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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

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF HAWAIIAN KINGDOM’S MOTION FOR JUDICIAL NOTICE; CERTIFICATE OF SERVICE

Non-Hearing Motion:
Judge: Leslie E. Kobayashi

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REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF HAWAIIAN KINGDOM'S MOTION FOR JUDICIAL NOTICE

I. INTRODUCTION

Federal Government Defendants' ("FGDs") opposition and cross-motion to dismiss is based entirely on the jurisdiction of this Court as an Article III Court. FGDs contend that Defendant UNITED STATES OF AMERICA is the legitimate sovereign over the Hawaiian Islands because "[t]he United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959 [and that] [t]his Court, the Ninth Circuit, and the courts of the state of Hawaii have repeatedly 'rejected arguments asserting Hawaiian sovereignty' distinct from its identity as a part of the United States." FGDs' claims lack merit on several grounds and are an attempt to obscure, mislead and misinform this Honorable Court's duty to apply the rule of law. Furthermore, Plaintiff views the actions taken by this Court as a matter of due diligence on its part regarding jurisdiction as an Article II Court.

II. UNITED STATES RECOGNITION OF THE HAWAIIAN KINGDOM AS A STATE AND ITS GOVERNMENT PREDATES 1898

The legal status of the Hawaiian Kingdom as an independent State **predates, not postdates, 1898**. FGDs omit in their pleading that President John Tyler on July 6, 1844, explicitly recognized the Hawaiian Kingdom as an independent State by letter from Secretary of State John C. Calhoun to the Hawaiian Commission. This was confirmed by the arbitral tribunal in *Larsen v. Hawaiian Kingdom*:

> [I]n the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United

> Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.[1]

The recognition of the Hawaiian Kingdom as a State was also the recognition of its government—a constitutional monarchy, as its agent. Successors in office to King Kamehameha III, who at the time of the United States recognition was King of the Hawaiian Kingdom, did not require diplomatic recognition. For the legal doctrine of recognition of governments see pages 2-6 of Plaintiff's memorandum in opposition to FGDs' cross-motion to dismiss.

On January 17, 1893, by an act of war, the United States unlawfully overthrew the government of the Hawaiian Kingdom. President Grover Cleveland entered into an executive agreement with Queen Lili'uokalani on December 18, 1893, in an attempt to restore the government but was politically prevented from doing so by members of Congress. The failure to restore the government, however, did not affect the legal status of the Hawaiian Kingdom as an independent State under international law.

In *Texas v. White*, the Supreme Court stated that a State "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[2] The Supreme Court also stated that a "plain distinction is made between a State and the government of a State."[3] The Supreme Court's position is consistent with international law where the "state must be distinguished from the government. The state, not the government, is the major player, the legal person, in international law."[4]

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[1] *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566, 581 (2001).
[2] *Texas v. White*, 74 U.S. 700, 721 (1868).
[3] *Id.*
[4] Sheldon M. Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* 17 (1989).

According to Judge Crawford, "[p]ending a final settlement of the conflict, belligerent occupation does not affect the continuity of the State. The governmental authorities may be driven into exile or silenced, and the exercise of the powers of the State thereby affected. But it is settled that the powers themselves continue to exist. This is strictly not an application of the 'actual independence' rule but an exception to it…pending a settlement of the conflict by a peace treaty or its equivalent."[5] There is no peace treaty or its equivalent between the Hawaiian Kingdom and the United States.

In 1996, remedial steps were taken to restore the Hawaiian government as a successor to the administration of Queen Lili'uokalani.[6] An *acting* Council of Regency was established in accordance with Hawaiian constitutional law, and, therefore, did not require diplomatic recognition like the previous administrations. Hence, the FGDs are estopped, as a matter of United States practice from 1846 to 1893 and international law, from denying the existence of the Hawaiian Kingdom as a State and its government—the Council of Regency.

