2016 NCHL Moot Court Competition Best Brief

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2016 NCHL MOOT COURT COMPETITION BEST BRIEF

Co-sponsored by the Lawyer’s Committee for Cultural Preservation, the National Cultural Heritage Law Moot Court Competition is the only moot court competition in the world that focuses exclusively on cultural heritage law issues. The Competition provides students with the opportunity to advocate in the nuanced landscape of cultural heritage, which addresses our past and our identity, and which has frequently become the subject of contentious legal debates and policies. This dynamic and growing legal field deals with the issues that arise as our society comes to appreciate the important symbolic, historical and emotional role that cultural heritage plays in our lives. It encompasses several disparate areas: protection of archaeological sites; preservation of historic structures and the built environment; preservation of and respect for both tangible and intangible indigenous cultural heritage; the international market in art works and antiquities; and recovery of stolen art works.

Topics covered by the Competition in past years include: the Foreign Sovereign Immunities Act and the act of state doctrine (2016); constitutional challenges to the Visual Artists Rights Act of 1990 (2015); statutory interpretation questions regarding the Convention on Cultural Property Implementation Act (2014); the Native American Graves Protection and Repatriation Act and the Takings Clause of the Fifth Amendment (2013); the constitutionality of the Theft of Major Artwork Act, which was passed under the Commerce Clause (2012); the Immunity from Seizure Act and the equitable defense of laches (2011); and the mens rea requirement and extraterritorial application of the Archaeological Resources Protection Act (2010).
1. Whether the FSIA’s expropriation exception requires the defendant to be the same foreign sovereign that expropriated property in violation of international law, despite no explicit requirement in the statute.

2. Whether the act of state doctrine applies to prevent U.S. courts from questioning the legitimacy of, and thus barring review of the acts of the Ottoman Empire when that sovereign is no longer extant and recognized.

*ii PARTIES TO THE PROCEEDING

The Petitioner in this case is the British Museum, a foreign instrumentality currently possessing the property at issue. The Respondent is the Acropolis Museum, the party seeking jurisdiction and seeks return of that property.
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*I OPINION BELOW


JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).
*2 Statutory Provision


Standard of Review

The decision of the United States Court of Appeals for the Twelfth Circuit as to whether the case was properly dismissed under either the Foreign Sovereign Immunities Act or under the application of the act of state doctrine is a question of law and is therefore reviewed de novo. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

Statement of the Case

Statement of the Facts

The Parthenon temple was the pinnacle of Athens and represented "artistic excellence and classical purity." [R. 4.] Constructed between 447 and 432 B.C.E. near the summit of the Acropolis, the temple's exterior was constructed and adorned with sculptural reliefs placed in the spaces between columns (called metopes), in the pediments, and around the upper walls of the inner temple (called the cella). [R. 4-5.] From the mid-eighteenth and through the nineteenth centuries, publications about the Parthenon propagated interest in the temple and its sculptural works. [R. 6.] French architect Le Roy published the first detailed study of the Parthenon in 1758. [R. 6.] James Stuart and Nicholas Revett later published The Antiquities of Athens in 1787, which included drawings of the Parthenon. [R. 6.] These studies inspired cultured *3 Europeans, who then sought sculptural fragments from the Parthenon when the publications indicated that the sculptures were quickly deteriorating. [R. 6.]
Thomas Bruce, the seventh Earl of Elgin, was among the interested Europeans who gained an interest in sculptural art. [R. 7.] Lord Elgin arrived as the British ambassador to the Ottoman Empire in 1799. [R. 6.] Lord Elgin brought artists and mold makers with him to draw and plaster casts of the Parthenon's Classical sculptural and architectural fragments described in the 1758 and 1787 studies. [R. 7.] He sought to bring casts of these sculptures back to England to improve English arts and society. [R. 7.] Although this was his original goal, Lord Elgin actually took several original pieces. [R. 7.]

The sculptures that Lord Elgin acquired between 1801 and 1803 ("the Sculptures") contained an abundance of cultural significance. [R. 4-7.] The Sculptures were taken from various locations throughout the Parthenon building, originating from the metopes, pediments, and cella. [R. 4.] The Parthenon contained ninety-two metopes that depicted mythic battle scenes such as the sack of Troy, the battle with the Amazons, the battle between the gods and the giants, and the battle between the Centaurs and the Lapiths. [R. 4.] The east pediment depicted the birth of Athena, and the west pediment displayed Athena's victory in her contest with Poseidon by which she became the patron goddess of Athens. [R. 4-5.] The cella exhibited an Ionic frieze depicting a procession. [R. 5.] The Sculptures adorned the Parthenon and remained in tact throughout the Hellenistic and Roman periods. [R. 5.] The building served as a church under the Byzantine Empire, then a Roman Catholic Church under the rule of Venice, and finally a mosque during the Ottoman Empire. [R. 5.] In 1687, the central part of the Parthenon’s structure was destroyed when the Venetians initiated an explosion. [R. 5.] As a result, the Venetians inflicted a significant amount of damage on the structures within the temple when *4 removing some of the remaining sculptures. [R. 5-6.] They also destroyed sculptures within the west pediment of the Parthenon. [R. 6.]

Lord Elgin acquired at least seven of the metopes, twenty slabs of the frieze, and almost all the surviving figures of the pediments. [R. 7.] When removing these pieces of art, Lord Elgin caused damage to the surrounding architectural elements of the structure. [R. 7.] Though legitimate title is still debated, Lord Elgin was presumed to have gained possession and ownership of
the Sculptures through a series of permissions, known as *firman*s. [R. 7.] The Ottoman Sultan granted these *firman*s to Lord Elgin in appreciation for the British defeat of the French at the naval battle of Aboukir. [R. 8.] These *firmans* were important in determining whether Elgin had legitimate title, as it was arguable what the *firmans* actually permitted Lord Elgin to do. [R. 8.] The original *firmans* did not survive, but an Italian translation of the second *firman* remains. [R. 8.] The second translated *firman* was submitted during a Parliamentary hearing in 1816 to determine whether the British nation should acquire the Sculptures. [R. 8.]

Lord Elgin eventually sold the Sculptures to the United Kingdom Parliament upon his bankruptcy. [R. 7-8.] The United Kingdom Parliament transferred the Sculptures to the British Museum, where they remain today. [R. 8.] Now, both the Acropolis Museum and the British Museum assert rightful ownership of the Sculptures. [R. 2.]

