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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HELICOPTER ASSOCIATION INTERNATIONAL, SAFARI AVIATION, INC. dba SAFARI HELICOPTERS HAWAI`I Plaintiffs, vs. STATE OF HAWAI'I, DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, EDWIN SNIFFEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE HAWAII DEPARTMENT OF TRANSPORTATION; Defendants.	CIV. NO. 23-00083 LEK-WRP

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

On May 12, 2023, Defendants State of Hawai`i ("the State"), Hawai`i Department of Transportation ("DOT"), and Edwin Sniffen, in his official capacity as Director of DOT ("Sniffen" and collectively "Defendants") filed their Motion to Dismiss First Amended Complaint Under FRCP Rules 12(b)(1) and 12(b)(6) ("Motion"). [Dkt. no. 21.] Plaintiffs Helicopter Association International ("Helicopter Association") and Safari Aviation, Inc. doing business as Safari Helicopters Hawai`i ("Safari" and collectively "Plaintiffs") filed their memorandum in opposition to the Motion on September 8, 2023. [Dkt. no. 26.] On September 15, 2023, Defendants filed their reply. [Dkt.

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no. 28.] This matter came on for hearing on September 29, 2023. Defendants' Motion is hereby granted in part and denied in part for the reasons set forth below.

BACKGROUND

The operative pleading is Plaintiffs' First Amended Complaint, filed on May 8, 2023 ("Amended Complaint"). [Dkt. no. 20.] Helicopter Association is a "non-profit membership and trade organization that represents and serves the interests of helicopter operators around the world[,]" including in Hawai`i. [Id. at ¶ 14.] Safari is a member of Helicopter Association, and operates air tours in Hawai`i. [Id. at ¶ 15.]

In 1990, Safari and other operators filed an action in this district court against the State, DOT, the then-DOT director, and the then-DOT Airports Administrator, seeking declaratory and injunctive relief that Act 397[1] was preempted by the Federal Aviation Act of 1958 ("FAA"), the Airline Deregulation Act of 1978 ("ADA"), and other federal statutes. [Amended Complaint, Exh. 3 (Verified Complaint for Declaratory and Injunctive Relief ("1990 Complaint"), filed in Haw. Helicopter Ass'n, Inc., et al. v. State of Hawai`i, et al., CV 90-0039 ACK ("1990 Action")) at ¶¶ 1-2.] In March 1994, the

[1] Act 397 was enacted by the Hawai`i State Legislature in 1998. 1998 Haw. Sess. Laws Act 397. The new section that enacted was codified at Haw. Rev. Stat. § 261-13.6, and it made amendments to Haw. Rev. Stat. § 261-12(b).

district court approved the parties' Stipulation for Dismissal with Prejudice of All Claims and All Parties ("Stipulation for Dismissal"). [Id., Exh. 2 (Stipulation for Dismissal).] The Stipulation for Dismissal provided:

> the State of Hawaii shall promulgate agency rules amending Hawaii Administrative Rules, Chapter 19-34, and clarifying that Hawaii Revised Statutes, section 261-12 **will not be applied in any manner that is inconsistent with, or contrary to, the [FAA]**, as amended, together with the Federal Aviation Regulations promulgated thereunder.

[Id. at 2 (emphasis added).]

In July 2022, Act 311 (originally introduced as Senate Bill No. 3272) was enacted. 2022 Haw. Sess. Laws Act 311. Among other things, Act 311 amended Haw. Rev. Stat. § 261-12(b) to read in relevant part:

> [N]o tour aircraft operation shall be permitted in any airport under the State's control without having a permit. The director shall adopt rules to regulate tour aircraft operations by permit, which shall include but not be limited to:
>
> . . . .
>
> (8) Submission of monthly written reports to the department, which shall be made available to the public, of each tour operation that occurred during the duration of the preceding month, including:
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> (A) The date and time that the aircraft took off and landed;
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> (B) The number of individuals aboard the aircraft during the operation;

> (C) The flight path from takeoff through landing; and;
>
> (D) Whether the aircraft deviated from its intended flight plan[.]

Id., § 2 at 945-46.

