02-1357

United States
Court Of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

FREDERICK SCHULTZ,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE ARCHAEOLOGICAL INSTITUTE OF AMERICA, THE AMERICAN ANTHROPOLOGICAL ASSOCIATION, THE SOCIETY FOR AMERICAN ARCHAEOLOGY, THE SOCIETY FOR HISTORICAL ARCHAEOLOGY AND THE UNITED STATES COMMITTEE FOR THE INTERNATIONAL COUNCIL ON MONUMENTS AND SITES IN SUPPORT OF PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

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The Archaeological Institute of America, et al., respectfully submit this brief as amici curiae in support of appellee, the United States of America.[1]

INTERESTS OF AMICI

This brief is submitted on behalf of a group of five archaeological, educational and professional organizations ("the AIA amici"), representing a membership of more than 30,000 professional and avocational members of the public committed to the preservation and scientific study of the past.

Essential to the mission of each of these organizations is the preservation of archaeological sites, historic and prehistoric monuments, and ancient art. The AIA amici have engaged in extensive efforts to promote preservation through the law and through the promulgation of codes of ethical standards. Two of these organizations, the Archaeological Institute of America and the Society for American Archaeology, as well as a number of their individual members, played pivotal roles in the drafting of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Objects (the "UNESCO Convention") and in the drafting

and enactment of the Convention on Cultural Property Implementation Act (the "CPIA"). All the AIA amici have long recognized that archaeological sites and monuments are a fragile, non-renewable cultural resource, representing the shared history of individuals, communities, and nations.

The looting of archaeological sites permanently destroys such sites, erasing part or all of their scientific, historic and cultural significance. This looting is overwhelmingly driven by the demand of art markets, where cultural objects become commercial merchandise. A central mission of the AIA amici has been to encourage art dealers, auction houses, private collectors and museums to act responsibly, so that the cultural objects bought and sold in the art market are the product of legal and controlled excavations, as opposed to looting. The AIA amici have thus encouraged participants in the art markets to obtain proof of the lawful background of the archaeological objects and works of ancient art that they sell or acquire. They have also worked together to encourage governments, including the United States government, to enforce laws and regulations against those who seek to profit from the illicit looting and theft of cultural objects.

The AIA amici submit this brief, first, to inform this Court of the importance of archaeological remains and the difficulties in preserving them, and

[1] This brief is filed with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29(d).

second, to set forth our views regarding the statutes and legal precedents the United States has adopted to enforce a policy of offering legal protection to the remains of the past, be they undiscovered antiquities in other nations or the archaeological heritage of the United States.

The Archaeological Institute of America (the "AIA") is a professional and academic association with approximately 10,000 members throughout North America, of whom 2500 are professional archaeologists. Founded in 1879 by Harvard Professor Charles Eliot Norton and chartered by an Act of Congress in 1906, for over a century the AIA has cultivated the interests of and educated the American public about the past. The AIA is a founder of the American School of Classical Studies in Athens, the American Schools of Oriental Research (which has constituent American overseas research institutes in Jerusalem, Amman and Cyprus), the School of Classical Studies of the American Academy in Rome, the School of American Research (Santa Fe, New Mexico), the Institute of Nautical Archaeology (Texas A & M University), the American Research Institute in Turkey, the American Research Center in Egypt, and the American Institute of Iranian Studies. The AIA is a member of the American Council of Learned Societies and an affiliated organization of the American Association for the Advancement of Science. The AIA's unique combination of scholars and the lay public in a single association has made the accountability of professional

archaeologists and their special responsibilities as custodians of the world's cultural heritage one of the AIA's top priorities. The AIA has led the debate concerning the trade in illicit antiquities and was one of the first organizations in the United States to call for adherence to the UNESCO Convention and to incorporate the Convention's principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation, ranging from the Antiquities Act of 1906 to the CPIA of 1983.

The American Anthropological Association (the "AAA"), founded in 1902, is the primary professional society of anthropologists in the United States. The AAA aims to advance anthropology as the discipline that studies humankind in all its aspects, involving archaeological, biological, ethnological, social-cultural, and linguistic research, and to disseminate anthropological knowledge and its use to address human problems. As the world's largest organization of more than 11,000 anthropologists, the AAA advances these purposes through its publications, meetings and various programs. The AAA is devoted to promoting the entire field of anthropology in all its diversity, providing the unified voice needed to represent the discipline nationally and internationally, in both the public and private sectors.

