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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM, Plaintiff, vs. 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; et al., Defendants.	)	CIVIL NO. CV21-00243 LEK-RT (Other Civil Rights) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On May 20, 2021, the Kingdom filed its Complaint pursuant to 28 U.S.C. §§ 1331, 1391(b)(2), 1391(e)(1), and 2201-2202. The Kingdom's claims can be summarized as follows: (1) the United States of America ("U.S.") unlawfully annexed the Islands of Hawai'i; (2) the Kingdom is and has always been a sovereign state; (3) the U.S. is currently occupying Hawai'i as an invading force; and (4) that it is unlawful for the U.S., including the State of Hawai'i and its counties, to impose its laws upon the citizens of the Kingdom.

Based upon those claims the Kingdom seeks (1) a judicial declaration that all U.S. laws, including those of the State of Hawai‘i and its counties, are repugnant to the U.S. Constitution and Treaties; (2) an order enjoining the U.S., including the State of Hawai‘i and its counties, from commencing or maintaining judicial proceedings against the Kingdom; (3) an order enjoining the U.S., including the State of Hawai‘i and its counties, from implementing or enforcing its laws in the territory of the Kingdom; and (4) an order enjoining agents of foreign diplomats from serving as consulates within the territorial jurisdiction of the Kingdom.

The County Defendants contend as follows: (1) the Kingdom lacks standing to bring this action; (2) the Kingdom has failed allege facts entitling it to the relief it seeks; (3) the Court lacks jurisdiction to entertain the Kingdom's non-justiciable political question claims; and (4) the Kingdom's claims are barred under the Doctrine of Qualified Immunity.

II. BRIEF STATEMENT OF RELEVANT FACTS

According to the Complaint, the Council of Regency, in its official capacity as the governmental representative of the Kingdom, brought this action to protect its officers, all Hawaiian subjects, and resident aliens who reside within the territorial jurisdiction of the Hawaiian Islands. ECF No. 1, PageID #5, ¶¶ 1-2.

The Kingdom alleges that it "was illegally overthrown by the United States on January 12, 1893." *Id*. at PageID #14, ¶ A. The Kingdom further alleges that it is a sovereign state currently occupied by the U.S. government which must administer the laws of the Kingdom and not those of the U.S. until such time as a peace treaty brings an end to the occupation. *Id*. at PageID #17, ¶ 71.

III. STANDARD OF REVIEW

A. Standard of Review for Motions Brought Under FRCP 12(b)(1).

FRCP 12(b)(1) allows the court to dismiss a complaint for lack of subject matter jurisdiction. A motion brought under 12(b)(1) presents a threshold challenge to the court's jurisdiction as federal courts are of limited jurisdiction, possessing only that power authorized by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994). Legal actions presumptively lie outside this jurisdictional limitation and the burden to establish subject matter jurisdiction rests on the party asserting it. *Id*. Rule 12(b)(1) challenges can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A facial challenge attacks 'the factual allegations of the complaint' that are contained on 'the face of the complaint,' while a factual challenge is addressed to the underlying facts contained in the complaint." *Al-Owhali v. Ashcroft*, 279 F.Supp.2d 13, 20 (D.D.C. 2003) (quoting *Loughlin v. United States*, 230 F.Supp.2d 26, 35-36 (D.D.C. 2006) (citations omitted). "When

the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact." *Malama Makua v. Rumsfeld*, 136 F.Supp.2d 1155, 1159-60 (D. Haw. 2001). A claim may "be dismissed for want of subject matter jurisdiction if it is not colorable, i.e., if the allegations are 'immaterial and are solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 513 n. 10, 126 S.Ct. 1235, 1244 n. 10 (2006) (citation omitted).

B. Standard of Review for Motions Brought Under FRCP 12(b)(6).

A motion to dismiss under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys*., 534 F.3d 1116, 1121 (9th Cir. 2008). The Court's review under Rule 12(b)(6) is generally limited to the contents of the complaint, documents attached to the complaint, and matters capable of judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable

inferences." *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC.*, 733 F.3d 1251, 1254 (9th Cir. 2013).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009)(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). The court in *Iqbal* applied the following two-prong approach for assessing the adequacy of a complaint: 1) identify factual pleadings that are merely conclusory and not entitled to the assumption of truth; and 2) determine whether the nonconclusory factual allegations that are pleaded give rise to a "plausible" theory of defendant liability. *Id.* at 679, 129 S.Ct at 1950.

Generally, courts freely allow plaintiffs to amend complaints that have been dismissed. However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (citing *Bonano v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962). In that regard, futility of amendment, by itself, justifies the court's refusal to allow the Kingdom a chance to amend. *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003).

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IV. DISCUSSION

A. The Kingdom Lacks Standing To Bring This Action.

The Kingdom comes to this Court alleging that "[w]hile this court is operating within the territory of the HAWAIIAN KINGDOM and not within the territory of Defendant UNITED STATES OF AMERICA, its jurisdiction is found as an Article II Court. ECF No. 1, PageID #5, ¶ 3. This Court is not an Article II Court. To have standing in this Court, the Kingdom must seek "an acceptable Article III remedy" that will "redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107, 118 S.Ct. 1003, 1019 (1998).

Article III of the Constitution restricts federal courts to adjudicating actual "cases" or "controversies." A core component of the case or controversy inquiry is the doctrine of standing. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984). "The Court's limited jurisdictional authority requires litigants to demonstrate that they have standing to assert their claims in federal court." *Al-Owhali*, 279 F.Supp.2d at 21. Standing is a jurisdictional requirement that precedes an analysis of the merits of the claim. *Krottner v. Starbucks*, 628 F.3d 1139, 1141 (9th Cir. 2010).

A defendant may challenge a plaintiff's standing via a motion to dismiss as standing pertains to the court's subject-matter jurisdiction under Article III of the U.S. Constitution. *White*, 227 F.3d at 1242. However, it is the party seeking to

invoke jurisdiction of the federal courts that has the burden of alleging specific facts which satisfy the three elements of constitutional standing. *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). The three elements are: (1) injury in fact; (2) causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992).

1. There Is No Legally Recognized Injury In Fact.

For an injury in fact to exist, "[p]lantiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1665 (1983) (citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962)). Abstract injury is not enough. *Id*. The plaintiff has the burden to demonstrate standing for each type of relief sought. For example, in injunctive relief actions "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable decision will prevent or redress the injury."

Summers v. Earth Island Institute, 555 U.S. 488, 493, 129 S.Ct. 1142, 1149 (2009) (citation omitted).

Here, the Kingdom, a purported sovereign government acting through its Council of Regency, alleges that this "Court has Federal question Jurisdiction under 28 U.S.C. § 1331 because this action arises under the U.S. Constitution and Treaties, which includes the 1849 Hawaiian-American Treaty of Friendship, Commerce and Navigation, the 1907 Hague Convention, IV (1907 Hague Regulations), the 1907 Hague Convention, V, and the 1949 Geneva Convention, IV (1949 Fourth Geneva Convention)." ECF No. 1, PageID #6, ¶ 4 (footnotes omitted). The Kingdom alleges that the County Defendants are in continual violation of the 1849 Treaty of Friendship, Commerce and Navigation, as well as the Vienna Convention on the Law of Treaties, through the unlawful imposition of American municipal laws over the Kingdom. *Id*. at PageID #32, ¶ 142. In other words, the Kingdom's alleged injury in fact is being forced to conform to the laws of the U.S., the State of Hawai‘i and its counties. This alleged injury is insufficient to confer standing upon an unrecognized self-proclaimed sovereignty.

Foreign governments may bring actions in our courts, not as a matter of right, but comity, which does not exist until such governments are recognized by the United States. *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 262-63, 139 N.E. 259 (N.Y. 1923). "The law is well settled that a

foreign government that is not recognized by the United States may not maintain suit in state or federal court." *Republic of Vietnam v. Pfizer*, 556 F.2d 892, 894 (8th Cir. 1977).

Hawai'i became the 50th state to be admitted into the Union on March 18, 1959 and statehood became effective on August 21, 1959.[1] *See* Hawaii Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). The Hawai'i Intermediate Court of Appeals has since "held that presently 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.'" *Hawai'i v. French*, 77 Haw. 222, 228, 883 P.2d 644, 650 (Ct. App. 1994) (citation omitted). Although it is alleged in the Complaint that the U.S. officially recognizes the Kingdom as a sovereign nation, it has not.[2]

The Kingdom, being a nonexistent sovereignty, cannot establish a concrete and particularized injury. Accordingly, the Kingdom has no standing to bring suit in this Court. *United States. v. Lorenzo*, 995 F.2d 1448, 1456 (9th Cir. 1993).

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[1] Prior to state admission, Hawai'i was previously annexed by U.S. government through the Newlands Resolution of 1898, whereunder "[a]ll existing treaties of Hawai'i were abrogated." *Territory of Hawai'i v. Mankichi*, 190 U.S. 197, 225, 23 S.Ct. 787, 793 (1903).

[2] Attached hereto as Exhibit A is the list of Independent States recognized by the U.S. government. The County hereby requests that this Court take judicial notice of the fact that the Kingdom is not recognized as a sovereign nation by the federal government. *The Penza*, 277 F. 91, 92 (E.D. New York 1912).

2. There Is No Causal Connection To Injury.

Assuming the Court finds that an injury in fact exists, "the 'case and controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 2641, 96 S.Ct. 1917, 926 (1976). This causation element "requires, at a minimum, that the defendant's purported misconduct was a 'but for' cause of the plaintiff's injury." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 198 (3d Cir. 2016). Put another way, there must be a "nexus between the violation of federal law and the individual accused of violating the law." *Young v. Hawai'i*, 548 F.Supp.2d 1151, 1163 (D. Haw. 2008). Thus, the Kingdom must "establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208 (1975).

Here, the Kingdom has brought suit against Mayor Kawakami because "[h]e is responsible for the faithful execution of Kaua'i County ordinances." ECF No. 1, PageID #12, ¶ 52. Chair Kaneshiro is named as a defendant because "[h]e is responsible for enacting Kaua'i County Council Legislation." ECF No. 1, PageID #12, ¶ 52 and #13, ¶ 60. The Kingdom seeks a judicial declaration that all federal,

state and local laws are repugnant to the Constitution and U.S. Treaties.[3] The Kingdom further seeks an order enjoining the County Defendants from enforcing federal, state and local laws against the Kingdom and its purported citizenry. However, there is nothing in the Kingdom's complaint articulating exactly what Mayor Kawakami and Chair Kaneshiro did to cause it injury.

3. The Kingdom's Claims Are Not Redressable.

"Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (2017) (citing *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). To establish redressability, a plaintiff must demonstrate that it is "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136 (internal quotation marks and citations omitted). In that regard, the Kingdom must "show a 'substantial likelihood' that the relief sought would redress the injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010).

Here, the Kingdom requests this Court to acknowledge it as a sovereign nation that is unlawfully occupied by the U.S. government. The Kingdom seeks

[3] Interestingly, the Kingdom does not specifically contest the constitutionality of a single federal, state or county law. A fact that clearly distinguishes this case from *Ex parte Young*, 209 U.S., 123, 28 S.Ct. 441 (1908), wherein the Supreme Court held that Minnesota's Attorney General was subject to civil suit because he was enforcing an unconstitutional enactment.

redress in the form of an injunction insulating its citizens from the enforcement of federal, state and local laws. Therefore, the redressability question at bar is whether this Court can issue such an injunction. The answer to that question is no.

Although federal courts have jurisdiction under 28 U.S.C. § 1331 to enjoin county officials from interfering with federal rights, the Kingdom, a self-proclaimed unrecognized sovereignty, has no federal rights to protect. That being the case, the Kingdom's likelihood for success in this matter is nil.

B. The Kingdom's Claims Raise Nonjusticiable Political Questions.

Federal "courts lack jurisdiction over political decisions that are by their nature 'committed to the political branches of government and to the exclusion of the judiciary.'" *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). The political question doctrine recognizes both the separation of powers among the branches of the federal government, as well as the limitations of the judiciary as a decisional body. *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978).

In *Baker v. Car*, the Supreme Court identified six factors that may render a case non-justiciable under the political question doctrine:

> [1] a textually demonstrable constitution commitment of the issue to coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing

> lack of respect due coordinate branches of government; or [5] an unusual need for questioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multi-various pronouncements by various departments on one question.

The presence of any one of the six *Baker* factors can be sufficient for dismissal under the political question doctrine. *Schneider*, 412 F.3d at 194.

Here, the Kingdom is asking this Court to recognize its existence as a sovereign government and not as a State of the Union. However, "[p]olitical recognition is exclusively the function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 931 (1964). "[T]he determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380, 69 S.Ct. 140, 142 (1948). Specifically, "[w]ho is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." *Jones v. United States*, 137 U.S. 202, 212, 11 S.Ct. 80, 83 (1890) (citations omitted). Moreover, "[w]hat government is to be regarded here as a representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as *well* as the underlying policy are to be addressed to it and not the

courts." *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 137-38, 58 S.Ct. 785, 791 (1938). "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and the Legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311 (1918).

Clearly, the Kingdom's claims raise nonjusticiable political questions involving matters that have been constitutionally committed to Congress. For this reason alone the Kingdom's Complaint should be dismissed in its entirety. It should be noted that dismissal does not leave the Kingdom without remedy as the "[l]ack of standing within the narrow confines of Art. III jurisdiction does not impair the" Kingdom's right to assert its position to the political branches of government. *United States v. Richardson*, 418 U.S. 166, 179, 94 S.Ct. 2940, 2948 (1974).

C. The Kingdom's Claims Against Mayor Kawakami And Chair Kaneshiro Are Barred By Qualified Immunity.

Qualified immunity protects officials from suit as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. It provides broad protection, immunizing officials from their exercise of poor judgment, and only failing to protect those that are plainly incompetent or those who knowingly violate the law. *Arakawa v.*

Sakata, 133 F.Supp. 2d 1223, 1230 (D. Haw. 2001). The purpose of qualified immunity is to protect state and local officials from undue interference with their duties and from potentially disabling threats of liability. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1098 (9th Cir. 1995). The defense of qualified immunity may be raised in a 12(b)(6) motion to dismiss. *Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004).

The "qualified immunity analysis is a two-step process. First, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the defendant's conduct violated a constitutional or statutory right? If no constitutional or statutory right would have been violated by the alleged actions, a defendant has qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established. This inquiry must be taken in light of the specific context of the case, not as a broad general proposition. If the law did not put the official on notice that his or her conduct would be clearly unlawful, the official has qualified immunity from the claim." *Mukaida v. Hawai'i*, 159 F. Supp.2d 1211, 1238 (D. Haw. 2001) (internal quotation marks and citations omitted). The protection of qualified immunity is forfeited only where "[t]he contours of the right [is] sufficiently clear that a reasonable official would

understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

The Kingdom wants to be free from having to adhere to U.S laws, including those of the State of Hawai‘i and the County. However, there is no clearly established statutory or constitutional right to be free from the laws that the Kingdom seeks to avoid. Moreover, no law exists that could have possibly put Mayor Kawakami and Chair Kaneshiro on notice that their execution and enactment of County ordinances would be clearly unlawful. For these reasons they are entitled to qualified immunity.

The United States Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536 (1991). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 105 S. Ct. 2806, 2815 (1985). Immunity is the entitlement not to be forced to litigate the consequences of official conduct and conceptually distinct from the merits of the Kingdom's claim that its rights have been violated. The privilege is "an *immunity from suit*, rather than a mere defense to liability; and like absolute immunity, it is effectively lost if the case is erroneously permitted to go trial." *Id*. at 526.

Mayor Kawakami and Chair Kaneshiro should be granted qualified immunity because there are no facts alleged in the Complaint to indicate that either one of them violated any of the Kingdom's clearly established constitutional or statutory rights.

V. CONCLUSION

For the reasons discussed above, the County Defendants respectfully request this Honorable Court to grant their motion seeking dismissal from the Kingdom's complaint.

DATED: Līhu'e, Kaua'i, Hawai'i, July 1, 2021.

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