Plaintiffs challenge the monthly reporting requirements imposed in Act 311 on two grounds: as a violation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2 due to field and conflict preemption; and as a violation of the 1994 Stipulation for Dismissal in the 1990 Action. [Amended Complaint at ¶¶ 4-12.]

Plaintiffs allege the following claims against Defendants: (1) a declaratory judgment claim against the State and Sniffen regarding field preemption ("Count I"); (2) a declaratory judgment claim against the State and Sniffen regarding conflict preemption with the FAA, 49 U.S.C. § 106, and the Aircraft Noise and Capacity Act of 1990, 49 U.S.C. § 47521, *et seq.* ("ANCA") ("Count II"); (3) a declaratory judgment claim against the State and Sniffen regarding preemption under the ADA ("Count III"); (4) a declaratory judgment claim against the State and Sniffen regarding preemption under the ANCA ("Count IV"); and (5) a claim against Defendants seeking specific performance of the 1994 Stipulation for Dismissal or a permanent injunction requiring them to comply with the 1994 Stipulation for Dismissal ("Count V").

Defendants' Motion asks this Court to dismiss the Amended Complaint because the Eleventh Amendment bars Plaintiffs' claims, and the claims are not ripe. Further, Defendants argue Count V should be dismissed because it fails as matter of law. [Motion at 2.]

STANDARD

I. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) authorizes a defendant to move for dismissal of an action for "lack of subject-matter jurisdiction[.]" "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." Robinson v. United States, 586. F.3d 683, 685 (9th Cir. 2009) (citation and quotation marks omitted). This district court has stated:

> a district court must dismiss a complaint if it lacks subject matter jurisdiction to hear the claims alleged in the complaint. Fed. R. Civ. P. 12(b)(1). A jurisdictional attack pursuant to FRCP 12(b)(1) may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). A facial attack challenges the sufficiency of the allegations contained in a complaint to invoke federal jurisdiction, while a factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id.
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> FRCP 12(b)(1) also requires a district court to dismiss a complaint for lack of subject matter jurisdiction where a plaintiff lacks standing to sue. See Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011) (citations omitted) ("[L]ack of Article III standing requires dismissal for

> lack of subject matter jurisdiction under [FRCP] 12(b)(1).”). When a plaintiff lacks constitutional standing, a suit “is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject matter jurisdiction over the suit.” City of Oakland v. Lynch, 798 F.3d 1159, 1163 (9th Cir. 2015) (quoting Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) (quotations omitted)); City of Los Angeles v. County of Kern, 581 F.3d 841, 845 (9th Cir. 2009).
>
> In determining constitutional standing, the trial court has the authority “to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing.” Maya, 658 F.3d at 1067 (citation and quotations omitted). “For purposes of ruling on a motion to dismiss for want of standing, both trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.” Namisnak v. Uber Techs., Inc., 971 F.3d 1088, 1092 (9th Cir. 2020) (internal quotations omitted) (citations omitted).

Ye Jiang v. Zhong Fang, CIVIL NO. 20-00100 JAO-KJM, 2020 WL 6889169, at *1 (D. Haw. Nov. 23, 2020) (alterations in Ye Jiang).

A. Consideration of Materials Beyond the Pleadings

> For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), the moving party may submit
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> > affidavits or any other evidence properly before the court. . . . It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The

> district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes.
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> St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (citations omitted) . . . .

Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 778 (9th Cir. 2000) (some alterations in Ass'n of Am. Med. Colls.).

II. Federal Rule of Civil Procedure 12(b)(6)

The Ninth Circuit has described the standard applicable to a motion under Rule 12(b)(6) as follows:

> To survive a motion to dismiss for failure to state a claim after the Supreme Court's decisions in Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the [plaintiff's] factual allegations "must . . . suggest that the claim has at least a plausible chance of success." In re Century Aluminum [Co. Sec. Litig.], 729 F.3d [1104,] 1107 [(9th Cir. 2013)]. In other words, their complaint "must allege 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Iqbal, 556 U.S. at 678, 129 S. Ct. 1937).
>
> Following Iqbal and Twombly, . . . we have settled on a two-step process for evaluating pleadings:
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> > First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.

> Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.
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> [Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)] (quoting Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)). In all cases, evaluating a complaint's plausibility is a "context-specific" endeavor that requires courts to "draw on . . . judicial experience and common sense." Id. at 995–96 (internal quotation marks omitted).

Levitt v. Yelp! Inc., 765 F.3d 1123, 1134-35 (9th Cir. 2014) (some alterations in Levitt). This Court is not required to accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

DISCUSSION

I. Count V

In Count V, Plaintiffs allege the monthly reporting requirements and preamble[2] to Senate Bill No. 3272 are inconsistent with the FAA, and thus violate the 1994 Stipulation for Dismissal. [Amended Complaint at ¶¶ 138-42.] Plaintiffs contend that, "[b]y submitting the [Stipulation for Dismissal]

[2] The relevant portion of the preamble states: "the State has the option not to renew a tour aircraft operation permit for any company that repeatedly deviates from flight plans over sensitive areas." [Amended Complaint, Exh. 1 (Senate Bill No. 3272) at PAGEID.360.]

with the settlement terms contained therein for [the district court] to approv[e] and enter, Defendants made the settlement terms part of the record as a Court order." [Mem. in Opp. at 26-27 (citations omitted).] Plaintiffs argue this court has ancillary jurisdiction to enforce the Stipulation for Dismissal. [Id. at 26 (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994)).] Defendants contend Count V should be dismissed for lack of jurisdiction. [Motion, Mem. in Supp. at 13-18.]

Part of Plaintiffs' argument hinges on the district court's alleged express incorporation of the terms of the parties' agreement into the Stipulation for Dismissal. See Mem. in Opp. at 25. Plaintiffs did not provide the terms of the settlement agreement that were allegedly incorporated into the Stipulation for Dismissal to this Court, making is impossible to determine whether the terms of the settlement agreement were substantively incorporated into the Stipulation for Dismissal.

Moreover, at the September 29 hearing, Plaintiffs' counsel conceded that Count V should be dismissed because Count V should have been brought as a continuation of the 1990 Action, not as a separate count in this action. Therefore, Defendants' Motion is granted, insofar as Count V is dismissed without prejudice to refiling in the 1990 Action. The Court

makes no ruling as to whether or not Plaintiffs can seek to reopen the 1990 Action in order to bring Count V.

Because Count V is dismissed, there are no remaining claims alleged against DOT. [Amended Complaint at pgs. 30, 32, 33, 35, 37.]

II. Eleventh Amendment

A. Claims Against the State

The Eleventh Amendment bars claims against the State. Plaintiff alleged Counts I-IV against the State and Sniffen. [Amended Complaint at pgs. 30, 32, 33, 35.] "'The Eleventh Amendment bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity.'" Wilbur v. Locke, 423 F.3d 1101, (9th Cir. 2005) (quoting Yakama Indian Nation v. State of Wash. Dep't of Revenue, 176 F.3d 1241, 1245 (9th Cir. 1999))).[3] Plaintiffs do not oppose dismissal of the State as to Counts I-IV. [Mem. in Opp. at 3 n.3, 5.] Thus, Plaintiffs' claims against the State are dismissed because the State is entitled to sovereign immunity. The dismissal is with prejudice because the claims cannot be saved by amendment. See Hoang v. Bank of Am., N.A., 910 F.3d 1096, 1102 (9th Cir. 2018) ("Dismissal with prejudice and without leave to amend is not appropriate unless

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[3] Wilbur was abrogated on other grounds by Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010).

it is clear . . . that the complaint could not be saved by amendment." (citation and quotation marks omitted)).

B. Claims Against Sniffen

As to Plaintiffs' claims against Sniffen, Defendants argue the State has not waived it sovereign immunity, and, because no rules have been promulgated, Plaintiffs cannot establish a sufficient enforcement nexus regarding Act 311 by Sniffen to establish a viable claim under Ex parte Young, 209 U.S. 123 (1908). [Motion, Mem. in Supp. at 8-9, 12-13.] There is no contention that the State has waived its sovereign immunity with respect to Counts I-IV. Accordingly, to overcome Eleventh Amendment immunity, Plaintiffs must allege a plausible equitable claim under Ex parte Young.

