No. 15-____

In The
Supreme Court of the United States

PIERRE KONOWALOFF,

Petitioner,

v.

YALE UNIVERSITY, NIGHT CAFÉ, PROPERTY, a PAINTING, in rem,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A universally acclaimed masterpiece painting by Vincent van Gogh was expropriated from petitioner's great-grandfather by the revolutionary Bolshevik government in 1918. In 1933 the painting was illegally removed from the Soviet Union and allegedly "sold" to an American art collector who subsequently bequeathed it to Yale University. Petitioner claims in this lawsuit that even if the original Bolshevik expropriation is immune from challenge in a United States court because of the act of state doctrine, his right to the painting prevails over that of Yale, which traces its claim of ownership to a thief, and not to the foreign sovereign. The district court granted summary judgment to Yale and the court of appeals affirmed on the ground that the 1918 taking by the Bolsheviks "extinguished" petitioner's interest in the painting under the act of state doctrine and deprived plaintiff of "standing" to bring a lawsuit.

The Questions Presented are:

1. Whether, under this Court's unanimous decision in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International*, 493 U.S. 400, 409 (1990), the "policies underlying the act of state doctrine [do] not justify its application" when a claimant to property expropriated by a foreign sovereign does not challenge the validity of the governmental expropriation but asserts, under local replevin law, an ownership right superior to that of a private non-governmental party who obtained the property from a thief.

2. Whether the act of state doctrine applies if the current administration of the foreign sovereign endorses maintenance of the claimant's civil action in a United States court because the property appears to have been bequeathed to the current owner by a thief who took the property illegally from the foreign sovereign.

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No. 15-____

IN THE

Supreme Court of the United States

PIERRE KONOWALOFF, *Petitioner,*

v.

YALE UNIVERSITY, NIGHT CAFÉ, PROPERTY, a PAINTING, inrem, *Respondents.*

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

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A, pp. 1a-5a, *infra*) is reported at 620 Fed. Appx. 60. The opinion of the United States District Court for the District of Connecticut (Pet. App. B, pp. 18a-35a, *infra*) is reported at 5 F. Supp. 3d 237.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on October 20, 2015. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATEMENT

1. The Bolsheviks Expropriate a Van Gogh Masterpiece Painting

The Night Café was painted by Vincent van Gogh in 1888 and is, according to the district court's opinion, "one of the world's most renowned paintings." (Pet. App. B., p. 6a, *infra*). A photograph of the painting appears as Pet. App. D, p. 36a, *infra.* On June 23, 1908, Ivan Morozov – a Russian national and petitioner's great-grandfather – acquired the *The Night Café* in Paris. J.A. 214-254, 316. [1]

In 1917, after a violent revolution, Russian Emperor Nicholas II was overthrown. A provisional government was installed and, shortly thereafter, the Bolsheviks seized power from the provisional government. J.A. 316. On December 19, 1918, the Bolshevik secret police occupied Morozov's home and seized his art collection, including the *The Night Café,* together with furniture and various household items. J.A. 217-218, 317. The seizure was not part of a general confiscation of property; it was a

[1] "J.A." represents the Joint Appendix filed in the court of appeals.

selective taking aimed at the estates of Morozov and his cousin. J.A. 217-218, 317. Morozov did not voluntarily relinquish the painting. Nor did he ever receive any compensation for being deprived of his collection. J.A. 236. The Soviet Union thereafter prohibited the removal of the van Gogh masterpiece from its territory absent authorization at the highest level. J.A. 243-245.

2. Clark Acquires the Masterpiece Illegally and Bequeaths It to Yale

Stephen C. Clark was a New York resident, a sophisticated art collector, and an heir to the Singer Manufacturing Company fortune. J.A. 238-239. Acting on his behalf, the New York art gallery Knoedler & Company surreptitiously arranged for him to acquire *The Night Café* illicitly through the Matthiesen Gallery in Berlin. J.A. 317. Clark took possession of *The Night Café* in New York in May 1933. He bequeathed it to Yale in 1960. J.A. 245-246, 317.

In 1991 the Soviet Union collapsed and was replaced by 15 independent states loosely affiliated in a Russian-dominated "Commonwealth." J.A. 233-234. After the U.S.S.R. dissolved as a legal entity, the Russian Federation was recognized by the United States as its successor. J.A. 317.

3. Petitioner Learns in 2008 That Yale Possesses *The Night Café*

Upon the death of his father in January 2002, petitioner became the sole heir of the Morozov collection. J.A. 318. In 2008, during a visit to museums in Russia housing his ancestor's collection, petitioner first discovered that of more than 200 paintings from his great-grandfather's collection confiscated by the Bolsheviks, *The Night Café* was one of only two paintings not physically in Russia. He learned that it was at the Yale Art Gallery in New Haven, Connecticut. J.A. 250-251. Within a month of this discovery petitioner demanded that Yale return the painting. Yale refused. J.A. 230.

4. Yale Sues To Quiet Title

On March 23, 2009, Yale commenced this action against petitioner in the United States District Court for the District of Connecticut. J.A. 19. The complaint sought an order quieting title under Conn. Gen. Stat. § 47-31 as well as declaratory and injunctive relief. Petitioner answered and filed counterclaims for an order quieting title under Conn. Gen. Stat. §47-31; for declaratory relief under 28 U.S.C. § 2201; for replevin under Conn. Gen. Stat. § 52-515; for conversion under Connecticut common law; for larceny under Conn. Gen. Stat. § 53a-119; for treble damages under Conn. Gen. Stat. § 52-564; for injunctive relief; for replevin under N.Y.C.P.L.R. § 7101; for declaratory relief under N.Y.C.P.L.R. § 3001; and for conversion under New York common law. J.A. 41.

5. Yale Moves for Summary Judgment and Proceedings Are Stayed

Yale moved for summary judgment on petitioner's counterclaims. On October 17, 2011, the district court stayed its proceedings to await the court of appeals' decision in *Konowaloff v. The Metropolitan Museum of Art*, 702 F.3d 140 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2837 (2013) (Pet. App. C, pp. 18a-35a, *infra*), which concerned a painting by Paul Cezanne which had also been taken from Morozov in 1918 by the Bolsheviks, was possessed by Clark, and was bequeathed by Clark to the Metropolitan Museum of Art. J.A. 265.

6. Russia Cooperates With Petitioner's Counsel in Documenting Clark's Illegality

While the stay was in effect, petitioner's counsel requested and obtained leave (over Yale's opposition) to meet abroad with Russian officials and seek evidence concerning removal of *The Night Café* from the Soviet Union. J.A. 265-273. Counsel returned with affidavits from Russian officials and supporting documentation from the Russian National Archives, an official organ of the Russian Federation, demonstrating that, contrary to the existing practice of multiple authorizations, there was no record of the van Gogh painting's sale to Clark and that it appeared to have been unlawfully exported from the Soviet Union. J.A. 279-310.

7. The District Court Grants Yale Summary Judgment

After the Second Circuit issued its decision in *Konowaloff v. The Metropolitan Museum of Art*, *supra* ("the *Met* case"), and without hearing oral argument, the district court granted Yale's motion for summary judgment. Pet. App. B, pp. 6a-17a, *infra*. The district judge held that the act of state doctrine, on which the court of appeals had relied in the *Met* case, also barred petitioner's claims to the van Gogh painting because the 1918 expropriation deprived petitioner of "standing" to assert any ownership interest.