**Procedural History**

The Acropolis Museum filed a complaint in the District Court for the Western District of DePaulia, alleging that the Sculptures were taken in violation of international law and sought restitution of the Sculptures and damages. [R. 2.] The British Museum moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). [R. 2.] For purposes of this motion, the parties conceded that the Ottoman Empire, not the United Kingdom, was the foreign *s*overeign that expropriated the Sculptures. [R. 9.] The British Museum argued that United States courts do not have jurisdiction under the FSIA and the act of state doctrine. [R. 2.]

The district court dismissed the complaint, holding that the Acropolis Museum’s claim is barred under the FSIA because the United Kingdom possesses did not expropriate the Sculptures. [R. 2.] The district court also dismissed the complaint on the applicability of the act of state doctrine. [R. 2.] The district court found that it could not question the actions of the Ottoman Empire in granting permission to Lord Elgin to take the Sculptures from its territory. [R. 2-3.]
The Acropolis Museum appealed the district court’s decision on both the FSIA and act of state doctrine issues. [R. 3.] Disagreeing with the district court, the United States Court of Appeals for the Twelfth Circuit reversed and remanded on both issues. [R. 3.] The Twelfth Circuit stated that “nothing in the plain language of the FSIA requires that the foreign sovereign against whom suit is brought be the sovereign that allegedly took the property in violation of international law.” [R. 9.] Additionally, the Twelfth Circuit held that the act of state doctrine does not bar further consideration of the merits of the case, because “there can be no question that the Republic of Turkey is a radically different government than its predecessor.” [R. 22-23.]

The British Museum appealed the decision of the Twelfth Circuit, and this Court granted its petition for writ of certiorari on November 20, 2015.

SUMMARY OF ARGUMENT

Both challenges to the Acropolis Museum’s claims for restitution and damages require this Court to affirm the decision of the Twelfth Circuit Court of Appeals.

First, the FSIA’s expropriation exception provides no requirement that the defendant be the same sovereign that expropriated the cultural property in question. This Court requires that the plain language of a text be considered first. If the language is conclusive and absent clearly expressed intent showing otherwise, the statute is unambiguous and the inquiry ends. The text of the expropriation exception is clear: there is no overt requirement specifying that the defendant must have expropriated property for the exception to apply. This Court should not institute such a requirement because doing so would improperly contravene the text of the statute.

Additionally, even if this Court resorts to legislative intent, other canons of statutory interpretation show no intention to limit jurisdiction to only defendant sovereigns that took the property at issue. Congress intentionally placed the phrase “by the foreign sovereign” in neighboring statutes but did not include the same in the expropriation exception. This shows Congress intentionally omitted the phrase from the expropriation exception.
Congressional reports indicate Congress’ preference not to limit the takings to foreign states that participated in the expropriations. The FSIA’s expropriation exception also remains consistent with common law and does not require a narrow reading. Therefore, the expropriation exception should apply here to maintain jurisdiction over the British Museum.

Second, this Court should not apply the act of state doctrine because the Ottoman Empire is no longer extant and recognized. The act of state doctrine precludes courts from inquiring into the validity of acts of a foreign sovereign committed in its own territory. The balance has been shifted since the Republic of Turkey has come into power and the Ottoman Empire is no longer extant and recognized. The Republic of Turkey is a vastly different regime than the Ottoman Empire in both time and circumstance. Harm to foreign policy is minimal and the judicial branch’s adjudication would not cause embarrassment or interfere with foreign relations.

The doctrine is flexible and application of the act of state doctrine allows courts to use wide discretion. In assessing whether to apply the act of state doctrine, this Court employs a balancing test, which accounts for three main considerations. First, consensus of law establishes *7 that courts generally return cultural property from the country in which it was taken, recognizing forced takings were unjustified under international law. Second, disruption in continuity of foreign affairs is minimal. Third, the Ottoman Empire’s allowance of Lord Elgin to seize the Sculptures was more attune to a commercial transaction between private parties than a formal governmental action. All factors weigh in favor of a court’s adjudication of this case. Therefore, the act of state doctrine should be rejected, and this case should be heard on the merits.
ARGUMENT

I. PETITIONER IS NOT ENTITLED TO IMMUNITY BECAUSE THE
PLAIN LANGUAGE OF THE FSIA'S EXPROPRIATION
EXCEPTION DOES NOT REQUIRE A DEFENDANT FOREIGN
SOVEREIGN TO BE THE SAME SOVEREIGN ALLEGED TO
HAVE EXPROPRIATED THE PROPERTY.


Under the expropriation exception, foreign states are not immune from jurisdiction of courts within the United States in all cases involving "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Section 1605(a)(3) provides:

*8 A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case...in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state....
The expropriation exception has three distinct requirements: (1) the property at issue must be taken in violation of international law; (2) the property must be owned or operated by an agency or instrumentality of a foreign state; and (3) the agency or instrumentality must be engaged in commercial activity in the United States. \textit{Id.}; see 1 Alexandra Darraby, \textit{Art, Architecture, and Museum Law}, § 6:156 (2014). Here, the parties conceded that the Ottoman Empire, not the United Kingdom expropriated the Sculptures. [R. 9.] However, this concession does not provide the United Kingdom or its instrumentalities immunity from jurisdiction in the United States.

\textit{A. The Language of Section 1605(a)(3) Has a Plain and Unambiguous Meaning.}

The FSIA’s expropriation exception does not explicitly mandate that a foreign sovereign against which suit is brought be the sovereign alleged to have taken property in violation of international law. \textit{See 28 U.S.C. § 1605(a)(3).} The Twelfth Circuit properly relied on the Ninth Circuit’s reasoning in \textit{Cassirer v. Kingdom of Spain} to find that the expropriation exception applies when a foreign state against which a claim is made did not expropriate the property at issue. 616 F.3d 1019, 1028 (9th Cir. 2010). This Court should look to the Ninth Circuit’s decision in \textit{Cassirer}, as it is the only circuit court to address the narrow issue presented here.

