No. 03-592

In the Supreme Court of the United States

FREDERICK SCHULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The National Stolen Property Act prohibits the knowing receipt or possession of property that has "crossed a State or United States boundary after being stolen, unlawfully converted, or taken." 18 U.S.C. 2315. The question presented is as follows:

Whether antiquities that were removed from Egypt in violation of that country's national patrimony law, which declares such objects to be the property of the Republic of Egypt, are "stolen" within the meaning of Section 2315.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 333 F.3d 393. The opinion of the district court (Pet. App. 39a-45a) denying petitioner's motion to dismiss the indictment is reported at 178 F. Supp. 2d 445.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2003. On September 16, 2003, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 23, 2003. The petition for a writ of certiorari was filed on October 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to receive stolen property that had been transported in interstate or foreign commerce, in violation of 18 U.S.C. 371 and 2315. He was sentenced to 33 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-38a.

1. The National Stolen Property Act (NSPA) establishes criminal penalties for any person who "receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise * * * which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken." 18 U.S.C. 2315.

2. The gravamen of the instant prosecution was that petitioner had conspired to receive property that had been "stolen" in violation of Egypt's Law 117, entitled *The Law on the Protection of Antiquities*. See Pet. App. 8a. As the court of appeals explained,

> [i]n order to preserve its cultural heritage, Egypt in 1983 enacted a "patrimony law" which declares all antiquities discovered after the enactment of the statute to be the property of the Egyptian government. The law provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal.

Id. at 7a. Although the instant prosecution involves unlawful removal of antiquities from Egypt, the Secretary General of Egypt's Supreme Council of Antiquities testified at a pre-trial hearing in this case (see

id. at 10a) that "he was aware of cases in which Law 117 had been applied to persons whose violations of the law took place entirely inside Egypt." *Id.* at 11a.[1]

3. In 1991, petitioner met Jonathan Tokeley Parry, a British national. Parry showed petitioner a photograph of an ancient sculpture of the head of Pharaoh

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[1] Law 117 provides in pertinent part as follows:

> **Article 1**
>
> An "Antiquity" is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from any such period.
>
> * * *
>
> **Article 6**
>
> All antiquities are considered to be public property—except for charitable and religious endowments. * * * It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.
>
> **Article 7**
>
> As of [1983], it is prohibited to trade in antiquities.
>
> * * *
>
> **Article 8**
>
> With the exception of antiquities whose ownership or possession was already established [in 1983] or is established pursuant to [this law's] provisions, the possession of antiquities shall be prohibited as from [1983].

Pet. App. 8a-9a.

Amenhotep III. Parry explained that he had obtained the sculpture in Egypt earlier that year and had smuggled it out of Egypt. Petitioner offered Parry a substantial fee in order to serve as the agent to sell the Amenhotep sculpture, and Parry accepted that offer. The two men then created a false provenance for the sculpture, claiming that it had been brought from Egypt in the 1920s and had been maintained since that time in an English private collection, which they dubbed the "Thomas Alcock Collection." With petitioner's knowledge, Parry prepared fake labels for the sculpture, which were designed to look as if they had been printed in the 1920s. Parry also restored the sculpture using a method that was popular during that period. Pet. App. 2a-3a.

Acting as Parry's agent, petitioner attempted unsuccessfully to sell the sculpture, and he eventually purchased it from Parry for $800,000. In 1992, petitioner sold the sculpture to a private collector for $1.2 million. In June 1995, Robin Symes, who then owned the sculpture, asked petitioner to provide him with more details about the sculpture's origin, because Symes had learned that the Egyptian government was pursuing the object. Petitioner inquired about the Egyptian pursuit of the object, but he did not provide Symes with any further information about the piece. Pet. App. 3a.