> Under the Ex parte Young exception to Eleventh Amendment immunity, however, "private individuals may sue state officials in federal court for prospective relief from ongoing violations of federal law, as opposed to money damages, without running afoul of the doctrine of sovereign immunity." Koala v. Khosla, 931 F.3d 887, 895 (9th Cir. 2019) (citing Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 254–55 (2011)); see also Ex parte Young, 209 U.S. 123 (1908). Ex parte Young is based on the proposition "that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." Va. Office for Prot. & Advocacy, 563 U.S. at 255 (citation omitted).
>
> In determining whether the Ex parte Young doctrine avoids an Eleventh Amendment bar to suit, a court conducts a "straightforward

> inquiry" into whether the complaint (1) alleges an ongoing violation of federal law, and (2) seeks relief properly characterized as prospective. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment); 521 U.S. at 298–299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting)). . . .

Duke's Invs. LLC v. Char, CIVIL NO. 22-00385 JAO-RT, 2023 WL 3166729, at *6 (D. Hawai`i Apr. 28, 2023).

Further, under Ex parte Young, the state officer "'must have some connection with enforcement of the act.'" Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1134 (9th Cir. 2012) (quoting Ex parte Young, 209 U.S. at 157, 28 S. Ct. 441). The connection requirement is a modest one, and "demands merely that the implicated state official have a relevant role that goes beyond 'a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision.'" Mecinas v. Hobbs, 30 F.4th 890, 903–04 (9th Cir. 2022) (quoting Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 919 (9th Cir. 2004)).

Sniffen meets the modest connection requirement of Ex parte Young. Act 311 requires the DOT Director - *i.e.*, Sniffen - to promulgate rules implementing the reporting requirements. See 2022 Haw. Sess. Laws Act 311, § 2 at 945 ("The director

shall adopt rules to regulate tour aircraft operations by permit . . . ."). As such, Sniffen's role goes beyond a generalized duty to enforce state law, because Act 311 mandates that the agency he directs promulgate specific regulations.

Finally, Defendants argue that Counts I and II must be dismissed because neither count alleges an equitable claim under Ex parte Young. [Motion, Mem. in Supp at 10; Reply at 5.] This argument is meritless. In Counts I and II, Plaintiffs seek declaratory judgments and permanent injunctions regarding ongoing violations of the Supremacy Clause of the United States Constitution. [Amended Complaint at ¶¶ 107-08, 115-16.] These allegations are sufficient to invoke Ex Parte Young. See Kincaid v. City of Fresno, No. 1:06-CV-1445 OWW SMS, 2007 WL 833058, at *4 (E.D. Cal. Mar. 19, 2007); see also Duke's Invs., 2023 WL 3166729, at *6. Plaintiffs' claims against Sniffen in Counts I and II are therefore not barred by the Eleventh Amendment.

Defendants' Motion is denied as to their request to dismiss Plaintiffs' claims in Counts I to IV against Sniffen on Eleventh Amendment grounds.

III. Ripeness

Defendants argue the case is both constitutionally and prudentially unripe because DOT has not finished the rulemaking

process, making the monthly written report requirement currently unenforceable. [Motion, Mem. in Supp. at 18-23.]

> The Supreme Court instructs that ripeness is "peculiarly a question of timing," Regional Rail Reorg. Act Cases, 419 U.S. 102, 140, 95 S. Ct. 335, 42 L.Ed.2d 320 (1974), designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).[4] Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution. See U.S. Const. art. III. Although ripeness, like other justiciability doctrines, is "not a legal concept with a fixed content or susceptible of scientific verification," Poe v. Ullman, 367 U.S. 497, 508, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), the Supreme Court has observed that the doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n. 18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993).

Thomas v. Anchorage Equal Rts. Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000).

Plaintiffs are challenging the monthly reporting requirements codified in Haw. Rev. Stat. § 261-12(b), **not** the rules that § 261-12(b) requires to be promulgated, which are not yet promogulated. See, e.g., Amended Complaint at ¶ 1. Section

[4] Abbott Laboratories was overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). See, e.g., Portman v. Cnty. of Santa Clara, 995 F.2d 898, 902 (9th Cir. 1993).