The district judge's ruling on "standing" was based on language quoted from the Second Circuit's *Met* opinion: "As Konowaloff has no right to or interest in the Painting other than as an heir of Morozov, and Morozov did not own the Painting after the 1918 Soviet appropriation, Konowaloff ***has no standing*** to complain of any sale or other treatment of the Painting after 1918, or to seek monetary or injunctive relief, or to seek a declaratory judgment with respect to the [Met's] right or title to the Painting." Pet. App. B, p. 15a *infra*, quoting from 702 F.3d at 147 (Pet. App. C, p. 33a, *infra*) (emphasis added). The district court then granted Yale's consent motion for voluntary dismissal, under Fed. R. Civ. P. 41(a)(2), of its affirmative claim to quiet title. Final judgment for Yale was entered on September 18, 2014. J.A. 334.

8. The Second Circuit Holds That, Because of an Act of State, Petitioner Lacks "Standing" To Claim Ownership

The Second Circuit issued a "Summary Order" affirming the district court's decision (Pet. App. A, pp. 1a-5a, *infra*). The Order misinterpreted petitioner's legal position that he did not have to challenge the validity of the Bolsheviks' expropriation of *The Night Café* to prevail in a replevin action against a party whose ownership claim derived from a theft. It treated this *arguendo* contention as "abandonment" by petitioner of any challenge to the 1918 expropriation and total acceptance of its legal consequence, even in independent litigation against a private party. The court below declared that by "abandoning" a challenge to the expropriation, petitioner "admitted any legal claim or interest he has in the Painting was extinguished at that time." Pet. App. A, p. 3a, *infra*. On this erroneous account, said the Second Circuit, relying again on the language in its *Met* opinion, petitioner "has no standing to assert any of the counterclaims brought in the District Court." *Id.*

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S RULING BOTH IGNORES AND CONFLICTS WITH THIS COURT'S UNANIMOUS *KIRKPATRICK* DECISION

In *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), this Court definitively limited the application of the act of state doctrine to bar a claim ***only*** "when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." 493 U.S. at 406 (emphasis original). This Court held that applying the act of state doctrine beyond that limited scope would be "justifying expansion of the act of state doctrine . . . into new and uncharted fields." 493 U.S. at 409.

Petitioner clearly indicated to the district court that in this case, as in *Kirkpatrick*, "the validity of no foreign sovereign act is at issue." 493 U.S. at 410. Petitioner's counterclaim accepted *arguendo* the validity of the Bolsheviks' 1918 expropriation but claimed that petitioner's right to possess the van Gogh painting was superior to Yale's because Yale could trace its alleged ownership only to a thief.

Petitioner's opening brief and his reply brief in the court of appeals discussed this Court's *Kirkpatrick* decision extensively (Opening Brief of Defendant-Appellant, pp. 12, 19-21; Final Reply

Brief of Defendant-Counter-Claimant-Appellant, pp. 5-6). Yale's brief also cited and sought to distinguish the *Kirkpatrick* decision (Brief of Plaintiffs-Counter-Defendants-Appellees, pp. 10, 11, 12, 14). Nonetheless, ***the opinion of the court of appeals did not even cite this Court's Kirkpatrick decision***.

On its face the court of appeals' opinion demonstrates that the court below took no account whatever of this Court's clarification in *Kirkpatrick* of the current "jurisprudential foundation for the act of state doctrine." 493 U.S. at 404. Elevating form over substance, the Second Circuit barred petitioner from pursuing his state-law claims on the ground that an act of state in 1918 had "extinguished" petitioner's legal rights. The court below did not care that petitioner was not, in his claim to superior title under Connecticut and New York law, challenging the foreign sovereign's act of confiscating his great-grandfather's very valuable property.

In its "no standing" ruling, the Second Circuit cited only one Connecticut precedent – a case in which plaintiffs were held to have made a "groundless claim" because they had no legal interest in a triangular strip of land that was the subject of their Connecticut lawsuit to quiet title. *Loewenberg v. Wallace*, 147 Conn. 689, 692, 695-696, 166 A.2d 150, 153, 155 (Conn. 1960). The very limited application of the *Loewenberg* decision was demonstrated in *Fountain Pointe, LLC v. Calpitano*, 2011 WL 6989873 (Conn. Superior Ct. 2011), at p. 5, where a Connecticut trial judge noted that "standing" for purpose of quieting title under Connecticut law requires only that a plaintiff

demonstrate "a specific, personal and legal interest in the subject property."

Petitioner unquestionably has a "specific, personal and legal interest" as the only living heir of the owner of the van Gogh painting before it was taken in 1918. His lawsuit against Yale rests on the claim that, even if the 1918 seizure is immune from challenge in a United States court, the original owner and his heir are entitled to prevail over a possessor whose only claim to ownership is that it received the painting as a gift from a thief who stole the painting from the Soviet Union.

Under New York law, petitioner has a superior claim that entitles him, as an original owner, to recover his property from even a good-faith purchaser for value. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 317, 569 N.E.2d 623, 626 (1991). The Second Circuit confirmed that "in New York, a thief cannot pass good title." *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010). The *Bakalar* opinion also read the New York Court of Appeals opinion in *Lubell* as placing on the possessor of allegedly stolen artwork "the burden of proving that the painting was not stolen property" after "the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it." 619 F.3d at 141-142.

Since the van Gogh painting entered the United States through New York harbor and the alleged thief was a New York resident who maintained it in New York, New York law would have to be applied by the Connecticut court. In any

event, the same legal principle affirmed in the *Bakalar* opinion applies under Connecticut law. *Atlas Ins. Co., Ltd. v. Gibbs*, 183 Atl. 690, 691-692 (Conn. 1936). Connecticut replevin law authorizes a plaintiff who has "a general or special property interest with a right to immediate possession" to initiate an action for "wrongful detention." Conn. Gen. Stat. § 52-515. See also *Plikus v. Plikus*, 599 A.2d 392, 394 (Conn. App. 1991) ("At common law, if the converted property remained in the hands of the converter, the return of the identical property was allowed.").

A proper application of the legal principles articulated in this Court's *Kirkpatrick* decision should not bar petitioner from pursuing his claims under New York and Connecticut law in a United States District Court. The Second Circuit reached a contrary result – which conflicts with *Kirkpatrick* – only because it totally ignored the *Kirkpatrick* opinion.

II.

WHEN THE FOREIGN SOVEREIGN SUPPORTS LITIGATION IN AN AMERICAN COURT, THE ACT OF STATE DOCTRINE IS PLAINLY INAPPLICABLE

An additional reason why the act of state doctrine should not have been applied by the Second Circuit in this case to prevent petitioner from challenging Yale's possession of the van Gogh painting in an American court is that the foreign sovereign – the Russian Federation – appears ready

to assist petitioner's lawsuit. As described at p. 5, *supra*, petitioner's counsel traveled to Russia during a court-ordered stay in the lawsuit and returned with affidavits and letters that indicate the Russian Federation's readiness to provide information concerning the mysterious transfer of the painting to Mr. Clark notwithstanding applicable law in the Soviet Union that forbade its removal.

Under the guidance provided by this Court in *Kirkpatrick*, avoiding "embarrassment to the sovereign" and "embarrassment to the Executive Branch in its conduct of foreign relations" are relevant considerations in determining whether the act of state doctrine should be applied to bar a lawsuit in a United States court. 493 U.S. at 408. When a foreign sovereign indicates that "national nerves" are not affected by an American court's consideration of claims made by a party in private litigation and that the lawsuit does not "embarrass foreign governments," the court has no choice. Its duty under *Kirkpatrick* is to exercise its constitutional "obligation . . . to decide cases and controversies properly presented to [it]." 493 U.S. at 408-409.