Using similar methods, Parry and petitioner smuggled additional antiquities out of Egypt for the purpose of offering them for sale in the United States. Parry's testimony at petitioner's trial identified six items or groups of items, in addition to the Amenhotep sculpture, that he and petitioner had attempted to remove from Egypt and sell in New York, using a false provenance. In 1992, Parry and his Egyptian middleman, Ali Farag, paid the debts of certain corrupt Egyptian

police officers, in return for which the officers allowed Parry to remove antiquities that were in police possession. Parry sent three such items to petitioner and told petitioner how he had obtained them. Also in 1992, Parry brought a limestone sculpture of a striding figure to petitioner in New York. In a letter to petitioner, Parry described the means he had used to remove the object from Egypt. As he had with other items, Parry disguised the figure in plastic and plaster in order to take it out of Egypt. In trying to sell that sculpture, petitioner once again created a fictional provenance. Pet. App. 3a-5a.

In 1994, Parry was arrested in Great Britain. He continued to correspond extensively with petitioner, both about his prosecution and about plans for future acquisitions. In 1995 and 1996, Parry and petitioner attempted to obtain limestone stelae, or inscribed slabs, that had recently been discovered in Egypt. Petitioner sent money to purchase the stelae, but neither he nor Parry was able to obtain them. Pet. App. 5a-6a.

Petitioner and Parry communicated regularly by letter. Those letters reflect an awareness that the activities described above entailed a great legal risk. Sometimes petitioner and Parry used "veiled terms" in their letters, as well as code and languages other than English. Pet. App. 6a, 30a-31a.

4. Petitioner was charged with conspiring to receive stolen property that had been transported in interstate or foreign commerce, in violation of 18 U.S.C. 371 and 2315. Pet. App. 1a-2a, 39a. Before trial, petitioner moved to dismiss the indictment, arguing that the items he was charged with conspiring to receive were not "stolen" within the meaning of Section 2315. The district court denied the motion to dismiss. *Id.* at 39a-45a.

Petitioner contended that Egypt's Law 117 is properly regarded as a licensing and export regulation, violation of which does not render unlawfully-removed property "stolen" within the meaning of the NSPA. See Pet. App. 40a. The district court rejected that characterization of Law 117, explaining that "so far as Egyptian antiquities are concerned, Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation." *Id.* at 41a. The court also found that the "interest of the United States in deterring its residents from dealing in the spoils of foreign thefts," which generally underlies the application of the NSPA to property stolen in violation of foreign law, is fully applicable when "a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance." *Id.* at 43a-44a. Finally, the court rejected petitioner's contention that application of the NSPA to the antiquities at issue here is superseded by the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. 2601 *et seq.* Pet. App. 44a-45a. The court explained that the CPIA was not intended to preempt or modify other applicable laws, and that there was in any event no inconsistency between the CPIA and NSPA as applied to this case. *Ibid.* Petitioner was subsequently found guilty by a jury of the charged offense. See *id.* at 1a.

5. The court of appeals affirmed. Pet. App. 1a-38a.

a. The court of appeals rejected petitioner's contention that Law 117 is an export restriction rather than a "'real' ownership law." Pet. App. 12a. The court found that characterization to be inconsistent both with the

plain language of Law 117 and with the testimony of Egyptian officials regarding the law's implementation. *Ibid.* The court explained that "[t]he Law's provisions are directed at activities within Egypt as well as export of antiquities out of Egypt. Law 117 makes it clear that the Egyptian government claims ownership of all antiquities found in Egypt after 1983, and the government's active enforcement of its ownership rights confirms the intent of the Law." *Id.* at 13a; see pp. 2-3, *supra* (noting evidence that Law 117 has been applied to activities occurring wholly within Egypt).

b. The court of appeals also rejected petitioner's argument that the type of ownership interest asserted by Egypt through its national patrimony law "should not be recognized by the United States for purposes of prosecution under the NSPA." Pet. App. 13a. Relying in part on *United States* v. *McClain*, 545 F.2d 988, 996-997, 1001-1002 (5th Cir. 1977), and *United States* v. *Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974), the court found that property taken from Egypt in violation of Law 117 is "stolen" within the meaning of the NSPA. See Pet. App. 13a-22a.