The Society for American Archaeology (the "SAA") is an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 6800 members, the

SAA represents professional, student, and avocational archaeologists working in a variety of settings, including government agencies, colleges and universities, museums, and the private sector. Since its inception in 1934, the SAA has endeavored to stimulate interest and research in the archaeology of the Americas; advocate and aid in the conservation of archaeological resources; encourage public access to and appreciation of archaeology, and oppose all looting of sites and the sale of looted archaeological materials.

The Society for Historical Archaeology (the "SHA"), formed in 1967, is the largest scholarly group concerned with the archaeology of the modern world (ca. A.D. 1400-present). With over 2400 members from more than 25 countries, SHA represents historical archaeologists working in government agencies, universities, museums, and the private sector around the world. The SHA, which promotes scholarly research and the dissemination of knowledge concerning historical archaeology, is also especially concerned with the identification, excavation, interpretation, and conservation of sites and materials both on land and under water. UNESCO recently recognized the SHA as a Non-Governmental Organization in the Convention on the Protection of Underwater Cultural Heritage.

The United States Committee for the International Council on Monuments and Sites (the "US/ICOMOS") is one of 115 national committees with over 6000 members worldwide that form the ICOMOS global alliance for the

study and conservation of significant historic buildings, structures, cultural landscapes, districts and archaeological sites. From the time of its founding in 1965, ICOMOS has had as its mission the creation of an international structure to foster the protection of cultural heritage through education, the exchange of ideas, cooperative assistance and the establishment of worldwide conservation standards. The US/ICOMOS has been involved in numerous initiatives to promote better conservation through exchanges of professionals between the United States and other countries and the representation of the United States in international fora.

I.

SUMMARY OF ARGUMENT

The AIA amici believe that it is in the interest of the United States and, indeed, all humankind that a comprehensive regime of national and state laws work to encourage the preservation of archaeological sites and the artifacts found therein. As part of that regime, both the National Stolen Property Act (the "NSPA"), 18 U.S.C. §§ 2314 et seq., and the Cultural Property Implementation Act (the "CPIA"), 19 U.S.C. §§ 2601-2613, play important and distinct roles in the protection and preservation of the international heritage from which we all benefit. By criminalizing traffic in stolen foreign archaeological objects, the NSPA reduces market demand for high-quality archaeological objects and the significant financial incentives that exist for the destructive looting of archaeological sites. The CPIA

also plays an important role, as it enables the United States to regulate the importation of certain foreign archaeological and ethnological objects without making the showings necessary to obtain a criminal conviction.

The AIA amici submit this brief to assist the Court in fully appreciating the context in which this case arises and the significance of its decision in terms of protecting the cultural and archaeological heritage of people around the world. We believe that the Government has fully set forth the relevant facts and addressed the legal bases for the district court's decision in its brief to this Court. We therefore focus our argument on the significant cultural and historical reasons why the NSPA should be interpreted to prohibit what appellant was found to have done here – conspire to traffic in archaeological artifacts looted from undiscovered archaeological sites in violation of a national ownership law.

The government's ability to prosecute persons who traffic in stolen archaeological artifacts under the NSPA is a critical component of the United States' efforts to protect the world's archaeological heritage. The United States is one of the largest markets for ancient art in the world. This Court's decision is thus likely to have a direct and real effect on the looting of archaeological sites overseas. If the Court adopts the government's position, as we urge, its decision will deter those who would traffic in stolen goods from doing so. It will thus significantly limit the ability of those who would loot and steal such objects to

profit from such activity. If, on the other hand, the Court adopts the position urged by appellant, the Court's decision will undermine the deterrent effect the NSPA and the threat of a criminal prosecution have on those who would traffic in stolen artifacts. The likely effect would be a significant increase in the looting of archaeological sites and increased destruction of the world's historical heritage. Indeed, a decision in favor of appellant will almost certainly have the effect of permanently destroying information about our past – information that can never be recovered or regained.

The AIA amici urge the Court to adopt the government's position and hold that it is indeed a criminal act to knowingly and intentionally conspire to traffic in stolen archaeological objects, whether those objects are stolen from a private collector, a museum, or, as in this case, from the government of another country that has acted to protect its cultural heritage by assuming legal ownership over the objects that represent its own history.

II.

ARGUMENT

A. The Court Should Affirm the District Court Decision which is Necessary to Protect the World's Archaeological and Cultural Heritage

1. The Public Interest in Preservation of Archaeological Sites

Archaeological sites and historic and prehistoric monuments are the remains of past cultures. The study of that past is crucial to the creation of a wealth of historic and cultural knowledge that serves as a guide to thoughtful, informed action in the present and future. It also fascinates the American public. A Harris Interactive Survey documented that ninety-nine percent of the survey respondents believe that archaeological sites have both educational and scientific value.[2]

The educational and scientific value of sites is realized through meticulous stratigraphic excavation. Sites are complexes of material culture which include architecture, pottery, floral and faunal remains, religious and artistic objects, tools and implements of everyday life, jewelry, written texts, and burials. These remains are preserved within strata, successive layers that preserve distinct but interrelated cultural phases, recording how a contemporary culture evolves over time. Through a careful analysis of the original context during scientific

[2] Maria Ramos & David Duganne, Exploring Public Perceptions and Attitudes about Archaeology, Harris Interactive (Feb. 2000), available at: http://www.saa.org/pubrel/publiced-poll.html.

excavation of objects in association with architectural and landscape features, it is possible for archaeologists, working with scientists and historians in many different fields, to reconstruct the culture of each time period during which a site was inhabited. This process allows us to understand the various features of that culture, including its way of life, religion, trade, political and social structure, literature, and economy. No two sites or objects are alike, and each can only be fully interpreted through their association with other objects and structures in an undisturbed context.

B. The Problem of Looting

Ancient sites and monuments are fragile and non-renewable cultural resources that inform us about our past. Yet archaeological sites throughout the world are looted on a massive scale, in large part to provide objects for sale on the international antiquities market. Although it is difficult to quantify this destruction and the value of the looted objects that appear on the illicit market,[3] looting is driven by the vast profits available from the exploitation and sale of plundered

[3] Interpol and other law enforcement agencies now place the illegal art market among the three largest international criminal activities, including illegal drugs and weapons. Simon Robinson & Aisha Labi, Endangered Art, Time (Int'l ed.), June 18, 2001, at 56. Links to violent crime and the Mafia have also been established. Interview of Lynne Chaffinch, Program Manager for the Art Theft Program at the FBI, and Angela Meadows, Cultural Property Program Manager at INTERPOL-U.S. National Central Bureau, In Search of Stolen Art (transcript of Live Online discussion, Aug. 10, 2000), available at: http://discuss.washingtpost.com/wp-srv/zforum/00/fbi0810.htm; Rory Carroll,

archaeological artifacts. Like most countries in the world including the United States,[4] Egypt has not been spared this devastation. See, e.g., Brian Fagan, The Rape of the Nile 368-71 (1975). Spurred on by demand of the illegal market, this plunder impedes a full understanding of a remarkable civilization that inspired and influenced the very Graeco-Roman cultures that are the well-springs of Western heritage.

The most destructive form of archaeological looting is the theft or plunder of objects directly from the ground. Such looting – the type at issue in this case – destroys much of the invaluable archaeological and historical information otherwise potentially available. This loss is precisely the harm caused by the conspiracy in which the defendant and his co-conspirator participated. In a letter submitted to the court at the time of the defendant's sentencing, Professor Lynn

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Tomb Raiders Plunder Italy's Past: Looters of the Night Get Rich on Worldwide Trade in Antiquities, Guardian (London), June 20, 2000, at 16.

[4] Looting of archaeological sites in the United States is a continuing problem. See, e.g., Mike Toner, Past in Peril: America the Looted, Atlanta J. & Const., Feb. 13, 2000, at 1C (describing looting in the United States and the increasing prices for Native American material on the international art market); Antonia M. DeMeo, More Effective Protection for Native American Cultural Property Through Regulation of Export, 19 Am. Indian L. Rev. 1, 8-10, 70 (1994) (documenting increasing values of Native American artifacts on the international art market and the extensive destruction and desecration of archaeological sites and cemeteries that have resulted from this increase); Veletta Canouts & Francis P. McManamon, Protecting the Past for the Future: Federal Archaeology in the United States, in Trade in illicit antiquities: the destruction of the world's archaeological heritage 97-110 (Neil Brodie, Jennifer Doole, & Colin Renfrew, eds, 2001) (describing extent of archaeological looting in the United States).