In the court below Yale challenged petitioner's contention that the Russian Federation will cooperate in providing information to an American court considering plaintiff's claims against Yale. Brief of Plaintiffs-Counter-Defendants Appellees, pp. 15-19. Although we believe that the documentation in the record sufficiently demonstrates the Russian Federation's support of petitioner's lawsuit, this Court can, of course, learn the Russian Federation's

position and the weight given it by the Executive Branch by requesting the Solicitor General to provide this Court with the views of the United States.

III.

THE SECOND CIRCUIT'S ERRONEOUS EXTENSION OF THE ACT OF STATE DOCTRINE CONFLICTS WITH NINTH CIRCUIT DECISIONS

Decisions of the Court of Appeals for the Ninth Circuit issued after this Court's unanimous ruling in *Kirkpatrick* indicate that the Ninth Circuit would have decided this case differently from the decision of the Second Circuit. The two Circuits where many of the act-of-state cases arise and are decided (see pp. 15-16, *infra*) conflict over the application of this Court's *Kirkpatrick* standard.

Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.2d 1083 (9th Cir. 2009), held that there was no federal jurisdiction justifying removal to a federal court even though the plaintiff alleged that actions of Philippine government authorities were corrupt. Applying the *Kirkpatrick* standard, the Ninth Circuit observed that "none of the supposed acts of state identified by the district court is essential to the [plaintiff's] claims." 582 F.3d at 1091.[2] Consequently, it reversed the decision of the

[2] In barring petitioner's claim in this case the Second Circuit observed that petitioner's filings in the district court and in the court of appeals "are rife with references to the expropriation

district court and directed that the case be remanded to the Nevada state court.

In *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001) (Kozinski, C.J.), the Ninth Circuit similarly rejected the contention that there was federal jurisdiction because of the act of state doctrine over a complaint alleging that government agents had participated in introducing a toxic pesticide in the growth of bananas. The court said, "[N]othing in plaintiff's complaint turns on the validity or invalidity of any act of a foreign state." 251 F.3d at 800. See also *von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 726 (9th Cir. 2014) (quoting *Kirkpatrick*: "Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign.").

The Second Circuit plainly gives this Court's *Kirkpatrick* decision a much narrower reading than does the Ninth Circuit. This Court should resolve that conflict.

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being an illegal act of theft." Appendix A, p. 3a, *infra.* The Ninth Circuit noted in *Marinduque* that "the complaint is sprinkled with references to the Philippine government, Philippine law, and the government's complicity in the claimed damage to the Marinduquenos." Nonetheless, the Ninth Circuit, relying on *Kirkpatrick*, held that the act of state doctrine applies only if "an act of state is an essential element of a claim" 582 F.2d at 1091.

IV.

BECAUSE ACT OF STATE CASES MOST FREQUENTLY ARISE IN THE SECOND AND NINTH CIRCUITS, RESOLUTION OF THE CONFLICT IS CRITICAL

Resolving the conflict between the Second and Ninth Circuits is particularly significant because these are the two jurisdictions where act-of-state issues most frequently arise. This conclusion is supported by *Westlaw* records of the 534 federal cases involving an act-of-state issue since January 17, 1990, when *Kirkpatrick* was decided.

A. The two Circuits account for 43.2% of the act-of-state federal rulings since *Kirkpatrick.*

Westlaw records establish that the Court of Appeals for the Second Circuit and the district courts in that Circuit issued 141 decisions involving the act of state doctrine between January 17, 1990, (when *Kirkpatrick* was decided) and the date on which this petition was filed. This was 26.4% of the 534 act-of-state cases decided in the time period. The Court of Appeals for the Ninth Circuit and district courts in that Circuit issued 90 decisions involving the act of state doctrine in the same time period. This was 16.8% of the total act of state cases decided.

B. The two Circuits account for 45.7% of the federal appellate decisions since 1951 involving the act of state doctrine.

Another measure of the importance of the rules governing the act-of-state doctrine in the Second and Ninth Circuits is the relative frequency of act-of-state rulings issued by the courts of appeals even prior to this Court's decision in *Kirkpatrick*. According to *Westlaw* records, there have been 300 federal appellate decisions involving the act of state doctrine issued since 1951. Of that total, 74 (24.7%) were issued by the Second Circuit and 63 (21%) by the Ninth Circuit. The District of Columbia Circuit was next with 41 decisions, and the Fifth Circuit with 40.

This Court should resolve the difference between these two Circuits over when and in what circumstance an act of state claim may be asserted by a party in private litigation between non-governmental parties. In the absence of such resolution, cases will be decided differently if brought in an East Coast court than if brought in a West Coast court. This Court should grant certiorari and clearly establish that the act of state doctrine may be considered by a court and affect the outcome of litigation only if the outcome of the case turns upon validating the effect of official action by a foreign sovereign.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 15, 2016

APPENDIX A

United States Court of Appeals,
Second Circuit.

YALE UNIVERSITY, Night Café, Property, a Painting, in rem, Plaintiffs–Counter–Defendants–Appellees,

v.

Pierre KONOWALOFF, Defendant–Counter–Claimant–Appellant.

No. 14–3899.
Oct. 20, 2015.

Appeal from the United States District Court for District of Connecticut (Alvin W. Thompson, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

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PRESENT: CHESTER J. STRAUB, RICHARD C. WESLEY and DEBRA ANN LIVINGSTON, Circuit Judges.

SUMMARY ORDER

In 1918, the Russian Bolshevik revolutionary government issued decrees expropriating the collections of three major Russian art collectors, including Ivan Abramovich Morozov, Plaintiff–Appellant Pierre Konowaloff's great-grandfather. Among these paintings were *Madame Cézanne in the Conservatory* by Paul Cézanne and *The Night Café* by Vincent van Gogh. The former resides at the Metropolitan Museum of Art in New York City and was the subject of this Court's decision in *Konowaloff v. Metropolitan Museum of Art,* 702 F.3d 140 (2d Cir.2012) [hereinafter "*Konowaloff I*"]. This case concerns the dispute over ownership of the latter painting between the plaintiff in that case and Yale University, in whose possession *The Night Café* ("the Painting") has been since 1961. We assume the parties' familiarity with the historical facts, as explained in *Konowaloff I,* and with the record below, which we reference only as necessary to explain our decision.

Konowaloff first appeals from the District Court's published opinion, dated March 20, 2014, granting Yale University's motion for summary judgment on his counterclaims. *See Yale Univ. v. Konowaloff,* 5 F.Supp.3d 237 (D.Conn.2014). He argues principally that the District Court erred in concluding that the act of state doctrine, as applied in *Konowaloff I,* bars this action, because he has now "abandoned any claim to the Painting on the grounds that the

confiscation of cultural property in 1918 was illegal." Appellant Br. 6. This argument fails for two reasons.

First, despite his characterization of his claims to this Court, Konowaloff's amended answer and counterclaims in the District Court are rife with references to the expropriation being an illegal act of theft. Second, even if we were to take his statement of abandonment to this Court as binding as we are entitled to do, *see Purgess v. Sharrock,* 33 F.3d 134, 144 (2d Cir.1994), the result is that Konowaloff has accepted the validity of the 1918 expropriation and thus admitted any legal claim or interest he has in the Painting was extinguished at that time. Absent a claim to an existing interest in the Painting, Konowaloff has no standing to assert any of the counterclaims brought in the District Court. *See Konowaloff I,* 702 F.3d at 147 (holding Konowaloff had no standing to challenge "any sale or other treatment of the [Cézanne] Painting after 1918"); *see also, e.g., Loewenberg v. Wallace,* 147 Conn. 689, 692, 166 A.2d 150 (1960) (observing that plaintiff needs to allege legal **62* title or some legal interest in property to have standing in quiet title action). Thus, the District Court appropriately granted Yale's motion for summary judgment on Konowaloff's counterclaims.