c. The court of appeals held that the CPIA neither supersedes the NSPA with respect to the conduct involved here, nor reflects any congressional understanding that such activities lie outside the NSPA's coverage. Pet. App. 23a-25a. The court acknowledged that there may be "cases in which a person will be violating both the CPIA and the NSPA when he imports an object into the United States." *Id.* at 25a. The court concluded, however, that "it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution, and the potential overlap between the CPIA and the NSPA is no reason to limit the reach of the NSPA." *Ibid.*

d. Relying on this Court's decision in *United States* v. *Turley*, 352 U.S. 407 (1957), the court of appeals rejected petitioner's contention that "interpreting the NSPA to apply to items that are 'stolen' in the sense that they are possessed by a defendant in violation of a foreign patrimony law would be in derogation of the common law." Pet. App. 26a. In *Turley*, this Court held that the word "'stolen' (or 'stealing') has no accepted common-law meaning," and it construed the term "stolen" (within a predecessor federal stolen-property statute) to encompass "all felonious takings * * * regardless of whether or not the theft constitutes common-law larceny." 352 U.S. at 411, 417 (quoted at Pet. App. 26a). Based on *Turley*, the court of appeals concluded that the NSPA "covers a broader class of crimes than those contemplated by the common law." Pet. App. 26a.

e. The court of appeals found it unlikely that application of the NSPA to petitioner's conduct would impede the lawful importation of antiquities into the United States. See Pet. App. 27a. The court acknowledged that its decision "does assuredly create a barrier to the importation of cultural property owned by a foreign government." *Ibid.* The court saw no justification, however, for treating "property stolen from a foreign sovereign" differently from "property stolen from a foreign museum or private home." *Ibid.* The court also observed that "[t]he *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods." *Ibid.*

ARGUMENT

The court of appeals' rejection of petitioner's interpretation of the National Stolen Property Act is correct and (as petitioner concedes, see Pet. 9) does not conflict

with any decision of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 8) that "[t]he court of appeals' decision effects an avulsive change in the law under the NSPA." That claim is without basis. To the contrary, the Second Circuit's decision in this case is consistent with the only appellate precedents addressing the application of the NSPA to property removed from a foreign country in violation of a national patrimony law.

In *United States* v. *Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974), the court agreed with the government that an object is "stolen" within the meaning of the NSPA if it was taken from its country of origin in violation of a national patrimony law. *Hollinshead* involved a statute enacted by the Republic of Guatemala providing that artifacts found in Mayan ruins were the property of the Republic. *Id.* at 1155-1156. Three years later, the Fifth Circuit held that the NSPA was validly applied to the theft and subsequent transportation to this country of pre-Columbian artifacts that were owned by the Republic of Mexico pursuant to a patrimony law similar to that involved in this case. See *United States* v. *McClain*, 545 F.2d 988, 996, 1000-1001 (5th Cir. 1977); see also *United States* v. *Long Cove Seafood, Inc.*, 582 F.2d 159, 163, 165 (2d Cir. 1978) (citing *McClain* with approval). Although *McClain* has been the subject of some scholarly criticism (see Pet. 16), petitioner cites no judicial decision that has rejected or criticized the Fifth Circuit's holding that property removed from a foreign country in violation of a

national patrimony law is "stolen" within the meaning of the NSPA.[2]

Petitioner suggests that, after the Fifth Circuit's subsequent decision in *United States* v. *McClain*, 593 F.2d 658, cert. denied, 444 U.S. 918 (1979), "the government's theory of prosecution in *McClain* had seemingly died a quiet death." Pet. 16 n.13. In 1985, however, a Senate subcommittee held hearings on proposed legislation that would have amended the NSPA to overturn the decision in *McClain*. See *Relating to Stolen Archeological Property: Hearing on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. of the Judiciary*, 99th Cong., 1st Sess. (1985) (*1985 Senate Hearing*). Representatives of the Justice and State Departments and of the Customs Service testified in opposition to that legislative proposal. See *id.* at 27-30, 41-44, 57-60. The Justice Department representative explained, *inter alia*, that "[t]he courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of [archeological] property"; that the Department "believe[d] that the *McClain* decision reflects the proper interpretation of the NSPA"; and that "the deterrent effect of *McClain* is consistent with the U.S. policy of protecting the archeological and ethnological property of foreign nations." *Id.* at 28. That witness testified that enactment of the proposed legislation "could effectively create a legal marketplace within the United States for the fruits of foreign grave robbery." *Id.* at 29-30. Congress was thus clearly placed on notice both of the existence of the *McClain* decision and of the Executive Branch's

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[2] Other scholarly commentary has embraced *McClain*'s analysis and the application of the NSPA in this setting. See Gov't C.A. Br. 37-38 n.*.

views about the decision's practical significance, and Congress thereafter declined to enact the proposed statutory amendment.

