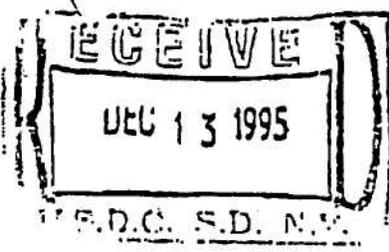


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United States Attorney for the
Southern District of New York
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-----X
UNITED STATES OF AMERICA,

Plaintiff,

- v -
AN ANTIQUE PLATTER OF GOLD, KNOWN
AS A GOLD PHIALE MESOMPHALOS,
C. 400 B.C.,

Defendant-in-rem.
-----X

VERIFIED COMPLAINT

95 Civ.

JUDGE PAPLANI

Plaintiff United States of America, by its attorney, Mary Jo White, United States Attorney for the Southern District of New York, for its complaint alleges as follows:

I. JURISDICTION AND VENUE

1. This is an action brought by the United States of America pursuant to 18 U.S.C. §§ 545, 981(a)(1)(C) and 19 U.S.C. § 1595a(c), seeking the forfeiture of all right, title and interest in personal property described as An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, c. 400 B.C., with an appraised value of approximately one million dollars (the "defendant-in-rem gold platter"), seized on November 9, 1995 from 1158 Fifth Avenue, New York, New York.

2. This Court has jurisdiction pursuant to 28 U.S.C. §§

1345 and 1355. Venue is proper because the defendant-in-rem gold platter is located in the Southern District of New York.

3. On November 9, 1995, pursuant to an affidavit in support of seizure in-rem pursuant to 18 U.S.C. § 545, 542 and 19 U.S.C. § 1595a, sworn to by Bonnie Goldblatt ("the Goldblatt Affidavit"), a seizure warrant was issued by Chief United States Magistrate Judge Naomi Reice Buchwald for the seizure of the defendant-in-rem gold platter pursuant to 18 U.S.C. § 542, 545 and 19 U.S.C. § 1595a. A copy of the Goldblatt Affidavit and seizure warrant with return is attached and fully incorporated by reference as Exhibit 1.

II. PROBABLE CAUSE FOR FORFEITURE

4. On February 16, 1995, the Italian Government submitted a letters rogatory request to the United States pursuant to the Treaty between the United States and the Italian Republic on Mutual Legal Assistance in Criminal Matters ("Letters Rogatory Request.") In the Letters Rogatory Request, Assistant District Attorney Aldo De Negri ("De Negri") of the Tribunale of Termini Imerese (Province of Palermo), sought the assistance of the United States (1) in investigating the circumstances surrounding the illegal exportation from Italy of the defendant-in-rem gold platter, and its subsequent importation into the United States; and (2) in confiscating the defendant-in-rem gold platter so that it may be returned to Palermo's Department of the Carabinieri for the

DEC 13 30 1984
PROTECTION OF ITALY'S ARTISTIC PATRIMONY.

5. In the Letters Rogatory Request, De Negri stated that according to a confidential informant ("CI"), the defendant-in-rem gold platter was discovered during the period 1984-92 in the course of excavations for the installation of electric light poles in a state-protected archaeological area near Caltavuturo, Palermo.

6. De Negri further stated that according to the CI, the defendant-in-rem gold platter was later sold by persons who found it to Vincenzo Cammarata, a wealthy Italian art collector living in Piazza Armerina (Province of Enna). The intermediary in the transaction was Vincenzo Brai, the owner of a photography shop in Palermo.

7. De Negri's investigation further determined that Cammarata approached Silvana Verga, a specialist in antique gold artworks, requesting that she act as an intermediary in selling the defendant-in-rem gold platter and another similar antique gold platter to a public museum. According to Verga, Cammarata brought the two gold platters to her for inspection and told her that they had been found near Caltavuturo during excavations to install light poles. Vincenzo Brai took photographs of the two gold platters (including the defendant-in-rem gold platter) at the time of Verga's inspection of the platters.

8. Brai informed Verga that Cammarata had undertaken to sell the gold platters in the United States.

9. De Negri's CI also confirmed that the defendant-in-rem gold platter was eventually put up for sale in the United

States. The CI subsequently discovered that the defendant-in-rem gold platter was transferred to Robert Haber & Company Ancient Art, 16 West 23rd Street, New York, New York.

10. On July 19, 1995, Assistant United States Attorney Evan T. Barr was appointed Commissioner by the United States District Court for the Southern District of New York for the purpose of executing the Letters Rogatory Request.

11. On September 21, 1995, a Commissioner's subpoena was issued to Robert Haber & Company Ancient Art requiring testimony and production of documents regarding the purchase, sale, transfer and importation of the defendant-in-rem gold platter.

12. On October 3, 1995, counsel for Robert Haber & Company informed Assistant United States Attorney Evan T. Barr that Haber would invoke his Fifth Amendment privilege against self-incrimination in response to any questions regarding his receipt or disposition of the defendant-in-rem gold platter. However, Robert Haber & Company Ancient Art produced documents responsive to the above-referenced Commissioner's subpoena. Furthermore, Haber also agreed, through counsel, to provide in letter form certain limited information regarding the defendant-in-rem gold platter, provided it would not be construed as a waiver of his Fifth Amendment privilege.

13. According to the letter referred to in paragraph 12 above, Haber received the defendant-in-rem gold platter from William Veres of Geneva and London. The letter further states that Haber, acting as an intermediary and expert, delivered the

defendant-in-rem gold platter to Michael Steinhardt of New York, New York.

14. The United States Customs Service ("Customs") was requested to assist in the investigation. Customs subsequently determined that Michael Steinhardt resides at 1158 Fifth Avenue, New York, New York.

15. The investigation obtained the Customs Form 7501, "Entry Summary" dated December 15, 1991 ("entry form") used in importing the defendant-in-rem gold platter into the United States. The entry form was included among the materials produced by Haber. The entry form states that Robert Haber is the importer of record. The entry form states that the exporting country is "CH." The entry form states that the country of origin is "CH." "CH" is the designation used by Customs for Switzerland. Because the country of origin is Italy, this entry form contains a material false statement.

16. In the course of the investigation, other documents produced pursuant to the Commissioner's subpoena by Robert Haber & Company Ancient Art were obtained and reviewed including: (a) a one-page typed description of the defendant-in-rem gold platter in which it is identified as "Gold phiale mesomphalos. Greek, ca. 4th - 3rd century B.C. From Sicily. Diameter: 23 cm. Weight: 982.9 grams (2.16 pounds)" and accompanying maps of southern Italy, Sicily and the Eastern Mediterranean; and (b) a "Summary and Translation" of an article by Giacomo Manganaro entitled "Darics in Sicily and the Gold Issues of Sicilian Cities and of Carthage from

the Fifth Through the Third Century B.C." in which a gold phiale is described as being of Sicilian or Greek origin. These documents indicate that Robert Haber & Company Ancient Art understood the defendant-in-rem gold platter to be of Italian origin, and apparently advertised it as such to prospective buyers.

17. The investigation obtained a one-page bill of sale relating to the defendant-in-rem gold platter which was produced pursuant to Commissioner's subpoena by Robert Haber & Company Ancient Art. This document states, *inter alia*, that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser."

18. Upon information and belief, importers of Italian artworks frequently misrepresent the country of origin on a Customs entry form to be Switzerland, because it is generally understood that Italy has more stringent laws prohibiting export of artistic and archaeological property than does Switzerland. Exporters of artworks from Italy frequently transship these items to their final destinations via Switzerland, which shares a common border with Italy.

III. CLAIM FOR FORFEITURE

19. Incorporated herein are the allegations contained in paragraphs 1 through 18 of the verified complaint.

20. The statutory provisions pursuant to which the defendant-in-rem gold platter is subject to seizure and forfeiture

are as follows:

a. 18 U.S.C. § 542 provides criminal penalties for

[w]hoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal. . . or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement

b. 18 U.S.C. § 545 subjects to forfeiture merchandise which has been "imported or brought into the United States contrary to law. . ."

c. 19 U.S.C. § 1595a(c) provides in pertinent part:

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

(1) The merchandise shall be seized and forfeited if it --

(A) is stolen, smuggled, or clandestinely imported or introduced.

d. 18 U.S.C. § 981(a)(1)(C) subjects to forfeiture to the United States any property which "constitutes or is derived from proceeds traceable to a violation of section . . . 542, 545. . ."

21. The defendant-in-rem gold platter is subject to forfeiture pursuant to 18 U.S.C. §§ 545, 981(a)(1)(C) and 19 U.S.C. 1595a(c) because there is probable cause to believe that the defendant-in-rem gold platter was introduced into the United States

contrary to law by means of a material false statement regarding its country of origin, in violation of 18 U.S.C. § 542.

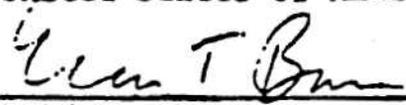
22. By reason of the above, the defendant-in-rem gold platter became and is subject to forfeiture to the United States of America.

WHEREFORE, plaintiff United States of America prays that process be issued to enforce the forfeiture of the defendant-in-rem gold platter and that all persons having an interest in the defendant-in-rem gold platter be cited to appear and show cause why the forfeiture should not be decreed, and that this Court decree forfeiture to the defendant-in-rem gold platter to the United States of America for disposition according to law, and that this Court grant plaintiff such further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated: New York, New York
December 13, 1995

MARY JO WHITE
United States Attorney for the
Southern District of New York
Attorney for the Plaintiff
United States of America

BY:


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UNITED STATES of America Plaintiff,
v.
AN ANTIQUE PLATTER OF GOLD, Known as a
Gold Phiale Mesomphalos, c. 400 B.C.,
Located at 1158 Fifth Avenue, New York, New
York, Defendant-in rem.
Michael H. Steinhardt, Claimant.

No. 95 MAG. 2167 (NRB).

United States District Court, S.D. New York.

Dec. 22, 1995.

Evan T. Barr, Assistant United States Attorney, New
York City, for plaintiff.

Michael S. Feldberg, Schulte Roth & Zabel, New
York City, for defendant.

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, Chief Magistrate
Judge.

*1 Claimant Michael H. Steinhardt ("Claimant") moves this Court pursuant to Federal Rule of Criminal Procedure 41(e) to exercise its powers of equitable jurisdiction and grant an order directing the return of the Defendant-in-rem platter of gold, c. 400 B.C. (the "gold phiale"). [FN1] The gold phiale was seized from Claimant's residence by the United States Customs Service on November 9, 1995 pursuant to a warrant issued by this Court under the authority of 19 U.S.C. § 1595(a) and 18 U.S.C. §§ 542 and 545.

On December 4, 1995, the Customs Service issued to Claimant a Notice of Seizure, marking the initiation of administrative forfeiture proceedings against the gold phiale. As the Customs Service appraised the gold phiale in an amount exceeding \$500,000, the matter was referred to the United States Attorney's Office, which instituted civil forfeiture proceedings pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and 19 U.S.C. § 1595a(c) against the gold phiale on December 13, 1995. Subsequently, an arrest warrant for the article in rem was issued. No criminal proceedings are pending against the Claimant.

By their own terms, the Federal Rules of Criminal Procedure are "not applicable to... civil forfeiture of property for violation of a statute of the United States." Fed. R. Crim. P. 54(b)(5). Nevertheless, courts have

allowed Rule 41(e) motions to act as a vehicle for requesting the court to exercise 'anomalous' jurisdiction over civil claims seeking the return of property. *United States v. Martinson*, 809 F.2d 1364, 1366-1368 (9th Cir. 1987); *Grant v. United States*, 282 F.2d 165, 168 (2d Cir. 1960) (Friendly, J.) ("We have said that such a motion 'was in effect a complaint initiating a civil action.'"); see also *Russo v. United States*, 241 F.2d 285, 287-288 (2d Cir. 1957) (finding a Rule 41(e) motion filed before indictment an "independent civil proceeding"). Such jurisdiction should be exercised with caution and restraint. In re *Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988) (labeling the court's power to order the return of unlawfully seized property "extraordinary"); *Boyd v. United States Dept. of Justice*, 673 F. Supp. 660, 662 (E.D.N.Y. 1987) (stating that courts should exercise anomalous jurisdiction "only when absolutely necessary and with great hesitation."); In re *Wiltron Assoc.'s, Ltd.*, 49 F.R.D. 170, 172 (S.D.N.Y. 1970) (stating that courts should exercise anomalous jurisdiction "sparingly").

A court may find "anomalous" jurisdiction in two circumstances: (1) to deter constitutional violations when the exclusionary rule is ineffective due to the absence of criminal proceedings; or (2) to facilitate the return of improperly seized property. *Music Deli & Groceries, Inc. v. Internal Revenue Service, District of Manhattan*, 781 F. Supp. 992, 998 (S.D.N.Y. 1991); see also, *Hunsucker v. Phinney*, 497 F.2d 29, 34 (5th Cir. 1974) (suggesting requirement of callous disregard for claimant's constitutional rights), cert. denied, 420 U.S. 927 (1975). Yet, even where such circumstances are present, a court should not find "anomalous" jurisdiction when the movant has an available statutory or civil remedy to contest ownership of the property and the lawfulness of the seizure. *United States v. Elias*, 921 F.2d 870, 872 (9th Cir. 1990) (administrative forfeiture); *United States v. U.S. Currency*, \$83,310.78, 851 F.2d 1231, 1235 (9th Cir. 1988) (civil forfeiture); cf. *Music Deli*, 781 F. Supp. at 998 (refusing to dismiss Rule 41(e) motion because "Plaintiffs most likely have no other relief."). Accordingly, a Rule 41(e) motion generally should be dismissed when a civil forfeiture proceeding is pending. See *U.S. Currency* \$83,310.78, 851 F.2d at 1234.

*2 In this case, Claimant contends that his property was seized improperly. He cites to *Floyd v. U.S.*, 860 F.2d 999 (10th Cir. 1988), and urges this Court to exercise jurisdiction in the face of the pending forfeiture proceeding. In *Floyd*, the court relied on the existence of an alleged fourth amendment violation in

order to find that no adequate legal remedies existed to require the dismissal of a Rule 41(e) motion. *Id.* at 1004-1005. Here, however, Claimant alleges no fourth amendment violation. Moreover, as Claimant recognizes, he can raise his defenses to seizure in the pending civil forfeiture proceedings. (See Letter of Feldberg, at 2, dated December 14, 1995). When faced with situations where claimants have an available forum to contest the lawfulness of a seizure, courts routinely have refused to adopt jurisdiction over Rule 41(e) motions. See, e.g., *One 1987 Jeep Wrangler Automobile*, 972 F.2d at 479 (where claimant makes motion pursuant to state rule of criminal procedure providing "essentially the same relief" as Rule 41(e)); *United States v. Castro*, 883 F.2d 1018, 1019 (11th Cir. 1989) ("It is well settled that the proper method for recovery of property which has been subject to civil forfeiture is not the filing of a Rule 41(e) Motion, but filing a claim in the civil forfeiture action."); *In re Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988) (affirming refusal to entertain Rule 41(e) motion where government had instituted civil forfeiture proceeding); *U.S. Currency, \$83,310.78*, 851 F.2d at 1235 ("[W]hen a civil forfeiture proceeding is pending, there is no need to fashion an equitable remedy to secure justice for the claimant."); *In re Seizure Warrant*, 830

F.2d (D.C. Cir. 1987) (refusing to entertain Rule 41(e) motion); *Pirelli v. United States*, 729 F. Supp. 715, 716 (S.D. Cal. 1990) ("Regardless of the merits of the petitioner's arguments, the court will not entertain his motion because the government has already filed a forfeiture complaint."); *Boyd*, 673 F. Supp. at 663-664 (refusing to exercise equitable jurisdiction where movant had remedy under forfeiture statute) (the "adequacy of movant's remedy at law is most significant.") We agree with the approach adopted in these cases. Claimant should raise his defenses to seizure in the proper forum -- the civil forfeiture proceeding.

Accordingly, Claimant's Rule 41(e) motion is dismissed.

IT IS SO ORDERED.

FN1. Rule 41(e) provides in pertinent part:

A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property.

END OF DOCUMENT

UNITED STATES of America, Plaintiff,
v.

AN ANTIQUE PLATTER OF GOLD,
KNOWN AS A GOLD PHIALE
MESOMPHALOS, C. 400 B.C.,
Defendant-in-rem.

Michael H. Steinhardt, Claimant.
Republic of Italy, Claimant.

No. 95 Civ. 10537(BSJ).

United States District Court,
S.D. New York.

Nov. 14, 1997.

Federal government sought civil forfeiture of antique Sicilian gold platter, alleging illegal importation into United States and illegal exportation from Italy. On owner's and government's cross-motions for summary judgment, the District Court, Jones, J., held that: (1) owner had standing; (2) statement on customs form misidentifying Switzerland as platter's county of origin was materially false; (3) innocent owner defense was not available; (4) platter was "stolen" within meaning of National Stolen Property Act; (5) evidence supported finding that importer of platter knew it was stolen; and (6) forfeiture of platter did not violate Eighth Amendment.

Motion granted.

[1] FEDERAL CIVIL PROCEDURE ⇔
2534

170Ak2534

Court deciding cross-motions for summary judgment considers each motion separately, and on each views facts in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[1] FEDERAL CIVIL PROCEDURE ⇔
2543

170Ak2543

Court deciding cross-motions for summary judgment considers each motion separately, and on each views facts in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE ⇔
2547.1

170Ak2547.1

Undisputed material facts properly placed before court on motion for summary judgment will be deemed admitted, unless they are properly controverted by nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[3] FORFEITURES ⇔ 5

180k5

Claimant had standing to challenge civil forfeiture of antique Sicilian gold platter where he exercised actual possession, dominion, and control over platter for several years before federal government seized it and he had financial stake in resolution of forfeiture action.

[4] FORFEITURES ⇔ 5

180k5

To establish standing in civil forfeiture proceeding, claimant must demonstrate some ownership or possessory interest in property at issue.

[5] FORFEITURES ⇔ 5

180k5

Claimant may prove the property interest needed to establish standing to challenge civil forfeiture by actual possession, dominion, control, title, or financial stake.

[6] FORFEITURES ⇔ 4

180k4

Government seeking civil forfeiture bears initial burden of establishing that there is "probable cause," i.e., reasonable grounds rising above level of mere suspicion, to believe that property at issue is subject to forfeiture under any statute.

See publication Words and Phrases for other judicial constructions and definitions.

[6] FORFEITURES ⇔ 5

180k5

Government seeking civil forfeiture bears initial burden of establishing that there is "probable cause," i.e., reasonable grounds rising above level of mere suspicion, to believe that property at issue is subject to forfeiture under any statute.

See publication Words and Phrases for other judicial constructions and definitions.

[7] FORFEITURES ⇔ 5

180k5

Once government seeking civil forfeiture has shown probable cause for forfeiture, burden of proof shifts to claimant to show by preponderance of evidence that property at issue is not in fact subject to forfeiture.

[8] CUSTOMS DUTIES ⇔ 125

114k125

Statute prohibiting making of false statements on customs forms applies only to material false statements. 18 U.S.C.A. § 542.

[9] CUSTOMS DUTIES ⇔ 125

114k125

Importation occurs "by means of" false statement on customs form, and thus the statement is material and violative of customs statute, if statement is made at some significant stage in importation process such that it has natural tendency to influence actions or decisions of Customs Service; materiality determination does not turn on rigid "but for" standard requiring that importation could not otherwise have been achieved. 18 U.S.C.A. § 542.

See publication Words and Phrases for other judicial constructions and definitions.

[10] CUSTOMS DUTIES ⇔ 125

114k125

Fundamental purpose of statute prohibiting making of false statements on customs forms is to ensure full disclosure in importation and thereby maintain integrity of importation process as whole. 18 U.S.C.A. § 542.

[11] CUSTOMS DUTIES ⇔ 125

114k125

Importer's statement on customs form misidentifying Switzerland as country of origin of antique Sicilian gold platter was materially false and thus violated customs statute, even though platter was being imported from Swiss-based art dealer. 18 U.S.C.A. § 542.

[12] CUSTOMS DUTIES ⇔ 130(10)

114k130(10)

Innocent owner defense is not available under statute requiring civil forfeiture of merchandise introduced into United States in violation of statute prohibiting making of false statements on customs forms. 18 U.S.C.A. §§ 542, 545.

[13] RECEIVING STOLEN GOODS ⇔ 2

324k2

Object may be considered "stolen" under National Stolen Property Act if foreign nation has assumed ownership of object through its artistic and cultural patrimony laws. 18 U.S.C.A. § 2314.

See publication Words and Phrases for other judicial constructions and definitions.

[14] ACTION ⇔ 17

13k17

Issues involving interpretation of foreign law are determined by court as matter of law. Fed.Rules Cr.Proc.Rule 26.1, 18 U.S.C.A.; Fed Rules Civ.Proc.Rule 44.1, 28 U.S.C.A.

[15] RECEIVING STOLEN GOODS ⇔ 2

324k2

Antique Sicilian gold platter imported into United States from Swiss-based art dealer belonged to Italy under Italian law, and accordingly was "stolen" within meaning of National Stolen Property Act. 18 U.S.C.A. § 2314.

See publication Words and Phrases for other judicial constructions and definitions.

[16] CUSTOMS DUTIES ⇔ 133(6)

114k133(6)

Evidence that American importer of antique Sicilian gold platter from Swiss-based art dealer knew platter was stolen from Italy when he imported it satisfied government's burden in action for civil forfeiture of platter as stolen merchandise imported in violation of National Stolen Property Act. 18 U.S.C.A. § 2314; Tariff Act of 1930, § 596(c), as amended, 19 U.S.C.A. § 1595a(c).

[17] CUSTOMS DUTIES ⇔ 133(6)

114k133(6)

American importer's invocation of Fifth Amendment at deposition and refusal to

answer any questions regarding purchase or importation of antique Sicilian gold platter allowed court deciding summary judgment motion in action for civil forfeiture of platter to infer that importer knew platter was stolen at time he imported it. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2314; Tariff Act of 1930, § 596(c), as amended, 19 U.S.C.A. § 1595a(c).

[18] CRIMINAL LAW ⇔ 1214

110k1214

Civil forfeiture of antique Sicilian gold platter, on ground that it was illegally imported by means of false statements about its origin on customs forms, did not violate any rights current owner may have had under constitutional prohibition against excessive fines, particularly considering that he had contractual right to full refund of purchase price, that he was not clearly innocent of wrongdoing, that property and offense were coextensive, and that offense at issue was grave. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. §§ 545, 981(a)(1)(C); Tariff Act of 1930, § 596(c), as amended, 19 U.S.C.A. § 1595a(c).

[19] CRIMINAL LAW ⇔ 1213.13

110k1213.13

Eighth Amendment applies to civil in rem forfeitures only where forfeiture constitutes punishment in some part. U.S.C.A. Const.Amend. 8.

[20] CRIMINAL LAW ⇔ 1213.13

110k1213.13

Civil forfeiture of contraband may be characterized as remedial rather than punitive for purposes of Eighth Amendment analysis because it removes dangerous or illegal items from society. U.S.C.A. Const.Amend. 8.

[21] CRIMINAL LAW ⇔ 1213.13

110k1213.13

Forfeiture of contraband imported in violation of customs laws is remedial and does not constitute "punishment" implicating Eighth Amendment. U.S.C.A. Const.Amend. 8. See publication Words and Phrases for other judicial constructions and definitions.

[22] CRIMINAL LAW ⇔ 1214

110k1214

In determining whether forfeiture is excessive under Eighth Amendment, court considers (1) harshness of forfeiture (nature and value of property and effect of forfeiture on innocent third parties) in comparison to gravity of offense and sentence that could be imposed on perpetrator of such offense; (2) relationship between property and offense; and (3) role and degree of culpability of owner of property. U.S.C.A. Const.Amend. 8.

*224 Mary Jo White, U.S. Attorney for the Southern District of New York (Evan T. Barr, Assistant U.S. Attorney), for U.S.

Schulte Roth & Zabel by Michael S. Feldberg, New York City, for claimant Michael H. Steinhardt.

MEMORANDUM & ORDER

JONES, District Judge.

This case involves the forfeiture of an antique gold platter known as a phiale mesomphalos (the "Phiale"). Pending are claimant Michael H. Steinhardt's and plaintiff United States of America's cross motions for summary judgment. For the reasons stated below, summary judgement is granted to the United States.

FACTS [FN1]

FN1. The following facts are from the parties' Statements Pursuant to Local Rule 3(g), and from their affidavits and exhibits. All facts presented, unless otherwise noted, are admitted or uncontroverted by the parties.

For clarity of reading, cites to the record are in footnotes.

The defendant-in-rem is a 4th Century B.C. antique gold platter of Sicilian origin. Its circuitous path to the United States began sometime around 1980, and culminated in the current forfeiture action.

In 1980, Vincenzo Pappalardo, a private antique collector living in Catania, Sicily in Italy approached Dr. Giacomo Manganaro, a professor of Greek history and Numismatics,

for an expert opinion regarding the authenticity of the Phiale, which was in Pappalardo's collection at the time. The Phiale had an inscription along its edge, written in a Greek Doric dialect that had been spoken in the ancient Greek-Sicilian colonies. Based on that inscription and his own study, Dr. Manganaro concluded that the Phiale was authentic and of Sicilian origin. [FN2]

FN2. Report of Information for Testimonial Evidence of Giacomo Manganaro (hereinafter "Manganaro Report") at 1-3; Government Statement Pursuant to Rule 3(g)(hereinafter "Government Statement") at ¶¶ 1, 2; Steinhardt Statement in Opposition to Plaintiff's Statement Pursuant to Rule 3(g)(hereinafter "Steinhardt Response") at ¶¶ 1, 2 (no information as to these facts).

Later in 1980, Pappalardo traded the Phiale to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for art works valued at about 30 million Italian lire (approximately \$20,000). [FN3]

FN3. Transcript of Interrogatory of Person Under Investigation of Vincenzo Cammarata (hereinafter "Cammarata Transcript") at 2-3; Government Statement at ¶ 3; Steinhardt Response at ¶ 3 (no information as to these facts).

In 1991, Cammarata showed the Phiale and a gold-plated silver cup to Silvana Verga, an employee of the Monuments and Fine Arts Bureau in Palermo, Sicily, and to Enzo Brai, an Italian photographer. Cammarata told Verga and Brai that the Phiale and silver cup had been found near Caltavuturo, Sicily during the completion of some electrical work by an Italian utility company. [FN4]

FN4. Transcript of Interrogatory of Person Under Investigation of Silvana Verga (hereinafter "Verga Transcript") at 3; Government Statement at ¶¶ 4-6; Cammarata Transcript at 3-4; Steinhardt Response at ¶¶ 4-6 (no information as to these facts).

Cammarata also gave a photograph of the Phiale to William Veres, an art dealer and *225 personal friend who owned an art dealership company named Stedron based in Zurich, Switzerland. Veres, a specialist in

antiquities, became interested in acquiring the Phiale despite some doubts as to its authenticity, and later acquired the Phiale from Cammarata in exchange for objects worth about 140 million lire (approximately \$90,000). [FN5]

FN5. Cammarata Transcript at 3-4; Government Statement at ¶¶ 7, 9, 17; Steinhardt Response at ¶¶ 7, 9, 17 (no information as to these facts).

Veres brought the Phiale to the attention of Robert Haber, [FN6] an American art dealer and owner of Robert Haber & Company Ancient Art in New York City. [FN7] In November, 1991, Haber traveled to Sicily to meet Veres and to see the Phiale in person. [FN8]

FN6. At a February 1, 1996 deposition, subsequent to the Government's seizure of the Phiale and the commencement of the current action, Haber invoked the Fifth Amendment and refused to answer any questions regarding the purchase and importation of the Phiale. See Deposition of Robert Haber (hereinafter "Haber Deposition").

FN7. Government Statement at ¶ 8; Steinhardt's Response at ¶ 8 (no information as to this fact).

FN8. Travel Itinerary for Robert Haber, submitted as Government Exhibit 4; Government Statement at ¶ 10; Steinhardt's Response at ¶ 10 (admitting this fact).

Haber became interested in the Phiale and believed that claimant Michael Steinhardt, a client of his, might be interested in acquiring it. [FN9] Haber had previously sold Steinhardt 20 to 30 objects, totaling \$4 million to \$6 million in sales. [FN10] Haber told Steinhardt that the Phiale was the twin of one belonging to the Metropolitan Museum of Art in New York City, and that its seller was a Sicilian coin dealer. [FN11]

FN9. Government Statement at ¶ 11; Steinhardt's Response at ¶ 11 (admitting this fact).

FN10. Steinhardt Deposition at 35-36.

FN11. Government Statement at ¶¶ 12, 13;

Steinhardt Response at ¶¶ 12, 13 (admitting this fact).

Thereafter, Steinhardt, with Haber as an intermediary, agreed to purchase the Phiale. Under the final terms of the agreement, as incorporated in a telefax dated December 4, 1991, Steinhardt agreed to pay 1.3 billion lire (over \$1 million) in two equal wire transfer installments plus a 15% commission fee for the Phiale. In total, Steinhardt agreed to pay approximately \$1.2 million to acquire the Phiale, the first installment of which would be wired to Credit Suisse, New York in favor of Veres' Stedron account at Bank Leu in Zurich, Switzerland. [FN12]

FN12. December 4, 1991, Telefax from Laura Siegel, submitted as Government Exhibit 6; Government Statement at ¶¶ 19-23; Steinhardt Response at ¶¶ 19-23 (admitting these facts).

In addition, a one page document entitled "Terms of Sale" and signed by Veres provided that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." [FN13] The Terms of Sale further provided that "[a] letter is to be written by Dr. Manganaro that he saw the object 15 years ago in Switz." [FN14]

FN13. Terms of Sale for the Phiale, submitted as Government Exhibit 5, at ¶ 6; Government Statement at ¶ 18; Steinhardt Response at ¶ 18 (admitting this fact).

FN14. Government Exhibit 5 at ¶ 3; Government Statement at ¶ 18; Steinhardt Response at ¶ 18 (admitting this fact).

The portion of the clause involving Dr. Manganaro's letter had been added by hand by Haber. The original typed language read, "[a] letter is to be written by Dr. Manganaro which is an unconditional guarantee of the authenticity and Swiss origins of the object." Government Exhibit 5 at ¶ 3.

Dr. Manganaro claims that he never agreed to certify that the Phiale was authentic, that it was of Swiss origin, or that he had seen it in Switzerland. Manganaro Report at 4.

On December 6, 1991, Steinhardt wired the first money transfer installment from his account in New York to Veres' Stedron account. [FN15]

FN15. December 6, 1991 Wire Transfer from Steinhardt to Stedron, submitted as Government Exhibit 14; Government Statement at ¶ 24; Steinhardt Response at ¶ 24 (admitting this fact).

On December 10, 1991, Haber flew from New York to Zurich. From there he traveled across the Swiss Alps to Lugano, Switzerland, a town near the Swiss-Italian border that is about a three-hour car drive from *226 Zurich. [FN16] On or about December 12, 1991, Haber took possession of the Phiale from Veres. [FN17] The transfer was confirmed in a commercial invoice signed by Veres and issued by Stedron, describing the object as "ONE GOLD BOWL--CLASSICAL ... DATE--C. 450 B.C.... VALUE U.S. \$250,000." [FN18]

FN16. Government Exhibits 4; Haber's American Express Card account statements, submitted as Government Exhibit 7; Government Statement at ¶¶ 25-26; Steinhardt Response at ¶¶ 25-26 (no information as to these facts).

FN17. December 12, 1991, Commercial Invoice from Stedron, submitted as Government Exhibit 8; Government Statement at ¶ 27; Steinhardt Response at ¶ 27 (admitting this fact).

FN18. Government Exhibit 8; Government Statement at ¶ 27; Steinhardt Response at ¶ 27 (admitting this fact).

On December 13, 1991, Haber sent a two-page fax to Larry Baker at Jet Air Service, Inc. ("Jet Air"), Haber's customs broker at J.F.K. International Airport in New York. The fax included information about Haber's return flight and a copy of the commercial invoice for the Phiale. [FN19]

FN19. Government Statement at ¶¶ 31, 32; Steinhardt Response at ¶¶ 31, 32 (admitting these facts).

Jet Air, in turn, prepared two Customs forms (collectively the "Customs forms"). First, Jet

Air prepared an Entry and Immediate Delivery form (Customs Form 3461) to obtain release of the Phiale by a Customs inspection team prior to formal entry. This form listed the Phiale's country of origin as "CH," the code for Switzerland. Second, Jet Air prepared an Entry Summary form (Customs Form 7501), which also listed the Phiale's country of origin as "CH." In addition, this form listed the Phiale's value at \$250,000, despite the fact that it had just been sold for over \$1 million. The form made no mention of the Phiale's Sicilian origin or of its Italian history. Haber was listed as the importer of record. [FN20]

FN20. Customs Forms 7501 and 3461, submitted as Government Exhibit 10; Government Statement at ¶¶ 33, 34, 37, 38; Steinhardt Response at ¶¶ 33, 34, 37, 38 (admitting these facts).

On or about December 14, 1991, Haber returned from Lugano to Zurich. [FN21] On December 15, 1991, Haber flew from Geneva to J.F.K. International Airport in New York carrying the Phiale. From there, he entered the United States with the Phiale. [FN22]

FN21. Haber's American Express Card account statements indicate that he stayed in a hotel in Lugano on the nights of December 12 and December 13, 1991. See Government Exhibit 7.

FN22. Government Statement at ¶ 36; Steinhardt Response at ¶ 36 (admitting these facts).

On January 6, 1992, Haber or Steinhardt consigned the Phiale to the Metropolitan Museum of Art to determine its authenticity. The museum declared the Phiale authentic and returned it to Haber or Steinhardt on January 24, 1992. [FN23]

FN23. Metropolitan Museum of Art Records Regarding Examination of Gold Phiale, submitted as Government Exhibit 11; Government Statement at ¶¶ 39-41; Steinhardt Response at ¶¶ 39-41 (admitting these facts).

On January 29, 1992, Steinhardt wired the second installment from his New York account to the Stedron account. On March 11, 1992, Steinhardt wired Haber's commission of

\$162,364 to the Stedron account. The commission price had been determined by taking 15% of the purchase price in lire and converting the amount to dollars. [FN24]

FN24. March 6, 1992 Fax from Haber to Steinhardt, submitted as Government Exhibit 12; March 11, 1992 Wire Transfer from Steinhardt to Stedron, submitted as Government Exhibit 13; Government Statement at ¶¶ 44, 45; Steinhardt Response at ¶¶ 44, 45 (admitting these facts).

From 1992 to 1995, Steinhardt possessed the Phiale and displayed it in his home.

PROCEDURAL HISTORY

On February 16, 1995, the Italian Government submitted a Letters Rogatory Request to the United States pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters seeking assistance in (1) investigating the circumstances surrounding the exportation from Italy of the Phiale and its subsequent importation into the United States, *227 and (2) confiscating the Phiale so that it could be returned to Italy.

On November 9, 1995, agents of the United States Customs Service, acting pursuant to a seizure warrant issued by Chief Magistrate Judge Naomi Reice Buchwald, seized the Phiale from Steinhardt's home in New York City. Magistrate Judge Buchwald issued the warrant pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a, finding that the Government had shown probable cause to believe that the Phiale was subject to civil forfeiture.

On December 13, 1995, the United States filed the current civil forfeiture action, seeking forfeiture of the Phiale pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and to 19 U.S.C. § 1595a(c). The Government's Complaint, as amended on February 13, 1995, alleged that the Phiale had been imported illegally into the United States due to the materially false statements provided by Haber in the Customs forms relating to the Phiale's country of origin. In addition, the Complaint alleged that the Phiale had been exported illegally from Italy pursuant to Article 44 of

Italy's Law of June 1, 1939, No. 1089, regarding the Protection of Objects of Artistic and Historic Interest. [FN25]

FN25. The Court has been supplied with a translation of the Italian law as well as an analysis of that law by Avv. Giuliano Berruti, an Italian lawyer and expert on cultural property. See Translation of Italy's Law of June 1, 1939, No. 1089, submitted as Government Exhibit 19; March 5, 1996 Affidavit of Giuliano Berruti, submitted as Government Exhibit 16, and May 10, 1996 Affidavit of Giuliano Berruti, submitted as Government Exhibit 1 of the Government's May 16, 1996 Reply Memorandum of Law (hereinafter collectively "Berruti Reports").

Claimant has proffered no expert opinion on Italian law to controvert Berruti's interpretation.

Pursuant to the Italian law, archaeological finds and objects of antiquity belong to the Italian state, unless a party can establish private ownership of the object pursuant to a legitimate title that predates 1902, the year in which the first Italian law protecting antiquities went into effect.

On December 26, 1995, Steinhardt filed the pending motion for summary judgment against the United States in the forfeiture action, claiming that the Phiale is not subject to forfeiture under 18 U.S.C. §§ 545 or 981(a)(1)(C) or under 19 U.S.C. § 1595a(c). Specifically, Steinhardt contends that any alleged misstatements by Haber at the time of the Phiale's importation were not material, as required by the statutes. Steinhardt further asserts that he is an innocent owner as a matter of law under each of the statutes. Finally, Steinhardt argues that forfeiture of the Phiale would violate the Excessive Fines Clause of the Eighth Amendment.

On May 16, 1996, the United States filed its opposition to Steinhardt's motion and cross-moved for summary judgment. The Government argues that: (1) Steinhardt lacks standing to challenge forfeiture of the Phiale because it belongs to Italy; (2) neither 18 U.S.C. § 545 nor 19 U.S.C. § 1595a(c) provides for an "innocent owner defense;" and (3) forfeiture of the Phiale does not violate the Excessive Fines Clause of the Eighth Amendment.

DISCUSSION

I. The Applicable Standard for Summary Judgment

[1] Summary judgment is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). It is the nonmoving party's burden to "demonstrate to the court the existence of a genuine issue of material fact." *Lendino v. Trans Union Credit Information Co.*, 970 F.2d 1110, 1112 (2d Cir.1992). In deciding cross-motions for summary judgment, the Court considers each motion separately, and on each views the facts in the light most favorable to the nonmoving party. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir.1993).

[2] "A fact is material when its resolution would 'affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party'." *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1452 (2d Cir.1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. *228 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Where undisputed material facts are properly placed before the Court, "those facts will be deemed admitted, unless they are properly controverted by the nonmoving party." *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir.1992).

II. Standing

[3] As an initial matter, the Government contends that Steinhardt lacks standing to challenge forfeiture of the Phiale. The Court disagrees.

[4][5] To establish standing in a civil forfeiture proceeding, a claimant must demonstrate some ownership or possessory interest in the property at issue. *Mercado v. United States Customs Serv.*, 873 F.2d 641, 644 (2d Cir.1989). A claimant may prove this interest "by actual possession, dominion, control, title, or financial stake." *United*

States v. Contents of Account Numbers 208-06070 & 208-06068-1-2, 847 F.Supp. 329, 333 (S.D.N.Y.1994).

It is undisputed that Steinhardt exercised actual possession, dominion and control over the Phiale from the time he took possession of and displayed it his home in 1992 until it was seized on November 9, 1995. In addition, Steinhardt has a financial stake in the resolution of this civil forfeiture action. As these facts demonstrate sufficient ownership of or possessory interests in the Phiale, Steinhardt has standing to contest the Government's forfeiture action.

III. The Relevant Forfeiture Statutes

The Government seeks civil forfeiture of the Phiale pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and to 19 U.S.C. § 1595a(c).

[6][7] The Government bears the initial burden of establishing that there is probable cause to believe that the Phiale is subject to forfeiture under any statute. *United States v. Two Parcels of Property Located at 19 & 25 Castle Street*, 31 F.3d 35, 39 (2d Cir.1994). To meet this burden, the Government must show "reasonable grounds, rising above the level of mere suspicion, to believe that [the] property is subject to forfeiture." *United States v. One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Conn.*, 897 F.2d 97, 101 (2d Cir.1990). Once the Government has met this burden, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the Phiale is not, in fact, subject to forfeiture. *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 487 (2d Cir.1995).

A. 18 U.S.C. § 545

Section 545 of Title 18 of the United States Code prohibits the importation of merchandise in a manner contrary to law. [FN26] The Government contends that Haber violated Section 545 by making materially false statements on the Customs forms in violation of 18 U.S.C. § 542. Specifically, the Government claims that Haber falsely

identified the Phiale's country of origin as "CH" or Switzerland, rather than Italy, on the Customs forms.

FN26. Section 545 provides, in relevant part:

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been brought into the United States contrary to law [shall be guilty of a crime.]

...

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

1. Importation "Contrary to Law"--Violation of 18 U.S.C. § 542

[8] Section 542 of Title 18 of the United States Code prohibits the making of false statements on various documents including Customs forms. [FN27] 18 U.S.C. § 542. For *229 purposes of the statute, an allegedly false statement must be material. See *United States v. Holmquist*, 36 F.3d 154, 157 (1st Cir.1994), cert. denied, 514 U.S. 1084, 115 S.Ct. 1797, 131 L.Ed.2d 724 (1995); *United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir.1990); *United States v. Teraoka*, 669 F.2d 577, 578 (9th Cir.1982).

FN27. Section 542 provides, in relevant part:

"Whoever enters or introduces ... into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, ... or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime .]"

18 U.S.C. § 542.

[9] The parties disagree, however, over the

standard the Court should employ to determine the materiality of Haber's statements on the Customs forms. Steinhardt, citing Teraoka and *United States v. Meldish*, 722 F.2d 26 (2d Cir.1983), cert. denied, 465 U.S. 1101, 104 S.Ct. 1597, 80 L.Ed.2d 128 (1984), urges the Court to apply a rigid "but for" standard, under which the statements in the Customs forms are not material unless the Government can show that but for those statements the Phiale would not have been permitted into the country. [FN28]

FN28. In an argument that merits little response, Steinhardt claims that listing "CH" on the Customs Forms was not a "misstatement of fact" because Customs also received an invoice describing the Phiale as "one gold bowl- classical" and dating the object as "c. 450 B.C." According to Steinhardt, because there was no Switzerland in 450 B.C., the Customs Service was "on notice as to the true origin of the phiale."

This argument is frivolous. The Customs forms required Haber to declare the country of origin of the Phiale. Clearly, an object that has been within the geographic boundary of what is now Italy for over 2000 years, and that was purchased from an Italian dealer in Italy, is "from" Italy. To declare it as being from Switzerland was a misstatement.

The Government, citing Bagnall and Holmquist, argues that a statement is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way." Bagnall, 907 F.2d at 436; see also Holmquist, 36 F.3d at 159 (holding that false statement is material "if it has the potential significantly to affect the integrity or operation of the importation process as a whole").

The standard proposed by the Government is consistent with the language of the statute, which prohibits importations "by means of" false statements. "By means of" implies that a person has made a false statement at some significant stage in the importation process, not that the importation could not otherwise have been achieved. See Holmquist, 36 F.3d at 159 ("by means of" [in Section 542] is not

synonymous with 'because of'").

[10] This standard is also consistent with the fundamental purpose of the statute, which is to "ensure full disclosure in importation and thereby maintain the integrity of the importation process as a whole." Holmquist, 36 F.3d at 160 (citing Bagnall, 907 F.2d at 436). Applying a rigid "but for" standard, as Steinhardt proposes, would thwart this purpose by preventing prosecution of many statements that unquestionably are false and deleterious to the importation process, but nonetheless cannot be proven to be the crucial factor in an object's admission through Customs.