Meskell of Columbia University described the destruction caused by the defendant as follows:

> [T]he theft of antiquities robs Egypt, first and foremost, of its cultural heritage and the right to celebrate this amazing culture as its own. Secondly, it robs archaeologists, Egyptologists and historians of all nations of the materials that enable us to construct important social, economic and historical developments within Egyptian civilization. Whether we focus upon the lives of pharaohs or ordinary citizens, the centrality of archaeological materials is crucial and can only be heightened when we are presented with contextualised artifacts. Thirdly, these crimes rob the world of the compelling information and narratives that archaeologists can disseminate through publications and media, that are key in humanity's past and common to all of us, irrespective of nation, religion or gender. I cannot stress enough that the influence of Egyptian culture upon the modern world is inestimable, from mathematics and science, to philosophy and aesthetics, and religious concepts of the afterlife.

(Letter of Lynn Meskell, appended to Gov't Sentencing Memo).

The most valuable of the objects involved in the Schultz conspiracy was a head of the 18th Dynasty pharaoh, Amenhotep III. As the portrait of one of the most renowned of the ancient Egyptian pharaohs, and by virtue of its age (made some 3350 years ago), the head of Amenhotep III is a supremely important archaeological and historical object. As documented in ancient texts as well as in stone, Amenhotep III's accomplishments include the construction of monumental buildings at Karnak and Luxor and the two Colossi of Memnon that mark the site of his tomb in western Thebes--sites that have inspired awe among visitors to Egypt for centuries. Considered one of the most artistically productive periods in Egypt's history, the reign of Amenhotep III has been the subject of major museum

exhibitions and numerous books. See, e.g., Arielle P. Kozloff, Betsy M. Bryan, Lawrence M. Berman, et al., Egypt's Dazzling Sun: Amenhotep III and His World (1992); J. Fletcher, Egypt's Sun King: Amenhotep III (2000); David B. O'Connor, Eric Cline, Amenhotep III: Perspectives on his Reign (1998).

As Professor Betsy Bryan of Johns Hopkins University explained in a letter to the District Court at the time of Schultz's sentencing, only three other heads of Amenhotep III made from this particular stone (graywacke) are known to exist. This head is a representation of the pharaoh as a god, probably part of a series of life-size god statues used for ritual reenactments. Appellant's actions have resulted in the loss of the find spot and other contextual information that might have led to the discovery of other statues, which were part of the series from which the looted object likely came. As Professor Bryan wrote, "[s]adly, the fact that this head was taken out of context and smuggled out of Egypt means that it will take years, and that is only if we are lucky, to regain the information that was lost by the actions of the looters." (Letter of Betsy Bryan, appended to Gov't Sentencing Memo Letter).

By applying scientific analyses and scholarly methodologies, objects such as the Amenhotep head ultimately can contribute to a detailed and comprehensive understanding of artistic products, traditions, and historical developments extending into the remote past. This is true as well of less important

artworks and artifacts, all of which are essential for piecing together the past. Thus, for example, in discussing another piece at issue in this case, a limestone statuette of a standing male figure of the Old Kingdom period (dated ca. 2350-2100 B.C.), Dr. Edna Russmann, Curator of Egyptian, Classical and Ancient Middle Eastern Art at the Brooklyn Museum of Art, commented that few statues of this type come from archaeological excavations and virtually none from the modern period when excavation techniques had improved considerably. As a result, relatively little is known about these statues. Dr. Russmann wrote:

> What cannot be corrected is the loss of information that occurred when this figure was taken from its archaeological setting. To list just some of the basic questions that will never be answered: For whom was this statue made? When, exactly, did he live? What was his profession? His social status? Who were his family? Was the statue (as is probable, but not certain) made for his tomb? Where was the tomb located? If in Saqqara, in which part of that huge cemetery? What type of tomb was it, and how large? Was the statuette placed in a chapel, or in the subterranean burial chamber? Were there (as one might expect) other statues of this man? Of his family? Of his servants? . . . [I]f even some of [these questions] could have been answered, this statuette would have been one of the most important examples of its kind.