2. Petitioner contends (Pet. 8-12) that the court of appeals' decision places good-faith purchasers of antiquities at risk of criminal prosecution if the relevant objects are subsequently found to have been removed from a foreign country in violation of that nation's patrimony law. That concern is considerably overstated. The NSPA's criminal prohibition applies only when a person receives or possesses stolen property "knowing the same to have been stolen, unlawfully converted, or taken." 18 U.S.C. 2315. As the court of appeals recognized, "[t]he *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods." Pet. App. 27a.

As petitioner correctly observes (Pet. 10), a person who initially purchases antiquities in good faith will be subject, under the court of appeals' decision, to potential criminal liability if he retains the objects *after* learning that they were removed from Egypt in violation of Law 117. But the risk of criminal prosecution for continued possession of stolen property that was initially acquired in good faith is not unique to the context of national patrimony laws, and it would not be eliminated by reversal of the court of appeals' judgment in this case. The NSPA unambiguously prohibits the "possess[ion]" of stolen property by a person who "know[s] the same to have been stolen." 18 U.S.C. 2315. Whenever a dealer or museum purchases antiquities or other property, it assumes the risk that the items will later be shown to have been stolen—in which case the buyer must relinquish possession or face potential criminal liability. That risk is inherent in the principle that "[e]ven a *bona fide* purchaser does not

obtain good title to a 'stolen' art object" (Pet. 12 n.9), and it will continue to exist regardless of the precise construction given to the word "stolen" in the NSPA. Petitioner offers no basis for concluding that it will be more difficult for a prospective buyer to determine whether a particular object was removed from Egypt before or after 1983 (see Pet. 10) than to determine whether the item was previously taken in violation of some other domestic or foreign law.[3]

Certainly there is no reason to believe that petitioner himself was subjected to any unfair surprise. Parry smuggled the antiquities out of Egypt by covering them with substances to make them appear to be copies, and he and petitioner fabricated a non-existent English collection in order to provide an ostensibly legitimate provenance for the artifacts. See Pet. App. 3a-5a. Parry also informed petitioner that he had obtained other items from corrupt Egyptian police officers. *Id.* at 5a. As the court of appeals observed, moreover, "[petitioner] and Parry demonstrated a keen awareness of the illegality of their actions by communicating in 'code,' forging documents, and even explicitly discussing the possibility that one or more of them might end up imprisoned." *Id.* at 30a-31a. Indeed, the jury at petitioner's trial "heard substantial evidence indicating that [petitioner] was actually aware that the

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[3] Art dealers and museums are potential victims of theft as well as potential defendants in NSPA prosecutions. Property that is unlawfully taken from a museum or dealer could be transferred to a third party who initially purchases the items in good faith but subsequently discovers that the objects are stolen. The NSPA's criminal ban on continued possession of property under those circumstances serves the interests of the victimized museum or dealer by providing additional incentives for return of the property to its rightful owner.

NSPA had been applied to objects stolen in violation of a patrimony law. Specifically, it appears that [petitioner] was aware of the *McClain* decision." *Id.* at 31a n.12.

3. Petitioner contends (Pet. 12-13) that the NSPA should not be construed to protect the Egyptian government's property interests established by Law 117 because the nationalization (without compensation) of property that Law 117 accomplishes is inconsistent with our own constitutional scheme. But while petitioner characterizes the property rights established by Law 117 as "exotic" (Pet. 13), nationalization of property by foreign governments is scarcely unique to Egypt (or to the preservation of antiquities). Petitioner does not appear to dispute the NSPA's general applicability to property that is "stolen" in violation of foreign law and then transported to the United States. In acting to protect property rights conferred by foreign law, Congress must be presumed to have understood that the scope and nature of such rights would vary widely, and to have intended (at least absent extraordinary circumstances) that United States courts in applying the NSPA would take the governing foreign law as they found it.[4] Petitioner cites no decision of any

