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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

HAWAIIAN KINGDOM,

Plaintiff,

v.

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

Defendants.

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

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER [ECF 244] DENYING PLAINTIFF'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE JULY 28, 2022, ORDER [ECF 238] AND TO STAY PROCEEDINGS PENDING APPEAL, AND TO SCHEDULE AN EVIDENTIARY HEARING IN ACCORDANCE WITH THE *LORENZO* PRINCIPLE; CERTIFICATE OF SERVICE

PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER [ECF 244] DENYING PLAINTIFF'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL THE JULY 28, 2022, ORDER [ECF 238] AND TO STAY PROCEEDINGS PENDING APPEAL, AND TO SCHEDULE AN EVIDENTIARY HEARING IN ACCORDANCE WITH THE *LORENZO* PRINCIPLE

Plaintiff moves the Court to reconsider its August 15, 2022 Order [ECF 244] denying Plaintiff's motion to certify for interlocutory appeal under Local Rule 60.1(c) on the grounds of manifest error of law or fact resulting from the application of judicial estoppel that precludes the Federal Defendants' cross-motion to dismiss and precludes the Court's granting of that motion as evidenced in *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919, and to schedule an evidentiary hearing in accordance with the *Lorenzo* principle. The Federal Defendants cannot blow hot and cold when dealing with the same issue in a previous proceeding. The reasons are set forth in the attached memorandum.

DATED: Honolulu, Hawai'i, August 24, 2022.

Respectfully submitted,

/s/ Dexter K. Ka'iama

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES……………………………………………………….ii

MEMORANDUM OF POINTS AND AUTHORITES……………………………1

I. INTRODUCTION………………………………………………...........3

II. STANDARD FOR INVOKING JUDICIAL ESTOPPEL ……………8

1. The parties' later position must be "clearly inconsistent" with their earlier position ………………………10

2. The party succeeded in persuading a court to accept that party's later position, so that judicial acceptance of an inconsistent position in a previous proceeding would create the perception that either the first or the second court was misled……………………………………...16

3. The parties asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped………...20

III. CONCLUSION………………...23

TABLE OF AUTHORITIES

Page(s)

CASES:

United States

Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982)....................................22

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002)......................23

Bethesda Lutheran Homes & Servs., Inc. v. Born,
238 F.3d 853 (7th Cir. 2001)...22

Carrasca v. Pomeroy, 313 F.3d 828 (3d Cir. 2002)...22

David v. Wakelee, 156 U.S. 680 (1895)..7

Erie R.R. v. Tompkins, 30 U.S. 64 (1938).....................................7, 14, 20, 23

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001)...............8

New Hampshire v. Maine, 532 U.S. 742 (2001)......................................7, 8, 9

Patriot Cinemas, Inc. v. Gen. Cinema Corp.,
834 F.2d 208 (1st Cir. 1987)...21

Rissetto v. Plumbers & Steamfitters Local 343,
94 F.3d 597 (9th Cir. 1996)..23

Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214 (6th Cir. 1990).........................22

Texaco Inc. v. Duhé, 274 F.3d 911 (5th Cir. 2001)..22

Total Petroleum, Inc. v. David, 822 F.2d 734 (8th Cir. 1987)...........................22

United States v. Goo, 2002 U.S. Dist. LEXIS 2919............................2, 3, 14, 16

United States v. Lorenzo, 995 F.2d 1448, *1455;
1993 U.S. App. LEXIS 10548...4, 14

Young v. United States Dep't of Justice, 882 F.2d 633 (2d Cir. 1989)……………22

State of Hawai'i

State of Hawai'i v. Araujo, 103 Haw. 508 (Haw. App. 2004)……………………..15

State of Hawai'i v. Armitage, 132 Haw. 36;
319 P.3d 1044 (2014)……………………………………………………………….5

State of Hawai'i v. French, 77 Hawai'i 222;
883 P.2d 644 (Ct. App. 1994)…………………………………………….........2