Konowaloff next argues that the District Court should have considered the question of title regardless of the act of state doctrine. In part, Konowaloff contends that the District Court erred in granting Yale's motion for voluntary dismissal of its affirmative claims without prejudice—a motion to which he consented, *see* Joint App'x 329. Though

neither party has challenged our jurisdiction to hear this appeal, "we have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Joseph v. Leavitt,* 465 F.3d 87, 89 (2d Cir.2006).

Our Circuit is clear that we generally do not have jurisdiction over appeals from plaintiffs following a voluntary dismissal without prejudice. *See, e.g., Rabbi Jacob Joseph Sch. v. Province of Mendoza,* 425 F.3d 207, 210 (2d Cir.2005); *Empire Volkswagen Inc. v. World–Wide Volkswagen Corp.,* 814 F.2d 90, 94 (2d Cir.1987). We have not addressed whether jurisdiction lies when a defendant consents to such a dismissal. *Cf. Ali v. Fed. Ins. Co.,* 719 F.3d 83, 89 (2d Cir.2013) ("Because the invitation to dismiss must be designed only to secure immediate appellate review of an adverse decision, parties cannot appeal a joint stipulation to voluntary dismissal, entered unconditionally by the court pursuant to a settlement agreement." (internal quotation marks omitted)). However, in comparable circumstances, a prior panel of this Court concluded that where a party's counterclaims became moot following summary judgment, voluntary dismissal without prejudice did not deprive our Court of appellate jurisdiction. *See Analect LLC v. Fifth Third Bancorp,* 380 Fed.Appx. 54, 55–56 (2d Cir.2010) (summary order). There, as here, the dismissed claim presented no "actual controversy" because the prior summary judgment order resolved the dispute. *See id.* at 56. Though *Analect* is of course not binding precedent, we agree with its

reasoning and therefore similarly conclude we possess jurisdiction in this case.

Although Konowaloff's consent does not deprive us of jurisdiction, it does prevent him from challenging the entry of voluntary dismissal. Parties who consent to an order of the District Court cannot be heard to argue error on appeal. *Cf. Zahorik v. Cornell Univ.,* 729 F.2d 85, 91 (2d Cir.1984). In any event, we review for abuse of discretion orders granting voluntary dismissal, *see Kwan v. Schlein,* 634 F.3d 224, 230 (2d Cir.2011), and in light of our conclusion above in favor of Yale on Konowaloff's mirror-image counterclaims, we cannot conclude that voluntary dismissal of Yale's quiet title action constituted such an abuse in this case.

We have considered Konowaloff's remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the District Court is **AFFIRMED.**

APPENDIX B

United States District Court,
D. Connecticut.

YALE UNIVERSITY, Plaintiff,
and
The Night Café, a Painting, Plaintiff-in-rem,
v.
Pierre KONOWALOFF, Defendant,
v.
Yale University, Counterclaim-defendant,
and
The Night Café, a Painting, Counterclaim-defendant-in-rem.

Civil No. 3:09CV466(AWT).
Signed March 20, 2014

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RULING ON MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

ALVIN W. THOMPSON, District Judge.

Pierre Konowaloff ("Konowaloff") has brought counterclaims seeking injunctive and declaratory relief as well as replevin of, or money damages for the possession and retention by Yale University ("Yale") of, Vincent van Gogh's *The Night Café* (the "Painting"), which the Russian government expropriated in 1918 from Russian industrialist Ivan A. Morozov ("Morozov"), Konowaloff's great-grandfather. Yale has moved for summary judgment on Konowaloff's counterclaims. For the reasons set forth below, Yale's motion for summary judgment is being granted.

I. Factual Background

The Night Café is a masterpiece painted by Vincent van Gogh in 1888 and is one of the world's most renowned paintings. In 1918, Morozov possessed the Painting, which he kept in his home in Moscow along with a large collection of other artworks by Russian and European artists.

In 1917, the Bolshevik faction of the Russian Social Democratic Workers party, led by Vladimir Lenin, seized power and declared itself the new socialist government of Russia; it would later be known as the Russian Soviet Federated Socialist Republic ("RSFSR"). Although the United States of America broke off formal diplomatic relations almost as soon as the new socialist government came into power, the United States, like other sovereigns, recognized

the RSFSR as the *de facto* government of Russia. On March 3, 1918, in the exercise of its sovereignty, the RSFSR signed the Peace Treaty of Brest–Litovsk, formally withdrawing from World War I, and establishing peace between Russia and Germany and Germany's allies. In 1922, the RSFSR joined with three other republics to form the Union of Soviet Socialist Republics ("USSR" or "Soviet Union"). On November 17, 1933, through the signing of the Roosevelt–Litvinov Agreements, the United States formally recognized the Soviet Union as Russia's government. Today, the United States also recognizes the Russian Federation.

Immediately after seizing power in 1917, the new socialist government had issued a decree abolishing private property and declaring confiscated property to belong to the "whole people," that is, the Soviet state. In December 1918, the RSFSR, by decree from the Council of People's Commissars, declared the art collection of **239* three Russian citizens, Ivan A. Morozov, I.C. Ostruokhov, and V.I. Morozov, to be state property. The Soviet Union displayed *The Night Café* in the Museum of Modern Art in Moscow from 1928 until 1933, when it was sold abroad. Later that year, Stephen Clark ("Clark") acquired the Painting. Konowaloff disputes that the Painting was sold; he asserts that it was delivered to the Matthiesen Gallery by the Soviet trade delegation in Berlin for shipment to Knoedler & Company, an art gallery in New York, which transferred the Painting to Clark. Konowaloff contends that the sales of art by the Soviet government via the Bolshevik Center, a criminal network, to wealthy westerners such as

Clark were cloaked in secrecy and employed an intricate laundering operation.

After Clark acquired the Painting, he loaned it to museums and galleries in the United States for public display until his death in 1960. In his will, Clark left numerous works of art, including *The Night Café,* to Yale. In June 1961, Yale received the works of art from Clark's estate and formally accessioned the Painting into the Yale University Art Gallery's permanent collection.

In 2002, Konowaloff became the official heir to the estate of his great-grandfather. He later learned that Morozov had owned the Painting and that the Painting had been sold to Clark in the 1930s and subsequently bequeathed to Yale. In March 2008, Konowaloff, through his wife, wrote to Yale inquiring about Yale's ownership of the Painting. Yale filed the instant action to quiet title and for declaratory and injunctive relief against Konowaloff. Konowaloff filed counterclaims seeking injunctive and declaratory relief, as well as replevin of, or money damages for the possession and retention by Yale of, the Painting.

II. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Gallo v. Prudential Residential Servs.,* 22 F.3d 1219, 1223 (2d Cir.1994). Rule 56(a) "mandates the entry of

summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. When ruling on a motion for summary judgment, the court may not try issues of fact, but must leave those issues to the jury. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 58 (2d Cir.1987). Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined ... to issue-finding; it does not extend to issue-resolution." *Gallo,* 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson,* 477 U.S. at 247, 106 S.Ct. 2505. An issue is "genuine ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.,* 477 U.S. at 248, 106 S.Ct. 2505 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." *Id.* Only **240* those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. Immaterial or minor facts will not prevent summary

judgment. *See Howard v. Gleason Corp.,* 901 F.2d 1154, 1159 (2d Cir.1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and ... draw all reasonable inferences in its favor." *Weinstock v. Columbia Univ.,* 224 F.3d 33, 41 (2d Cir.2000) (quoting*Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 177 (2d Cir.1990)). However, the inferences drawn in favor of the nonmovant must be supported by evidence. "[M]ere speculation and conjecture is insufficient to defeat a motion for summary judgment." *Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 315 (2d Cir.1997) (quoting *Western World Ins. Co. v. Stack Oil, Inc.,*922 F.2d 118, 121 (2d Cir.1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which a jury could reasonably find for the [nonmovant]." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

III. Discussion

Yale argues that summary judgment should be granted in its favor on Konowaloff's counterclaims based on the act of state doctrine. The court agrees.

"The act of state doctrine ... arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Banco Nacional de Cuba*

v. Sabbatino, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). As formulated in decisions of the Supreme Court, the doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.*

> Under the act of state doctrine, the courts of the United States, whether state or federal, *will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit,* in the absence of a treaty or other unambiguous agreement regarding controlling legal principles....

Konowaloff v. Metro. Museum of Art, 702 F.3d 140, 145 (2d Cir.2012) (quoting *Sabbatino,* 376 U.S. at 428, 84 S.Ct. 923) (emphasis in *Konowaloff*). "[T]he validity of the foreign state's act may not be examined" even when there is a claim that the taking of property was in violation of "customary international law" or "the foreign state's own laws." *Konowaloff,* 702 F.3d at 145–46. Moreover, in *Oetjen v. Central Leather Co.,* the Court held that:

> [W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, *such recognition is*

> *retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.*

Konowaloff, 702 F.3d at 146 (quoting *Oetjen,* 246 U.S. 297, 302–03, 38 S.Ct. 309 (1918)) (emphasis in *Konowaloff*). "The Supreme Court has repeatedly applied this principle to cases involving nationalizations ordered during the Russian Revolution—appropriating the property and assets of **241* various Russian corporations—notwithstanding the fact that formal recognition of the Soviet government by the United States occurred years after the decrees themselves." *Konowaloff,* 702 F.3d at 146 (citing *United States v. Pink,* 315 U.S. 203, 230–33, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *United States v. Belmont,* 301 U.S. 324, 326, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937)).

All of Konowaloff's counterclaims arise from his claim to ownership of the Painting. (*See* Amend. Countercl., Doc. No. 35, ¶ 1 ("This is an action for a declaration of title as residing in Pierre Konowaloff as the heir to *The Night Café* ....").) To prevail on any of his counterclaims, Konowaloff must prove that he either has title or a superior possessory right to the Painting. *See Falker v. Samperi,* 190 Conn. 412, 420, 461 A.2d 681 (1983) (conversion claimant must prove ownership); *Fiorenti v. Cent. Emergency Physicians, PLLC,* 305 A.D.2d 453, 762 N.Y.S.2d 402, 403 (2003) (conversion claimant must prove ownership or superior right of possession); *Velsmid v. Nelson,* 175 Conn. 221, 229, 397 A.2d 113 (1978) (adjudication of title depends on the strength of plaintiff's own

title); *M. Itzkowitz & Sons, Inc. v. Santorelli,* 128 Conn. 195, 198, 21 A.2d 376 (1941) ("The plaintiff in replevin must prevail by the strength of his title rather than by the weakness of the defendant's."); *Nissan Motor Acceptance Corp. v. Scialpi,* 94 A.D.3d 1067, 944 N.Y.S.2d 160, 162 (2012) ("A cause of action sounding in replevin must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right."); *Discover Leasing, Inc. v. Murphy,* 33 Conn.App. 303, 309, 635 A.2d 843 (1993) (conversion and statutory theft require proof that property "belonged to" plaintiff). Thus, Konowaloff's ownership of or superior possessory right to the Painting is "an essential element of [his] case with respect to which [he] has the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. 2548. However, there is no genuine issue as to the fact that "The *Night Café* was taken by the new Soviet government of Russia by order of Lenin and Sovnarkom (the Council of People's Commissars) in December 1918," as part of the movement to nationalize private property. (Def. and Countercl. Pl. Pierre Konowaloff's Local Rule 56(a)(2) Statement, Doc. No. 80–1, ¶ 8.) For the court to determine whether Konowaloff has proven this "essential element" would necessarily require the court to make an inquiry into the legal validity of the 1918 nationalization decree. However, such inquiry is precluded by the act of state doctrine.

Konowaloff is directly on point. That action involved the possession and retention by the Metropolitan Museum of Art (the "Met") of a Cézanne painting entitled *Madame Cézanne in the*

Conservatory, which the RSFSR expropriated from Morozov under the same decree and at the same time it expropriated *The Night Café.* The court held:

> As Konowaloff has no right to or interest in the Painting other than as an heir of Morozov, and Morozov did not own the Painting after the 1918 Soviet appropriation, Konowaloff has no standing to complain of any sale or other treatment of the Painting after 1918, or to seek monetary or injunctive relief, or to seek a declaratory judgment with respect to the [Met's] right or title to the Painting.

Konowaloff, 702 F.3d at 147 (internal citation omitted).

The counterclaim plaintiff contends that *Konowaloff* is not on point because unlike *Konowaloff,* "[t]his case ... has progressed beyond the pleading to the discovery stage and Yale's motion is for summary **242* judgment[,]" and "[a]ccordingly, the applicability of the act of state doctrine necessarily involves factual questions requiring the taking of evidence, first and foremost the position of the Russian Federation regarding the irrelevance of the adjudication of the rights of the parties in this litigation to amicable relations between the United States and the Russian Federation." (Pierre Konowaloff's Opp'n to Yale University's Renewed Mot. for Summ. J., Doc. No. 141, at 2.) However, in *Konowaloff,* the court noted that "the successor to the U.S.S.R. has not renounced the 1918 appropriations," 702 F.3d at 147,

and the counterclaim plaintiff has not produced any evidence that the successor to the U.S.S.R. has done so subsequent to the date of the opinion in *Konowaloff* even though he was given additional time by the court in which to obtain such evidence.

Konowaloff also contends that summary judgment cannot be granted in light of the results of the investigation by Alexei Alekseevich Melnikov, who submitted an affidavit (*see* Aff. of Phillip Brown, Doc. No. 150, Ex. A) concerning his examination of the findings of the Russian Federation National Archives relative to its investigation of the sale of the Painting in 1933. However, this evidence merely reflects that a factual dispute may exist as to the historical circumstances surrounding the sale of the Painting by the Soviet government. (*See id.,* at 2 ("I ... received [the Russian archival entities'] official responses to the effect that their respective archives do not contain any documents directly or indirectly related to the sale of Van Gogh's *The Night Café* painting."); Aff. of Alexei Alekseevich Melnikov, Doc. No. 148, ¶ 4 ("When considering the mechanics of such an examination, one must take into account that over 80 years have passed and it could be quite complicated to find, locate and get access to relevant documents, many of which may still be privileged and classified.").) Thus, Konowaloff's contention does not address whether there is a genuine issue of *material* fact because the act of state that matters for purposes of whether Konowaloff can prove he has title or a superior possessory right to the Painting is the 1918 appropriation by the Soviet government, not the 1933 sale. This point was also addressed in *Konowaloff. See* 702 F.3d at 147 ("The relevant

act of state revealed by the Amended Complaint occurred in 1918 when the Soviet government appropriated the Painting. Upon the appropriation, as the Amended Complaint alleged, 'Morozov was deprived of all his property rights and interests in the Painting ....' ") (citation omitted).