III. PRESUMPTION OF CONTINUITY OF THE HAWAIIAN STATE

Under international law, there "is a presumption that the State continues to exist, with its rights and obligations…despite a period in which there is…no effective, government,"[7] and that belligerent "occupation does not affect the continuity of the State, even where there exists no government claiming to represent

[5] James Crawford, *The Creation of States in International Law* 73 (2nd ed., 2006).
[6] David Keanu Sai, "Royal Commission of Inquiry," in *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*, ed. David Keanu Sai 18-23 (2020); see also Declaration of Professor Federico Lenzerini [ECF 55-2].
[7] Crawford, 34.

the occupied State."[8] "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted."[9] "If one were to speak about a presumption of continuity," explains Professor Craven, "one would suppose that an obligation would lie upon the party opposing that continuity to establish the facts sustaining its rebuttal. The continuity of the Hawaiian Kingdom, in other words, may be refuted only by a reference to a valid demonstration of legal rights, or sovereignty, on the part of the United States, absent of which the presumption remains."[10] According to Craven, only by a "State's incorporation, union, or submission to another" would it be considered rebuttable evidence.[11]

The 1898 joint resolution of annexation is not a treaty of State "incorporation" but rather an internal law of the United States that stems from a failed treaty. To give the joint resolution proper context, the legislative history is important in understanding the backstory of the joint resolution. On June 16, 1897, the McKinley administration signed a treaty of "incorporation" with its American puppet—the Republic of Hawai'i, in Washington, D.C. On the following day, Queen Lili'uokalani submitted a formal protest to the U.S. State Department stating, "I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have

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[8] *Id*.
[9] Black's Law 1185 (6th ed., 1990).
[10] 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).
[11] *Id*., 133.

made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me."[12]

Ignoring the protest, President McKinley submitted the treaty for Senate ratification, which required a minimum of 60 votes under United States law. The Senate, however, was not convening until December 6, 1897. This prompted two Hawaiian political organizations to mobilize signature petitions protesting annexation. According to Professor Silva, the "strategy was to challenge the U.S. government to behave in accordance with its stated principles of justice and of government of the people, by the people, and for the people."[13] The Hawaiian Political Association (Hui Kalaiʻāina) gathered over 17,000 signatures, and the Hawaiian Patriotic League (Hui Aloha ʻĀina) gathered 21,269 signatures.[14] The last official census, done in 1890, tallied Hawaiian subjects at 48,107, and, therefore, the petitions, in fact, represented the majority of the Hawaiian citizenry.[15]

The leaders representing the Hawaiian Patriotic League and the Hawaiian Political Association, arrived in Washington, D.C., on December 6, 1897, the same day the Senate opened its session, and were told there were 58 votes for annexation.[16] The next day, they met with Queen Liliʻuokalani and chose her as chair of the Washington Committee. In that meeting, "they decided to present only the petitions of Hui Aloha ʻĀina because the substance of the two sets of petitions were different. Hui Aloha ʻĀina's petition protested annexation, but the Hui Kālaiʻāina's petitions

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[12] Liliuokalani, *Hawaii's Story by Hawaii's Queen* 354 (1898); Petition (June 17, 1897), http://libweb.hawaii.edu/digicoll/annexation/protest/pdfs/liliu5.pdf.
[13] Noenoe K. Silva, *Aloha Betrayed* 146 (2004).
[14] *Id*., 151; Hawaiian Patriotic League Signature Petitions (1897), https://hawaiiankingdom.org/pdf/1897_HPL_Petition_Against_Annexation.pdf.
[15] David Keanu Sai, "American Occupation of the Hawaiian State: A Century Unchecked," 1 *Hawaiian Journal of Law and Politics* 46-81, 63 (2004).
[16] Silva, 158.

called for the monarchy to be restored. They agreed that they did not want to appear divided or as if they had different goals."[17]

Senators Richard Pettigrew and George Hoar met with the Committee and said they would lead the opposition in the Senate. Senator Hoar stated he would introduce opposition into the Senate and the Senate Foreign Relations Committee. "On December 9, with the delegates present, Senator Hoar read the text of the petitions to the Senate and had them formally accepted."[18] In the days that followed, the Committee would meet with many Senators urging them not to ratify the treaty. By the time the Committee left Washington, D.C., on February 27, 1898, they had successfully chiseled the 58 Senators in support of annexation down to 46.[19] Unable to garner the necessary 60 votes, the treaty failed by March, yet war with Spain was looming over the horizon.

