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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

PLAINTIFF’S SUPPLEMENT TO 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 SUPPLEMENT TO 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 Hawaiian Kingdom hereby supplements its motion 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], and to stay proceedings pending appeal, in light of the Court's Minute Order filed August 12, 2022 [ECF 242] stating "no response to the Certification Motion is necessary." The Plaintiff was prepared to respond to the Federal Defendants opposition to its motion to certify with the information herein.

The Plaintiff maintains that by the common law of the State of Hawai'i, as declared by the Intermediate Court of Appeals (ICA) and the Hawai'i Supreme Court in *State of Hawai'i v. Lorenzo*,[1] there is an evidentiary burden regarding the continuity of the Hawaiian Kingdom as a State, whether that evidentiary burden is on the defendant to provide evidence that the Hawaiian Kingdom DOES EXIST as a State, or, when applying international law, the evidentiary burden is on the opposing party to provide rebuttable evidence that the Hawaiian Kingdom DOES

[1] *State of Hawai'i v. Lorenzo*, 77 Hawai'i 219; 883 P.2d 641 (Ct. App. 1994).

NOT CONTINUE TO EXIST as a State. In *United States v. Goo*,[2] the court referred to the evidentiary standard in the *Lorenzo* case as the "*Lorenzo* principle."[3]

The ICA acknowledged in the *Lorenzo* case that by placing the evidentiary burden on the defendant, its "rationale is open to question in light of international law."[4] Because international law provides for the presumption of the Hawaiian Kingdom's existence as a State,[5] the evidentiary burden is, therefore, placed on the party opposing that continuity to provide rebuttable evidence that the Hawaiian Kingdom DOES NOT CONTINUE TO EXIST as a State, and not for a party to provide evidence that it DOES EXIST when international law presumes its existence. Notwithstanding the burden and what needs to be proven from a factual or legal basis, the Plaintiff has complied with the *Lorenzo* principle by applying international law as to the Hawaiian Kingdom's continued existence as a State, and the United States has provided no rebuttable evidence except for arguing that the amended complaint should be dismissed because it raises a political question.

In 1994, Lorenzo appealed to the ICA claiming the trial court lacked

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[2] *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919.
[3] *Id*., *3.
[4] *State of Hawai'i v. Lorenzo*, 221; 643.
[5] *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.").

jurisdiction over him because the Hawaiian Kingdom continues to exist as a State. The appeal came on the heels of the apology joint resolution where the United States acknowledged that its overthrow of the government of the Hawaiian Kingdom was unlawful and offered an apology to Native Hawaiians.[6] International law distinguishes between a State, which is the subject of international law, and its government, which is the subject of the State's domestic law or legal order. Under international law, the unlawful overthrow of the government of the Hawaiian Kingdom did not affect the continued existence of the State of the Hawaiian Kingdom, which raised the question of its continued existence or extinction in *Lorenzo*.

In *Lorenzo*, the ICA based its denial of the motion to dismiss the indictment on an evidentiary burden as described by the Ninth Circuit in its 1993 decision, in *United States v. Lorenzo*, that "[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government."[7] As a result, the ICA stated, it "was incumbent on Defendant to present evidence supporting his claim. *United States v. Lorenzo*. Lorenzo has presented no factual (or

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[6] *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii*, 107 Stat. 1510 (1993); See also President Grover Cleveland's Message to the Congress (Dec. 18, 1893), United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai'i: 1894-95*, 445-458 (1895).

[7] *United States v. Lorenzo*, 995 F.2d 1448, 1456; 1993 U.S. App. LEXIS 10548.

legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature."[8] Neither the Ninth Circuit Court nor the ICA foreclosed the question but rather provided, what it saw at the time, instruction for the courts to arrive at the conclusion that the Hawaiian Kingdom, from an evidentiary basis, continues to exist as a State, notwithstanding which party has the evidentiary burden and what needs to be proven.

The Plaintiff met this evidentiary standard in these proceedings, especially considering the Permanent Court of Arbitration's acknowledgement of the Hawaiian Kingdom as a State in accordance with Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes ("1907 Convention") in *Larsen v. Hawaiian Kingdom* in 1999.[9] Article 47 provides access to the PCA to resolve international disputes for non-Contracting States. There are currently 122 Contracting States that have immediate access to the PCA, which includes the United States,[10] while non-Contracting States have access by virtue of Article 47. Unlike the United States, the Hawaiian Kingdom is a non-Contracting State to the 1907 Convention but a State, nevertheless.

The ICA's standard of review in determining whether the Hawaiian Kingdom continues to exist as a State provides for uniformity and predictability of future cases

[8] *State of Hawai'i v. Lorenzo*, 221; 643.
[9] Amended Complaint [ECF 55], para. 96-102.
[10] 36 Stat. 2199.

and set the course for the *Lorenzo* case to become common law. In 2004, the ICA, in *State of Hawai'i v. Araujo*, reiterated *Lorenzo's* evidentiary burden. The ICA stated:

> Because Araujo has not, either below or on appeal, "'presented [any] factual (or) legal basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature,'" (citing Lorenzo, 77 Hawai'i at 221, 883 P.2d at 643), his point of error on appeal must fail.[11]

In 2014, the Hawai'i Supreme Court, in *State of Hawai'i v. Armitage*,[12] clarified this evidentiary burden as well as discerning between a new Hawaiian nation brought about through nation-building, and the Hawaiian Kingdom that existed as a State in the nineteenth century. The Hawai'i Supreme Court explained:

> Petitioners' theory of nation-building as a fundamental right under the ICA's decision in Lorenzo does not appear viable. 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. Thus, Lorenzo does not recognize a fundamental right to build a sovereign Hawaiian nation.[13]

Lorenzo was cited by the Hawai'i Supreme Court in 8 cases, and by the ICA in 45 cases. The latest Hawai'i Supreme Court's citation of *Lorenzo* was in 2020 in

[11] *State of Hawai'i v. Araujo*, 2004 Haw. App. LEXIS 3, *3.
[12] *State of Hawai'i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
[13] *Id*., 57; 1065.

State of Hawai'i v. Malave.[14] The most recent citation of *Lorenzo* by the ICA was in 2021 in *Bank of N.Y. Mellon v. Cummings*.[15] Since 1994, the *Lorenzo* case had risen to precedent, and, therefore, is common law.

The instant Orders are an attempt to supersede the common law of the State of Hawai'i when the Court took no account of the evidence of the Hawaiian Kingdom's existence as a State pursuant to the *Lorenzo* principle. The Court's determination that the case presents a political question implies the Hawaiian Kingdom is a new "sovereign Hawaiian nation" under the theory of nation-building that has yet to be recognized by the United States. This is plainly not the case before the Court because State of Hawai'i common law discerns nation-building by native Hawaiians, which is commonly referred to as the sovereignty movement, from the Hawaiian Kingdom as a State since the nineteenth century. The latter applies to the *Lorenzo* principle as pointed out by the Hawai'i Supreme Court in *Armitage*, and the former as a political question until the United States recognizes such an entity. These proceedings did not present a matter of first impression to the Court, but rather operates on the evidentiary basis for the Hawaiian Kingdom's existence as a State established by 28 years of State of Hawai'i common law. The *Lorenzo* principle precludes the political question doctrine from arising.

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[14] *State v. Malave*, 146 Haw. 341, 463 P.3d 998, 2020 Haw. LEXIS 80.
[15] *Bank of N.Y. Mellon v. Cummings*, 149 Haw. 173, 484 P.3d 186, 2021 Haw. App. LEXIS 102, 2021 WL 1345675.

Further, it appears that the Court adopted a federal rule of decision to favor the United States despite its admitted illegal conduct regarding the overthrow of the government of the Hawaiian Kingdom on January 17, 1893. The application of the *Lorenzo* principle, as the common law of the State of Hawai‘i, should not be deemed by the Court to be incompatible with federal interests because it does not promote the interest of the United States. This is problematic because the federal court did adopt the *Lorenzo* principle as federal law in 17 cases, but this Court adopted a rule of decision—political question doctrine, in this one instance without any basis in law or fact, that unfairly advances the interest of the United States and shields them from accountability for its admitted unlawful conduct. This gives the impression that the Court is giving one party to the controversy an unfair advantage.

In *United States v. Lorenzo*, the Ninth Circuit did not invoke the political question doctrine, as a federal rule of decision, to advance the interests of the United States as a party to the litigation. Rather, it sought evidence from the appellants that the "[Hawaiian Kingdom] is currently recognized by the federal government," which they did not provide. The defendant in this case should have but did not cite *Restatement (Third) of the Foreign Relations Law of the United States*, §202, comment g, where the United States' "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.'" In other words, because there is a presumption, under

international law, that the Hawaiian Kingdom continues to exist as a State, it is presumed that the United States continues to recognize it, and, therefore, the Ninth Circuit Court's query was misplaced. Since the United States provided no rebuttable evidence, in *United States v. Lorenzo*, that the Hawaiian Kingdom as a State was extinguished under international law, the presumption of State continuity remains.

Of the 17 federal cases that applied the *Lorenzo* principle, the United States was a party to 5, 2 of which as a plaintiff, and 3 as a defendant.[16] "The mere presence of the United States as a party clearly does not require a federal rule,"[17] and it is "agree[d] that application of state law should not be deemed incompatible with federal interest simply because it does not advance the interests of the United States."[18] Professor Martha Field argues:

> When the presence of the United States as a party provides the basis for adopting a federal rule, an additional question arises, one that relates to the content of the rule created. Some commentators suggest that it is contradictory for the federal courts to create federal law but adopt a rule that does not advance the interests of the United States in the particular litigation. Such a suggestion is problematic. It smacks of one party to the controversy deciding the rules in its own favor. Unless the United States has a greater need for the favorable result than private parties in the same position have, the argument lacks force.[19]

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[16] *United States v. Lorenzo*, 995 F.2d 1448; 1993 U.S. App. LEXIS 10548; *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919; *Kupihea v. United States*, 2009 U.S. Dist. LEXIS 59023; *Simeona v. United States*, 2009 U.S. Dist. LEXIS; *Waialeale v. Officers of the United States Magistrate(s)*, 2011 U.S. Dist. LEXIS 68634;
[17] Martha A. Field, "Sources of Law: The Scope of Federal Common Law," 99(5) *Harvard Law Review* 881-984, 954 (1986).
[18] *Id*., n. 317.
[19] *Id*., 955.

By refusing to apply the *Lorenzo* principle, the Court's Orders are in direct conflict with §34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. §1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

As the United States Supreme Court, in *Erie R.R. v. Tompkins*, stated, "federal courts are […] bound to follow decisions of the courts of the State in which the controversies arise."[20] This case is manifestly governed by *Erie* and not *Baker v. Carr*[21] as to the political question doctrine. Because the Court chose to supersede the decisions of the ICA and the Hawai'i Supreme Court regarding the evidentiary basis of *Lorenzo* by invoking the political question doctrine in favor of the United States, the Court should certify for interlocutory appeal so that the Ninth Circuit can address this matter in the light of §1652, *Erie*, and the *Lorenzo* principle as controlling law in this case.

DATED: Honolulu, Hawai'i, August 14, 2022.

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[20] *Erie R.R. v. Tompkins*, 30 U.S. 64, 87 (1938).
[21] *Baker v. Carr*, 369 U.S. 186 (1962).