Because "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," *Anderson,* 477 U.S. at 247, 106 S.Ct. 2505, and the court finds that the act of state doctrine applies to bar Konowaloff's counterclaims, the motion for summary judgment is being granted.

IV. Conclusion

Accordingly, the Motion for Summary Judgment on Counterclaims by Counterclaim Defendant Yale University (Doc. Nos. 78 and 134) is hereby GRANTED. The Clerk shall enter judgment in favor of counterclaim defendant Yale University on all of the counterclaims of Pierre Konowaloff.

It is so ordered.

APPENDIX C

United States Court of Appeals,
Second Circuit

Pierre KONOWALOFF, Paris, France, Plaintiff–Appellant,

v.

THE METROPOLITAN MUSEUM OF ART, New York, New York, Defendant–Appellee.

Docket No. 11–4338–cv
Argued: April 20, 2012
Decided: Dec. 18, 2012

Attorneys and Law Firms

James E. Tyrrell, Jr., Newark, NJ (Joseph E. Hopkins, Jonathan M. Peck, Calvin W. Souder, Patton Boggs, Newark, NJ; Paul V. Curcio, Philip Y. Brown, Adam M. Weisberger, Adler Pollock & Sheehan, Boston, MA; Allan Gerson, AG International Law, Washington, D.C., on the brief), for Plaintiff–Appellant.

David W. Bowker, Washington, D.C. (Wilmer Cutler Pickering Hale & Dorr, Washington, D.C.; Charu A. Chandrasekhar, Michael D. Gottesman, Wilmer Cutler Pickering Hale & Dorr, New York, NY, on the brief), for Defendant–Appellee.

Before: JACOBS,Chief Judge, KEARSE and McLAUGHLIN, Circuit Judges.

Opinion

KEARSE, Circuit Judge:

Plaintiff Pierre Konowaloff appeals from a judgment of the United States District Court for the Southern District of New York, Shira A. Scheindlin, *Judge,* dismissing his action against defendant Metropolitan Museum of Art (the "Museum") for its acquisition, possession, display, and retention of a painting that had been confiscated by the Russian Bolshevik regime from Konowaloff's great-grandfather in 1918. The district court granted the Museum's motion to dismiss Konowaloff's Amended Complaint, ruling that the pleading reveals that his claims are barred by the act of state doctrine. On appeal, Konowaloff contends principally that the district court erred in holding that the painting was taken pursuant to a valid act of state despite factual allegations in his Amended Complaint to the contrary. For the reasons that follow, we find Konowaloff's contentions to be without merit, and we affirm the judgment of the district court.

I. BACKGROUND

The allegations in Konowaloff's Amended Complaint are described in detail in the September 22, 2011 Opinion and Order of the district court, reported at 2011 WL 4430856, familiarity with which is assumed. The factual allegations material to Konowaloff's challenge to the court's act-of-state ruling, taken as true and with all reasonable

inferences drawn in favor of Konowaloff for purposes of our review of a dismissal based on the pleading, included the following.

A. *The Allegations of the Amended Complaint*

Konowaloff is the sole heir to the estate of his great-grandfather Ivan Morozov, a Russian national who prior to 1920 lived in Moscow, and who prior to World War I had a modern art collection that ranked "among the finest in Europe" (Amended Complaint ¶ 8; *see id.* ¶¶ 6–7, 12). In 1911, Morozov acquired, for value, a Cézanne painting known as *Madame Cézanne in the Conservatory* or *Portrait of Madame Cézanne* (the "Painting"). (*See id.* Introductory paragraph and ¶ 6.)

The March 1917 revolution in Russia overthrew Tsar Nicholas II and installed a Provisional Government, which was **142* promptly recognized by the United States. (*See id.* ¶ 9.) In November 1917, "the Bolsheviks (the Bolshevik faction of the Russian Social Democratic Workers Party) seized power from the Provisional Government." (*Id.*) The Bolshevik—or "Soviet"—regime, called the Russian Socialist Federated Soviet Republic ("RSFSR") (*see id.*), and its official successor, called the Union of Soviet Socialist Republics (or "U.S.S.R.") (*see id.* ¶ 36), are referred to collectively as the "Soviet Union" or the "Soviet government." The United States did not recognize the Soviet government until November 16, 1933. (*See id.* ¶ 36.)

Immediately after gaining power in 1917, the Bolsheviks set about issuing "numerous decrees" nationalizing property, "[f]or example, ... abolish[ing]

the private ownership of land" on November 8, 1917, and "making museums ... property of the state." (*Id.* ¶ 13.) "The Bolsheviks confiscated artworks, particularly of Tsarist origins, for possible sale abroad." (*Id.* ¶ 15.) They also took steps to conceal or destroy evidence of the origins of the artwork. (*See id.*)

"On December 19, 1918, ... the Bolsheviks decreed that the 'art collection [ ] of I.A. Morozov,' including the Painting, was 'state property'...." (Amended Complaint ¶ 11; *see id.* ¶ 57 ("The Painting was confiscated by the RSFSR in 1918, in an act of theft. Morozov did not voluntarily relinquish the Painting.").) As a result of that decree "Morozov was deprived of all his property rights and interests in the Painting" and "did not ... receive any compensation for being deprived of his rights and interests in the Painting." (*Id.*¶ 11.) "The December 19, 1918 order"—which was directed only at the art collections of Morozov and one other family—"was tantamount to a bill of attainder, meting out punishment to particular individuals without legal process and on account of no sin." (*Id.*¶ 14.)

The Amended Complaint alleged that in May 1933, the Painting was acquired by Stephen C. Clark "in a transaction that may have violated Russian law" (*id.* ¶ 22), including decrees issued in September and October 1918 prohibiting "the export of objects of particular and historical importance," including "artworks" (*id.* ¶ 29; *see also id.* ¶ 33). It alleged that "[t]he Soviet state, including its institutions and laws, was distinct from the Communist Party of the Soviet Union" (*id.* ¶ 32); that "[t]he Politburo was the

executive arm of the [Communist Party]" (*id.*); that "[t]he Politburo made the decisions on art sales" (*id.* ¶ 34) and "secretly approved the sale" of the Painting and other works to Clark (*id.* ¶ 30); and that "[t]he sale of ... the Painting[ ] to Clark in 1933, like the confiscation of the Painting in 1918, was an act of party, not an act of state. Party actions in selling the art abroad violated Soviet laws. The Politburo members who ordered the sale of the Painting were acting independently of the Soviet state and were engaged in illegal private trade with western capitalists" (*id.* ¶ 31).

The Amended Complaint contained extensive descriptions of Clark and the conduct of other persons Konowaloff contends dealt in "stolen art from the Soviet government and transferr[ed] funds into Soviet accounts" (*id.* ¶ 18; *see also id.* ¶¶ 15–28) and likely assisted in Clark's purchase of the Painting (*see id.* ¶¶ 26–28). It alleged that "Clark may have known" that the Painting had been "taken ... from Morozov without compensation" (*id.* ¶ 35) and that Clark "made no attempt to contact Morozov's heirs prior to, or at any time after, his purchase of the Painting" (*id.* ¶ 27). It alleged that Clark "employed a Soviet laundering operation to acquire the ***143** Painting" (*id.* ¶ 26) and "concealed the" Painting's "provenance" (*id.* ¶ 39).