State of Hawai'i v. Lee, 90 Haw. 130, 142;
976 P.2d 444 (Haw. App. 1999)……………………………………………………4

State of Hawai'i v. Lorenzo, 77 Hawai'i 219;
883 P.2d 641 (Ct. App. 1994)………………………………...................2, 4, 5, 10

TREATIES:

1907 *Hague Convention on the Pacific Settlement of International Disputes*, I, 36 Stat. 2199 (1907)……………………………………20

UNITED STATES STATUTES:

§34 of the Federal Judiciary Act of September 24, 1789,
28 U.S.C. §1652……………………………………………………...14, 20, 23

RULES:

Federal Rule of Civil Procedure……………………………………………15, 20

Local Rule 60.1(c)……………………………………………………………1, 24

OTHER AUTHORITIES:

Ian Brownlie, *Principles of Public International Law* (4th ed. 1990)……………...6

Black's Law Dictionary (6th ed. 1990)…………………………………….........3

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* (2020)…………………...6

James Crawford, *The Creation of States in
International Law* (2nd ed. 2006)……………………………………………..6

Nicole C. Frazier, "Reassessing the Doctrine of Judicial Estoppel:
The Implications of the Judicial Integrity Rationale," 101 *Virginia
Law Review* 1501 (September 2015)…………………………………………....8

Douglas Kmiec, "Legal Issues Raised by Proposed
Presidential Proclamation to Extend the Territorial Sea,"
12 *Opinions of the Office of Legal Counsel* 238 (1988)………………………11, 12

*Restatement (Third) of the Foreign Relations Law
of the United States*……………………………………………………18, 19

Westel Woodbury Willoughby, *The Constitutional Law
of the United States*, vol. 1 (1910)…………………………………………...13

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff moves the Court to reconsider its August 15, 2022 Order [ECF 244] denying Plaintiff's motion to certify for interlocutory appeal under Local Rule 60.1(c) on the grounds of manifest error of law or fact resulting from the application of judicial estoppel, and to schedule an evidentiary hearing in accordance with the *Lorenzo* principle.

I. INTRODUCTION

At issue in *United States v. Goo*[1] was an interlocutory order by Judge Leslie Kobayashi, who at the time was the Magistrate Judge, that was appealed by the defendant before District Court Judge David Ezra. Judge Ezra stated:

> Defendant Goo provides no evidence or any argument whatsoever that the Magistrate's order was "clearly erroneous or contrary to law." Defendant Goo's only argument is that he is a Hawaiian subject within the Domain of the Hawaiian Kingdom, and thus, not subject to the laws of the United States, or the orders of this federal court. As a citizen of the Hawaiian Kingdom ("Kingdom"), Defendant seems to claim he is immune from suit or judgment in any court of the United States or the State of Hawaii. Defendant contends that the State is illegally occupying the Kingdom, and thus the laws of the Kingdom should govern his conduct rather than any state or federal laws. Therefore, Defendant opposes an order from a federal court forcing him to pay "foreign" taxes through a foreclosure mechanism.
>
> The court finds that Defendant has failed to provide any viable legal or factual support for his claim that as a citizen of the Kingdom he is not subject to the jurisdiction of the courts. 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

[1] *United States v. Goo*, 2002 U.S. Dist. LEXIS 2919.

Lorenzo, 883 P.2d at 643). This court sees no reason why it should not adhere to the *Lorenzo* principle.[2]

Judge Ezra concluded that "[f]or the reasons stated above, the court AFFIRMS Magistrate Judge Kobayashi's Order Dated September 26, Granting United States' Motion To Have Creative Signs and Graphics Pay Rent To The United States."[3] The *Lorenzo* principle should not be confused with a final decision. A principle is "a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure or legal determination."[4]

The Federal Defendants who are the United States, and, therefore, were the Plaintiff in *Goo*, did not object to Judge Ezra's application and adherence to the *Lorenzo* principle. The Federal Defendants benefitted by the court's adherence and application of the *Lorenzo* principle because Goo did not provide a "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."[5] If Goo had provided evidence according to the evidentiary standard set by the *Lorenzo* principle, he would have prevailed and, consequently, be "immune from suit or judgment in any court of the United States or the State of Hawaii."

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[2] *Id.*, *3.
[3] *Id.*
[4] Black's Law Dictionary (6th ed. 1990), 1193.
[5] *Goo*, *4.

This is acknowledged by Judge Ezra when he cited the *Lorenzo* court that stated, "presently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state." In other words, "presently" was applied by the *Lorenzo* court because, as a principle, "it was incumbent on Defendant to present evidence supporting his claim. *United States v. Lorenzo*. Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state."[6] Like Goo, Lorenzo made the argument but did not provide evidence, whether of a factual or legal basis, in support of his argument. The *Lorenzo* court used the word "presently" because it is an open legal question and not a question that has been answered in the affirmative. The ICA stated in a subsequent case that the *Lorenzo* court "suggested that it is an open legal question whether the "[Hawaiian Kingdom]" **still exists** (emphasis added)."[7] The operative word here is "still exists," which means the *Lorenzo* court was referring to the the Hawaiian Kingdom from the nineteenth century and whether or not it "still exists." It was not referring to the so-called kingdom(s) or nations, which are a part of the political sovereignty movement of today.

The *Lorenzo* principle also separates the sovereignty movement and nation building from the continued existence of the Hawaiian Kingdom as a State. The

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[6] *State of Hawai'i v. Lorenzo*, 77 Haw. 219, 221; 883 P.2d 641, 642 (Haw. App. 1994).
[7] *State of Hawai'i v. Lee*, 90 Haw. 130, 142; 976 P.2d 444, 456 (Haw. App. 1999).

Hawai‘i Supreme Court, in *State of Hawai‘i v. Armitage*,[8] not only clarified this evidentiary burden but also discerned between a new native 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.[9]

However, the *Lorenzo* court also acknowledged that it may have misplaced the burden of proof and what needs to be proven. It stated, "[a]lthough the court's rationale is open to question in light of international law, the record indicates that the decision was correct because Lorenzo did not meet his burden of proving his defense of lack of jurisdiction."[10] 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 and what is to be proven. According to Judge Crawford, there "is a presumption that the State continues to exist, with its

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[8] *State of Hawai‘i v. Armitage*, 132 Haw. 36, 57; 319 P.3d 1044, 1065 (2014).
[9] *Id.*, 57; 1065.
[10] *State of Hawai‘i v. Lorenzo*, 221, 643.

rights and obligations […] despite a period in which there is no, or no effective, government,"[11] and belligerent occupation "does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State."[12] "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 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."[13] Addressing the presumption of State continuity after hostilities ceased in Europe during the Second World War, Professor Brownlie explains:

> 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 [its independence and sovereignty] 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.[14]

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[11] James Crawford, *The Creation of States in International Law* 34 (2nd ed. 2006).
[12] *Id*.
[13] 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).
[14] Ian Brownlie, *Principles of Public International Law* 109 (4th ed. 1990).

The first amended complaint was filed under the international rule of the presumption of continuity of the Hawaiian Kingdom as a State.

As a continuing legal question to be determined by evidence of a factual or legal basis, the Federal Defendants are precluded from stating "the Court lacks jurisdiction over Plaintiff's claims because they emanate from a theory of 'Hawaiian sovereignty' which this Court and the Ninth Circuit have rejected numerous times as frivolous."[15] The Federal Defendants appear to conflate the continued existence of the Hawaiian Kingdom as a State with the sovereignty movement and nation building, which the latter has no application in these proceedings. The Supreme Court declared, "the federal courts are bound to recognize an asserted rule of state law where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality."[16] Therefore, the Hawai'i Supreme Court, in *State of Hawai'i v. Armitage*, did assert the evidentiary rule with "sufficient definiteness and finality."

When a party "assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."[17] While *Goo* is a different proceeding from

[15] Scheduling Conference Statement of the United States of America [ECF 247, 2].
[16] *Erie R.R. v. Tompkins,* 30 U.S. 64 (1938).
[17] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *David v. Wakelee*, 156 U.S. 680, 689 (1895)).

Hawaiian Kingdom v. Biden, et al., judicial estoppel can apply to a second proceeding, where "the first proceeding need not have been a complete case; rather it may have taken a variety of forms—from a complete court case, to a pleading, to a sworn statement made to an administrative agency."[18]

According to the Ninth Circuit, "[j]udicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position."[19] The Ninth Circuit also stated that it "invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'"[20]

II. STANDARD FOR INVOKING JUDICIAL ESTOPPEL

In *New Hampshire*, the Supreme Court noted that "several factors typically inform the decision whether to apply the doctrine in a particular case."[21] First, "a party's later position must be 'clearly inconsistent' with its earlier position.[22]

[18] Nicole C. Frazier, "Reassessing the Doctrine of Judicial Estoppel: The Implications of the Judicial Integrity Rationale," 101 *Virginia Law Review* 1501, 1502 (September 2015).
[19] *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).
[20] *Id*.
[21] *New Hampshire*, 750.
[22] *Id*.

Second, the party "has succeeded in persuading a court to accept that party's [later] position, so that judicial acceptance of an inconsistent position in a [previous] proceeding would create the perception that either the first or the second court was misled."[23] And third, if the parties asserting the inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[24] Judicial estoppel precludes the Federal Defendants' from claiming in its cross-motion to dismiss the first amended complaint that this case presence a political question because by doing so it prevents an evidentiary hearing the *Lorenzo* principle calls for. Unlike Goo, the Plaintiff has evidence, both legal and factual, that the Hawaiian Kingdom continues to exist as a State.

In the previous proceeding in *Goo*, the court merely found that the defendant provided no evidence for his argument pursuant to the standard set by the *Lorenzo* court. In other words, the *Goo* court's adherence to the *Lorenzo* principle was evidence based, which the defendant failed to provide, whether factual or legal, that the Hawaiian Kingdom continues to exist as a State. There can be no doubt that the Federal Defendants benefitted by the *Goo* court's "adhere[nce] to the *Lorenzo* principle" where the defendant failed to provide evidence of the Hawaiian Kingdom's existence as a State. If Goo did provide evidence that the Hawaiian

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[23] *Id.*, 743.
[24] *Id.*, 751.

Kingdom still exists as a State, it would have rendered the *Goo* court without jurisdiction to affirm "an order from a federal court forcing him to pay "foreign" taxes through a foreclosure mechanism."

Whether under the *Lorenzo* court's rationale that the burden is on the defendant to prove the Hawaiian Kingdom exists as a State, or under international law, as the *Lorenzo* court acknowledged, the opposing party provides rebuttable evidence as to the presumption of Hawaiian State continuity, the standard is evidence based where the Federal Rules of Evidence apply. According to the *Lorenzo* court, the court's jurisdiction "is a question of law."[25] As such, it precludes the application of the political question doctrine because under this doctrine it is presumed that the question is not a legal question governed by a principle or doctrine.

1. The parties' later position must be "clearly inconsistent" with their earlier position

Since the beginning of these proceedings, the jurisdiction of the Court was always at issue. This was acknowledged by Judge Kobayashi in her first Order of March 30, 2022, granting in part and denying in part Defendant Nervell's motion to dismiss [ECF 222]. She stated, "Plaintiff argues that '[b]efore the Court can address the substance of [Nervell's] motion to dismiss it must transform itself in an Article II Court…." [Mem. in Opp. at 19-20.] Plaintiff bases this argument on the

[25] *State of Hawai'i v. Lorenzo*, 220, 642.

proposition that the Hawaiian Kingdom is a sovereign and independent state."[26] [ECF 222, 3].

