the Cypriot request, State announced an additional ten (10) day comment period. State made this announcement on the Cultural Heritage Center website and not in the Federal Register. Nevertheless, during this extremely short time frame, numismatic groups generated over 1100 letters opposing the extension of import restrictions to coins.

62. Upon information and belief, comments provided by ACCG and others established: (a) that Cypriot coins were common, with many known examples of coin types struck on the Island; (b) that Cypriot coins travelled widely so that one could not assume that a coin struck in Cyprus was "first discovered" there; (c) that less drastic remedies like the imposition of a treasure trove law and/or the regulation of metal detectors should be tried before import restrictions were considered; (d) and that the CPIA's "concerted international response" requirement could not be met.

63. Upon information and belief CAARI, the AIA, the Bank of Cyprus Cultural Foundation, and the late Dr. Danielle Parks submitted comments supporting import restrictions at the behest of Cyprus.

64. In a letter dated February 5, 2007, the AIA's president claimed that it was proper to assume that

coins of Cypriot type can be assumed to have Cypriot find spots, because "Coins minted on Cyprus were very rarely taken from the island in antiquity."

65. On May 2, 2007, Assistant Secretary of State, ECA Dina Powell, the decision maker for the extension of the MOU with Cyprus announced her departure to become the Director for Global Corporate Engagement at Goldman Sachs. *See* http://en.wikipedia.org/wiki/Dina_Powell (last checked, 7/13/10).

66. Upon information and belief, Goldman Sachs is a bank holding company with worldwide business interests, likely including relationships with Cyprus or Cypriot entities like the Bank of Cyprus.

67. On or about May 7, 2007, according to a document released in response to a FOIA request, CPAC issued its report making its recommendations concerning the extension of the MOU with Cyprus. Although State has refused to release that report in unredacted form to the public, as set forth more fully below CPAC's Chairman at the time later indicated that his committee recommended against extending restrictions to coins.

68. On or about May 14, 2007, according to a document released in response to a FOIA request, Pavlos Flourentzos, Director, Cypriot Department of Antiquities, admitted in a private communication to State, "It is true that Cypriot coins shared the same destiny as all other coins of the ancient world. As a standard media of exchange they circulated all over the ancient world due to their small size, which facilitated their easy transport . . . The continuous circulation of coins for many centuries amongst collectors and between collectors and museums make

any attempt to locate their exact find spot extremely difficult."

69. On or about May 16, 2007, Undersecretary of State Nicholas Burns, upon information and belief the third ranking official at State, accepted an award from Greek and Greek Cypriot advocacy groups as these groups lobbied the State policy makers. According to a press release, "Undersecretary of State Nicholas Burns was the first Philhellene to receive the Livanos Award. This award is given each year to, as its states on the award, 'that individual who, like George P. Livanos, has utilized ancient Hellenic values to realize extraordinary achievement in modern society while contributing to the improvement of our civilization.'" *See* http://news.pseka.net/uploads/img/documents/PSEKA-SAE_2007_Conference_EN_01_CEH_01.pdf (last checked, 7/13/10).

70. On or about May 16, 2007, State's news service quoted Burns as stating on receipt of the Livanos award, "I wear this title of Philhellene rather proudly. You don't spend four years in Greece, as my wife and three daughters and I did, and not come back feeling committed to Greek thought, to the Greek way of life, to Greece itself in my case. . . .We're personally committed to the country, to the relationship."

71. On May 17, 2007, according to a document released in response to a FOIA request, Kurt Volker, Acting Assistant Secretary of State, Bureau of European and Eurasian Affairs, wrote the Assistant Secretary, ECA Dina Powell, stating "[G]iven our general support for protection of antiquities and the importance of this MOU to our bilateral relations with Cyprus, EUR strongly recommends that ECA approve the renewal of the MOU and include the protection of coins."

72. On May 29, 2007, according to a document released in redacted form in response to a FOIA request, Principal Deputy Assistant Secretary, ECA Miller Crouch wrote an "Action Memo" to the decision maker Assistant Secretary, ECA Dina Powell regarding the extension of the MOU with Cyprus. That Action Memo only provides the decision maker with the false choice of approving the import restrictions including coins in their entirety or disapproving them in their entirety. The Action Memo does not provide the decision maker the option of continuing the then current import restrictions without extending them to coins.

73. On May 30, 2007, according to that same document, Assistant Secretary of State Dina Powell signed off on that action memo that authorized import restrictions on ancient coins of Cypriot type.

74. On July 13, 2007, Defendants formally extended import restrictions to coins of Cypriot Types. *See* Extension of Import Restrictions Imposed on Pre-Classical and Classical Archaeological Objects and Byzantine Period Ecclesiastical and Ritual Ethnological Material from Cyprus, 19 CFR Part 12, reported at 72 Fed. Reg. 38470-74 (July 13, 2007). The applicable regulations impose import restrictions on "coins of Cypriot type" and generally cover archaeological objects "from Cyprus." The regulations contain no qualifying language that the restrictions only apply to archaeological artifacts "first discovered within" Cyprus.