Moreover, this standard is consistent with the materiality standard applied in other false-statement contexts. See, e.g., *Kungys v. United States*, 485 U.S. 759, 770-71, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (applying "natural tendency to influence" standard to 8 U.S.C. § 1451(a), denaturalization statute); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir.) (applying "natural tendency to influence" standard to 18 U.S.C. § 1623, perjury statute), cert. denied, --- U.S. ---, 117 S.Ct. 2484, 138 L.Ed.2d 992 (1997); *United States v. Ali*, 68 F.3d 1468, 1474-75 (2d Cir.1995) (applying "natural tendency to influence" standard to 18 U.S.C. § 1001, false statements statute). [FN29]

FN29. See also *United States v. Kross*, 14 F.3d 751, 753-54 (2d Cir.) (false statements in civil deposition), cert. denied, 513 U.S. 828, 115 S.Ct. 99, 130 L.Ed.2d 48 (1994); *Pacific Indem. Co. v. Golden*, 985 F.2d 51, 56 (2d Cir.1993) (false statements in investigation for insurance litigation); *United States v. Greenberg*, 735 F.2d 29, 30 (2d Cir.1984) (false statements in tax returns); *Goodridge v. Harvey Group Inc.*, 728 F.Supp. 275, 281 (S.D.N.Y.1990) (omissions in Rule 10b-5 shareholder suits).

Having considered these cases and the parties arguments, the Court determines *230 that the standard for materiality under Section 542 is whether the false statement had a natural tendency to influence the actions or decisions of the Customs Service. [FN30]

FN30. Steinhardt's reliance on Meldish does not require a different result. The Meldish court did not address the issue of materiality or express an intent to adopt the "but for" standard discussed in Teraoka. Rather, the court merely cited Teraoka as support for a general description of the underlying purpose of Section 542; nothing in that description is incompatible with the materiality standard applied by the Court here.

[11] Applying this materiality standard here, the Court finds that the statements in the Customs forms--misidentifying Switzerland as the country of origin--were materially false and in violation of Section 542.

Customs' procedures provide that the country of origin is a significant factor in determining whether Customs officials should admit an object, hold it for further information, or seize it as smuggled, improperly declared or undervalued. See Government Exhibit 20, Customs Directive No. 5230-15. Since certain countries have stringent laws to protect their cultural and artistic heritage, identification of such a country raises a red flag to Customs officials who are reviewing Customs forms. Italy is known to be such a country; Switzerland is not.

Truthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity, dated circa 450 B.C., was being exported from a country with strict antiquity-protection laws. This information would have been useful to the agency's determination, and could have prevented Haber from bringing the Phiale into the country illegally. Certainly, such information would have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole.

Based on these facts, the Court concludes that the Government has met its burden of establishing that there is probable cause to believe that the Phiale is subject to forfeiture pursuant to 18 U.S.C. § 545 as merchandise imported contrary to law in violation of 18 U.S.C. § 542.

The burden of proof, therefore, shifts to Steinhardt to show by a preponderance of the evidence that the Phiale is not, in fact, subject to forfeiture.

2. Availability of an Innocent Owner Defense Under 18 U.S.C. § 545

[12] To meet this burden, Steinhardt argues that even if the Phiale is subject to forfeiture pursuant to 18 U.S.C. § 545, he has a complete defense to forfeiture because he is an innocent owner. The Court disagrees, finding that Section 545 does not afford an innocent owner defense.

Property may be subject to forfeiture regardless of the guilt or innocence of its owner. See *Bennis v. Michigan*, 516 U.S. 442, 116 S.Ct. 994, 998-1000, 134 L.Ed.2d 68 (1996) (noting "well-established authority rejecting the innocent-owner defense"). Where, as here, a statute is silent as to the availability of an innocent owner defense, the Supreme Court has made clear that courts should not read such a defense into the statute. *Id.* 116 S.Ct. at 999-1000.

Section 545 contains no express provision for an innocent owner defense. [FN31] Compare 18 U.S.C. § 981(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."). Availability of the defense, therefore, turns on whether there is language in the statute from which to infer such a defense.

FN31. The forfeiture provision of section 545 reads as follows:

"Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

Steinhardt claims that the language "recovered from any person" in Section 545 impliedly limits forfeiture to merchandise in

the possession of an individual who has violated the statute. A review of the legislative history, however, demonstrates that that language *231 relates only to situations where the merchandise to be seized was lost and the Government now seeks to recover its value. It has no relevance to situations, such as here, where the Government seeks forfeiture of the merchandise itself.

Prior to 1954, the statute read, "[m]erchandise introduced into the United States in violation of this section shall be forfeited to the United States." See Act of Sept. 1, 1954, 1954 U.S.C.C.A.N. 3900, 3907. A problem arose when the Government sought to claim the value of merchandise that was unavailable for seizure. See *National Atlas Elevator Co. v. United States*, 97 F.2d 940, 944 (8th Cir.1938) (statute providing "such merchandise shall be forfeited" did not permit Government to retrieve "value of goods which are made subject to forfeiture but which have never been seized"). To address this, Congress amended the statute in 1954 to add the clause "or the value thereof, to be recovered from any person described in the first or second paragraph of this section." See Act of Sept. 1, 1954, 1954 U.S.C.C.A.N. 3900, 3907. By this amendment, Congress meant to allow the Government to reach profits from criminal offenders who had already moved their merchandise beyond the Government's reach. The amendment, however, did not modify the first part of the provision dealing with forfeiture of illegal merchandise itself. *Id.* In such cases, the merchandise is still available for forfeiture and the Government need not seek its value. [FN32]

FN32. Steinhardt's reliance on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and *United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor"*, 691 F.2d 603 (2d Cir.1982), is to no avail. Tintoretto relied on dicta from *Calero-Toledo*—the same dicta now used by Steinhardt—which the Supreme Court has since stated should not be relied on to create an innocent owner defense. *Bennis*, 116 S.Ct. at 999.

As such, Section 545 does not permit an innocent owner defense. Because Steinhardt has not produced any other evidence to support his claim, Steinhardt has failed to meet his burden of showing by a preponderance of the evidence that the Phiale is not subject to forfeiture pursuant to Section 545. Accordingly, the Government's motion for summary judgment pursuant to 18 U.S.C. § 545 is granted.

B. 19 U.S.C. § 1595a(c)

As an alternative basis, the Government argues that the Phiale is subject to forfeiture pursuant to 19 U.S.C. § 1595a(c) [FN33] as stolen property imported contrary to law in violation of 18 U.S.C. § 2314, the National Stolen Property Act.

FN33. Section 1595a(c) provides, in relevant part: "Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

(1) The merchandise shall be seized and forfeited if it—

(A) is stolen, smuggled, or clandestinely imported or introduced."

19 U.S.C. § 1595a(c).

[13] Section 2314 of Title 18 of the United States Code prohibits the importation of merchandise known to be stolen at the time of import. [FN34] 18 U.S.C. § 2314. Under Section 2314, an object may be considered "stolen" if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws. *United States v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), cert. denied, 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir.1974).

FN34. Section 2314 provides, in relevant part: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of a crime]."

18 U.S.C. § 2314.

[14][15] Issues involving the interpretation of foreign law are determined by the Court as a matter of law. See Fed.R.Civ.Proc. 44.1; Fed.R.Crim.Proc. 26.1. Here, having reviewed the relevant Italian law and the submissions of the parties, including the expert opinion of Avv. Giuliano Burruti, see Berruti Reports, the Court concludes that the Phiale belongs to Italy pursuant to Article 44 of Italy's law of June 1, 1939, No. 1089. Accordingly, the Court finds that the Phiale *232 is "stolen" within the meaning of Section 2314.

[16] Next, the Court considers whether the Government has shown probable cause to believe that Haber knew the Phiale was stolen at the time he imported it.

In November, 1991, Haber traveled to Sicily to meet Veres and to see the Phiale in person. Sometime later, he told Steinhardt that the Phiale was the twin of one belonging to the Metropolitan Museum of Art, and that its seller was a Sicilian coin dealer.

In negotiating for the Phiale on behalf of Steinhardt, Haber provided for a full refund if the Phiale was seized by Customs or claimed by a country or governmental agency. He also inserted a provision in the Terms of Sale that Dr. Manganaro would write a letter certifying that he saw the Phiale fifteen years ago in Switzerland. In fact, Dr. Manganaro claims to have never agreed to write this letter.

To acquire the Phiale, Haber took great effort to ensure that the Phiale was not exported directly from Italy. After arriving in Zurich, Haber traveled across the Swiss Alps to Lugano, a town near the Swiss-Italian border that is about a three-hour car drive from Zurich. There, he took possession of the Phiale and received a commercial invoice dating the Phiale as circa 450 B.C. Haber then traveled back to Zurich, rather than to a closer Italian city such as Milan, to fly back to New York.

Upon entry to the United States, Haber, assisted by his customs broker, succeeded in importing the Phiale through the use of two materially false Customs forms.

[17] Finally, following seizure of the Phiale and commencement of the current action, Haber invoked the Fifth Amendment at a deposition and refused to answer any questions regarding the Phiale's purchase or importation. See Haber Deposition. From this fact, the Court can draw an adverse inference against Haber that he knew the Phiale was stolen at the time he imported it. See *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Brink's Inc. v. City of New York*, 717 F.2d 700, 709 (2d Cir.1983).

Based on these undisputed facts, the Court finds probable cause to believe that Haber knew the Phiale was stolen when he imported it. Accordingly, the Government has met its burden of showing that the Phiale is subject to forfeiture pursuant to 19 U.S.C. § 1595a(c), as stolen merchandise imported in violation of 18 U.S.C. § 2314.

Against this finding of probable cause, Steinhardt offers no facts to suggest that the Phiale is not, in fact, subject to forfeiture. Moreover, Section 1595a(c) does not provide for an innocent owner defense. See *Bennis*, 116 S.Ct. at 999-1000.

The Government's motion for summary judgment pursuant to 19 U.S.C. § 1595a(c) is granted. [FN35]

FN35. In view of the Court's findings with respect to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c), the Court need not reach Steinhardt's motion for summary judgment pursuant to 18 U.S.C. § 981(a)(1)(C).

IV. Eighth Amendment

[18] Steinhardt's final argument is that forfeiture of the Phiale violates the Excessive Fines Clause of the Eighth Amendment. The Court disagrees.

[19][20] The Eighth Amendment applies to civil in rem forfeitures only where the forfeiture constitutes punishment in some part. *Austin v. United States*, 509 U.S. 602, 610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993).

Where the seized goods are contraband, however, forfeiture may be characterized as remedial because it removes dangerous or illegal items from society. *Austin*, 509 U.S. at 621 (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (holding that forfeiture of contraband is remedial sanction that does not constitute punishment for double jeopardy purposes)). [FN36]

FN36. See also *Bennis*, 116 S.Ct. at 1004 (Stevens, J., dissenting) (noting that forfeiture of "pure contraband" serves "obvious remedial" purpose of removing illegal items from private circulation).

*233 [21] Goods such as the Phiale imported in violation of customs laws are contraband. See *Bennis*, 116 S.Ct. at 1004 (Stevens, J., dissenting) (characterizing smuggled goods as "pure contraband"). Forfeiture of these goods serves remedial rather than punitive purposes because it prevents forbidden merchandise from circulating in the United States and reimburses the Government for investigation and enforcement expenses. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972). [FN37]

FN37. See also *United States v. Proceeds From Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F.Supp. 385, 391 (S.D.Fla.1993) (forfeiture of lobster tails imported in violation of Lacey Act, 16 U.S.C. § 3371 et seq., characterized as purely remedial because tails were contraband).

Accordingly, forfeiture of the Phiale--contraband imported in violation of the customs laws--is remedial and does not constitute "punishment" implicating the Eighth Amendment. [FN38] See *United States v. \$50,000 in United States Currency*, 93 Civ. 3874, 1994 WL 75145 (N.D.Ill. March 9, 1994) (holding that Eighth Amendment is not implicated in forfeiture of money transported in violation of reporting requirements of 31 U.S.C. § 5317).

FN38. In this connection, the Phiale is not the proceeds of a crime and is more than the instrumentality of a crime. It is, rather, the precise

substance of the unlawful act. As such, Steinhardt's reliance on cases in which the Government seized proceeds from or instrumentalities of a crime is misplaced. See, e.g., *United States v. Van Brocklin*, 115 F.3d 587, 601-02 (8th Cir.1997) (fine and forfeiture of proceeds in bank fraud scheme); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2d Cir.1995) (forfeiture of car lot used to sell stolen car parts); *United States v. Milbrand*, 58 F.3d 841 (2d Cir.1995) (forfeiture of land used as instrumentality in marijuana production), cert. denied, 516 U.S. 1182, 116 S.Ct. 1284, 134 L.Ed.2d 228 (1996).

[22] Even if the Eighth Amendment were implicated, the Court finds that forfeiture of the Phiale would not be unconstitutional. In determining the excessiveness of a forfeiture, the Court considers (1) the harshness of the forfeiture (the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to the gravity of the offense and the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense; and (3) the role and degree of culpability of the owner of the property. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir.1995).

Here, forfeiture of the Phiale is not particularly "harsh." Pursuant to the Terms of Sale, Steinhardt is entitled to a full refund of the purchase price because the Phiale was seized and claimed by both a governmental agency and country. [FN39] At the same time, the offense at issue here is grave; it involves the trafficking of a cultural antiquity by means of false statements.

FN39. Insofar as Steinhardt is innocent of any wrongdoing, his dispute should be with Haber or Veres and not with the Governments of the United States or Italy.

Second, as Steinhardt concedes, the property and offense are coextensive.

Third, the extent of Steinhardt's culpability is unclear. Steinhardt's experience as an art collector (and specifically his experience with Haber) and the fact that, in the purchase

agreement, he provided for the risk of seizure that eventually occurred, both detract from his claim of innocence. Even assuming that he is an innocent owner, however, the Court finds that this third factor is outweighed by the first and second factors.

Accordingly, the Court finds that forfeiture of the Phiale is not unconstitutionally excessive and does not violate Steinhardt's rights, if any, under the Eighth Amendment.

CONCLUSION

For the reasons stated above, the Government's motion for summary judgment pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a(c) is granted.

The clerk is directed to enter judgment.

SO ORDERED.

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97-6319

To be Argued By:
FREDERICK P. SCHAFFER

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

AN ANTIQUE PLATTER OF GOLD, known as a GOLD PHIALE
MESOMPHALOS, C. 400 B.C.,

Defendant-in-rem,

MICHAEL H. STEINHARDT,

Claimant-Appellant,

REPUBLIC OF ITALY,

Claimant-Appellee.

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

BRIEF FOR CLAIMANT-APPELLANT

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PRELIMINARY STATEMENT

This case involves an unprecedented attempt by the United States government to forfeit an antique work of art from an innocent American owner in order to enforce the cultural property laws of a foreign state. Such forfeiture is not supported by the law or the facts, and, if permitted, would place in jeopardy title to works of artistic and archaeological interest owned not only by individual Americans, but also by American museums, galleries and other cultural institutions. Accordingly, Claimant-Appellant Michael H. Steinhardt ("Steinhardt") appeals from the judgment of the United States District Court for the Southern District of New York (Hon. Barbara S. Jones) forfeiting the Defendant-In-Rem Antique Platter of Gold, Known As A Gold Phiale Mesomphalos (the "Phiale") to Plaintiff-Appellee United States of America (the "government") pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c).

STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1345 and 1355. This Court has appellate jurisdiction to review the District Court's decision pursuant to 28 U.S.C. § 1291, because it was a final Order and Judgment granting forfeiture of the Phiale to the government. The Opinion and Order of the District Court was filed on November 14,

1997. (JA 630-60)¹ The Judgment was entered on November 17, 1997.
(JA 661-62) Steinhardt timely filed his Notice of Appeal on December
15, 1997. (JA 663-64)

STATEMENT OF ISSUES ON APPEAL

1. Did the District Court err in granting summary judgment forfeiting the Phiale under 19 U.S.C. § 1595a(c) on the ground that it was imported in violation of the National Stolen Property Act, 18 U.S.C. § 2314, where (a) the violation of Italy's cultural property laws, even if proven, does not make the Phiale "stolen" property; (b) Italy's cultural property laws fail to give fair notice that Italy claims ownership of all archaeological objects regardless of where or when or how they were found; and (c) the enforcement of Italy's cultural property laws by means of the forfeiture statutes relied on by the District Court would be inconsistent with the public policy of the United States, as set forth in the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613?

2. Did the District Court err in granting summary judgment to the United States on its claim for forfeiture of the Phiale under 18 U.S.C. § 545 on the ground that the Customs forms filed for the Phiale contained a material false statement in violation

¹ Citations to "JA ____" indicate the Joint Appendix filed with this brief.

of 18 U.S.C. § 542 by identifying the Phiale's country of origin as Switzerland where the Court applied the wrong standard of materiality and where, in any event, (a) the Customs Service had no legal basis to prevent the importation of the Phiale even if the Customs forms had designated Italy as the country of origin; and (b) at the time the Phiale was imported, the Customs Service had no policy concerning the designation of the country of origin for an antique object and no practice of attempting to enforce the cultural property laws of foreign countries?

3. Did the District Court err in granting summary judgment forfeiting the Phiale without affording Steinhardt an "innocent owner" defense in violation of his right to due process?

STATEMENT OF THE CASE

On October 3, 1995, the United States Attorney, acting pursuant to a Letters Rogatory request from the Republic of Italy, issued a commissioner's subpoena to Steinhardt seeking information concerning the Phiale. Steinhardt, through counsel, began working out the details of subpoena compliance with the government. (JA 296-97)

On November 9, 1995, while those discussions were in progress, Customs agents raided Steinhardt's home and seized the Phiale. (JA 297) The government has retained it since then, advancing seriatim a variety of legal theories to try to justify forfeiture.

The Letters Rogatory request suggested, without supplying evidence, that the Phiale had been excavated in Sicily between 1984 and 1992 in the course of installation of light poles and that such excavation gave Italy rights to the Phiale. (JA 34) The government's first theory, advanced in October 1995 when it issued subpoenas in response to Italy's Letters Rogatory request, was that it could assist Italy in attempting to recover the Phiale under Italy's cultural property laws. In discussions concerning subpoena compliance, the government was advised of the apparent absence of authority permitting the government to use its power in such a manner, and also that Italy appeared to be attempting to circumvent internationally established norms for the recovery of cultural property, embodied in the UNESCO Treaty, to which both Italy and the United States are signatories, which require the payment of compensation for such recovery. (JA 297)

The government's second theory was set forth in the ex parte papers supporting its seizure in November 1995. There the government claimed that the Phiale could be forfeited because a false statement was made concerning its country of origin on the Customs forms filed at the time it was brought into the United States. (JA 30-32)

In response, Steinhardt pointed out to the government that he had nothing to do with the importation of the Phiale into the United States or the filling out of Customs forms, and that in any event the statement regarding country of origin on the Customs forms

was not material. Initially these points were communicated orally to the government. (JA 297) Then, when the government refused either to return the Phiale or to file any formal legal proceedings pertaining to it, Steinhardt filed a motion, pursuant to Fed. R. Crim. P. 41(e), seeking return of the seized property. (Id.) The government refused to confront the motion on the merits, instead raising a raft of procedural objections to the Court adjudicating the motion. (JA 17-20)

When the Court seemed poised to decide the motion, the government initiated an administrative forfeiture proceeding, claiming the filing divested the Court of jurisdiction to decide the Rule 41(e) motion. The government's filing, however, was applicable only to items with a value of less than \$500,000, and thus did not apply to the Phiale. (JA 19-20)

Then, on December 13, 1995, when the Court again seemed poised to decide the Rule 41(e) motion, the government filed this action, effectively mooting the Rule 41(e) motion. (JA 20) The Verified Complaint alleged that the government could forfeit the Phiale pursuant to 18 U.S.C. §§ 545, 981(a)(1)(C) and 19 U.S.C. § 1595a(c) because a false statement concerning country of origin was made on the Customs Entry Form in violation of 18 U.S.C. § 542. (JA 5-12)

On December 21, 1995, Steinhardt filed a Verified Statement of Claim to the Phiale and also moved for summary judgment.

(JA 14-15, 115-17) The government responded by asking for time to take discovery to try to gather evidence to support its claim. Over Steinhardt's objection,² time was granted, and discovery ensued.³

Steinhardt cooperated in the discovery process. He testified fully at a deposition, and produced all of the relevant documents he had. The government also deposed other witnesses and gathered documents. Steinhardt took depositions as well. The government never contended, and there is no evidence to demonstrate, that Steinhardt had anything to do with the importation of the Phiale into the United States or had any knowledge of the country of origin information on the Customs entry forms. In fact, the discovery confirmed that the

² Steinhardt took the position that the government should have had evidence supporting its claim before raiding the home of an innocent American citizen and seizing his property.

³ On January 31, 1996, the Republic of Italy, through New York counsel, also filed a Verified Statement of Claim. (JA 118-19) That Statement set forth no factual basis for Italy's claim of ownership. At a pre-trial conference on February 22, 1996, counsel for Italy represented that Italy would make a filing setting forth the basis for its claim on March 15, 1996, at the time the government responded to Steinhardt's summary judgment motion. However, Italy never made such a filing despite the obvious fact that Italy is in the best position to know the factual basis of any claim it might have to the Phiale. Indeed, Italy's representative -- the Italian official upon whose statement the Verified Complaint rested and whose statement was attached to the Verified Complaint -- was compelled by subpoena to give a deposition, but refused to answer questions seeking to elicit the factual basis for Italy's claim to the Phiale. (JA 298, 446-491)

country of origin designation was made by a customs broker, with whom Steinhardt never had any contact, based on the Swiss letterhead on the commercial invoice that it had been provided by Haber. (JA 346-47) The discovery also confirmed that the country of origin designation on the form was not material, because the Phiale was in fact reviewed by a team of Customs experts at the time it was imported in December 1991 (JA 353-55), and in any event even if the country of origin had been indicated as Italy, there would have been no basis for Customs to prohibit entry.

The government then changed theories again. In its First Amended Complaint filed February 13, 1996, the government returned to the factual allegation that an unidentified confidential informant claimed the Phiale "was discovered during the period 1984-92 in the course of excavations for the installation of electric light poles in a state-protected archaeological area in Caltavuturo, Palermo." (JA 124) Based on that allegation, the government advanced a new legal theory: the Phiale was "stolen" because Italy's cultural property laws vest ownership in the Italian State of cultural objects found in the course of excavations. (JA 130) Thus, the government alleged, the Phiale can be forfeited because its importation into the United States violated the National Stolen Property Act, 18 U.S.C. § 2314. The government provided no evidence to indicate why the confidential informant might be reliable. Indeed, the government's

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case agent admitted at her deposition that: (a) she had no basis to believe the informant was reliable; (b) in her experience some confidential informants are not reliable; and (c) she did not even know who the supposed informant is. (JA 86-87)

In support of its cross-motion for summary judgment, filed on March 15, 1996, the government advanced yet another theory, providing evidence refuting its own earlier claims, but providing no evidence supporting its new theory. Where it previously claimed Italy owns the Phiale because it was found during excavations between 1984 and 1992, the government put forward evidence that the Phiale was in private hands by 1980. (JA 144) The government then argued that Italy owns the Phiale not because it was found in the course of an excavation, but because under Italian law all archaeological items are presumed to belong to the Italian State unless the holder can demonstrate private ownership prior to 1902. (JA 202) On April 19, 1996 Steinhardt submitted further papers in support of his motion for summary judgment and in opposition to the government's cross-motion for summary judgment. (JA 296-495)

In an Opinion and Order dated November 14, 1997, the District Court granted the government's motion for summary judgment on its claims for forfeiture pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c). (JA 630-60) Judgment was entered on November 17, 1997. (JA 661-62)

STATEMENT OF FACTS

The Facts Known To Steinhardt

In late 1991 Steinhardt was contacted by Robert Haber, a Manhattan art dealer. (JA 574-75) Steinhardt, a respected and successful investment fund manager, had begun collecting antiquities in 1987 or 1988. (JA 528) His collection included Peruvian textiles, Chinese textiles, 14th century Ming porcelain, and Judaica. Steinhardt had known Haber since the late 1980's (JA 531) and believed Haber to be a reputable art dealer. (JA 111) Over time, Steinhardt purchased 20 to 30 objects from Haber collectively worth approximately \$4 million to \$6 million. (JA 540)

Haber informed Steinhardt about an antique gold platter he had seen recently. He described this Phiale, meaning "cup" in Greek, as a "third or fourth century Hellenistic object of Greek origin." (JA 546) He told Steinhardt that the Phiale was the "twin" of a phiale owned by the Metropolitan Museum of Art in New York City (the "Metropolitan Museum"), and that the seller of the Phiale was a Sicilian coin dealer. (JA 545)

After some period of consideration, including reviewing a published article about the "twin" in the Metropolitan Museum's collection (JA 548), Steinhardt agreed to purchase the Phiale. The final terms of the agreement were incorporated into a telefax dated December 4, 1991 (JA 169), which provided that Steinhardt would pay

1.3 billion lire (more than \$1 million), plus a 15% commission, for a total purchase price of approximately \$1.2 million. (Id.) The telefax further provided that Steinhardt would pay the purchase price in two installments: the first was to be wired to Credit Suisse in New York for the account of Stedron, a Swiss art dealer, at Bank Leu in Zurich, Switzerland; the second (along with the commission) was to be sent after Steinhardt examined the Phiale and decided to acquire it. (Id.) On December 6, 1991, in accordance with the terms of the Purchase Agreement, Steinhardt wired the first installment of the purchase price in favor of Stedron's account. (JA 197, 553)

Steinhardt was concerned as to whether the Phiale was truly a product of antiquity or was a fake. (JA 336) He therefore arranged for the Phiale to be consigned to the Metropolitan Museum after it arrived in New York City in mid-December.⁴ (JA 188) The museum's experts subjected the Phiale to an analysis, and opined that the Phiale was as authentic as the one in the museum's collection. (JA 560) The museum held the Phiale from January 6, 1992 until January 24, 1992. (JA 189)

⁴ On December 15, 1992, Haber brought the Phiale back to J.F.K. Airport in New York City. The government has not alleged, and there is no evidence in the record to demonstrate, that Steinhardt had any involvement in, or knowledge concerning, the importation of the Phiale into the United States.

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After receiving the Metropolitan Museum's opinion as to the authenticity of the Phiale, on January 29, 1992, Steinhardt wired the second half of the purchase price to the Stedron account. (JA 553) Steinhardt wired Haber's commission of \$162,364 to the Stedron account on March 11, 1992. (JA 196, 553)

After the Metropolitan Museum returned the Phiale to him, Steinhardt displayed the Phiale in his home. (JA 58) It remained there until November 9, 1995, when the Customs Service seized it.

(Id.)

The Facts Not Known To Steinhardt

There is scant evidence concerning ownership of the Phiale up until Steinhardt purchased it. First, the government produced a statement of Giacomo Manganaro, a professor of Greek history and numismatics at the University of Catania. (JA 143) He stated that in 1980, he was asked by Vincenzo Pappalardo, an Italian art collector living in Sicily, to examine a platter in Pappalardo's collection. (JA 144) Prof. Manganaro further stated that he examined the platter, determined that the inscription along the edge of the platter was written in a Greek-Doric dialect spoken in the Greek colonies of ancient Sicily, and therefore determined that the platter was authentic. (Id.)

The government also relied on a statement of Vincenzo Cammarata, a Sicilian coin dealer and art collector, who stated that

he purchased the Phiale from Pappalardo in exchange for various art works worth approximately \$20,000. (150-51) Cammarata claimed that he maintained the Phiale in his private collection until 1991.

(JA 151)⁵ In that year, according to Cammarata, he gave a photograph of the Phiale to William Veres (JA 151), an art dealer and owner of an art dealership called Stedron, based in Zurich, Switzerland.

(JA 572-73) Veres brought the Phiale to the attention of Haber, and in November 1991, Haber traveled to Sicily to see the Phiale with Veres. (JA 574) According to Cammarata, Veres eventually purchased the Phiale in exchange for works of art worth approximately \$90,000.

(JA 152)

Upon seeing the Phiale, Haber believed that Steinhardt might be interested in purchasing it. (JA 575) As set forth above, Haber then contacted Steinhardt to discuss the Phiale, and an agreement was reached whereby Steinhardt would purchase the Phiale for a total price of approximately \$1.2 million.

After Steinhardt wired the first installment of the purchase price of the Phiale, on December 10, 1991, Haber traveled from New York to Zurich. (JA 166) Once there, he traveled to Lugano,

⁵ A third witness, Silvana Verga, an employee of the Monuments and Fine Arts Bureau in Palermo, Sicily, stated that during a visit to Cammarata's home in 1991, the coin dealer showed her the Phiale and a silver cup and that she was told they had been found around Caltavuturo during the completion of some electrical work. (JA 158)

Switzerland. (JA 170-82) On December 13, 1991, Haber sent a two-page fax to his Customs Broker, Jet Air Service, Inc. ("Jet Air").

(JA 183-84). In the fax, Haber included information concerning his return trip to the United States, as well as a commercial invoice dated December 12, 1991. (Id.) The invoice, made out on Stedron letterhead, described the object as "One Gold Bowl -- Classical" and reflected that the object was consigned to Haber. (JA 183) At around this time, Haber took possession of the Phiale.⁶ On or about December 14, 1991, Haber left Lugano and returned to Zurich, and on December 15, 1991, he flew from Geneva to J.F.K. Airport. (JA 185, 589) Haber carried the Phiale with him.⁷ (JA 581)

Jet Air had already drafted two customs entry forms for the Phiale. (JA 185-86) Both forms requested identification of "country

⁶ There is no evidence in the record, and the District Court did not find, that Haber himself brought the Phiale from Italy into Switzerland. Indeed, in its Reply Memorandum of Law below (at p. 10), the government conceded: "It appears that Haber took actual possession of the [Phiale] from Veres." The Italian government learned from Haber during its investigation subsequent to the submission of the parties' motions in this case that it was Cammarata, not Haber, who exported the Phiale from Italy to Switzerland.

⁷ At some point Veres signed a document entitled "Terms of Sale", which contains some changes in Haber's handwriting and which provides that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or government agency whatsoever, full compensation will be made immediately to the purchaser." (JA 168) Steinhardt testified that he never saw this document prior to discovery in this case. (JA 556) There is no evidence to the contrary.

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of origin," (id.) even though the Phiale could have been brought into the country by means of other Customs forms that do not require any such designation. (JA 358-59) Jet Air listed the country of origin on both forms as "CH", the Customs Service's designation for Switzerland, because of the Swiss letterhead on the invoice Haber had faxed to Jet Air. (JA 185-86, 346-47) Jet Air submitted one of the forms, along with the invoice Haber had faxed, to the Customs Service prior to Haber's arrival in the country. (JA 344) Upon review of that form and the invoice, the Customs Service directed that its import specialist team for antiquities review the Phiale. (JA 353)

When Haber arrived, the import specialist team for antiquities conducted an examination of the Phiale. Although aware from the invoice that it was an item of classical antiquity exported from Switzerland, they allowed Haber to bring the Phiale into the United States. (JA 353-355) The government took no further interest in the Phiale until it received the Letters Rogatory request from Italy in February 1995.

STANDARD OF REVIEW

This Court reviews a District Court's grant of summary judgment de novo. Sealey v. Giltner, 116 F.3d 47, 59 (2d Cir. 1997).

SUMMARY OF ARGUMENT

The District Court granted summary judgment in favor of the government on the ground that the Phiale was imported "contrary to

law" and could therefore be forfeited under 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c). The laws that were violated, according to the District Court, were (i) the National Stolen Property Act (the "NSPA"), 18 U.S.C. § 2314 and (ii) 18 U.S.C. § 542. The Court erred as to both.

The District Court held that the Phiale was stolen property within the meaning of the NSPA because it belongs to Italy pursuant to Italy's cultural property laws. However, the theory that property taken in violation of a foreign cultural property law is "stolen" is at odds with the language, purpose and judicial construction of the NSPA and with the more restrained and balanced manner in which Congress has chosen to deal with this issue during the past 25 years. Moreover, the government's theory, by incorporating foreign cultural property laws into the NSPA, would violate fundamental principles of notice and certainty in federal criminal statutes. Finally, under the government's theory the NSPA incorporates concepts of theft under foreign law that should not be granted comity by American courts because they violate the public policy of the United States as set forth in the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13. (See Point I below.)

The District Court also erred in holding that the designation of the country of origin as Switzerland on the Customs entry forms involved a material misstatement in violation of 18 U.S.C.

§ 542. Under that statute, the government must demonstrate that "but for" the alleged false statement, the article in question would not have been admitted into the country. The District Court erred in applying a looser standard of materiality. Moreover, under either standard, the designation of Switzerland instead of Italy as the country of origin was not material because (a) the Customs Service had no legal basis for preventing the importation of the Phiale even if Italy has been listed as the country of origin; and (b) at the time the Phiale was imported, the Customs Service had no policy concerning the designation of the country of origin for an antique object and no practice of attempting to enforce the cultural property laws of foreign countries. (See Point II below.)

Finally, the forfeiture of the Phiale violates Steinhardt's right to due process because he qualifies as an "innocent owner" or, at the very least, there are disputed issues of material fact with respect to that defense. (See Point III below.)

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE ON THE GROUND
THAT IT WAS IMPORTED IN VIOLATION OF THE NATIONAL STOLEN
PROPERTY ACT

A. Property Of Archaeological Interest Imported In Violation Of A Foreign Cultural Property Law Is Not "Stolen" Within The Meaning of the NSPA.

Many "art rich" countries have enacted laws which, through various means, attempt to limit or prevent the exportation of cultural artifacts. Thus, "[s]ome countries simply prohibit the export of all or some categories of art treasures," whereas other countries "require that a license be obtained before some or all works of art are exported." Bator, An Essay On The International Trade In Art, 34 Stan. L. Rev. 275, 288 (1982). Exportation of property of archeological interest in breach of such a cultural property law constitutes a violation of the domestic laws of that nation.

Importation of items of archeological interest in violation of a foreign cultural property export law, however, is not illegal under the laws of the United States. As this court recognized in Jeanneret v. Vichey, 693 F.2d 259, 267 (2d Cir. 1982), the "'fundamental general rule'" is that "'illegal export does not itself render the importer . . . in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another

country.'" (quoting Bator, supra, at 287). Thus, in order to justify the forfeiture of the Phiale under its first theory, the government must establish that it is "stolen" within the meaning of the NSPA.

1. The NSPA Does Not Cover Blanket Assertions Of Property Rights By A Foreign State That Are Inconsistent With American Law And That Would Treat Property As "Stolen" Contrary To The Well Known Legal And Popular Definition Of That Word.

As this Court has recognized: "In using the term[] 'stolen' . . . in the National Stolen Property Act the legislators employed [an] expression[] of 'well and long known legal and popular meaning.'" United States v. Handler, 142 F.2d 351, 354 (2d Cir.), cert. denied, 323 U.S. 741 (1944) (citation omitted). In sum, "the concept of 'stolen' property requires an interference with the property rights of its owner." United States v. Bennett, 665 F.2d 16, 22 (2d Cir. 1981) (emphasis supplied). While courts have read the term "stolen" broadly with regard to the means used to interfere with property rights,⁸ they have refused to construe broadly the property rights covered by the NSPA.

For example, in Dowling v. United States, 473 U.S. 207, (1985), the Supreme Court held that copyright infringement does not

⁸ See, e.g., United States v. Turley, 352 U.S. 407, 408 (1957) ("stolen" "includes an embezzlement or other felonious taking with intent to deprive the owner of the rights and benefits of ownership."); Handler, 142 F.2d at 353 ("stolen" not limited to taking of property through larceny).

fall under the NSPA, concluding that "[w]hile one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run of the mill theft, conversion, or fraud" under the NSPA. Id. at 217-18.⁹ In reaching that conclusion, the Court cautioned that "[d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate." Id. at 213. The Court also noted that it "has stressed repeatedly that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." Id. at 214 (internal quotation marks and citations omitted).

Here, as in Dowling, 473 U.S. at 218, the word "stolen" is "ill-fitting" in respect to the possession of property claimed by a foreign government pursuant to a blanket declaration of ownership as to all archaeological objects. The concept that certain cultural property belongs to the state and is therefore "stolen" when possessed

⁹ See also United States v. Carman, 577 F.2d 556, 565 (9th Cir. 1978) (money placed outside the reach of creditors is not stolen property under the NSPA); Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969, 974 (S.D.N.Y. 1989) (lost profits are not stolen property under the NSPA).

by a private citizen is quite alien to our ideas of private property and due process. The general rule in the United States is that an item of archaeological interest belongs to the owner of the property on which it is found. See United States v. Gerber, 999 F.2d 1112, 1116 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994). Such property does not automatically belong to the government and cannot be taken by the government except upon payment of just compensation.

In United States v. Greco, 298 F.2d 247 (2d Cir. 1962), cert. denied, 369 U.S. 820 (1962), this Court upheld a defendant's conviction under the NSPA for knowingly transporting bonds that had been stolen from a bank vault in Canada. The Court held that the language of the NSPA covered securities "stolen in another country," id. at 251, and assumed that Canadian law considered the securities to be stolen. Id. The Court was careful to point out, however, that the fact that property is "stolen" under foreign law does not automatically render the property "stolen" under the NSPA.

We are not here concerned with the unlikely case where the goods or securities might be "stolen" according to the laws of one of the two countries and yet not be "stolen" according to the laws of the other country.

Id. Here we are faced with precisely that situation. Thus, it simply cannot be said that taking property subject to blanket claims of ownership by a foreign state set forth in its foreign cultural

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property laws falls within the "well and long known legal and popular meaning" of the term "stolen" in the NSPA.

2. Incorporation Of Foreign Cultural Property Laws Into The NSPA Fails To Give Adequate Notice Of The Proscribed Conduct.

It is a fundamental principle of American law that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (citation omitted). It flows from this fundamental principle that the courts "should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." Morissette v. United States, 342 U.S. 246, 263 (1952). To read the NSPA as incorporating foreign concepts of stolen property into the statute would violate this fundamental principle by depriving American citizens of fair notice of what conduct the statute proscribes.

To define "stolen" by referring to the various laws of foreign countries would infuse an unacceptable degree of uncertainty as to what the NSPA proscribes in two distinct ways. First, it would stand the strong presumption in favor of uniform interpretation of federal criminal statutes on its head. It is well settled that in the absence of a clear expression of congressional intent to the contrary, courts will not infer a congressional intent to make the application

of federal law dependent even on state law. See Taylor v. United States, 495 U.S. 575, 591 (1990). Incorporating foreign concepts of stolen property into the NSPA would even more dramatically violate the principle of uniform interpretation of federal criminal statutes.

Second, incorporation of foreign cultural property laws into the NSPA would introduce an unacceptable level of uncertainty into the statute because those laws are inherently vague. Foreign cultural property laws often include both sweeping claims of governmental ownership of cultural property alongside provisions for private ownership of such items. Thus, they often do not clearly delineate the boundaries of what is and is not stolen property. See Point I.B. below.

This is not to say that Congress, if it so chooses, can never make criminal the transportation of property in violation of a foreign law. However, where Congress has desired to make a violation of foreign law a predicate for a violation of a criminal statute, it has done so explicitly. For example, the Lacey Act, 16 U.S.C. §§ 3371-78, which provides criminal liability for the transportation of certain wildlife, explicitly prohibits the transportation of "any fish or wildlife taken, possessed, transported, or sold in any manner in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A) (emphasis supplied).

Because Congress has explicitly incorporated foreign law into one criminal statute concerning the importation of goods, but has remained silent as to foreign law under the NSPA, the Court should conclude that Congress thereby intended to exclude foreign law from the NSPA. In United States v. Azeem, 946 F.2d 13 (2d Cir. 1991), for example, this Court held that foreign offenses are not to be included in the computation of base offense levels under the Sentencing Guidelines where the Guidelines are silent on the matter. The Court reasoned that because other sections of the Guidelines expressly incorporated foreign sentences for upward departures from otherwise applicable sentencing ranges, the failure to expressly include foreign offenses in the computation of base level offenses meant that Congress did not intend that foreign offenses be used to compute base offense levels. Id. at 17. The Court also noted that because some acts may be criminal under foreign law but not under domestic law, introduction of foreign offenses into the computation of base offense levels "would require courts to perform a careful comparative analysis of foreign and domestic law" and would upset the "simplicity" of the Guidelines analysis. Id. The Court refused to take such a step in the absence of a "clear mandate" from Congress. Id. at 18.

The National Stolen Property Act does not make any reference to foreign law; it refers only to "stolen" property. As a result, there is no legal basis to enforce under the NSPA a foreign

government's claim to title to an item of archaeological interest as defined in that country's cultural property laws where, as here, the property would not be considered "stolen" within the usual legal or popular meaning of the word in the United States.

3. **The History Of Federal Legislation In This Area Affords Additional Reasons Not To Extend The National Stolen Property Act To Property Covered By Foreign Cultural Property Laws.**

In Dowling, 473 U.S. at 221-26, the Court took into account the history of copyright infringement provisions in holding that the NSPA does not cover interstate shipments of goods that infringe the copyright laws. The Court noted in particular that "[n]ot only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, . . . but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." Id. at 221. The Court therefore rejected the government's theory because it "presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly." Id. at 226. The same is true of the government's theory here.

a. **The UNESCO Convention**

In response to increasing concerns about the international traffic in stolen cultural property, in 1972 the United States entered into the Convention on the Means of Prohibiting and Preventing the

Illicit Import, Export, and Transfer of Ownership of Cultural Property (the "UNESCO Convention"), 823 U.N.T.S. 23 (1972). The UNESCO Convention, an international agreement eventually ratified by more than 80 countries, including Italy, see 19 C.F.R. § 12.104b, sets forth general principles for international cooperation in the protection of cultural property.

The UNESCO Convention's primary "enforcement" mechanism is contained in Article 9, which provides that a State Party whose cultural patrimony is in danger of pillage may call upon other State Parties for cooperation in the protection of its endangered archaeological or ethnological materials. Article 9 was inserted into the treaty at the insistence of, among other countries, the United States. See Bator, supra, at 339-40. Because of Article 9, the UNESCO Convention does not bind the United States to enforce the export control laws of foreign nations as violations of American law. Rather, it commits the United States to entering into agreements to adopt protections for the cultural property of other nations under American law.

The UNESCO Convention was not self-implementing, and over the decade following its ratification, Congress debated the proper implementing legislation. It eventually agreed upon a statute which, as the product of extensive congressional debate and lobbying by

interested parties, expresses the policy choices and careful balancing of interests that Congress arrived at after due deliberation.

b. The Cultural Property Implementation Act

The Convention On Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601-2613, which became law in 1983, established a comprehensive scheme for dealing with cultural property claimed by parties to the UNESCO Convention.

The CPIA embodies two fundamental policies. The first is Congress' intent that the United States will not blindly enforce foreign cultural property laws. The legislative history unambiguously records Congress' intent that "the United States reach an independent judgment regarding the need and scope of import controls" and directs that "U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations." S. Rep. No. 97-564. (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4104 (the "Legislative History") (emphasis supplied). As such Congress made clear that:

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.

Id.