Clark, who had been a trustee of the Museum (*see* Amended Complaint ¶ 24), died in 1960 and bequeathed the Painting to the Museum (*see id.* ¶ 39–40). The Amended Complaint alleged that "the Museum may have known that Clark's bequest involved looted art" (*id.* ¶ 41) and "may have known

that Soviet law prohibited the alienation of Western art unless approved by the highest authorities" (*id.* ¶ 43). "Yet the Museum did nothing to (1) inquire as to whether Clark had good title; (2) locate the heirs of Ivan Morozov; and (3) ascertain whether the heirs to Ivan Morozov had received compensation for the Painting or had voluntarily given up any claims of title to the Painting." (*Id.* ¶ 41.)

Konowaloff became the official heir to the Morozov collection in 2002, and in 2008 learned that Morozov had owned the Painting. (*See* Amended Complaint ¶¶ 51, 53.) In May 2010, he demanded that the Museum return the Painting to him. (*See id.* ¶ 54.) After the Museum refused, Konowaloff commenced the present action, seeking injunctive, monetary, and declaratory relief.

B. *The Decision of the District Court*

The Museum moved for dismissal of the Amended Complaint on the grounds that Konowaloff's claims are barred by the act of state doctrine, the political question doctrine, the doctrine of international comity, and the statute of limitations or laches, or, in the alternative, on the ground that the Amended Complaint failed to state a claim on which relief can be granted. The district court concluded that the Museum had met its burden of showing that the act of state doctrine applies to bar Konowaloff's claims. *See* 2011 WL 4430856, at *8.

Noting the general principle that the act of state doctrine " 'precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed

within its own territory,' " *id.* at *4 (quoting *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("*Sabbatino*")), the court also pointed out that "[c]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law," 2011 WL 4430856, at *8 n. 111 (internal quotation marks omitted), and that "the act of state doctrine applies 'even if international law has been violated,' " *id.* at *8 (quoting *Sabbatino,* 376 U.S. at 431, 84 S.Ct. 923).

The district court also noted (a) that " 'when a revolutionary government is recognized as a de jure government, "such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized *from the commencement of its existence,*" ' " 2011 WL 4430856, at *8 (quoting *United States v. Pink,* 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (quoting *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302–03, 38 S.Ct. 309, 62 L.Ed. 726 (1918))) (emphasis ours); (b) that the United States recognized the Soviet government in 1933 (*see* Amended Complaint ¶¶ 9, 36) and thereby validated that government's actions from the commencement of its existence, *see* 2011 WL 4430856, at *8; and (c) that "the Supreme Court" and courts in this Circuit "have consistently held Bolshevik/Soviet nationalization decrees to be official acts accepted as valid for the purpose of invoking the act of state doctrine," *id.* at *5.

> In the instant case, there is no dispute that the Painting was taken from Morozov by virtue of the 1918 nationalization decree. *It is only the legal validity of *144 that decree that is at issue.* Thus, this Court is indeed being asked to "decide the legality of [an] official act[ ] of a sovereign"—precisely the sort of inquiry precluded by the act of state doctrine.

Id. at *6 (emphasis added).

Although the Amended Complaint sought to distinguish acts of the Politburo—characterizing them as the acts of a party, not of the Soviet state—the court pointed out that the alleged

> activities of the Politburo ... pertain[ed] to the *sale* of the Painting, not to its confiscation from Morozov. The act of state that I decline to question here is the act of expropriating the Painting from Morozov. I accept that the Soviet government took ownership of the Painting in 1918 through an official act of state, and accordingly, the Painting's sale abroad in 1933—whether legal or illegal, an act of party or an act of state—becomes irrelevant, as Konowaloff lacks any ownership stake in the Painting.

Id. at *5 (emphasis in original) (footnote omitted).

The court rejected Konowaloff's contention that the act of state doctrine should not be applied on the ground that "the Painting was 'seized for no

legitimate governmental purpose or operation,' " 2011 WL 4430856, at *6 (quoting Memorandum of Law in Support of Konowaloff's Opposition to Defendant Metropolitan Museum of Art's Motion to Dismiss Plaintiff's Amended Complaint ("Konowaloff Opposition Memorandum") at 9), stating that "whether the expropriation was an official act does not turn on the legitimacy or illegitimacy of governmental purposes. The act of state doctrine prohibits just such an inquiry into the purpose of an official act," 2011 WL 4430856, at *6.

The court also rejected the argument that the act of state doctrine should not foreclose Konowaloff's action on the ground that the Soviet Union collapsed in 1991. The Amended Complaint alleged that the U.S.S.R., which was established through the Bolshevik revolution, is no longer an extant and recognized regime, and that the current Russian Federation has been investigating the sales of art abroad during 1928–1933 to determine "to what extent the Soviet government's sale of artworks from museum collections was legal according to existing laws at that time." (Amended Complaint ¶ 47 (internal quotation marks omitted).) The district court concluded that, even if a regime change were dispositive, and not simply one of several factors that may be taken into consideration in determining the applicability of the act of state doctrine, *see* 2011 WL 4430856, at *6 (citing *Sabbatino,* 376 U.S. at 428, 84 S.Ct. 923), nothing cited by Konowaloff shows that "the ubiquitous *nationalization* of property under the Communist regime" has been repudiated; the cited investigation shows only the repudiation of "sale[s]" of art to foreign parties, and

the disinclination of the Russian government to adopt a current policy of nationalization, 2011 WL 4430856, at *7 (emphasis added).

The district court also rejected Konowaloff's contention that the act of state doctrine should not apply on the basis that

adjudication of these claims "will not impact, let alone harm, U.S. foreign relations," insofar as "the United States, the Russian Federation, and the Commonwealth of Independent States have not indicated any interest in these proceedings." However, the question is not merely whether either the U.S. or the foreign government seeks to intervene in the specific action, but rather whether any decision this Court renders could affect U.S. relations with the foreign government.

**145 Id.* at *7 (footnote omitted) (quoting Konowaloff Opposition Memorandum at 11). The court reasoned that

> [j]ettisoning long-established precedent regarding Soviet nationalization decrees would call into question long-settled decrees and titles to property resolved under these decrees, and would plainly risk upsetting the Russian Federation, which, plaintiff admits, itself owns much private property taken pursuant to many decrees.

2011 WL 4430856, at *7 (internal quotation marks omitted). The possibility that this "could affect U.S. relations with the foreign government"—"one of the

several factors that the *Sabbatino* Court advised taking into consideration"—favored application of the doctrine. *Id.* at *7–*8.

The district court having concluded that the act of state doctrine precluded inquiry into the validity of the 1918 decree that confiscated the Painting from Morozov and stripped him of ownership, concluded that Konowaloff's claims for declaratory, injunctive, and monetary relief are foreclosed. The court found it unnecessary to address the Museum's alternative grounds for its motion to dismiss.

II. DISCUSSION

On appeal, Konowaloff contends principally that the district court erred (a) in concluding that the Painting was taken pursuant to a valid act of state despite factual allegations in the Amended Complaint to the contrary, (b) in disregarding the Amended Complaint's factual allegations as to events subsequent to the confiscation that call the Museum's title to the Painting into question and in failing to consider Konowaloff's request for declaratory relief, and (c) in failing to find the act of state doctrine inapplicable on the basis that the Soviet government that appropriated the Painting is no longer extant.

In reviewing the dismissal on the basis of the pleading, we accept the factual allegations of the Amended Complaint as true, and draw all reasonable factual inferences that are available, in order to assess whether the pleading states a legal claim to relief " 'that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937,

173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("*Twombly*")). We are not, however, required to credit legal assertions or "a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955 (internal quotation marks omitted). Within this framework, we conclude that Konowaloff's contentions are without merit, and we affirm the dismissal substantially for the reasons stated by the district court.