On April 25, 1898, Congress declared war on Spain. The following month on May 4, Representative Francis Newlands submitted a joint resolution for the annexation of the Hawaiian Islands to the House Committee on Foreign Affairs. On May 17, the joint resolution was reported out of the Committee without amendment and headed to the floor of the House of Representatives. The joint resolution's accompanying Report justified the congressional action to seize the Hawaiian Islands as a matter of military interest.

The Congressional record clearly showed that when the joint resolution of annexation reached the floor of the House of Representatives, members of Congress knew the limitations of congressional laws. Representative Thomas H. Ball emphatically stated, "[t]he annexation of Hawaii by joint resolution is unconstitutional, unnecessary, and unwise. …Why, sir, the very presence of this

[17] *Id.*
[18] *Id.*, 159.
[19] *Id.*

measure here is the result of a deliberate attempt to do unlawfully that which can not be done lawfully."[20] When the resolution reached the Senate, Senator Augustus Bacon sarcastically remarked that the "friends of annexation, seeing that it was not possible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House."[21] Senator William Allen added, "[t]he Constitution and the statutes are territorial in their operation; that is, they can not have any binding force or operation beyond the territorial limits of the government in which they are promulgated."[22] He later reiterated, "I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution."[23]

Despite these objections the Congress passed the joint resolution and President McKinley signed it into law on July 7, 1898. This notwithstanding, the Department of Justice concluded in a legal opinion in 1988, it is "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."[24]

Since the United States failed to carry out its obligation to reinstate the Executive Monarch and her Cabinet, under the executive agreement concluded with

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[20] 31 Cong. Rec. 5975.
[21] *Id.*, 6150.
[22] *Id.*, 6635.
[23] 33 Cong. Rec. 2391.
[24] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238-263, 252 (1988).

the Cleveland administration, the McKinley administration took complete advantage of its puppet called the Republic of Hawai‘i, and deliberately violated Hawaiian neutrality during the war. This served as leverage to force the hand of Congress to pass the joint resolution purporting to annex a foreign State. This was revealed while the Senate was in secret session on May 31, 1898, where Senator Henry Cabot Lodge argued that the "[a]dministration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity."[25]

In violation of international law and the treaties with the Hawaiian Kingdom, the United States maintained the insurgents' control until the Congress could reorganize its puppet. By statute, the Congress changed the name of the Republic of Hawai‘i to the Territory of Hawai‘i on April 30, 1900.[26] Later, on March 18, 1959, the Congress, again by statute, changed the name of the Territory of Hawai‘i to the State of Hawai‘i.[27] According to the U.S. Supreme Court, however, "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory," which renders these congressional acts *ultra vires*.[28] Of significance is this Court's Article III status that derives from Section 9(a) of the 1959 Statehood Act.[29]

Under the maxim *ex injuria jus non oritur*, FGDs' argument that "[t]he United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959" fails to constitute "a valid demonstration of legal rights, or sovereignty, on the part of the United States." Therefore, the United States has provided no "facts sustaining

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[25] "Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898," 1 *Hawaiian Journal of Law and Politics* 230-284, 280 (2004).
[26] 31 Stat. 141.
[27] 73 Stat. 4.
[28] *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 318 (1936).
[29] 73 Stat. 4, 8.

its rebuttal" of the continuity of the Hawaiian State. Furthermore, under international law, the 1898 joint resolution of annexation and the 1959 Statehood Act, are considered internationally wrongful acts, and the FGDs are estopped from asserting that it is the legitimate sovereign over the Hawaiian Islands.