The CPIA effects this policy by authorizing the President to enter into agreements with a State Party to apply import restrictions to archaeological or ethnological material of the State Party, but only if the President determines that certain specific conditions are present. 19 U.S.C. § 2602(a).¹⁰ In addition, the CPIA provides that the President may apply import restrictions to archaeological and ethnological material of any State Party if he determines, pursuant to a request from a State Party, that an "emergency condition" exists as to such material. 19 U.S.C. § 2603. In this manner, the CPIA "limit[s] the effects of [the UNESCO Convention] in the United States by requiring an independent U.S. investigation and determination of the gravity of the allegedly illicit traffic before action is taken under the Convention." John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 Am.J.Int'l L. 831, 845 n.46 (1986).

¹⁰ Those conditions are as follows: (i) "the cultural patrimony of the State Party is in jeopardy from pillage of archaeological or ethnological materials of the State Party", 19 U.S.C. § 2602(a)(1)(A); (ii) "the State Party has taken measures consistent with the [UNESCO Treaty] to protect its cultural patrimony", 19 U.S.C. § 2602(a)(1)(B); (iii) designation of the material, "if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations having a significant import trade in such materials, would be of substantial benefit in deterring a serious situation of pillage", 19 U.S.C. § 2602(a)(1)(C)(i); (iv) less drastic remedies are not available, 19 U.S.C. § 2602(a)(1)(C)(ii); and (v) designation of the material "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)(D).

The CPIA evidences a second and related public policy -- to ensure that American importers are given fair notice as to which material is subject to import restrictions. The CPIA specifies that when the President enters into an agreement or declares an "emergency condition" to place import restrictions on designated archaeological or ethnological material, he must provide notice to American importers by identifying the designated material in federal regulations. The statute further provides that such notice "shall be sufficiently specific and precise to insure that (1) the import restrictions . . . are applied only to the [designated material]; and (2) the notice is given to importers and other persons to what material is subject to such restrictions." 19 U.S.C. § 2604. By requiring public notice of the specific materials designated for protection under the statute, the CPIA serves to provide "importers and other interested parties . . . fair notice of what archaeological or ethnological material is subject to export restrictions." Legislative History at 4106.

Since the enactment of the CPIA, a number of nations have obtained U.S. approval of their requests for protection under the Act.¹¹ The Republic of Italy has never sought the designation of any

¹¹ The President has designated for protection under the CPIA "[a]rcheological material representing Prehispanic cultures of El Salvador." 19 C.F.R. § 12.104g. In addition, the President has

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of its archaeological or ethnological material for protection under the CPIA. Nor has it ever requested the declaration of an "emergency condition" with respect to any such material.

The CPIA contains two other provisions that indicate the balanced and cautious approach Congress intended to deal with foreign cultural property. First, in a section entitled "Stolen cultural property", the CPIA bars the importation of any "article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution." 19 U.S.C. § 2607. Thus, Congress chose quite clearly not to cover cultural property owned or exported in violation of a foreign cultural property law, but rather to limit that section to cultural property stolen from a cultural institution.¹²

Second, although the CPIA provides for the forfeiture of cultural property imported into the United States in the absence of proper documentation, as well as property stolen from a cultural

declared an emergency condition with respect to materials from four other nations: Bolivia, Guatemala, Mali and Peru. Id.

¹² Furthermore, in any forfeiture action for violation of this section of the CPIA, the government bears the burden of establishing that the material was documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in a State Party and that it was stolen from such institution. 19 U.S.C. § 2610.

institution, the State Party is generally required to compensate an innocent owner of the forfeited article. 19 U.S.C. § 2609(c)(1).¹³

In sum, the CPIA contains carefully calibrated provisions and limited remedies which require (i) an independent determination by the President as to the need to protect designated archaeological or ethnological material, (ii) fair notice to American importers, and (iii) compensation for innocent owners. In light of those provisions, the government should not be permitted to use the NSPA, on behalf of Italy, to achieve "an indirect but blunderbuss solution to a problem treated with precision when considered directly" by Congress.

4. **McClain Was Wrongly Decided And Should Not Be Extended To Permit The NSPA To Be Used, For The First Time, As The Basis For A Forfeiture Of An Archaeological Object Because Of An Alleged Violation Of A Foreign Cultural Property Law.**

The District Court ordered the Phiale to be forfeited as stolen property because Haber knowingly brought it into the United States in violation of Italian cultural property laws based on the holding in United States v. McClain, 545 F.2d 988 (5th Cir.)

("McClain I"), reh'g denied, 551 F.2d 52 (5th Cir. 1977). That

¹³ The sole exception to the requirement of compensation is where the claimant does not establish title to the article and the State Party would in similar circumstances recover and return an article stolen from an American cultural institution without requiring the payment of compensation. 19 U.S.C. § 2609(c)(1)(B). There is no evidence that that exception would apply here.

decision was wrong and has not been followed in any subsequent case involving an alleged violation of the NSPA.

In McClain I the defendants had engaged in a scheme to excavate pre-Columbian artifacts from Mexican soil, smuggle them into the United States by means of bribes and false paperwork, and then sell the artifacts in this country. The government alleged that the artifacts the defendants had transported from Mexico to the United States were the property of the Mexican state under a series of Mexican cultural property acts, so that the importation of the artifacts constituted transportation of stolen property under the NSPA. Facing a question of first impression, the Fifth Circuit held that as a matter of law, "stolen" property under the NSPA includes "art objects or artifacts declared to be the property of another country and illegally imported into this country," 545 F.2d at 997.¹⁴

The court, however, reversed the NSPA convictions on the grounds that the government had failed to demonstrate that the Mexican law unambiguously vested ownership of the cultural artifacts in the

¹⁴ In United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974), the Court upheld the defendant's conviction under the NSPA for transporting pre-Columbian artifacts out of Guatemala in violation of that nation's cultural property laws. Hollinshead, however, did not pass on whether the NSPA could be used to enforce a violation of a foreign cultural property law, as the issue was apparently not raised there. Moreover, Hollinshead's conduct was akin to true "theft," because the artifacts he stole were part of a government archeological site. See Bator, supra, at 346.

Mexican state, and had thereby failed to sustain its burden of demonstrating that the artifacts were "stolen" property under the NSPA. In a second ruling after re-trial, the Fifth Circuit again reversed the NSPA convictions on the same grounds. United States v. McClain, 593 F.2d 670 (5th Cir.), cert. denied, 444 U.S. 918 (1979) ("McClain III"). The Court upheld only a conspiracy count based on a scheme that arose after the effective date of a 1972 law that clearly vested ownership of the artifacts in the Mexican government. Id. at 671.

McClain's holding that a foreign nation's legislative declaration of ownership over cultural property is sufficient to impose liability under American law erodes the basic distinction, reflected in the UNESCO Treaty and later in the CPIA, between illegally exported antiquities and stolen antiquities. As Professor Bator explained:

A blanket legislative declaration of state ownership of all antiquities, discovered and undiscovered, without more, is an abstraction -- it makes little difference in the real world. Yet McClain gives this abstraction dramatic weight: Illegal export, after the adoption of the declaration, suddenly becomes "theft." The exporting country, without affecting any real changes at home, can thus invoke the criminal legislation of the United States to help enforce its export rules by simply waving a magic wand and promulgating this metaphysical declaration of ownership.

Bator, supra, at 350-51.

McClain's misreading of the NSPA may be excused because the court was acting without the benefit of a definite congressional pronouncement on the protection of foreign cultural property. Since the McClain decision, however, Congress has done just that with the passage of the CPIA. As set forth above, the CPIA makes clear that a blanket claim of ownership of cultural property is not given force under American law.

Since McClain, there has not been a single reported case of a prosecution under the NSPA for the importation of cultural property that is alleged to be the property of a foreign state under a foreign cultural property law. Nor has there ever been a reported case in which McClain was relied upon to forfeit cultural property under U.S. forfeiture law.¹⁵

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¹⁵ There have been several civil actions for replevin and interpleader actions in which foreign governments have attempted to recover items allegedly taken in violation of those nations' cultural property laws. See, e.g., United States v. Pre-Columbian Artifacts, 845 F. Supp. 544 (N.D. Ill. 1993) (interpleader action to determine whether art collectors or government of Guatemala were owners of pre-Columbian artifacts allegedly taken in violation of Guatemalan cultural property law); Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass 1992) (action for replevin and conversion of coins allegedly taken in violation of Turkey's cultural property law); Government of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub. nom. Government of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991) (claim for conversion of pre-Columbian artifacts allegedly taken in violation of Peru's cultural property law). Although the decisions in those cases cited McClain, none them involved either a criminal prosecution or a forfeiture proceeding based on an alleged violation of the NSPA.

Here, the government has taken the unprecedented step of attempting to forfeit a valuable antiquity from an American citizen based on the holding of McClain. However, the application of McClain to a civil forfeiture proceeding underscores that court's error in allowing the NSPA to be used to enforce foreign cultural property laws. The McClain court reasoned that its holding neither violated the principle of uniformity of interpretation of federal criminal statutes nor introduced an impermissible degree of uncertainty into the definition of criminal conduct because of the scienter requirement under the NSPA. According to the court, the requirement that the government prove beyond a reasonable doubt that the importer knew the property to be stolen would protect a defendant "who might otherwise be trapped" by differences in foreign law, and would "eliminate the possibility that a defendant is convicted for an offense he could not have understood to exist." 545 F.2d at 1002 n.31.

The McClain court obviously did not foresee that its construction of the NSPA might apply with equal force to civil forfeiture proceedings, in which the government need only demonstrate the underlying criminal conduct by a probable cause standard. That low burden of proof eviscerates the scienter requirement as a bulwark against the harms caused by incorporating diverse and inherently vague foreign cultural property laws into an American criminal statute. That is especially true where, as here, the government seeks to

forfeit the object not from the importer, but from a purchaser who has far less ability to prove by a preponderance of the evidence that the importer did not know that the object was "stolen" under some foreign cultural property law.

Thus, even if McClain were not wrongly decided, it should not be extended to forfeiture proceedings against an object that is no longer in the hands of the alleged wrongdoer.

B. Italian Law Does Not Vest Title To The Phiale In The Republic of Italy In A Manner Consistent With Basic Standards of Fair Notice.

Even if there were merit to the government's legal theory based on McClain -- that is, the Phiale was "stolen" within the meaning of the NSPA because of a violation of Italian cultural property laws -- this forfeiture action should be dismissed because those laws do not vest title to the Phiale in the Italian State with sufficient clarity to give fair notice to an American purchaser like Steinhardt.

- 1. Due Process Requires That Italy's Claim Of Ownership Be Supported By Clear And Unequivocal Language In Italy's Cultural Property Laws.**

In order for the government to prove that the Phiale was "stolen" from Italy, the government must demonstrate not only that Italian law vests title to the Phiale in the Italian state, but also that it does so in a manner consistent with American standards of fair notice. Indeed, as set forth above, in McClain the Fifth Circuit

twice reversed the defendants' NSPA convictions because the government, while proffering expert testimony that Mexican law vested ownership of the subject artifacts in the Mexican state, failed to prove that Mexican law was "clear and unequivocal in claiming ownership" of the artifacts. 593 F.2d at 670-71. In reaching this conclusion, the court relied upon the fact that "a literal translation of the Mexican statutes into English would mislead those not familiar with Mexican law into thinking that such movables had been capable of being privately owned." Id. The court acknowledged that "[i]t may well be, as testified so emphatically by most of the Mexican witnesses, that Mexico has considered itself the owner of all pre-Columbian artifacts for almost 100 years," but held that Mexico "has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens." Id. at 670-71. The Court concluded that "the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards." Id. at 670 (emphasis supplied).

Similarly, in a civil action to recover cultural property allegedly taken in violation of the NSPA, Government of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom., Government of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), the court held that even though the Peruvian cultural property law at issue expressly

stated that cultural artifacts in historical monuments are "the property of the State," and further provided that unregistered artifacts "shall be considered to be the property of the State," the law failed to satisfy the McClain standard because other provisions in Peruvian property law contradicted these seemingly unambiguous declarations by permitting items to remain in private hands and be transferred. Id. at 813-14.

The holdings in the McClain and Peru cases correctly apply basic principles of fair notice. The Supreme Court has held that where "the governing standard" for imposition of a civil remedy "is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage." Crandon v. United States, 494 U.S. 152, 158 (1990) (applying rule of lenity in civil action by United States to recover monies allegedly paid to defendants in violation of 18 U.S.C. § 209(a)). The rule of lenity provides that a court should "resolve[] . . . ambiguity in a criminal statute as to apply it only to conduct clearly covered," United States v. Lanier, 117 S.Ct. 1219, 1225 (1997), and "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." Crandon, 494 U.S. at 158 (citations omitted). Likewise, the related vagueness doctrine "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that

men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Lanier, 117 S.Ct. at 1225 (citation omitted). These doctrines are especially important where, as here, the statute defining liability is a foreign cultural property law.

2. **Italian Law Fails To Give Fair Notice of Italy's Claim To Own The Phiale.**

The District Court uncritically adopted the government's argument that "[p]ursuant to the Italian law, archaeological finds and objects of antiquity belong to the Italian state, unless a party can establish private ownership of the object pursuant to a legitimate title that predates 1902, the year in which the first Italian law protecting antiquities went into effect." (JA 640, n.25) That interpretation of Italian law was based on two affidavits submitted by Professor Guiliano Berutti. (JA 200-12; 496-519) However, that statement of Italian law appears nowhere in the text of the statutes cited by Prof. Berutti. Indeed, the provisions of Italian law are contradictory and ambiguous in defining Italy's claim to ownership of items of archaeological interest.¹⁶

¹⁶ This court reviews a district court's determination of foreign law *de novo*. Seetransport Wiking Trader v. Navimpex Centrala Navala, 29 F.3d 79, 81 (2d Cir. 1994). Contrary to the District Court's suggestion (JA 640 n.25), the fact that Steinhardt did not provide an expert opinion on Italian law is no basis for adopting the opinion of the government's expert without analyzing the legal issues Steinhardt identified. See Ackermann v. Levine, 788 F.2d 830, 838 n. 7 (2d Cir. 1986) ("[F]oreign law is to be determined by the court, in light of

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Prof. Berutti's affidavit reads a clarity and order into Italian law that simply is not there. He begins by citing Article 826 of the Italian Civil Code. (JA 200-01) That law provides that "things of historical, archaeological, paleoethnological, paleontological and artistic interest, by whoever and however discovered in the subsoil . . . are part of the nondisposable patrimony of the State." (JA 310) That language does not state unambiguously that it is impossible for a private person to acquire a right to or interest in such property, although Prof. Berutti asserts, without citation, that that is what it means. (JA 200-01) Moreover, Article 826 by its terms applies only to things "discovered in the subsoil." The government never offered any competent evidence that the Phiale was found in the subsoil of Italy.¹⁷ Recognizing this

both evidence admitted and the court's own research and interpretation.").

¹⁷ In paragraph 5 of both the Verified Complaint and the First Amended Complaint, the government alleged that the Phiale "was discovered during the period 1984-92 in the course of excavations for the installation of electric light poles in a state-protected archaeological area near Caltavuturo, Palermo." (JA 7; 124) However, that allegation is contradicted by the statement of Manganaro, on which the government also relies, that he saw the Phiale in 1980 in the private collection of Pappalardo in Catania. (JA 144) The government's sole basis for claiming that the Phiale was found in the subsoil is the statement of Silvana Verga, who claims she visited Cammarata in 1991 at which time "I was told [presumably by Cammarata] that [the Phiale] had been found around Caltavuturo during the completion of some electrical work by the E.n.e.l." (JA 158) This testimony is utterly incompetent, as there is no basis for knowing the source of the declarant's knowledge. See United States v. Parcels of Real Property, 913 F.2d 1,3 (1st Cir. 1990) (hearsay evidence can

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defect in proof, Prof. Berutti cites to a single case holding that "archaeological items belong to the Italian State even if they were not found in the soil." (JA 201)¹⁸ However, that decision, if it means what Prof. Berutti says it means, contradicts the plain language of Article 826. No American reading an English translation of Article 826 would have notice of such an interpretation.

Prof. Berutti then turns to the Law n. 1089 of June 1, 1939 ("the 1939 Law"), upon which the government primarily relies. (JA 201-03)¹⁹ Prof. Berutti first cites to sections of that law which provide that archaeological items found in the course of archaeological excavations belong to the State. (JA 201) As noted above, there is no competent evidence that the Phiale was discovered

support a judgment of forfeiture only "if there is a substantial basis for crediting the hearsay." (citation omitted). In fact, in his statement Cammarata denies that the Phiale was excavated. (JA 152) Furthermore, Verga's credibility is called into grave doubt by her admission to having systematically looted the museum at which she worked of several valuable works of art. (JA 156-162)

¹⁸ Elsewhere, Berutti acknowledges that under Article 826 of the Italian Civil Code items of archeological interest that are "found by anyone and in whatever manner in the Italian soil, are part of the inalienable patrimony of the State." (JA 200) (emphasis supplied)

¹⁹ In Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982), this Court, in examining provisions of the 1939 Law, expressed sympathy with the conclusion of the District Judge in that case that despite testimony by several experts "he was 'unable to determine what the Italian law is.'" Id. at 265. As demonstrated below, Judge Friendly's observation in Jeanneret that one section of the law at issue there "speaks with the clarity of the Delphic oracle," id. at 262, could be applied to the provisions of the 1939 Law that are relevant here.

as a result of an excavation. Moreover, Article 44 of the 1939 Law provides that the owner of property on which archaeological objects are found has the right to be compensated by the Ministry of National Education, "in cash or through release of part of the works found." (JA 313) Similarly, Articles 45 and 49 provide that the discoverer of archaeological objects is to be compensated by the Ministry of National Education "in cash or through release of part of the works found." (JA 313-14; 316) Thus, the 1939 Law expressly provides for private ownership of archaeological objects.

Prof. Berutti's assertion that the Italian State is automatically the owner of all archaeological property is also contradicted by the provisions of the 1939 Law dealing with "notification." Article 3 provides that the Ministry of National Education "notifies in administrative form the private owner, possessor or holder under title, the things listed under Article 1 [including property of archaeological interest] which are of particular important interest." (JA 236) As Prof. Berutti acknowledges, such notification creates a "lien" on properties "having historical and cultural interest which are not by right the property of the Italian State." (JA 202) (emphasis supplied) Such lien does not vest title in the Italian State but only limits the exercise of property rights "by the owner" and provides an "option" which is "of particular importance" to the Italian State (JA 202) -- i.e., the

right to purchase the item.²⁰ See McClain I, 545 F.2d at 998 (provisions of Mexican cultural property law granting government right of first refusal to purchase artifacts were inconsistent with government's claim to ownership of all such artifacts); McClain III, 593 F.2d at 668 n.13 (provisions of Mexican cultural property law establishing government's authority to acquire from private owners artifacts found outside of context of archaeological excavations were inconsistent with government's claim to own all such artifacts).

Thus, the notification provisions of the 1939 Law clearly contemplate the possibility of private ownership of items of archaeological interest. Indeed, none of those provisions would be necessary if, as Prof. Berutti contends, the Italian State already owned all archaeological items, and private ownership of such items were not possible. See McClain III, 593 F.2d at 668 n.14 (noting government's failure to explain "the statutory declarations of ownership of some items [of cultural property] if the government supposedly owned all types of artifacts already.").

²⁰ Subdivision II of the 1939 Law (Articles 30-34) concerns "Things belonging to private individuals." Article 30 provides that an owner of an object subject to notification that the item is of historical or cultural interest must report to the government any intended transfer of its ownership interest in the property. Article 31 then gives the government a right of first refusal. Similarly, Article 36 requires that one seeking to export items falling under Article 1 must obtain an export license, but Article 39 provides that the government has the right to purchase the item at the price stated on the export license application. (JA 202-03, 238-39)

Prof. Berutti concedes as much when he states: "The ownership by private citizens of archaeological findings is therefore an exceptional hypothesis, although, in theory, it might be verified." (JA 202) (emphasis supplied) Prof. Berutti seeks to avoid the implications of that concession by arguing that in reality, "ownership by a private citizen is possible only in marginal cases, and in particular for archaeological findings which were made prior to 1902 or, at best, prior to 1909." (Id.) The significance of those dates rests on the claim that the right of the Italian State to archaeological items was first established by Law n. 364 of June 20, 1909 (the "1909 Law") and Law n. 185 of June 12, 1902. (JA 201) According to Prof. Berutti, those laws deal only with rights to objects found during archaeological excavations.²¹ (Id.) Moreover, Professor Berutti goes on to state that the 1909 Law contemplates a division of the items so found, with one quarter of them going to the owner of the land or the researcher. (Id.) Private ownership of archaeological items therefore appears to be possible under that law. Significantly, Prof. Berutti again relies on a court decision, not statutory language, for the proposition that a private citizen cannot

²¹ Neither Prof. Berutti nor the government submitted the text or the English translation of those earlier laws.

have property rights in archaeological items unless possession by a private citizen existed prior to 1902. (JA 202)

Thus, the text of the several cultural property laws discussed by Prof. Berutti do not state clearly and unequivocally that all items of archaeological interest belong to the Italian State. Likewise, none of those laws contains language establishing the alleged presumption that all such items are considered stolen unless the private citizen sustains the burden of proving "by irrefutable evidence" the existence of a legitimate title to them existing prior to 1902. On the contrary, those Italian laws, on their face, clearly contemplate private ownership of items of archaeological interest and contradict the claim that all such items belong, as a matter of law, to the Italian State.

Finally, it is doubtful that under Italian law the Italian State has any continuing right to an archaeological object or that it is considered "stolen" once it has been sold to an innocent owner and exported. The criminal penalties for illegal exportation under the 1939 Law are set forth in Article 66. A case annotation to Article 66(b) reflects a decision of Italy's Constitutional Court holding that the penalty of confiscation for illegal export is unconstitutional as

applied to a third party, "who is not the person who committed the crime and did not derive any profit therefrom." (JA 243)²²

Prof. Berutti concedes that "[t]he Constitutional Court has correctly affirmed that the criminal sanction cannot be applied to a third party (i) who is not responsible for the crime and (ii) who has not profited from the crime itself." (JA 501) Nevertheless, Prof. Berutti argues that that decision does not relate to property rights but only to the application of the criminal penalty of confiscation. (Id.) However, even if that were true, Italy would appear to have no means of obtaining possession of an object that has been sold to an innocent party and exported other than through confiscation.²³ In any event, if Italian law does not permit forfeiture of an archaeological item against an innocent Italian owner who is trying to export it, it

²² A certified translation of that decision is set forth in the Appendix to this Brief. The defendants in those cases were persons who were innocent owners of works covered by the 1939 Law who were seeking to export those works. The rationale for the decision was that "under Article 27, Section 1, of the Constitution, it is not permissible to confiscate items involved in a crime, where, at the time when the confiscation should be ordered, their owner is not the perpetrator of the crime or has not benefited from the crime in any way." (Opinion, p. 9)

²³ The only other remedy that might be available to Italy in this situation is the option of purchasing the object from the innocent owner under Article 31 or Article 39 of the 1939 Law. See note 20 above. Here the Italian State has never offered to purchase the Phiale from Steinhardt and therefore has no possessory interest in it.

is hard to fathom why an American court should order forfeiture against an innocent American owner to whom it was exported.

In sum, Italian law is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." United States v. Lanier, 117 S.Ct. at 1225. It does not clearly state that cultural artifacts are presumed to be stolen unless a private owner can demonstrate a chain of title reaching back to the beginning of the century. In fact, the text of the law does not say any such thing at all. Thus "a literal translation of the [Italian] statutes into English would mislead those not familiar with [Italian] law" to think that no such presumption exists. McClain III, 593 F.2d at 670. Therefore, while "[i]t may well be, as testified so emphatically by [Prof. Berutti] . . . that [Italy] has considered itself the owner of all . . . artifacts for almost 100 years," the fact is that Italy "has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens." Id.

Because the government cannot establish that the Italian law gives fair notice of a presumption that all items of archaeological interest belong to the Italian State, its NSPA claim must fail as a matter of law.²⁴

²⁴ The government must also demonstrate that Italy would have imposed liability upon one of its own citizens for the same conduct

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C. U.S. Courts Should Not Enforce Italy's Cultural Property Laws As A Matter Of Comity Because They Violate U.S. Public Policy As Set Forth In The Cultural Property Implementation Act.

U.S. courts are not required to enforce foreign law, but may do so as a matter of comity. "International comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" Pravin Banker Associates, Ltd., v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)). While the courts have "long recognized the principles of international comity," nonetheless "comity remains a rule of 'practice, convenience, and expediency' rather than of law." Id. (citation omitted).

U.S. courts will refuse to afford comity to foreign law where to do so would violate a fundamental U.S. public policy. As this Court recently re-affirmed, "[n]o nation is under unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." Id. (quoting Laker

relied upon to deprive Steinhardt of his Phiale. Otherwise, Italy's cultural patrimony laws, even if they purport to vest title to archaeological objects in the Italian State, are in reality nothing more than export laws and therefore not enforceable by American courts. See Government of Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Cal. 1989), aff'd sub nom., Government of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991). The evidence on which the government relies for this forfeiture proceeding clearly incriminates Cammarata. Moreover, Italy apparently knew of Cammarata's ownership of the Phiale even before he sold it. (JA 158) Nevertheless, it was not until last month -- more than two years after this action was initiated and nearly three years since Italy's Letters Rogatory request -- that Italy initiated a criminal action against Cammarata.

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Airways, Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909, 937

(D.C. Cir. 1984)). "'Thus, from the earliest of times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.'" Id. See also Allied Bank Int'l v. Banco Credito Agricola De Cartago, 757 F.2d 516, 522 (2d Cir. 1985) (foreign laws "should be recognized by the courts only if they are consistent with the law and policy of the United States.").²⁵

To determine U.S. public policy with regard to the forfeiture of cultural property, the Court need not look any further than the CPIA. As set forth in Point I.A. above, the CPIA incorporates two fundamental public policies: (i) the United States will not

²⁵ This Court has refused to enforce foreign laws that would deprive American citizens of property in contravention of a fundamental U.S. public policy. See, e.g., Pravin Banker Associates, 109 F.3d at 885 (district court properly refused to extend comity to Peru's compulsory negotiations to restrict its international debt; though the negotiations were consistent with U.S. policy of participation in debt resolution plans, they violated U.S. policy of enforceability of valid debts under principles of contract law); Bandes v. Harlow & Jones, Inc., 852 F.2d 661, 667 (2d Cir. 1988) (district court properly refused to give effect to foreign government's taking of private property without compensation); Allied Bank International v. Banco Credito Aguiola De Caetago, 757 F.2d 516, 522-23 (2d Cir. 1985) (refusing to recognize directives of foreign government relieving debtors of obligation to repay international debt as violative of U.S. policies in favor of "orderly resolution of international debt problems" and principles of U.S. contract law). See also Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (district court refused to enforce a libel judgment obtained in England because British libel law is "repugnant to the public policies of the State of Maryland and the United States.")

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enforce foreign cultural property laws directly, but will impose import restrictions under American law only if certain conditions justifying those restrictions exist; (ii) American importers are to be placed on notice of the specific import restrictions imposed under American law; and (iii) innocent American owners are to be compensated for any object that is forfeited. The application of Italian law to this forfeiture proceeding violates all of those policies.

First, a foreign state's claim to be the owner of any archaeological item unless a party can establish continuous private ownership of the item since 1902 is precisely the kind of sweeping law that Congress has said the United States should not enforce. As set forth above, Congress spelled out in the CPIA the limiting conditions that must be met before the United States will grant protection to a foreign country's cultural property. 19 U.S.C. § 2602(a). The District Court applied and enforced Italy's cultural property laws even though there was no showing that any of those conditions have been satisfied here.

Second, the application of Italian law to this case flouts the policy of fair notice embodied in the CPIA. While the CPIA specifically provides that there is to be public notification of the archaeological materials whose importation into the United States is forbidden, the Italian law provides no such notice. In fact, as set forth in Section I.B., above, nowhere in the text of the Italian

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cultural property laws does it state clearly and unequivocally that all items of archaeological interest are presumed to be the property of the Italian state, and the language of several of those laws contradicts such a presumption. Furthermore, Prof. Berutti conceded that Italy did not give public notification under its own laws that it claimed to own the Phiale. (JA 202) Thus, no meaningful notice was ever given to an American citizen such as Steinhardt that the Phiale belonged to Italy.²⁶

Third, the CPIA sets forth a policy favoring compensation for innocent owners who suffer forfeiture of cultural property. 19 U.S.C. § 2609(c)(1). Here, the District Court applied Italian law to forfeit the Phiale without requiring compensation and without regard to whether Steinhardt was an innocent owner.

In view of the manifest disparities between the sweeping nature of the government's articulation of Italian law and the public policies expressed in the CPIA, the Court should decline the

²⁶ Pursuant to the CPIA, 19 C.F.R. § 12.104g sets forth "Specific items or categories designated by agreements or emergency actions" under the CPIA. An American citizen reviewing this list in 1991 would have been on notice of the items or categories of items for which importation into the United States would be illegal under the CPIA in the absence of an import license. Under the government's theory, an American citizen could not rely upon this list set forth in American regulations, but would instead be required to undertake an additional examination of foreign law (including foreign case law as well as statutory law) to determine whether importation of a particular item would violate the NSPA.

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government's invitation to enforce Italy's cultural property laws in the context of this forfeiture proceeding. See Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997).

II.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE ON THE GROUND THAT IT WAS IMPORTED BY MEANS OF A FALSE STATEMENT AS TO ITS COUNTRY OF ORIGIN IN VIOLATION OF 18 U.S.C. § 542.

This Court has held that because 18 U.S.C. § 542 requires the government to demonstrate that a defendant brought an item into the United States "by means of" a false statement, the government must demonstrate under § 542 that the false statement was material. United States v. Avelino, 967 F.2d 815, 817 (2d Cir. 1992). The District Court erred by applying the wrong standard of materiality and then by misconstruing the authority and policies of the Customs Service to find that the mis-designation of the Phiale's country of origin as Switzerland was material.

A. The Materiality Standard Under § 542 Is Whether The Goods Would Not Have Come Into The Country But For The Alleged Misstatement.

Although § 542 does not expressly set out a materiality standard, its language and purpose suggest that a "but for" test is the appropriate standard. See United States v. Corcuera-Valor, 910 F.2d 198 (5th Cir. 1990); United States v. Teraoka, 669 F.2d 577 (9th Cir. 1982).

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In Corcuera-Valor, the court held that under § 542, the government must demonstrate "that but for the false statement the merchandise would not have been allowed to cross United States borders." 910 F.2d at 199 (citation omitted). The court there threw out a conviction under Section 542 because, though there was no question that the defendants had presented false invoices upon the importation of certain goods, the government did not present any evidence that the goods were allowed into the country because of the false invoices. Id. at 200. See also United States v. Ven-Fuel, Inc., 602 F.2d 747, 753 (5th Cir. 1979), cert. denied, 447 U.S. 905 (1980) (misrepresentation in application for license to import fuel was not material under Section 542 in the absence of "a logical nexus between the [misrepresentation] and the actual importation of fuel.").

In Teraoka, the court held that "[u]nder the clear language of § 542, the false statement must have significance not to any aspect of the importation process, but rather to the actual admission of the goods in question." 669 F.2d at 579 n.3 (emphasis supplied). In Teraoka, the defendant importer was charged with violating Section 542 by filing false invoices that overstated the value of the goods it was importing in order to avoid a duty that would be imposed under an anti-dumping statute. The court held that because the effect of the filing of a truthful invoice would have been merely the imposition of a tax on the goods, not a bar on their importation, the defendant had

not brought the goods into the country "by means of" a false statement. Id. at 579. This court cited Teraoka with approval in United States v. Meldish, 722 F.2d 26 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984), noting that "[s]ection 542 concerns itself only with whether a false statement was made to effect or attempt to effect the entry of the goods in question." Id. at 28 (emphasis supplied).

Similarly, the court in United States v. Gallo, 599 F. Supp. 241 (W.D.N.Y. 1984), looked to Teraoka to resolve whether the false statements at issue there were material under Section 542. In Gallo, the defendants were charged with violating Section 542 by making false statements in connection with the importation of video games; they moved to dismiss the charges, claiming that the goods would have been permitted into the country even had no false statements been made. The government contested this construction of the materiality requirement, and argued that "under section 542, materiality to the importation process is all that is required." Id. at 244. The Court rejected the government's argument. Citing both Meldish and Teraoka, the Court stated that "[t]he question in this case is whether the merchandise would have been admitted in any event, thereby showing that the false statements were not material to the entry of the games." Id. at 245.

Prior to this case, one court had adopted a looser materiality standard under § 542. United States v. Holmquist, 36 F.3d

154, 158 (1st Cir. 1994), cert. denied, 514 U.S. 1084, (1995) ("[A] false statement is material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole."); see United States v. Bagnall, 907 F.2d 432, 435 (3d Cir. 1990) (dictum).²⁷ Relying on Holmquist, the District Court held that "the standard for materiality under Section 542 is whether the false statement had a natural tendency to influence the actions of the Customs Service." (JA 646-47)

That standard, however, vitiates the "by means of" language of § 542, which clearly means that the government must demonstrate that the false statement actually caused the importation of the goods into the country, not that the false statement had a "natural tendency

²⁷ Although the District Court also cited Bagnall to support its adoption of the "natural tendency to influence" test, Bagnall did not concern, as this case does, an alleged false statement that was made to effect the entry of goods that allegedly could not otherwise have been imported into the United States. Rather, it concerned false statements that resulted in the imposition of a lower duty than would have been imposed in the absence of the false statements. The government argued that the alleged false statements were material because the goods would not have been imported into the United States but for the false statements. Id. at 436. The court indicated that it was "troubled" by the government's proposed "but for" test in the context of a case where the false statements were made for some reason other than to effect the entry of the goods. Id. at 436-37. The Court concluded, however, that it did not have to decide the appropriate standard of materiality because under either the view proposed by the government or the one proposed by the defendant, the government failed to sustain its burden of proof. Id. at 437.

to influence the actions of the Customs Service."²⁸ Accordingly, this Court should effectuate Congress' intent that § 542 reach only false statements that actually cause goods to come into the country by adopting the "but for" materiality standard set forth in Corcuera-Valor and Teraoka.

B. The Designation Of The Phiale's Country Of Origin As Switzerland Was Not A Material False Statement Under Either Materiality Standard.

The materiality element of the government's § 542 claim is a mixed issue of law and fact to be resolved by the trier of fact. United States v. Gaudin, 515 U.S. 506, 524 (1995). Under either the "but for" test or the "natural tendency to influence" test adopted by the District Court, the evidence does not support the District Court's conclusion that the designation of the country of origin as Switzerland instead of Italy was material. At the very least, there is a factual issue that precludes summary judgment in the government's favor on this issue.

The District Court's entire analysis as to why the designation of the Phiale's country of origin as Switzerland was material is contained in two paragraphs:

²⁸ The District Court's citation to various false statement statutes for which the courts have adopted a "tendency to influence" test for materiality (JA 647-48) is therefore inapposite. None of those statutes include the "by means of" language present in § 542.

Customs' procedures provide that the country of origin is a significant factor in determining whether Customs officials should admit an object, hold it for further information, or seize it as smuggled, improperly declared or undervalued. See Government Exhibit 20, Customs Directive No. 5230-15. Since certain countries have stringent laws to protect their cultural and artistic heritage, identification of such a country raises a red flag to Customs officials who are reviewing Customs forms. Italy is known to be such a country; Switzerland is not.

Truthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity, dated circa 450 B.C., was being exported from a country with strict antiquity-protection laws. This information would have been useful to the agency's determination, and could have prevented Haber from bringing the Phiale into the country illegally. Certainly, such information would have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole. (JA 648-49)

However, that analysis completely misconstrues the legal authority, policies and practices of the Customs Service. As demonstrated below, it would have made no difference if the Customs entry forms had designated Italy rather than Switzerland as the country of origin.

1. The Customs Service Had No Legal Authority To Prevent The Importation Of The Phiale.

The critical assumption of the District Court's ruling on the issue of materiality is that the importation of the Phiale was illegal and that the Customs Service would therefore have had the legal authority to seize it or otherwise prevent it from entering the United States. Otherwise, the mis-designation of the country of

origin could not possibly have been material because the Phiale's importation into the United States would not have been illegal; it would have entered the United States in any event; and there would have been no actions or decisions of the Customs Service that could have been influenced or affected in any way.

The Customs Directive cited by the District Court discusses three statutory bases for seizing cultural property: (1) the "Pre-Columbian Monumental Act" (19 U.S.C § 2091 et seq.), (2) the CPIA, and (3) the NSPA. (JA 246-58) As a Customs Service lawyer acknowledged, the Phiale is not covered by either of the first two statutes. (JA 363)²⁹ As to the NSPA, unless cultural property has been stolen in the usual sense of the word and information has been forwarded by INTERPOL or the Office of Enforcement to the field (JA 250), the Directive relies entirely on the McClain decision. As demonstrated in Point I above, however, the NSPA does not apply to the objects merely because they were owned or exported in violation of Italy's cultural property laws.

Because there was no violation of the NSPA, it follows that the Customs Service had no authority to prevent the Phiale from being

²⁹ The government also argued below that Customs would have had the authority to seize the Phiale under 19 U.S.C. § 1499. That statute, however, is simply a general statute that allows Customs to detain items at the border; it does not empower Customs to seize any items in the absence of some other statutory authority for doing so.

imported into the United States even if the country of origin had been listed as Italy instead of Switzerland. Thus, the mis-designation of the Phiale's country of origin was not a material misstatement under 18 U.S.C. § 542.

2. In December 1991 The Customs Service Had No Policy Concerning The Designation Of The Country of Origin For An Antique Object Like The Phiale And No Practice Of Attempting To Enforce The Cultural Property Laws Of Foreign Countries.

The District Court's conclusion that the designation of the Phiale's country of origin as Switzerland rather than Italy was material is also contradicted by the evidence concerning the policies and practices of the Customs Service at the time it was imported. In the first place, there was admittedly no Customs regulation or guideline in place in December 1991 (or any time since then) requiring Customs inspectors to ask an importer the country of origin for an item of cultural property more than 100 years old. (JA 360)³⁰ In fact, it is undisputed that the Phiale could have been imported into the United States by means of forms that do not ask for a designation of country of origin. (JA 358-59)

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³⁰ An importer is required to mark the country of origin on other items as to which a duty or quota may apply depending on the country where they were made. See, e.g., 19 U.S.C. § 1304 (requiring the marking of country of origin on articles of foreign origin). Works of art are expressly exempt from the marking requirements. 19 C.F.R. § 134.33.

The Customs Service's indifference to the country of origin is further demonstrated by the fact that the government has pointed to no law, regulation, directive, or any other document setting forth the proper means for designating the country of origin of an item of antiquity such as the Phiale. Indeed, Donette Rimmer, an attorney with the Customs Service's Office of Regulations and Rulings, admitted that she had no knowledge of any documents reflecting the Customs Services' policies regarding designation of country of origin and has never seen any Customs Service regulation or directive prescribing how importers are to identify the country of origin of an item produced at a time before the existence of current national boundaries. (JA 359, 368).³¹

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Nor is there any evidence that in practice the Customs Service attempted to enforce the cultural property laws of foreign countries notwithstanding the language of the Customs Directive. On

³¹ The meaning of country of origin is far from obvious in the context of an object of art or antiquity. Even aside from the issue of changing national boundaries, it is unclear whether the country of origin is the country where the object was originally made or the country to which it was later brought. For objects (unlike the Phiale) which are required to be marked with the country of origin, see note 30 above, "country of origin" is defined as "the country of manufacture, production or growth." 19 C.F.R. § 134.1(b). However, Italy seeks to limit the export of works of art that were produced elsewhere and then brought to Italy. See Jeanneret v. Vichey, 693 F.2d at 261-62. Thus, from the perspective of Italy's cultural property laws, the country of origin of the painting by Matisse which was at issue in Jeanneret was not France, where it was painted, but Italy, where it had been in a private collection.

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the contrary, what happened here demonstrates forcefully that this was not a concern for the Customs Service and that the Customs Service would not have treated the Phiale differently if Italy had been listed as the country of origin.

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The Customs Service maintains a team that specializes in the importation of antiquities at J.F.K. Airport. That team reviews the Form 3461 prior to importation, and then the Form 7501 during entry and meets individually with the customs broker and the importer.

(JA 344) To the extent those forms serve any useful purpose, it would appear to be to indicate whether there is any need for the team of antiquities experts to get involved. In this case, the importation of the Phiale was reviewed by that special team of experts. Those experts were therefore aware that the Phiale was a "classical" gold bowl c. 450 B.C. which had been shipped from Switzerland. Since Greek civilization never extended as far north as Switzerland, the Phiale had obviously come from somewhere else. Nevertheless, the Customs Service's experts permitted the Phiale to enter the United States.

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There is absolutely no reason to think they would have acted differently if Italy, rather than Switzerland had been designated as the country of origin.

Let Customs make that decision

The District Court reasoned that the identification of Italy would have raised a "red flag" because Italy has stringent cultural property laws, whereas Switzerland does not. (JA 649) Although the

District Court did not cite to the record, this finding appears to be based on the following statement in the affidavit of Special Agent Bonnie Goldblatt, submitted by the government in support of the seizure of the Phiale:

Based on my experience as a Customs agent, I am aware that importers of Italian artworks frequently misrepresent the country of origin on a Customs entry form to be Switzerland because it is generally understood that Italy has more stringent laws prohibiting export of artistic and archaeological property than does Switzerland. I am also aware that exporters of artworks from Italy frequently transship these items to their final destinations via Switzerland, which shares a common border with Italy. (JA 31)

However, the government produced no evidence that Customs has ever seized an item of cultural property because it was believed to have been transshipped from Italy through Switzerland. Indeed, Ms. Rimmer acknowledged that in her nine years of experience at the Customs Service, she had never seen any instance in which "an item of cultural property claimed to originate in what is now Italy was seized as a result of a claim that it was transshipped through Switzerland to the United States". (JA 366) Nor was Ms. Rimmer aware of any case in which the U.S. government had ever returned cultural property to Italy based on a claim that it was stolen from Italy. (JA 369)³²

³² Moreover, if, as Special Agent Goldblatt claimed, artistic and archaeological property is often transshipped from Italy through Switzerland in order to evade Italian export laws, then surely the team of experts that examined the Phiale would have known that.

Continued on next page

Other evidence also demonstrates that in December 1991 it was not the practice of the Customs Service to try to enforce the cultural property laws of foreign countries. In response to the government's subpoena, Jet Air produced various entry documents that reflected its practice, which it employed in this case, of designating as the country of origin for an item of cultural property the country listed on the accompanying commercial invoices. The Customs Service never expressed any disapproval of this form of designation prior to 1993.³³ The 46 entry packets cover Haber's importation of cultural property into the United States from 1992-95. Each packet contains Customs Forms 3461 and 7501, and an invoice for the imported objects.

- In eleven instances, the form identified the country of origin as being Italy. (JA 356, 370-403) Customs never detained any of those items. (JA 356)

- In six instances, the country of origin was identified as "Multi," but either the accompanying Form 3461 or the invoice identified Italy as one of the countries of origin. (JA 404-22) Customs never detained any of those items. (Id.)

Accordingly, a classical artifact exported from Switzerland should have raised a "red flag" regardless of whether Italy was listed as the country of origin. Nevertheless the team of experts decided to permit the Phiale to be imported into the United States. *

³³ Larry Baker, the Jet Air employee who filled out the Customs forms in this case, testified that not until around January 1993 did the import specialist team specializing in antiquities (the same team that reviewed the importation of the Phiale) request that where the invoice does not indicate country of origin, Customs brokers should make further inquiry of the importer. (JA 351)

• In seven instances, the country of origin was identified as either Great Britain or Switzerland, yet the accompanying invoice indicated a different country of origin. (JA 423-45) Customs never detained any of those items. (Id.)

