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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

HAWAIIAN KINGDOM,

Plaintiff,

v.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al.,

Defendants.

Civil No. 1:21:cv-00243-LEK-RT

ORDER

AND NOW, this _____ day of _____, 2022, on consideration of the Plaintiff's motion for certification and to stay all proceedings pending appeal, it is ORDERED that the motion is GRANTED as follows:

1. The Court's July 28, 2022 Order [ECF 238] denying Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint [ECF 234] is CERTIFIED to the Ninth Circuit Court of Appeals for review under 28 U.S.C. §1292(b), because the Court's opinion that "'there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature [ECF 234],'" involve a controlling question of law as to which there is substantial ground for difference of opinion, and as to which an immediate appeal may materially advance the ultimate termination of the litigation;

2. The following issue is CERTIFIED for review:

    3. Whether there is a factual (or legal) basis for concluding that the [Hawaiian] Kingdom ceases to exist as a state in accordance with the *Lorenzo* principle and the application of international law. *See United States v. Goo*, 2002 U.S. Dist. LEXIS 2919 ("[s]ince the Intermediate Court of Appeals for the State of Hawaii's decision in *Hawaii v. Lorenzo*, the courts in Hawaii have consistently adhered to the *Lorenzo* court's statements that the Kingdom of Hawaii is not recognized as a sovereign state [*4] by either the United States or the State of Hawaii. *See Lorenzo*, 77

> Haw. 219, 883 P.2d 641, 643 (Haw. App. 1994); *see also State of Hawaii v. French*, 77 Haw. 222, 883 P.2d 644, 649 (Haw. App. 1994) (stating that 'presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognizing attributes of a state's sovereign nature') (quoting *Lorenzo*, 883 P.2d at 643). This court sees no reason why it should not adhere to the *Lorenzo* principle")). *See The Paquette Habana*, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

4. All other proceedings are STAYED pending appeal.

BY THE COURT:

_____

LESLIE E. KOBAYASHI
United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM,

Plaintiff,

v.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al.,

Defendants.

Civil No. 1:21:cv-00243-LEK-RT

PLAINTIFF'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE JULY 28, 2022, ORDER [ECF 238] DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING THE FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS THE FIRST AMENDED COMPLAINT [ECF 234], AND TO STAY PROCEEDINGS PENDING APPEAL; CERTIFICATE OF SERVICE

PLAINTIFF'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE JULY 28, 2022, ORDER [ECF 238] DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING THE FEDERAL DEFENDANTS' CROSS-MOTION TO DISMISS THE FIRST AMENDED COMPLAINT [ECF 234], AND TO STAY PROCEEDINGS PENDING APPEAL

Plaintiff moves the Court to certify for interlocutory appeal under 28 U.S.C. §1292(b) the Court's July 28, 2022 Order [ECF 238] denying the Plaintiff's Motion to Alter or Amend Order granting the Federal Defendants' Cross-motion to Dismiss the First Amended Complaint [ECF 234]. The Plaintiff also moves the Court to stay

the proceedings pending appeal.[1] The reasons are set forth in the attached memorandum.

DATED: Honolulu, Hawai‘i, August 5, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

DEXTER K. KA‘IAMA (Bar No. 4249)
Attorney General of the Hawaiian Kingdom
DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM
Attorney for Plaintiff, Hawaiian Kingdom

[1] *See* 28 U.S.C. §1292(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

HAWAIIAN KINGDOM, Plaintiff, v. JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al., Defendants.	Civil No. 1:21:cv-00243-LEK-RT

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Hawaiian Kingdom moves the Court to certify for interlocutory appeal under 28 U.S.C. §1292(b) the Court's July 28, 2022 Order [ECF 238] denying Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint [ECF 234]. The Hawaiian Kingdom

also moves the Court to stay all other proceedings in this matter pending the outcome of an appeal.[2]

U.S. Federal defendants, through its legal counsel, have been informed of Plaintiff's intent to file and stated they will not consent to the filing and will oppose the instant motion to certify for interlocutory appeal.