Reliance on dicta from the Fifth Circuit and D.C. Circuit is incorrect, as these courts addressed requirements of the expropriation exception that are not at issue here. \textit{See Vencedora Oceania Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation}, 730 F.2d 195 (5th Cir. 1984); \textit{see Agudas Chasidei Chabad of U.S. v. Russ. Fed’n}, 528 F.3d 941 (D.C. Cir. 2008). For example, the Fifth Circuit in \textit{Vencedora} addressed the second requirement of the *9 expropriation exception, whether property was “owned or operated” by an instrumentality of the foreign sovereign. \textit{Vencedora}, 730 F.2d at 204. There, a vessel owned by a Panamanian corporation caught fire while transporting crude oil near the coasts of Algeria and Sicily. \textit{Id.} at 196. An Algerian
tugboat rendered assistance to the vessel and transported it to an Algerian port rather than a Sicilian port, contrary to the Panamanian vessel’s managing agent. *Id.* The Fifth Circuit clarified that “it is not clear whether property was ‘taken in violation of international law’” and that the district court only found the expropriation exception inapplicable because the Algeria’s instrumentality did not “own or operate” the vessel. *Id.* at 204. The court found that the defendant instrumentality of the Algerian government did not “own or operate” the vessel at issue because it did not assume control and use it for the benefit of the Algerian government. *Id.*

The Fifth Circuit analyzed an issue not in contention here. The court in *Vencedora* addressed the “owned or operated” provision within the second requirement of the expropriation exception. The issue properly before this Court pertains to the first requirement of the expropriation exception—whether property was taken in violation of international law. Further, the Algerian instrumentality in *Vencedora* was the same foreign sovereign alleged to have expropriated the vessel. *Id.* at 196. Here, the defendant instrumentality, the British Museum, is not the sovereign alleged to have expropriated the Sculptures. Moreover, there is no dispute over whether the Ottoman Empire “owned or operated” the Sculptures. *Vencedora*’s analysis is therefore not relevant to the issues before this Court.

1. *Section 1605(a)(3) does not affirmatively require the defendant foreign sovereign to have taken property at issue.*

When determining the meaning of a statute, courts must regard the plain language as conclusive if the statutory language is unambiguous and absent clearly expressed legislative intent showing otherwise. *Russello v. United States*, 464 U.S. 16, 20 (1983); *see CBS Inc. v. *10 PrimeTime24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (finding no ambiguity in the phrase “any termination,” the court relied on the common usage and ordinary meaning of the terms). “If the statutory language is plain, [courts] must enforce it according to its terms.” *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). When construing the meaning and

This Court should adopt the reasoning of *Cassirer* to comport with the language of Section 1605(a)(3) and to avoid misconstruing the plain meaning of the expropriation exception. In *Cassirer*, an agent of the Nazi government confiscated a Pissarro painting. 616 F.3d at 1022-23. Various art dealers sold the Pissarro painting several times before the Thyssen-Bornemisza Museum displayed it in Madrid, Spain in 2000. *Id.* At this time, the plaintiff, heir to the original owner, discovered the location of the painting and filed a claim against the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation ("Foundation") under the FSIA. *Id.* The Foundation filed a motion to dismiss based on lack of subject matter jurisdiction, among other reasons. *Id.* at 1024. Spain and the Foundation argued the expropriation exception applies only to foreign states that expropriated the property and not to later purchasers. *Id.* at 1028. Unconvinced, the Ninth Circuit found no support for this in the statutory text of Section 1605(a)(3). *Id.* Rather, the court found that a literal reading of the section connotes "any foreign state" may expropriate the property for the exception to apply. *Id.*

*11* Section 1605(a)(3) does not state that property must have been taken in violation of international law "by the foreign state being sued." *See Cassirer*, 616 F.3d at 1028. Rather, the statute merely provides an exception to sovereign immunity in cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The plain language of the statute does not include a requirement that the defendant foreign sovereign must have expropriated property. Imposing such a requirement would improperly contravene the text of Section 1605(a)(3) by mandating an additional requirement not present in the statute. Moreover, it would ascribe meaning
other than the text's literal meaning, requiring this Court to improperly rewrite the text of the statute and "put words in Congress' mouth." See Gates v. Victor Fine Foods, 54 F.3d 1457, 1461-62 (9th Cir. 1995). Barring jurisdiction because the Ottoman Empire, and not the United Kingdom, expropriated the Sculptures would contravene the plain language of Section 1605(a)(3). The plain language does not impose this additional requirement, so Petitioner cannot escape jurisdiction. Requiring the United Kingdom or its instrumentalities to have expropriated the issue improperly rewrites the text of Section 1605(a)(3).

2. Congress' use of passive voice in Section 1605(a)(3) focuses on the event of expropriation rather than the specific foreign state that expropriates.

When analyzing the literal meaning of a statute, this Court has deemed Congress' use of the passive voice as a grammatical tool emphasizing the occurrence of an event over the identity of an actor. See Dean v. United States, 556 U.S. 568, 572-74 (2009); Watson v. United States, 552 U.S. 74, 81-82 (2007). In Dean, this Court observed Congress' use of passive voice in a criminal enhancement statute and held that liability under the statute does not require a separate showing of intent. 556 U.S. at 572. The text of the statute at issue in Dean provides that a defendant must be sentenced to a minimum of ten years imprisonment "if the firearm is discharged." 18 U.S.C. § 924 (c)(1)(A)(iii) (emphasis added). This Court stated, "[t]he passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." Dean, 556 U.S. at 572. "It is whether something happened—not how or why it happened—that matters." Id. Looking only at the statutory text, this Court found there to be no intent requirement in the enhancement statute. Id. at 572-74. Straying from the text of the statute and implying an intent requirement would contort and stretch the statutory language. Id. at 574.

Along with Dean, this Court in Watson v. United States noted the significance the passive voice carries in determining a
statute’s meaning. See 552 U.S. at 81. Analyzing the same enhancement statute in Dean, this Court highlighted that Congress’ use of the passive voice in Section 924(d)(1) shows “agnosticism . . . about who does the using” and indicates an increased level of generality. Watson, 552 U.S. at 81-82. Use of the passive voice emphasizes the event at issue rather than the identity of the actor.

This Court should apply a similar analysis here because the text of Section 1605(a)(3) of the FSIA includes the passive voice in one of its key requirements. According to the expropriation exception, foreign states are subject to jurisdiction of courts within the United States in any case “in which rights in property taken in violation of international law are in issue . . . .” 28 U.S.C. § 1605(a)(3) (emphasis added). Here, Congress’ use of passive voice places emphasis on the event of expropriation and disregards the identity of state actor alleged to have expropriated the property. Cassirer, 616 F.3d at 1028 (9th Cir. 2010) (citing Dean v. United States, 556 U.S. 568 (2009)). This grammatical choice indicates the property at issue may be taken by “any foreign state,” not just the defendant foreign state. Cassirer, 616 F.3d at 1028 (emphasis in original). Thus, the defendant foreign state—here, the United Kingdom—need not be the sovereign alleged to have taken property at issue for the exception to apply.