(Letter of Edna Russmann, appended to Gov't Sentencing Memo).

Looting from undiscovered sites is the most lucrative type of antiquities theft. It occurs because people can make money – sometimes a lot of money – doing it. That money is available to looters because it is supplied by those who sell such objects through apparently "legitimate" channels in countries like the United States. Appellant and his supporters – many of whom would share

in these profits -- ignore the effects their cramped reading of the NSPA would have. Indeed, amici for the defendant, the National Association of Dealers in Ancient, Oriental & Primitive Art, Inc., *et al.*, ("NADAOPA") desire and indeed are asking this Court to legitimize a regime in which the ability of those in the art and antiquities markets to profit from artifacts removed illegally takes precedence over the preservation of archaeological treasures and the historical data available from their original contexts. This profit motive is aptly demonstrated by the facts of appellant's crime: fully aware of the value of the Amenhotep head, appellant sold it for $1.2 million.

One of the perverse realities of this trade in looted items is that the greater the historical significance of an artifact, the higher its price. As one of the most sophisticated dealers in ancient art in the United States and the president of the (amicus) NADAOPA until shortly before his indictment, appellant was well aware that these objects were valuable because of their historical and cultural significance. Nonetheless, the potential for profit apparently outweighed any interest appellant may have otherwise had in the preservation of irreplaceable historical information – information destroyed as a result of the illicit market in which he participated. This conspiracy is a perfect example of the type of trade that provides financial inducement to those who loot sites in Egypt.

C. The Law Should Work to Preserve the Past

Many countries have adopted laws and regulations to reduce and eliminate this destruction of the past. These regimes generally incorporate some or all of a range of laws including licensing of excavations, publication requirements, export controls, and the vesting of ownership of monuments, sites and archaeological objects in the national government. The Egyptian statute, Law 117, is a vesting statute, a type of law that is particularly well suited – and narrowly tailored – to protect undiscovered antiquities.

Statutes that vest ownership of undiscovered antiquities in the state do so in order to deprive looters, middlemen, and subsequent purchasers of title to archaeological objects. Without title, it is difficult or impossible to sell such objects on the international market. This is, of course, why the appellant and his co-conspirators sought to create a false provenance for the stolen objects they sought to sell. Obviously, if the objects cannot be sold, the profit motive for looting and other historically destructive activities is reduced or eliminated. And it is the prospect of making money by selling newly discovered objects that motivates looters.

States that assert ownership over unexcavated antiquities do so to protect sites before they have been looted. As owners of those unexcavated objects, national governments that have adopted vesting laws can then enforce

their own laws criminalizing the theft of such objects. They can also, as in this case, work with other governments such as the United States to enforce their laws criminalizing trafficking in stolen objects.

In contrast to vesting statutes, export controls do not affect the title to objects. Jeanneret v. Vichey, 693 F.2d 259, 266-67 (2d Cir. 1982) (holding that illegal export is not a breach of the seller's warranty of title). Export controls typically apply to a variety of types of works of art, including those that are in private ownership and possession at the time of the enactment of the export controls, as well as to a broad array of other types of goods such as weapons and technology. Export controls do not deny title to a finder or looter but rather regulate the outflow of works of art from a particular country.

It is thus important to distinguish between national ownership laws and export controls in terms of their nature, their fundamental purpose, their internal effect within the country, and their extraterritorial effect.[5] Here, the United States recognizes Egypt's law as a basis for state ownership, a law adopted

[5] The British courts, for example, have had little difficulty in discerning this distinction. In Attorney-General of New Zealand v. Ortiz, 2 All E.R. 98 (Eng. 1983), the court recognized the New Zealand statute, which vested ownership of the Maori carved wood panels in the government only after they were illegally exported, as an export control and not an ownership law. On the other hand, the British court that convicted appellant's co-conspirator, Jonathan Tokeley-Parry, for dealing in the same stolen Egyptian antiquities at issue here understood the distinction between theft and illegal export. R. v. Tokeley-Parry, [1999] Crim. L.R. 578.

by Egypt to prevent persons from looting its undiscovered antiquities. Such ownership or vesting laws have undoubtedly resulted in fewer legal antiquities being available on the market, by eliminating antiquities dealers' opportunities to (legally) profit from the sale of plundered antiquities. A decision by this Court that fails to apply the NSPA to the theft of antiquities owned by a foreign state pursuant to a national declaration of ownership would send an invitation to the market to encourage plunder of unknown sites and to remove their treasures to the Court-declared safe harbor of the states that comprise the Second Circuit.

Vesting laws are neither new nor alien to our jurisprudence, and there is no reason why this Court should not recognize the ownership rights they create. Indeed, many nations, including the United States, have enacted vesting laws. The Antiquities Act of 1906, 16 U.S.C. §§ 431-433m (2002), adopted nearly a century ago, penalizes, inter alia, the appropriation of objects of antiquity found on federally-owned or controlled land. The Antiquities Act was passed, in large part, because of concern over the looting of sites in the American Southwest and the removal of archaeological objects to foreign countries.[6] The Antiquities Act was followed by the more comprehensive Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (2001) (the "ARPA"), the primary federal law

[6] In one well-known case, a Swedish explorer dug in Cliff Palace (Colorado) and removed a large collection of prehistoric objects to Scandinavia. Ronald F. Lee, The Antiquities Act of 1906 29-38 (1970).

protecting archaeological sites. Among other provisions, ARPA vests ownership in the federal government, despite the government's lack of actual possession, of all "material remains of past human life or activities which are of archaeological interest" and more than one hundred years old that are found on federally-owned or controlled land. 16 U.S.C. § 470bb; § 470cc(b)(3) (declaring that "resources which are excavated or removed from public lands will remain the property of the United States."). ARPA thus abrogates the common law of finds which, in some circumstances, might otherwise have vested ownership in the finder. All fifty states have passed parallel statutes, vesting ownership of objects from archaeological sites on state owned- or controlled-land in the state government. See, e.g., N.Y. Educ. Law § 233-4 (2001)(stating that "no person shall appropriate, excavate, injure, or destroy any object of archaeological and paleontological interest, situated on or under the lands owned by the state of New York, without the written permission of the commissioner of education").

Statutory protection of undiscovered antiquities in the United States is by no means limited to public property. While Schultz broadly condemns public ownership of property, Schultz Brief at 40, the public interest in public ownership of such property is, we submit, strong and indisputable. Indeed, twenty-two states have passed laws that deny private landowners title to undiscovered human remains and burial objects on their own property and have transferred title to such

objects to lineal descendants or those who are culturally affiliated for reburial purposes. See, e.g., Ariz. Rev. Stat. Ann. § 41-865(C)(5) (West 2000); Fla. Stat. Ch. 872.05 (2000).[7] A number of those states specify that grave artifacts that cannot be returned shall be held in trust for the people of the state, thus asserting public ownership over newly-discovered objects in the same manner as the Egyptian statute at issue in this case. See, e.g., Ala. Code § 41-3-1 (2001); 20 Ill. Comp. Stat. 3440/14 (2001); La. Rev. Stat. Ann § 8:681C (West 2000); W. Va. Code Ann. § 29-1-8a(h) (Michie 2000). Appellant's misguided arguments concerning "common law" notions of property would apply equally to these statutes. Rather, these statutes clearly demonstrate that the United States recognizes legislative enactments as a basis for state ownership of archaeological artifacts.[8]

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[7] For a list of state statutes protecting burials on private land, see Patty Gerstenblith, Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine after Lucas, 13 St. Thomas L. Rev. 65, 102 & n.149 (2000); Carol L. Carnett, A Survey of State Statutes Protecting Archeological Resources, Preservation Law Reporter: Special Report, 3 Archeological Assistance Study (National Trust for Historic Preservation: U.S. Department of the Interior, National Park Service, Cultural Resources, Archeological Assistance Division 1995). Furthermore, two states regulate all archaeological resources found on private land. Ind. Code § 14-3-3.4 (1999); Wash. Rev. Code § 27.53.060(1) (2000); see also Whitacre v. State, 619 N.E.2d 605 (Ind. Ct. App. 1993), aff'd, 629 N.W.2d 1236 (Ind. 1994) (holding that state permission is required for excavation on private, as well as public land).