IV. DEFENDANTS ARE PRECLUDED FROM INVOKING ITS INTERNAL LAW AS A JUSTIFICATION FOR NOT COMPLYING WITH ITS INTERNATIONAL OBLIGATIONS

When the United States assumed control of its installed puppet under the new title of Territory of Hawai'i in 1900, and later the State of Hawai'i in 1959, it surpassed "its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts."[30] The purpose of this extraterritorial prescription was to conceal the belligerent occupation of the Hawaiian Kingdom and bypass their duty to administer the laws of the occupied State in accordance with customary international law at the time, which was later codified under Article 43 of the 1907 Hague Regulations.[31] According to Professor Benvinisti, "[t]he occupations of Hawaii, The Philippines, and Puerto Rico reflected the same unique US view on the unlimited authority of the occupant."[32] This extraterritorial application of American municipal laws is prohibited by the rules of *jus in bello*.

> The occupant may not surpass its limits under international law through extra-territorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this

[30] Eyal Benvenisti, *The International Law of Occupation* 19 (1993).
[31] 36 Stat. 2277, 2306.
[32] Eyal Benvenisti, *The International Law of Occupation* 37 (2nd ed., 2012).

> symmetry, Article 43 could become meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.[33]

According to Article 27 of the 1969 Vienna Convention on the Law of Treaties, FGDs are prohibited from "invok[ing] the provisions of its internal law as justification for its failure to perform a treaty,"[34] which is Article 43 of the 1907 Hague Regulations. Although the United States has not ratified the Vienna Convention, U.S. foreign relations law pronounced the rule that no State may invoke its internal law as justification for the nonobservance of a treaty by which it is bound.[35] In *Coplin v. United States*, the Supreme Court referred to the U.S. government's brief in *Weinberger v. Rossi*: "[a]though the Vienna Convention is not yet in force for the United States, it has been recognized as an authoritative source of international treaty law by the courts…and the executive branch."[36] The court was referring to Article 27 of the Vienna Convention. "The first sentence of article 27 gives expression to a well-established principle of international law that a State may not evade its international obligations by pleading its own law as an excuse for noncompliance."[37]

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[33] Benvenisti (1993), 19.
[34] Article 27, 1969 Vienna Convention on the Law of Treaties.
[35] *Coplin v. United States*, 6 Cl. Ct. 115 (1984, rev'd, 761 F.2d 688 (Fed. Cir. 1985); *Collins v. Weinberger*, 707 F.2d 1518 (D.C. Cir. 1983); *Weinberger v. Rossi*, 456 U.S. 25 (1982), *Rossi v. Brown*, 467 F. Supp. 960 (D.D.C. 1978), rev'd, 642 F.2d 553 (D.C. Cir. 1980); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980).
[36] *Coplin v. United States*, 6 Cl. Ct. 115, 122.
[37] Maria Frankowska, "The Vienna Convention on the Law of Treaties before United States Courts," 28(2) *Virginia Journal of International Law* 281-392, 325 (1988). For authority under international law see, *e.g.*, *Treatment of Polish Nationals in Danzig, Advisory Opinion*, 1932 P.C.I.J. (ser. A/B) No. 44, 22, 24; *Case Concerning the Factory at Chorzow* (Merits) (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, 33-34; *Case Concerning Certain German Interests in*

V. DISTINGUISHING THE INSTITUTIONAL JURISDICTION OF THE PERMANENT COURT OF ARBITRATION FROM THE SUBJECT MATTER JURISDICTION OF THE LARSEN ARBITRAL TRIBUNAL

FGDs erred when they stated that "[c]entral to Professor Lenzerini's opinion is an arbitration between an individual, Lance Larsen, and the Plaintiff before the Permanent Court of Arbitration ("PCA") at the Hague, which Plaintiff and Professor Lenzerini believe is a tacit acknowledgment of Plaintiff's status as a sovereign entity. However, the final arbitral award from the PCA in this dispute, issued on February 5, 2001, explicitly stated that, 'in the absence of the United States of America [as a party] the Tribunal can neither decide that Hawaii is not part of the USA, nor proceed on the assumption that it is not.'"

Plaintiff is puzzled by this statement, given Plaintiff's previous pleadings clearly distinguishes between the institutional jurisdiction of the PCA and the subject matter jurisdiction of the arbitral tribunal. What are the undisputed facts is that a notice of arbitration was filed by Larsen's counsel with the International Bureau of the PCA on November 8, 1999, and that six months later the International Bureau, by virtue of Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes ("1907 Convention"),[38] established the arbitral tribunal on June 9, 2000. Professor Lenzerini, in his opinion attached to Plaintiff's motion for judicial notice, addressed the actions taken by the International Bureau of the PCA prior to the formation of the arbitral tribunal, which the civil law tradition explains from an evidentiary standpoint, and not the arguments of the arbitral tribunal, which did not have subject matter jurisdiction because of the indispensable third-party rule. Without the Hawaiian Kingdom being a *juridical fact*, the International Bureau

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Upper Silesia (Merits) (Germany v. Poland), 1926 P.C.I.J. (ser. A) No. 7, 19, 22, 42.

[38] 36 Stat. 2199, 2224.

could not have completed the *juridical act* of establishing the arbitral tribunal in the first place.

The institutional jurisdiction of the International Criminal Court ("ICC") was also recently the central issue relating to the "Situation in the State of Palestine." Like Article 47 of the 1907 Convention, Article 12(2)(a) of the Rome Statute grants the ICC the authority to "exercise its jurisdiction" to investigate international crimes within the territory of a State Party to the Statute. Professor Malcolm Shaw authored an *amicus curiae* brief filed with the ICC's Pre-Trial Chamber I on March 16, 2020, that addressed the question of Palestinian Statehood. According to Shaw:

> [W]hether or not Palestine is a state is actually critical to defining and determining the Court's territorial jurisdiction in this matter. If Palestine is not a state, then it cannot have sovereignty over territory and cannot come within the terms of article 12 of the Statute. Thus, in the absence of clear and irrefutable evidence of Palestine's existence as a state and taking into account the lack of an international consensus in this regard, both quantitative and qualitative, the Court cannot assert that there is such a state at this point in time.[39]

Article 12 does not refer to the subject matter jurisdiction of an ICC trial court, but rather provides institutional jurisdiction for the Prosecutor of the ICC to investigate international crimes that may or may not go to trial. Similarly, Article 47 does not refer to the subject matter jurisdiction of the arbitral tribunal, but rather provides the institutional jurisdiction for the International Bureau to form the arbitral tribunal to resolve an international dispute.

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[39] Professor Malcolm N. Shaw, QC, *Amicus Curiae Brief—Situation in the State of Palestine* 6-7 (March 16, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_01017.PDF.

VI. CONCLUSION

FGDs have provided no legal basis that would deny the Court's obligation to give judicial notice of the civil law in these proceedings pursuant to FRCP Rule 44.1. While this Court has not yet transformed itself from an Article III Court to an Article II Court, the Plaintiff perceives this Court to be in a state of due diligence because its motion for judicial notice is not a dispositive motion.

The Plaintiff's motion for judicial notice is critical for the Court to take affirmative steps to transform itself into an Article II Court by virtue of Article 43 of the 1907 Hague Regulations, just as the International Bureau of the PCA established the arbitral tribunal by virtue of Article 47 of the 1907 Convention because of the *juridical fact* of the Hawaiian Kingdom's existence as a State. This Court is obligated to transform itself into an Article II Court because it is situated within the territory of the Hawaiian Kingdom and not within the territory of the United States.

DATED: Honolulu, Hawai'i, January 28, 2022.

Respectfully submitted,

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