These documents reflect that at the time of the importation of the Phiale, the Customs Service did not review the designation of country of origin for items of cultural property for the purpose of enforcing the cultural property laws of foreign countries.

III.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE WITHOUT AFFORDING STEINHARDT AN "INNOCENT OWNER" DEFENSE IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

Although in rem forfeiture has traditionally been understood to rest on the legal fiction of the "guilt" of the res, the Supreme Court has recognized that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment." Austin v. United States, 509 U.S. 602 (1993). This understanding prompted the Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), to note that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Id. at 689. See also United States v. One Tintoretto Painting, Etc., 691 F.2d 603, 607 (2d Cir. 1982).

The District Court held that the due process limitations on forfeiture of property from innocent owners is inapplicable here because of the Supreme Court's decision in Bennis v. Michigan, 516 U.S. 442 (1996). (JA 652) In Bennis, the Court held that it was not a violation of the Due Process Clause of the Fourteenth Amendment for Michigan courts to order forfeiture of a wife's interest in a jointly-owned automobile worth less than \$600 in which her husband had committed a sexual act with a prostitute. Id. at 443-45. The car was forfeited under a Michigan statute that allowed for abatement of public nuisances; the car was found to be a public nuisance because it had been used for an illegal purpose. Id. at 444. The Court's opinion, joined by four of the five Justices in the majority, held that even though Ms. Bennis lacked knowledge of her husband's wrongdoing, forfeiture of the car did not violate Due Process under case law upholding civil forfeiture for remedial and deterrent purposes. Id. at 453.

Justice Ginsburg, however, who cast the deciding vote, filed a separate concurrence to "highlight features of the case key to my judgment." Id. at 457. First, she noted "it bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis," and that "he had her consent to use the car." Thus, "[t]he sole question, then, is whether Tina Bennis is entitled not to the

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car, but to a portion of the proceeds . . . as a matter of constitutional right." Id.

Second, Justice Ginsburg stressed that the Michigan statute under which the car was forfeited was an equitable statute, under which the trial court had discretion to mitigate the forfeiture. Id. (citation omitted). That the forfeiture action was one in which the courts retained equitable jurisdiction to mitigate an unduly harsh forfeiture "means the State's Supreme Court stands ready to police exorbitant applications of the statute." Id. Given the equitable discretion afforded to the trial court under the Michigan statute, Justice Ginsburg concluded that "Michigan, in short, has not embarked on an experiment to punish innocent third parties. . . . Nor do we condone any such experiment." Id. at 458.³⁴

These "key factors" that informed Justice Ginsburg's decision to side with the Bennis majority are simply not present here. Unlike in Bennis, the alleged wrongdoer here (Haber) has no property interest in the Phiale; the full effect of this forfeiture will fall solely on Steinhardt, who is not alleged to have committed any

³⁴ Even the majority opinion found "considerable appeal" in Ms. Bennis' argument "the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners," but added that "[i]ts force is reduced in this case . . . by the Michigan Supreme Court's confirmation of the trial court's remedial discretion . . ." Id. at 453.

wrongdoing. Furthermore, unlike the forfeiture statute at issue in Bennis, the forfeiture statutes on which the government relies here do not afford courts equitable discretion to mitigate the forfeiture. In Justice Ginsburg's phrase, the Court is powerless under §§ 545 and 1595a(c) to "police exorbitant applications of the statute[s]." Id. at 458.

Another point distinguishes this case from Bennis -- and indeed from all other civil forfeiture cases under American law -- namely, that this forfeiture is an attempt to enforce Italian law. As set forth above, Article 66 of the 1939 Law has been held to be unconstitutional to the extent it permits confiscation of cultural property from owners who are not guilty of having violated Article 66 and who made no profit from the wrongdoing. To permit the United States to forfeit an item without regard to the innocence of the owner, where the cultural property law that is the basis for the government's claim that the property is stolen does not permit confiscation against an innocent owner, would surely violate due process.

Prior to Bennis the Supreme Court "consistently recognized an exception [to forfeiture] for truly blameless individuals. The Court's opinion in Calero-Toledo . . . established the proposition that the Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to

prevent its alleged use." Bennis, 516 U.S. at 466-67 (Stevens, J. dissenting). Measured by this standard, forfeiture of the Phiale would clearly violate Steinhardt's due process rights.

There is no evidence that Steinhardt knew of the existence or provisions of Italy's cultural property laws, that the Phiale had been exported from Italy in violation of those laws or that the Phiale might be considered "stolen" property under those laws. Nor is there any evidence (or even a claim) that Steinhardt knew of the alleged misstatement on the Customs forms. On the contrary, Steinhardt relied entirely on the integrity of Haber, whom he had known for several years and had every reason to believe was a reputable dealer. Moreover, Steinhardt hardly exhibited the state of mind of a smuggler when he submitted the Phiale to the Metropolitan Museum for an examination by the museum's experts. Thus, forfeiture of the Phiale would violate Steinhardt's due process rights, and summary judgment should therefore have been granted in favor of Steinhardt.

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The District Court found that "the extent of Steinhardt's culpability is unclear" noting that "Steinhardt's experience as an art collector (and specifically his experience with Haber) and the fact that, in the purchase agreement, he provided for the risk of seizure that eventually occurred, both detract from his claim of innocence." (JA 659-60) However, there is no reason why his prior experience in purchasing art and antiquities from places other than Italy should

have put him on notice of Italy's cultural property laws or should have caused him to cross-examine Haber about the provenance of the Phiale. Furthermore, the District Court mistakenly assumed that Steinhardt was aware of the document it referred to as the purchase agreement (which was entitled "Terms of Sale"). However, the government never contended, and there is no evidence in the record to suggest, that Steinhardt ever saw that document; on the contrary, Steinhardt testified at his deposition that he had never seen it prior to discovery in this case. In any event, even if there were some valid question as to whether Steinhardt qualifies as an innocent owner, it would at best raise a material issue of fact that would preclude the grant of summary judgment forfeiting the Phiale. See One Tintoretto Painting, 691 F.2d at 607 (issue of fact as to claimant's innocent owner defense under Calero-Toledo precluded award of summary judgment for the government where art dealer, rather than owner, was responsible for making false statements on customs forms).

CONCLUSION

For the reasons set forth above, this Court should reverse the Memorandum and Order and the Judgment of the District Court denying Steinhardt's motion for summary judgment and granting the government's cross-motion for summary judgment forfeiting the Phiale. In the alternative, to the extent this Court holds there are disputed issues of material fact, it should reverse the Memorandum and Order

and Judgment of the District Court granting the government's cross-motion for summary judgment and remand this case for further proceedings.

Dated: New York, New York
March 2, 1998

Respectfully submitted,

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APPENDIX

U.S. Statutes

18 U.S.C. §§ 542, 545, and 2314-15

19 U.S.C. §§ 1595a(c) and 2601-13

Italian Statutes

See Joint Appendix, pp. 236-45, 309-11, 313-18

Italian Case Law

Decision of Constitutional Court, January 14, 1987, n.2

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TRANSLATION FROM ITALIAN

CONSTITUTIONAL COURT, January 14, 1987, No. 2 — LA PERGOLA, *Chief Judge* —

PESCATORE, *Reporter* — Bottega et al. — Prime Minister (Government Attorney:
Bruno).

Contraband — Matters pertaining to the crime — Works of artistic value —

**Confiscation — Property belonging to third parties who are not accessories to
the crime — Unconstitutionality** (Constitution, Article 27; Law No. 1089 of June
1, 1939, Article 66; Law No. 1424 of September 25, 1940, Article 116, Section 1,
now Presidential Decree No. 43 of January 23, 1973, Article 301, Section 1).

*Article 66 of Law No. 1089 of June 1, 1939, and Article 116, Section 1, of Law
No. 1424 of September 25, 1940 (now Article 301, Section 1, of Presidential Decree No. 43
of January 23, 1973) are unconstitutional under Article 27 of the Constitution in the part
that orders the confiscation of works protected under Law No. 1089 of 1939 (works of
artistic and historical value) that are being unlawfully exported, even when these works
are owned by a third party who did not perpetrate the crime and has not benefited in any
way from said crime. ⁽¹⁾*

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... — *Law*: 3. The cases submitted with the abovementioned orders concern issues that are similar and can therefore be combined and settled with a single decision.

4. The Court of Appeals of Rome (Order of November 19, 1984), after finding in its decision that the case against certain defendants whom the lower court had found guilty of fraudulent appropriation and illegal export of a painting should be dismissed under the statute of limitations, in the course of an enforcement procedure raised the issue of the constitutionality of Article 66 of Law No. 1089 of June 1, 1939, in the part that calls for the mandatory confiscation of items having artistic or historical value which are being illegally exported and which belong to third parties who were not accessories to the crime, even when they are not found to have been guilty of negligence. The Court of Appeals of Rome found that this provision is in conflict with Article 3 of the Constitution because it irrationally treats in the same fashion the owners of an item who are guilty of a crime and the owners of an item who are extraneous to the crime and cannot be deemed to have been negligent.

Also in the course of an enforcement procedure, the Magistrate's Court of Milan (Order of May 25, 1985) raised the issue of constitutionality with respect to Article 66 of Law No. 1089 of June 1, 1939 and [Article 116, Section 1] of Law No. 1424 (now Article 301, Section 1, of Presidential Decree No. 43 of January 23, 1973), in the part that

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calls for the confiscation of works of art that are being illegally exported, even when they are owned by an individual who was not an accessory to the crime and who is entitled to regain the enjoyment of the works of art pursuant to civil law. It found the abovementioned articles to be in conflict with the following:

1) Article 3 of the Constitution because: *a)* they set forth that a third party who was not an accessory to a crime should be handled in a fashion that is unreasonably different from the general provision that govern confiscations, as set forth in Article 240 of the Penal Code; *b)* they provide an unreasonably different treatment for the items that are illegally exported and the items used for that purpose; and *c)* they make an irrational differentiation between the treatment of a third party who was the victim of theft and the treatment of a third party who was not an accessory to the crime [and] who had not suffered the theft of the item being illegally exported.

2) Article 27 of the Constitution, because they assign an objective liability to a third party who was not an accessory to the crime.

3) Article 24 of the Constitution, because a mandatory confiscation would prevent the third party from filing a claim and would injure his right to defend himself.

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5. The Office of the General Government Attorney, which appeared before this Court on behalf of the Prime Minister in the action filed by the Court of Appeals of Rome, moved, as a prejudicial objection, that the issues at bar be ruled inadmissible, first because they had been raised by a judge who lacked jurisdiction and, second, because they were irrelevant, since the ownership of the asset which was being illegally exported had not been ascertained with a final judgment, in view of the fact that the prior decision to dismiss the case under the statute of limitations issued by the Court of Appeals was not effective as a final decision. A similar generic exception was raised with respect to the action stemming from an Order of the Magistrate's Court of Milan.

These exceptions should be rejected.

With regard to the first exception, this Court has repeatedly stated that, normally, in an incidental constitutional proceeding, no ruling can be made with regard to the jurisdiction of the judge who issued the Order submitting the case to the Constitutional Court, nor with regard to the other judicial prerequisites (Decisions No. 65 of June 26, 1962; No. 58 of June 23, 1964; No. 69 of April 19, 1972; No. 201 of July 10, 1975; No. 173 of July 17, 1981; and No. 46 of January 28, 1983), since constitutional proceedings take place on a different plane than *a quo* proceedings, due to their specific

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purposes and special goals. In the case submitted by the Court of Appeals, the issue of unconstitutionality was also linked with the principle of law established by the Supreme Court and regarding specifically the provision the enforcement of which the latter had referred to the former as the court of referral.

As for the exception of irrelevance, it is groundless with respect to the issue raised in the Order of the Magistrate's Court of Milan and contradictory with respect to the issue raised by the Court of Appeals of Rome.

In putting forth this objection, the Office of the Government Attorney cannot claim, as it in fact does, that for the *a quo* judge the findings contained in the decision to dismiss a case are restricted with respect to the illegality of the exportation of the asset for which confiscation is being requested and, at the same time, insofar as the title of ownership of the assets subject of the confiscation is concerned, are unsuitable for supporting a decision as to the relevance of the issue of the constitutionality of the provisions which, as the court of referral, it is required to enforce, in accordance with a principle of law established by the Supreme Court.

6. As for the considerations of merit, it should be noted that Article 66 of Law No. 1089 of June 1, 1939 calls for the confiscation of items having an artistic or historical

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value that are exported illegally. The provision states that "the confiscation shall take place in accordance with the provisions of the Customs Law covering items involved in contraband." Article 116, Section 1, of Law No. 1424 of September 25, 1940 (now incorporated into Article 301, Section 1, of the Single Act that combines legal provisions governing Customs matters, approved by Presidential Decree No. 43 of January 23, 1973), states that "in cases of contraband, the confiscation of items that were used or intended for use in committing the crime, and the items that were the subject or the product or the gain of the crime, must always be ordered." These provisions are an exception to Article 240 of the Penal Code, which, while it requires the mandatory confiscation of "the items which represent the price of the crime," exempts them from the confiscation, when they belong to a party who is not an accessory to the crime. Furthermore, in requiring the mandatory confiscation of items whose manufacture, use, holding, possession and disposal constitutes a crime even when no judgment has been issued, Article 240 of the Penal Code sets forth that this provision is not applicable "when the item in question belongs to a person who is not an accessory to the crime and the manufacture, use, holding, possession and disposal can be allowed by virtue of an administrative permit."

By Decision No. 229 of July 17, 1974, this Court already ruled that Article 116, Section 1, of Law No. 1424 of September 25, 1940, and Article 301, Section 1, of

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Presidential Decree No. 43 of January 23, 1973 are unconstitutional "in the part in which, with respect to the items that were used or intended for use in committing a crime," they mandate confiscation, even when these items belong to individuals who were not accessories to the crime and who cannot be deemed to have been negligent." By Decision No. 259 of December 29, 1976, this Court also ruled that the abovementioned Article 116 of Law No. 1424 of 1940 and Article 301 of Presidential Decree No. 43 of 1973 are unconstitutional "in the part in which they fail to exempt from confiscation items subject of the crime of contraband that have been stolen from a third party, when the theft has been judicially ascertained."

7. The *a quibus* judges conclude that the specific cases submitted to them, while they concerned the confiscation of items belonging to third parties who were not accessories to the crime, do not fall under either of the two hypotheses set forth in the two abovementioned Decisions, since, in practice, they were being asked to rule on the confiscation of items which were the *subject* of contraband and had not been stolen from their owner. Therefore, for the reasons given above, they asked that further rulings of unconstitutionality be pronounced with regard to Article 116 of Law No. 1424 of 1940 and of Article 66 of Law No. 1089 of June 1, 1939, which it cites, which they find unconstitutional "in the part in which they set forth the confiscation of illegally exported works of art which are owned by third parties who were not accessories to the crime and

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who, under the civil law, hold a valid title for regaining enjoyment of the works of art” (Order of the Magistrate’s Court of Milan), as well as with regard to Article 66 of Law No. 1089 of June 1, 1939, “in the part in which it sets forth the mandatory confiscation of illegally exported items with artistic or historical value which belong to third parties who were not accessories to the crime, even when said third parties are not deemed to have been negligent” (Order of the Court of Appeals of Rome).

In effect, the rulings of unconstitutionality issued by Decisions No. 229 of 1974 and No. 259 of 1976 addressed specific considerations submitted to the Court in the Orders of Referral and regarded specific instances that had arisen in the course of the proceedings during which the issues of unconstitutionality had been raised. Furthermore, as pointed out in the abovementioned rulings, the objection to the fact that, in accordance with the provisions of Article 116, Section 1, of Law No. 1424 of 1940 (now Article 301, Section 1, of Presidential Decree No. 43 of 1973), the owner of an item subject of a mandatory confiscation who is not an accessory to a crime ends up suffering the financial consequences of a criminal violation perpetrated by others, for merely objective reason (Decision No. 229 of 1974) has a broader reach. In fact, the provisions in question, which are clearly in conflict with Article 27 of the Constitution, set forth in this regard an objective liability, without taking into account intent when assessing the behavior of individuals, and order the confiscation of goods without taking into account the

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ownership of the goods. (Decision No. 259 of 1976).

8. If we draw the logical consequences of these considerations, generally speaking we can conclude that, while there may be items the possession of which may entail an objective illegality in the absolute sense, which would exist irrespective of the relationship with the person who has possession of the said items and would justify their confiscation regardless of who holds them (Article 240 of the Penal Code), in all other cases, under Article 27, Section 1, of the Constitution, it is not permissible to confiscate items involved in a crime, when, at the time the confiscation should be ordered, their owner is not the perpetrator of the crime or has not benefited from the crime in any way. Therefore, in pursuance of this principle and consistently with Article 27, Section 1, of the Constitution, Article 66 of Law No. 1089 of June 1, 1939 and Article 116, Section 1, of Law No. 1424 of September 25, 1940 (now Article 301, Section 1, of Presidential Decree No. 43 of 1973) should be declared unconstitutional in the part that orders the confiscation of works protected under Law No. 1089 of 1939 that are being illegally exported, even when these works are owned by a party who did not perpetrate the crime and has not benefited in any way from said crime.

The foregoing cover all other claims of unconstitutionality. — ...

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⁽¹⁾ The issue of constitutionality was raised with an Order issued on November 19, 1984 by the Court of Appeals of Rome, published in 1986 in issue No. 33/1 *et seq.* of the Official Gazette of the Italian Republic, and by the Magistrate's Court of Milan, with an Order issued on May 25, 1985, published in 1986 in issue No. 24/1 *et seq.* of the Official Gazette of the Italian Republic.

The Decision is consistent with the pertinent constitutional case law. Already by Decision No. 8 of 1971 (see *Foro It.*, 1971, I, 807) the Court had emphasized the strict consequentiality that exists between a criminal act and the confiscation of property. Subsequently, Article 116 of Law No. 1424 of 1940, later incorporated into Article 301 of Presidential Decree No. 43 of 1973, was found to be unconstitutional in the two rulings cited in the Decision: First, with Decision No. 229 of 1974 (see *Giur. It.*, 1975, I, 1, 396), in the part that ordered the confiscation of items which had been used or were intended for use in committing a crime, even if they belonged to parties who were not accessories to the crime in question and could not be found to be negligent, and, subsequently, with Decision No. 259 of 1976 (see *Giur. It.*, 1977, I, 1, 1243), in the part that did not set forth exclusion from confiscation of items which, while the subject of a crime, had been stolen from a third party, when the theft had been proven in a judicial proceeding.

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As regards the commentators, in addition to the bibliography provided in the notes to the two Decisions mentioned above, as hereby quoted, we also cite the note by G. MANERA (regarding the Order issued by the Magistrate's Court of Naples on December 2, 1970), *Doglianze in materia di confisca* [Complaints regarding confiscations], in *Giur. It.*, 1971, III, 1, 460 *et. seq.* See also S. GALLO, *Confisca delle cose appartenenti a terzi* [Confiscation of items belonging to third parties] (comments to Constitutional Court Decision No. 229 of 1974) in *Rivista della Guardia di Finanza* [Revenue Police Review], 1975, 511 *et seq.*

From a procedural standpoint, the position taken by the Court is noteworthy, when the Office of the Government Attorney asked it to rule that the issue was inadmissible because it had been raised by a judge who lacked jurisdiction. As it had done in the past, the Court ruled that, since constitutional proceedings take place on a different plane than *a quo* proceedings, normally it is not up to the Constitutional Court to question whether or not the judge who raised the issue had jurisdiction in the matter. See in this regard Decisions No. 65 of 1962, in *Giur. It.*, 1962, I, 1, 1153; No. 58 of 1964, *ibid.*, 1964, I, 1, 1090; No. 72 of 1969, *ibid.*, 1969, I, 1, 1439; No. 201 of 1975, in *Foro It.*, 1975, I, 2160; No. 173 of 1981, in *Giur. It.*, 1981, I, 1, 1450; No. 46 of March 10, 1983, *ibid.*, 1983, I, 1, 1594. The exceptions to this principle have occurred in cases

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where it was the judge himself who found that he lacked jurisdiction: see Decisions No. 109 of 1964, in *Giur. Cost.*, 1964, 1109; No. 86 of 1977, in *Giur. It.*, 1978, I, 1, 1404, with a note by F. GABRIELE; No. 140 of 1980, *ibid.*, 1980, I, 1, 1761. However, it has been held that a judge who lacks jurisdiction may raise the issue of unconstitutionality with respect to a provision that excludes his jurisdiction: see Decision No. 102 of 1977, in *Foro It.*, 1977, I, 1607, with a note by A. PIZZORUSSO.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 97-6319

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– against –

AN ANTIQUE PLATTER OF GOLD, known as a GOLD
PHIALE MESOMPHALOS C. 400 B.C.,

Defendant-in-Rem,

MICHAEL H. STEINHARDT,

Claimant-Appellant,

REPUBLIC OF ITALY,

Claimant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Claimant-Appellant Michael H. Steinhardt ("Steinhardt") appeals from a judgment of the United States District Court for the Southern District of New York (Hon. Barbara S. Jones, J.) entered November 17, 1997, granting the summary judgment motion of plaintiff United

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States of America (the "Government"). (A. 661-62, 4).^{*} The judgment was entered in accordance with a Memorandum & Order dated November 14, 1997, ordering the forfeiture to the Government of a 4th century B.C. gold platter known as a phiale mesomphalos (the "Phiale"). (A. 630-60).

The Phiale belongs to the Republic of Italy under Italian cultural property laws that vest title to antiquities in the Italian state. In December 1991, the Phiale was illegally exported from Italy, transshipped through Switzerland, and unlawfully imported into the United States under false pretenses by Robert Haber ("Haber"), an American art dealer. At the time, Haber was acting as Steinhardt's agent and intermediary.

In February 1995, the Republic of Italy sought the assistance of the United States in obtaining the return of the Phiale. Following Haber's invocation of the Fifth Amendment in response to a letters rogatory subpoena, the Government obtained a seizure warrant for the Phiale. In February 1996, the Government filed its civil forfeiture complaint against the Phiale, alleging that (1) the Customs entry forms used to import the Phiale contained false statements regarding the Phiale's true country of origin and (2) the Phiale is stolen property introduced into the United States contrary to law. Upon cross-motions for summary judgment, the District Court ordered the Phiale forfeited pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c).

The District Court correctly based its decision on the facts that Haber made material false statements on the Customs entry forms used to import the Phiale, and that the Phiale was stolen property that belonged to Italy and

^{*} References to the Joint Appendix are in the form "A. __" with appropriate page numbers inserted. References to the Brief for Claimant-Appellant are in the form "Br. at __" with appropriate page numbers inserted.

had been imported into the United States contrary to law. Accordingly, the judgment of the District Court should be affirmed.

Issue Presented for Review

Whether the District Court properly granted summary judgment to the United States pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c), absent any applicable innocent owner defense.

Statement of the Case

A. Origin and Purchase of the Phiale

In 1980, Vincenzo Pappalardo, a private antique collector living in Catania, Sicily, approached Dr. Giacomo Manganaro, a professor of Greek history and numismatics, for an expert opinion regarding the authenticity of the Phiale, which was in Pappalardo's collection at the time. (A. 631).^{*} The Phiale had an inscription along its edge, written in a dialect of Doric Greek that had been spoken in the ancient Greek colonies in Sicily. (*Id.*). Based on that inscription and his own study, Dr. Manganaro concluded that the Phiale was authentic and of Sicilian origin. (*Id.*).

Later in 1980, Pappalardo traded the Phiale to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for art works valued at about 30 million Italian lire (approximately \$20,000). (A. 632).

In 1991, Cammarata showed the Phiale and a gold-plated silver cup from his collection to Silvana Verga, an employee of the Monuments and Fine Arts Bureau in Palermo, Sicily, and to Enzo Brai, a photographer. (*Id.*). Cammarata told Verga and Brai that the Phiale and the silver cup had been found near Caltavuturo, Sicily, during

^{*} The following facts are drawn from the District Court's November 14, 1997 Memorandum & Order, unless otherwise noted.

the completion of electrical work by an Italian utility company. (*Id.*)

Cammarata also gave a photograph of the Phiale to William Veres, an art dealer and personal friend who owned an art dealership company called Stedron, based in Zurich. (*Id.*) Veres, a specialist in antiquities, became interested in acquiring the Phiale despite doubts as to its authenticity. (*Id.*) Later, Veres acquired the Phiale from Cammarata in exchange for objects worth about 140 million Italian lire (approximately \$90,000). (A. 633).

Veres brought the Phiale to the attention of Robert Haber, an American art dealer and owner of Robert Haber & Company Ancient Art in New York City. (*Id.*) In November 1991, Haber traveled to Sicily to meet Veres and to see the Phiale in person. (*Id.*)

Haber became interested in the Phiale and believed that Steinhardt, his client, might be interested in acquiring it. (*Id.*) Haber had previously sold Steinhardt 20 to 30 objects, totaling \$4-6 million worth of sales. (*Id.*) Haber told Steinhardt that the Phiale was the twin of one belonging to the Metropolitan Museum of Art in New York City, and that its seller was a Sicilian coin dealer. (A. 634).

Thereafter, Steinhardt, with Haber acting as an intermediary, agreed to purchase the Phiale from Veres. (*Id.*) Under the terms of the final sales agreement, as incorporated in a telefax dated December 4, 1991, Steinhardt agreed to pay 1.3 billion Italian lire (over \$1 million) in two equal wire transfer installments, plus a 15% commission fee to Haber, for the Phiale. (*Id.*) In total, Steinhardt agreed to pay approximately \$1.2 million to acquire the Phiale, the first installment of which would be wired to Credit Suisse, New York, in favor of Veres' Stedron account at Bank Leu in Zurich, Switzerland. (*Id.*)

In addition to the telefax, a one-page document entitled "Terms of Sale" and signed by Veres provided, among

other things, that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." (A. 634-35). The document further provided that "[a] letter is to be written by Dr. Manganaro that he saw the object 15 years ago in Switz." (*Id.*)

On December 6, 1991, Steinhardt wired the first money transfer installment from his account in New York to Veres' Stedron account. (*Id.*) On December 10, 1991, Haber flew from New York to Zurich. (*Id.*) From there he traveled across the Swiss Alps to Lugano, Switzerland, a town near the Swiss-Italian border that is about a three-hour drive from Zurich. (*Id.*) On or about December 12, 1991, Haber took possession of the Phiale from Veres. (A. 636). The transfer was confirmed in a commercial invoice signed by Veres and issued by Stedron, describing the object as "ONE GOLD BOWL - CLASSICAL . . . DATE - C. 450 B.C. . . . VALUE U.S. \$250,000." (*Id.*)*

B. Importation of the Phiale into the United States

On December 13, 1991, Haber sent a two-page fax to Larry Baker at Jet Air Service, Inc. ("Jet Air"), Haber's Customs broker at J.F.K. International Airport in New York. (*Id.*) The fax included information about Haber's return flight and a copy of the commercial invoice for the Phiale. (*Id.*)

Jet Air, in turn, prepared two Customs forms. First, Jet Air prepared an Entry and Immediate Delivery form (Customs Form 3461) to obtain release of the Phiale by a Customs inspection team prior to formal entry. (*Id.*) This form listed the Phiale's country of origin as "CH," the code

* The name of the seller, Cammarata, does not appear on the invoice. (A. 183).

for Switzerland. (*Id.*)* Second, Jet Air prepared an Entry Summary form (Customs Form 7501), which also listed the Phiale's country of origin as "CH." (A. 636-37). In addition, this form listed the Phiale's value at \$250,000, despite its recent sale for over \$1 million. (A. 637). The form made no mention of the Phiale's Sicilian origin or of its Italian history. (*Id.*) Haber was listed as the importer of record. (*Id.*)

On or about December 14, 1991, Haber returned from Lugano to Zurich. (*Id.*) The next day, Haber flew from Geneva to J.F.K. International Airport, carrying the Phiale with him on the flight. (*Id.*) From there, he entered the United States with the Phiale. (*Id.*)

On January 6, 1992, Haber or Steinhardt consigned the Phiale to the Metropolitan Museum of Art to determine its authenticity. (*Id.*) The museum declared the Phiale to be as authentic as the Phiale in its collection, and returned it to Haber or Steinhardt. (A. 560, 637).

On January 29, 1992, Steinhardt wired the second installment from his New York account to the Stedron account. (A. 637-38). On March 11, 1992, Steinhardt wired Haber's commission of \$162,364.00 to the Stedron account. (A. 638). The commission price had been determined by taking 15% of the purchase price in lire and converting the amount to dollars. (*Id.*)

* Steinhardt claims that Jet Air listed the Phiale's country of origin as Switzerland because of the letterhead on the Stedron invoice. Br. at 14. However, Jet Air's president, Joe Podbela, testified at deposition that where the invoice does not specifically indicate country of origin, Jet Air would determine country of origin from the contextual information on the commercial invoice, or, failing that, seek further information from the importer. (A. 599-600).

In the spring or summer of 1992, Laura Siegel, an assistant employed at Haber's firm, prepared a one-page description of the Phiale at the request of Steinhardt's wife. (A. 582). The Phiale is identified at the top of the page as "Gold phiale mesomphalos. Greek, ca. 4th-3rd century, B.C. From Sicily." (A. 198). Siegel attached to the description a map of Southern Italy and Sicily. (A. 199, 582-83).

From 1992 until 1995, Steinhardt possessed the Phiale and displayed it in his home. (A. 638).

C. Letters Rogatory Proceedings

On February 16, 1995, the Republic of Italy submitted a Letters Rogatory Request to the United States, pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters, seeking assistance in (1) investigating the circumstances surrounding the exportation of the Phiale from Italy and (2) confiscating the Phiale for return to Italy. (A. 638, 37-40). According to the Letters Rogatory request, the Phiale had been removed from an excavation site in Italy, passed into private hands, and later transferred to Robert Haber & Company in New York. (A. 38-39). The Letters Rogatory request stated that Italian police were investigating possible violations of Articles 35, 36, 66, and 67 of Italy's Law of June 1, 1939, No. 1089 (concerning illegal exportation and possession of antiquities) and Article 648 of the Italian penal code (receiving stolen property). (A. 34).

On September 21, 1995, a Commissioner's subpoena was issued to Robert Haber & Company for testimony and documents concerning the Phiale. (A. 69). On October 3, 1995, Haber's counsel informed the Government that Haber would invoke the Fifth Amendment and refuse to testify. (*Id.*) Haber did agree, however, to produce documents responsive to the subpoena and to provide in writing certain limited information regarding the Phiale. (*Id.*) Based on that information, on October 3, 1995, a Commissioner's subpoena was issued to Steinhardt (returnable October 11, 1995) seeking testimony and documents

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concerning the Phiale. (A. 300-01). Steinhardt failed to comply with the Commissioner's subpoena by the return date. (A. 70).

D. Seizure Warrant of November 9, 1995

On November 9, 1995, agents of the Customs Service, acting pursuant to a seizure warrant issued by Chief Magistrate Judge Naomi Reice Buchwald, seized the Phiale from Steinhardt's residence in New York City.* Magistrate Judge Buchwald issued the warrant pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c). (A. 639). Specifically, in its seizure warrant application, the Government asserted that the Phiale was subject to forfeiture under the Customs statutes because it had been imported by means of a material false statement -- that its country of origin was Switzerland, not Italy. (A. 30). The Government also asserted in the application that the misrepresentation regarding country of origin was likely related to the fact that Italy had more stringent laws prohibiting export of artistic and archeological property than did Switzerland. (A. 31).

On November 17, 1995, Steinhardt filed a motion before the Magistrate Judge seeking return of the Phiale,

* Steinhardt claims that Customs agents "raided" his home while "discussions were in progress" regarding compliance with the Commissioner's subpoena. See Br. at 3. In fact, there was nothing to negotiate with respect to the subpoena. As the rider to the subpoena reflects, the Government's document request was limited to items such as receipts and bills of lading relating solely to the purchase and importation of the Phiale. (A. 301). Steinhardt never moved to quash the subpoena, asserted a privilege, or otherwise contested the scope of the document request. Steinhardt did not produce any documents responsive to the Commissioner's subpoena until November 20, 1995, eleven days after the seizure of the Phiale by Customs agents. (A. 70).

pursuant to Federal Rule of Criminal Procedure 41(e). (A. 52-53). In the motion, Steinhardt alleged, among other things, that because he had no knowledge of any wrongdoing in connection with the importation of the Phiale, he was entitled to its return. (A. 60-67). The Government opposed the motion, asserting that there was probable cause to seize the Phiale under the applicable statutes, that Steinhardt's involvement in the underlying Customs offense was not relevant to the determination of probable cause, and that any affirmative defenses by Steinhardt instead should be brought before a District Court upon the initiation of a formal civil forfeiture complaint by the Government. (A. 68-77).

E. Civil Forfeiture Proceeding

On December 13, 1995, the Government timely filed its *in rem* civil forfeiture complaint against the Phiale.* The Government's complaint (as amended on February 13, 1996) alleged that the Phiale was subject to forfeiture under 18 U.S.C. § 545 because it had been imported illegally into the United States by means of a false and fraudulent invoice and by the making of false statements by Haber on the Customs forms, in violation of 18 U.S.C. § 542, 981(a)(1)(C). In addition, the complaint alleged that the Phiale was subject to forfeiture under 19 U.S.C. § 1595a(c)

* By letter dated December 14, 1995, Steinhardt argued that the Magistrate Judge retained "equitable jurisdiction" over the Rule 41(e) motion despite the filing of a civil forfeiture complaint by the Government. (A. 106). On December 19, 1995, the Magistrate Judge informed the parties of her intention to deny Steinhardt's Rule 41(e) motion in light of the filing of a civil complaint and further stated that Steinhardt would not prevail on the merits even if the Court had retained jurisdiction over the motion. Later on December 19, 1995, the Magistrate Judge issued a memorandum opinion formally denying Steinhardt's Rule 41(e) motion as moot.

and 18 U.S.C. § 981(a)(1)(C) because as a matter of law the Phiale belongs to the Republic of Italy under Article 44 of Italy's Law of June 1, 1939, No. 1089, regarding the Protection of Objects of Artistic and Historic Interest, and was therefore stolen property imported contrary to law in violation of the National Stolen Property Act, 18 U.S.C. § 2314. (A. 639-40).*

F. Cross-Motions for Summary Judgment

On December 26, 1995, Steinhardt moved for summary judgment, before the parties had even had an opportunity to take discovery. (A. 640; Br. at 6). In his motion, Steinhardt claimed that the Phiale was not subject to forfeiture under 18 U.S.C. § 545, 981(a)(1)(C), or 19 U.S.C. § 1595a(c), contending that any alleged false statements by Haber at the time of the Phiale's importation were not material. (A. 640).** Steinhardt urged the Court to apply a standard of materiality that would require a showing that "but for" the false statements at issue, the Phiale would not have been permitted into the country. (A. 645). Steinhardt also argued that he was an "innocent owner" under each of the applicable statutes. (A. 640). Finally, Steinhardt asserted that forfeiture of the Phiale would violate the Excessive Fines Clause of the Eighth Amendment. (*Id.*).

* On January 31, 1996, the Republic of Italy filed a Verified Statement of Claim to the Phiale, thereby entering the civil litigation. (A. 118-19).

** Steinhardt also argued that the listing of "CH" on the Customs forms was not a "misstatement of fact" because Customs had the Stedron invoice, which described the Phiale as "one gold bowl--classical" and dating the object as "c.450 B.C." (A. 646). According to Steinhardt, because there was no Switzerland in 450 B.C., the Customs Service was "on notice as to the true origin of the Phiale." (*Id.*). The District Court rejected this argument as frivolous. (*Id.*).

On May 16, 1996, the Government filed its opposition to Steinhardt's motion and cross-moved for summary judgment. (A. 640-41). In its cross-motion, the Government asserted that it had established probable cause to believe that the Phiale was subject to forfeiture under 18 U.S.C. § 545 based on the material false statements made on the relevant Customs forms and, alternatively, under 19 U.S.C. § 1595a(c), because the Phiale had been stolen from its true owner, Italy, and subsequently imported contrary to the National Stolen Property Act.* The Government argued against application of the materiality standard suggested by Steinhardt and further asserted that given the absence of any applicable innocent owner defense under the relevant Customs statutes, there was no genuine issue of triable fact under Federal Rule of Civil Procedure 56.

G. The Memorandum & Order of November 14, 1997

In its Memorandum & Order dated November 14, 1997, the District Court granted the Government's cross-motion for summary judgment forfeiting the Phiale. (A. 630).

With respect to the false statement issue, the District Court rejected the "but for" materiality standard proposed by Steinhardt. The District Court held that a false statement was "material" not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation

* To establish that, under Italian law, title to the Phiale has vested in the Republic of Italy, the Government submitted two detailed affidavits of Giuliano Berrutti, a practicing attorney and expert in the field of historical and archeological properties in Rome. (A. 200-12, 496-519). Steinhardt did not submit an expert affidavit or other evidence regarding Italian law, although he acknowledged having consulted Italian counsel on the issue. (A. 297).

process in any other way.” (A. 646 (quoting *United States v. Bagnall*, 907 F.2d 432, 436 (3d Cir. 1990))).

Applying that standard, the District Court concluded that the false statements regarding country of origin were materially false, in violation of 18 U.S.C. § 542. Specifically, the District Court noted that the “[t]ruthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity, dated c. 450 B.C., was being exported from a country with strict antiquity-protection laws” and that such information “would have had a tendency to influence the Customs Service’s decision-making process and to significantly affect the integrity of the importation process as a whole.” (A. 649). The District Court thus concluded that there was probable cause to believe that the Phiale was subject to forfeiture under 18 U.S.C. § 545, as merchandise imported contrary to law. (*Id.*).

The District Court then rejected Steinhardt’s “innocent owner” defense to forfeiture. (A. 650). Citing *Bennis v. Michigan*, 116 S. Ct. 994, 998-1000 (1996), the District Court held that “[w]here, as here, a statute is silent as to the availability of an innocent owner defense, the Supreme Court has made clear that courts should not read such a defense into the statute.” (A. 650). After carefully reviewing the statutory language and history of section 545, the District Court then concluded that section 545 did not contain either an express or implied innocent owner defense. (A. 650-52). Accordingly, the District Court granted the Government’s summary judgment motion under section 545. (A. 653).

The District Court next adopted the Government’s alternative argument -- that the Phiale was subject to forfeiture under 19 U.S.C. § 1595a(c) as stolen property imported in violation of the National Stolen Property Act, 18 U.S.C. § 2314. (A. 653). The District Court, having examined the relevant provisions of Italian law and the expert opinion on Italian law submitted in connection

with the Government’s motion, concluded that the Phiale belonged to Italy pursuant to Article 44 of Italy’s Law of June 1, 1939, No. 1089, and accordingly determined that the Phiale was therefore stolen property within the meaning of section 2314. (A. 654).

Finally, the District Court found probable cause to believe that Haber knew that the Phiale was stolen when he imported it. (A. 656). This conclusion was based on the undisputed facts relating to the circumstances surrounding Haber’s purchase and transshipment of the Phiale in Switzerland; the manner in which the Phiale was imported into the United States; and Haber’s subsequent invocation of the Fifth Amendment at his deposition. (A. 654-56). Because Steinhardt offered no facts to controvert this finding, and given that section 1595a(c) did not provide an innocent owner defense, the District Court granted the Government’s motion for summary judgment under section 1595a(c), holding that the Phiale was forfeitable as stolen merchandise imported contrary to law. (A. 656).*

This appeal followed.

Summary of Argument

The District Court properly granted summary judgment in favor of the Government on the ground that the Phiale was imported by means of material false statements regarding the Phiale’s true country of origin. The District

* With respect to Steinhardt’s Excessive Fines Clause argument, the District Court held that forfeiture of the Phiale was remedial and did not constitute “punishment” implicating the Eighth Amendment. (A. 658). The District Court further held that even if the Eighth Amendment were implicated, forfeiture of the Phiale would not be excessively harsh under *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995), *cert. denied*, 516 U.S. 1182 (1996). (A. 659-60).

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Court correctly held that false statements as to country of origin were material in that they were capable of influencing the decision of the Customs Service to permit the importation of the Phiale into the United States.

The District Court properly granted summary judgment in favor of the Government on the alternative ground that the Phiale is subject to forfeiture under 19 U.S.C. § 1595a(c) as stolen property imported contrary to law. Specifically, the District Court correctly concluded that under Italian law, the Phiale belonged to the Republic of Italy and therefore was stolen property under the National Stolen Property Act, 18 U.S.C. § 2314.

Finally, the District Court properly concluded that under *Bennis v. Michigan*, 516 U.S. 442 (1996), Steinhardt cannot interpose an innocent owner defense to forfeiture of the Phiale under either 18 U.S.C. § 545 or 19 U.S.C. § 1595a(c).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE GOVERNMENT ON THE GROUND THAT THE PHIALE WAS IMPORTED BY MEANS OF MATERIAL FALSE STATEMENTS

The District Court properly granted summary judgment* under the Customs statutes, 18 U.S.C. § 545 and

* Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." On a summary judgment motion, "all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought." *Gallo*

19 U.S.C. § 1595a(c), because the Government established probable cause to believe that the Phiale was imported into the United States by means of material false statements, in violation of 18 U.S.C. § 542.

A. Applicable Legal Standards for Forfeiture

Title 18, United States Code, Section 545 prohibits the importation of merchandise "contrary to law" and requires forfeiture of such illegally imported merchandise:

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

18 U.S.C. § 545 (as amended Sept. 13, 1994). The second paragraph of section 545 provides criminal penalties against

[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into United States contrary to law. . . .

18 U.S.C. § 545 (as amended Sept. 13, 1994).

v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). The movant's burden is satisfied if it can point to a lack of evidence to support an essential element of the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). A grant of summary judgment is reviewed *de novo*. See *National Awareness Found. v. Abrams*, 50 F.3d 1159, 1164 (2d Cir. 1995).

Title 18, United States Code, Section 542, prohibits the making of false statements on various documents, including Customs forms:

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal . . . or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement . . . [s]hall be fined for each offense under this title or imprisoned not more than two years, or both.

18 U.S.C. § 542 (second clause emphasized).

B. Absence of Materiality Requirement Under the Second Clause of Section 542

Preliminarily, the second clause of section 542 does not require the Government to allege materiality with respect to false statements made "in any declaration without reasonable cause to believe the truth of such statement." The making of the statement is actionable without regard to its impact on the importation process. The Government tracked this clause in the First Amended Complaint (at ¶ 23) when it alleged that the Phiale was imported by Haber "by the making of a false statement in a declaration without reasonable cause to believe the truth of such statement." (A. 129-30).

The absence of a materiality requirement applicable to the second clause of section 542 was specifically addressed by the Fifth Circuit in *United States v. Corcuera-Valor*, 910 F.2d 198, 200 (5th Cir. 1990), a case upon which Steinhardt relies. There, the court noted that, in contrast to

the first part of section 542, where the importation at issue must be "by means of" the false statement, "the government is free to prosecute without proof of materiality under the latter part of § 542, which imposes criminal liability purely for making a false statement in a customs declaration." *Corcuera-Valor*, 910 F.2d at 200. The court further stated, "[w]e emphasize that the latter part of § 542 enumerates offenses which do not require proof of materiality." *Corcuera-Valor*, 910 F.2d at 200.*

Since Steinhardt has never asserted that Switzerland was the Phiale's true country of origin, there was no genuine issue of fact with respect to the making of false statements on the Customs forms under the second clause of section 542. Thus, summary judgment in favor of the Government on that issue was appropriate.