75. On July 16, 2007, the MOU renewal with Cyprus was signed. That MOU fails to suggest that restrictions under the agreement satisfy the CPIA's requirements, including the "concerted international response" requirement or the requirement that less

drastic remedies than import restrictions on coins are not available.

76. On July 19, 2007, Undersecretary Nicholas Burns conducted a signing ceremony for the MOU to coincide with Greek and Greek Cypriot lobbying efforts on Capitol Hill and at the State Department itself. Upon information and belief, representatives of CAARI were invited to this signing ceremony.

77. The official transcript of the Cyprus MOU signing ceremony omits several significant words. In the transcript, Ambassador Kakouris of Cyprus is reported as saying, "In fact, I was reminded just before we came in about something that I had said in January when we were before the Committee and responding to someone very much on the side of the coin collectors who—talked about the hobby of collecting coins. And I said to him: 'It may be your hobby, but it's our heritage!' and that is the way that we look at this issue.'"

78. In fact, what Kakouris actually said can be heard (at 10:09 of the audio). There, he states, "In fact, I was reminded *by [Cultural Heritage Center ED] Maria Kouroupas* just before we came in about something that I had said in January when we were before the Committee and dealing with the coin collectors and somebody who was very much on their side, when he talked about the hobby of collecting coins. And I said to him: 'It may be your hobby, but it's our heritage!' and that is the way that we look at this issue.'" (Emphasis added.)

79. On July 20, 2007, State issued a press release about the MOU. That press release stated, "With the extension of this MOU, DHS amended the designated list of restricted categories to include ancient coins of

Cypriot types produced from the end of the 6th century B.C. to 235 A.D. Coins, a significant and inseparable part of the archaeological record of the island, are especially valuable to understanding the history of Cyprus. *This extension of the MOU is consistent with the recommendation of the Cultural Property Advisory Committee, which is administered by the Bureau for Educational and Cultural Affairs*." (Emphasis added.)

80. On August 29, 2007, State sent a report mandated under the CPIA to Congress. Under 19 U.S.C. § 2602 (g)(2), that report is required to: (a) describe the actions taken; (b) whether there were any differences between those actions and CPAC's recommendations; and, (c) if so, the reasons for those differences. That report, however, contains no indication whether State rejected CPAC recommendation against import restrictions on coins, and, if so, why?

81. In addition, that report also indicates that Customs acted as the lead agency for imposing import restrictions on coins. In pertinent part, the report states, "The Federal Register notice for Cyprus was amended by the Department for Homeland Security, in consultation with the Department of State, to include coins of Cypriot types which are also vulnerable to archaeological looting."

82. In or about July 17, 2007, ECA publicized the new restrictions on coins of Cypriot types on its website as follows: "The Government of the Republic of Cyprus requested and amendment to the designated list to include coins. . . . Q. What was the response? A. The Cultural Property Implementation Act places the authority for the Designated List with the Department of Homeland Security (DHS) in consultation with the Department of State. On July

13, 2007, DHS published a Federal Register notice concerning the extension of the agreement and amending the Designated List to include certain coins from Cyprus, effective July 16, 2007."

83. In or about May-June 2008, the Cyprus News Service quoted CAARI's president as stating, "CAARI has been in the forefront of the successful effort to renew the Memorandum of Understanding between Cyprus and the USA restricting the import of Cypriot antiquities into the United States. . . . ." *See* http://www.caari.org/CAARIat30.htm (last checked, 7/13/10).

84. On January 16, 2009, the Federal Register announced import restrictions on Chinese cultural artifacts, including those on early media of exchange to Tang era cash coins. *See* 19 CFR Part 12, reported at 74 Fed. Reg. 2838-2844 (Jan. 16, 2009). The applicable regulations impose import restrictions on "coins" and generally cover archaeological objects "from China." The regulations contain no qualifying language that the restrictions only apply to archaeological artifacts "first discovered within" China.

85. On April 20, 2009, past CPAC Chairman Jay Kislak signed a declaration in FOIA litigation that stated in pertinent part:

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

misleading information contained in official State Department documents.

- *I specifically recall the Cypriot request that then current import restrictions on other cultural artifacts be extended to coins was a matter of great public controversy. CPAC considered the question specifically and I recall a special vote being taken on this particular issue.*
- *With that in mind, I have reviewed both an official State Department Press Release and a State Department report made pursuant to CPIA Section 303 (g) about the MOU with Cyprus . . . I believe it is absolutely false to suggest in those materials that the State Department's decision to extend import restrictions to ancient coins was consistent with CPAC's recommendations. The full release of CPAC's recommendations with regard to coins could be in the public interest because it should clarify misleading information contained in official State Department documents.*

86. On November 13, 2009, at a public interim review of import restrictions on Italian cultural artifacts, archaeologists associated with the AIA and the Italian Ministry of Culture argued to CPAC that import restrictions should be extended to coins struck in Italy based on the Cypriot precedent.