I. INTRODUCTION

The Hawaiian Kingdom requests that the Court certify for interlocutory appeal under 28 U.S.C. §1292(b) the question of whether there is a factual (or legal) basis for concluding that the [Hawaiian] Kingdom ceases to exist as a state in accordance with the *Lorenzo* principle and the application of international law. *See United States v. Goo*, 2002 U.S. Dist. LEXIS 2919 ("[s]ince the Intermediate Court of Appeals for the State of Hawaii's decision in *Hawaii v. Lorenzo*, the courts in Hawaii have consistently adhered to the *Lorenzo* court's statements that the Kingdom of Hawaii is not recognized as a sovereign state [*4] by either the United States or the State of Hawaii. *See Lorenzo*, 77 Haw. 219, 883 P.2d 641, 643 (Haw. App. 1994); *see also State of Hawaii v. French*, 77 Haw. 222, 883 P.2d 644, 649 (Haw. App. 1994) (stating that 'presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognizing attributes of a state's sovereign nature') (quoting *Lorenzo*, 883 P.2d at

[2] See 28 U.S.C. §1292(b).

643). This court sees no reason why it should not adhere to the *Lorenzo* principle")). *See The Paquette Habana*, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

By its July 28, 2022 Order [ECF 238], and for the reasons stated in its June 9, 2022 Order [ECF 234], the Court denied the Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint. Notwithstanding Federal Defendants opposition to the instant motion to certify for interlocutory appeal, Plaintiff respectfully submits that these Court Orders ignore 29 years of federal common law and represents a degrading departure of the *Lorenzo* principle and its binding nature on this Court. Prompt appellate review of the question of whether the Plaintiff's claims may proceed is necessary.

But before the Court proceeds in this case, the Court should permit the Ninth Circuit Court of Appeals the opportunity to consider the question raised in the Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint, which is the type of legal question for which the Congress enacted 28 U.S.C. §1292(b). It is a controlling question of law; there is substantial ground for difference of opinion; and an immediate appeal

on the question would materially advance the ultimate termination of the litigation.[3] Certifying the question for interlocutory appeal would therefore promote the most expeditious and inexpensive resolution of this case.[4]

No party will be prejudiced by determining now whether there is a factual (or legal) basis for concluding that the Hawaiian Kingdom ceases to exist as a State in accordance with the *Lorenzo* principle and the application of international law. Federal Defendants' will have a full and fair opportunity to explain their theories as to why there is no factual or legal basis to conclude that the Hawaiian Kingdom continues to exist as a state in accordance with the *Lorenzo* principle and international law, and they will have the benefit of this Court's written decision in doing so. If the Ninth Circuit reverses, this Court's certification decision will have vindicated the parties' and the public interests by streamlining the proceedings. And if the Ninth Circuit affirms, the path forward will be clear: the parties will have obtained confirmation of the Court's legal ruling on the Plaintiff's motion to amend or alter. Either outcome is preferable to risking an appellate reversal after many months of potentially, burdensome, and expensive effort by the parties and the Court.

[3] *Id*.
[4] Fed. R. Civ. P. 1.

For the reasons stated above and explained in more detail below, this case exemplifies the circumstances in which certification under §1292(b) is appropriate. It is appropriate for this Court to grant certification and to allow the Ninth Circuit to decide whether an immediate interlocutory appeal is warranted. If the Court grants certification, both parties will have the opportunity to present their arguments to the Court of Appeals, which may then exercise its discretion to accept or to decline the appeal.[5] Given the importance of the question presented and the declaratory and injunctive relief sought by the Plaintiff—for themselves and on behalf of all the residents of the Hawaiian Islands—there is no reason to deny the Court of Appeals the opportunity to consider that question, especially where the Ninth Circuit and the District of Hawai‘i Court has applied the *Lorenzo* principle in 17 cases since 1993.[6]

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[5] 28 U.S.C. §1292(b).

[6] *United States v. Lorenzo*, 995 F.2d 1448; 1993 U.S. App. LEXIS 10548; *First Interstate Mortgage Co. v. Lindsey*, 1995 U.S. Dist. LEXIS 18172; *Hawaii v. Macomber*, 40 Fed. Appx. 499; 2002 U.S. App. LEXIS 12593; *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919; *Villanueva v. Hawaii*, 2005 U.S. Dist. LEXIS 49280; *Shinn v. Norton*, 2006 U.S. Dist. LEXIS 111053; *Epperson v. Hawaii*, 2009 U.S. Dist. LEXIS 100045; *Kupihea v. United States*, 2009 U.S. Dist. LEXIS 59023; *Simeona v. United States*, 2009 U.S. Dist. LEXIS; *Baker v. Stehura*, 2010 U.S. Dist. LEXIS 93679; *Waialeale v. Officers of the United States Magistrate(s)*, 2011 U.S. Dist. LEXIS 68634; *Piedvache v. Ige*, 2016 U.S. Dist. LEXIS 152224; *Vincente v. Chu Takayama*, 2016 U.S. Dist. LEXIS 137959; *Kapu v. AG*, 2017 U.S. Dist. LEXIS 166103; *Mo‘i Kapu v. AG*, 2017 U.S. Dist. LEXIS 73469; *U.S. Bank Tr., N.A. v. Fonoti*, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295; *Megeso-William-Alan v. Ige*, 538 F. Supp. 3d 1063; 2021 U.S. Dist. LEXIS 91037.

Further, it is appropriate to suspend all other proceedings in the case pending the appeal, which would conserve the parties' and the Court's resources.

II. STANDARD FOR CERTIFICATION UNDER 28 U.S.C. §1292(B)

In most cases, only "final decisions" of district courts are appealable.[7] An interlocutory order by a district court, such as the Court's July 28, 2022 Order [ECF 238] denying Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint [ECF 234], is not such a "final decision," as there are other parties to the litigation. It would appear that the Court will apply the same opinion to the rest of the parties that the Hawaiian Kingdom does not exist as a state and dismiss them as well.

However, under 28 U.S.C. §1292(b), interlocutory orders can be appealable if certified by the district court and subsequently accepted by the court of appeals for consideration. The statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not

[7] *See* 28 U.S.C. §1291; Fed. R. Civ. P. 54(a).

> stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[8]

Normally, interlocutory orders are not immediately appealable.[9] But, "[i]n rare circumstances, the district court may approve an immediate appeal of such an order by certifying that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[10]

Plaintiff seeks to appeal this Court's Order of July 28, 2022, under §1292(b). As the party seeking an interlocutory appeal, Plaintiff has the burden of demonstrating "exceptional circumstance" justifying a departure from the basic policy of postponing appellate review until a final judgment has issued."[11] Because §1292(b) is a departure from the normal final judgment rule, the Ninth Circuit has stated that §1292(b) should be construed "narrowly."[12]

Before the Ninth Circuit exercises its discretion to permit an interlocutory appeal under §1292(b), this Court must first certify: "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and

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[8] 28 U.S.C. §1292(b).
[9] *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002).
[10] *Id*.
[11] *Coopers & Lybrand*, 437 U.S. 463, 475 (1978).
[12] *James*, 283 F.3d at 1068, n. 6.

(3) that an immediate appeal my materially advance the ultimate termination of the litigation."[13]

Section 1292(b) is primarily intended to expedite litigation by permitting appellate consideration of legal questions that, if decided in favor of appellant, would end the lawsuit.[14] Accordingly, controlling questions of law include issues relating to jurisdiction or a statute of limitations, as an appeal from the denial of dismissal based on either, if decided differently on appeal, would terminate the case.[15] However, an issue need not be dispositive of the lawsuit to be considered controlling.[16] Instead, a "question of law" is controlling if a "resolution of the issue on appeal could materially affect the outcome of litigation in the district court."[17] The Ninth Circuit has noted that such issues include questions of "who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law shall be applied."[18]

The Ninth Circuit has stated:

> To determine if a "substantial ground for difference of opinion" exists under §1292(b), courts must examine to what extend the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the

[13] *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981).
[14] *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959).
[15] *Id.*
[16] *Id.*
[17] *In re Cement Antitrust Litig.*, 673 F.2d 1026.
[18] *Woodbury*, 263 F.2d at 787.

> question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." 3 Federal Procedure, Lawyers Edition §3:212 (2010) (footnotes omitted). However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." Id. (footnotes omitted).[19]

Put another way:

> A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusion, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.[20]

Section 1292(b) does not require a "dispositive effect on the litigation," and instead only requires that it "may materially advance the litigation."[21]

A. The Court should certify its July 28, 2022 Order for immediate interlocutory appeal under 28 U.S.C. §1292(b)

The Plaintiff requests that the Court certify for immediate interlocutory review under 28 U.S.C. §1292(b) the following question:

> Whether there is a factual (or legal) basis for concluding that the [Hawaiian] Kingdom ceases to exist as a state in accordance with the *Lorenzo* principle and the application of international law. *See United*

[19] *Crouch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).
[20] *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).
[21] *Id.*

> *States v. Goo*, 2002 U.S. Dist. LEXIS 2919 ("[s]ince the Intermediate Court of Appeals for the State of Hawaii's decision in *Hawaii v. Lorenzo*, the courts in Hawaii have consistently adhered to the *Lorenzo* court's statements that the Kingdom of Hawaii is not recognized as a sovereign state [*4] by either the United States or the State of Hawaii. *See Lorenzo*, 77 Haw. 219, 883 P.2d 641, 643 (Haw. App. 1994); *see also State of Hawaii v. French*, 77 Haw. 222, 883 P.2d 644, 649 (Haw. App. 1994) (stating that 'presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognizing attributes of a state's sovereign nature') (quoting *Lorenzo*, 883 P.2d at 643). This court sees no reason why it should not adhere to the *Lorenzo* principle")). *See The Paquette Habana*, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

As explained below, that question controls the remainder of this litigation; there is substantial ground for difference of opinion on this question when applying international law to the *Lorenzo* principle and whether the Court can invoke the political question doctrine. Certification is therefore warranted, and for the same reasons, a suspension of proceedings pending appeal is similarly warranted.

1. Order Raises Controlling Question of Law

A question of law is controlling if its resolution on appeal "could materially affect the outcome of litigation in the district court."[22] A question may be controlling even though its resolution does not determine who will prevail on the merits. *See*

[22] *In re Cement Antitrust Litig.*, 673 F.2d at 1026.

Kuehner v. Dickinson & Co., 84 F.3d 316, 318-19 (9th Cir. 1996) (concluding order involved controlling question of law where "it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter"). However, a question is not controlling simply because its immediate resolution may promote judicial economy.[23]

The question of whether the Hawaiian Kingdom continues to exist as a state since the nineteenth century pursuant to the *Lorenzo* principle and international law is plainly a controlling question of law. And the propriety of certification is particularly apparent given that the *Lorenzo* principle was applied in error when the Ninth Circuit and the district court did not apply international law. *See State of Hawai'i v. Lorenzo*, 221 n. 2: 643 n. 2 ("[t]he essence of the lower court's decision is that even if, as Lorenzo contends, the 1893 overthrow of the Kingdom was illegal, that would not affect the court's jurisdiction in this case. […] [However, **the] court's rationale is open to question in light of international law**. [And the] illegal overthrow leaves open the question whether the present governance system should be recognized, even though the illegal overthrow predated the United Nations Charter (emphasis added)"). That alone would be sufficient basis for finding a controlling question, as it would be grounds for reversal on appeal. The Ninth Circuit

[23] *Id.,* at 1027.

stated that an example of a question of law relates to the jurisdiction of the district court.[24]

If the Hawaiian Kingdom continues to exist as a State pursuant to the *Lorenzo* principle and international law, the entire docket of the district court would be affected because it would "cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter." Further, it is not inconceivable for the defense in these cases to file dispositive motions to dismiss pursuant to the *Lorenzo* principle after they become aware it is federal common law. Consequently, all the forums of the Hawai'i district court will have to transform into Article II Occupation Courts in order to have jurisdiction over the cases whether civil or criminal.[25] If the Hawaiian Kingdom was extinguished in accordance with the *Lorenzo* principle and international law, then the *status quo* remains and those proceedings, whether civil or criminal, would not be interrupted.

2. Difference of Opinion Exists as to Controlling Question

To permit appeal under §1292(b), there must be substantial ground for difference of opinion as to the question raised.[26] "Under the second element, there is

[24] *Woodbury*, 263 F.2d at 787.
[25] *See Amicus Curiae* Brief by the International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint (October 6, 2021) [ECF 96].
[26] *See In re Cement Antitrust Litig.*, 673 F.2d at 1026; see also *Englert v. MacDonnell*, 551 F.3d 1099, 1103 (9th Cir. 2009).

a substantial ground for difference of opinion about an issue when the matter involves one or more difficult and pivotal questions of law not settled by controlling authority. […] In other words, substantial grounds for difference of opinion exist where there is genuine doubt or conflicting precedent as to the correct legal standard," and "conflicting and contradictory opinions can provide substantial grounds for a difference of opinion."[27] That standard is met here.

Whether the Court can disregard the *Lorenzo* principle and invoke the political question doctrine in its June 9, 2022 Order [ECF 234 at 6] ("Plaintiff's claims against the Federal Defendants necessarily involve a political question beyond the jurisdiction of the Court"), as alleged by Federal Defendants in their cross-motion to dismiss the first amended complaint [ECF 188 at 6], is plainly a controlling question of law. When the Ninth Circuit stated, in *United States v. Lorenzo*, 995 F.2d 1456; *20, "[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government," it set an evidentiary standard for the State of Hawai'i Intermediate Court of Appeals (ICA) to adopt in *State of Hawai'i v. Lorenzo*. The ICA stated, "it was incumbent on Defendant to present evidence supporting his claim. *United States v. Lorenzo*. Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." Further, the

[27] *Knipe v. SmithKline Beecham*, 583 F.Supp.2d 553, 599-600 (E.D. Pa. 2008).

Hawai‘i Supreme Court, in *State of Hawai‘i v. Armitage*,[28] clarified this evidentiary burden. The Supreme Court stated:

> Lorenzo held that, for jurisdictional purposes, should a defendant demonstrate a factual or legal basis that the [Hawaiian Kingdom] "exists as a state in accordance with recognized attributes of a state's sovereign nature[,]" and that he or she is a citizen of that sovereign state, a defendant may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him or her.[29]

Neither the Ninth Circuit, the State of Hawai‘i Supreme Court nor the Intermediate Court of Appeals invoked the political question doctrine. In *United States v. Goo*, the court restated *State of Hawai‘i v. Lorenzo* that "presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognizing attributes of a state's sovereign nature."[30] The operative word is "presently" because of the evidentiary burden. The court then concluded it "sees no reason why it should not adhere to the *Lorenzo* principle."[31] The court acknowledged the evidentiary burden of the *Lorenzo* principle when it found "that Defendant has failed to provide any viable legal or factual support for his claim that as a citizen of the Kingdom he is not subject to the jurisdiction of the courts."[32] The court in *Goo* **did not** invoke the political question doctrine, and nor

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[28] *State of Hawai‘i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
[29] *Id*., 57; 1065.
[30] *United States v. Goo*, *4.
[31] *Id*.
[32] *Id*.

did the court in *Lindsey, Macomber, Villanueva, Shinn, Epperson, Kupihea, Simeona, Baker, Waialeale, Piedvache, Vincente, Kapu, Mo'i Kapu, Fonoti,* and *Megeso-William-Alan.*

The *Lorenzo* principle was applied in the aforementioned 16 cases that came before the District Court of Hawai'i, which clearly attests to the fact that the *Lorenzo* principle is federal common law in the Ninth Circuit. When the Plaintiff brought the *Lorenzo* principle and the application of international law to the attention of the Court in its motion to alter or amend order granting the Federal Defendants' cross-motion to dismiss the first amended complaint [ECF 235], the Court stated in its July 28, 2022 Order, "[a]lthough Plaintiff argues there are manifest errors of law in the 6/9/22 Order, Plaintiff merely disagrees with the Court's decision."[33] This standard of whether a difference of opinion exists as to controlling question is clearly met.

This Court's decision involves a disregard of the *Lorenzo* principle when it invoked the political question doctrine. To do so the Court omitted the word "presently," that precedes "there is no factual or (or legal) basis" when it stated in its June 9, 2022 Order (ECF 234 at 5], "'[T]here is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'" By the Court omitting

[33] Court Order Denying Plaintiff's Motion to Alter or Amend Order Granting the Federal Defendants' Cross-Motion to Dismiss the First Amended Complaint [ECF 234] [ECF 238].

"presently" it would appear to give the impression that it is a final and conclusive statement, thereby precluding any evidence, whether factual or legal, "that the [Hawaiian] Kingdom exists as a state." Note 4 of the *State of Hawai'i v. Lorenzo* decision that followed "recognized attributes of a state's sovereign nature," cites *Restatement (Third) of the Foreign Relations Law of the United States* §201 (1987) ("[a] state is defined as 'an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities,'" and *Klinghoffer v. S.N.C. Achille Lauro*.[34] In *Klinghoffer*, the court was addressing whether the Palestine Liberation Organization (PLO) was a State, which it stated, "[i]t is clear that the PLO meets none of those requirements."[35]

Unlike the PLO, the Hawaiian Kingdom met those requirements as a State in the nineteenth century prior to its government being illegally overthrown by the United States on January 17, 1893. Secretary of State Walter Gresham not only distinguished between the State and its government, but also acknowledged the Hawaiian Kingdom to be a State. The Secretary of State stated to President Grover Cleveland, "[s]hould not the great wrong done to a feeble but **independent State** by an abuse of the authority of the United States be undone by restoring the legitimate

[34] *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991).
[35] *Id*.

government? Anything short of that will not, I respectfully submit, satisfy the demands of justice (emphasis added)."[36] The United States has yet to recognize Palestinian Statehood but did recognize Hawaiian Statehood and entered into a treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom in 1849.[37] Once recognition of a State is granted, it "is incapable of withdrawal"[38] by the recognizing State, and that "recognition estops the State which has recognized the title from contesting its validity at any future time."[39] "The duty to treat a qualified entity as a state also implies that so long as the entity continues to meet those qualifications its statehood may not be 'derecognized.'"[40] This bars the Federal Defendants' argument that the case presents a political question. *Baker v. Carr*, 369 U.S. 186 (1962), has no application to these proceedings.

Further, when international law is properly applied to the *Lorenzo* principle, the international norm of the presumption of continuity of a State,[41] despite its

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[36] United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 463 (1895).
[37] 9 Stat. 977 (1841-1851).
[38] Lassa Oppenheim, *International Law* 137 (3rd ed. 1920).
[39] Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51(2) *American Journal of International Law* 308, 316 (1957).
[40] *Restatement (Third) of the Foreign Relations Law of the United States*, §202, comment g.
[41] *See* James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006) ("[t]here is a strong presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government. Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State.").

government being overthrown by another State, becomes an evidentiary rule that shifts the evidentiary burden and what needs to be proven.[42] Because international law provides for the presumption of the Hawaiian Kingdom's existence as a State, the evidentiary burden is therefore placed on the party opposing that continuity to provide evidence that the Hawaiian Kingdom **does not exist**, and not for a party to provide evidence that it **does exist**. Neither the Court nor the Federal Defendants provided any evidence that the Hawaiian Kingdom was extinguished as a State in accordance with the *Lorenzo* principle and the application of international law. In other words they had the evidentiary burden to show that the Hawaiian Kingdom does not "continue[] to meet those qualifications [of] its statehood." While the Plaintiff did not have the burden to provide evidence of the Hawaiian Kingdom's existence as a State, it did so throughout these proceedings, and it was clearly articulated in Plaintiff's motion to amend or alter order granting the Federal Defendants' cross-motion to dismiss the first amended complaint [ECF 235]. The Court cannot simple ignore 29 years of federal common law.

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[42] See Matthew Craven, "Continuity of the Hawaiian Kingdom as a State under International Law," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 128 (2020) ("[i]f one were to speak about a presumption of continuity, one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts substantiating its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States, absent of which the presumption remains.").

3. Immediate Interlocutory Appeal Would Materially Advance Litigation

An order is not reviewable under §1292(b) unless its immediate review may materially advance the litigation.[43] Although "material advancement" has not been expressly defined, in one case the court determined that immediate appeal would not materially advance the ultimate termination of litigation where the appeal might postpone the scheduled trial date.[44]

Following the Court's denial of Plaintiff's motion to alter or amend order granting the federal defendants' cross-motion to dismiss the first amended complaint, this matter remains in its early stages and neither fact nor expert discovery has begun. Immediate interlocutory appeal of the Court's July 28, 2022 Order would permit the parties and the Court to obtain an authoritative determination of whether the Hawaiian Kingdom was extinguished as a State pursuant to the *Lorenzo* principle and international law. On the one hand, if the Ninth Circuit reverses, this Court's certification decision will have aided the parties and the Court by avoiding the expense and delay of unnecessary proceedings. On the other hand, if the Ninth Circuit affirms, the path forward would be clear: the Court will have obtained confirmation of its legal ruling on the Federal Defendants' motion to

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[43] *See* 28 U.S.C. §1292(b); see also *Englert v. MacDonnell*, 551 F.3d 1099, 1103 (9th Cir. 2009).

[44] *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988).

dismiss and cleared the way for additional proceedings. Either outcome is preferable to risking and appellate reversal after months or years of unnecessary effort, expense, and inconvenience to the parties and the Court.

The purpose of §1292(b) certification is "institutional efficiency" where an intermediate appeal would avoid protracted and expensive litigation.[45] No party would be prejudiced by this Court's certification of its decision. Accordingly, there is no reason for the parties and the Court to undertake months of additional litigation and expend countless resources without first permitting the Ninth Circuit to consider the threshold legal question whether the Hawaiian Kingdom was extinguished as a State in accordance with the *Lorenzo* principle and international law. Prompt appeal of the certified order will materially advance litigation because its resolution will either eliminate the need for further proceedings or avoid protracted and expensive litigation by potentially streamlining such proceedings.[46]

B. The Court Should Stay Further Proceedings Pending the Outcome of an Interlocutory Appeal under 28 U.S.C. §1292(b)

The Court's power to stay proceedings is incidental to its inherent power to control the disposition of the causes on its docket with economy of time and effort for itself, counsel, and litigants.[47] A stay is an exercise of judicial discretion, and the

[45] *See Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979).
[46] *See, e.g., Shaver v. Siemens Corp*., 2010 WL 11691782, *2 (W.D. Pa. Oct. 15, 2010).
[47] *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

propriety of its issue depends on the circumstance of the particular case.[48] Here, because certification and acceptance of an interlocutory appeal does not automatically stay proceedings in the district court, which requires a court order,[49] the Court should exercise its authority to stay all proceedings pending appeal.

As explained above, certification of the Court's July 28, 2022 Order is warranted because resolution of the legal question will determine whether this action can proceed, or must be dismissed, in its entirety. Because an appellate decision on the ability of this case to proceed would be significant to further proceedings, there would be little value in the expending significant resources by the Court and litigants. Further, it is the first instance in 29 years that the *Lorenzo* principle, as federal common law, has been invoked by a party to litigation and, whereby, that party, in good faith, relies on the *Lorenzo* principle to maintain its lawsuit. The Plaintiff respectfully takes the position that the Court cannot simply disregard 29 years of federal common law in order to align itself with the Federal Defendants' argument that the case presents a political question. This line of reasoning runs counter to the evidentiary burden that the *Lorenzo* principle requires.

[48] *Nken v. Holder*, 556 U.S. 418, 433 (2009).
[49] *See* 28 U.S.C. §1292(b).

III. CONCLUSION

For these reasons, the Plaintiff respectfully requests that the Court certify its July 28, 2022 Order [ECF 238] denying the Plaintiff's Motion to Alter or Amend Order granting the Federal Defendants' Cross-motion to Dismiss the First Amended Complaint [ECF 234] for interlocutory appeal under 28 U.S.C. §1292(b), and requests that the Court stay all further proceedings in this matter pending the outcome of the appeal.

DATED: Honolulu, Hawai'i, August 5, 2022.

Respectfully submitted,

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