3. *13 Since there is no ambiguity in the statute’s text, using legislative history to contravene the plain meaning of Section 1605(a)(3) is improper.

When analyzing the meaning of a statute, courts turn to legislative history only when there is ambiguity in the statutory language. Burwell, 135 S. Ct. at 2489. It is improper for this Court to consider the FSIA’s legislative history because there is no ambiguity in the text of Section 1605(a)(3). See Burwell, 135 S. Ct. at 2497 (Scalia, J., dissenting); see also CBS Inc., 245 F.3d at 1224. Section 1605(a)(3) purposefully omits the language “by the foreign sovereign” while including it in surrounding provisions of the FSIA. This omission does not allude to ambiguity in the statute but rather demonstrates an intentional action taken by the legislature. Further, use of passive voice in Section 1605(a)(3)
focuses on the event of expropriation rather than the foreign sovereign performing that act. A literal reading of the text unambiguously shows that there is no additional requirement that the defendant foreign state had expropriated the property at issue. Therefore, the Twelfth Circuit properly found that Section 1605(a)(3) does not require Petitioner be the foreign sovereign that expropriated the Sculptures.

Moreover, the legislative history of Section 1605(a)(3) must not be used to contradict its plain meaning or to create ambiguity in the text. See CBS Inc, 245 F.3d at 1222-24. This Court “[does] not resort to legislative history to cloud a statutory text that is clear.” Ratzlaff v. United States, 510 U.S. 135, 147 (1994). Here, the Twelfth Circuit’s dissent improperly relies on the FSIA’s purpose of granting sovereign immunity only to foreign states’ public acts to create ambiguity in the statutory text and contravene its literal meaning. The Twelfth Circuit’s dissent is therefore misguided because it strays from the framework of statutory interpretation provided by this Court.

B. *14 Even If This Court Finds the Language of Section 1605(a)(3) Ambiguous, Other Canons of Statutory Interpretation Indicate a Defendant Foreign State Need Not Have Expropriated the Property at Issue.

A statute’s meaning may become evident when situated within a wider context, requiring courts to analyze the language in its overall statutory scheme. Burwell, 135 S. Ct. at 2489. Even if this Court finds Section 1605(a)(3) ambiguous, its broader placement within the FSIA and its legislative history support a finding that Petitioner need not be the foreign sovereign alleged to have expropriated the Sculptures to obtain jurisdiction.

1. Congress’ use of the phrase “by the foreign state” in neighboring provisions indicates intent for courts to obtain jurisdiction, regardless of which foreign state expropriated the property at issue.

The doctrine of expressio unius est exclusio alterias supports a finding that it is not necessary for the defendant foreign
sovereign to have taken the property at issue under the expropriation exception. Under the doctrine of *expressio unius*, this Court "[has] long held that ['where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).

Congress focused on the identity of the defendant foreign state in other sections of the FSIA by including the explicit language “by the foreign state.” *See* 28 U.S.C. § 1605(a)(2); *see also* 28 U.S.C. § 1605(a)(6); *see also* 28 U.S.C. § 1610(f)(1). The expropriation exception is one of six general exceptions to foreign sovereign immunity. *See* 28 U.S.C. § 1605(a). Along with the expropriation exception, two additional general exceptions explicitly denote that an action must be taken “by the foreign sovereign.” Under the commercial activity exception, a foreign state is not immune from jurisdiction of United States courts when an action “is based upon a *commercial activity carried on in the United States* by the foreign state . . . .” 28 U.S.C. § 1605(a)(2) (emphasis added). Another general exception within the FSIA provides for jurisdiction in cases brought “to enforce an agreement made *by the foreign state* . . . or to confirm an award made pursuant to such an agreement . . . .” 28 U.S.C. § 1605(a)(6) (emphasis added). Apart from the FSIA’s general exceptions in Section 1605(a), the FSIA also permits attachment of property owned by a foreign sovereign liable for terrorism. *See* 28 U.S.C. § 1610(f)(1). That statute explicitly refers to property “expropriated or seized by the foreign state.” 28 U.S.C. § 1610(f)(1).

Each of these neighboring provisions includes an explicit requirement that the defendant foreign state took a particular action to be liable under the statute. Such a requirement is lacking in the expropriation exception. The inclusion of the phrase “by the foreign state” in surrounding sections of the FSIA demonstrates that Congress intended, under Section 1605(a)(3), for United States courts to obtain jurisdiction regardless of which state expropriated the property at issue.
2. **The legislative history of the FSIA reflects that Congress did not intend to waive immunity of a foreign state only if the state itself was alleged to have expropriated property.**

Nothing in the FSIA’s legislative history indicates Congress meant something other than what it stated in the statutory text. *Cassirer*, 616 F.3d at 1029-40. The plain meaning of Section 1605(a)(3) does not conflict with legislative intent because it requires a foreign sovereign either to possess the property at issue within the United States or engage in commercial activity within the United States. 28 U.S.C. § 1605(a)(3). Congress enacted the FSIA to clarify the rules judges apply in resolving immunity claims and to eliminate political pressures from the determination of. *Altmann*, 541 U.S. at 699. Congress also intended for courts to grant sovereign immunity for a foreign sovereign’s public acts but not its commercial acts. H.R. Rep. No. 94-1487 (1976).

*16 The FSIA’s legislative history does not indicate a defendant foreign sovereign must be the same foreign sovereign that expropriated property at issue. Congress stated in its concurrent House Report, “[t]he term ‘taken in violation of international law’ would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature.” H.R. Rep. No. 94-1487 (1976). These statements did not specify a specific defendant sovereign. Rather, it characterized the taking by usage of the third person and mirrors the language of Section 1605(a)(3). Congress included a general category of “takings which are arbitrary and discriminatory in nature” as a violation of international law. This inclusion represents Congress’ broad intent and does not limit jurisdiction to foreign states that conducted the takings. Therefore, nothing in the FSIA’s legislative history runs contrary to the statutory text of Section 1605(a)(3).
3. Section 1605(a)(3) should not be strictly construed because it is not in derogation of common law.

Courts construe statutes strictly when they are in derogation of common law, unless statutory intent to the contrary is evident. United States v. Texas, 507 U.S. 529, 534 (1993); Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 108 (1991); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Statutes invading the common law are read with a presumption favoring long established principles. Texas, 507 U.S. at 534. Here, this Court should not strictly construe the FSIA’s expropriation exception because it is not in derogation of common law and there is no statutory intent to the contrary. Rather, the FSIA may be interpreted broadly. See generally Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525 (S.D. Tex. 1994) (stating “[t]he FSIA is interpreted broadly” when deciding whether a foreign manufacturer was a “foreign state” subject to jurisdiction).