87. On April 7, 2007, the Federal Register provided public notice of a CPAC hearing to address the renewal of the MOU with Italy. *See* 75 Fed. Reg. 17823 (April 7, 2010). That notice was silent as to whether Italy had formally requested new restric-

tions on coins or that CPAC would such new restrictions on coins in the context of that renewal. Although a written inquiry was made to Under Secretary McHale about whether CPAC would consider new restrictions on coins, no response was ever received.

88. The Federal Register Notice only provided a little over two weeks for public comment. In that short period, coin collectors sent almost two thousand (2,000) faxes to CPAC opposing any effort to extend new restrictions to coins. In addition to collectors and the small businesses of the numismatic trade, the American Numismatic Association and the Italian Numismatic Society also wrote CPAC to express opposition to any such proposal. At the subsequent CPAC meeting on the subject, nine (9) speakers opposed various aspects of the MOU, including six (6) representatives of the numismatic trade or collectors. This group included the President of the American Numismatic Association as well as the curator of its museum.

89. Upon information and belief, the Bank of Cyprus Cultural Foundation and collectors in Cyprus have materially benefitted from the imposition of U.S. import restrictions because they (like other collectors in the EU and worldwide) now enjoy a competitive advantage over U.S. collectors who must contend with difficult to meet provenance requirements on the Cypriot coins they import pursuant to current Customs regulations and practices.

90. Upon information and belief, collectors in China have materially benefitted from the imposition of U.S. import restrictions because they (like other collectors worldwide) now enjoy a competitive advantage over U.S. collectors who must contend with

difficult to meet provenance requirements on the Chinese coins they import pursuant to current Customs regulations and practices.

Customs Seizes the Collectors' Coins and Harasses ACCG's Executive Director

91. On or about April 7, 2009, ACCG purchased the collectors' coins from Spink, a coin dealer established since 1666 in London, England. The collectors' coins consisted of twenty-three (23) ancient Chinese and Cypriot coins valued at $275.00. Upon information and belief, certain of the Chinese coins were sourced from Canada.

92. As is typical for the vast majority of historical coins on the international numismatic market and in collections such as that of the Bank of Cyprus Cultural Foundation, the collectors' coins have no known provenance. ACCG has no knowledge where or when the collectors' coins were found.

93. The commercial invoice that accompanied the coins reflected the seller's lack of knowledge about the coins' provenience. Although the invoice identified the coins as being minted in either Cyprus or China, the invoice also indicated that each had "No recorded provenance. Find spot unknown."

94. On April 15, 2009, ACCG imported the collectors' coins via a British Airways flight to Baltimore, Maryland where ACCG's customs broker presented the Collectors' coins to Customs along with a copy of the applicable regulations.

95. On or about April 24, 2009 (amended May 15, 2009), Customs detained the collectors' coins for possible violation of 19 U.S.C. § 2606 and 19 CFR § 12.104.

96. On July 20, 2009, Customs seized the collectors' coins which it described as 3-Knife shaped coins, 12-Chinese coins and 7-Cyprus coins. The coins were seized under 19 U.S.C. § 2609 (a) due to alleged violations of 19 U.S.C. § 2606 and 19 CFR § 12.104.

97. On August 26, 2009, Customs wrote to ACCG's counsel to report the seizure of the collectors' coins.

98. On September 3 and 8, 2009, ACCG asserted a claim to the collectors' coins and provided Customs with a cost bond to secure any forfeiture action in U.S. District Court.

99. In or about early January 2010, Customs detained Spink's stock on entry to the United States for an important international coin fair held each year in New York, New York. Although Customs ultimately released the coins, upon information and belief Spink suffered substantial financial loss as a result of Customs' actions.

100. After several telephonic inquiries, on January 26, 2010, counsel for ACCG wrote Customs to indicate that if a forfeiture action was not filed within two-week's time, ACCG would likely seek relief in Court.

101. On February 11, 2010, ACCG filed this action in this Court.

102. On March 15, 2010, ACCG's Executive Director was searched by uniformed Customs officers on his return to the United States from England after speaking at a conference designed to help bridge gaps between collectors and archaeologists. Based on his interactions with Customs at the time as well as Customs' detention of Spink's property, ACCG's Executive Director reasonably believes he was placed

on a "watch list" due to ACCG's decision to import coins of Cypriot and Chinese type for purposes of this test case.