[8] It is clear that in applying a federal statute that does not itself create property interests, such as the NSPA, local law defines the property interests at stake. See Aquilino v. United States, 363 U.S. 509, 513-14 (1960) (in determining

These vesting statutes embody the Congressional and state legislatures' determination that the United States has a strong public interest in preserving our domestic cultural heritage. As Judge Posner explained in United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994), applying ARPA to the interstate transport of artifacts taken in violation of state law:

> . . . it is almost inconceivable that Congress would have wanted to encourage amateur archaeologists to violate state laws in order to amass valuable collections of Indian artifacts, especially as many of these amateurs do not appreciate the importance to scholarship of leaving an archaeological site intact and undisturbed until the location of each object in it has been carefully mapped to enable inferences concerning the design, layout, size, and age of the site, and the practices and culture of the inhabitants, to be drawn.

999 F.2d at 1115-16.

The Egyptian statute at issue in this case serves these same public policy goals. Egypt's Law 117, enacted in 1983, vests title to all antiquities undiscovered as of that date in the Egyptian national government. It, too, was enacted to discourage looters from stealing undiscovered antiquities and cultural objects. The district court, after extensive briefing and a lengthy hearing on this

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what property interests the taxpayer had, "both federal and state courts must look to state law."). It was therefore necessary to look to Egyptian law to determine who owns the archaeological objects at issue here. See also United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (applying law of Austria, a civil law country, to determine ownership of art object).

issue, found that Law 117 is an ownership law and not an export control. 178 F. Supp. 2d 445, 447-48 (2002). The court concluded that "[i]t is clear . . . that Law 117, far from being a disguised licensing scheme or export regulation, is precisely what it purports to be: a transfer of ownership of Egyptian antiquities to the state, effective 1983." Id. at 448.[9] Schultz does not challenge this determination. Therefore, the discussion in appellant's brief (15-16) concerning export controls is entirely irrelevant to this appeal. Neither Law 117 nor the NSPA is an export control. Moreover, since it is undisputed that the antiquities involved in the Schultz conspiracy were discovered in Egypt after 1983, the effective date of this Egyptian law, these antiquities were and are the property of the Egyptian national government.

The AIA amici urge this Court to recognize the Egyptian statute for what it is – an ownership law – and to give full effect to the plain terms of the NSPA.[10] The United States' prosecution of those who traffic in stolen artifacts

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[9] The court found first that Law 117 "on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation." 178 F. Supp. 2d at 447. The court then relied on the evidence of extensive internal investigation and prosecution of violations of Law 117, primarily for trafficking within Egypt, as well as seizure of newly discovered antiquities "by the state as the lawful owner." Id. at 448.

[10] As the Government's brief sets forth in more detail, appellant's position regarding the NSPA has never been accepted by a single court. (Government brief at 36-39). Moreover, while appellant relies upon the views of certain

under the NSPA will further the critical and legitimate interest of the government in stopping the flow of illegally-looted objects and preventing antiquities dealers from profiting from the sale of such objects. By contrast, a decision which permits the sale of such objects will inevitably result in the increased plunder and destruction of unknown sites and all the history they may contain. The AIA amici urge this Court to adopt the plain reading of the NSPA urged by the United States and act to prevent this needless destruction.

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commentators, he fails to disclose that the principal commentator he relies upon endorsed the application of the NSPA in circumstances like those presented in this case. Specifically, Professor Paul Bator wrote: "[c]riminal liability under the NSPA is appropriate in clear and egregious cases...where there is a specific showing that antiquities were unlawfully appropriated and that the defendant knew that this had occurred." Paul M. Bator, An Essay on the International Trade in Art, 34 Stan. L. Rev. 275, 353 (1982). In light of Judge Rakoff's ruling on the character of Egypt's Law 117 and the extensive evidence presented in this case, the Schultz prosecution presents just such a clear and egregious case.

D. The Enactment of the CPIA Should Not Affect the Construction of the NSPA

Contrary to the assertions of the amici supporting appellant, (see NADAOPA Brief at 11, Citizens for a Balanced Policy with Regard to the Importation of Cultural Property ("Citizens") Brief at 3), the CPIA is not, and was not intended to be, the sole expression of United States cultural property policy. Amici discuss at great length how the CPIA imposes import restrictions on designated categories of archaeological and ethnological materials. This discussion is entirely irrelevant to the present appeal. The CPIA is a civil customs statute, which provides for its only penalty forfeiture of the object involved. The NSPA is a criminal statute, providing for the prosecution and punishment of persons who commit certain wrongful acts. The issue on this appeal, as both the government and appellant recognize, is the scope and proper application of the NSPA. However, because we do not wish to leave amici's arguments unrebutted, we briefly address the CPIA.

It is often stated that the general rule is that, in the absence of a treaty or convention, one country does not recognize the export controls of another nation.[11] With respect to archaeological and ethnological objects, however, Article

[11] There is disagreement on this point in the legal scholarly literature. See, e.g., Patrick J. O'Keefe, Export and Import Controls on Movement of the Cultural Heritage: Problems at the National Level, 10 Syr. J. Int'l L. & Comm. 352, 362-64 (1983).

9 of the 1970 UNESCO Convention calls upon States Parties to take "necessary concrete measures," including restrictions on the import of archaeological and ethnological materials whose pillage has placed the cultural patrimony of other States Parties in jeopardy. The CPIA is the statute enacted by the United States to create a mechanism to comply with the mandate of the 1970 UNESCO Convention and impose import restrictions on such materials.

Sections 303 and 304 of the CPIA set out the criteria and determinations to be made by the President or his delegated decision maker in deciding whether to impose import restrictions for designated archaeological and ethnological materials upon request from another State Party, 19 U.S.C. §§ 2602 and 2603. The Cultural Property Advisory Committee, established pursuant to the CPIA, assists the decision maker by making recommendations concerning the various determinations outlined in the statute.[12] The CPIA thus establishes a complex process that impliedly recognizes other countries' export controls, on a case-by-case basis, through the imposition of temporary United States import restrictions for designated materials. This entire process, interesting and important

[12] We note that in discussing the "concerted action" requirement of section 304, amici omit to mention that there is an exception that applies under the bilateral agreement provision, 19 U.S.C. § 2602. NADAOPA Brief at 14; Citizens Brief at 3, 4). This exception permits the President to enter into a bilateral agreement even in the absence of concerted international action if import restrictions "would be of substantial benefit in deterring a serious situation of pillage." 19

though it may be, is entirely irrelevant to the use of the NSPA to deter and prosecute thefts of cultural materials. These sections of the CPIA concern import restrictions and not theft of archaeological materials.

This point is aptly illustrated by the bilateral agreement between the United States and Canada, in place from 1997 to 2002, which imposed import restrictions on specified categories of Canada's archaeological and ethnological materials. These restrictions were in place even though Canada has no national ownership law that applies to all newly discovered archaeological objects.[13] Thus, sections 303 and 304 of the CPIA can and do operate independently from the existence of national ownership laws and do not specifically address the problems created by theft.

Of course, import restrictions may also apply to material that has been stolen. For example, if a group of persons were to steal from a museum in Italy an antiquity that is also subject to import restrictions under the U.S.-Italy bilateral agreement, and seek to sell that item in the United States, it is likely that both

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U.S.C. § 2602(c)(2). And there is no concerted action requirement under the emergency provisions, 19 U.S.C. § 2603.

[13] NADAOPA amici state that import restrictions under the CPIA "will, necessarily, generally be narrower in scope than a given foreign nation's patrimony laws . . . ." Brief at 24. The case of Canada demonstrates that this is wrong because Canada has no national vesting law that applies to all archaeological objects and none that applies to ethnological objects. Thus, the CPIA import restrictions were broader than any Canadian ownership law.

sections 303 and 308 of the CPIA, and the NSPA, would have been violated. However, only under the NSPA could those involved in the crime be punished. And it is clear that the "safe harbor provisions" of the CPIA, to which amici refer, NADAOPA Brief at 22-23, would not prevent prosecution of the thief, even though the material might be covered by the CPIA as well.

In sum, these two statutes provide the government with two different and complementary tools to deter and punish looting and theft. Neither appellant nor the amici supporting him have provided any justification why this Court should not construe the NSPA according to its own terms, and permit the government to utilize that statute, as it was intended, to prosecute those who traffic in stolen objects, including stolen antiquities.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to affirm the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

The undersigned counsel for amici certifies that this Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(I). In preparing this Certificate, I relied on the word-count program of Microsoft Word. This Brief contains 6,623 words.

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