In their cross-motion to dismiss the first amended complaint, the Federal Defendants argued that "Plaintiff's claims and assertions lack merit. The United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959." This statement is clearly inconsistent with the Federal government's 1988 Office of Legal Counsel ("OLC") legal opinion regarding the annexation of Hawai'i. The OLC's memorandum opinion was written for the Legal Advisor for the Department of State regarding legal issues raised by the proposed Presidential proclamation to extend the territorial sea from a three mile limit to twelve.[27] The OLC concluded that only the President and not the Congress possesses "the constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."[28] The OLC further stated, "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."[29] Therefore, he stated it is "unclear which constitutional power

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[26] Order Granting in Part and Denying in Part Defendant Nervell's Motion to Dismiss [ECF 222].
[27] Douglas Kmiec, "Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea," 12 *Opinions of the Office of Legal Counsel* 238 (1988).
[28] *Id.*, 242.
[29] *Id.*

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."[30] That territorial sea was extended from three to twelve miles under the United Nations Law of the Sea Convention. In other words, the Congress could not extend the territorial sea by nine miles because its authority was limited up to the three-mile limit. As Justice Marshall stated, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"[31] and not the Congress.

Arriving at this conclusion, the OLC cited constitutional scholar Professor Willoughby, "[t]he constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. …Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature enacted it."[32] Professor Willoughby also stated, "The incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is…essentially a matter falling within the domain of international relations, and,

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[30] *Id.*, 262.
[31] *Id.*, 242.
[32] *Id.*, 252.

therefore, beyond the reach of legislative acts."[33] If it is unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution," it would be equally unclear how the Congress could establish the State of Hawaiʻi in 1959, which is beyond the twelve-mile territorial sea. Therefore, the Federal Defendants are estopped from claiming the "United States annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959," in light of the OLC's legal opinion, which has not been superseded by another OLC opinion.

The Federal Defendants argued that the Court "lack[s] subject matter jurisdiction when a claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy with the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues.'"[34] This statement is clearly inconsistent with *Goo* and the *Lorenzo* principle and State of Hawaiʻi common law. The Federal Defendants, whether deliberately or not, omit *Goo* in their cross-motion to dismiss first amended complaint and, instead, selectively cite cases as if it were federal

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[33] Westel Woodbury Willoughby, *The Constitutional Law of the United States*, vol. 1, 345 (1910).

[34] Federal Government Defendants' Cross-Motion to Dismiss the First Amended Complaint [ECF 188], 5.

common law.[35] §34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. §1652,[36] and *Erie*[37] precludes this attempt.

When the Federal Defendants cited the Ninth Circuit, in *United States v. Lorenzo*, they conveniently omit the court stating that "[t]he appellants have presented no evidence that the Sovereign Kingdom of Hawaii is currently recognized by the federal government,"[38] which led to its conclusion "rejecting claim that defendants were citizens of the Sovereign Kingdom of Hawaii."[39] Federal Defendants attempt to use the latter statement of the court as if the Ninth Circuit was responding to a frivolous claim.

In *Goo*, the court stated, "[t]he court finds that Defendant has failed to provide any viable legal or factual support for his claim that as a citizen of the Kingdom he is not subject to the jurisdiction of the courts."[40] And in *State of Hawai'i v. Araujo*, the ICA made it clear, "[b]ecause Araujo has not, either below or on appeal, 'presented [any] factual (or legal) basis for concluding that the Kingdom exists as a

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[35] Cross-Motion to Dismiss [ECF 188], 6 n. 3.
[36] 28 U.S.C. §1652 ("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).
[37] *Erie,* 87 ("[F]ederal courts are now bound to follow decisions of the courts of the State in which the controversies arise").
[38] *United States v. Lorenzo*, 995 F.2d 1448, 1456; 1993 U.S. App. LEXIS 10548.
[39] *Id*.
[40] *Goo*, *3.

state in accordance with recognized attributes of a state's sovereign nature,' […] his point of error on appeal must fail."[41] In each of the decisions that applied the *Lorenzo* principle, the courts did not invoke the political question doctrine, and their decisions were made as to the individuality of the defendants and their burden to provide evidence of the Hawaiian Kingdom's existence as a State, which bolstered the *Lorenzo* principle as an open legal question.