C. Materiality Standard Under the First Clause of Section 542

Steinhardt argues that the materiality standard of section 542 requires a showing that "but for" the false statements at issue, the Phiale would not have been allowed into the country. Br. at 51. Steinhardt's "but for" standard is beside the point, however, because Steinhardt does not dispute that under the second clause of section 542, there is no materiality requirement at all. See Point I.B, *supra*. Accordingly, since the Government alleged violations of both the first and second clauses of section 542 in its Complaint (A. 129-30), Steinhardt has failed to controvert the Government's position (advanced in the District Court) that the false statements about the Phiale's country of origin violated section 542. In any event, Steinhardt's argument is erroneous.

* Although the absence of any materiality requirement under this clause of section 542 was raised by the Government below (Cross-motion for Summary Judgment at 37), the District Court did not address the issue in its November 14, 1997 Memorandum & Order.

Under the first clause of section 542, all actionable false statements necessarily are material because the statute specifically states that importation must be "by means of" the false statement. *United States v. Avelino*, 967 F. 2d 815, 817 (2d Cir. 1992); *United States v. Holmquist*, 36 F.3d 154, 158 (1st Cir. 1994) ("section 542's first provision must be read to contain [a materiality] requirement"), *cert. denied*, 514 U.S. 1084 (1995). The question remains, however, as to what "materiality" means in this context.

Although the Second Circuit has apparently never squarely addressed this issue, the First Circuit has held that "a false statement is material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole, and that neither actual causation nor actual harm to the government need be demonstrated." *Holmquist*, 36 F.3d at 159. *Holmquist* involved a prosecution of a firearms importer for submission to Customs of invoices that understated the price of imported merchandise. On appeal, the defendant argued that the false statements at issue were not material because they had no bearing on whether the items would be allowed into the country. *Id.* at 158. The *Holmquist* court specifically rejected the defendant's claim "that 'by means of' is synonymous with 'because of' and that a false statement is material under the first part of section 542 only if the importation of any particular item would have been forbidden in its absence." *Holmquist*, 36 F.3d at 158. Instead, reviewing the plain meaning of the statute, the court observed:

[S]aying that someone has effected an importation by means of a false statement is simply to suggest that the person has introduced a false statement at some significant stage in the process. The phrase does not mean that the person could not have used a true statement in tandem with the false statement, or that the importation could not otherwise have been achieved.

Id. at 159.

Steinhardt contends that the District Court should have adopted a rigid materiality standard requiring a showing that "but for" the false statements at issue, the Phiale would not have been permitted into the country. In so arguing, Steinhardt relies on *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982), and progeny. The District Court properly declined to adopt Steinhardt's suggested materiality standard.

In *Teraoka*, the defendants were prosecuted for fraudulently inflating the purchase price of nails made in Japan for import to the United States in order to evade antidumping restrictions. *Teraoka*, 669 F.2d at 578-79. The district court dismissed the indictment on the grounds that the false statements lacked any relationship to the actual importation of the goods, and thus that entry of the goods could not be said to have been "by means of" the false statement. *Id.* at 579. On appeal, the Ninth Circuit affirmed, holding that the entry of the nails would not have been affected even had correct invoice prices been submitted. *Id.*

Teraoka has been criticized by numerous courts and should not be followed in this Circuit. In *Bagnall*, for example, the Third Circuit noted that while *Teraoka* could be read to require a very narrow reading of section 542,

[t]he foundation of this narrow view . . . is the assumption that the purpose of section 542 is limited to keeping out of United States commerce those goods that cannot lawfully be imported. As we read the text of the statute, its target does not appear so limited. The language of § 542 suggests to us that its purposes is no less than to preserve the integrity of the process by which foreign goods are imported into the United States. As a result, we are inclined to believe that a false statement is material not only if it is calculated to effect the impermissible

introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way.

Bagnall, 907 F.2d at 436 (emphasis added).^{*} Other courts have declined to follow *Teraoka's* restrictive view of materiality, particularly as applied to civil penalties. Thus, in *United States v. Daewoo International*, 696 F. Supp. 1534 (C.I.T. 1988), *vacated on other grounds*, 704 F. Supp. 1067, 1068 (C.I.T. 1988), the court, in determining the materiality standard applicable under 19 U.S.C. § 1592 (the civil Customs false statement counterpart to § 542), noted that "*Teraoka* has not been well received by this or other courts construing § 1592. To the extent *Teraoka* implies that an entry is only accomplished 'by means of' a false document where the entry would otherwise be restricted or prohibited, the courts have refused to engraft such a requirement on § 1592." *Daewoo Int'l*, 696 F. Supp. at 1542; *see also United States v. Modes*, 804 F. Supp. 360, 367 (C.I.T. 1992) ("The *Teraoka* rationale has been widely rejected within the civil penalty context of § 1592.")^{**}

^{*} Steinhardt misleadingly claims that this Court cited *Teraoka* with approval in *United States v. Meldish*, 722 F.2d 26, 28 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). *See* Br. at 53. As the District Court noted (A. 648), the *Meldish* court did not address the issue of materiality or express an intent to adopt the "but for" standard discussed in *Teraoka*. Rather, the *Meldish* court merely cited *Teraoka* as support for a general description of the underlying purpose of section 542; nothing in that description was incompatible with the materiality standard adopted by the District Court. *Meldish*, 722 F.2d at 27-28.

^{**} Steinhardt also relies on *Corcuera-Valor*. Br. at 51-52. There, the defendants were prosecuted under the first clause of section 542 for understating the price of garments made in Mexico and imported into the United States to avoid duty. 910 F.2d at 199. The court interpreted the "by

Finally, as the District Court noted (A. 647), the materiality standard applied in *Holmquist* and *Bagnall* is consistent with the materiality standard applied in many other false statement contexts. *See, e.g., Kungys v. United States*, 485 U.S. 759, 770-71 (1988) (applying "natural tendency to influence" standard under 8 U.S.C. § 1451(a) denaturalization statute); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir.) (applying same to 18 U.S.C. § 1623 perjury statute), *cert. denied*, 117 S. Ct. 2484 (1997); *United States v. Ali*, 68 F.3d 1468, 1474-75 (2d Cir. 1995) (applying same to 18 U.S.C. § 1001). Accordingly, the District Court properly rejected the rigid "but for" test, which, as the District Court noted, would thwart the purpose of section 542 "by preventing prosecution of many statements that unquestionably are false and deleterious to the importation process, but nonetheless cannot be proven to be the crucial factor in an object's admission through Customs." (A. 647).

D. The False Statements Were Material

Steinhardt unavailingly argues that under either the "but for" test or the "natural tendency to influence test" adopted by the District Court, there is no evidence that the false statements at issue were material. Br. at 55. Steinhardt asserts (1) that the Customs Service had no legal authority to prevent the importation of the Phiale and (2) that at the time the Phiale was imported, the Customs Service had no policy in place with respect to the enforcement of foreign countries' cultural property laws. Br. at 56-63. Steinhardt thus argues that "it would have made no difference if the Customs entry forms had designated

means of" language as requiring that "but for" the false statement at issue, the goods would not have entered the country. *Id.* This portion of *Corcuera-Valor*, however, relies on the same faulty reasoning found in *Teraoka* (which it cites for support) and, for the reasons stated above, should not be followed by this Court.

Italy rather than Switzerland as the country of origin." Br. at 56. Steinhardt's argument lacks merit.

There is no need to show actual reliance by a Government agency to demonstrate the materiality of a false statement. See, e.g., *United States v. Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993) (prompting official action is not an element under 18 U.S.C. § 1001); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir.) (actual influence or reliance by a Government agency is not required under § 1001; statement may be material even if agency ignored or never read it), *cert. denied*, 508 U.S. 962 (1993); *United States v. Diaz*, 690 F.2d 1352, 1358 (11th Cir. 1982).

A false statement may be material even where agency action in connection with the false statement was a theoretical impossibility. See, e.g., *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (§ 1001 applies "irrespective of whether actual favorable agency action was, for other reasons, impossible. [T]he test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances" (citation omitted)). A violation of section 1001 is complete without actual receipt of the false statement at issue by the federal agency. *United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984). Indeed, a false statement is actionable even where the filing in which it was made was not required by agency regulations. *United States v. Masters*, 612 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980).

Determining materiality by the statement itself, and not by its effect, is consistent with the underlying purpose of the materiality rule, which is "to exclude 'trivial' falsehoods from the purview of the statute." *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980) (quoting *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975)). Clearly, false statements about an item's country of origin impact the Customs Service's decision whether to

allow the item into the United States, and, if so, under what terms. Such falsehoods are far from "trivial." If importers fail to provide accurate information about country of origin, Customs cannot properly enforce the trade restrictions, embargoes, tariffs, and other import regulations that fall within its jurisdiction. In short, country of origin goes to the heart of Customs enforcement activity, and is the subject of routine inquiry by most Customs officers. (A. 234, 610). It is hard to imagine a piece of information more "material" to Customs than country of origin.*

Even assuming *arguendo* that false statements regarding country of origin are not, as a matter of law, always material to Customs, Steinhardt errs in asserting that the Phiale's importation could not have been prevented by Customs, or that Customs lacked any policy on cultural property. Although Steinhardt disagrees with *McClain* regarding enforcement of foreign cultural property laws, the record below is clear that as of at least April 1991, Customs officers had been alerted (1) to determine whether an imported item of cultural property was subject

* Steinhardt says there is no legal guidance in designating country of origin for an antiquity. See Br. at 59. While there is apparently no definition unique to antiquities, "country of origin" is defined in Customs regulations relating to importation of Pre-Columbian Monumental and Architectural Sculpture and Murals as "the country where the sculpture or mural was first discovered." 19 C.F.R. § 12.105(4)(c). Customs brokers have constructive knowledge of such regulations. Steinhardt also claims that "[t]he meaning of country of origin is far from obvious in the context of art or antiquity." Br. at 59 n. 32. But even if Haber were truly confused as to where the Phiale was made, surely *Switzerland* was not a plausible response, particularly where the forms clearly distinguish between "Country of origin" and "Exporting country." (A. 185).

to a foreign cultural property ownership claim and (2) to seize any such items as having been imported in violation of 18 U.S.C. § 2314. See Customs Directive No. 5230-15 ("Detention and Seizure of Cultural Property") (A. 246-57). As the District Court noted, "[s]ince certain countries have stringent laws to protect their cultural and artistic heritage, identification of such a country raise a red flag to Customs officials. . . . Italy is known to be such a country; Switzerland is not." (A. 649; see also A. 234).

Aside from the possibility of seizure based on a foreign cultural property ownership claim, the Phiale also could have been seized for violation of 19 U.S.C. § 1592(a) (prohibiting entry of merchandise by means of any document that contains a material omission, whether by fraud, gross negligence, or negligence) based on (1) the failure of the Stedron invoice to disclose the name and Sicilian domicile of Cammarata as seller and (2) the false statement declaring the Phiale's value as \$250,000, when it had just been sold for more than \$1 million.

Steinhardt fruitlessly claims that the manner in which Customs actually handled the Phiale also demonstrates that country of origin was immaterial. Specifically, Steinhardt argues that the Phiale was examined by a special team of import specialists at J.F.K. Airport and that

[t]hose experts were therefore aware that the Phiale was a "classical" gold bowl c. 450 B.C. which had been shipped from Switzerland. Since Greek civilization never extended as far north as Switzerland, the Phiale had obviously come from somewhere else. Nevertheless, the Customs Service's experts permitted the Phiale to enter the United States.

Br. at 60.

While the record indicates that an import specialist team signed off on the Phiale's entry documents (A. 353-56), there is no evidence to support Steinhardt's allegation

that anything close to full disclosure of the relevant facts had been made to the import specialist team. To the contrary, the only evidence in the record demonstrates that the import specialist team was provided with inaccurate and false information with respect to the actual value of the Phiale (A. 109), the identity of the Sicilian seller, Cammarata (*id.*), and the Phiale's true country of origin (A. 49). Furthermore, given the silence of the record below, there is no way of knowing what oral representations Jet Air or Haber may have made to the import specialist team or other Customs officials at the airport to ensure entry of the Phiale.

Most important, Steinhardt's argument ignores practical reality. The Customs forms request simple responses based on today's map. Customs inspectors are not responsible for memorizing ancient history. They are charged with enforcing the Customs laws based, in large part, on the information provided to them by an importer. Steinhardt offers no reason why the description of the Phiale as being a "'classical' gold bowl c. 450 B.C." from Switzerland would lead a reasonable Customs officer (or anyone else for that matter) to conclude that the Phiale must be from Italy, and thus possibly subject to strict Italian patrimony laws.*

* Steinhardt argues that in several other instances, Haber (through Jet Air) imported antiquities from Italy and other nations without apparent incident. Br. 62; see A. 356, 370-403. The argument is misplaced. First, based on the record here, it cannot be determined whether Haber or Jet Air made any oral representations to Customs in connection with these imports. Second, with one or two exceptions, all of the other entries involved items priced under \$100,000, far less than the ultimate price of the Phiale. Third, based on the adverse inference arising from Haber's assertion of the Fifth Amendment, see *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976), there is reason to believe that some of these entries may have

Accordingly, the District Court properly concluded that the statements regarding country of origin were material because "such information would have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole." (A. 649).

POINT II

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE GOVERNMENT ON THE GROUND THAT THE PHIALE WAS STOLEN PROPERTY IMPORTED CONTRARY TO LAW

In the alternative, the District Court properly granted summary judgment to the Government on the grounds that the Phiale is subject to forfeiture under 19 U.S.C. § 1595a(c) as stolen property imported contrary to the National Stolen Property Act, 18 U.S.C. § 2314.

A. Applicable Legal Standards for Forfeiture

Title 19, United States Code, Section 1595a(c) provides:

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

(1) The merchandise shall be seized and forfeited if it --

(A) is stolen, smuggled, or clandestinely imported or introduced

19 U.S.C. § 1595a(c).

involved transshipments or false entry documents, as with the Phiale. Finally, an agency's failure to enforce the law in some instances plainly does not excuse other violations, let alone render immaterial information pertaining to country of origin.

Title 18, United States Code, Section 2314, the National Stolen Property Act ("NSPA"), provides:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . . . [s]hall be fined . . . or imprisoned not more than ten years, or both.

18 U.S.C. § 2314.

B. The *McClain* Decisions

As the District Court held (A. 653-54), an object may be considered "stolen" under the NSPA if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws. *United States v. McClain*, 545 F.2d 988, 996-97 (5th Cir. 1977) ("*McClain I*"); *United States v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), cert. denied, 444 U.S. 918 (1979) ("*McClain III*").

In *McClain*, the defendants were convicted of conspiring to transport stolen pre-Columbian artifacts, in violation of 18 U.S.C. §§ 2314, 2315, 371. The Government contended that the artifacts had been "stolen" within the meaning of the NSPA because Mexican cultural property laws had vested title to such pre-Columbian artifacts in the Mexican government. *McClain I* at 993.

On appeal, defendants raised three main issues. First, they argued that application of the NSPA to "cases of mere illegal exportation constitutes unwarranted federal enforcement of foreign law." *McClain I* at 994. Second, the defendants claimed that the artifacts could not be considered "stolen" under the NSPA because there was no evidence that there had been a deprivation of private ownership rights under common law. *Id.* Third, they contended that even assuming that the Mexican cultural property laws fell within the protection of the NSPA, the trial court erred in instructing the jury that Mexico had

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vested itself with ownership of pre-Columbian artifacts since 1897. *Id.*

Relying on the "expansive scope" and purpose of the NSPA, the Fifth Circuit held that the NSPA clearly applied to illegal exportation of items declared by Mexican law to be the property of the nation. *Id.* at 996. The court rejected the defendants' assertion that application of the Mexican cultural property law constituted improper enforcement of an export ban:

Congress chose to protect property owners living in states or countries hampered by their borders from effectively providing their own protection. The question posed, then, is not whether the federal government will enforce a foreign nation's export law, or whether property brought into this country in violation of another country's exportation law is stolen property. The question is whether this country's own statute, the NSPA, covers property of a very special kind -- purportedly government owned, yet potentially capable of being privately possessed when acquired by purchase or discovery. Our examination of Mexican law leads us to reject the appellants' argument that the NSPA cannot apply to illegal exportation of artifacts declared by Mexican law to be the property of the nation.

McClain I at 996.

Although the court noted the existence of the UNESCO Convention on Cultural Property as well as other, more specific legislation applicable to importation of antiquities, the court held that such laws did not limit or preempt the application of the NSPA in this context:

[W]e cannot say that the intent of any statute, treaty, or general policy of encouraging the importation of art more than 100 years old was to narrow the National Stolen Property Act so as to

make it inapplicable to art objects or artifacts declared to be the property of another country and illegally imported into this country.

McClain I at 997.

The court then reviewed the relevant provisions of the Mexican cultural property laws at issue and concluded that, contrary to the trial court's jury instruction, title to all pre-Columbian artifacts had not been declared as vested in the Republic until 1972 -- and not 1897, as the trial court had instructed. The court held that

a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered "stolen" within the meaning of the National Stolen Property Act. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.

McClain I at 1000-01. Accordingly, the court reversed and remanded because the jury had not been instructed to determine as a factual matter exactly when the pre-Columbian artifacts had been exported from Mexico. *Id.* at 1003.

The defendants were retried and convicted, and appealed their convictions. On appeal, the defendants again asserted (1) that the NSPA did not reach items deemed stolen based on a country's declaration of ownership, (2) that more specific legislation (19 U.S.C. §§ 2091-2095) on importation of pre-Columbian items providing only for civil forfeiture penalties superseded the NSPA, and (3) that the convictions should be overturned on vagueness grounds because the Mexican laws were known only to "a handful of experts who work for the Mexican government." *McClain III* at 663-64.

The Fifth Circuit rejected the defendants' claims with respect to the application of the NSPA to cultural property

owned by a foreign state. *Id.* at 663-66. With respect to the void-for-vagueness issue, however, the court reversed the defendants' convictions on the substantive NSPA counts because the court concluded that the series of Mexican statutes at issue did not announce proscribed conduct sufficiently to put defendants on notice that their activities violated criminal law. *Id.* at 671.

McClain's holding regarding the applicability of the NSPA to items of foreign cultural property is the product of thorough and detailed analysis of the issues by two separate panels of the Fifth Circuit. Nor is the *McClain* holding unique. As Steinhardt admits (Br. at 33 n. 15), numerous other courts have also recognized that the NSPA applies to cultural property whose title is vested in a foreign country.* *See, e.g., United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill. 1993) (denying motion to dismiss civil action brought under NSPA to recover artifacts removed in violation of Guatemalan law); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974) (prosecution under section 2314 for transporting pre-Columbian artifacts from Guatemala into the United States based on violation of Guatemalan cultural patrimony statute vesting title in Guatemala); *Government of Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989), *aff'd sub nom. Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (claim for conversion of pre-Columbian artifacts allegedly taken in violation of

* Steinhardt distinguishes these cases on the grounds that "none of them involved either a criminal prosecution or a forfeiture proceeding based on an alleged violation of the NSPA" and instead arose in the context of replevin or interpleader actions. Br. at 33 n. 15. Steinhardt does not explain, however, how the procedural context detracts from the fact that in each of these cases, courts recognized the applicability of the NSPA in recovering items deemed to be owned by a foreign country under a cultural property law.

Peruvian cultural property law); *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 66-67 (D. Mass. 1992) (action for replevin and conversion of coins taken in violation of Turkish cultural property law).^{*} Thus, the District Court correctly applied *McClain* to the facts of this case, particularly in the absence of any compelling or controlling authority to the contrary.

C. Haber Had Sufficient Notice of the Italian Cultural Property Laws

Steinhardt asserts that the Phiale should not be forfeited under section 1595a(c) because the Italian cultural property laws at issue here "do not vest title in the Italian State with sufficient clarity to give fair notice to an American purchaser like Steinhardt." Br. at 35.^{**} Steinhardt's contention is without merit, both legally and factually.

* In addition, federal courts have recognized and enforced foreign cultural property laws outside the context of the NSPA. *See, e.g., Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (S.D.N.Y. 1990) (court declines to dismiss action brought under New York law by Turkey to recover artifacts excavated and exported in violation of Turkish law); *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 21-22 (S.D.N.Y. 1976) (enforcing decree vesting title to various works of art in Soviet government); *United States v. Two Gandharan Stone Sculptures*, 1986 WL 8344, at * 2 (N.D. Ill. 1986) (declining to dismiss interpleader claim under Pakistani antiquities acts to recover stone sculptures seized by U.S. Customs).

** Steinhardt improperly phrases the issue as whether or not the Italian laws at issue "give fair notice to an American purchaser like Steinhardt." Br. at 35. Steinhardt's knowledge is irrelevant. The relevant issue is whether Haber, who clearly acted at all times as Steinhardt's duly authorized agent in the Phiale transaction,

As a threshold matter, Steinhardt's notice argument ignores the fundamental difference between a civil forfeiture and a criminal prosecution. Because the Government proceeds *in rem* against allegedly tainted property in a civil forfeiture proceeding, it is not necessary to show that the owner of the forfeited property was aware of the illegality of the transaction that serves as the basis for forfeiture. *United States v. 316 Units of Mun. Sec.*, 725 F. Supp. 172, 177 (S.D.N.Y. 1989) (owner's purported lack of knowledge of transaction's illegality not relevant to assertion of innocent owner defense); *United States v. 105,800 Shares of Common Stock*, 830 F. Supp. 1101, 1131 (N.D. Ill. 1993) (same); see also *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir. 1982) (owner's interest may be forfeited even though owner neither participated in nor knew of illegal acts that prompted forfeiture).

Absent a knowledge requirement, courts in civil forfeiture proceedings therefore have declined to adopt the vagueness and fair notice analysis that might otherwise be applicable to a criminal case. See, e.g., *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989) ("A statute providing for civil sanctions is reviewed for vagueness with somewhat 'greater tolerance' than one involving criminal penalties." (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982))); *United States v. \$122,043 in United States Currency*, 792 F.2d 1470, 1477-78 (9th Cir. 1986) (in civil forfeiture against currency that had not been disclosed under reporting requirements, court rejected claimant's defense that funds could not be forfeited because he lacked awareness of reporting regulations); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (greater leeway allowed with respect to notice when statutes are regulatory in

and was the importer of record responsible to Customs, was on notice of the Italian laws.

nature). Accordingly, Steinhardt's invocation of the "rule of lenity" applicable to criminal statutes is inapposite.*

Even assuming *arguendo* that the Italian laws at issue here were subject to a vagueness analysis comparable to that applied in criminal cases, Haber still had full and fair notice of its provisions.**

As a threshold matter, Steinhardt's challenge is foreclosed on appeal since it was not raised in the District Court. Issues involving interpretation of foreign law are determined by the district court, pursuant to Federal Rule of Civil Procedure 44.1. (See A. 654). In reaching its decision, the District Court reviewed the relevant Italian laws and the expert opinion of Giuliano Berrutti offered by the Government. *Id.* Steinhardt chose not to present any expert opinion, affidavit, or other evidence to the District

* Steinhardt argues that the vagueness doctrine is "especially important where, as here, the statute defining liability is a foreign cultural property law." Br. at 38. In fact, there is no legal basis for the proposition that foreign laws are subject to greater scrutiny for notice. See, e.g., *United States v. Lee*, 937 F.2d 1388, 1393-95 (9th Cir. 1991) (rejecting vagueness challenge to Lacey Act, 16 U.S.C. § 3372, which criminalizes trafficking in fish and wildlife "in violation of any foreign law" where defendants imported salmon into the United States caught in violation of Taiwanese fishing regulation), *cert. denied*, 502 U.S. 1076 (1992).

** The standard vagueness inquiry is whether the statutes at issue are sufficiently clear such that they "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law fails for want of specificity only when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

Court to controvert Berrutti's interpretation of the Italian laws at issue. *Id.* Moreover, it is only for the first time on appeal that Steinhardt makes any argument concerning the interpretation of Italian law. Because a party on appeal may not present an argument that was not made in the district court, *see United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995), Steinhardt's contentions concerning Italian law should be rejected. Based on the materials properly before it, the District Court concluded that the Phiale belonged to the Republic of Italy pursuant to Article 44 of Italy's Law of June 1, 1939, No. 1089. *Id.*

In any event, the record belies the notion that Haber lacked notice of the Italian cultural property laws. As the District Court observed, the manner in which Haber handled almost every aspect of the Phiale transaction indicates that he was acutely aware of the existence and scope of the Italian cultural property statutes, and took numerous steps to circumvent them:

In negotiating for the Phiale on behalf of Steinhardt, Haber provided for a full refund if the Phiale was seized by Customs or claimed by a country or governmental agency. He also inserted a provision in the Terms of Sale that Dr. Manganaro would write a letter certifying that he saw the Phiale fifteen years ago in Switzerland. In fact, Dr. Manganaro claims to have never agreed to write this letter.

To acquire the Phiale, Haber took great effort to ensure that the Phiale was not exported directly from Italy. After arriving in Zurich, Haber traveled across the Swiss Alps to Lugano, a town near the Swiss-Italian border that is about a three-hour car drive from Zurich. There, he took possession of the Phiale and received a commercial invoice dating the Phiale as circa 450 B.C. Haber then traveled back to Zurich, rather than

to a closer Italian city such as Milan, to fly back to New York.

Upon entry to the United States, Haber, assisted by his customs broker, succeeded in importing the Phiale through the use of two materially false Customs forms.

Finally, following seizure of the Phiale and commencement of the current action, Haber invoked the Fifth Amendment at a deposition and refused to answer any questions regarding the Phiale's purchase or importation. . . . From this fact, the Court can draw an adverse inference against Haber that he knew the Phiale was stolen at the time he imported it.

(A. 655-56).* The District Court thus reasonably concluded, based upon these undisputed facts, that Haber acted as he did because Italy's statutes unambiguously provide that title to archeological items such as the Phiale vests in the Italian state.**

Finally, the Italian statutes at issue simply are not ambiguous, despite Steinhardt's best effort to distort and

* Haber conducted approximately 17 transactions involving Italian antiquities between 1992 and 1995, a frequency that increases the likelihood that he became aware of the Italian cultural property laws while conducting business. *See Br.* at 62; A. 356, 404-22, 423-45. Even Steinhardt, as a collector of antiquities, acknowledged an awareness and understanding of cultural patrimony laws. (A. 542).

** Furthermore, Haber and Steinhardt were on notice that as a matter of U.S. law under *McClain*, *Hollinshead*, and other cases cited herein, an object may be considered "stolen" if a foreign nation has assumed ownership of the object through its cultural patrimony laws.

mischaracterize their plain meaning. The relevant provisions are summarized below.*

Under Italian law, title to archeological findings is reserved to the Italian state. (A. 200). Pursuant to Article 826 of the Italian Civil Code and the 1939 Law, items of archeological interest, independently of whether their historical origin may be in Italy or any other country, are part of the inalienable patrimony of the state. (*Id.*). Such items belong to the Republic regardless of whether they were found in the soil of Italy. (*Id.*). Furthermore, under the 1939 Law, persons learning of the existence of previously undiscovered antiquities are required to report the discovery to officials of the Italian state within a specified time, and persons in possession of the antiquities are required to deliver them to the authorities. (*Id.*). If the antiquity is found on private property, the state is entitled to keep it, but will pay a reward to the owner of the land where the antiquity was found. (*Id.*).

Possession of an archeological object by a finder or any other person does not create any property rights in that person. (A. 203). To own antiquities covered under the statute, a possessor must prove that he acquired the item legally; absent such proof, the item belongs to the Italian state. (*Id.*). The only manner in which a private person can establish ownership of an antiquity covered under the 1939 Law is to provide proof that a private citizen had legitimate title to the object prior to 1902, when the first comparable law establishing the state's right to archeological items went into effect in Italy. (A. 202). Finally, the 1939 Law proscribes exportation of such items from Italy. (A. 203).

* A detailed discussion of the meaning of the Italian statutes at issue is contained in the Brief for Claimant-Appellee Republic of Italy, and is incorporated herein by reference.

From Haber's handling of the Phiale transaction, the limited vagueness review applicable to civil forfeitures, and the plain meaning of the Italian laws, it is clear that Haber had sufficient notice of Italy's claim to the Phiale.

D. The Cultural Property Implementation Act Does Not Preclude Use of the National Stolen Property Act to Recover Items Such as the Phiale

Steinhardt argues that the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601-2613, precludes the use of the NSPA in recovering items of cultural property belonging to foreign nations. Br. at 24-30. This argument is without merit.

The CPIA provides three basic procedures for the recovery and return of cultural property. First, the CPIA authorizes the President to enter into agreements with other countries participating in the UNESCO Convention on Cultural Property ("State Parties") to apply import restrictions on certain archeological or ethnological property of the State Party. 19 U.S.C. § 2602(a). Second, the CPIA allows the President to impose import restrictions pursuant to request by a State Party when there is an "emergency" situation in which cultural property is being plundered from a specific area. 19 U.S.C. § 2603. Third, the CPIA provides for the seizure and return of "any article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution." 19 U.S.C. § 2607.

Steinhardt argues that the CPIA preempts the use of the NSPA (and presumably other laws) in the area of cultural property because the CPIA provides a "comprehensive scheme for dealing with cultural property claimed by parties to the UNESCO Convention." Br. at 26. Other than the conclusory statement that the CPIA "established a comprehensive scheme for dealing with cultural property" (Br. at 26), however, Steinhardt cites no authority or precedent for this proposition.

The CPIA was never intended to be an exclusive procedure for the recovery of cultural property. Nothing in the CPIA indicates an intent to preempt otherwise applicable laws. In fact, the Senate report on the CPIA contains a clear statement that the CPIA did *not* supplant other available remedies:

Further, [the CPIA] neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which provisions of this bill apply.

S. Rep. No. 564, 97th Cong., 2d Sess. 25 (1982), *reprinted* in 1982 U.S.C.C.A.N. 4078, 4099.*

Even absent such legislative history, general principles of statutory construction compel a finding that the CPIA is not an exclusive remedy. Indeed, it is axiomatic that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). Where Congress enacts two overlapping statutes, they "should be permitted to co-exist unless the two are mutually exclusive." *United States v. Stephenson*, 895 F.2d 867, 872 (2d Cir. 1990) (quoting *United States v. Jackson*, 805 F.2d 457, 461 (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987)).

As a matter of common sense, the CPIA could not properly preempt provisions used to recover cultural property such as the Phiale because the CPIA does not even purport to cover items that are clandestinely excavated. Rather, as noted above, the CPIA deals only with situations in which State Parties have identified specific thefts, looting areas, or particular designated classes of materials.

* Indeed, several district courts have recognized cultural patrimony claims without regard to the CPIA. See *Pre-Columbian Artifacts*, 845 F. Supp. at 547; *Republic of Turkey*, 797 F. Supp. at 66-67.

Certainly, the CPIA cannot plausibly be read to preclude the use of other laws that could prevent the unlawful excavation and trafficking in cultural property, particularly where such property was unearthed before a foreign government even knew of its existence.

Apparently no court has addressed the relationship between the CPIA and the NSPA with regard to the recovery of cultural property. In *McClain III*, however, the Fifth Circuit specifically rejected the notion that the NSPA no longer applied in light of Congress' adoption of (1) a highly specific import ban on certain items of pre-Columbian art* and (2) the UNESCO Convention on Cultural Property (the precursor to the CPIA). The court observed:

[T]he earlier panel [in *McClain*] had considered the evidence of the 1972 statute, its legislative history and UNESCO negotiations, holding nevertheless that neither statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country.

McClain III, 593 F.2d at 664.

E. Enforcement of Italy's Cultural Property Laws Is Consistent with United States Public Policy

Steinhardt also asserts that under principles of international comity, United States courts should not enforce

* The statute, 19 U.S.C. §§ 2091-2095, enacted in 1972, prohibited importation into the United States of pre-Columbian stone carvings and wall art from Mexico, Central America, and South America unless the country of origin certified the exportation. See *McClain I*, 545 F.2d at 996.

Italy's cultural property laws because to do so would violate U.S. public policy. Br. at 47. In support of this assertion, Steinhardt relies on the provisions of the CPIA which, he says, set forth a U.S. policy that is at odds with the Italian laws. Br. at 48.

Precisely defined, the forfeiture of the Phiale does not even involve enforcement of a foreign country's laws; rather, the specific issue presented here is whether the Phiale may be considered "stolen property" within the purview of the NSPA, and therefore forfeitable under 19 U.S.C. § 1595a(c). Italian law is relevant only by reference to the NSPA.

Assuming *arguendo* that reference to the Italian cultural property laws within the context of the NSPA implicates possible comity concerns, the presumption is heavily in favor of applying the foreign nation's law. Indeed, where public policy is asserted to escape the consequences of foreign law, the court's inquiry is quite limited. See *Bader v. Purdom*, 841 F.2d 38, 40 (2d Cir. 1988) (party seeking to invoke public policy to avoid application of foreign law has "heavy burden" of showing that such application "would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal"); *Finnish Fur Sales v. Juliette Shulof Furs*, 770 F. Supp. 139, 143-46 (S.D.N.Y. 1991) (courts are not free to indulge individual notions of expediency and fairness, and must apply foreign law unless fundamental local interest outweighs interest of other forum).

Steinhardt alleges that application of the Italian statutes flouts the policies articulated in the CPIA that detail the limited conditions under which cultural property covered by the CPIA may be repatriated. Br. at 49. But the mere fact that the Italian law (as incorporated by the NSPA) provides an *alternative* remedy does not render that foreign law inconsistent with basic American legal principles. Clearly, a law that affects title to personal

property located within the borders of a sovereign state does not qualify as one so immoral or offensive to fundamental principles that it will not be enforced.

Moreover, under a variety of federal and state* laws, the United States protects its own cultural heritage (and vests title in the nation to valuable resources) in much the same manner as the Italian statutes at issue. See, e.g., Archeological Resources Protection Act, 16 U.S.C. §§ 470ee-70mm (resources excavated or removed from federal lands remain the property of the United States); Native American Graves Protection and Repatriation Act of 1991, 25 U.S.C. §§ 3001 *et seq.*; Abandoned Shipwrecks Act, 43 U.S.C. §§ 2101 *et seq.* (United States asserts title to abandoned shipwrecks embedded in submerged state lands); Wild and Free Roaming Horses and Burros Act, 16 U.S.C. § 1338 (prohibiting removal of wild horses from federal public lands).** The Italian statutes, with their

* A listing of relevant state laws is contained in the Brief of Amici Curiae Archeological Institute of America *et al.*

** In *United States v. Tomlinson*, 574 F. Supp. 1531 (D. Wyo. 1983), defendants were charged under both the NSPA and the Wild and Free-Roaming Horse and Burros Act with having unlawfully removed wild horses from federal lands in Wyoming and thereafter sold the horses for slaughter. Defendants moved to dismiss the indictment asserting that the NSPA should not apply because the Government had not established that the horses were "stolen property" simply based on the property interest asserted under the Wild and Free-Roaming Horses and Burros Act. *Id.* at 1534. In denying the motion, the court cited, *inter alia*, *McClain's* use of a Mexican cultural property law in defining stolen property under the NSPA. *Id.* at 1536. The court noted that "any distinction between the Mexican law in *United States v. McClain* and the Burros Act would be one of form rather than substance, since

broad protection of items found in the soil of Italy, have much in common with these American laws.

Accordingly, enforcement of Italy's cultural property laws within the context of the NSPA is fully consistent with United States policy and does not raise any comity concerns.

POINT III

THE DISTRICT COURT PROPERLY CONCLUDED THAT THERE IS NO INNOCENT OWNER DEFENSE TO FORFEITURE UNDER 18 U.S.C. § 545 OR 19 U.S.C. § 1595a(c)

The District Court properly held under *Bennis v. Michigan*, 516 U.S. 442 (1996), that Steinhardt could not assert an innocent owner defense to forfeiture of the Phiale under either 18 U.S.C. § 545 or 19 U.S.C. § 1595a(c). Given that the Government established probable cause to forfeit the Phiale, and in the absence of any applicable affirmative defense, the District Court correctly awarded summary judgment in favor of the Government.

In *Bennis*, the Supreme Court unequivocally held that where, as here, a forfeiture statute is silent as to the availability of an innocent owner defense, courts should not read such a defense into the statute. The case involved the forfeiture of an automobile jointly owned by a husband and wife that had been used by the husband to engage in sexual activity with a prostitute. *Id.* at 443-44. The husband was convicted of gross indecency, and the automobile was forfeited as a public nuisance under Michigan's red light abatement law. *Id.* The wife contested the forfeiture on the ground that when she entrusted the car to her husband, she did not know that it would be used to violate the indecency law. The wife's argument relied on dicta in

the provisions of the two enactments are to a large extent indistinguishable." *Tomlinson*, 574 F. Supp. at 1536.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 (1974), suggesting that forfeiture could not be awarded against an owner who could prove he or she was uninvolved in criminal activity.

The Supreme Court affirmed the forfeiture and rejected the wife's attempt to import a culpability requirement into the Michigan forfeiture provision. *Bennis*, 516 U.S. at 446. Denying her claim, the Court observed that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was put to such use." *Id.* at 446.

In rejecting the wife's purported "innocent co-owner" defense based on *Calero-Toledo's* dicta, the Court further observed:

Petitioner relies on a passage from *Calero-Toledo*, that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." 416 U.S. at 689. But she concedes that this comment was obiter dictum, and "it is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S.375, 379 (1994).

Bennis, 516 U.S. at 449-50.

Bennis has been applied by at least one court in the context of a Customs forfeiture of stolen art. In *United States v. Various Ukrainian Artifacts*, 1997 WL 793093 (E.D.N.Y. 1997), the Government filed a civil forfeiture action against religious artifacts that had been smuggled into the United States. The action arose under 19 U.S.C. § 1497, which allows for forfeiture of all undeclared items. *Id.* at *1. The intended recipient of the artifacts argued

that he was entitled to an innocent owner defense because he had purchased the artifacts from an intermediary who had been solely responsible for shipping the items and complying with Customs regulations. *Id.* Noting that it was bound by *Bennis*, the district court rejected the use of an innocent owner defense and granted the Government's motion for summary judgment. 1997 WL 79303, at *2-3. Similarly, that Haber handled the Phiale transaction does not entitle Steinhardt to assert an innocent owner defense.

Steinhardt attempts to evade *Bennis's* holding by referring instead to Justice Ginsburg's concurring opinion. Steinhardt claims that that opinion left open the possibility of asserting an innocent owner defense in the absence of express statutory authority. Br. at 64. Specifically, Steinhardt argues that Justice Ginsburg observed that the Michigan courts retained equitable jurisdiction to mitigate the forfeiture and to police "exorbitant applications" of the statute. Br. at 64. Steinhardt's argument is unavailing.

The concurring opinion, while instructive of Justice Ginsburg's reasons for voting with the majority, does not constitute the holding of the Supreme Court in *Bennis*, and is not controlling here. Furthermore, far from carving out an exception to the majority's ruling, Justice Ginsburg's opinion expressly *endorsed* Michigan's effort to utilize a red light abatement statute to deter prostitution by forfeiting vehicles used in the offense without affording an innocent owner defense. *Bennis*, 516 U.S. at 457-58.

There is every reason to believe that Congress's decision not to afford an innocent owner defense under the Customs statutes at issue here would also pass constitutional muster. The absence of a statutory innocent owner defense under section 545 or 1595a(c) is hardly surprising. A civil forfeiture in the Customs context is an *in rem* proceeding brought against offending property, not individuals. The forfeiture is based on the fact that the property

has been introduced into the United States illegally, and that illegally imported property should not be allowed to enter or remain in the country. Given the statutory goal of keeping such items out of the United States, the purported "innocence" of the ultimate possessor of the item is generally irrelevant to the application of the statute.*

Finally, even assuming *arguendo* that an innocent owner defense were available, the record below indicates that Steinhardt was willfully blind to the suspicious nature of the Phiale transaction, and thus not entitled to the innocent owner defense. See *United States v. All Funds Presently on Deposit*, 832 F. Supp. 542, 564 (S.D.N.Y. 1993) (to establish innocent owner defense, claimant must show, *inter alia*, that he was not willfully blind to illegal activities and that he took all reasonable steps to prevent illegal activity from occurring).

The record demonstrates that Steinhardt was eager to know as little as possible about the source of the Phiale, even though he was spending more than \$1 million to acquire the item. Specifically, Steinhardt knew only that the seller was a "Sicilian coin dealer"; Steinhardt made no further inquiries about the seller's identity. (A. 545-46,

* Steinhardt argues that the fact that the husband in *Bennis* had the wife's consent to use the car was central to Justice Ginsburg's thinking. Br. at 64. Steinhardt states that by contrast to *Bennis*, "the alleged wrongdoer here (Haber) has no property interest in the Phiale; the full effect of this forfeiture will fall solely on Steinhardt." Br. at 65. The argument is unavailing. It is undisputed that Steinhardt instructed Haber to purchase and import the Phiale on his behalf. (A. 634). Moreover, as the District Court observed, the "full effect" of forfeiture will not fall on Steinhardt since, pursuant to the Terms of Sale, he is entitled to a full refund of the purchase price. (A. 659). Steinhardt's dispute should be with Haber or Veres, if he is indeed innocent of wrongdoing. (*Id.*)

549). Nor did Steinhardt inquire as to whether the seller had good title to the Phiale. (A. 551).

If Steinhardt had inquired regarding the seller (Cammarata) or the intermediary (Veres) involved in this transaction, he might well have discovered that Haber proposed illegally to export the Phiale from Italy and transship it through Switzerland. Steinhardt's lack of interest in the particulars of the transaction is all the more disturbing in light of his sophistication in dealing with the art market, having purchased millions of dollars worth of antiquities, paintings, and other works of art from Haber and other dealers. (A. 526-40).^{*} Significantly, although Steinhardt, as chairman of the international council of the Israel Museum, was aware of increasing concern over the illegal removal of objects of artistic and archeological importance from European nations that claim them as their patrimony, Steinhardt took no interest in what country the Phiale was being exported from and did not inquire of Haber as to whether there were restrictions on exporting or importing the Phiale. (A. 542-44, 563-64).

^{*} From Haber alone, Steinhardt purchased 20 to 30 objects, with an aggregate value of \$4-6 million. (A. 540).

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: New York, New York
May 1, 1998

Respectfully submitted,

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97-6319

Tarler

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

AN ANTIQUE PLATTER OF GOLD, a/k/a GOLD PHIALE
MESOMPHALOS, C. 400 B.C.,

Defendant-in-rem,

MICHAEL H. STEINHARDT,

Claimant-Appellant,

REPUBLIC OF ITALY,

Claimant-Appellee.