Under the act of state doctrine, the courts of the United States, whether state or federal,

> *will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit,* in the absence of a treaty or other unambiguous agreement regarding controlling legal principles....

Sabbatino, 376 U.S. at 428, 84 S.Ct. 923 (emphasis added). The doctrine "arises out of the basic relationships between branches of government in a system of separation of powers," and "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals ... in the international sphere." *Id.* at 423, 84 S.Ct. 923.

Under this doctrine, the validity of the foreign state's act may not be examined "even if the complaint alleges that the **146* taking violates customary

international law," *id.* at 428, 84 S.Ct. 923, or the foreign state's own laws, *see id.* at 415 n. 17, 84 S.Ct. 923 ("The courts below properly declined to determine if issuance of [Cuba's] expropriation decree complied with the formal requisites of Cuban law."). "[W]hen it is made to appear that the foreign government has acted in a given way ... the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud v. American Metal Co.,* 246 U.S. 304, 309, 38 S.Ct. 312, 62 L.Ed. 733 (1918); *see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 493 U.S. 400, 409, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990) ("The act of state doctrine ... requires that, in the process of deciding [a case or controversy], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

After the Executive Branch's recognition of a foreign state, the act of state doctrine applies retroactively to acts that were undertaken by the foreign state prior to official United States recognition:

> [W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, *such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.*

Oetjen v. Central Leather Co., 246 U.S. 297, 302–03, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (emphasis added). The Supreme Court has repeatedly applied this principle to cases involving nationalizations ordered during the Russian Revolution—appropriating the property and assets of various Russian corporations—notwithstanding the fact that formal recognition of the Soviet government by the United States occurred years after the decrees themselves. *See United States v. Pink,* 315 U.S. 203, 230–33, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (ruling that the decision by the Executive Branch to formally recognize the Soviet government was "conclusive in the courts," and that the act of state doctrine barred United States courts from adjudicating the legality of decrees passed by the Soviet government in 1918 and 1919 nationalizing the Russian insurance industry); *United States v. Belmont,* 301 U.S. 324, 326, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) (taking judicial notice of the fact that in 1933 the United States formally recognized the Soviet government, and concluding that "[t]he effect of this was to validate ... all acts of the Soviet Government here involved from the commencement of its existence.")

Although, as the district court noted, the act of state doctrine is an affirmative defense as to which the Museum had the burden, a court may properly grant a motion to dismiss on the basis of that doctrine when its applicability is shown on the face of the complaint. Here, it is clear that the Amended Complaint, on its face, shows that Konowaloff's action is barred by the act of state doctrine. The Amended Complaint alleged that the Bolshevik

party "seized power from the Provisional Government" in 1917 and established the RSFSR government (Amended Complaint ¶ 9), and that its successor, the U.S.S.R., received official United States recognition in 1933 (*see id.* ¶ 36); that in 1918 "[t]he Painting was confiscated by the RSFSR" (*id.* ¶ 57), and "the Bolsheviks decreed" that Morozov's art collection "was *state property,* to be transferred to the jurisdiction of the People's Commissariat of the Enlightenment" (*id.* ¶ 11 (internal quotation marks omitted) (emphasis added)); that the art collection was placed **147* under control of that Commissariat (*see id.*); and that in 1919 the art collection "was declared the 'Second Museum of Western Art' " and placed under the supervision of a "political commissar" (*id.* ¶ 12). When the Painting—described in the Amended Complaint as "art from the Soviet government" (*id.* ¶ 18)—was ultimately sold, the proceeds were "deposit[ed] in a Soviet-controlled bank account" (*id.* ¶ 27).

Although Konowaloff contends that the Painting was confiscated by the Bolshevik "party" rather than the Bolshevik government, the district court noted that the Amended Complaint itself "explicitly allege[d] that '[t]he Painting was confiscated *by the RSFSR,*' " 2011 WL 4430856, at *5 n. 92 (quoting Amended Complaint ¶ 57 (emphasis in district court opinion)). Konowaloff objects to the court's acceptance of this allegation on the ground that the allegation continued by asserting that the confiscation was " '*an act of theft.*' " (Konowaloff brief on appeal at 16–17 (quoting Amended Complaint ¶ 57 (emphasis in brief)).) This objection suffers two flaws. First, the characterization of the Soviet government's

appropriation as "an act of theft" is a legal assertion, which the court was not required to accept. Second, the lawfulness of the Soviet government's taking of the Painting is precisely what the act of state doctrine bars the United States courts from determining. *Cf. Sosa v. Alvarez–Machain,* 542 U.S. 692, 727, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens....").

Konowaloff's argument that the act of state doctrine is inapplicable to the 1933 sale of the Painting is far wide of the mark. The relevant act of state revealed by the Amended Complaint occurred in 1918 when the Soviet government appropriated the Painting. Upon that appropriation, as the Amended Complaint alleged, "Morozov was deprived of all his property rights and interests in the Painting...." (Amended Complaint ¶ 11.)

As Konowaloff has no right to or interest in the Painting other than as an heir of Morozov, and Morozov did not own the Painting after the 1918 Soviet appropriation, Konowaloff has no standing to complain of any sale or other treatment of the Painting after 1918, or to seek monetary or injunctive relief, or to seek a declaratory judgment with respect to the Museum's right or title to the Painting, *see, e.g., MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (party seeking a declaratory judgment

must show "a substantial controversy, between parties having adverse *legal interests,* of sufficient immediacy and reality" (internal quotation marks omitted) (emphasis added)). The district court properly concluded that in light of the Soviet government's appropriation of the Painting in 1918, the court had no need to consider any alleged legal defects in the sale of the Painting in 1933.

Finally, we reject Konowaloff's contention that the act of state doctrine should not be applied here because the Soviet government is no longer "extant," arguing that hence there is no danger of upsetting diplomatic relations between our countries. Although the fact that the regime whose acts are challenged has been replaced may be a factor in the analysis of whether the act of state doctrine should be applied, that factor is not material here, given that the successor to the U.S.S.R. has not renounced the 1918 appropriations.

**148* Konowaloff's reliance on two decisions of this Court, declining to apply the act of state doctrine after a change in the foreign regime, is misplaced because in each of those cases the new governments had repudiated the prior governments' acts that had deprived the claimants of property. *See Bigio v. Coca–Cola Co.,* 239 F.3d 440, 453 (2d Cir.2001) (seizures of certain property by the prior government of Egypt were repudiated by the new government's "issu[ance of a decree] which ordered [the recipient of the seized property] to return the [claimants'] property, along with any rental burden and active occupants, or to forward to the [claimants] the proceeds of any sale of the property

that might have occurred"); *Republic of Philippines v. Marcos,* 806 F.2d 344, 359 (2d Cir.1986) (noting that the successor government of the Philippines had taken steps to investigate and cause the adjudication of any meritorious claims with regard to property taken by the prior regime, and had "come[ ] into our courts and ask[ed] that our courts scrutinize [those prior state] actions").

As the district court observed in the present case, the current Russian government is apparently disinclined to engage in further appropriations of private property and has initiated an investigation into the 1930s art sales; but it has not repudiated the 1918 appropriation that is the government act that deprived Morozov, and hence Konowaloff, of any right to the Painting. We see no error in the district court's application of the act of state doctrine.

CONCLUSION

We have considered all of Konowaloff's arguments challenging the district court's dismissal of his action on the basis of the act of state doctrine and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX D