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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN KINGDOM,

Plaintiff-Appellant,

v.

JOSEPH R. BIDEN JR., in his official capacity as President of the United States; et al.,

Defendants-Appellees.

No. 22-15637

D.C. No. 1:21-cv-00243-LEK-RT

PLAINTIFF-APPELLANT HAWAIIAN KINGDOM’S NOTICE OF MOTION AND MOTION TO DISMISS FOR *FORUM NON CONVENIENS*; EXHIBITS 1-6; CERTIFICATE OF SERVICE

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TO THE COURT AND TO ALL PARTIES HEREIN:

Please take notice that Plaintiff-Appellant HAWAIIAN KINGDOM will move this Court, at the Ninth Circuit Court of Appeals, for an order dismissing Plaintiff Hawaiian Kingdom's Notice of Appeal to a Competent Court of Appeals to be hereafter established by the United States as the Occupying Power [ECF 228], filed with the United District Court for the District of Hawai'i on April 24, 2022, based on *forum non conveniens*[1] on the ground that an appropriate forum for this action is an Article II Appellate Court to be hereafter established in compliance with international humanitarian law. This motion is in response to the Order of the Clerk of the U.S. Court of Appeals for the Ninth Circuit filed on May 3, 2022, that "[w]ithin 21 days after the date of this order, appellant shall either move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction." Order [DktEntry: 2].

This motion is based on the following documents: this Motion to Dismiss for *Forum Non Conveniens*, the Jurisdiction and Venue and Factual Allegations sections of the Amended Complaint [ECF 55] with Exhibits 1 [ECF 55-1] and 2 [ECF 55-2]; Brief of *Amicus Curiae* International Association of Democratic Lawyers, National

[1] *Forum non conveniens* is a doctrine that applies when an alternative forum is in another country.

Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96]; Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent Court of Arbitration [ECF 174] and Exhibit 1 [ECF 174-2]; and Notice of Appeal to a Competent Court of Appeals to be hereafter established by the United States as the Occupying Power [ECF 228], and all other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at any hearing on the motion ordered by the Court.

DATED: Honolulu, Hawai‘i, May 20, 2022.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 11, 2021, Plaintiff-Appellant HAWAIIAN KINGDOM (hereafter "Hawaiian Kingdom") filed an Amended Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Hawai'i. The Hawaiian Kingdom raised a preliminary issue in its Amended Complaint regarding the District Court of Hawai'i's status as an Article III Court situated within the territory of the Hawaiian Kingdom.

Under international law there is a presumption that an established sovereign and independent State, being a subject of international law, continues to exist despite the overthrow of its government. See Professor Quincy Wright, "The Status of Germany and the Peace Proclamation," 46, no. 2 *American Journal of International Law* 299, 307 (April 1952) ("[i]nternational law distinguishes between a government and the state it governs. This distinction makes it clear that the extinction of the Nazi Government and the temporary absence of any German Government did not necessarily mean that Germany as a state ceased to exist"); see also Professor Yejoon Rim, "State Continuity in the Absence of Government: The Underlying Rationale in International Law," 20(20) *European Journal of International Law* 1, 4 (2021) (the State continues "to exist even in the factual absence of government so long as the

people entitled to reconstruct the government remain"). According to Professor Ian Brownlie, *Principles of Public International Law*, 109 (4th ed., 1990):

> Thus after the defeat of Nazi Germany in the Second World War the four major Allied powers assumed supreme power in Germany. The legal competence of the German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. The German state continued to exist, and, indeed, the legal basis of the occupation depended on its continued existence.

Therefore, the Hawaiian Kingdom as a State is presumed to continue to exist despite its government being unlawfully overthrown by the Defendant Appellee UNITED STATES OF AMERICA's (hereafter "United States") military on January 17, 1893. As such, the District Court of Hawai'i is not a properly constituted court in accordance with international humanitarian law, and, therefore, had to transform itself into an Article II Occupation Court.

After Magistrate Judge Rom Trader granted leave on September 30, 2021 [ECF 90], the International Association of Democratic Lawyers, the National Lawyers Guild, and the Water Protectors Legal Collective filed an *amicus curiae* brief bringing to the "Court's attention customary international law norms and judicial precedent regarding Article II occupation courts that bear on the long-standing belligerent occupation of the Hawaiian Kingdom by the United States at issue in this case." [ECF 96, p. 4].

Neither defendants nor the Court provided any evidence rebutting the presumption of continuity of the Hawaiian Kingdom as an independent State that

has been under a prolonged belligerent occupation by the United States since January 17, 1893, when Her late Majesty Queen Lili'uokalani conditionally surrendered to the United States. In its pleading, the United States admitted to the war crime of usurpation of sovereignty[2] when it stated, "[t]he United States annexed Hawaii in 1898, [*Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, 30 Stat. 750 (1898)] and Hawaii entered the union as a state in 1959. Hawaii Admission Act, Pub. L. 86-4, 73 Stat. 4 (1959)." [ECF 188-1, p. 2]. This pleading does not constitute rebuttable evidence.

The annexation of the territory of the Hawaiian Kingdom was done as a war measure in its war with the Spanish in its colonies of the Philippines and Guam in the Pacific Ocean five years after the illegal overthrow of the Hawaiian government. See David Keanu Sai, "Backstory—*Larsen v. Hawaiian Kingdom* at the Permanent Court of Arbitration (1999-2001)," 4 *Hawaiian Journal of Law and Politics* 133, 145-152 (2022). When the U.S. Senate went into secret session on May 31, 1898, Senator Henry Cabot Lodge stated that the "Administration was compelled to violate

[2] See William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai, ed., *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 155-157, 167 (2020), https://hawaiiankingdom.org/pdf/Hawaiian_Royal_Commission_of_Inquiry_(2020).pdf. (The *actus reus* of the offense of usurpation of sovereignty occurs where the "perpetrator imposed or applied legislative or administrative measures of the occupying power going beyond those required by what is necessary for military purposes of the occupation.").

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." *Id*., 150. Without a treaty, international law does not permit a State to annex the territory of another State while under belligerent occupation. According to *The Handbook of Humanitarian Law in Armed Conflicts*, Section 525, 242 (1995):

> The annexation of conquered territory is prohibited by international law. This necessarily means that if one state achieves power over parts of another state's territory by force or threat of force, the situation must be considered temporary by international law. The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory. The legal situation of the territory can be altered only through a peace treaty or *debellatio*.[3] International law does not permit annexation of territory of another state. It follows from this that all measures taken by the occupying authorities should affect only the administration of the territory, avoiding far-reaching changes to the existing order. In this sense, the occupying power assumes 'responsibility for the occupied territory and its inhabitants.'

The United States District Court for the District of Hawai'i, as an Article III Court, is not a properly constituted court as a result of the international rule of the presumption of State continuity unless there is rebuttable evidence to the contrary. Congress established the United States District Court for the District of Hawai'i as

[3] There was no extinction of the Hawaiian State by *debellatio* because the Permanent Court of Arbitration acknowledged the continued existence of the Hawaiian Kingdom as a State in *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01.

an Article III Court by virtue of section 9(a), *An Act To provide for the admission of the State of Hawaii into the Union*, Public Law 86-3, 73 Stat. 4, 8 (1959). Previously the District Court of Hawai‘i was an Article IV Court by virtue of section 86, *An Act To provide a government for the Territory of Hawaii*, 31 Stat. 141, 158 (1900). In its brief, the *Amici* stated:

> The facts here show that Congress has no legitimate power over Hawai‘i because there was never a peace treaty between nations ending the occupation and Congress has no extraterritorial capabilities. Essentially Congress exceeded its constitutional powers and legislated a legal framework over a sovereign Nation that never ceded its state sovereignty nor the ability and desire to rule itself. Rather than wait to ratify a negotiated peace treaty with Hawai‘i to end the occupation and remedy the illegal annexation and later acquisition of Hawai‘i, Congress admitted Hawai‘i into the Union as the 50th State seeking to sweep a century of inconvenient truths and illegal acts under the rug. The extensive judicial and political infrastructure in modern Hawai‘i exists in violation of the laws of war and norms of international law applicable to occupying powers. Yet the Hawaiian Kingdom persists and the United States occupation of Hawai‘i that began in 1893 has never effectively ended. [ECF 96, p. 25].

These Congressional laws have no effect within the territory of the Hawaiian Kingdom, and, therefore, are not voidable but rather are *void ab initio*—having no legal effect from inception. Until the District Court for Hawai‘i transforms itself into an Article II Court, being a properly constituted court with jurisdiction, the Hawaiian Kingdom was unable to seek relief in its complaint nor could it file any motions. When the Hawaiian Kingdom filed a Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential

Juridical Act by the Permanent Court of Arbitration [ECF 174] to assist the Court in transforming to an Article II Court, it was the Court that changed the Request into a Motion [ECF 175].

The Ninth Circuit, however, is an Article III Appellate Court that allows the Hawaiian Kingdom to file its motion based on *forum non conveniens* without infringing on the presumption of State continuity because this Court is sitting within the territory of the United States and not in the territory of the Hawaiian Kingdom.

Accordingly, this case should be dismissed based on *forum non conveniens* because the proper forum under international humanitarian law is an Article II Appellate Court unless the United States provides rebuttable evidence that the Hawaiian Kingdom was extinguished under international law, *i.e.*, treaty of cession.

II. FACTUAL BACKGROUND

In the interest of judicial economy, the Hawaiian Kingdom incorporates the Jurisdiction and Venue and Factual Allegations sections of the Amended Complaint [ECF 55] with Exhibits 1 [ECF 55-1] and 2 [ECF 55-2]; Brief of *Amicus Curiae* International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint [ECF 96]; Request for Judicial Notice Pursuant to FRCP 44.1 Re: Civil Law on Juridical Fact of the Hawaiian State and the Consequential Juridical Act by the Permanent

Court of Arbitration [ECF 174] and Exhibit 1 [ECF 174-2]; and Notice of Appeal [ECF 228], filed concurrently herewith.

III. MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

In *U.S. Bank Tr., N.A. v. Fonoti*, Civil No. 18-00118 SOM-KJM, 2018 WL 3433295, at *10, the issue of the Hawaiian Kingdom's continued existence as a State was addressed. The *Fonoti* decision quotes *State v. French*, 77 Hawai'i 222, 228; 883 P.2d 644, 650 (Ct. App. 1994) that makes specific reference to *State of Hawai'i v. Lorenzo*, 77 Hawai'i 219; 883 P.2d 641, (Ct. App. 1994), which has become a precedent case on this matter and is known in the United States District Court in Hawai'i since 2002 as the *Lorenzo* principle. Black's Law Dictionary, 1193 (6th ed., 1990) (a principle is a "comprehensive rule or doctrine which furnishes a basis or origin for others"). As the District Court stated, in *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919 *3:

> Since 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.

In *French,* the Court applied the *Lorenzo* principle when it stated, "this particular kind of claim was rejected in State v. Lorenzo, [internal citation omitted] which 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 (emphasis added)." *French*, 228, 650. The *Lorenzo* Court clearly stated the reason for its rejection was because "[i]t 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 […]." *Lorenzo,* 220; 642. The reason for "presently" was because Lorenzo did not "present evidence supporting his claim." The Court did not foreclose the question but rather provided, what it saw at the time, instruction for the Court to arrive at the conclusion "that the [Hawaiian] Kingdom [continues to] exists as a state" based on evidence of a "factual (or legal) basis."

The *Lorenzo* Court's standard of review in determining whether the Hawaiian Kingdom "exists as a state" placed the burden of proof on the Defendant. *United States v. Lorenzo*, 995 F.2d 1448, *1455; 1993 U.S. App. LEXIS 10548, **17, ("[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government […]."). The term "Kingdom of Hawaii" is the "Hawaiian Kingdom." The *Lorenzo* Court, however, did acknowledge that its "rationale is open to question in light of international law,"

Lorenzo, 220, 642, and that "[t]he illegal overthrow leaves open the question whether the present governance system should be recognized […]" under international law. *Id*., 221, 643, n. 2.

Because international law provides for the presumption of the continuity of the State despite the overthrow of its government by another State, it shifts the burden of proof. According to Judge Crawford, "[t]here is a presumption that the State continues to exist, with its rights and obligations […] despite a period in which there is no, or no effective, government." James Crawford, *The Creation of States in International Law* 34 (2nd ed., 2006). "Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State." *Id*. According to Professor Craven, "[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." 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).

Therefore, the *Lorenzo* principle of placing the burden on the Defendant is misplaced because international law places the burden "on the party opposing that continuity to establish the facts substantiating its rebuttal." In 2001, the international arbitral tribunal, in *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Reports 566, 581 (2001), stated "in 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 conclusions of treaties (emphasis added)." From a juridical standpoint, the *Larsen* case shifted the burden in the *Lorenzo* principle, but it wasn't applied by the federal courts.

In its Amended Complaint, the Hawaiian Kingdom provided a legal basis as well as a factual basis of the Hawaiian Kingdom's continued existence. The presumption of State continuity is the legal basis, and the factual basis is that the Hawaiian Kingdom's continued existence is a *juridical fact*, whereby the Permanent Court Arbitration, by a *juridical act*, acknowledged the Hawaiian Kingdom, in *Larsen v. Hawaiian Kingdom*, to be a non-Contracting "State" pursuant to Article 47 of the 1907 Hague Convention for the Pacific Settlement of International Disputes ("1907 PCA Convention"), 36 Stat. 2199. See Declaration of David Keanu Sai, Ph.D. [ECF 55-1], and Exhibit #1—Memorandum of Professor Federico Lenzerini, *Civil Law on Juridical Fact of the Hawaiian State and the Consequential*

Juridical Act by the Permanent Court of Arbitration [ECF 174-2]; see also Declaration of Professor Federico Lenzerini [ECF 55-2], *Legal Opinion on the Authority of the Council of Regency of the Hawaiian Kingdom*, para. 1-6. The Hawaiian Kingdom was not applying the *Lorenzo* principle but merely provided the factual and legal basis of its existence for the District Court. Judge Kobayashi raised the *Lorenzo* principle in her two Orders that cited *Fonoti*.

Additional factual basis of "continuity" includes the delivering of an oral statement to the United Nations Human Rights Council on March 22, 2022, by Dr. David Keanu Sai, as Minister of Foreign Affairs *ad interim*.[4] Dr. Sai was accredited by the Office of the United Nations High Commissioner for Human Rights for his statement. Dr. Sai stated to the Human Rights Council:

> The International Association of Democratic Lawyers and the American Association of Jurists call the attention of the Council to human rights violations in the Hawaiian Islands. My name is Dr. David Keanu Sai, and I am the Minister of Foreign Affairs *ad interim* for the Hawaiian Kingdom. I also served as lead agent for the Hawaiian Kingdom at the Permanent Court of Arbitration from 1999-2001 where the Court acknowledged the continued existence of my country as a sovereign and independent State.
>
> The Hawaiian Kingdom was invaded by the United States on 16 January 1893, which began its century long occupation to serve its military interests. Currently, there are 118 military sites throughout the islands and the city of Honolulu serves as the headquarters for the Indo-Pacific Combatant Command.

[4] International Association of Democratic Lawyers, *Dr. Keanu Sai oral statement on the U.S. Occupation of Hawai'i to UN Human Rights Council* (March 22, 2022), https://www.youtube.com/watch?v=EinKf6QEUew.

> For the past century, the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory, which has denied Hawaiian subjects their right of internal self-determination by prohibiting them to freely access their own laws and administrative policies, which has led to the violations of their human rights, starting with the right to health, education and to choose their political leadership.

The United States, who is a current member State of the Human Rights Council, did not object to Dr. Sai's statement that "the United States has and continues to commit the war crime of usurpation of sovereignty, under customary international law, by imposing its municipal laws over Hawaiian territory," thereby, acquiescing to the Hawaiian Kingdom's continued existence as a State and the United States' commission of the war crime of usurpation of sovereignty for over a century.

According to the International Court of Justice, acquiescence "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstance such that a response expressing disagreement or objection in relation to the conduct of another State would be called for." *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of June 15, 1962, I.C.J. Reports 1962, p. 6, at 23. Under international law, the "function of acquiescence may be equated with that of consent," whereby the "primary purpose of acquiescence is evidential; but its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which

is both objective and practical." I.C. MacGibbon, "The Scope of Acquiescence in International Law," 31 *British Yearbook of International Law* 143, 145 (1954). In *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."

The failure of the United States to disagree or object to the Hawaiian Kingdom being acknowledged as a non-Contracting State to the 1907 PCA Convention, by virtue of Article 47, and its failure to disagree or object to the statement to the Human Rights Council regarding the war crime of usurpation of sovereignty are official acts by the United States under customary international law. War crimes can only be committed in an international armed conflict between two or more States, and, therefore, the United States acquiescence are official acts that bind this Court. "[W]hen the executive branch of the government, which is charged with our foreign relations […] assumes a fact […] it is conclusive on the judicial department." *Williams v. Suffolk Insurance Co.*, 36 U.S. 415, 420 (1839). The aforementioned facts are confirmed by the United States' acquiesence and, therefore, "is conclusive" on this Court as evidential.

United States President John Tyler, by letter of Secretary of State John C. Calhoun on July 6, 1844, to Hawaiian officials, recognized the Hawaiian Kingdom

as a sovereign and independent State. On December 20, 1849, the United States entered into a Treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom (9 Stat. 977) and maintained a diplomatic Legation[5] in Honolulu and Consulates throughout the islands. The Hawaiian Kingdom maintained a diplomatic Legation in Washington, D.C., and Consulates throughout the United States. *Jones v. United States*, 137 U.S. 202, 212 (1890) ("[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial […] question.").

In its pleadings, the United States has not provided any rebuttable evidence, whether factual or legal, that the Hawaiian Kingdom was extinguished as a State under international law. Rather it pled that the United States, by Congressional legislation, annexed the Hawaiian Islands in 1898 and Hawai'i became a State of the Union in 1959. From an international law standpoint, "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." *Lotus*, PCIJ, ser. A no. 10 (1927), 18.

[5] A Legation is "[a]n embassy; a diplomatic minister and his suite." Black's Law, 898.

From a municipal law standpoint, both the 1898 Joint Resolution of annexation and the 1959 Hawai‘i Admission Act are municipal laws and "can have no force to control the sovereignty or rights of any other nation within its own jurisdiction." *The Apollon,* 22 U.S. 362, 370 (1824); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory […], and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law"; see also Douglas W. Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238, 242, 252 (1988) ("we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States. […] It is therefore unclear which constitutional power of Congress exercised when it acquired Hawaii by joint resolution.").

"The clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, the President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.' U.S. Const. art. II, §2, cl. 2. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either

purchase or conquest." *Id*., 247. Neither the Joint Resolution of annexation nor the Hawai‘i Admission Act are treaties or conventions.

The failure of the United States to have extinguished Hawaiian Statehood under international law renders these laws in violation of Article VIII of the 1849 Hawaiian-United States Treaty, 9 Stat. 977, 979, "and each of the two contracting parties engages that the citizens or subjects of the other residing in their respective states, shall enjoy their property and personal security, in as full and ample manner as their own citizens or subjects, or the subjects or citizens of the most favored nation, but **subject always to the laws and statutes of the two countries respectively** (emphasis added)," and Article 43 of the 1907 Hague Regulations, 36 Stat. 2277, 2306, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, **the laws in force in the country** (emphasis added)." According to Professor Eyal Benvinisti, *The International Law of Occupation* 19 (1993):

> The occupant [State] may not surpass its limits under international law through extraterritorial 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 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.

IV. EVIDENTIARY HEARING PURSUANT TO THE *LORENZO* PRINCIPLE

The Hawaiian Kingdom requests an evidentiary hearing pursuant to the *Lorenzo* principle to compel the United States to provide evidence rebutting the presumption of continuity of the Hawaiian Kingdom as a State under international law. Should the United States provide rebuttable evidence acceptable under international law, *i.e.*, treaty of cession, this Court would then be able to consider that it "may lack jurisdiction over this appeal because the order challenged in the appeal may not be final or appealable." Until such time, the presumption of continuity remains and the doctrine of *forum non conveniens* applies.

In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007), the Supreme Court held that a district court can exercise its discretion to immediately consider a motion based upon *forum non conveniens* before taking up jurisdictional issues. Motions of this sort are normally filed by a defendant appellee and not by the plaintiff appellant, but this case is *sui generis*. When the Hawaiian Kingdom filed its Notice of Appeal, it was to be heard by an Article II Court of Appeals to be hereafter established by the United States as an Occupying Power. It was the Clerk for the District Court of Hawai'i that transferred the appeal to the Ninth Circuit and not the Hawaiian Kingdom.

Although the facts and laws in this motion to dismiss based on *forum non conveniens* are in favor of dismissal, the Hawaiian Kingdom invokes the *Lorenzo* principle to compel the United States to provide rebuttable evidence of the Hawaiian Kingdom's continued existence as a State. The international rule of the presumption of continuity is international law and, therefore, is an accepted part of American law that must be applied by federal courts. See *The Paquette Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States*, §111(3) ("customary international law must be enforced in U.S. courts even in the absence of implementing legislation or whether they appear in a treaty").

There have been seventeen federal cases that applied the *Lorenzo* principle in error,[6] two of which have come before the Ninth Circuit, and the United States should be compelled to prove with rebuttable evidence that the federal courts were **NOT** in error. On a broader level, failure to do so consequently renders all federal

[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.

court decisions, whether as an Article III Court since 1959 or as an Article IV Court since 1900, null and void because the presumption of Hawaiian State continuity was triggered on January 17, 1893, and, therefore, remains under international law.

In *Shillaber v. Waldo et al.*, 1 Haw. 31, 32 (1848), Chief Justice William Lee stated, "[i]n the language of another, 'Let justice be done though the heavens fall.' Let the laws be obeyed, though it ruin every judicial and executive officer in the Kingdom. Courts may err. Clerks may err. Marshals may err—they do err in every land daily; but when they err let them correct their errors without consulting pride, expediency, or any other consequences."

V. CONCLUSION

For the foregoing reasons, the Notice of Appeal should be dismissed under *forum non conveniens* unless the United States provides rebuttable evidence to the presumption of continuity of the Hawaiian Kingdom as a State, the absence of which the presumption remains.

DATED: Honolulu, Hawai'i, May 20, 2022.

Respectfully submitted,

/s/ Dexter K. Ka'iama

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