103. On August 25, 2010, Defendants filed a motion to dismiss or, in the alternative, motion for summary judgment in this action. In their mem. at 12-16, Defendants portray CPAC as a mere "rubber stamp" for MOU's with no authority to make specific recommendations as to what artifacts should appear in the list of materials subject to import restrictions. At page 28, Defendants also state that the collectors' coins could be forfeited as "stolen" property exported in violation of patrimony laws.

104. As of the date for filing this First Amended Complaint, upon information and belief, the United States has not filed a forfeiture action against the collectors' coins, which would allow ACCG to contest the validity of their seizure in Court.

FIRST CAUSE OF ACTION
Agency Action Failing to Meet Statutory, Procedural, and Constitutional Requirements—Administrative Procedure Act, 5 U.S.C. § 706 (2) (B), (C), and (D)

105. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 104.

106. Under the APA, 5 U.S.C. § 706 (2) (B) (C) and (D), a federal district court may hold unlawful and set aside an agency decision that is "contrary to constitutional right, power, privilege or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law."

107. By seizing and confiscating the collectors' coins without filing a complaint for forfeiture Defendants have acted contrary to ACCG's rights under the Fifth Amendment, which is actionable under the APA, 5 U.S.C. § 706 (2).

108. By reason of the foregoing, Defendants should be compelled to return the collectors' coins.

109. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of import restrictions on Cypriot and Chinese coins can be tested in court as set forth more fully below.

SECOND CAUSE OF ACTION
Due Process of Law—Fifth Amendment

110. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 109.

111. By seizing the collectors' coins without filing a forfeiture action, Defendants have deprived Plaintiff ACCG of its property without due process of law, in violation of the Fifth Amendment of the United States Constitution.

112. By virtue of its inherent equitable powers to remedy constitutional violations, and pursuant to 28 U.S.C. § 2201, this Court is possessed of authority and power to declare the seizure of the collectors' coins to be an unlawful violation of the Fifth Amendment of the U.S. Constitution, and to compel Defendants to return the collectors' coins to Plaintiff ACCG.

113. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for

forfeiture of the collectors' coins in which the validity of import restrictions on Cypriot and Chinese coins can be tested in court as set forth more fully below.

THIRD CAUSE OF ACTION
Relief in the Nature of Mandamus

114. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 113.

115. At all relevant times, officials at Defendants had a nondiscretionary duty to cause the prompt commencement of a proceeding for the forfeiture of the collectors' coins and otherwise act in accordance with the law.

116. More than fifteen (15) months have elapsed since Defendant Customs detained the collectors' coins and over ten (10) months have elapsed since Plaintiff ACCG submitted a seized assets claim asserting ownership of the collectors' coins and requesting that the matter be referred to court for the institution of a forfeiture action.

117. Upon information and belief, Defendants have failed to cause the commencement of any proceeding for forfeiture of the collectors' coins. Instead, Defendants have in retaliation caused Spink and the Executive Director of Plaintiff ACCG to be placed on a "watch list," causing them delay, embarrassment and loss of income in violation of the First Amendment to the U.S. Constitution's right to seek access to the courts.

118. By virtue of its inherent equitable powers to remedy constitutional violations, and pursuant to 28 U.S.C. § 1361, this Court has the authority to grant Plaintiff ACCG relief in the nature of mandamus,

compelling Defendants to return the collectors' coins to Plaintiff ACCG and to remove Spink and ACCG's Executive Director from any "watch list" they have been placed on as a result of pursuing this test case.

119. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of import restrictions on Cypriot and Chinese coins can be tested and show cause whether Defendants unlawfully placed Spink and the Director of ACCG on a government watch list.

FOURTH CAUSE OF ACTION
Relief Under APA- Declaration that Cypriot Import Restrictions on Coins are Arbitrary and Capricious, an Abuse of Discretion or Without Observance of Procedure Required By Law

120. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 119.

121. Under the APA, 5 U.S.C. § 702, ACCG is entitled to review of Defendants actions.

122. Pursuant to the APA, 5 U.S.C. § 706 (2) (A), (D), a federal district court may hold unlawful and set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

123. The United States Supreme Court has set aside as "arbitrary and capricious" an agency action in circumstances where the agency failed to provide a reasoned explanation for its departure from prior agency precedent. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 533-35 (2007) (Supreme Court ruled

agency's decision to be arbitrary and capricious because the agency failed to offer any reasoned explanation for its refusal to decide whether greenhouse gases caused or contributed to climate change); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983) (agency's rescinding of rule requiring passive restraints in automobiles was arbitrary and capricious for failure to provide a reasoned explanation justifying the revocation).

124. Prior to the decision to impose import restrictions on coins of Cypriot type, such coins had been exempted from import restrictions.