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

BRIEF OF *AMICI CURIAE* ARCHAEOLOGICAL INSTITUTE OF
AMERICA, AMERICAN ANTHROPOLOGICAL ASSOCIATION,
UNITED STATES COMMITTEE FOR THE INTERNATIONAL
COUNCIL ON MONUMENTS AND SITES, SOCIETY FOR
AMERICAN ARCHAEOLOGY, AMERICAN PHILOLOGICAL
ASSOCIATION AND SOCIETY FOR HISTORICAL
ARCHAEOLOGY IN SUPPORT OF APPELLEES UNITED
STATES OF AMERICA AND REPUBLIC OF ITALY

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**MEMORANDUM OF LAW OF AMICI CURIAE
ARCHAEOLOGICAL INSTITUTE OF AMERICA, ET AL., IN SUPPORT
OF APPELLEES UNITED STATES OF AMERICA AND REPUBLIC OF ITALY**

The Archaeological Institute of America, et al., respectfully submit this brief as amici curiae in support of appellees the United States of America and the Republic of Italy.^{1/}

INTERESTS OF AMICI

This brief is submitted on behalf of a broad-based group of organizations (collectively, the "AIA Amici"), representing professional and lay members of the public committed to the preservation and archaeology of the past. As a part of their work, these organizations have engaged in extensive efforts to maximize the protection of archaeological sites and artifacts by demanding their legal and ethical treatment. These organizations have long recognized the fragile nature of archaeological sites, whose concealed information may be studied only once, during the first excavation, which forever disturbs and erases evidence as it is brought to light.

Illegal and uncontrolled excavations, overwhelmingly driven by the demand in the art markets in which discovered objects cease to be cultural artifacts and become merchandise, pillage and permanently ruin archaeological sites, erasing part or all of their significance. In consequence, a central mission of AIA Amici has been to demand that art markets act responsibly in insuring that objects derive from legal and controlled excavations and requiring proof of legal procedures in transactions involving archaeological objects and ancient art. The resolution of this case tests these efforts of AIA Amici.

^{1/} This brief is filed with the consent of all parties, as set forth in the accompanying letters.

AIA Amici are: the Archaeological Institute of America ("AIA"), the American Anthropological Association ("AAA"), the United States Committee for the International Council on Monuments and Sites ("US/ICOMOS"), the Society for American Archaeology ("SAA"), the American Philological Association ("APA"), and the Society for Historical Archaeology ("SHA").

Amicus AIA is a professional and academic association with approximately 11,000 members throughout the United States, of which 2,500 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 has educated the American public about the past.^{2/} Working to protect the world's archaeological heritage, the AIA has led the debate concerning the trade in illicit antiquities. Within months of the 1970 ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export, Import, and Transfer of Ownership of Cultural Property (the "UNESCO Convention"), the AIA adopted a resolution condemning "the destruction of the material and historical records of the past by plundering of archaeological sites both in the United States and abroad and by the illicit export and import of antiquities." In 1973, in cooperation with (among others) the American Association of Museums (the "AAM") and the Association of Art Museum Directors (both now amici on behalf of appellant), the AIA adopted a second resolution, instructing that

^{2/} The AIA is a founder of numerous American and overseas research institutes dedicated to classical studies and archaeological research; annually sponsors 275 lectures at its local societies, presented by some 70 scholars to almost 20,000 individuals; publishes Archaeology magazine, which has an audited circulation of 210,000 and an estimated 500,000 readers per issue; has co-produced 52 half-hour segments of the television program "Archaeology" and publishes the scholarly journal The American Journal of Archaeology.

museums should refuse to acquire through purchase, gift or bequest any object exported in violation of the laws of a country of origin, and requiring signatories to “cooperate fully with foreign countries in their endeavors to preserve cultural property and its documentation and to prevent illicit traffic in such cultural property.” These resolutions urged adherence to the UNESCO Convention.

In 1972, the AIA adopted a Code of Ethics summarizing the essential aspects of its philosophy. The Code requires AIA members to abstain from participating in the trade in or validation of undocumented antiquities. Through the AIA’s leadership, over the past 26 years, numerous public and university museums, scientific laboratories, and professional societies have adopted similar codes of conduct forbidding activities involving objects stolen or illegally removed from the country of origin, as well as unscientific or intentional destruction or damage of ancient monuments or sites; other organizations in the fields of ancient history and literature, classics, and conservation have followed the AIA’s lead by creating ethical guidelines concerning the acquisition, exhibition or publication of archaeological artifacts.^{3/}

Amicus American Anthropological Association, founded in 1902, is the primary professional society of anthropologists in the United States. The AAA aims to advance

^{3/} In addition to other AIA Amici, these include the American Institute for Conservation, the American Oriental Society, the American Schools of Oriental Research, and the College Art Association. Similarly, the Antiquities Dealers Association and major auction houses have subscribed to a “Code of Practice for the Control of International Trading in Works of Art,” while the International Association of Dealers Trading in Works of Art has produced its own code of ethics. See Patrick J. O’Keefe, Trade in Antiquities 48-49, 115-16 (1997). Some scientific laboratories that analyze ancient materials, such as the Wiener Laboratory of the American School of Classical Studies in Athens, have established policies that acknowledge the AIA Code with regard to undocumented antiquities.

anthropology as the discipline that studies humankind in all its aspects, involving archaeological, biological, ethnological, social-cultural, and linguistic research; and to further the professional interests of anthropologists, including the dissemination of anthropological knowledge and its use to address human problems. As the world's largest organization of nearly 11,000 anthropologists, the AAA advances these purposes through its publications, meetings and various programs.^{4/} The AAA's Government Relations, Academic Relations, and Press Relations programs inform public discourse, provide a unified voice on issues affecting the discipline, provide technical assistance to departments of anthropology, and promote the teaching of anthropology. 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 the public and private sectors.

Amicus US/ICOMOS is one of more than 90 national committees with over 5,000 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.^{5/} US/ICOMOS has been involved in numerous initiatives to promote better

^{4/} The AAA publishes 15 major journals and numerous newsletters, books and special editions. Approximately 5,000 anthropologists regularly attend the AAA annual meeting.

^{5/} ICOMOS is recognized in the World Heritage Convention (the most ratified Convention ever) as the official advisor to UNESCO's World Heritage Center on all matters addressing the conservation of culturally significant sites.

conservation through exchanges of professionals between the United States and other countries and the representation of the United States in international preservation fora. Among the most respected of its achievements are ICOMOS Charters -- documents providing guidance for the ethical management and treatment of cultural resources -- including the 1967 Venice Charter, which serves as the foundation for modern preservation of the built environment. The Venice Charter paved the way for the Standards for Historic Preservation, guidelines approved by the U.S. Department of the Interior's National Park Service for preserving the built environment. In 1990, ICOMOS adopted the "Charter for the Protection and Management of the Archaeological Heritage," which articulates a series of principles relating to the preservation and management of archaeological resources around the world.

Amicus Society for American Archaeology is an international organization dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 6,000 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 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 purchase and sale of looted archaeological materials.

Amicus American Philological Association, founded in 1869, is a professional and academic association, and the principal learned society in North America dedicated to the study of the languages, literatures, and histories of classical Greece and Rome and the larger

Mediterranean world of which those cultures were a part. Its membership of 3,400 in the United States, Canada, and some forty other countries is comprised mostly of professional classicists, as well as some lay members interested in the ancient world.⁶ The APA has a fundamental interest in adherence to the UNESCO Convention and the U.S. Cultural Property Implementation Act. Some of the most dynamic recent work in the field of Classics has been accomplished by scholars uniting a traditional philological approach with approaches developed in the field of archaeology. Because the careful documentation of antiquities is essential to this scholarship -- including knowledge of the historical, cultural, and archaeological importance of such artifacts -- the proper preservation of archaeological sites is essential to the mission of the APA.

Amicus Society for Historical Archaeology, formed in 1967, is the largest scholarly group concerned with the archaeology of the modern world (A.D. 1400-present), the era since the beginning of European exploration. With over 2,000 members throughout the world, SHA represents historical archaeologists working in government agencies, universities, museums and the private sector. 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 on land and underwater.

AIA Amici respectfully submit this memorandum to urge the Court to uphold the decision below, which recognizes the cultural rights in historic objects of countries of origin,

⁶ The APA publishes a bi-monthly newsletter, an annual scholarly journal, Transactions and Proceedings of the American Philological Association, scholarly monographs, textbooks in Greek and Latin, and an annual Guide to Graduate Programs in the Classics, as well as pamphlets on professional issues. The APA works closely with amicus AIA, particularly by participating in a joint annual meeting attended by some 2,500 people.

will aid in efforts to discourage the looting and pillaging of archaeological sites and resources, and work toward proper respect for United States, as well as international, cultural heritage.

SUMMARY OF ARGUMENT

AIA Amici file this memorandum to address issues not fully developed by the parties. We understand that appellees will fully set forth the relevant facts and address the proper basis for the district court's decision, including the court's conclusion that the Phiale is subject to forfeiture pursuant to the National Stolen Property Act, that appellant's misrepresentations on Customs forms were material and also are a sound basis for forfeiture, and that appellant is not entitled to an "innocent owner" defense. We wholly endorse the arguments and positions forwarded by appellees.

We write separately to assist the Court in fully appreciating the context in which the instant case arises and the significance of its decision in terms of protecting the cultural heritage and patrimony of people around the world. The preservation of original contexts of objects such as the Phiale, which is the subject of this litigation, allows achievement of the maximum historic and cultural information illuminating both the ancient world and our understanding of the antecedents of our own society. The widespread looting of archaeological sites -- the result of the increasing demands of the illegal market for antiquities in the United States and elsewhere -- has resulted, however, in a concomitant loss of this irretrievable historical information and context. As one way to reduce the flow of antiquities to the illegal art market and to eliminate the incentive of dealers and purchasers to acquire such objects illegally, some nations, like Italy, have vested ownership of archaeological and historic resources in their national governments. The United States too has followed this philosophy in adopting an

extensive regime of federal and state protective legislation that vests ownership of archaeological resources on public land in the government. The United States also increasingly regulates and protects archaeological resources found on private land.

Based on the United States' own interests, as well as its policy of protecting the world's archaeological heritage, the district court here properly relied on the law of Italy declaring the Phiale national property and therefore subject to forfeiture under the National Stolen Property Act, 18 U.S.C. § 2314. The district court's decision therefore was not only warranted based on the controlling law but also will serve to protect the world's archaeological sites, to confer the appropriate deference upon the laws of other countries seeking to protect their own cultural patrimony and to protect our own, unique American heritage.

We ask that this Court affirm.

ARGUMENT

I.

The Court Should Affirm the District Court Decision Which Is Necessary To Uphold and Protect Archaeological and Cultural Heritage

A. The Law Should Value the Protection of Archaeological Heritage

It is essential that courts protect the world's archaeological heritage to the full extent of the law. That heritage consists of the fragile and non-renewable physical evidence of humankind's origins and behavior. Only carefully preserved, original contexts can furnish the data upon which the reconstruction of our past depends.^{2/} Among the multiple values of

^{2/} The 1990 ICOMOS Charter for the Protection and Management of the Archaeological Heritage, published on the ICOMOS website at <http://www.international.icomos.org>.

archaeological research that Professor Bruce Trigger describes in A History of Archaeological Thought is the “special vantage point” offered by archaeological findings that have “strong implications concerning human nature and why modern societies have come to be as they are.” He explains that “[h]istorical interpretation helps to guide public action and is a human substitute for instinct.”²

Archaeologists study the past through the careful excavation of sites and the retrieval of an array of evidence of material culture. A primary goal of this work is the preservation of objects of archaeological, historical, artistic, religious and cultural significance. The reasons to recover and preserve these objects, though sometimes aesthetic so that the objects can be enjoyed for their intrinsic appeal, are more often scientific, offering evidence of history otherwise lost. Sites range from large urban centers, such as Pompeii, to single burials. The archaeologist excavates such sites by “peeling back” each layer in reverse chronological order, regarding all remains of human activity as potentially valuable sources of knowledge. It is particularly crucial that artifacts be excavated together and in association with pre-existing architectural features, such as houses, industrial areas, and burials. Careful excavation allows the archaeologist to place a found object in its proper chronology and context, in turn aiding the

defines “archaeological heritage” as

compris[ing] all vestiges of human existence and . . . all manifestations of human activity, abandoned structures, and remains of all kinds (including subterranean and underwater sites), together with all portable cultural material associated with them The archaeological heritage is a fragile and non-renewable cultural resource The protection of the archaeological heritage should be considered as a moral obligation upon all human beings; it is also a collective public responsibility.

² Bruce Trigger, A History of Archaeological Thought 3, 14 (Cambridge 1989).

reconstruction of each of a site's time periods, the characteristics of society at those times, and the connections among objects found and sites located in far corners of the world.

Archaeological finds vary from the glamorous, such as precious jewelry, to the mundane, such as cooking utensils. Reconstructing an assemblage, the archaeologist can determine which materials are associated and contemporary with each other and gain understanding of the history, cultural development, trade patterns and social structure of the inhabitants of the site. Those studying past cultures are thereby able to reconstruct the functions of such objects, to learn more about technology, trade, living patterns, religion, literature -- in short, about every aspect of a past society. Even a single burial, if discovered undisturbed, can reveal much about the individual buried there, including his or her age, sex, health, social status, occupation and religious beliefs. What is learned from the complete reconstruction of past societies and civilizations enhances our understanding and appreciation of modern societies and our own cultural development.

The legal protection of archaeological sites -- particularly against the devastating effects of looting, most often caused by demand in the illicit art market -- is essential to maintaining this evidence of our histories.

B. The Law Should Work to Protect Archaeological Sites

The illegal and illicit looting of archaeological sites by tomb robbers and others forever devastates the archaeological heritage. These traffickers not only destroy objects in order to unearth or transport them but also wreak havoc on archaeological sites. To protect archaeological heritage, it is critical that looting be stopped. The United States and other

countries have used the law to this end and those laws should be vigilantly enforced so that the past can be unearthed with due care.

Archaeological sites are looted and objects stolen to satisfy the demands of the art market. Looting is worldwide, affecting archaeological sites anywhere that significant remains of past cultures lie, from the United States to Central and Latin America, Africa, the Middle East and Asia. It is a primary vehicle to bring ancient art and archaeological materials to art dealers and auction houses, and from there into private and institutional collections. Estimated to occupy third place behind the international traffic in drugs and arms, the illicit art market is valued at \$2-6 billion annually.^{9/}

Especially since the 1970s, the effect of illicit traffic in antiquities has increased dramatically, due in part to the inflation of the art market and the marketing of antiquities as "investment" opportunities. The consequences for archaeological sites, monuments, and local collections have been dire. As Professor Ricardo Elia of Boston University recently wrote:

In many parts of the world, looting has reached crisis proportions. Thieves digging for marketable antiquities destroy archaeological sites and, in the process, the information they contain about ancient cultures. This irreplaceable loss of knowledge is the most important consequence of looting Collectors buying from looters feed a process that obliterates our ability to learn anything meaningful about the very cultures whose art is being collected.^{10/}

^{9/} See P. Boylan, Illicit Trafficking in Antiquities and Museum Ethics, in Antiquities Trade or Betrayed: Legal, Ethical & Conservation Issues 95 (K. Tubb, ed., 1995); J. Walsh, It's a Steal, Time, Nov. 25, 1991, at 86-88. For example, in January 1997, the contents of warehouses at the Geneva freeport, containing 10,000 Italian antiquities worth some \$42.5 million, were seized. The antiquities, some of which were destined for auction at Sotheby's in London, were illicitly excavated from sites all over Italy. See Peter Watson, Sotheby's: The Inside Story 290-93 (1997).

^{10/} Ricardo J. Elia, Chopping Away Culture -- Museums Routinely Accept Artifacts Stripped of Context by Looters, Boston Globe, Dec. 21, 1997, at D1; see John Yemma &

In a study that Professor Elia conducted of eight collections of pre-Columbian antiquities containing 2,300 objects, for example, not a single object was obtained from a legal excavation. Of the total known corpus of 341 terra cottas from Mali, 91% have no documented source. For these objects, it is not possible to determine their original findspot, authenticity or the significance of unique types.^{11/} Similarly, Dr. David Gill and Dr. Christopher Chippindale conducted an extensive study of Cycladic figurines of the third millennium B.C. and determined that 90% of the known figurines do not have a provenience, which means that we do not know anything about their archaeological contexts. It is not even possible to determine which are genuine and which are fake. At the same time, an estimated 85% of Cycladic burial sites have been destroyed by looting.^{12/}

Walter V. Robinson, Questionable Collection: MFA Pre-Columbian Exhibit Faces Acquisition Queries, Boston Globe, Dec. 4, 1997, at A1; Thalia Griffiths, Artifact Looters Cut Down Hopes of Researching Ancient Mali, Washington Post, Jan. 2, 1996, at A18; Deborah Pugh, Leslie Plommer & Mark Tran, The Greed that is Tearing History Out by its Roots: The Illicit International Traffic in Antiquities Rivals the Drugs and Arms Trades in the Catalogue of World Crime, The Guardian, June 13, 1992, at 13; Remains of Mali's Ancient Civilization being Sold Piecemeal to Collectors at the Expense of Cultures, Dallas Morning News, Feb. 16, 1995, at 40A.

In her seminal article, published in 1969, Professor Clemency Coggins first documented the destruction of sites in Central America, where looters had chiseled out sculptural reliefs from ancient monuments that were then sold on the art market and often ended up in museums in the United States. See Clemency Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 Art J. 94, 94-98 (1969).

^{11/} See John Yemma & Walter V. Robinson, supra note 10, at A1.

^{12/} See David Gill & Christopher Chippindale, Material and Intellectual Consequences of Esteem for Cycladic Figures, 97 Am. J. Archaeology 601, 601-60 (1993); see also Alison Wylie, Archaeology and the Antiquities Market: The Use of "Looted" Data, in Ethics in American Archaeology: Challenges for the 1990s 17, 19-20 (M. J. Lynott & A. Wylie eds., 1995).

Southern Italy has not escaped this problem. As elsewhere, the scope of the problem is well documented. Looting affects nearly 50% of recorded sites and archaeological areas under the supervision of the regional Archaeological Superintendencies.^{13/} Clandestine excavators damage and pillage large numbers of sites in rural and agricultural areas that are difficult if not impossible to patrol. During a 16-month period between January 1991 and April 1993, Italian law enforcement recovered over 6,800 illicitly excavated artifacts in the Southern Italian province of Taranto alone.^{14/} Despite the efforts of law enforcement, customs agents, and the Archaeological Superintendencies, the destruction of archaeological heritage continues, dispossessing Italy of its cultural and artistic patrimony and depriving the international community of precious evidence of history.^{15/}

^{13/} See Speech of Dr. Mario Serio, Director General of Antiquities, "Antichità senza provenienza" ("Antiquities without provenience") conference, held in Viterbo, Oct. 17-18, 1997 (publication forthcoming); see also Claire L. Lyons, Antiquities without Provenience Conference Report, 7 Int'l J. Cultural Prop. (1998) (forthcoming).

^{14/} See D. Graepeler and M. Mazzei, Provenienza: Sconosciuti! Tombaroli, mercanti e collezionisti: L'Italia archeologica allo sbaraglio [Provenience: Unknown! Tomb robbers, dealers, and collectors: Archaeological Italy at risk] 47 (1996). The statistics represent a fraction of the archaeological material that is successfully looted and stolen. In view of the extensive territories that must be patrolled in archaeologically rich countries like Italy and sheer quantities of artifacts that are looted to satisfy the demands of the international market, it is disingenuous to blame countries of origin for less than perfect law enforcement and surveillance (See AAM Amici Br. at 48)

^{15/} "The desire to learn about and preserve the culture of other countries and civilizations" (AAM Amici Br. at 6) is not only a hallmark of American culture but is a desire shared by people worldwide and includes first and foremost the records of their own past history. In Sicily, for example, a majority of over 90 museums and public galleries display ancient art and artifacts. See International Directory of the Arts (Berlin 1997-98).

C. **The Phiale -- Transported to the United States in the Illicit Market
In Antiquities -- Is a Critical Example of Archaeological Evidence
That United States and International Laws Should Protect**

The object at the center of this dispute -- a Phiale mesomphalos, the Greek term for a shallow bowl with a central raised boss -- is exactly the type of object that the laws of the United States and other countries should and do protect.^{16/} The Phiale was used in antiquity as a libation vessel in religious rituals and for drinking during ceremonial occasions. Phialai are normally found in the context of cult sanctuaries as votive offerings, in tombs as grave gifts, or in habitations, where precious metal vessels and coins were sometimes hoarded in times of threat. Although frequently forged of bronze or silver, gold examples like the Phiale are extremely rare.

The Phiale has been securely identified as Sicilian in origin, on the basis of the Greek Doric inscription on its rim written in a dialect spoken in parts of ancient Sicily,^{17/} where Greek colonists settled in antiquity and developed their own distinctive culture. In his scholarly publication of this object, Professor Giacomo Manganaro translates the inscription, which identifies the Phiale as a dedication by a "Damarchos" (the term for "civil magistrate") named Achyris.^{18/} This form of magistracy was instituted in various ancient Sicilian cities after 339

^{16/} We are deeply indebted to the work and contributions of Dr. Claire Lyons, Vice President for Professional Responsibilities, Archaeological Institute of America, with respect to this section, as well as others, of this amicus brief.

^{17/} See G. Manganaro, Darici in Sicilia e le emissioni auree delle poleis Siceliota e di Cartagine nel V-III sec. a.C., 91 *Revue des Etudes Anciennes* 302-04, figs. 1-3 (1989).

^{18/} Id. at 302.

B.C. The reference to it in the inscription supports the date and its Sicilian origin.^{19/} On the basis of the form of the engraved letters, the Phiale can be dated from the late fourth to the early third century B.C. The presence of a dedicatory inscription indicates that it may have been found in a religious or ritual context, a proposition also supported by the vessel's unique shape.

According to the evidence in this case, the Phiale was discovered during unauthorized diggings in the archaeological zone of Caltavuturo ("Vulture Rock"), a rural village located in the mountainous interior region of central northern Sicily. Excavations conducted there by the Archaeological Institute at the University of Palermo since the 1970s have brought to light an ancient habitation and cemetery. The cemetery dates from the early third to the second century B.C., and the remains of the ancient town span the period from the fourth to the first century B.C. -- consistent with the dating of the Phiale. In a report on the results of fieldwork, the archaeologist at the site noted that the cemetery has "repeatedly been devastated by clandestine excavators."^{20/} As a result, only a limited amount of data has been recovered through scientific excavation.

The use of precious metal, the scarcity of phialai of this type, and the quality of craftsmanship evince the value of the Phiale as an object of Italian cultural patrimony. The

^{19/} An identical gold phiale, lacking a known provenience, is displayed in the Metropolitan Museum of Art in New York City. Professor Manganaro observes that both were probably manufactured in the same Siceliote workshop. See id. at 304. The Metropolitan phiale bears a Punic inscription and is likely to have been exported from Sicily. See id. at 302.

^{20/} N. Bonacasa, Scavi e ricerche dell'Istituto di archeologia dell'Università di Palermo a Himera e Caltavuturo (1972-1975), 22-23 Kokalos 710-712 (1976-77); see also C. Di Stefano, Ricognizioni archeologiche nel territorio di Caltavuturo, 5 Sicilia Archeologica 85 (1972).

inscription referring to an individual of rank and the function of the piece as a votive offering suggest that the original archaeological findspot was a significant site for the study of settlement, religious and funerary practices, and local political structures in Sicily during the Hellenistic period. However, illicitly torn from its setting, the Phiale is substantially separated from the archaeological record; that loss is compounded by the loss of data furnished by other artifacts, now dispersed or destroyed, that may have accompanied it.^{21/} Had the Phiale been excavated in context, so much more would have been learned from this exceptional piece about Sicilian history and culture. The outcome of this case -- particularly this Court's determination whether and under what circumstances to respect Italy's cultural patrimony laws -- will significantly determine to what extent other such losses will occur in the future.

II.

The Court Should Affirm the District Court Decision Which Is Consistent With United States Law and Serves United States Interests

Individual nations and societies have long viewed preservation of their artistic, religious and cultural monuments as a means of increasing knowledge of their past. Over the past two centuries, many nations have developed legal regimes to protect the objects that embody their past, as well as their archaeological sites, declaring national ownership of archaeological and cultural treasures and enacting legislation that protects sites from looters and eliminates the incentive of collectors to purchase looted objects on the art market. Among such

^{21/} The Phiale was reported by Cammarata to have been found together with a silver cup (Pet. Br. at 12), a fact that would support the conclusion that the original archaeological context was a substantial and historically important one.

efforts, many nations have enacted laws declaring that the nation owns all previously unowned or unrecovered cultural objects. Under such laws, upon discovery, ownership of such objects vests in the nation; taking such objects without government permission constitutes theft, and the nation may seek, through legal means, restitution of the objects.²²

International determination to combat the destruction of cultural heritage was heralded by the UNESCO Convention. In 1972, the United States signed the Convention, which Congress implemented in 1983 with passage of the Convention on Cultural Property Implementation Act (the "CPIA"), 19 U.S.C. §§ 2201 *et seq.* That Act adopted two UNESCO Convention provisions, in addition to establishing the Presidential Cultural Property Advisory Committee. In particular, the CPIA allows for the recovery (consistent with pre-existing U.S. law) of stolen cultural property which had been in the inventory of a museum, religious or other public institution, *id.* § 2607, and allows the President, upon a request by a foreign country and with the advice of the Advisory Committee, to impose import restrictions on categories of archaeological and ethnographic materials, the pillage of which has placed a nation's cultural patrimony in jeopardy. In such a case, the cultural property originating from within the modern-day political boundaries of the nation may be seized at the U.S. border for return to the country of origin. *Id.* §§ 2603, 2606.

²² For the law of Turkey, see Ergun Özsunay, Protection of Cultural Heritage in Turkish Private Law, 6 Int'l J. Cultural Prop. 278, 278-80 (1997); for the Greek law, see Beni Culturali e mercato europeo 232 (A. Maresca Compagna & P. Petrarola eds., Rome 1991); Kurt Siehr, The Protection of Cultural Heritage and International Commerce, 6 Int'l J. Cultural Prop. 304, 307 & n.27 (1997); for the law of Mexico, see United States v. McClain, 593 F.2d 658 (5th Cir. 1979); for the law of Peru, see Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989).

Appellant urges this Court to construe the CPIA in such a fashion as to unduly limit the authority of the United States to recover cultural property stolen from the country of origin. In particular, appellant contends that the CPIA limits the application of another statute, the National Stolen Property Act, 18 U.S.C. § 2314, such that the United States may not apply that Act based on the laws of foreign nations declaring national ownership of objects of cultural patrimony. Appellant thus argues that, in applying the National Stolen Property Act, the district court here erroneously relied on a law of Italy declaring the Phiale national property. Appellant's argument is inconsistent with settled law concerning the National Stolen Property Act and with the history of the CPIA itself. The Court should reject it.

Prior to enactment of the CPIA, the National Stolen Property Act enabled the United States to seize and return stolen cultural property to its rightful owner.²³ As two Circuit Courts of Appeal have ruled, the National Stolen Property Act includes among "stolen" property objects -- like the Phiale -- that are removed from their country of origin in violation of national ownership laws. See United States v. McClain, 593 F.2d 658, 664 (5th Cir.) ("McClain II"), cert. denied, 444 U.S. 918 (1979); United States v. McClain, 545 F.2d 988, 994-97 (5th Cir. 1977) ("McClain I"); United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974).

In McClain I, 545 F.2d at 992, for example, the Fifth Circuit reviewed the convictions of several art dealers charged with illegally importing pre-Columbian artifacts into the United States from Mexico. The Court held that Mexico could establish ownership of the artifacts by virtue of a Mexican national ownership law even though the Mexican government

²³ The National Stolen Property Act, 18 U.S.C. § 2314, prohibits the importation of merchandise known to be stolen at the time of importation. Seizure or forfeiture of such objects is permitted by 19 U.S.C. § 1595(a).

never had actual possession of the objects and within Mexico the objects were “capable of being privately possessed when acquired by purchase or discovery.” Id. at 996. While remanding the case for certain further factual determinations, the Court concluded:

This Court, of course, recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction; possession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law.

Id. at 992.

Following a second round of convictions of defendants, the Fifth Circuit explicitly held that the Mexican law was a sufficiently clear basis for the vesting of ownership of antiquities in the Mexican government and affirmed the convictions for conspiracy to remove antiquities from Mexico after the effective date of the Mexican declaration of ownership. See McClain II, 593 F.2d at 671-72. The Court reiterated the principle earlier articulated in McClain I that the National Stolen Property Act

protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government. Moreover, the earlier panel [in McClain I] had considered the evidence of the 1972 statute, its legislative history and UNESCO negotiations, holding nevertheless that neither statute nor treaty nor our historical policy of encouraging the importation of art more than 100 years old had the effect of narrowing the N.S.P.A. so as to make it inapplicable to artifacts declared to be the property of another country and illegally imported into this country.

Id. at 664; see also McClain I, 545 F.2d at 994-97.

In an earlier opinion, the Ninth Circuit similarly interpreted the National Stolen Property Act, applying it to a pre-Columbian stele taken from Guatemala under whose law such artifacts are regarded as the property of the Republic. See Hollinshead, 495 F.2d at 1155. Like the McClain Court, the Ninth Circuit also concluded that the National Stolen Property Act

forbids the importation of objects of which another country has declared national ownership. Id. Both cases therefore establish the principle that national ownership laws may vest ownership of cultural artifacts in a foreign national government, even though the government had only constructive and not actual possession of the artifacts. Other courts of the United States also should respect and recognize such ownership, and the court below was correct to do so.

Relying on the National Stolen Property Act, as well as its interpretation in McClain and Hollinshead, the district court in the instant case concluded that the Phiale is subject to forfeiture because, under applicable Italian law, it was owned by and stolen from the Italian government. That conclusion was unquestionably correct. The facts of this case easily satisfy the three prongs of the McClain standard. See McClain II, 593 F.2d at 670-72. First, the national ownership law at issue here clearly vests ownership in the national government; appellee's expert witness so testified and appellant offered no witness to the contrary. Second, the object in question left Italy after the effective date of the Italian statute; no one has questioned that the Phiale was known to be in Sicily between 1980 and 1991. Third, the object was found within the modern political boundaries of Italy, the nation that claims ownership; all evidence indicates the Phiale is from Sicily, and Sicily is certainly within the modern nation of Italy.²⁴ Moreover, because McClain was a criminal prosecution, and this is not, a lower standard

²⁴ AAM Amici (Br. at 24) attempt to distinguish this case from McClain, relying on Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), aff'd sub nom. Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), and The Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement, 203 A.D.2d 167, 610 N.Y.S.2d 263 (1st Dep't 1994), lv. to appeal denied, 84 N.Y.2d 805, 642 N.E.2d 325 (1994). In both of those cases, however, the cultural objects in question were the products of ancient cultures that today span several modern nations (in the former case, the Inca Culture, and in the latter, the Roman Empire), and claimants failed to offer proof that the objects came from the claimant nation. The McClain test therefore was not met.

of proof should suffice to render the Phiale subject to forfeiture. Appellant here -- who does not face criminal prosecution and whose Swiss dealer will fully compensate him for the loss of the Phiale -- has considerably less at stake than did defendants in McClain.

Appellant and AAM Amici contend that the court below erred, arguing that the Phiale is not subject to forfeiture under the National Stolen Property Act because, in their view, the Phiale is not "stolen." To reach this result, appellant and AAM Amici suggest that McClain is a discredited decision. (See App. Br. 18-21, 32-33; AAM Amici Br. 39-40). Appellant and AAM Amici miss the mark.

McClain and Hollinshead remain the law. First, even after enactment of the CPIA, federal courts have followed McClain and U.S. Customs has relied on its interpretation of the National Stolen Property Act to seize stolen cultural objects. In Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Cal. 1989), aff'd sub nom., Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), for example, a case involving the seizure of artifacts by U.S. Customs, the court implicitly held that the National Stolen Property Act would require the forfeiture of a foreign nation's cultural property based on the nation's ownership declaration. Similarly, in United States v. Pre-Columbian Artifacts and the Republic of Guatemala, 845 F. Supp. 544 (N.D. Ill. 1993), the court, quoting McClain, held that the NSPA "'protects ownership derived from foreign legislative pronouncements, even though the owned objects have never been reduced to possession by the foreign government' Thus, while traveling in foreign commerce, the artifacts were stolen in that they belonged to the Republic, not the person who unlawfully possessed the artifacts." Id. at 547; see also Republic of Turkey v. OKS Partners, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994) (Turkish national government's right to possession of

antiquities was sufficient to support claims for replevin and conversion against purchasers).
McClain is not discredited.

Indeed, the two McClain decisions, which caused an extreme reaction among antiquities dealers and collectors in the United States, led to several attempts to change the National Stolen Property Act. Both at the time that Congress implemented the UNESCO Convention through the CPIA in 1982 (see 128 Cong. Rec. 19, 25345, S. 2963) and again in 1985 (see 131 Cong. Rec. 4601, March 6, 1985, S. 605), Senator Moynihan introduced legislation to reverse the McClain and Hollinshead decisions by amending the National Stolen Property Act. The proposed amendments would have had the effect of excluding archaeological objects from the category of "stolen" property when a foreign nation's claim to title is based on a national declaration of ownership. But Congress did not enact these proposals.

AAM Amici's further suggestion that enactment of the CPIA pre-empted the entire field of regulation of the import of illegal antiquities has no basis in the CPIA. (See AAM Amici Br. at 15-21, 40) First, the CPIA's legislative history explicitly states that the Act "neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the Act's] provisions . . . may apply." S. Rep. 97-564, 97th Cong., 2d Sess. 25 (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4099. AAM Amici attempt to explain away this statement by arguing that its references to previously existing remedies did not include those based on foreign national ownership laws (AAM Amici Br. at 30). But there is no reason to conclude that Congress intended to limit its statement in any way, no less in that way.^{25/}

^{25/} Purporting to illustrate their point, AAM Amici refer to Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990). In that case, the Church of Cyprus

Second, if the CPIA did preclude the application of the National Stolen Property Act to illegally exported antiquities -- as appellant and the AAM Amici contend -- then why did the dealer/collector community consider it necessary to alter the National Stolen Property Act to exclude archaeological objects? Why did Senator Moynihan twice attempt to amend the Act? The CPIA, by itself, simply did not change the existing National Stolen Property Act.

In fact, the testimony of the AAM submitted to Congress in 1985 at the time of Senator Moynihan's second attempt to amend the National Stolen Property Act reveals that AAM Amici's current argument -- that the CPIA did change the National Stolen Property and overrule McClain -- is wholly disingenuous. In 1985, the AAM articulately advanced the position that the decision in McClain II "resolved the concerns of many in the Museum community," removing the ambiguity of the earlier decision and upholding "the validity of the national declarations of ownership as a basis for prosecution." The AAM thus opposed amending the National Stolen Property Act for the very reason that the proposed amendment would eviscerate the positive effects of the McClain decision:

Our opposition stems from the long-standing commitment of the museum community to deter the theft of cultural property and the looting and destruction of archeological sites. In the AAM's view, the proposed legislation would

successfully sued for the return of mosaics that had been stolen from a Byzantine Church on Cyprus and ultimately sold to an Indianapolis art dealer. AAM Amici seem to argue that the CPIA legislative history refers only to claims such as this one, i.e., for "traditional" theft, based on legal principles established before the CPIA's enactment. This argument, however, makes no sense, especially as the type of theft in the Church of Cyprus case is explicitly covered in the CPIA itself, 19 U.S.C. § 2607 (prohibiting import of any "article of cultural property documented as appertaining to the inventory of a museum or religious . . . institution which is stolen"). The legislative history indicating that prior remedies are preserved must therefore apply to claims that arise under factual circumstances different from those of the Church of Cyprus case, such as claims based on foreign national ownership laws.

encourage the degradation of archeological sites and the illegal export of cultural material from its country of origin.

S. 605 [the proposed amendment] would disregard for the purposes of the National Stolen Property Act declarations by foreign governments of national ownership with respect to archeological and ethnological materials Passage of this law would in a single stroke signal to other nations this country's lack of regard for their efforts to protect their cultural patrimony and give U.S. citizens a right to disregard another country's laws with impunity. With the proposed amendments, the National Stolen Property Act would be transformed from an instrument of law enforcement to one that encouraged the violation of laws elsewhere. . . .

The implementation of the convention on cultural property was not meant to become the sole remedy for the theft or illegal exportation of archeological or ethnological material, but one of a number of means of discouraging their illicit trade. By excluding all declarations of national ownership, whatever their merit, as basis for prosecution under the National Stolen Property Act, S. 605 removes the NSPA as a legitimate means to a remedy.

The adoption of implementing legislation for the convention on cultural property sent an important signal to the rest of the world: the U.S., a major art importing country, was prepared to participate constructively in the efforts of other countries to preserve their cultural heritage. . . . The changes proposed for the National Stolen Property Act would contradict . . . much of what museums have publicly supported in the last decade. S. 605 offers a protection that museums do not need and do not seek. (Emphasis added.)^{26/}

With the CPIA, Congress did not change McClain, though it could have, did not change the ability of U.S. Customs to seize illegal antiquities, and did not change the definition of "stolen" property under the National Stolen Property Act as applied to antiquities. Despite appellant's suggestion otherwise, the Fifth and Ninth Circuit's construction of the National Stolen Property Act in McClain and in Hollinshead stand: so long as a foreign nation's declaration of ownership and the property to which it applies are sufficiently clear, then in "deferring to this legitimate act of another sovereign, . . . it is proper to punish through the

^{26/} Attached hereto as an Appendix is a true and correct copy of the AAM's 1985 testimony.

National Stolen Property Act encroachments upon legitimate and clear [foreign] ownership, even though the goods may never have been physically possessed by agents of that nation." McClain II, 593 F.2d at 671.

The district court's interpretation of "theft" under the National Stolen Property Act -- which, as the AAM urged in 1985, Congress never changed -- accords squarely with prior decisions of the Fifth and Ninth Circuits, as well as other federal district courts. It should be affirmed.

III.

The United States Protects Its Cultural Heritage In a Manner Consistent with the Decision Below

Indeed, while appellant and AAM Amici argue that the United States should not recognize ownership of cultural artifacts based upon constructive (rather than actual) possession of unexcavated objects, AIA Amici and appellees' interpretation of the National Stolen Property Act in fact accords with the treatment given to cultural objects and the definition of ownership within the United States. Appellant's view -- that a buried archaeological object, when looted, does not belong to the looted nation even though the nation has declared the property its own -- flies in the face of our policy and law: the United States, as well as every State, declares ownership of buried cultural property based on constructive possession. Moreover, extensive laws regulate the excavation of archaeological sites, and American cultural property is subjected

to illegal sale and export abroad.^{27/} It is in the best interests of the United States, as an art-importing and art-source nation, to protect cultural property on the international market.

Congress recognized the national interest in the preservation of archaeological remains more than nine decades ago with enactment of the Antiquities Act of 1906, 16 U.S.C. §§ 431-433m (1998), which penalizes the destruction, damage, excavation, appropriation, or injury of historic or prehistoric ruins or monuments, as well as objects of antiquity, located on federal lands.^{28/} This statute was followed by the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1998) ("ARPA"), the primary federal law protecting archaeological sites. This Act -- somewhat akin to other countries' statutes declaring national ownership of cultural property -- abrogates the law of "finds" specifying that "resources which are excavated or removed from public lands will remain the property of the United States." 16 U.S.C. § 470cc(b)(3). ARPA thus restates the well-accepted common law principle that grants ownership of everything contained on the land and below its surface to the real property owner based on his or her constructive possession and regardless of the owner's lack of actual possession.^{29/} ARPA

^{27/} See, e.g., 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 the 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).

^{28/} In fact, one impetus for the passage of the Antiquities Act was that American antiquities were being excavated without permission and removed to foreign countries. In a celebrated case, a Swedish explorer dug in Cliff Palace (Colorado) and removed a large collection of pre-historic objects to Scandinavia, where they still reside in Finland's National Museum. See Hal Rothman, Preserving Different Pasts 18-19, 34-51 (1989); Ronald F. Lee, The Antiquities Act of 1906 29-38 (1970).

^{29/} Property found on private land generally "is and always has been in the constructive possession of the owner of said premises . . ." Bishop v. Ellsworth, 234 N.E.2d 49, 52 (Ill. App. 1968); see also Ferguson v. Ray, 77 P. 600, 603 (Or. 1904); Allred v. Biegel,

also requires a permit for excavation and removal of archaeological resources from federal lands, id. § 470cc & 470ee(a), and criminalizes the interstate commercial transport of artifacts obtained in violation of state or local law. Every state has likewise declared its right to ownership and control of any archaeological resources found on publicly owned or controlled land, including ownership based on constructive possession.^{30/}

In United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993), cert. denied, 510 U.S. 1071 (1994), the Seventh Circuit interpreted ARPA expansively, holding that it may protect archaeological sites located on private land. There, a Hopewell burial mound was discovered accidentally in the course of a construction project. One of the workmen recognized the significance of artifacts in the mound, tried to cover the site, but returned to find others digging

219 S.W.2d 665, 666 (Mo. App. 1949) (holding that ancient Indian canoe found embedded on flooded property belonged to real property owner). Under certain circumstances, objects that qualify as "treasure trove" may be excepted from this general rule. See Patty Gerstenblith, Identity and Cultural Property: The Protection of Cultural Property in the United States, 75 B.U. L. Rev. 559, 592-95 (1995).

^{30/} See id. at 572-86; see, e.g., Conn. Gen. Stat. § 10-390(a) (1997) (prohibiting any person to "excavate, damage or otherwise alter or deface any archaeological or sacred site on state lands unless in accordance with a permit"); N.Y. Educ. Law § 233-4 (1997) ("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").

In a system that mirrors that of some foreign nations, while imposing various restrictions, including the possibility of forfeiture, a few states permit individuals to retain possession of archaeological objects found on public land, although various restrictions may be imposed. See Minn. Stat. Ann. § 138.37(1) (1997) (license may designate custodian for objects, but physical possession reverts to state if custodian does not properly care for them and keep them available for study); N.H. Rev. Stat. Ann. § 227-C: 8 IV (1996) (historic resources placed in private custody are subject to perpetual preservation agreement providing for cataloguing, protection, availability for study, and reversion to state if not properly cared for; upon sale or auction, assessment of 25% of value must be paid to the state).

and looking for artifacts. Id. at 1114. The workman removed certain artifacts from the site and contacted defendant Gerber, a well-known collector, who then conducted digs at the site and removed numerous artifacts from the mound. Id. Defendant, charged with violating ARPA, argued that ARPA applied only to archaeological sites located on federal or Indian lands. The Seventh Circuit rejected the argument and held that ARPA also criminalizes the interstate transport of artifacts taken in violation of state and local laws, including laws that regulate the use of private land and objects on (or in) such land. Judge Posner justified this expansive reading of ARPA by relying on the public policy embodied in Congress' effort to protect archaeological sites:

[T]here is no right to go upon another person's land, without his permission to look for valuable objects buried in the land and take them if you find them. At common law [the owner of the land] would have been the owner of the mound and its contents regardless of the fact that it was unaware of them. . . . No doubt, theft is at the root of many titles; and priceless archaeological artifacts obtained in violation of local law are to be found in reputable museums all over the world. But 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.

Id. at 1115-16. Gerber thus affirms that the national interest in protecting archaeological sites allows both the ownership of property based upon constructive possession and the protection of artifacts discovered on private land.

The most recent case to consider the application of ARPA and the national policy of protecting archaeological materials provides yet another analogue to the foreign laws at issue in this case. In United States v. Shivers, 96 F.3d 120 (5th Cir. 1996), the federal government

seized a collection of metal tokens uncovered by defendant in a National Forest. Because ARPA defines archaeological resources as material remains which, among other things, are at least 100-years old and these tokens were not that old, defendant argued that ARPA did not vest ownership of them in the federal government. Further, because ARPA explicitly permits private individuals to collect from federal land objects that do not fit the statutory definition of "archaeological resource," the collector argued that ARPA in fact vests ownership of such objects in the private collector. The Fifth Circuit, relying on the common law of finds vesting ownership of embedded objects in the land owner,^{31/} rejected defendant's arguments and concluded that, even absent a specific statutory transfer of title, the United States owned the tokens. *Id.* at 124.