Further, by seeking dismissal under Rule 12(b)(1) on subject matter jurisdictional grounds by invoking the political question doctrine, Federal Defendants attempt to prevent this Court from having an evidentiary hearing because without subject matter jurisdiction the Court is unable to adhere to the *Lorenzo* principle that warrants an evidentiary hearing.

The Federal Defendants' refusal to adhere to the *Lorenzo* principle's evidentiary burden and standard is "clearly inconsistent" with their previous position in *Goo*, where there was an evidentiary burden placed on the defendant to prove the Hawaiian Kingdom exists as a State. The *Lorenzo* principle places the Federal Defendants in the same position as Goo, but rather proving the Hawaiian Kingdom exists as a State, they must prove with evidence that the Hawaiian Kingdom does not exist as a State. The Federal Defendants' mere statement that the "United States

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[41] *State of Hawai'i v. Araujo*, 103 Haw. 508 (Haw. App. 2004).

annexed Hawaii in 1898, and Hawaii entered the union as a state in 1959" is subject to rebuttable evidence by the Plaintiff, which it has provided in these proceedings.

Further, if this statement had any merit, the *Goo* court would not have any reason to "adhere to the *Lorenzo* principle." Surely, Judge Ezra knew that Hawai'i was annexed in 1898 and became the State of Hawai'i in 1959 when he presided over *Goo*, but as a legal question and not a question of convenience, the *Lorenzo* principle obliged the defendant to provide rebuttable evidence, whether factual or legal, that the annexation and the establishment of the State of Hawai'i was not lawful because the Hawaiian Kingdom still exists as a State.

The Federal Defendants, as the United States in *Goo*, did not contest Judge Ezra's "adher[ence] to the *Lorenzo* principle," where they prevailed in its suit against Goo.

2. The party succeeded in persuading a court to accept that party's later position, so that judicial acceptance of an inconsistent position in a previous proceeding would create the perception that either the first or the second court was misled

The Federal Defendants have persuaded Judge Kobayashi that this Court lacks subject matter jurisdiction over Plaintiff's claims because of the political question doctrine. In her Order of June 9, 2022, granting the Federal Defendants' cross-motion to dismiss the first amended complaint, Judge Kobayashi stated, "Hawaii is a state of the United States …. The Ninth Circuit, this court, and Hawaii state courts

have rejected arguments asserting Hawaiian sovereignty,"[42] and concluded without providing any evidence supporting the Court's position, "'[T]here is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.'"[43] This is not an accurate statement by the Court. A more accurate statement would be that "[t]he Ninth Circuit, this court, and Hawaii state courts" ruled that the defendants in each of these cases failed to have "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" pursuant to the *Lorenzo* principle.

The Court then sides with the Federal Defendants argument that evidence of the Hawaiian Kingdom's existence is irrelevant. In their cross-motion to dismiss, the Federal Defendants state, "[t]he premise underlying all of Plaintiff's claims is that Defendants have failed to recognize Plaintiff as the true sovereign government of Hawaii. That is an axiomatic political question. The Court has no authority to answer such a question, **regardless of the evidence Plaintiff proffers to support it (such as Mr. Lenzerini's legal opinion)** (emphasis added)."[44] This statement is also false and misleading because the Plaintiff is not seeking recognition "as the true sovereign

[42] Order Granting the Federal Defendants' Cross-Motion to Dismiss the First Amended Complaint [ECF 234], 5.
[43] *Id*.
[44] U.S. Cross-Motion to Dismiss [ECF 188], 7.

government of Hawaii," because according to *Restatement (Third) Foreign Relations Law of the United States*, "[w]here a new administration succeeds to power in accordance with a state's constitutional processes, no issue of recognition or acceptance arises; **continued recognition is assumed** (emphasis added)."[45] As a successor to Queen Liliʻuokalani in accordance with the constitution and laws of the Hawaiian Kingdom, the Council of Regency does not require recognition by the United States, unless the Federal Defendants can provide evidence that the Council of Regency was not established "in accordance with [the Hawaiian Kingdom's] constitutional process."

In 1999, the Permanent Court of Arbitration acknowledged the Hawaiian Kingdom's continued existence as a State in accordance with Article 47 of the 1907 Hague Convention on the Pacific Settlement of International Disputes ("PCA Convention," and the Council of Regency as its government.[46] As a Contracting State to the PCA Convention, the United States did not object to the PCA's acknowledgment,[47] and, therefore, are precluded from denying the existence of the Hawaiian State and the Council of Regency as its government.

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[45] *Restatement (Third) of the Foreign Relations Law of the United States*, §203, comment c.
[46] First Amended Complaint [ECF 55], para. 96-98.
[47] *Id*., para. 99.

Furthermore, since the United States recognized the Hawaiian Kingdom as a State in the nineteenth century, the United States is precluded from derecognizing it. *Restatement (Third) of the Foreign Relations Law of the United States*, also states, "[t]he 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.'** If the entity ceases to meet those requirements, it ceases to be a state and derecognition is not necessary (emphasis added)."[48] By applying international law, the *Lorenzo* principle places the burden on the Federal Defendants to provide any factual (or legal) basis for concluding that the Kingdom "ceases to be a state," and not that it derecognized it.

Notwithstanding the law on this subject, the Court affirmed the Federal Defendants false argument, by stating in her Order that "Plaintiff's claims are 'so patently without merit that the claim[s] require[ ] no meaningful consideration."[49] The Court's statement that Plaintiff's claims are without merit is made in a vacuum with no supporting law or evidence except for citing what the Federal Defendants call federal common law, in an attempt to supersede State of Hawai'i common law.

Furthermore, Federal Defendants also attempt to treat *Sai v. Clinton* as a precedent case because the court dismissed the complaint as a political question.[50]

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[48] *Restatement (Third)*, §202, comment g.
[49] Order [ECF 234], 5.
[50] U.S. Cross-Motion to Dismiss (ECF 188], 7.

In *Sai*, the court erred because it did not comply with §34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. §1652, *Erie*, and the *Lorenzo* principle. Therefore, Federal Defendants are precluded from claiming *Sai* as precedent.

Did the Federal Defendants, as the United States in *Goo*, mislead the court by allowing the court to answer the question as to whether Goo could provide evidence that the Hawaiian Kingdom exists as a State which would have vindicated his argument "that the State is illegally occupying the Kingdom, and thus the laws of the Kingdom should govern his conduct rather than any state or federal laws." Or did the Federal Defendants, in these proceedings, mislead the Court that it cannot answer the question as to whether the Hawaiian Kingdom continues to exist as a State, or has it been extinguished by the United States because it presents a political question. Plaintiff takes the position that it is the latter.

3. The parties asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped

In their cross-motion to dismiss, Federal Defendants argue, "[t]his Court may, with or without a motion, dismiss a complaint over which it has no jurisdiction. Fed. R. Civ. P. 12(h)(3). The Court should exercise its authority to dismiss the entire complaint here on one of the jurisdictional grounds noted above, which would also vindicate the interest of the United States in protecting consular officials from civil

lawsuits arising from their official conduct."[51] The Court bases the dismissal on the political question argument that would prevent the *Lorenzo* principle and an evidentiary hearing from arising. The Court states, "Plaintiff's claims against the Federal Defendants necessarily involve a political question beyond the jurisdiction of the Court. Thus, no amendment could cure the defects with Plaintiff's claims against the Federal Defendants."[52] The Court then concludes the "[d]ismissal is therefore with prejudice." This smacks of one party, with the Court' support, making arguments without proffering any supporting evidence, and then convincing the Court that it cannot consider Plaintiff's evidence that counters these arguments because it lacks subject matter jurisdiction. This is an attempt by the Federal Defendants to make an end run on the football field and argue the Plaintiff cannot tackle them. This an attempt by the Federal Defendants to overcome a difficulty without directly confronting it, which is precisely why judicial estoppel applies.

Judicial integrity is the primary function of judicial estoppel and applies in these proceedings. According to the First Circuit, judicial estoppel is to be used "when a litigant is 'playing fast and loose with the courts,' and when 'international self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'"[53] The Second Circuit states that judicial

[51] U.S. Cross-Motion to Dismiss [ECF 188], 14.
[52] Order [ECF 234], 7.
[53] *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

estoppel "is supposed to protect judicial integrity by preventing litigants from playing fast and loose with courts, thereby avoiding unfair results and unseemliness."[54] The Third Circuit established a requirement that "the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority and integrity."[55] The Fourth Circuit applies judicial estoppel to prevent litigants from "blowing hot and cold as the occasion demands."[56] According to the Fifth Circuit, "[l]itigants undermine the integrity of the judicial process when they deliberately tailor contradictory (as opposed to alternate) positions to the exigencies of the moment."[57] The Sixth Circuit states that judicial estoppel "preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."[58] The Seventh Circuit seeks to have judicial estoppel "to protect the judicial system from being whipsawed with inconsistent arguments."[59] The Eighth Circuit says, "[t]he purpose of judicial estoppel is to protect the integrity of the judicial process. As we read the caselaw, this is tantamount to a knowing misrepresentation to or even fraud on the court."[60]

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[54] *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989).
[55] *Carrasca v. Pomeroy*, 313 F.3d 828, 835 (3d Cir. 2002).
[56] *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n. 3 (4th Cir. 1982).
[57] *Texaco Inc. v. Duhé*, 274 F.3d 911, 923 (5th Cir. 2001).
[58] *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990).
[59] *Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853 (7th Cir. 2001).
[60] *Total Petroleum, Inc. v. David*, 822 F.2d 734, 737 n. 6 (8th Cir. 1987).

The Ninth Circuit allows judicial estoppel to preclude "a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."[61] Observing that for judicial estoppel to apply, according to the Eleventh Circuit, the "inconsistencies must be shown to have been calculated to make a mockery of the judicial system."[62]

This inconsistent position taken by the Federal Defendants to completely disregard the doctrine that courts shall adhere to precedent in making their decisions—*stare decisis,* has placed the Plaintiff in an unfair position. These proceedings do not present a legal issue that has never been decided by the Ninth Circuit jurisdiction, and, therefore, is not a case of first impression. Further, Federal Defendants' arguments violate §34 of the Federal Judiciary Act of September 24, 1789, 28 U.S.C. §1652, and *Erie*, which has imposed an unfair detriment on the Plaintiff if not estopped.[63]

III. CONCLUSION

If the Federal Defendants are confident that "Plaintiff's claim and assertions lack merit," then let them make their case that the Hawaiian Kingdom "ceases to be a state" under international law pursuant to the *Lorenzo* principle that the *Goo* court

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[61] *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996).
[62] *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002).
[63] Plaintiff's Supplement to Motion to Certify for Interlocutory Appeal [ECF 243].

adhered to. But they cannot prevail by having the Court muzzle the Plaintiff in its own case seeking justice under the rule of law.

For these reasons, the Plaintiff respectfully requests that the Court reconsider its August 15, 2022 Order [ECF 244] denying Plaintiff's motion to certify for interlocutory appeal under Local Rule 60.1(c) on the grounds of manifest error of law or fact as a result of judicial estoppel, and to schedule an evidentiary hearing in accordance with the *Lorenzo* principle.

DATED: Honolulu, Hawai‘i, August 24, 2022.

Respectfully submitted,

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