125. Moreover, under CPIA, 19 U.S.C. § 2602 (g)(2), once State enters into an MOU with a State Party to the 1970 UNESCO Convention imposing import restrictions on cultural artifacts, State is required to report to Congress. That report must: (a) describe the actions taken; (b) indicate whether there were any differences between those actions and CPAC's recommendations; and (c) state, if so, the reasons for those differences.

126. On August 29, 2007, State sent the mandated report concerning the Cyprus MOU and import restrictions on cultural artifacts to Congress pursuant CPIA, 19 U.S.C. § 2602 (g)(2).

127. That Report contains no indication whether State rejected CPAC recommendation against import restrictions on coins, and, if so, why?

128. Subsequently, in a signed declaration, CPAC's chairman at the time the Cypriot restrictions were decided, reviewed this report and then stated, "*I believe it is absolutely false to suggest in those materials that the State Department's decision to extend import restrictions to ancient coins was*

consistent with CPAC's recommendations." (Emphasis added).

129. By reason of the foregoing, the Court should declare that Defendants' failure to provide a rational explanation under the CPIA for its departure from prior agency practice exempting coins of Cypriot type from restriction mandates that State's decision be held unlawful and set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

130. Moreover, by reason of State's failure under the CPIA to report to Congress about this departure from both prior agency practice and the recommendations of its own advisory committee, the Court should also declare that Defendants' actions are unlawful and should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

131. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of State's decision to impose import restrictions on coins of Cypriot type can be tested in Court as to whether it should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

FIFTH CAUSE OF ACTION
Relief Under APA—Declaration that Cypriot and Chinese Import Restrictions on Coins are Arbitrary and Capricious, an Abuse of Discretion, Contrary to Law or Without Observance of Procedure Required By Law

132. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 131.

133. Under the APA, 5 U.S.C. § 702, ACCG is entitled to review of Defendants actions.

134. Pursuant to the APA, 5 U.S.C. § 706 (2) (A), (D), a federal district court may hold unlawful and set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

135. As set forth more fully above in the Statement of Facts, the decisions to impose import restrictions on coins of Cypriot and Chinese type and apply those restrictions broadly are the products of bias, and/or prejudgment and/or *ex parte* contact. Upon information and belief, these deficiencies include, *inter alia,* the following actions:

a. Adding coins to the designated list of artifacts subject to restriction in response to China's request for import restrictions without a request from China to do so;

b. Engaging in behind the scenes contacts with CAARI about extending import restrictions to coins of Cypriot type even before Cyprus requested them to be added to the designated list;

c. Directly or indirectly funding CAARI, a proponent of extending import restrictions to coins of Cypriot type;

d. Refusing to recuse an archaeologist who is dependent on a license from the Cypriot Department of Antiquities in order to continue to excavate on the Island from voting on CPAC's recommendations with regard to import restrictions on coins of Cypriot type;

e. Failing to provide proper public notice for the effort to extend import restrictions on coins of Cypriot type:

f. Confusing "cultural significance" with "archaeological significance" when it comes to objects that exist in many multiples, like coins;

g. Ignoring evidence that Cypriot and Chinese coins circulated widely beyond the places of their manufacture and instructing Customs that its officers could assume that Cypriot and Chinese coins were first found in the ground of these countries for purposes of imposing import restrictions;

h. Refusing to allow or ignoring CPAC's advice about whether coins should be subject to import restrictions;

i. Ignoring or misapplying the CPIA's requirements that less drastic measures be contemplated before imposing import restrictions;

j. Ignoring or misapplying the CPIA's "concerted international response" requirement;

k. Providing past Assistant Secretary, ECA Dina Powell with the false choice of either approving

import restrictions adding coins in their entirety or disapproving them in their entirety;

l. Allowing past Assistant Secretary, ECA Dina Powell to extend the MOU with Cyprus and add restrictions on coins of Cypriot type after she had already announced her departure from ECA to an entity that likely has business relationships with either Cyprus or Cypriot entities;

m. Allowing Undersecretary of State Nicholas Burns to influence the decision to impose import restrictions on coins of Cypriot type, though he had just received an award from Greek and Greek Cypriot interests and had displayed bias in favor of such interests;

n. Inviting proponents of import restrictions on coins to the signing ceremony for the Cypriot MOU, and stage managing the Cypriot Ambassador's statements disparaging coin collectors at that ceremony;

o. Misleading the public in a press release about the MOU about CPAC's recommendations on coins;

p. Misleading Congress about CPAC's recommendations about coins in an official report mandated under the CPIA;

q. Holding Plaintiff's coins indefinitely without filing the required forfeiture action;

r. Harassing Plaintiff's Executive Director and the supplier of the coins used for this "test case' in retaliation for ACCG asserting its First Amendment rights to access to the Courts.

136. By reason of the foregoing, the Court should declare that Defendants' decisions to impose import

restrictions on coins of Cypriot or Chinese type should be held unlawful and set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

137. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of Defendants' decision to impose import restrictions on coins of Cypriot type can be tested in Court as to whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."

SIXTH CAUSE OF ACTION
Relief Under APA and CPIA—
Declaration that Customs Has the Burden of
Proof to Trace Coins Back to Their Find Spots

138. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 137.

139. Under the APA, 5 U.S.C. § 706 (2) (A) (C) and (D), a federal district court may hold unlawful and set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority or limitations, or short of statutory right" or "without observance of procedure required by law."

140. Under the CPIA, Customs must ensure that any designated list of material subject to restriction shall be sufficiently specific and precise to ensure that the material is *only applied* to the material

covered by any agreement to impose import restrictions. CPIA, 19 U.S.C. § 2604 (1) (emphasis added) before import restrictions may be imposed under CPIA, 19 U.S.C. § 2606.

141. By designating as restricted "coins of Cypriot type" and Chinese coins from the Tang and pre-Tang periods as subject to import controls under the applicable regulations, Defendants have violated the CPIA's provisions that restrictions shall only be applied to artifacts that the restricted artifacts were "first discovered within" the State Party seeking restrictions. CPIA, 19 U.S.C. § 2601 (2) (C).

142. By issuing ambiguous regulations that fail to indicate that "coins of Cypriot type" "from Cyprus" and "Chinese coins" "from China" must also be "first discovered in" either Cyprus or China, Defendants have violated the notice provisions of the CPIA designed to ensure that any designated list shall be sufficiently specific and precise to ensure that the restrictions are *only applied* to the material covered by any agreement. CPIA, 19 U.S.C. § 2604 (1) (emphasis added).

143. Moreover, it is Defendants' burden to meet all the requirements the CPIA, 19 U.S.C. § 2606, including that the collectors' coins were "discovered" within Cyprus and China as required under 19 U.S.C. § 2601 (2). To the extent Defendants rely on the assumption to meet this burden that Cypriot and Chinese coins must have been first discovered in those countries, any such assumption is both demonstrably false and insufficient as a matter of law.

144. By reason of the foregoing, the Court should declare that Defendants' practice to seize coins based

on their type alone is unlawful and set it aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory . . . limitations, or short of statutory right" or "without observance of procedure required by law . . . ."

145. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of State's and Custom's practice to seize coins based on their type alone can be tested in Court as to whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory . . . limitations, or short of statutory right"; or without observance of procedure required by law. . . ." and wherein the Court will assign Defendants the burden to demonstrate that the collectors' coins were "first discovered" within Cyprus and China.

SEVENTH CAUSE OF ACTION
Relief Under APA—19 CFR §12.104a and Cypriot and Chinese Regulations Violate the Berman Amendment and the Free Trade in Ideas Act

146. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 145.

147. Under the APA, 5 U.S.C. § 706 (2) (A) (C) and (D), a federal district court may hold unlawful and set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority or limitations, or short of

statutory right" or "without observance of procedure required by law."

148. Congress passed the Berman Amendment, 50 U.S.C. app. § 5(b) (4) (2000) in order to rein in executive authority over the importation and exportation of informational materials.

149. Congress passed the (FTIA, 12 U.S.C. § 95a, 50 U.S.C. § 1702 (2000) both to clarify the scope and to reaffirm the intention of the Berman Amendment.

150. The Berman Amendment and FTIA prohibit the President from regulating or prohibiting the import and export of any and all First Amendment protected materials, directly or indirectly.

151. Ancient coins constitute "informational materials" because they convey historical information about ancient societies in the form of portraiture and inscriptions.

152. Defendants have seized the collectors' coins pursuant to under 19 U.S.C. § 2609 (a) due to alleged violations of CPIA, 19 U.S.C. § 2606 and 19 CFR § 12.104.

153. 19 CFR §12.104a and the Cypriot and Chinese designated lists referenced at 72 Fed. Reg. 38470-74 (July 13, 2007) and 74 Fed. Reg. 2838-2844 (Jan. 16, 2009) ("the designated lists") openly defy that unconditional ban by regulating and prohibiting, directly and indirectly, the import and export of information and informational materials, such as ancient coins, without regard to their place of discovery, violating not only the plain language of the statutes but the clearly expressed intent of Congress as evidenced in the statutes' legislative history.

154. These same regulations, by violating the Berman Amendment and the FTIA, exceed Defendants' statutory authority.

155. By reason of the foregoing, the Court should declare Defendants' actions to be unlawful and set them aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory . . . limitations, or short of statutory right"; or without observance of procedure required by law. . . ."

156. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of Defendants' actions can be tested in court.

EIGHTH CAUSE OF ACTION
Relief Under APA—19 CFR §12.104a and Cypriot and Chinese Regulations are Unconstitutional under the First and Fifth Amendments to the Constitution of the United States

157. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 156.