Further, both Congress and some states now regulate or even take ownership of certain categories of cultural objects found on private land.^{32/} In 1990, Congress passed the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1998). Many state legislatures have enacted comparable legislation, as well. Several states now regulate burials and associated funerary objects found on private land,^{33/} while other states

^{31/} The Fifth Circuit relied on one of a long line of cases addressing the ownership of abandoned shipwrecks, before enactment of the Abandoned Shipwreck Act. In Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985), the court concluded that ships embedded in submerged lands belong to the land owner, in this case the federal government.

^{32/} Because the federal government owns or manages approximately one-third of all land in the United States -- thus giving the federal government control of much of the nation's archaeological resources -- ownership of objects found on private land may have received less legislative attention in the past. See U.S. General Accounting Office, Cultural Resources: Problems Protecting and Preserving Federal Archeological Resources (1987); Federal Lands: Information on Land Owned and on Acreage With Conservation Restrictions (1995).

^{33/} Examples of state statutes that specifically apply to burials found on private land include Ark. Stat. Ann. § 13-6-401 (1997); Fla. Stat. Ann. § 872.05(1) (1997); Minn. Stat. Ann. §

regulate all archaeological resources on private land.³⁴ Several states also deprive landowners of ownership or prohibit any sale or transfer of Native American artifacts taken (after the effective date of the statute) from a grave located on private land.³⁵

Notably, in two reported decisions to consider the constitutionality of a state statute that regulates archaeological sites and burials, in particular those located on private land, both the Iowa Supreme Court and the Minnesota Court of Appeals held that statutes preventing landowners from free use of their land in order to protect Native American burials were not unconstitutional takings. See Hunziker v. Iowa, 519 N.W.2d 367, 370 (Iowa 1994), cert. denied, 514 U.S. 1003 (1995); Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. App. 1990). The AAM Amici's argument that the Italian law similarly protecting Italy's cultural patrimony is somehow adverse to United States policy or amounts to an unconstitutional taking simply is without merit.

In fact, the Supreme Court also has drawn a distinction between the extent of permissible regulation of real versus personal property. As the AAM Amici point out (Br. at 13-14 n.14), the Supreme Court approved in Andrus v. Allard, 444 U.S. 51, 66-67 (1979), extensive

307.08(1) (1997); N.D. Cent. Code § 55-03-01.1 (1997).

³⁴ See N.C. Gen. Stat. § 70-51 (1997); Or. Rev. Stat. § 358.920 (1996); Wash. Rev. Code Ann. § 27.53.060 (1997); W. Va. Code § 29-1-8a(c)(1)(1997).

³⁵ See Ala. Code § 41-3-1 (1997); Ark. Stat. Ann. § 13-6-406 (1997); Cal. Pub. Res. Code § 5097.99(b) (1997) (making it a felony, punishable by imprisonment, knowingly or willfully to obtain or possess any Native American artifacts or human remains taken from a grave or cairn after January 1, 1988); Ga. Code Ann. § 12-3-622 (1997) (prohibiting the sale or trading of American Indian burial objects, sacred objects or objects of cultural patrimony); Mo. Rev. Stat. § 194.410 (1997). West Virginia also "holds in trust for the people of West Virginia" any grave artifacts from public or private lands that are not subject to reburial. See W. Va. Code § 29-1-8a (1997).

regulation of those who had obtained legal ownership of eagle bird feathers before the enactment of the Eagle Protection Act and the Migratory Bird Treaty Act. Subsequently, in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Justice Scalia cited approvingly to Andrus and noted that the owner of personal property does not have the same degree of expectation of freedom from governmental regulation as does the owner of real property.³⁶ AAM Amici fail to point out that in Andrus the possessors of the eagle feathers had lost all economic value, and they failed to appreciate the distinction that the Court drew between real and personal property.

Like the property owners in Andrus, purported "owners" of cultural artifacts to be returned to their nation of origin do not face unconstitutional takings. (Indeed, here the issue appears purely academic: appellant will retain the economic value of the Phiale by virtue of his indemnification agreement with the Swiss dealer who sold him the artifact.) A grant of comity to Italy's cultural patrimony laws by the United States -- consistent with McClain -- neither

³⁶ In Lucas, Justice Scalia wrote:

[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).

Lucas, 505 U.S. at 1027 (citing Andrus). See also James A.R. Nafziger, The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage, 30 Willamette L. Rev. 581, 603-04 (1994). In light of the long-standing common law treatment in both England and the United States of human remains and objects therewith as not subject to private ownership (or, in the case of objects, sometimes owned by the descendants of the deceased), and because of the possibility that the Phiale which is the subject of this litigation was from a burial or religious context based on the comparative archaeological information, the Phiale might not be considered subject to private ownership even under the laws of the United States. See Gerstenblith, supra note 29, at 645-46.

conflicts with the public policy and interest of the United States nor constitutes a taking under the Fifth Amendment of the U.S. Constitution.

IV.

The Protection of Ancient Art and Antiquities By Law Is Consistent With The Educational Function of Cultural Institutions

As many people find their first opportunity to view the arts of antiquity in the context of museum exhibitions, museums play an important role in stimulating interest in and appreciation for ancient art and archaeology. There are various ways to bring ancient art to the attention of American museum audiences, not limited to the acquisition of new objects. As custodians of material, natural, and artistic heritage, museums and a number of organizations concerned with museums and art history have developed codes of ethics that deal explicitly with the acquisition of archaeological material.^{37/} Indeed, the quintessential role of museums is to educate the American public. It is therefore of the utmost importance that the objects they display and care for have as much information as possible -- information that can be learned only from a full understanding of their original context. Without context, the objects fall short in their educational function.

Shortly after ratification of the UNESCO Convention, representatives of certain art historical, archaeological and anthropological associations (including two amici supporting appellant, the AAM and the Association of Art Museum Directors) prepared a "Resolution Concerning the Acquisition of Cultural Properties Originating in Foreign Countries." This Resolution provides that museums can best cooperate with foreign countries in their endeavors

^{37/} See P. Boylan, supra note 9, at 94-104.

to preserve cultural property by "refusing to acquire through purchase, gift, or bequest cultural property exported in violation of the laws obtaining in the countries of origin."^{38/}

A similar sensitivity to the endangered status of many of the world's archaeological sites due to the illicit trade in antiquities is expressed in the Code of Professional Ethics of the International Council of Museums, an organization with which 56 U.S. museums and nearly 700 museum professionals are affiliated. The ICOM Code, adopted in 1986, devotes considerable attention to the acquisition of illicit material, specifying: "Museums should recognize the relationship between the market place and the initial and often destructive taking of an object for the commercial market, and must recognize that it is highly unethical for a museum to support in any way, whether directly or indirectly, that illicit market."^{39/} The ICOM Code explicitly acknowledges that the laws of countries of origin and intermediate countries are an essential consideration to acquisition policies.^{40/}

Some U.S. museums, following the lead of these professional associations, have adopted stringent policies to govern the acquisition of archaeological objects. As examples:

- The University Museum at the University of Pennsylvania, which houses premier archaeological collections in the United States, was the first. The Museum was

^{38/} The Resolution is published on the College Art Association website at <http://www.collegart.org>.

^{39/} ICOM Code of Professional Ethics, adopted 4 November 1986, section 3.2. The document is available on the ICOM website at <http://www.icom.org/ethics.html>. Amicus AAM is affiliated with ICOM through the AAM/ICOM committee. It is perplexing that the AAM Amici have adopted a position that challenges due regard for the laws of countries of origin and contradicts the ICOM Code of Ethics.

^{40/} See id. The AIA Amici are mystified at the decision of the AAM not only to ignore the Code of Ethics of ICOM and its own earlier Statement of Principles but to reverse its earlier testimony on this very issue before Congress. See Appendix.

an initiator of the UNESCO Convention, which it abides by in "spirit and letter." It requires that objects meet export guidelines of the country of origin.^{41/}

- The Harvard University Art Museum acquisitions policy requires a reasonable assurance that an object was not exported after July 1, 1971 in violation of the laws of the country of origin and/or the country where it was last legally owned.^{42/}
- The J. Paul Getty Museum acquisitions policy specifies that acquisitions be made in accordance with the UNESCO Convention and that classical antiquities have a documented provenience and come from existing, published collections.^{43/}

The position taken by the AAM Amici -- urging this Court to reject application of the laws of other countries enacted to protect archaeological finds within their territories (AAM Amici Br. at 3-6, 28-29) -- is not consistent with that of a number of sister organizations or prominent U.S. museums with significant archaeological collections. If accepted, the AAM Amici position would jeopardize future relations between American and foreign museums and

^{41/} See The University of Pennsylvania Museum of Archaeology and Anthropology Code of Ethics (revised Apr. 1997).

^{42/} Among the authors and three main proponents of this policy was Professor Paul Bator, relied on at length by AAM Amici. The Harvard policy states:

"The Museum Director, librarian, curator or other University officer . . . responsible for making an acquisition should assure himself that the University can acquire valid title to the object in question. This means that the circumstances of the transaction and/or his knowledge of the object's provenance must be such as to give him adequate assurance that the seller or donor has valid title to convey . . . [and] . . . have reasonable assurance that the object has not, within a recent time, been exported from its country of origin (and/or the country where it was last legally owned) in violation of that country's laws . . . In any event, the Curator should have reasonable assurance under the circumstances that the object was not exported after July 1, 1971, in violation of the laws of the country of origin and/or the country where it was legally owned."

^{43/} The Getty Museum's acquisition policy was revised in November 1995 and is described in VI The Art Newspaper, No. 54, December 1995, at 1. The policy brought the Museum into line with the policies of other major international museums, such as the Berlin Antikensammlung and the British Museum, prohibiting the acquisition of artifacts lacking a documented provenience.

would weaken efforts that the United States may undertake in order to recover its own looted artifacts from foreign institutions.

Indeed, the AAM Amici's current position is at odds with the position that the AAM itself forwarded in 1985 testimony before Congress, where the AAM explicitly acknowledged that new international traveling exhibits had been made possible in light of the feelings of cooperation resulting from the McClain decision and the subsequent enactment of the CPIA. The AAM testified: "One outgrowth of the [CPIA] with significant public benefit has been easing in restrictions on loans from foreign collections to U.S. museums for exhibitions and research."⁴⁴ Further, AAM Amici's current (contrary) statement (Br. at 2) that affirming the decision of the district court "would inevitably discourage foreign institutions from lending objects to U.S. museums for the types of significant exhibitions that have become so popular with the public and so important to museums" is entirely without basis. In the 20 years since the McClain decision, not a single object has been taken from a museum institution by a civil forfeiture proceeding. Moreover, any work of art or object of cultural significance that enters the

⁴⁴ Since McClain, some museums have developed innovative collaborations explicitly accounting for ethical and legal considerations. The Michael C. Carlos Museum at Emory University in Atlanta, working with colleagues at the Regional Archaeological Museum in Syracuse (Sicily), organized a major loan exhibition of ancient Sicilian art deriving from identified archaeological proveniences. See B. Westcoat, Syracuse, The Fairest Greek City: Ancient Art from the Museo Archeologico Regionale "Paolo Orsi" (Rome 1989); M. Anderson & L. Nista, Roman Portraits in Context: Imperial and Private Likenesses from the Museo Nazionale Romano (Rome 1988). The Kelsey Museum at the University of Michigan also initiated a successful collaboration with the Museo Nazionale Romano that resulted in a loan exhibition displayed both in Ann Arbor and in Rome. For the first time in centuries, fragments of Roman sculpture owned by the Kelsey from an ancient Roman temple that joined other fragments in Rome were united. See E. Gazda, Images of Empire: Flavian Fragments in Rome and Ann Arbor Rejoined (Ann Arbor 1996).

United States as part of an international exhibition may receive immunity from seizure or any other legal action while on temporary display. See 22 U.S.C. § 2459 (1998). There is no reason to fear that the district court's decision in this case will have a negative impact on international cooperation; rather, it is likely to result in further cooperative international efforts.

AAM Amici also miss the mark by asserting (Br. at 10) that modern day countries do not enjoy "a unique and compelling link to the ancient culture which created the cultural objects in question beyond the happenstance of territorial congruence" and so do not have the right to seek the protection and return of their patrimony. This position betrays a serious misunderstanding of the ways in which nations evolve, ignoring the role that shifts in the ethnic or religious composition of populations play in directing the long-term course of nation formation and the fact that national identities are grounded in sometimes age-old historical events. By the logic of AAM Amici, the United States should not enact legislation to protect its own archaeological and historical heritage, as most contemporary Americans cannot establish a "unique and compelling link" either to the first Colonial settlers or to the Native American communities that preceded them.^{45/} But that is no logic at all, and the Court should reject it.

^{45/} Although most people living in the United States are descendants of immigrants from throughout the world, the government has chosen to protect Native American and Native Hawaiian archaeological sites and cultural heritage beginning with the Antiquities Act of 1906 and now through an extensive series of both federal and state laws, discussed supra. See Gerstenblith, supra note 29, at 595-96 & nn.162-66. Indeed, the majority culture in the United States today is no less the product of conquest than is the modern Turkish population in Turkey. The AAM Amici's distinction cannot stand. (See AAM Amici Br. at 10 n.7)

Finally, AAM Amici are in error contending generally that many foreign countries seek the return of national patrimony for motives of profit or to effect an "economic windfall." (AAM Amici Br. at 10) No evidence cited by the AAM Amici supports the assertion that repatriated archaeological objects have later been sold or otherwise converted for financial gain by claimant countries. Rather, countries of origin "profit" indirectly from the restitution of cultural patrimony by regaining the ability to display such material in their own museums for the enjoyment of international visitors, thereby stimulating cultural tourism.⁴⁶

⁴⁶ While AAM Amici claim, without support, that a nation has sold objects of cultural patrimony after their restitution and contend that the market confers better value and care on antiquities than would be afforded them in their countries of origin (AAM Amici Br. at 12 & n.13), experience demonstrates otherwise. When Byzantine mosaics that were the subject of the litigation in Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), aff'd, 917 F.2d 278 (7th Cir. 1990), cert. denied, 502 U.S. 941 (1991), were ordered returned to Cyprus, the mosaics were placed on public display at the Archbishop Museum in Nicosia. See Isabel Wilkerson, Hoosiers Glimpse a Bit of Byzantium, N.Y. Times, July 8, 1991, at A6. By contrast, the dealer who had purchased the mosaics damaged the work. She had the tiles reset because, although the mosaics originally came from the curved church apse, she thought they would be more saleable if flattened. See Catherine Sease and Danaë Thimme, The Kanakariá Mosaics: the Conservators' View, in Antiquities Trade or Betrayed: Legal, Ethical & Conservation Issues 122, 124-30 (K. Tubb ed., 1995). Similarly, when the Lydian Hoard was returned by the Metropolitan Museum of Art to Turkey after years of protracted litigation, the material was placed on display in the Anatolian Civilizations Museum in Ankara. Despite the AAM Amici's criticism of Turkey's actions in seeking restitution of its cultural artifacts, most of the objects that comprised the Lydian Hoard had sat in storage at the Metropolitan Museum for 25 years benefitting neither scholars nor the public. See Lawrence M. Kaye & Carla T. Main, The Saga of the Lydian Hoard from Usak to New York and Back Again in Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues 150, 151 (K. Tubb ed., 1995)

In fact, artworks that reside in storerooms, unexhibited and under-catalogued, are not only a problem in foreign countries where museums are frequently official repositories for the results of ongoing excavations (AAM Amici Br. at 12), but also in the United States. Commenting that barely 20% of European paintings have been fully catalogued at the Chicago Art Institute, Director James Wood noted: "The holes in our knowledge are so gaping." Walter V. Robinson, Museums' Stance on Nazi Loot Belies Their Role

By challenging existing protective legislation, AAM Amici risk having an effect opposite of that intended: more stolen and looted antiquities will wind their way from the illicit market into museum collections, the products of destruction of sites and loss of historical information. Further, a failure to respect the legitimate laws of foreign nations protecting their cultural patrimony will diminish international cooperation and hurt the U.S. public interest in education and access to the international cultural heritage.

Conclusion

Only the vigorous enforcement of laws fighting against the all-too-pervasive market in looted antiquities will insure the adequate protection of archaeological sites from the devastating effects of unlawful pillage. While only a step in the important international effort, allowing countries of origin to seek the return of objects of their cultural patrimony by enforcing their declarations of national ownership of such objects is a critical means of quelling the illicit, international market in antiquities and therefore protecting our heritage.

in Key Case, The Boston Globe, February 13, 1998, at A1.

For the foregoing reasons and those set further in the briefs of appellees, AIA

Amici respectfully request that the Court affirm the ruling of the district court.

Dated: New York, New York
May 1, 1998

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97-6319

To be Argued By:
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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

AN ANTIQUE PLATTER OF GOLD, known as a GOLD PHIALE
MESOMPHALOS, C. 400 B.C.,

Defendant-in-rem,

MICHAEL H. STEINHARDT,

Claimant-Appellant,

REPUBLIC OF ITALY,

Claimant-Appellee.

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

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PRELIMINARY STATEMENT

The significance of this case is not limited to one object purchased by one U.S. citizen. Indeed, according to the brief of amici curiae in support of appellees United States of America ("the government") and Republic of Italy ("Italy"), an identical gold phiale, which was probably manufactured at the same workshop and is likely to have been exported from Sicily, is currently on display at the Metropolitan Museum of Art. (AIA Br. at 15 n.19)¹ If, at the request of Italy, the government were to commence a forfeiture proceeding against that phiale, it could be forfeited under the theory adopted by the District Court -- that it was "stolen" based solely on a showing of probable cause that it was exported from Italy in violation of Italy's ambiguous cultural property laws, regardless of the innocence or good faith of the museum. There are numerous foreign countries with cultural property laws and undoubtedly countless other objects covered by those laws on display at museums throughout the United States for the enjoyment and education of our citizens. It is for this reason that this case is so important, and, for the reasons set forth below and in our opening brief, so wrongly decided.

¹ In this reply brief, we will refer to the brief of the amici in support of appellees as "AIA Br.", the brief of appellant United States of America as "Gov. Br.", the brief of appellant Republic of Italy as "It. Br.", the brief of the amici in support of appellant as "AAM Br." and our opening brief as "Steinhardt Br."

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ARGUMENT

I.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE ON THE
GROUND THAT IT WAS IMPORTED IN VIOLATION OF THE NATIONAL
STOLEN PROPERTY ACT

A. Property Of Archaeological Interest Imported In Violation Of A
Foreign Cultural Property Law Is Not "Stolen" Within The Meaning
of the NSPA.

In our opening brief, we advanced a number of arguments why the Phiale is not "stolen" property. Appellees ignore or misconstrue many of them, and to the extent they address any of them fairly, their response is without merit.²

First, we argued that the legal and popular meaning of the word "stolen" does not cover property allegedly owned by a foreign government solely because of a declaration of national ownership contained in its cultural property laws. (Steinhardt Br. at 18-21) Neither appellees nor the amici respond to this point directly.

In its argument on the issue of comity, the government cites to several federal statutes in which it claims "the United States protects its own cultural heritage (and vests title in the nation to

² At the outset it should be noted that Italy's brief misstates the issue as "whether Steinhardt's seller, Veres (through his company Stedron) and Veres' seller, Cammarata, conveyed good title." (It. Br. at 9) That would be the issue if this were a civil proceeding in which Italy claimed the Phiale and had proven, by a preponderance of the evidence, that it had better title to the Phiale than did Steinhardt. However, this is a forfeiture proceeding based on the government's claim that the Phiale is "stolen" property within the meaning of the NSPA. Thus, the state case law cited by Italy (It. Br. at 9-10, 12-13) is utterly irrelevant.

valuable resources) in much the same manner as the Italian statutes at issue." (Gov. Br. at 41) However, all of those statutes are limited to property found on public or Indian lands. Unlike Italy's cultural property laws, none of them applies to artifacts found on private property. The amici also claim that "the United States, as well as every State, declares ownership of buried cultural property." (AIA Br. at 25) Again, nearly all of the statutes cited deal with objects found on public land.³ They are thus consistent with "the well-accepted common law principle that grants ownership of everything contained on the land and below its surface to the real property owner." (AIA Br. at 26)⁴ As for the state laws cited by the amici that regulate burial sites or archaeological excavations on private land (AIA Br. at 29-30 nn. 33-35), only one purports to vest ownership of grave artifacts in the state,⁵ and the constitutionality of that law has never been tested.

³ Contrary to the assertion of the amici (AIA Br. at 29), the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013, applies only to federal and tribal lands, not to private lands.

⁴ Similarly consistent with that principle is the holding in United States v. Gerber, 999 F.2d 1112, 1115-16 (7th Cir. 1993), cert. denied, 501 U.S. 1097 (1994), which applies the criminal penalties of the Archaeological Resources Protection Act of 1979 to persons who trespass on the private property of others to excavate and remove artifacts.

⁵ W. Va. Code § 29-1-8a(h) provides that "[a]ll human skeletal remains and grave artifacts found in unmarked graves on public or private land, and not subject to reburial, under the provisions of subsection (e) of this section, are held in trust for the people of

In sum, appellees and the amici have failed to rebut our argument that cultural property owned by a person that is subject to a government's blanket declaration of national ownership is not within the well known legal and popular definition of "stolen."

Second, we argued that there is a presumption against incorporating foreign laws into a criminal statute unless that statute makes specific reference to such laws. (Steinhardt Br. at 21-24) In response the government asserts that "there is no legal basis for the proposition that foreign laws are subject to greater scrutiny for notice" and cites to a case which rejected a vagueness challenge to the Lacey Act. (Gov. Br. at 33 n.*) However, as we previously noted (Steinhardt Br. at 22), the Lacey Act is distinguishable from the NSPA because it explicitly incorporates foreign law.

Moreover, the government ignores the point that if foreign law is to be used in defining what is "stolen" within the meaning of the NSPA, it should not be done selectively. As we have shown (Steinhardt Br. at 44-46), the Constitutional Court, Italy's highest court, has ruled that it is unconstitutional to apply the 1939 Law to permit confiscation of cultural property from a purchaser who did not participate in the wrongdoing and who did not benefit from it. The government should not be permitted to rely on Italy's cultural

West Virginia by the state" Subsection (b)(3) defines "grave artifacts" as "any items of human manufacture or use that are associated with the human skeletal remains in a grave."

property laws to define "stolen" but ignore them with respect to the constitutional limitation on the remedy that may be applied for their violation.

Italy seeks to distinguish the case decided by the Constitutional Court on the ground that it involved a painting rather than an archaeological object. (It. Br. at 18) However, that decision dealt with the constitutionality of Article 66 of the 1939 Law generally, without regard to the specific category of object involved. There is nothing in the holding or the reasoning that would or could suggest that a different constitutional principle applies to paintings as opposed to archaeological objects.

Italy also argues that the decision allows confiscation "not only from those who possess criminal intent, but also from those who have been negligent", citing to a portion of the opinion that refers to the concept of negligence in discussing a prior decision (Id.) However, the holding itself states only that the 1939 Law is unconstitutional as applied to a third party "who is not the person who committed the crime and did not derive any profit therefrom." (JA 243) Moreover, even if the opinion did define wrongdoing in terms of negligence, that would merely raise a factual issue making summary judgment inappropriate.

Third, we argued, based on the approach taken by the Supreme Court in Dowling v. United States, 473 U.S. 207, 221-26 (1985), that

by treating the Phiale as stolen property under the NSPA, the District Court erred in adopting "a blunderbuss solution to a problem treated with precision when considered directly" by Congress. Id. at 226.⁶ That argument rested on a careful analysis of the text and legislative history of the UNESCO Convention and the CPIA. (Steinhardt Br. at 24-30; see also AAM Br. at 15-21) In particular, we showed that the District Court's holding in this case is flatly inconsistent with the language in the Senate Report that the CPIA reflects Congress' intent that "the United States reach an independent judgment regarding the need and scope of import controls" and directs that "U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations" and that "U.S. actions in these complex matters should not be bound by the characterization of other countries." S. Rep. No. 97-564 (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4104.

Neither the government nor Italy even mentions Dowling or responds to our argument based on the provisions and legislative history of the CPIA.⁷ Instead, they pretend that we had argued that

⁶ Although Dowling is the only case we have found that deals specifically with the NSPA, the principle is well established that a statute should not be read broadly where it would serve to "circumvent the detailed remedial scheme constructed in a later statute", especially one that is more specific with regard to the subject matter involved. E.g., Patterson v. McLean Credit Union, 491 U.S. 164, 181-82 (1989) (citing United States v. Fausto, 484 U.S. 439, 453 (1988)).

⁷ The District Court ignored our argument entirely and did not even cite the CPIA.

the CPIA "preempts the use of the NSPA (and presumably other laws) in the area of cultural property" (Gov. Br. at 37) or that we had argued that the CPIA provides "exclusive procedures for seizure of property belonging to foreign nations." (It. Br. at 19) They then knock down that straw man by quoting from the language of the legislative history that the CPIA "'neither pre-empts State law in any way, nor modifies any Federal or State remedies that may pertain to articles to which provisions of this bill apply.'" (Gov. Br. at 38; It. Br. at 20) That argument misstates the relevant legislative history of the CPIA and mischaracterizes our argument.

The language quoted by the government and Italy is set forth in the general introduction to the Senate Report on the CPIA. Later, in discussing the provisions of the CPIA dealing specifically with seizure and forfeiture, the Senate Report states:

All provisions of law relating to seizure, forfeiture, and condemnation for violation of the customs law apply insofar as they are applicable to and not inconsistent with the provisions of this Act.

1982 U.S.C.C.A.N. at 4109 (emphasis supplied). The Report then goes on to state:

Implementation of article 7(b) of the Convention [which deals with "the import of cultural property stolen from a museum or a religious or secular public monument or similar institution"] affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate

and foreign commerce (e.g., National Stolen Property Act, Title 18, U.S.C. Sections 2314-15), including the possible recovery of stolen property for the rightful owner in the courts without payment of compensation.

Id. at 4110 (emphasis supplied). Reading all three of these statements together makes clear that Congress did not intend to make the CPIA the exclusive remedy relating to archaeological objects; other applicable provisions of customs law providing for forfeiture apply unless they are inconsistent with the CPIA; and the CPIA does not affect existing remedies relating to the knowing theft and receipt of property stolen from cultural institutions, such as museums.

In fact, we have not argued that the CPIA is the exclusive remedy or that it preempts all other provisions for the recovery of cultural property. Obviously, the owner of (or claimant to) such property may bring a civil action to recover it, and the government may prosecute under the NSPA where such property has been "stolen" within the usual meaning of the law. Our argument is much more limited. The CPIA established a detailed and precise scheme for dealing with the importation of cultural property that struck a delicate balance among various competing interests.⁸ The resulting

⁸ The passage of the CPIA was the result of a long, difficult struggle in which Congress considered and balanced the legitimate interests and concerns of foreign governments, archaeologists, museums, art dealers and collectors. See, Exec. Rep. 92-29, 92d Cong., 2d Sess. (1972); S. 2677, 93d Cong., 1st Sess. (1973); H.R. 5643, 95th Cong., 1st Sess. (1977); UNESCO Convention on Cultural Property: Hearings Before the Subcommittee on Trade of the House Committee on Ways and Means, 95th Cong., 1st Sess. (1977); H. Rep. No. 95-615, 95th Cong., 1st Sess. (1977); Convention on Cultural Property

legislation is inconsistent with the government's theory that all property imported into the United States in violation of the cultural property laws of every foreign state is "stolen" and can be forfeited without regard to any of the prerequisites or limitations established in the CPIA for protection of foreign cultural property under U.S. law.⁹ If that were the law, it is hard to see why Congress would have bothered to spend eleven years developing and enacting the detailed provisions of the CPIA or why any foreign state would ever seek to avail itself of those provisions rather than enlist the Customs

Implementation Act: Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance, 95th Cong. 2d. Sess. (1978); Cultural Property Treaty Legislation: Hearings Before the Subcommittee on Trade of the House Committee on Ways and Means, 96th Cong. 1st Sess. (1979); S. 426, 97th Cong. 1st Sess. (1981); Miscellaneous Tariff Bills -- 1982: Hearings Before the Subcommittee on International Trade of the Senate Committee on Finance, 97th Cong., 2d Sess. (1982); Sen. Rep. No. 97-564 (1982); H.R. 4566, 97th Cong. 2d Sess. (1981); House Rep. No. 97-989 (1982). Over time, the CPIA became increasingly protective of the interests favoring interchange of cultural property. The amici seek to reargue that debate by setting forth their view of what the law "should" provide. (AIA Br. at 8-14) However, their perspective as to the appropriate national policy on this subject was previously considered by Congress and has no place on this appeal.

⁹ As previously demonstrated (Steinhardt Br. at 27-30), these include a requirement that the President determine that (i) the cultural patrimony of the foreign state is in jeopardy of pillage; (ii) the foreign state has taken steps to protect its cultural patrimony; (iii) the forfeiture of the material would be of substantial benefit in deterring pillage; (iv) no less drastic remedies are available; and (v) the forfeiture is consistent with the general interest of the international community in the interchange of cultural property, and that there be (vi) public notice of the specific material designated for protection and (vii) compensation for the innocent owner of a forfeited article. See 19 U.S.C. §§ 2602(a), 2604 and 2609(c) (1).

Service and the Department of Justice to act unilaterally on its behalf.

Italy also cites to the fact that Congress did not enact proposed legislation to amend the NSPA so as to prevent its application to materials covered by foreign cultural property laws and thereby overturn United States v. McClain, 545 F.2d 988 (5th Cir.), reh'g denied, 551 F.2d 52 (5th Cir. 1977) ("McClain I"), and United States v. McClain, 593 F.2d 670 (5th Cir.), cert. denied, 444 U.S. 918 (1979) ("McClain III"). (It. Br. at 19-20; see also AIA Br. at 23) However, it is well established that Congress' failure to enact proposed legislation to overturn a judicial interpretation of a statute provides no support for the inference that Congress approved that statutory interpretation. E.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186-87 (1994); Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989); National Assoc. for the Advancement of Colored People v. American Family Mut. Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

Moreover, the salient point about the bill to amend the NSPA is that it was first introduced while Congress was still considering the CPIA precisely because, in the view of Senators Dole and Moynihan, McClain's interpretation of the NSPA was not only wrong, but was also

inconsistent with the national policy Congress was about to enact in the CPIA. 128 Cong. Rec. S12418-19 (Sept. 28, 1982).¹⁰

Fourth, we argued that McClain was wrongly decided, especially in light of the CPIA. (Steinhardt Br. at 30-33) The government responds by contending that a similar argument was rejected in McClain III. (Gov. Br. at 39) In McClain, appellant argued that the NSPA was "superseded" by a 1972 law dealing with pre-Colombian artifacts and by the UNESCO Convention, but the court rejected that argument because it could not see in the legislative history of either that statute or treaty "any desire to prevent application of criminal sanctions for dealing in items classified as stolen because a particular country has enacted national ownership of its patrimony." McClain III, 593 F.2d at 665. However, since McClain, Congress passed

¹⁰ In introducing the bill to amend the NSPA, Senator Dole stated that "it is important for the Congress to insure that the potential application of existing law [*i.e.*, the NSPA] is consistent with our national policy, that will be substantially established by H.R. 4566 [the CPIA], with respect to illicitly traded cultural materials." 128 Cong. Rec. S124218. Senator Moynihan then went on to criticize the reasoning of McClain at length and concluded by stating that the bill to amend the NSPA "goes hand-in-hand with, and is essential to the successful implementation of, the Cultural Property Implementation Act." Id. at S124119. The bill had to be introduced separately from the CPIA because it required consideration by the Judiciary Committee. Id. at S12419. There was insufficient time for Congress to take up that bill during the 97th Congress, and similar legislation was introduced in the 98th Congress and the 99th Congress. See Hearing Before the Subcommittee on Criminal Law of the Committee on the Judiciary, U.S. Senate, 99th Cong., 1st Sess. (May 22, 1985) ("Senate Hearing") at 5. The remarks of Senators Dole and Moynihan in introducing the original bill to amend the NSPA and excerpts from the 1985 Senate Hearing are set forth in the Appendix to this Reply Brief.

the CPIA, which as demonstrated above, provides compelling evidence that Congress did not intend courts to apply the NSPA to cultural property allegedly owned by a foreign country pursuant to a national declaration of ownership.

The government also tries to create the impression that a number of other courts have reached the same result as McClain. (Gov. Br. at 30-31) That is not true. In Hollinshead v. United States, 495 F.2d 1154 (9th Cir. 1974), the issue was not raised as to whether the NSPA could be applied to cultural property allegedly owned by a foreign state solely because of a declaration of national ownership. Indeed, that issue was not even presented because the property at issue was "stolen" in the ordinary meaning of the word; defendant illegally removed a catalogued object from a government archaeological site and then smuggled it out of Guatemala. Id. at 1155-56; see also McClain III, 593 F.2d at 659 n.1. As for the three district court cases cited by the government, none of them involved actions under the NSPA and therefore those courts had no occasion to consider whether the NSPA could be applied to property owned or exported in violation of the cultural property laws of a foreign state.¹¹ Moreover, in two

¹¹ The government purports not to understand how this makes a difference. (Gov. Br. at 30 n.*) Where, as in those cases, parties in a civil action litigate title to an article of cultural property, the issue is whether, under foreign law, the foreign government claimant owns the property. In order to decide that issue, it is irrelevant whether or not the property is "stolen" within the meaning of the NSPA.

of those cases, the court cited McClain not for the proposition that such property was "stolen", but rather for the principle that export restrictions do not create ownership in the state, Government of Peru v. Johnson, 720 F. Supp. 810, 814 (C.D. Cal. 1989), aff'd sub nom., Government of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991), or that a sovereign cannot establish its ownership of a class of artifacts in the absence of its prior clear declaration to that effect. Republic of Turkey v. OKS Partners, 797 F. Supp. 64, 66-67 (D. Mass. 1992).

Finally, appellees and the amici completely disregard our argument that even if McClain were not wrongly decided, it should not be extended to forfeiture proceedings against an object that is no longer in the hands of the alleged wrongdoer. (Steinhardt Br. at 34-35) As we demonstrated, the court in McClain I justified its holding on the ground that in a criminal proceeding the government must satisfy its burden of proving beyond a reasonable doubt that the importer knew the property to be stolen. 545 F.2d at 1002 n.31.

During the hearings on the bill to amend the NSPA so as to overturn McClain, the government appeared to recognize this point. In response to a question as to how McClain could be squared with the statement in the legislative history of the CPIA quoted at page 7 above, the Department of Justice argued that "the cited language is addressing potential agreements to be made under the CPIA that will create import controls over certain property" whereas "McClain

involves a criminal statute that has other elements to protect innocent persons (e.g., the requirement of proof beyond a reasonable doubt that the defendant had knowledge of the stolen nature of the property)." Senate Hearing at 38. The government thus implicitly acknowledged that McClain could not be applied outside the context of a criminal proceeding without conflicting with the CPIA.

B. Italian Law Does Not Vest Title To The Phiale In The Republic of Italy In A Manner Consistent With Basic Standards of Fair Notice.

In our opening brief, we demonstrated that even in applying McClain the District Court erred in granting forfeiture of the Phiale because Italy's cultural property laws do not give fair notice of its claim to own all archaeological objects. (Steinhardt Br. at 35-46) Anxious to avoid this issue, the government advances two arguments as to why this Court should not even reach it. Both are without merit.

First, the government argues that the fair notice analysis adopted by the court in McClain does not apply to a civil forfeiture proceeding. (Gov. Br. at 32) The government begins by arguing that in in rem forfeiture cases, "it is not necessary to show that the owner of the forfeited property was aware of the illegality of the transaction that serves as the basis for forfeiture." (Id.) (emphasis supplied).¹² However, the issue under McClain is whether the NSPA

¹² The government cites three cases. Two of them do nothing more than interpret the specific statutory "innocent owner" defense contained in 18 U.S.C. § 981(a)(2). United States v. 105,800 Shares of Common Stock, 830 F. Supp. 1101, 1131 (N.D. Ill. 1993); United States v. 316 Units of Mun. Sec., 725 F. Supp. 172, 177 (S.D.N.Y.

fails to give adequate notice to the alleged wrongdoer (i.e., the importer of cultural property) that it is "stolen" solely because of a declaration of national ownership in a foreign cultural property law, where that foreign law is ambiguous.

The government then argues that "[a]bsent a knowledge requirement," courts in civil forfeiture proceedings apply a weaker standard of vagueness and fair notice than in criminal cases. (Id.) However, the premise of that argument is wrong. This case involves an alleged violation of the NSPA, which is a criminal statute that does contain a knowledge requirement. Accordingly, the same requirement of fair notice applies in this civil forfeiture case as it would in a criminal proceeding. See United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992); Crandon v. United States, 494 U.S. 152, 158 (1990); United States v. One 1973 Rolls Royce, 43 F.3d 794, 819 (3d Cir. 1994); United States v. One Big Six Wheel, 987 F. Supp. 169, 179 (E.D.N.Y. 1997).¹³

1989). The third case mentions that under the common law, an article may be forfeited even though the owner was not a participant in and had no knowledge of the illegal acts, but goes on to apply, as a matter of constitutional law, an "innocent owner" defense. United States v. One Tintoretto Painting, 691 F.2d 603, 606-07 (2d Cir. 1982). Thus, it is incorrect that the owner's awareness of the alleged illegality is never an issue in a forfeiture proceeding.

¹³ All but one of the cases cited by the government for the proposition that greater leeway is allowed as to fair notice in civil cases than in criminal cases involved statutes or ordinances that were regulatory in nature, rather than a forfeiture or civil penalty provision that is triggered by a violation of a criminal law. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99

In sum, the government's argument turns McClain on its head. As noted above, McClain's holding that property is stolen within the meaning of the NSPA based upon a foreign cultural property law was justified on the ground that the government would have to prove scienter beyond a reasonable doubt. Now the government proposes not only to extend that holding to a civil forfeiture proceeding, where the government's burden is much lower, but also to use the fact that it is a civil proceeding to eviscerate McClain's holding that due process requires that there be no ambiguity in the declaration of national ownership set forth in the foreign law.

Second, the government asserts that Steinhardt is foreclosed from raising this issue on appeal because it was not raised in the District Court. (Gov. Br. at 33-34) That is incorrect. We argued below at length that the Italian law did not unambiguously vest title to the Phiale in the Italian State. See Steinhardt's Reply Memorandum of Law at 11-21. However, the District Court completely ignored that argument.

(1982); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. \$122,043 in United States Currency, 792 F.2d 1470, 1477-78 (9th Cir. 1986). The one exception is United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 829 (9th Cir. 1989). That case was decided prior to the Supreme Court decisions in Crandon and Thompson/Center Arms cited above. Furthermore, it is distinguishable in that the issue there was not whether the foreign law was ambiguous, but rather whether the Lacey Act, which specifically prohibits goods imported in violation of "foreign law", provided adequate notice that "foreign law" included the regulations as well as the statutes of a foreign country.

Nor is there any substance to the government's subsidiary point that Steinhardt did not present any expert opinion, affidavit or other evidence to the District Court to controvert Prof. Berrutti's interpretation of Italian law. (Gov. Br. at 33-34) That is true but irrelevant because our argument below and on this appeal does not require us to offer a different interpretation of Italian law. Rather, as we have demonstrated, the ambiguities and contradictions of Italian law are evident by reading the text of the statutes, and Prof. Berrutti's efforts to bring clarity and order to those statutes are based on his reading of case law interpreting them. (Steinhardt Br. at 39-44) That approach simply does not satisfy the requirement of fair notice set forth in McClain.

On this appeal the government simply repeats the substance of Prof Berrutti's affidavits without coming to terms with the ambiguities in the text of the Italian statutes. (Gov. Br. at 35-36) Similarly, Italy argues that its cultural property laws cover archaeological objects regardless of whether they were found "in the soil" because it is in the nature of such objects to be excavated from the soil and Italian law does not require the Italian State to prove the exact circumstances of the excavation. (It. Br. at 11-12) That argument is based not on the text of the statutes but on a judicial interpretation of them. However, an American reading an English translation of the statutes would hardly be on notice of that

interpretation.¹⁴ The statutes themselves refer to objects found in the soil; if all archaeological objects were, by definition, found in the soil, it is hard to fathom why the statutes would have used that language.

In addition, Italy argues that Italian law makes a fundamental distinction between items of archaeological interest and other objects to which its cultural property laws apply and that we have failed recognize that distinction. (It. Br. at 10-12) However, Italy cites nothing in the statute (or even in the case law) which purports to make such a distinction.¹⁵ On the contrary, Article 1 of the 1939 Law specifically provides that the Law covers any property

¹⁴ Italy concedes this point by arguing that Steinhardt (and therefore other U.S. citizens) are on notice of the meaning of Italy's cultural property laws because "[a]ny reasonable inquiry would have revealed the Italian statutes discussed above and the decision of the Court of Cassation", which allegedly holds that all archaeological property belongs to the Italian State without qualification. (It. Br. at 15) (emphasis supplied) Not surprisingly, Italy cites no case to support this argument, for the idea is absurd that in the context of a U.S. criminal statute, which does not refer to foreign law, a U.S. citizen is deemed to have notice not only of all foreign statutes relating to cultural property, but also to all of the case law interpreting them.

¹⁵ Italy cites only to the portion of Prof. Berrutti's affidavit in which he discusses the notification provision of the law. (It. Br. at 12) However, not even Prof. Berrutti claims that the notification provision is inapplicable to all archaeological objects. Rather, he states only that there is no record of any notification with respect to the Phiale and therefore, pursuant to judicial interpretation of the 1939 Law, the Italian State has title to, rather than a lien on, the Phiale. (JA 202)

"which has any historic, artistic, archaeological, [or] ethnographic interest." (JA 236) (emphasis supplied)

Finally, both the government and Italy place great weight on the District Court's finding that Haber knew the Phiale was stolen at the time he imported it. (Gov. Br. at 34-35; It. Br. at 13-15)¹⁶ However, that argument -- that a finding of willfulness cures the problem of notice caused by ambiguities in a foreign statute -- was specifically rejected in McClain III, 593 F.2d at 671, citing Screws v. United States, 325 U.S. 91, 105 (1945), where the Supreme Court observed, "willfull conduct cannot make definite that which is undefined."

C. U.S. Courts Should Not Enforce Italy's Cultural Property Laws As A Matter Of Comity Because They Violate U.S. Public Policy As Set Forth In The Cultural Property Implementation Act.

As we demonstrated in our opening brief, enforcement of the Italian cultural property laws under the NSPA violates U.S. public policy as set forth in the CPIA. (Steinhardt Br. at 47-51) The government and Italy respond by asserting that Italian law relating to cultural property merely "affects title to personal property located

¹⁶ After quoting from the opinion below, both the government and Italy go on to misstate that the District Court "reasonably concluded" that Haber acted as he did "because Italy's statutes unambiguously provide" that title to archaeological items such as the Phiale vests in the Italian State. (Gov. Br. at 35; It. Br. at 15) As noted above, the District Court reached no such conclusion, reasonable or otherwise, as to whether or not Italy's statutes were unambiguous. The District Court simply accepted Prof. Berrutti's statement of Italian law and ignored altogether our argument that Italy's statutes were ambiguous.

within the borders of a sovereign state and therefore does not qualify as one so immoral or offensive to fundamental principles that it will not be enforced." (Gov. Br. at 40-41; It. Br. at 22) That argument misses the point that Italy's cultural property laws are inconsistent with the legislative history and text of the CPIA which (i) reject acceptance of a foreign country's characterization of property as stolen and unilateral enforcement of foreign cultural property laws, (ii) mandate that Americans be placed on notice of import restrictions on cultural property, and (iii) provide for compensation for innocent owners. (Steinhardt Br. at 48-51) Neither the government nor Italy addresses the inconsistency between Italy's cultural patrimony laws and these fundamental policies of American law.

The government, Italy and the amici also argue that various federal and state laws protect this nation's cultural heritage in the same manner as Italy's cultural property laws. (Gov. Br. at 41; It. Br. at 22-23; AIA Br. at 25-32) However, as demonstrated above at page 3, with the exception of one provision of West Virginia law dealing with human skeletal remains and grave artifacts, none of those statutes purport to vest title in the government of archaeological objects found on private land. The Italian cultural property laws, thus, far exceed the scope of American statutes concerning cultural property.

II.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE ON THE GROUND THAT IT WAS IMPORTED BY MEANS OF A FALSE STATEMENT AS TO ITS COUNTRY OF ORIGIN IN VIOLATION OF 18 U.S.C. § 542.

We demonstrated in our opening brief that the Phiale is not subject to forfeiture because the identification on Customs forms of the country of origin of the Phiale as Switzerland rather than Italy was not a material false statement in violation of 18 U.S.C. § 542. (Steinhardt Br. 51-63) Instead of meeting our argument head on, the government urges that the Court relieve it of its burden of proving that the country of origin designation had any effect on the importation of the Phiale. Specifically, the government contends that (i) the government need not demonstrate materiality of the country of origin designation under one provision of 18 U.S.C. § 542; (ii) even to the extent that the government must prove materiality, it is sufficient to demonstrate that the country of origin designation had some effect on the integrity of the importation process in general, not the actual importation of the Phiale; and (iii) the country of origin designation of the Phiale was therefore material.¹⁷ Each of these arguments is wrong.

¹⁷ The government mentions in passing that the Customs Form 7501, which Jet Air prepared and submitted for the Phiale, also misstated its value as \$250,000, whereas the Phiale had just been sold for more than \$1 million. (Gov. Br. at 6) The government did not base its argument below on that statement, and the District Court made no finding about it. In fact, that statement as to the Phiale's value was not material because it was used solely to compute the \$400 processing fee (JA 185), which was the maximum fee provided by law.

A. The Government Must Prove Materiality Of The Identification Of The Country Of Origin Of The Phiale.

The government's first argument is that under the second clause of § 542, which imposes criminal penalties on anyone "who makes a false statement in any declaration without reasonable cause to believe the truth of such statement", the government need not prove materiality of the false statement. (Gov. Br. at 16) The government states incorrectly that the District Court did not address its argument that the second clause of § 542 does not require a showing of materiality. (Gov. Br. at 17 n. *) In fact, the District Court rejected the government's argument, holding that "[f]or purposes of [§ 542], an allegedly false statement must be material." (JA 645)

The government's argument that it need not demonstrate materiality under the second clause of § 542 also flies in the face of this Court's holding in United States v. Avelino, 967 F.2d 815, 817 (2d Cir. 1992). In that case, defendant was charged with and convicted of making false statements on Customs forms in violation of 18 U.S.C. § 542 and 18 U.S.C. § 1001. On appeal, Avelino argued that prosecution on both charges penalized him twice for the same conduct contrary to his rights under the Double Jeopardy Clause. This Court agreed, holding that "every element needed to prove a crime under Section 1001 is an element of a Section 542 offense," Id. at 817.

19 C.F.R. § 24.23(b)(i)(B). Thus, it would have made no difference if the Phiale had been valued at a figure greater than \$250,000.

Specifically, the Court found that "Section 1001's materiality requirement is redundant because false statements under Section 542 are necessarily material because the importation must be 'by means of [the] false statement.'" Id. See also United States v. Rose, 570 F.2d 1358, 1363 (9th Cir. 1978) (holding that convictions under §§ 542 and 1001 were redundant as both offenses include the same elements, including materiality).¹⁸

Moreover, it is noteworthy that prior to the 1996 amendments, § 1001, like § 542, contained three clauses, not all of which contained an express materiality requirement. Nevertheless, following the Supreme Court's decision in United States v. Gaudin, 515 U.S. 506 (1995), this Court joined the other circuits in holding that a materiality requirement should be implied for prosecutions under every clause of § 1001. United States v. Ali, 68 F.3d 1468, 1475 (2d Cir. 1995). See also United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987); United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985); United States v. Beer, 518 F.2d 168, 170 (5th Cir. 1975).

Even if this Court were to adopt the government's flawed reading of § 542 and to treat the second clause as a separate basis

¹⁸ The government relies upon language from United States v. Corcuera-Valor, 910 F.2d 198 (5th Cir. 1990), which is plainly dictum. The court's holding, which the government urges the Court to reject, was that the government failed to demonstrate the materiality of the alleged false statements under the "by means of" language of § 542. Id. at 199-200. (Steinhardt Br. at 52)

for liability that does not require proof of materiality, the government still could not prevail. The second clause of § 542 requires proof that defendant made a false statement on a declaration without reasonable cause to believe the truth of such statement. Here, the declaration that was filed for the Phiale was contained on the Customs Form 7501. See 19 U.S.C. § 1485 (defining a Customs declaration). That declaration was signed (and therefore made) by Jet Air, not by Haber. (JA 185) However, the government has not demonstrated (and the District Court did not find) that Jet Air lacked reasonable cause to believe that the Phiale's country of origin was Switzerland. In fact, the Jet Air employee responsible for completing the Customs Forms for the Phiale testified that he listed Switzerland as the country of origin because of the Swiss letterhead on the invoice for the Phiale that Haber had faxed to Jet Air. (JA 346-47) There is no evidence in the record that Jet Air had knowledge of any other facts that would have put it on notice that Switzerland was not the true country of origin.¹⁹

¹⁹ Haber's knowledge that Italy was the country of origin would be relevant under the third clause of § 542, which imposes liability on any person who "procures the making of any such false statement", but that clause is expressly limited to false statements "as to any matter material thereto without reasonable cause to believe the truth of such statement." (emphasis supplied).

B. A False Statement Is Material Under § 542 Only If, But For The False Statement, The Goods Would Not Have Been Allowed Into The Country.

The government argues that to the extent § 542 requires proof that the false statement was material, this Court should adopt the materiality standard articulated by the District Court; namely, that a false statement is material if it has a "natural tendency to influence the actions of the Customs Service." (Gov. Br. at 17-21; JA 646-67) As set forth below, even under that materiality standard, Steinhardt would prevail. However, as we have demonstrated, the government's proposed materiality standard is at odds with the language and purpose of § 542. (Steinhardt Br. 51-55)

In urging that the Court adopt the "natural tendency to influence" standard, the government suggests that the purpose of § 542 is to police the importation process generally, and to assure the accuracy of all statements to the Customs Service without regard to whether those statements actually effect the importation of any goods. To bolster its reading of § 542, the government points out that the Courts have adopted that standard of materiality under the "catch-all" false statements statute, 18 U.S.C. § 1001. (Gov. Br. at 21) In short, the government implicitly suggests that § 542 is as broad as § 1001, except that § 542 covers only false statements that happen to arise in the context of importation.

In fact, § 542 employs language distinct from that of § 1001 and has a different purpose. Whereas § 1001 penalizes anyone who makes a materially false statement "in any matter within the jurisdiction of the . . . Government of the United States," § 542 applies only to the importation of goods "by means of" a false statement. Thus, § 542 is not intended to police the integrity of the importation process generally, but rather "concerns itself only with whether a false statement was made to effect or attempt to effect the entry of the goods in question." United States v. Meldish, 722 F.2d 26, 28 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984) (emphasis supplied). The "natural tendency to influence" standard under § 1001, therefore, is not suited to the language and purpose of § 542.

C. The Identification Of The Phiale's Country Of Origin As Switzerland Was Not A Material False Statement Under Either Standard.

In our opening brief, we demonstrated that because the Customs Service lacked any authority to seize and forfeit the Phiale under the NSPA, the country of origin designation could not have been material because there was no legal basis upon which Customs could have seized the Phiale even if the country of origin had been identified as Italy. (Steinhardt Br. at 56-58) The government responds by asserting that "as of at least April 1991, Customs officers had been alerted by a Customs Directive (JA 246-57) (1) to determine whether an imported item of cultural property was subject to

a foreign cultural property ownership claim and (2) to seize any such items as having been imported in violation of 18 U.S.C. § 2314."

(Gov. Br. at 23-24) The question, however, is not whether the Customs Service claimed to have legal authority to seize the Phiale, but rather whether it had such authority. As we have demonstrated, the Customs Service had no legal basis for seizing the Phiale under the NSPA or any other statute.

As a backstop to its reliance on the NSPA, the government asserts that "the Phiale also could have been seized for violation of 19 U.S.C. § 1592(a)" based on the alleged false statements in the Stedron invoice. (Gov. Br. at 24) The government's position is without merit. Under § 1592, the maximum penalty the government can impose for a violation of the statute is a fine, not forfeiture of the item.²⁰ Indeed, at the time the Phiale was imported into the United States in December 1992, the Customs forfeiture statute on which the government relies here expressly precluded the government from using a violation of § 1592 as a basis for forfeiture. 19 U.S.C. § 1595a ("[A]ny merchandise that is introduced or attempted to be introduced contrary to law (other than in violation of 19 U.S.C. § 1592) may be

²⁰ The Customs Service has the authority to seize an item based on a violation of § 1592 only in limited circumstances, namely where the offender is insolvent, beyond the jurisdiction of the United States, or where "seizure is otherwise essential to protect the revenue of the United States or the prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States." 19 U.S.C. § 1592(c)(6).

seized and forfeited.") (emphasis supplied). Accordingly, the Customs Directive does not even mention § 1592 as a basis for seizure of cultural property.

In light of the absence of any legal authority for seizing and forfeiting the Phiale, the government argues that the country of origin designation is material as a matter of law because it is relevant to the enforcement of laws unrelated to the Phiale or to antiquities generally. Thus, the government argues that the country of origin designation here was material because "[i]f importers fail to provide accurate information about country of origin, Customs cannot properly enforce the trade restrictions, embargoes, tariffs, and other import regulations that fall within its jurisdiction."

(Gov. Br. at 23) However, it is undisputed that no trade restriction, embargo, tariff or other import regulation applies to an antique object made in Italy and imported from Switzerland. Indeed, as we have pointed out, and the government does not challenge, the Phiale could have been brought into the United States without the filing of any form asking for its country of origin. (Steinhardt Br. at 58)

Thus, the country of origin designation was incapable of affecting any determination regarding the Phiale. It was therefore immaterial. See Kungys v. United States, 485 U.S. 759, 771-72 (1988) (holding that a false statement as to a date in a naturalization application was immaterial because it lacked "a natural tendency to

produce the conclusion that [petitioner] was qualified [for citizenship]"); United States v. Oaisi, 779 F.2d 346, 348 (6th Cir. 1985) (overturning conviction of defendant who made false statements in an immigration hearing as to the viability of his marriage because they "were not material to the issue at hand"); United States v. Naserkhaki, 722 F. Supp. 242, 248-49 (E.D. Va. 1989) ("[A] misstatement in this context is material only if it relates to a fact or circumstance the INS examiner considers in deciding whether to issue [the requested visa].").

III.

THE DISTRICT COURT ERRED IN FORFEITING THE PHIALE WITHOUT AFFORDING STEINHARDT AN "INNOCENT OWNER" DEFENSE IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

We demonstrated in our opening brief that due process protects innocent owners from forfeiture of their property, and that there is at least an issue of fact as to whether Steinhardt qualifies as an innocent owner. (Steinhardt Br. 63-68) Further, we argued that this case is distinguishable from Bennis v. Michigan, 516 U.S. 442 (1996) for three reasons, two of which were specifically mentioned by Justice Ginsburg in her concurring opinion. (Steinhardt Br. at 64-66)

The government does not contest our characterization of Justice Ginsburg's concurrence, but rather asserts that her opinion was not the holding of the Court and therefore "is not controlling here." (Gov. Br. at 44) Justice Ginsburg's concurring opinion,

however, is instructive in that it highlights two factors that Justice Ginsburg thought were so critical as to cause her to cast the deciding vote. The first factor was that the Michigan statute afforded courts equitable discretion to mitigate harsh forfeitures. The government does not dispute that here, unlike Bennis, the federal forfeiture statutes do not afford the courts any such equitable discretion.

The second factor was that the full force of the forfeiture in Bennis did not fall solely on the innocent party, but also on the wrongdoer. The government argues that this case is different because "Steinhardt instructed Haber to purchase and import the Phiale on his behalf." (Gov. Br. at 45 n.*) However, there is no evidence, and the District Court did not find, that Steinhardt had any knowledge of Haber's alleged wrongdoing. The government also argues that this case is different because pursuant to the "Terms of Sale" document, Steinhardt is entitled to a full refund of the purchase price of the Phiale and therefore the full effect of the forfeiture does not fall solely on him. (Id.) However, that document purports to give him a claim against the seller, Veres, not against the alleged wrongdoer, Haber. In addition, even if Steinhardt has a possible claim against Haber, his likelihood of success and collection are far from certain. What is certain is that the object the government seeks to forfeit belongs solely to him.

The third factor that distinguishes this case from Bennis is that the government here seeks to use the forfeiture laws to enforce Italy's cultural patrimony laws which have been declared unconstitutional as applied to confiscation against an owner who did not commit the violation of Italian law and who did not profit from it. (Steinhardt Br. at 66) The government makes no response at all to that argument.

Finally, the government contends that even if the Court recognizes an innocent owner defense here, Steinhardt does not qualify because he "was willfully blind to the suspicious nature of the Phiale transaction." (Gov. Br. at 45) The government hypothesizes that had Steinhardt asked more questions of Haber, he would have discovered Haber's alleged wrongdoing, and that Steinhardt should have known to ask such questions based on his experience as an art collector. (Gov. Br. at 45-46) In fact, Michael Steinhardt is an investment manager who did not begin collecting antiquities until 1987 or 1988 -- three or four years before his purchase of the Phiale. (JA 528) Before buying the Phiale, Steinhardt had purchased several antique objects, none of which came from Italy. (JA 532)

The government's argument is based on two incorrect statements of fact. First, the government relies on the District Court's finding that Haber had previously sold Steinhardt 20 to 30 objects totaling \$4-6 million worth of sales. (Gov. Br. at 4, 46 n.*)

However, that finding was based on testimony in which Steinhardt was discussing all of his purchases from Haber, including those made after the Phiale. (JA 539-40, 633) Second, the government states that "Steinhardt, as the chairman of the international council of the Israel museum, was aware of increasing concern over the illegal removal of objects of artistic and archaeological importance from European nations that claim them as their patrimony." (Gov. Br. at 46) Again, it was only after he purchased the Phiale that Steinhardt first became aware of the issue of cultural patrimony and that he served as chairman of the international council of the Israel Museum. (JA 541-43)²¹

In sum, Steinhardt's limited prior experience as an art collector does not compel the conclusion that he had reason to believe there was illegality involved in the importation of the Phiale or that he was willfully blind to the suspicious nature of the transaction.

²¹ In a similar vein, Italy asserts that "Mr. Steinhardt arranged a purchase of an item, from a questionable source, which he knew was in Italy just prior to his acquisition of it. (JA 545, 546)." (It. Br. at 17) That statement is false. Steinhardt knew that he was buying the Phiale through Haber, whom he believed to be a reputable dealer. (JA 111) The pages of the Joint Appendix cited by Italy contain Steinhardt's testimony that the seller was a Sicilian coin dealer and that he was willing to guarantee the authenticity of the Phiale. (JA 545-46) There is nothing in that testimony to support the claim that Steinhardt knew the Phiale was in Italy at the time. Moreover, the District Court found, based on the evidence submitted by the government, that Steinhardt bought the Phiale from Veres, a Swiss dealer and that Haber took possession of the Phiale from Veres in Switzerland. (JA 632-33, 636)

At the very least, there is an issue of fact as to whether Steinhardt qualifies as an innocent owner, and the District Court erred in granting the government summary judgment on this ground. See United States v. One Tintoretto Painting, Etc., 691 F.2d 603, 607 (2d Cir. 1982).

CONCLUSION

For the reasons set forth above and in our opening brief, this Court should reverse the Memorandum and Order and the Judgment of the District Court denying Steinhardt's motion for summary judgment and granting the government's cross-motion for summary judgment forfeiting the Phiale. In the alternative, to the extent this Court holds there are disputed issues of material fact, it should reverse the Memorandum and Order and Judgment of the District Court granting the government's cross-motion for summary judgment and remand this case for further proceedings.

Dated: New York, New York
June 1, 1998

Respectfully submitted,

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UNITED STATES of America, Plaintiff-
Appellee,

v.

AN ANTIQUE PLATTER OF GOLD,
known as a Gold Phiale Mesomphalos C.
400 B.C.,

Defendant-in-rem,

Michael H. Steinhardt, Claimant-
Appellant,

Republic of Italy, Claimant-Appellee.

No. 97-6319.

United States Court of Appeals,
Second Circuit.

Argued: Oct. 14, 1998.

Decided: July 12, 1999.

Federal government sought civil forfeiture of an antique Sicilian gold platter, alleging illegal importation into United States and illegal exportation from Italy. The United States District Court for the Southern District of New York, Barbara S. Jones, J., 991 F.Supp. 222, granted summary judgment against the claimant, and he appealed. The Court of Appeals, Winter, Chief Judge, held that: (1) false designation of the platter's origin on a customs form was material; (2) there was no "innocent owner" defense to forfeiture; and (3) forfeiture did not violate the Excessive Fines Clause of the Eighth Amendment.

Affirmed.

[1] CUSTOMS DUTIES ⇌ 123

114k123

The false designation on a customs form of Switzerland as country of origin of an antique Sicilian gold platter's was "material," for purposes of the statute prohibiting the making of false statements in the course of importing merchandise into the United States, thus subjecting the platter to forfeiture; Customs Directive advised officials to determine whether property was subject to a claim of foreign ownership, and to notify the Office of

Enforcement if they were unsure of a nation's patrimony laws, such that a reasonable official should have viewed the platter's true country of origin as highly significant. 18 U.S.C.A. §§ 542, 545; Tariff Act of 1930, § 596(c), as amended, 19 U.S.C.A. § 1595a(c).

See publication Words and Phrases for other judicial constructions and definitions.

[2] CUSTOMS DUTIES ⇌ 123

114k123

The proper test for "materiality," for purposes of the statute prohibiting the making of false statements in the course of importing merchandise into the United States, is the "natural tendency" test, asking whether the false statement would have a natural tendency to influence customs officials, rather than the "but for" test, under which a false statement is material only if a truthful answer on a customs form would have actually prevented the item from entering the United States. 18 U.S.C.A. § 542.

See publication Words and Phrases for other judicial constructions and definitions.

[3] CUSTOMS DUTIES ⇌ 123

114k123

False statement is "material," for purposes of the statute prohibiting the making of false statements in the course of importing merchandise into the United States, if it has the potential significantly to affect the integrity or operation of the importation process as a whole, and neither actual causation nor harm to the government need be demonstrated; this test of materiality applies not only to the decision to admit an item but also decisions as to processing, e.g., expediting importation. 18 U.S.C.A. § 542.

See publication Words and Phrases for other judicial constructions and definitions.

[4] CUSTOMS DUTIES ⇌ 123

114k123

For a trier of fact to determine whether a statement can significantly affect the importation process, for purposes of determining the statement's materiality under the statute prohibiting the making of false statements in the course of importing

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merchandise into the United States, it need ask only whether a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties. 18 U.S.C.A. § 542.

[5] CUSTOMS DUTIES ⇔ 130(1)

114k130(1)

There was no "innocent owner" defense to forfeiture of imported property based on false statements in customs forms, despite claim that Due Process Clause entitled claimant to such a defense. U.S.C.A. Const.Amend. 14; 18 U.S.C.A. §§ 542, 545.

[6] CUSTOMS DUTIES ⇔ 130(10)

114k130(10)

Forfeiture of an antique Sicilian gold platter, based on a false designation or origin on a customs form, did not violate the Excessive Fines Clause of the Eighth Amendment; forfeiture was not part of a criminal prosecution, and customs law was traditionally viewed as non-punitive. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. §§ 542, 545.

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Leonard V. Quigley, General Counsel, Archaeological Institute of America, Boston, Massachusetts (Patty Gerstenblith, DePaul University School of Law, Chicago, Illinois, Gregory A. Clarick, of counsel), for Amici Curiae Archaeological Institute of America, American Anthropological Association, United States Committee for the International Council on Monuments and Sites, Society for American Archaeology, American Philological Association, and Society for Historical Archaeology.

B e f o r e: WINTER, Chief Judge, RESTANI, [FN*] Judge, and MUKASEY, [FN**] District Judge. [FN***]

FN* The Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

FN** The Honorable Michael B. Mukasey of the United States District Court for the Southern District of New York, sitting by designation.

FN*** Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by a panel consisting of the Chief Judge of this Court, one judge of the United States District Court sitting by designation, and one judge of the United States Court of International Trade sitting by designation.

WINTER, Chief Judge:

Michael H. Steinhardt appeals from Judge Jones's ordering of the forfeiture of a "Phiale," an antique gold platter. The district court held that false statements on the customs entry forms and the Phiale's status as stolen property under Italian law *133 rendered its importation illegal. As such, the Phiale was subject to forfeiture.

Steinhardt contends that: (i) the false statements on the customs forms were not material under 18 U.S.C. § 542, (ii) stolen property under the National Stolen Property Act ("NSPA") does not encompass property presumed to belong to the state under Italian patrimony laws, (iii) both statutes afford him an innocent owner defense, and (iv) the

forfeiture violates the Eighth Amendment. We hold that the false statements on the customs forms were material and, therefore, need not reach issue (ii). We further hold that there is no innocent owner defense and that forfeiture of the Phiale does not violate the Eighth Amendment.

BACKGROUND

At issue is a Phiale of Sicilian origin that dates from the 4th Century B.C. Its provenance since then is largely unknown, other than its possession by Vincenzo Pappalardo, a private antique collector living in Sicily, who traded it in 1980 to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for art works worth about \$20,000. Cammarata sold it in 1991 to William Veres, the owner of Stedron, a Zurich art dealership, for objects worth about \$90,000.

Veres brought the Phiale to the attention of Robert Haber, an art dealer from New York and owner of Robert Haber & Company. In November 1991, Haber traveled to Sicily to meet with Veres and examine the Phiale. Haber informed Steinhardt, a client with whom he had engaged in 20-30 previous transactions, of the piece. Haber told Steinhardt that the Phiale was a twin to a piece in the Metropolitan Museum of Art in New York City and that a Sicilian coin dealer (presumably Cammarata) was willing to guarantee the piece's authenticity.

On December 4, 1991, Haber, acting for Steinhardt, finalized an agreement to purchase the Phiale for slightly more than \$1 million--plus a 15% commission, making the total price paid by Steinhardt approximately \$1.2 million. Haber and Veres also agreed to a "Terms of Sale," which stated, inter alia, that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." It further provided that a "letter is to be written by Dr. [Giacomo] Manganaro that he saw the object 15 years ago in Switz." [FN1] In fact, Dr. Manganaro, a professor of Greek history and

Numismatics, had examined the Phiale in 1980 in Sicily and had determined thereafter that it was authentic and of Sicilian origin.

FN1. This provision of the Terms of Sale is handwritten. It replaced a sentence that read: "A letter is to be written by Dr. Manganaro which is an unconditional guarantee of the authenticity and Swiss origin of the object."

On December 10, 1991, Haber flew from New York to Zurich, Switzerland, and then proceeded to Lugano, near the Italian border, where he took possession of the Phiale on December 12. The transfer was confirmed by a commercial invoice issued by Stedron, describing the object as "ONE GOLD BOWL--CLASSICAL ... DATE--C. 450 B.C. VALUE U.S. \$250,000." The next day, Haber sent a fax to Jet Air Service, Inc. ("Jet Air"), Haber's customs broker at John F. Kennedy International Airport in New York, which included a copy of the commercial invoice. Jet Air prepared an Entry/Immediate Delivery form (Customs Form 3461) to obtain release of the Phiale prior to formal entry. This form listed the Phiale's country of origin as "CH," the code for Switzerland. In addition, Jet Air prepared an Entry Summary form (Customs Form 7501), which also listed the country of origin as "CH" and stated the Phiale's value at \$250,000, as Haber's fax had indicated. Haber was listed as the importer of record.

*134 On December 15, Haber returned to the United States from Zurich with the Phiale and later gave it to Steinhardt. [FN2] Before completing the purchase, Steinhardt had the piece authenticated through a detailed examination by the Metropolitan Museum of Art. Thereafter, the Phiale was displayed in his home from 1992 until 1995.

FN2. Haber himself has provided no details surrounding the Phiale's purchase and importation. In his February 1, 1996 deposition, he exercised his Fifth Amendment right by refusing to answer any questions asked by the government or Steinhardt's attorney.

Under Article 44 of Italy's law of June 1, 1939, an archaeological item is presumed to

belong to the state unless its possessor can show private ownership prior to 1902. On February 16, 1995, the Italian government submitted a Letters Rogatory Request to the United States seeking assistance in investigating the circumstances of the Phiale's exportation and asking our government to confiscate it so that it could be returned to Italy. In November 1995, the Phiale was seized from Steinhardt pursuant to a warrant. Soon thereafter the United States filed the present in rem civil forfeiture action. The government claimed that forfeiture was proper under 18 U.S.C. § 545 because of false statements on the customs forms. It also claimed that forfeiture was proper under 19 U.S.C. § 1595a(c) because the Phiale was stolen property under the NSPA as a result of Article 44 of Italy's patrimony laws.

Steinhardt entered the proceeding as a claimant, and he and the government moved for summary judgment. In granting judgment for the government, see *United States v. An Antique Platter of Gold*, 991 F.Supp. 222 (S.D.N.Y.1997), the district court held that the misstatement of the country of origin was material, see *id.* at 228-30, and, alternatively, that the Phiale was stolen property under Italian law, see *id.* at 231-32. The court also held that an innocent owner defense was not available under either statute, see *id.* at 230-32, and that the forfeiture did not violate the Excessive Fines Clause, see *id.* at 232-33. This appeal followed.

DISCUSSION

We review the grant of summary judgment *de novo*. See *Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir.1996). Summary judgment is inappropriate if there is a genuine dispute on any issue of material fact that could lead a reasonable factfinder to return a judgment for the nonmoving party. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

As noted, the district court found that summary judgment was proper on either of two independent statutory bases. We hold that importation of the Phiale violated 18

U.S.C. § 545 because of the false statements on the customs forms. We need not, therefore, address whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony laws. Cf. *United States v. McClain*, 545 F.2d 988, 994-97 (5th Cir.1977) (adopting broad definition of property under NSPA).

Section 545 prohibits the importation of merchandise into the United States "contrary to law" and states that material imported in such a manner "shall be forfeited." 18 U.S.C. § 545. [FN3] The government claims that the importation of the Phiale *135 was illegal because it violated 18 U.S.C. § 542, which prohibits the making of false statements in the course of importing merchandise into the United States. Steinhardt claims, however, that an element of a Section 542 violation is that such a false statement must be material and that the government has failed to show materiality in the instant case, at least for purposes of summary judgment. He further contends that Section 545 provides him with an innocent owner defense and that forfeiture would violate the Excessive Fines Clause of the Eighth Amendment in light of the Supreme Court's recent decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

FN3. Section 545 reads, in relevant part:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law [shall be subject to criminal penalties.]

....

....

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

18 U.S.C. § 545.

A. Materiality Under Section 542

[1] Section 542 states in pertinent part: Whoever enters or introduces ... into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, ... or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime].

18 U.S.C. § 542. There can be no dispute that the designation of Switzerland as the Phiale's country of origin and the listing of its value of \$250,000 were false. Haber had examined the Phiale in Sicily about a month before the sale to Steinhardt, and that sale was for \$1 million plus 15% commission.

We have previously held that Section 542 does include a materiality requirement. See *United States v. Avelino*, 967 F.2d 815, 817 (2d Cir.1992) ("[F]alse statements under Section 542 are necessarily material because the importation must be 'by means of [the] false statement.' "). While the government argues to the contrary, we see no reason to revisit our decision in *Avelino*.

[2] The dispute pertinent to this appeal concerns the proper test for materiality. Steinhardt argues for a "but for" test of materiality, i.e., a false statement is material only if a truthful answer on a customs form would have actually prevented the item from entering the United States. The district court, however, employed a "natural tendency" test, asking whether the false statement would have a natural tendency to influence customs officials. See *An Antique Platter of Gold*, 991 F.Supp. at 230. The circuits are divided as to the proper test. The Fifth and Ninth Circuits have adopted a but for test, see *United States v. Corcuera-Valor*, 910 F.2d 198, 199-200 (5th Cir.1990); *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir.1982), while the First Circuit has come down in favor of the natural tendency test, see *United States v. Holmquist*, 36 F.3d 154, 158-61 (1st Cir.1994); see also

United States v. Bagnall, 907 F.2d 432, 436-37 (3d Cir.1990) (noting, without deciding, that all false statements affecting the importation process are material under Section 542). We adopt the natural tendency test. [FN4]

FN4. Appellant argues that in *United States v. Meldish*, 722 F.2d 26 (2d Cir.1983), we adopted the "but for" test the Ninth Circuit used in *Teraoka*. *Meldish*, however, cited *Teraoka* only for the basic proposition that "Section 542 concerns itself only with whether a false statement was made to effect or attempt to effect the entry of the goods in question." *Meldish*, 722 F.2d at 28 (citing *Teraoka*, 669 F.2d at 579). In no way did *Meldish* purport to adopt the "but for" standard employed in *Teraoka*.

The statutory language, caselaw, and the statutory purpose lead us to this conclusion. First, the statute prohibits importations "by means of" a false statement. Although there is overlap, this language is not synonymous with "because of," see *Holmquist*, 36 F.3d at 159 (examining in detail statutory language of Section 542), and ought not be read so narrowly. Instead, *136 the ordinary meaning of the statutory language requires only that the false statements be an integral part of the importation process. In this case, the false statements were on custom forms and thus easily meet the by means of requirement.

Second, the Supreme Court has noted that "[t]he most common formulation of [materiality] ... is that a concealment or misrepresentation is material if it 'has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (citation omitted). Both the Supreme Court and this circuit have employed such a standard in numerous contexts. See, e.g., *id.* at 771, 108 S.Ct. 1537 (test for materiality under 8 U.S.C. § 1451(a) is "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision"); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir.1997) (employing natural tendency test for 18 U.S.C. § 1623); see also

Neder v. United States, --- U.S. ---, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). These decisions provide a solid basis for adopting a natural tendency test under Section 542.

Finally, the natural tendency approach is far more consistent with the purpose of the statute--to ensure truthfulness of representations made during importation--than is a but for test. See Bagnall, 907 F.2d at 436. Under a but for test, lying would be more productive because the government would bear the difficult burden of proving what would have happened if a truthful statement had been made. Moreover, under such a test, liability would not attach for misstatements in cases where truthful answers would still have enabled the goods to enter the United States. Importers have incentives to lie for reasons not related to achieving actual entry of the goods--e.g., to reduce the duties payable or to obtain expeditious customs treatment. Cf. Holmquist, 36 F.3d at 160 (noting that the but for test makes it "more attractive for importers ... to practice strategic forms of deception under the guise of immateriality"). The statutory purpose would thus be frustrated by the narrow reading suggested by appellant.

[3][4] We therefore hold that "a false statement is material under [S]ection 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole, and that neither actual causation nor harm to the government need be demonstrated." Holmquist, 36 F.3d at 159. [FN5] For a trier of fact to determine whether a statement can significantly affect the importation process, it need ask only whether a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties. This analysis is analogous to the securities context, where a statement (or omission) is material if there is a "substantial likelihood" that a reasonable investor would view it as "significantly alter [ing] the 'total mix' of information made available." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976); see also Levitin v.

PaineWebber Inc., 159 F.3d 698, 702 (2d Cir.1998), cert. denied, --- U.S. ---, 119 S.Ct. 1039, 143 L.Ed.2d 47 (1999). Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529, 1532-34 (2d Cir.1991) (discussing materiality under securities laws). Moreover, this test of materiality applies not only to the decision to admit an item but also decisions as to processing, e.g., expediting importation. See Bagnall, 907 F.2d at 436. With this test in mind, we *137 turn to the misstatements on the Phiale's entry form.

FN5. This standard is also consistent with our holding in United States v. Greenberg, 735 F.2d 29, 31 (2d Cir.1984):

Where a false statement is made to a public body or its representative, materiality refers to the impact that the statement may reasonably have on the ability of that agency to perform the functions assigned to it by law. The question is not what effect the statement actually had[].... The question is rather whether the statement had the potential for an obstructive or inhibitive effect.

Steinhardt contends that even under a natural tendency test, the misstatements are immaterial. He claims that the customs officials lacked statutory authority to seize the Phiale and that it was customs policy not to review information about the country of origin of such an object. He further argues that the statement of the Phiale's value was relevant only to the imposition of the processing fee, which was unaffected by the misstatement. Because the misstatement of the country of origin was material as a matter of law and thus proper grounds for summary judgment, we need not examine the misstatement of value.

Customs Directive No. 5230-15, regarding the detention and seizure of cultural property, fatally undermines Steinhardt's contention that listing Switzerland as the country of origin was irrelevant to the Phiale's importation. The Directive advised customs officials to determine whether property was subject to a claim of foreign ownership and to seize that property. Customs Directive No. 5230-15 (Apr. 18, 1991) [hereinafter "Directive"]. An item's country of origin is

clearly relevant to that inquiry.

Steinhardt contends, however, that the Directive does not cover the Phiale and, therefore, the misstatements could not have been material because there was no legal basis for the Phiale's seizure. We disagree. The Directive provides a basis for seizing cultural property under the NSPA in the seizure provisions of 19 U.S.C. § 1595a(c). Seizure of the Phiale would clearly be authorized by this provision under *United States v. McClain*, 545 F.2d 988 (5th Cir.1977), which held that violations of a nation's patrimony laws are covered by the NSPA. Because Steinhardt asserts that *McClain* was improperly decided, he claims that the customs officials lacked a statutory basis to seize the Phiale.

This argument, however, misperceives the test of materiality. Regardless of whether *McClain*'s reasoning is ultimately followed as a proper interpretation of the NSPA, a reasonable customs official would certainly consider the fact that *McClain* supports a colorable claim to seize the Phiale as having possibly been exported in violation of Italian patrimony laws. Indeed, the Directive explicitly references the *McClain* decision and informs officials that if they are unsure of the status of a nation's patrimony laws, they should notify the Office of Enforcement. See Directive at 9. Knowing that the Phiale was from Italy would, therefore, be of critical importance.

Even if such a seizure might ultimately fail in court--an issue we need not address--the misstatement was still material because it had the "potential significantly to affect the integrity or operation of the importation process"--the manner in which Customs handles the assessment of duties and passage of goods into the United States. *Holmquist*, 36 F.3d at 159. To decide otherwise would give an importer license and incentive to mislead customs officials whenever the legal basis of a seizure was somewhat unclear. If the good was actually imported without challenge then or later, the importer's goal would be achieved. If the good was stopped at customs or was later the subject of a forfeiture

proceeding, the importer would still have opportunity to challenge the statutory basis for seizure. See *id.* at 160. As noted above, we decline to create such counter-productive incentives.

Steinhardt makes two additional arguments--one relying on Customs Service practices, the other on the Supreme Court's decision in *Kungys*--in an attempt to demonstrate that the misstatement of country of origin was not material as a matter of law. These contentions are also flawed.

He first claims that the statements were immaterial because the Customs Service had no policy of relying upon this information. In support, he provides examples in *138 which items, such as those that listed Italy as the country of origin, were not detained. First, even if country of origin were not required, as he claims, the misstatement could still influence a customs official. See e.g., *United States v. Masters*, 612 F.2d 1117, 1120 (9th Cir.1979) ("It is immaterial that the filing ... may not have been required by Air Force regulations in the particular circumstances..."). Misinformation that is volunteered can affect the importation process. For example, if the customs forms stated that the Phiale had been in private hands since 1800 (and thus not subject to Italian patrimony laws, see Art. 44 of Italy's Law of June 1, 1939, No. 1089), this information, which is not required, would certainly affect the judgment of a reasonable customs official. Even if Customs did not require this information, that would be insufficient to defeat summary judgment.

Second, Steinhardt's provision of instances where items entered the country without interference fails to create a disputed issue of material fact. The record does not demonstrate whether any curative oral representations were made at the time of the importation of these particular items. Moreover, virtually all of the items were valued at less than \$100,000, significantly below the Phiale's value. Most critically, even if lax customs officials failed to act appropriately with some of these items, this would not preclude a finding of materiality

because the proper test involves a reasonable customs official, not the least vigilant one. As the Directive makes clear, customs officials were alerted to McClain and violations of cultural property laws prior to the importation of the Phiale. A reasonable customs official should have viewed the Phiale's true country of origin as highly significant.

Finally, Steinhardt's reliance on the Supreme Court's decision in *Kungys* is misplaced. *Kungys* simply reaches the unsurprising conclusion that not all misstatements are material under the "natural tendency" test. However, its facts are inapposite to the instant case. *Kungys* involved a misstatement of a person's date and place of birth on his naturalization petition. Although the Court overturned the lower court's finding that this information was material, its holding turned on what the government had attempted to prove and what the lower court had found. The Court stated that "[t]here has been no suggestion that [the date and place of birth] were themselves relevant to his qualifications for citizenship," *Kungys*, 485 U.S. at 774, 108 S.Ct. 1537 (plurality opinion) (emphasis added), and there was no finding that "the true date and place of birth would predictably have disclosed other facts relevant to his qualifications." *Id.* Instead of focusing on the impact of the misrepresentation, the government's evidence went to a discrepancy between the information used on the naturalization petition compared with an earlier visa application. A plurality of the Court found this analysis to be improper and stated that "what is relevant is what would have ensued from official knowledge of the misrepresented fact ... not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Id.* at 775, 108 S.Ct. 1537. In the instant case, the relevant inquiry clearly relates to the designation of country of origin, and it is this information that has a natural tendency to influence a reasonable customs official. The statements were thus material under Section 542.

B. Innocent Owner Defense

[5] Steinhardt next contends that even if the statements were material, Section 545 affords him an innocent owner defense. Our discussion will assume for purposes of analysis that Steinhardt is such an innocent owner. While numerous statutes contain an explicit innocent owner defense, see, e.g., 18 U.S.C. § 981(a)(2); 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7), Section 545 does not, and there is no reason to believe that *139 the omission in Section 545 was anything but deliberate. Steinhardt argues, however, that the Due Process Clause entitles him to such a defense.

This argument has been rejected by the Supreme Court. In *Bennis v. Michigan*, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), the Court upheld a Michigan statute that permitted the forfeiture of an automobile co-owned by an innocent owner. In its analysis, the Court traced the long history of forfeiture laws that did not provide for such a defense. See *id.* at 446-51, 116 S.Ct. 994; see also *United States v. Bajakajian*, 524 U.S. 321, ---, 118 S.Ct. 2028, 2034, 141 L.Ed.2d 314 (1998) ("Historically, the conduct of the property owner [in an in rem proceeding] was irrelevant; indeed the owner of forfeited property could be entirely innocent of any crime."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."); *Origet v. United States*, 125 U.S. 240, 246, 8 S.Ct. 846, 31 L.Ed. 743 (1888) ("[T]he merchandise is to be forfeited irrespective of any criminal prosecution.... The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it."). Against this long line of precedent, Steinhardt relies principally on dicta from *Calero-Toledo* and our decision in *United States v. One Tintoretto Painting*, 691 F.2d 603 (2d Cir.1982), which also relied on the *Calero-Toledo* dicta. However, the *Bennis* Court explicitly rejected this language, see *Bennis*, 516 U.S. at 449-50, 116 S.Ct. 994, and we must follow suit.

C. Eighth Amendment

[6] While Steinhardt raised an Eighth Amendment claim in the district court, he did not raise it on appeal. Nonetheless, he now contends that under the Supreme Court's recent decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), handed down after the briefs were filed in this case, the forfeiture violates the Excessive Fines Clause of the Eighth Amendment. We disagree.

Bajakajian involved a criminal prosecution for failing to report the transporting of more than \$10,000 out of the United States. The Court held that this proceeding triggered the Excessive Fines Clause and that the seizure of the entire amount, in excess of \$357,000, would violate this constitutional safeguard. Critical to the Court's analysis, however, was that the forfeiture pursuant to Section 982(a)(1) of Title 18, which Mr. *Bajakajian* pleaded guilty to violating, constituted a punishment. See *Bajakajian*, 524 U.S. at ---, ---, 118 S.Ct. at 2033-35. In making this determination, the Court focused on several factors: the fine was imposed at the culmination of a criminal proceeding that required a conviction of the underlying felony and could not have been imposed upon an innocent party. See *id.* at ---, 118 S.Ct. at 2034.

All of these factors are absent from the forfeiture at issue in the instant case, which bears all the "hallmarks of the traditional civil in rem forfeitures." *Id.* at ---, 118 S.Ct. at 2035. First, the forfeiture here was not part of a criminal prosecution. See *id.* at ---, ---, 118 S.Ct. at 2034-35 (distinguishing cases directed against "guilty property" and noting that "[t]raditional in rem forfeitures were ... not considered punishment against the individual for an offense"). While Section 545 is part of the criminal code, this fact alone does not render the forfeiture punitive. [FN6] Although the question whether a *140 proceeding is civil or criminal is certainly relevant, it is not dispositive. See e.g., *Austin v. United States*, 509 U.S. 602, 621-22, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). Thus, the fact that the present action is a civil in rem proceeding weighs against a finding that it is

punitive.

FN6. The Supreme Court's decision in *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (per curiam) is not to the contrary. That case involved an acquittal after a trial for violating Section 545. A civil forfeiture pursuant to 19 U.S.C. § 1497 followed. The Court held that the latter proceeding did not violate the Double Jeopardy Clause. While it noted that Section 545 is a criminal provision, see *id.* at 236, 93 S.Ct. 489, the Court had no reason to reach the issue of whether a Section 545 civil forfeiture proceeding such as the instant one was punitive. Instead, it simply determined that the forfeiture at issue was "a civil sanction." *Id.*; see also *United States v. Ursery*, 518 U.S. 267, 276, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (discussing *Emerald Cut Stones*).

Even more important to the inquiry is the nature of the statute that authorizes forfeiture. As opposed to Section 982(a), the provisions at issue in *Bajakajian*, Section 545 is a customs law, traditionally viewed as non-punitive. See *Taylor v. United States*, 44 U.S. (3 How.) 197, 210, 11 L.Ed. 559 (1845) (Story, J.) (stating that laws providing for in rem forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] ... truly deserve to be called remedial"). The *Phiale* is thus classic contraband, an item imported into the United States in violation of law. See *Bennis*, 516 U.S. at 459, 116 S.Ct. 994 (Stevens, J., dissenting) (describing "smuggled goods" as "pure contraband"); *Bajakajian's* money, which he was attempting to export, was not. It is forfeiture of the former that *Bajakajian* continues to recognize as nonpunitive and outside the scope of the Excessive Fines Clause.

We therefore affirm.

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