261-12(b)’s monthly reporting requirements will become enforceable upon DOT’s promulgation of the relevant rules. See § 261-12(b)(8) (stating “[t]he director shall adopt rules to regulate tour aircraft operations by permit,” including the “[s]ubmission of monthly written reports”).

In analyzing ripeness, courts consider the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. See Thomas, 220 F.3d at 1141 (quoting Abbott Laboratories, 387 U.S. at 149, 87 S. Ct. 1507). This Court first examines whether the issues in this case are fit for judicial decision.

> A challenge to a statute or regulation that has not yet been applied is generally considered fit for judicial determination if the issue raised is a “purely legal one,” Abbott Laboratories, 387 U.S. at 149, 87 S. Ct. at 1515, or one which “further factual development will not render more concrete.” Western Oil & Gas [Ass’n v. U.S. Env’t Prot. Agency], 633 F.2d [803,] 808 [(9th Cir. 1980)]; see Gardner v. Toilet Goods Association, 387 U.S. 167, 171, 87 S. Ct. 1526, 1528, 18 L. Ed. 2d 704 (1967). On the other hand, if the issue would be illuminated by the development of a better factual record, the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied. Regional Rail Reorganization Act Cases, 419 U.S. [102,] 143-44, 95 S. Ct. [335,] 358-59 [(1974)]; Pence [v. Andrus], 586 F.2d [733,] 737 & n.12 [(9th Cir. 1978)].

Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n, 659 F.2d 903, 915 (9th Cir. 1981).[5]

Count I is ripe because it alleges field preemption, which is a purely legal issue that does not require further factual development. The question of whether the FAA "occupies the field" does not depend on what regulation DOT will promulgate, making it currently fit for judicial decision. See Sayles Hydro Assocs. v. Maughan, 985 F.2d 451, 454 (9th Cir. 1993).

Count II alleges conflict preemption and Counts III and IV simply allege preemption. Compare Amended Complaint at pg. 32, with id. at pgs. 33, 35. Because Plaintiffs challenge Haw. Rev. Stat. § 261-12(b)'s reporting requirements itself, rather than the content of the eventual DOT regulations, these issues are currently fit for judicial decision. See id. at ¶¶ 1, 110, 121, 130-31. The Court can analyze the language of § 261-12(b) in light of the various federal laws Plaintiff alleges conflicts with § 261-12(b)'s monthly reporting requirements.

Second, the Court considers the hardship to the parties of withholding consideration of the issues presented in

[5] 659 F.2d 903 was affirmed by the United States Supreme Court in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983).

Counts I to IV. In the Amended Complaint, Plaintiffs allege the State intends to enforce the reporting requirements and intends to adopt regulations implementing the reporting requirements. [Amended Complaint at ¶¶ 34-35.] Indeed, the DOT Director is required to promulgate rules under § 261-12(b). There is no doubt the regulations will be promulgated; the only question is when. See § 261-12(b) ("The director **shall** adopt rules to regulate tour aircraft operations by permit, which **shall** include but not be limited to: . . . . (8) Submission of monthly written reports[.]" (emphases added)). Exhibits 4-7 attached to Plaintiff's Memorandum in Opposition demonstrate the steps DOT has taken to implement the reporting requirements, including: drafting the amendment to Haw. Admin. R. Chapter 19-34; undergoing multiple rounds of review of the draft regulation amendment by the Attorney General's Office; and creating a website for tour operators to upload their monthly reports. See Mem. in Opp., Exhs. 4-7.[6]

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[6] Because this Motion to Dismiss is made pursuant to Rule 12(b)(1), the Court may consider the exhibits attached to the memorandum in opposition, although these exhibits were not included in the Amended Complaint. See Ass'n of Am. Med. Colls., 217 F.3d at 778. Exhibits 4-8 were provided by DOT to Plaintiff's counsel, and are attached to the memorandum in opposition. [Mem. in Opp., Decl. of Lisa K. Swartzfager ("Swartzfager Decl.") at ¶¶ 4-9.] Exhibit 4 is memorandum, dated November 30, 2022, from the then-DOT Director to the then-Attorney General ("AG") asking for review of the draft Amendment to Haw. Admin. R. Chapter 19-34. [Dkt. no. 26-5.] Exhibit 5 is

(. . . continued)