*17 The doctrine of foreign sovereign immunity developed under the common law long before Congress adopted the FSIA. Samantar v. Yousuf, 560 U.S. 305 (2010); Verlinden, 461 U.S. at 487. Beginning in 1812 with this Court’s decision in Schooner Exchange v. McFaddon, 11 U.S. 116 (1812), courts extended absolute immunity to foreign sovereigns “as a matter of grace and comity.” Verlinden, 461 U.S. at 486. Following Schooner Exchange, courts developed a two-step process to resolve sovereign immunity disputes. Samantar, 560 U.S. at 311 (citing Republic of Mexico v. Hoffman, 324 U.S. 30 (1945)). First, a diplomatic representative of the foreign sovereign had the opportunity to request a “suggestion of immunity” from the State Department. Id. Second, the State Department then made a determination on that request. Id. at 311-12. If the State Department granted the request, the district court surrendered its jurisdiction. Id. at 312. If denied, the district court would make the sovereign immunity determination by looking to “whether the ground of immunity is one which is the established policy of [the State Department] to recognize.” Id. (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)).

In the 1952 “Tate Letter,” the State Department adopted a restrictive theory of sovereign immunity such that the judicial
branch, rather than the executive, would make determinations of foreign sovereign immunity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976). Around this time, two conflicting concepts of sovereign immunity existed: (1) the absolute theory where a foreign state must consent to jurisdiction in court; and (2) the restrictive theory where foreign states have immunity for their public acts but not their private acts. *Altmann*, 541 U.S. at 690. Both concepts were “widely and firmly established” around 1952 before the State Department announced it would apply the restrictive theory. *Id.* From 1952 to 1976, courts inconsistently applied sovereign immunity. *Id.* Political pressures and *18 considerations led the State Department to file suggestions of immunity when it would not have otherwise been available under the restrictive theory. *Altmann*, 541 U.S. at 690. The FSIA halted this practice in 1976 and codified the restrictive theory of sovereign immunity to provide clarity and uniformity in sovereign immunity jurisprudence. *Id.* at 691.

The FSIA was not in derogation of the common law at the time of its enactment. When Congress enacted the FSIA in 1976, the State Department had already announced its adoption of the restrictive theory. *Id.* at 690. The restrictive theory aligns with the FSIA, as the FSIA’s findings and declaration of purpose state, “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . .” 28 U.S.C. § 1602. The FSIA codifies the restrictive theory of sovereign immunity which the State Department adopted fourteen years prior. Therefore, the FSIA was not in derogation of the common law when enacted in 1976. Rather, it extended the restrictive theory and provided for clearer guidelines free from political considerations. This Court should not interpret the expropriation exception narrowly by requiring Petitioner to be the same foreign sovereign that expropriated the Sculptures, as the FSIA was not in derogation of the common law at the time of its enactment. Imposing such a requirement results in an interpretation of the expropriation exception that unnecessarily limits the court’s jurisdiction over foreign states.

II. THE ACT OF STATE DOCTRINE DOES NOT BAR RESPONDENT’S CLAIM BECAUSE THE REPUBLIC OF TURKEY IS A VASTLY
DIFFERENT REGIME THAN THE OTTOMAN EMPIRE AND THIS LITIGATION DOES NOT INTERFERE WITH THE EXECUTIVE BRANCH’S HAND IN FOREIGN AFFAIRS.

The FSIA and the act of state doctrine are independent concerns. *Asociacion de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1198 (D.C. Cir. 1983). Unlike the FSIA, the act of state doctrine is only subject to discretionary application and courts are given wider discretion in their act of state rulings. *Id.* The act of state doctrine “precludes the courts of *19 this country from inquiring into the validity of the public acts [that] a recognized foreign sovereign power committed within its own territory.” *Sabbatino*, 376 U.S. at 401. In *Underhill v. Hernandez*, this Court circumscribed the act of state doctrine’s framework for the first time. 168 U.S. 250, 252 (1897). In *Underhill*, this Court stated that sovereign states must respect the authority and laws of their counterparts. *Id.* Each sovereign abides by its own laws and regulations such that United States courts will not sit in judgment on the acts of another country when that country’s actions take place within its own borders. *Id.*

In determining the applicability of the act of state doctrine, this Court has taken a flexible stance and has issued certain criteria in order for the doctrine to apply as a defense on the merits. *Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The criteria require that (1) the taking must be by a foreign government; (2) the taking must have occurred within the territorial limitations of that government; (3) the foreign sovereign government must be extant and recognized by the United States at the time of suit; and (4) the taking must not be in violation of a treaty obligation. *Id.; Menzel v. List*, 267 N.Y.S. 2d 804 (NY Sup. Ct. 1966). The only factor at issue in this case is whether the Ottoman Empire is extant and recognized, notwithstanding its transition to the Republic of Turkey. [R. 18.] The essential principle of the doctrine is whether a court’s adjudication of a sovereign’s action would interfere with foreign affairs. *See Sabbatino*, 376 U.S. at 427. Assessing whether adjudication touches upon foreign affairs “requires a balancing of interests,” and the act of state doctrine should not be invoked if the essential foreign affairs principle is not infringed upon by the judiciary.
Bigio v. Coca-Cola, 239 F.3d 440, 452 (2d Cir. 2000). The third factor from Sabbatino shifts the balance to weigh against the doctrine’s application if the government that perpetuated the act is no longer extant and recognized. When *20 a regime no longer exists for its past actions to be questioned, foreign affairs are less likely to be infringed upon. Id. at 428.

A. Since the Ottoman Empire Is No Longer Extant and Recognized, the Balancing Test Weighs Against Application of the Act of State Doctrine.

1. Adjudication of this claim will not interfere with foreign affairs because the Ottoman Empire has not existed in over a century.

While the act of state doctrine precludes inquiring into the validity of public acts by a sovereign done within its own territory, that rule is significantly limited in cases where the sovereign is no longer extant and recognized. Sabbatino, 376 U.S. at 428. Rather than codify an all-encompassing rule, this Court noted that the doctrine’s applicability to a given case can shift if the government that perpetuated the challenged act is no longer in existence. Id.; See Chabad, 528 F.3d at 954 (“whatever flexibility Sabbatino preserves is at its apex where the taking government has been succeeded by a radically different regime.”). When the prior regime no longer exists, the act of state doctrine is not applicable and a court will adjudicate matters concerning a sovereign’s prior action. Id. This Court noted that the extant and recognized prong is significant because the political interest that the United States has in adjudicating the matter is “measurably altered” when the government that committed an act is no longer in existence. Id.

This Court has rejected the notion that a court of this country may not adjudicate a matter of another state, even when that state has ceased to exist. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l, 493 U.S. 400, 409 (1990). In W.S. Kirkpatrick, this Court reiterated Sabbatino’s doctrine. Id. “[I]n Sabbatino, we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may
not justify its application.” *Id.* Where there has been a significant change in government, courts have found that the third prong of the *Sabbatino* criteria *21* may not be met and the act of state doctrine is not applied. See *Bigio v. Coca-Cola*, 239 F.3d at 453 (overturning lower court decision because the court did not consider that the Nasser regime was succeeded by a different sovereign); *Menzel v. List*, 267 N.Y.S. 2d 804, 816 (1966) (holding the act of state doctrine did not apply because the Third Reich was neither extant nor recognized by the government at the time of the trial but rather collapsed with its surrender in 1945); *Republic of Phil. v. Marcos*, 862 F.2d 1355, 1369 (9th Cir. 1998) (analyzing considerations for application of the doctrine were less compelling because the challenged actions involved a government that was no longer in power).

Here, the disruption in continuity of United States foreign affairs is minimal at best, since the Ottoman Empire was abolished over one hundred years ago. When a sovereign has been replaced by a radically different regime that was not responsible for the expropriation, the danger of a court interfering with the executive’s conduct in foreign policy decreases and the act of state doctrine is less applicable. See *Bigio*, 239 F.3d at 453.

2. *The Ottoman Empire’s transition to the Republic of Turkey marks a significant change that renders the act of state doctrine inapplicable under Sabbatino.*

A sovereign is no longer extant and recognized by the United States when there is a significant change in government. In *Bigio*, the Second Circuit held that the district court erred when it granted the defendant’s act of state doctrine defense. *Id.* Plaintiffs were owners of *Bigio & Co.*, seized by the Egyptian government when President Nasser sequestered and nationalized the plaintiffs’ property. *Id.* The *Bigio* complaint alleged that Coca-Cola purchased the property knowing it was seized unlawfully. *Id.* Coca-Cola argued that the district court should abstain from hearing the case pursuant to the principles of the act of state doctrine. *Id.* at 446.

*22* When considering the applicability of the act of state doctrine, the Second Circuit considered this Court’s analysis in
Sabbatino that the balance might be shifted if the government that perpetuated the act is no longer in existence. *Id.* at 453. The Second Circuit weighed heavily on the issue when it stated, "there is little doubt that the Egyptian government that is now in power is far removed in time and circumstance from that which seized the Bigios’ property. The expropriation took place thirty-four or more years ago; President Nasser has been dead for thirty years." *Id.* Most notably, the court highlighted that interfering with an Executive’s conduct of foreign policy is more dangerous when the act is that of the current government. *Id.* The Second Circuit characterized the new Egyptian government as far different from the old regime in time and circumstance, ultimately holding that the act of state defense did not apply because the taking and President Nasser’s death both occurred more than thirty years prior. *Id.*

Here, the act of state doctrine does not apply as a defense because the Ottoman Empire has undergone a significant change in government and is no longer extant and recognized by the United States. Ottoman rule ended over one hundred years ago. [R. 22.] The symbolic end to its reign is evidenced by the terms of the Sykes-Picot Treaty at the conclusion of World War I. [R. 16.] At the time of the treaty, the Ottoman Empire was carved up and the Republic of Turkey succeeded the Ottoman Empire in 1923 and became a recognized sovereign. [R. 16.] Similar to Bigio, the Turkish government that replaced the Ottoman Empire is vastly different in both time and circumstance. Furthermore, the facts of this case are even more heightened than those in Bigio. In Bigio, the Nasser regime had been disintegrated for thirty-four years by the time litigation commenced. In contrast, the Ottoman Empire was extinguished for over one hundred years at the time of this litigation. The period from the Republic of Turkey’s succession of the Ottoman Empire surpasses the period from the Egyptian government’s succession of the *23* Nasser regime by nearly seventy years. The amount of time that passes following a transition in government is compelling because it often denotes how closely an old regime still manifests itself in the new one. It would be hard-pressed to say that the new Turkish government is similar to the Ottoman regime, as over a hundred years has elapsed since its demise. During that time, the Ottoman Sultan who
allegedly issued firmans to Lord Elgin, has long since passed away. Moreover, none of the firmans that the Sultan allegedly issued to Lord Elgin survive today.

While the issue of whether Lord Elgin received valid title to the Sculptures is not relevant to the act of state doctrine question, it remains a valid and accurate measure of both the time and circumstance in which an old regime no longer exists. Furthermore, the Turkish government did not keep the firmans as records of their own. This shows that the Turkish government has created a new system of government and bureaucracy vastly different from the Ottoman Empire’s. As in Bigio, litigating this case on its merits would not upset with the executive branch’s control of foreign conduct because a great deal of time has passed since the Ottoman rule. Not adjudicating the matter would legitimize an old foreign regime that is no longer extant and recognized. The Ottoman Empire, its rulers, and firmans granted by an old ruler, are no longer in existence. On par with this Court’s Sabbatino analysis, the balance must be shifted since the former government is no longer in power and the act of state doctrine does not apply.

B. As Shown by Sabbatino, a Flexible Application of the Act of State Doctrine Best Facilitates the Foreign Relation Policies at Stake.

While some courts have taken a hard-lined approach to the FSIA, courts are given discretion to apply the act of state doctrine without stringent guidelines. See Asociacion de Reclamantes, 561 F. Supp. at 1198 (“Sovereign immunity and the act of state doctrine are generally independent concerns, and the former is binding while the latter is subject to discretionary application.”). This Court has highlighted the wider latitude and maneuverability of the act *24 of state doctrine. See Sabbatino, 376 U.S. 398, 428 (explaining that the “doctrine demands a case-by-case analysis...tempered by common sense.”).

Rather than establishing an all-encompassing rule, the balancing approach in Sabbatino sought to (1) consider the degree of international law concerning the legality of the sovereign act, (2) determine the importance of the issue’s implications in foreign
affairs, and (3) establish whether the regime that perpetuated the act still exists. *Id.* In weighing these considerations, there is a presumption that courts will decide whether the resolution of the matter is the proper function of the judicial or executive branch. *Id.* Sabbatino’s flexible approach and the proper application of the act of state doctrine “requires a balancing of interests” and it “should not be invoked if the policies underlying the doctrine do not justify its application.” *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 533-34 (NY Dist. Ct. 2013) (quoting *Bigio*, 239 F.3d at 452). Those policy concerns include comity and separation of powers. Margaret A. Miles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under The Act of State Doctrine*, 35 Stan. L. Rev. 327 (1983). This judicial balancing allows judges to evaluate the facts of each case in light of the policies behind the doctrine. *Id.* Courts have discretion to waive the doctrine if the case is not likely to impact international relations or “embarrass or hinder the executive in the realm of foreign relations.” *Id.* at 427-28.

Lower courts have also followed the flexible balancing approach, adhering to this Court’s guidance. The Ninth Circuit reiterated this Court’s approach that the act of state doctrine is “supple, flexible, ad hoc.” *Marcos*, 862 F.2d at 1361. This flexible approach allows the act of state doctrine to be applied narrowly and expands the foreign government’s actions that a United States court can evaluate. It does not provide an exception for cases and controversies that may embarrass foreign affairs. *W.S. Kirkpatrick & Co.*, 493 U.S. at 409.

*25 The balancing test is vital to the act of state doctrine framework since it takes all aspects of the dispute into consideration. When assessing whether to apply the act of state doctrine, a court will come to a more comprehensive decision if it is able to weigh every component rather than one single factor. By following this formula, a court will have greater means to assess whether the adjudication would interfere with foreign affairs.*
1. A court should decide the Sculptures’ ownership rights since international law facilitating the return of expropriated art is well-documented.

As stated by this Court, “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.” Sabbatino, 376 U.S. at 428. When courts come to a consensus surrounding a particular area of the law, courts can focus more attentively on the application of that agreed-upon principle, rather than worry over the law’s intrusion into the executive’s sphere of foreign affairs. Id. This falls directly in line with the principle that courts should follow established law and avoid reaching a decision inconsistent with national interest or international justice. Id.

The Twelfth Circuit’s holding aligns with the established principle that historical art taken from a country, which the expropriating sovereign no longer controls, is returned to its country of origin. This historical trend is grounded in the congruency of the United States’s executive and judicial branches, effectually making the principle well-established. See Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d. Cir. 1954); see Menzel, 267 N.Y.S.2d 804. Two cases following the Third Reich demonstrate the agreement between the executive and judicial branches that expropriated property should be returned when wrongfully taken by a regime that has not passed a formal law. Donald T. Kramer, Annotation, Modern Act of State Doctrine, 12 A.L.R. Fed. 707 (1972). Bernstein v. N.V. Nederlandsche-Amerikaansche raised the issue of whether the act of state doctrine barred Bernstein from recovering damages from the Nazi-mandated conversion of stock interest in his company. 173 F.2d 71 (2d Cir. 1949). There, the Second Circuit initially held that it would not rule on the validity of the German government’s acts during the Nazi regime, applying the act of state doctrine defense. Id. at 73. However, the State Department’s issuance of the Tate Letter stated that government’s policy was “to undo forced transfers.” Bernstein, 210 F.2d at 376. Relying on the Tate Letter, the Second Circuit amended its order and declined to extend the act of state doctrine. Id. This amended
order now allowed the court to hear the merits of cases involving the Nazi Regime. *Id.* In light of the Executive Policy in the official letter, the court “[struck] out all the restraints based on the inability of the court to pass on the acts of officials in Germany during the period in question.” *Id.* In *Menzel*, the plaintiff sought to recover her painting seized by an agency of the Nazi Party after she fled from Belgium. 267 N.Y.S.2d at 809. The court rightfully assumed jurisdiction and rejected that the painting was seized lawfully by an occupying power. *Id.* at 815. The court held the act of state doctrine inapplicable because the Third Reich collapsed in 1945 and was neither extant nor recognized at the time of trial. *Id.* at 816-17.

The consensus and codification of the law—stating that forced transfers during the Nazi regime are not upheld by many U.S. courts—applies to the forced taking of the Sculptures from the Parthenon by the Ottoman Empire. Similar to *Bernstein*, where the plaintiff’s property was seized during the Nazi reign throughout Europe, the Parthenon was stripped of the Sculptures during the “grand tour.” [R. 6.] Elgin’s expeditions into the Parthenon to seize the Sculptures caused “considerable damage to the ancient structure.” [R. 7.] His reckless removal of property deprived Greece of rich history. Like Nazi takings, the Europeans deprived a country of history. When a sovereign seizes property outside its borders, it violates well-codified international law.

2. *27 This Court’s resolution of a private adjudication between museums will not have significant implications for foreign relations.*

This Court has noted that some aspect of international law “touch more sharply on national nerves than do others.” *Sabbatino*, 376 U.S. at 428. Moreover, the less important the implications of an issue are for foreign relations, the weaker the justification for exclusivity in the political branches. *Braka v. Bancomer*, S.C., 762 F.2d 222, 224 (2d. Cir. 1985). Courts have discretion to waive the doctrine if the case is not likely to impact international relations or hinder the executive’s hand in foreign relations. *Sabbatino*, 376 U.S. at 427-28.
When assessing the validity of an act of state defense, a court must assume the facts as alleged by the non-moving party. *Alfred Dunhill of London*, 425 U.S. at 691. The party who is seeking to invoke the act of state doctrine defense has the burden of proving that the doctrine should be applied. *Id.* Further, courts have declined to apply the doctrine in prior cases where a defendant failed to show a direct relevance to foreign affairs. *See Id.* at 706 (declining to expand the act of state doctrine to foreign sovereigns that act in a purely commercial manner); *see also McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1074 (D.C. Cir. 2012) (declining to apply the act of state doctrine over claims by agents of the Iranian government who acted as representatives of private entities rather than in their official public capacity); *see also Bodner v. Banque Paribas*, 114 F. Supp. 2d. 117, 131 (2000) (finding that the case did not "interfere with the laws and policies of the French government" because it involved "private litigants for specific historical injury."). Courts apply the doctrine narrowly and the defendant has a high burden in showing that adjudication will touch upon a significant foreign affairs matter.