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[4] In various contexts, federal courts routinely look to foreign law to determine underlying property interests and other issues relevant to the disposition of criminal or civil cases. See, *e.g.*, *United States* v. *Pierce*, 224 F.3d 158, 165-166 (2d Cir. 2000) (examining Canadian law to determine whether a Canadian had a right to be paid money in a prosecution concerning a scheme to defraud the Canadian government of tax revenues); *United States* v. *Mitchell*, 985 F.2d 1275, 1282-1283 (4th Cir. 1993) (looking to Pakistani law to determine whether defendant could be prosecuted under the Lacey Act for receiving wild animal trophies). Federal Rule of Criminal Procedure 26.1 specifically contemplates the

court that has refused to apply the NSPA to property taken in violation of foreign law based on the perceived repugnance of that law to our own legal system.[5]

For much the same reason, there is no merit to petitioner's argument (see Pet. 15-20) that the court of appeals' decision will disrupt the sale and acquisition of art works by making the legality of private conduct within the United States dependent on arcane rules of foreign law. Assuming (as petitioner appears to concede) that the NSPA generally applies to property taken in violation of foreign law, there is no reason to suppose that the construction of national patrimony laws will pose unique interpretive difficulties. Indeed, even when the governing law is altogether clear, uncertainty about the relevant facts may prevent a prospective buyer of art from determining with assurance whether a particular item is "stolen" within the meaning of the NSPA. See Pet. 9 ("The reality of the art market is that provenances are often lost to history.").

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prospect that questions of foreign law may arise in federal criminal prosecutions, and it provides that "in deciding such issues a court may consider any relevant material or source."

[5] Petitioner also contends that "enactments like Egypt's Law 117 are not properly understood as ownership laws" because "[t]heir purpose is to keep cultural objects within the national territory even if the government does not make any effort to reduce those objects to possession." Pet. 14 (internal quotation marks omitted). Whatever may be true of other national patrimony laws, the courts below considered and correctly rejected that characterization of Law 117. See Pet. App. 12a-13a, 19a-21a, 23a, 40a-43a. The court of appeals relied on, *inter alia*, evidence that "the Egyptian government actively pursues any person found to have obtained an antiquity and takes immediate possession of all antiquities of which it becomes aware," *id.* at 19a, and that Law 117 "is used in Egypt to prosecute people for trafficking in antiquities *within Egypt's borders*," *id.* at 23a.

In drafting the NSPA, Congress protected potential defendants against unfair surprise, not by arbitrarily distinguishing between different types of property laws, but by requiring proof that the defendant knew the property to be stolen. See p. 11, *supra*.

4. Petitioner argues (Pet. 20-27) that the court of appeals' ruling is inconsistent with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, and with the CPIA, which implemented the Convention. That claim lacks merit.

a. Nothing in the text or history of the CPIA suggests that Congress intended that statute to supersede the NSPA or render it inapplicable to conduct that the NSPA had previously forbidden. To the contrary, as the court of appeals recognized (Pet. App. 24a), the Senate Report accompanying the CPIA states that the CPIA "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)." S. Rep. No. 564, 97th Cong., 2d Sess. 33 (1982). Nor does petitioner suggest that any "positive repugnancy" (*United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939)) exists between the two statutes in their application to the conduct at issue here.

b. Petitioner does not appear to contend that the CPIA rendered the NSPA inapplicable to conduct that the NSPA had previously covered. See Pet. 25. Rather, petitioner argues that the CPIA reflects "an understanding of property ownership that is inconsistent with" a decision to treat artifacts that were

removed from Egypt in violation of that country's national patrimony law as "stolen" within the meaning of the NSPA. Pet. 25. Even if the Congress that enacted the CPIA in 1972 could be shown to have believed that the NSPA would not apply to conduct like petitioner's, that conception of the NSPA's coverage would not be dispositive, since "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996). In any event, the CPIA does not imply any particular answer to the question whether the NSPA prohibits conduct like that in which petitioner engaged.

As the court of appeals observed (see Pet. App. 25a), the CPIA is an import law that contains no criminal provisions. Though the CPIA may sometimes apply to objects that have been designated by a national patrimony law to be the property of a foreign government, the CPIA does not specifically refer to such laws, and the applicability of the CPIA's import restrictions does not turn on the presence or absence of a claim of ownership by a foreign state. Rather, once those import restrictions are triggered (see 19 U.S.C. 2602-2604), they more broadly prohibit the importation into the United States of any "designated archaeological or ethnological material that is exported" from a nation that is a party to the Convention "unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party." 19 U.S.C. 2606(a). That ban on the importation of culturally significant items that have been exported from a party to the Convention in violation of that nation's *export* laws reflects no congressional judgment about the proper

treatment of persons who knowingly deal in antiquities over which a foreign government asserts *ownership*.[6]

The CPIA's only prohibition on importation of "stolen" property is contained in 19 U.S.C. 2607, which forbids the importation into the United States of cultural property that has been stolen from "a museum or religious or secular public monument or similar institution in any State Party." As the court of appeals recognized, Section 2607's narrow focus on a particular class of stolen artifacts does not suggest that Congress viewed the NSPA as inapplicable to other stolen antiquities. "If, for instance, an artifact covered by the

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[6] Some proponents of the 1985 legislative proposal that would have overturned the *McClain* decision (see pp. 10-11, *supra*) defended the proposal as a means of furthering the principles underlying the UNESCO Convention and the CPIA. The State Department witness who testified in opposition to the bill disputed that rationale, explaining that

> [w]hile the present bill has been presented as having its foundation in the [CPIA], the implementing legislation for the [UNESCO] Convention, the Department believes that its enactment would signal a significant departure from principles upon which that convention was based. Neither the convention nor the Act was intended to limit pre-existing domestic remedies for the recovery of stolen cultural property. Countries having archeological and ethnological materials in great demand in the international art market would view the legislative override of the *McClain* case as depriving them of meaningful cooperation in the recovery of the cultural property which they have determined to be most important to their heritage; namely, that which has been declared to be the property of the nation.

1985 Senate Hearing 41. That witness further testified that "the [State] Department does not agree that the [CPIA] established any national policy regarding the importation of archeological and ethnological materials which requires the override of the *McClain* decision." *Id.* at 42.

CPIA were stolen from a private home in a signatory nation and imported into the United States, [Section 2607] would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the NSPA." Pet. App. 25a.

c. Petitioner's reliance (Pet. 25-27) on *Dowling* v. *United States*, 473 U.S. 207 (1985), is misplaced. In *Dowling*, this Court held that the NSPA did not reach interstate transportation of "bootleg" phonorecords—*i.e.*, phonorecords of unauthorized performances of copyrighted musical compositions. *Id.* at 214-229. The Court observed that earlier prosecutions under the NSPA had involved "physical goods, wares, or merchandise that have themselves been stolen, converted or taken by fraud," *id.* at 216 (brackets and internal quotation marks omitted), and it found that "interference with copyright does not easily equate with theft, conversion, or fraud," *id.* at 217. As an additional factor supporting its decision, the Court noted that Congress has "chiefly relied on an array of civil remedies to provide copyright holders protection against infringement," and that "in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." *Id.* at 221.

The CPIA is not remotely comparable to the body of copyright infringement legislation considered in *Dowling*. The CPIA cannot plausibly be regarded as a comprehensive effort to define the proper treatment of persons who knowingly deal in antiquities stolen abroad: the statute contains no criminal provisions, and it addresses only a narrow category of stolen property. See p. 17, *supra*. In *Dowling*, moreover, the inference drawn by the Court from the extensive body of copyright protection law reinforced what the Court in any event regarded as the most natural reading of the

NSPA's text. The property at issue here, by contrast —artifacts removed from Egypt in violation of Egyptian law, and in derogation of the Egyptian government's declaration of ownership—were "stolen" within any ordinary understanding of that term. And unlike the situation in *Dowling*, where the Court found no evidence of congressional awareness that the NSPA had been applied to bootleg phonorecords, see 473 U.S. at 225 n.18, Congress considered and declined to enact a proposed statutory amendment that would have limited the scope of the NSPA in the manner that petitioner now advocates. See pp. 10-11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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