158. Under the APA, 5 U.S.C. § 706 (2) (B), a federal district court may hold unlawful and set aside agency actions "contrary to constitutional right, power, privilege or immunity."

159. 19 CFR §12.104a and the designated lists are unconstitutional on their face and as applied, under the First and Fifth Amendments to the United States Constitution.

160. 19 CFR §12.104a and the designated lists are not content and viewpoint neutral. Defendants'

regulation in 19 CFR §12.104a and the designated lists attempt to direct or control the content of Plaintiff's speech. Regulations that deny a collector's access to the content of an ancient coin because of its content as "Chinese" or "Cypriot," and therefore its historical significance, constitute regulations that control the content of the affected coin and the collector is deprived of that content. By promulgating rules that ban U.S. collectors' trade in Cypriot and Chinese coins, the Defendants have denied collectors the indispensable "content" of direct experience of ancient Cypriot and Chinese coins. The prohibitions impose an unconstitutional burden on core First Amendment rights, including the rights to collect and disseminate information in the United States, the rights of United States citizens like the Plaintiff to promote the trade and publication in constitutionally protected materials in the United States and the American public's right to receive information.

161. The application of 19 CFR §12.104a and the designated lists by Customs amounts to a prior restraint on protected speech. Plaintiff's coins were seized by Customs pursuant to 19 CFR §12.104a which states: "(b) No archaeological or ethnological material designated pursuant to 19 U.S.C. §2604 and listed in §12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. §2604 may be imported into the U.S. unless the State Party issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party." The regulations fail to address the fact that only archeological materials that are discovered within the State Party are subject to the restrictions under 19 U.S.C. §§2604 and 2606. As written, §12.104a is a

content-based restriction because all "Chinese" and "Cypriot" type coins are restricted due to their content and not their place of discovery.

162. 19 CFR §12.104a and the designated lists are also unconstitutionally vague because they fail to provide the kind of notice that would enable ordinary people to understand what conduct is prohibited and it authorizes arbitrary and discriminatory enforcement, in violation of the First and Fifth amendments to the Constitution.

163. 19 CFR §12.104a and the designated lists are also unconstitutional on their face or as applied in that they are overbroad and encompass within its coverage activities that are clearly protected by the guarantees of the First Amendment to the Constitution of the United States.

164. The government's interest in restricting the importation of archaeological coins under the CPIA is to deter looting in a foreign country. This can only apply and be effective to archaeological objects actually discovered within the foreign country. Most archaeological pieces lack inscription or other elements that would make them informational materials. Therefore, for most archaeological pieces the First Amendment issues are muted. However, ancient coins amplify the First Amendment concerns because of their information content.

165. The effect of §12.104a and the designated lists without the discovery requirement is to frustrate the purpose of the First Amendment which is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired

by the people." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976) (citations omitted).

166. 19 CFR §12.104a and the designated lists are also unconstitutional on their face or as applied in that it is susceptible to sweeping and improper application by Customs to protected activities in violation of the First Amendment to the Constitution of the United States.

167. The CPIA and 19 C.F.R. §12.104a restrict and burden plaintiffs' Fifth Amendment liberty collecting and trading in informational materials in the United States.

168. By reason of the foregoing, the Court should declare Defendants' actions to be unlawful and set them aside "as contrary to constitutional right, power, privilege or immunity."

169. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of Defendants' actions can be tested in court.

NINTH CAUSE OF ACTION
Judicial Review of Ultra Vires Actions

170. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 169.

171. Pursuant to 28 U.S.C. § 1331, this Court has the authority to review whether Defendants acted beyond the scope of their authority under the CPIA, the Berman Amendment, the FTIA, and the First and Fifth Amendments in promulgating import restrictions on coins of Cypriot type and Chinese coins from the pre-Tang and Tang periods and in

applying those restrictions to coins with no proof that they were "first discovered" within either Cyprus or China.

172. Furthermore, APA, 5 U.S.C. § 703 provides that in the absence of special statutory authorization for review, "the form of proceeding for judicial review" is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction or habeas corpus."

173. As set forth more fully above, Defendants have acted outside the provisions of the CPIA and instead have based their decisions to impose import restrictions and to seize ACCG's collectors' coins based on bias and/or prejudgment and/or *ex parte* contact with members of the archaeological community who are ideologically opposed to collecting even common artifacts like coins that are widely collected elsewhere. Moreover, by designating as restricted "coins of Cypriot type" and Chinese coins from the Tang and pre-Tang periods as subject to import controls, Defendants have violated the CPIA's provisions that restrictions shall only be applied to artifacts that the restricted artifacts were "first discovered within" the State Party seeking restrictions. CPIA, 19 U.S.C. § 2601 (2) (C).

174. In addition, Customs acted outside its statutory authority when issuing 19 CFR §12.104a and the designated lists without including a requirement to determine an archaeological object's place of discovery. The regulations, as written and enforced, prejudge the importation of all archaeological coins of a type restricted under the CPIA §§2604 and 2606 regardless of their place of discovery, thus exceeding the statutory authority granted in the CPIA and also

in violation of the Berman Act, the FTIA, and the First and Fifth Amendments.

175. 19 CFR §12.104a and the designated lists assume that all coins that could have originated in a State Party, regardless of the actual find spot, are subject to import restriction. The absence of the discovery requirement rests only on the assumption that all "Chinese" or "Cypriot" coins must have been looted. The CPIA does not grant Customs such authority and it also is in violation of the Berman Act, the FTIA, and the First and Fifth Amendments.

176. By reason of the foregoing, the Court should declare Defendants' actions to be unlawful and set them aside under the applicable statutory and Constitutional provisions.

177. Alternatively, Defendants should be compelled to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of Defendants' actions can be tested in court.

TENTH CAUSE OF ACTION
Relief under CAFRA-18 U.S.C. §983

178. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in paragraph numbers 1 through 177.

179. Under the APA, 5 U.S.C. § 706 (1), a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed . . ."Under CAFRA, 18 U.S.C. § 983 (a) (3) (A), "[n]ot later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint. . . ."

180. In the Memorandum accompanying its Motion to Dismiss or, in the Alternative for Summary Judgment, Defendants suggest that the collectors' coins are the "stolen cultural property" of either Cyprus or China.

181. If so, Defendants' should have followed the procedures set forth in CAFRA and filed a forfeiture action within ninety (90) days of the filing of a claim for the collectors' coins.

182. More than ninety (90) days have elapsed since ACCG has submitted its seized asset claim, but upon information and belief, no proceedings relating to the collectors' coins have been instituted in any court.

183. By failing to file a forfeiture complaint within ninety (90) days of Plaintiff ACCG's submission of a seized asset claim, Defendants have unlawfully withheld and unreasonably delayed agency action required under CAFRA, in violation of and as actionable under APA, 5 U.S.C. § 706 (1).

184. As a result of Defendants' unlawful withholding and unreasonable delay of agency action, Plaintiff ACCG has been adversely affected and aggrieved.

185. By reason of the foregoing, Defendants should be compelled to return the collectors' coins.

186. Alternatively, by reason of the foregoing, Defendants should be compelled to cause the prompt commencement of a proceeding in forfeiture in which the validity of import restrictions on Cypriot and Chinese coins can be tested in court.

WHEREFORE, Plaintiff respectfully requests that judgment be granted as follows:

a. Declaring as follows:

   i. That Defendants have deprived Plaintiff of property without due process of law, in violation of the Fifth Amendment;

   ii. That the decision to impose import restrictions on ancient coins of Cypriot type is arbitrary and capricious and/or *ultra vires* because, pursuant to applicable law, Defendant State failed to disclose the reason, or reasons, to Congress behind State's decision making processes in rejecting the advice of its own advisory committee and also in departing from prior agency practice;

   iii. That the decisions to impose import restrictions on ancient coins of both Cypriot and Chinese type are also arbitrary and capricious and/or *ultra vires* because they are they are both contrary to law and the product of bias, prejudgment and *ex parte* contact; and

   iv. That under the CPIA Customs and State must prove that Cypriot or Chinese coins were illicitly removed from Cypriot or Chinese find spots before they may be forfeited.

   v. That import restrictions violate Plaintiff's statutory and First and Fifth Amendment Rights to import informational material by restricting the importation of ancient coins without any reference to their place of discovery.

b. Compelling or enjoining Defendants Commissioner of Customs and Assistant Secretary, ECA to suspend import restrictions on ancient coins of Cypriot type and Tang period and pre-Tang period Chinese coins and enjoining Defendants from enforcing these regulations;

c. Compelling or enjoining Defendant Commissioner of Customs to ensure that coins be traced back to their find spots before they may be forfeited under CPIA and enjoining Defendants from seizing coins based on their type;

d. Compelling or enjoining Defendants to return the collectors' coins to ACCG and enjoining Defendants from seizing them in the future;

e. Or, alternatively compelling Defendants to cause a prompt commencement of a proceeding for forfeiture of the collectors' coins in which the validity of State's and Custom's decision to impose import restrictions on coins of Cypriot and Chinese type and practice to seize coins based on their type alone can be tested in Court.

f. Awarding reasonable attorneys' fees and costs in favor of Plaintiff ACCG; and

g. Ordering such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff respectfully demands a jury trial in this action.

Dated: July 15, 2010

Respectfully submitted,

/s/ Jason H. Ehrenberg
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