Petitioner has not met its burden in this matter to show that adjudicating this case would interfere with the separation of powers in relation to foreign affairs. The record, as it stands now, favors a court adjudicating the matter instead of the executive branch. Adjudicating this case *\*28* will not affect foreign policy with the Republic of Turkey since expropriation can be viewed as a commercial transaction rather than a significant government action. Lord Elgin’s allowance to expropriate the Sculptures was informal. Here, a United States court would not interfere with the executive’s role in foreign policy since the Acropolis Museum is not challenging Turkish law. The Acropolis Museum merely challenges the British Museum’s refusal to return looted assets. This Court adheres to the separation of powers doctrine by leaving the executive branch to carry out large foreign matters and the judiciary to decide commercial disputes between museums.

Although Lord Elgin’s takings were allegedly warranted through the Ottoman Sultan’s issuance of *firmans*, his eventual possession of the Sculptures resembles a private transaction between parties, rather than an official act of a sovereign
government. Although these firmans may have allowed takings in 1801, Lord Elgin’s continued to seize the Sculptures until 1811. [R. 7-8.] While it was Lord Elgin’s original goal to only make drawings and molds, he ended up seizing more sculptures than he intended. [R. 6-7.] The volume of artifacts seized from the Parthenon after the firmans were issued indicates significant cultural history was taken outside the scope of any official government action. The Sculptures are rightfully owned by the Acropolis Museum, as they were unjustly expropriated. This Court has the means to return this property to its rightful owners. Foreign policy would be undisturbed by adjudication, and failure to settle this matter in a United States court would hinder Greece’s historical and cultural preservation and the wellbeing of the international museum community.

3. The Executive’s diminished political interest and Congress’ distaste for the act of state doctrine advocate for the return of the Sculptures through judicial action.

Under the flexible approach, a court will not grant the act of state doctrine to a foreign sovereign defendant whenever its expropriation action minimally touches upon foreign affairs. *29 Sabbatino, 376 U.S. at 423. Rather, it calls for a balancing test that levies both sides and comes to a rational decision that would not infringe on the individual rights of the political branches. Id. at 428; Underhill, 493 U.S. at 409. The executive branch’s political interest significantly decreases when a sovereign’s reign ends and a new government comes to power. See Sabbatino, 376 U.S. at 428. As in Bigio, there has been a shift towards not applying the act of state doctrine here since the Ottoman Regime ceased to exist over one hundred years ago. Thus, the third prong of Sabbatino’s balancing approach has been satisfied.

Congress cautioned against applying the act of state doctrine by enacting 22 U.S.C. § 2370, or the Second Hickenlooper Amendment, stating that courts must not apply the doctrine to prevent against hearing expropriation cases. 22 U.S.C. § 2370(e)(2). The text provides:
[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted.

Though situated in the broader context of furnishing assistance to foreign states, the Second Hickenlooper Amendment indicates Congressional aversion towards applying the act of state doctrine in the expropriation context. Courts should follow the flexible approach to the extant and recognized criteria, since the degree of international law is well established, foreign affairs will not be implicated, and the regime that perpetuated the acts in question no longer exists. Through changes in time and the sheer amount of international transactions, courts have the means to resolve situations without the worry of international disagreement. See First Nat’l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 790-92 (1972) (Brennan, J., dissenting). ("Although the act of state doctrine has a long history ... there is debate over whether the doctrine is even good policy, given that so many transactions in our modern world are international and involve some act of a foreign *30 government."). Employing a flexible approach to the extant and recognized prong is consistent with the executive, legislative, and judicial branches’ views on expropriation. Also, Petitioner has not demonstrated foreign relations would be implicated under the flexible approach.

C. Konowaloff Improperly Applied a Strict Reading of the Act Of State Doctrine, Contrary to This Court’s Precedent in Sabbatino.

Konowaloff should not be the exemplary case in determining whether the act of state doctrine should apply here. The court’s decision in Konowaloff v. Metro. Museum of Art strays from this Court’s precedent in Sabbatino. 702 F.3d 140, 147 (2d Cir. 2012). Konowaloff failed to consider a regime change, a necessary countervailing factor weighing against the doctrine’s
application. See Sabbatino, 376 U.S. at 428; see also Chabad, 528 F.3d at 954 (noting other circuits “declined to apply the doctrine...in reliance on a change in regime.”).

Unlike Sabbatino, Konowaloff did not consider the significance of a regime change and did not follow this Court’s guidance to balance countervailing factors that may weigh against application of the act of state doctrine. In Konowaloff, the Second Circuit stated the plaintiff’s contention that the Soviet government is no longer extant and recognized is not a “material” factor. Id. There, a third party unjustly acquired the plaintiff’s painting in a decree that nationalized property after the Bolsheviks came in power. Id. at 142. After the plaintiff unsuccessfully demanded that the museum return the painting, he filed an action to recover it. Id. The Museum moved for dismissal on the grounds that the claim was barred by the act of state doctrine. Id. The plaintiff’s argument hinged on the premise that the Russian Federation was now in power, instead of the Soviet Union, which collapsed and was no longer extant and recognized. Id. at 144. The Second Circuit rejected the plaintiff’s contention that the act of state doctrine should not be applied to foreclose his action on the ground that the Soviet government is no longer extant. Id. at 147. The Konowaloff court determined the regime change was not material because the successor to the Soviet Union did not renounce the predecessor government’s appropriations. Id. While the court observed that the present Russian government declined to engage in further appropriations, the Soviet Union’s failure to repudiate led the court to uphold the act of state doctrine and affirm the taking of the plaintiff’s property. Id. at 148.

With the exception of Konowaloff, the judicial trend has been to apply a flexible approach. The flexible approach applies the doctrine narrowly, thus expanding a foreign government’s actions that a United States court will evaluate. [R. 21.] The Konowaloff comparison is immaterial because the Second Circuit did not correctly analyze the “extant and recognized” prong in the balancing test. Further in Konowaloff, the court held that the act of state doctrine was applicable even though the old regime had been replaced, since the successor government had not repudiated the challenged appropriations. The decision in Konowaloff not only disregarded Sabbatino’s requirements, but also improperly
extended the requirement to include a repudiation. When applying a strict approach, the court must end its inquiry once it establishes that a government is no longer extant and recognized. A strict approach fails to account for whether the foreign sovereign's old form of government has dissolved materially. This Court has never required a successor government to repudiate the actions of its predecessor, and applying a strict approach strays from Sabbatino's decision.

CONCLUSION

For the foregoing reasons, Respondent Acropolis Museum respectfully requests that this Court affirm the decision below and find that (1) jurisdiction exists over the British Museum under the FSIA, and (2) that the act of state doctrine does not preclude adjudication of the matter.

Respectfully Submitted,

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