Plaintiffs sufficiently allege their hardship. Plaintiffs allege they "have suffered and will suffer harm as a result of the monthly reporting requirements." [Amended Complaint, at ¶¶ 106, 114, 124.] Plaintiffs explain the monthly reporting requirements are "burdensome and harmful," and that "operators will have to dedicate substantial time and resources to reporting data on flights every month[.]" [Id. at ¶¶ 32, 37.] Plaintiffs allege the "monthly reporting requirements will also require more work from pilots, who will need to record flight plans and 'deviations' from those plans." [Id. at ¶ 38.] In their memorandum in opposition, Plaintiffs argue Helicopter Association's members need to take action to comply with the reporting requirements before implementation, such as planning how to comply with requirements, preparing pilots, and learning to use the website. [Mem. in Opp. at 22.] Exhibit 8 appears to indicate the steps that helicopter tour operators have already

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a memorandum, dated March 6, 2023, from a Deputy Director of DOT Airports Division ("Airports Division") to the AG, indicating DOT received the AG's review of the draft, incorporated revisions, and would like final review and approval to the Amendment to Chapter 19-34. [Dkt. no. 26-6.] Exhibit 6 consists of emails, dated October 24, 2022, between a Deputy Director of the Airports Division and other State employees regarding the status of a planned website for tour operator monthly reports. [Dkt. no. 26-7.] Exhibit 7 consists of emails, dated from August 25, 2022 to January 30, 2023, between State employees regarding various issues related to Act 311, including the public website for tour operators' monthly reports. [Dkt. no. 26-8.]

taken to comply with the forthcoming monthly reporting requirement regulations. See Swartzfager Decl., Exh. 8. The first two pages of Exhibit 8 is a document titled "Tour Operators Monthly Reports (Act 311)" and lists numerous helicopter tour operators, including Safari. [Id. at PageID.740-41.] Exhibit 8 also includes: emails dated November 4, 2022 to November 7, 2022, between the Director of Operations of Blue Hawaiian and State employees regarding uploading monthly reports to a state-created website [id. at PageID.742-46]; a list of flight information with flight times and routes for the month of October 2022 [id. at PageID.747-71]; and four maps of flight routes and possible flight route variations depending on weather [id. PageID.772-75]. Exhibit 8 indicates the effort helicopter tour operators already expended to comply with the monthly reporting requirements.

Plaintiffs have demonstrated sufficient hardship. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Pac. Gas & Elec., 461 U.S. at 201 (citations and quotation marks omitted). The threat of enforcement is "credible, [and] not simply imaginary or speculative." See Thomas, 220 F.3d at 1140 (citation and internal quotation marks omitted).

Therefore, the claims are ripe. See Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (rejecting a ripeness objection in a case challenging the imposition of train regulations as unconstitutional "because it is clear that any standard required" by the regulations would be unconstitutional). The instant case is neither abstract nor contingent on future events which may not occur. See Ass'n of Am. R.R. v. Cal. Off. of Spill Prevention & Response, 113 F. Supp. 3d 1052, 1057 (E.D. Cal. 2015) ("The basic rationale behind the ripeness doctrine 'is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements,' when those 'disagreements' are premised on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 580–81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985))). The Motion is denied as to Defendants' ripeness argument.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss First Amended Complaint Under FRCP Rules 12(b)(1) and 12(b)(6), filed May 12, 2023, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as: Count V is DISMISSED WITHOUT PREJUDICE to refiling in the 1990 Action, but without leave to amend in the instant case; and Plaintiffs'

claims in Counts I, II, III, and IV against the State are DISMISSED WITH PREJUDICE. The Court makes no ruling as to whether or not Plaintiffs can seek to reopen the 1990 Action in order to bring Count V. The Motion is DENIED as to Plaintiff's claims in Counts I, II, III, and IV against Edwin Sniffen.

There being no remaining claims against the State and DOT, the Clerk's Office is DIRECTED to terminate them as parties on **November 1, 2023**, unless Plaintiffs file a timely motion for reconsideration of this Order.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, October 17, 2023.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

HELICOPTER ASSOCIATION INTERNATIONAL, ET AL. VS. STATE OF HAWAII, ET AL CV 23-00083 LEK-WRP; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS