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statutes cited by plaintiffs waive the United States' sovereign immunity or otherwise grant this Court jurisdiction over plaintiffs' claims.

Moreover, even if plaintiffs' claims were justiciable, they would have failed to state a claim upon which relief could be granted. Plaintiffs base their entire cause of action on an order issued by General Douglas MacArthur, who was the Supreme Commander for the Allied Powers in the Pacific at the end of World War II. However, that order did not create a private right of action. Accordingly, the United States respectfully requests this Court to grant its motion to dismiss this complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

### **BACKGROUND**

This action is brought by ten individuals and the Taiwan Nation Party, "acting on behalf of approximately 1,000 of its other members." See Complaint ("Compl.") at ¶ 14. Plaintiffs state that the "[d]eclaratory [j]udgment sought in this action relates to the purposes for which the Taiwan Nation Party was founded." Id. Plaintiffs base their complaint on an order issued by General Douglas MacArthur, Supreme Commander for the Allied Powers in the Pacific, on September 2, 1945, that spelled out the manner in which the Japanese were to surrender to the allied forces. See id. at ¶ 1 (arguing that the General Order created a "trust on behalf of the Allied Powers [that] remains in effect today"). Under the terms of the order issued by General MacArthur, the "Imperial General Headquarters by direction of the Emperor, and pursuant to the surrender to the Supreme Commander for the Allied Powers of all Japanese armed forces by the Emperor, hereby orders all of its commanders in Japan and abroad to cause the Japanese armed forces and Japanese-controlled forces under their command to cease hostilities at once, to lay

down their arms, to remain in their present locations and to surrender unconditionally.” See Text of Japanese Order, Congressional Record, Vol. 91, Part 6, September, 1945, at 8348 (“Japanese Order”) (attached as Exhibit 1). In the same document, the Imperial General Headquarters of Japan ordered its senior commanders within Formosa (“Taiwan”), and in other areas, to “surrender to Generalissimo Chiang Kai-shek.” Id. at (1)(a).

Plaintiffs allege that because of this surrender order, “[f]rom 1945 to the present, Taiwan has been an occupied territory of the United States . . . and [n]either the Treaty of San Francisco nor the Taiwan Relations Act nor any other legal instrument terminated the agency relationship between the United States and the [Republic of China (“ROC”)] for the purpose of the occupation and administration of Taiwan.” See Compl. at ¶¶ 46, 47. According to the plaintiffs, the United States was “the principal occupying Power” and MacArthur’s Order “empower[ed] the government of the ROC to accept the surrender of the Japanese troops in Taiwan.” Id. Plaintiffs assert that the United States “is still holding sovereignty over Taiwan.” Id. at ¶ 49. In addition to asking this Court to determine that the United States does indeed hold sovereignty over Taiwan, plaintiffs are also seeking to have this Court advise them of “what fundamental rights, if any, they may have under United States laws” because they allegedly “suffer as a result of the legal limbo in which they find themselves.” Id. at ¶ 3.<sup>1</sup>

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<sup>1</sup>For the Court’s information, a history of the United States relations with Taiwan is available at the U.S. Department of State’s Country Page on China, <http://www.state.gov/p/eap/ci/ch/>.

## ARGUMENT

### **I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS ACTION**

For a lower federal court to have subject matter jurisdiction, the action must present a case or controversy pursuant to Article III, §2, of the United State Constitution and there must be a statutory basis for the jurisdiction. See Insurance Corp. of Ireland, LTD. v. Compagnie des Bauxites de Guinee, 456 US 694, 701-2 (1982) (“[f]ederal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Article III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal juridical power: Apart from [the Supreme Court] that power only exists ‘in such inferior Courts as the Congress may from time to time ordain and establish.’ Art. III, § 1.”).

This action does not present a case or controversy that arises under Article III, § 2 because plaintiffs lack standing and their cause of action presents a non-justiciable political question. See Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 215 (1974) (the “[Supreme] Court noted that the concept of justiciability, which expresses jurisdictional limitations imposed upon federal courts by the ‘case or controversy’ requirement of Art. III, embodies both the standing and political question doctrines”) (citing Flast v. Cohen, 392 U.S. 83, 88 (1968); see also Hwang Geum Joo v. Japan, 413 F.3d 45, 47-48 (D.C. Cir. 2005). It is only necessary for one jurisdictional defect to exist to deprive a court of jurisdiction. See Schlesinger, 418 U.S. at 215 (“either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the

complaining party”) (citations omitted). Both are present in this case.<sup>2</sup> Furthermore, the subject matter of this action is not encompassed by a statutory grant of jurisdiction; plaintiffs cite two statutes as a basis for jurisdiction but they are both not applicable in this case. See Compl. at ¶ 16 (citing “28 U.S.C. Sections 1331 and 1346(a)(2)”). Due to these independent constitutional and statutory deficiencies, any one of which would be sufficient, this Court lacks subject matter jurisdiction over this action.

**A. Plaintiffs Lack Standing to Bring this Action**

Plaintiffs seek no more than an advisory opinion from this Court. They are asking “this Court to determine what fundamental rights, if any, they may have under United States laws.” See Compl. at ¶ 3 (emphasis added). Plaintiffs are not even alleging that they are certainly entitled to such rights but rather are asking this Court to advise them of what rights they “may” have. However, “[t]he Constitution (article 3, s 2) limits the exercise of judicial power to ‘cases’ and ‘controversies.’” See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239 (1937). This requirement includes actions, such as this one, in which the plaintiffs seek a declaratory judgment. See Golden v. Zwickler, 394 U.S. 103, 108 (1969) (“The federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are requisite. This is as true of declaratory judgments as any other field.”) (quoting

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<sup>2</sup>There is “no fixed rule as to the order of analysis elements of justiciability.” See American Jewish Congress v. Vance, 575 F.2d 939, 943 (D.C. Cir. 1978) (finding it “more prudent to initially determine the issue of standing” because it only involves inquiry into Article III limitations as opposed to also involving “an analysis of the separation of powers doctrine” for determining whether the cause of action presents a non-justiciable political question).

United Public Workers of American (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) (quotation marks omitted).

The advisory nature of the relief plaintiffs seek is evidenced by their inability to establish standing. An essential “element of the case-or-controversy requirement” is that a complainant “must establish that they have standing to sue.” See Raines v. Byrd, 521 U.S. 811, 818 (1997). “The party invoking federal jurisdiction bears the burden of establishing” the elements of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (emphasis added). “A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.” See Allen v. Wright, 468 U.S. 747, 751 (1984). Instead of being able to establish standing, plaintiffs are asking this Court to issue an advisory opinion on whether they would be entitled to certain rights if the United States did indeed exercise sovereignty over Taiwan.

Plaintiffs seek to bring a claim in which there is no personal injury, in which any generalized injury is not fairly traceable to any alleged unlawful conduct on the part of the United States, and in which that generalized injury would not likely be redressed by the requested relief. First, the only injury that plaintiffs allege in their complaint is that “they continue to suffer as a result of the legal limbo in which they find themselves.” See Compl. at ¶ 3. This injury is neither “concrete and particularized” nor “actual or imminent,” but rather based on the conjecture that harm would result from being in such an alleged legal limbo. See Lujan, 504 U.S. at 560. The plaintiffs are not in any different position than the millions of others who live in Taiwan. Furthermore, plaintiffs have not alleged that any harm has resulted from being in such a purported legal limbo. Second, no where in the complaint do plaintiffs allege any

unlawful conduct by the United States; instead, they merely seek to “have this Court determine what fundamental rights, if any, they may have under United States laws.” See Compl. at ¶ 3. Their complaint is therefore entirely speculative and hypothetical. Plaintiffs do not allege that the United States inflicted injury on them, and without showing a causal connection between some unlawful conduct of the United States and an alleged injury, plaintiffs do not have standing. Third, the only form of redressability that plaintiffs seek is a declaratory judgment that they are entitled to fundamental rights because they are allegedly “subject to the jurisdiction of the United States.” See Compl., Relief Requested. However, it is unclear how a court would redress plaintiffs’ alleged vague injury of being in a legal limbo; the declaration of such broad fundamental rights would not necessarily foreshadow how those rights would be applied. The application of such rights, assuming arguendo that plaintiffs do suffer an injury, would be a necessary determination because otherwise plaintiffs may remain in a legal limbo by not knowing the specifics of the rights to which they would be entitled. Accordingly, plaintiffs have failed to satisfy each of the necessary preconditions for Article III standing.

#### **B. The Complaint Presents a Non-Justiciable Political Question**

“The political question doctrine is one aspect of ‘the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the ‘case or controversy’ requirement’ of the Article III of the Constitution.” Bancoult v. McNamara, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. at 215). The doctrine is “primarily a function of the separation of powers.” Id. (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)) (quotation marks omitted). It “excludes from judicial review those controversies which revolve around policy choices and value determinations

constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” Id. (quoting Japan Whaling Ass’n v. Am Cetacean Soc’y, 478 U.S. 221, 230 (1986)) (quotation marks omitted). The topics of national security and foreign relations are “quintessential sources of political questions” and “rarely proper subjects for judicial intervention.” Id. (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)). That is because “[t]he conduct of the foreign relations of our governments is committed by the Constitution to the executive and legislative - ‘the political’ - departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); see also Bancoult v. McNamara, 445 F.3d at 433 (same). The Supreme Court has cautioned in Baker v. Carr that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” 369 U.S. at 211. Nevertheless, the Court did instruct that “[n]ot only does resolution of [questions touching foreign relations] frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views.” Id.<sup>3</sup>

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<sup>3</sup>Baker v. Carr lists six different criteria a Court could use in determining whether a case presents a non-justiciable political question: “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” 369 U.S. at 217. However, “[t]o find a political question, [a court] need only conclude that one factor is present, not all.” See Bancoult v. McNamara, 445

In each of the seven requests for relief, plaintiffs state that they are entitled to certain Constitutional rights “by virtue of living in a territory subject to the jurisdiction of the United States.” See Compl., Relief Requested. However, that statement assumes that plaintiffs are living a territory subject to the jurisdiction of the United States. The question of what rights, if any, to which plaintiffs are entitled may be answered only if the Court were first to determine that the United States does exercise sovereignty over Taiwan. See Compl. at ¶ 2. This initial question, which is the primary one before the Court, is inherently political and is, therefore, non-justiciable. See Baker v. Carr, 369 U.S. at 212 (“[w]hile recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called ‘a republic of whose existence we know nothing,’ and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area”) (emphasis added) (footnotes omitted). It has been long settled that the question of who has sovereignty over a territory “is not a judicial, but a political, question.” See 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, but a political, question, the determination of which by the legislative and executive of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.”) (citing cases as far back as 1818) (emphasis in original); see also People’s

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F.3d at 432 (citation and quotation marks omitted).

Mojahedin Organization of Iran v. United States Department of State, 182 F.3d 17, 24 (D.C. Cir. 1999); Sevilla v. Elizalde, 112 F.2d 29, 33-35 (D.C. Cir. 1940).

The issue of how to classify Taiwan's status is a matter to which it is particularly important for the United States government to speak in a single voice and which is best left to the political branches. The Ninth Circuit, when faced with the question of whether Taiwan was bound by the Warsaw Convention by the People's Republic of China being a party to the Convention, found that it must look "to the statements and actions of the 'political departments' in order to answer whether, following recognition of China and derecognition of Taiwan, China's adherence to the Warsaw Convention binds Taiwan." Mingtai Fire & Marine Ins. Co. v. United Parcel Service, 177 F.3d 1142, 1145 (9<sup>th</sup> Cir. 1999). The Court determined that "whether China is the sovereign, *de jure* or *de facto* of the territory of Taiwan is a political question, and '[o]bjections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the court.'" Id. (quoting United States v. Pink, 315 U.S. 203, 229 (1942)) (emphasis in original). Ultimately, the Court "merely recognize[d] and defer[red] to the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention," but cautioned that it did "not independently determine the status of Taiwan." Mingtai, 177 F.3d at 1147.

The political departments have made it clear that the status of Taiwan does not include Taiwan being "an occupied territory of the United States." See Compl. at ¶ 46. As a matter of law, the relationship between the United States and Taiwan derives solely and exclusively from Executive Order No. 13014 of August 15, 1996, 61 Fed. Reg. 42963, and the Taiwan Relations

Act, 22 U.S.C. 3301, et seq. That intricate relationship does not involve the United States exercising sovereignty over Taiwan.

On December 30, 1978, President Carter issued a memorandum maintaining that the “United States has announced that on January 1, 1979, it is recognizing the government of the People's Republic of China as the sole legal government of China and is terminating diplomatic relations with the Republic of China.” 44 Fed. Reg. 1075. President Carter further stated that the “[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force.” Id. (emphasis added). Besides continuing the international agreements that the United States entered into with Taiwan prior to January 1, 1979, President Carter’s memorandum stated that “[a]s President of the United States, I have constitutional responsibility for the conduct of the foreign relations of the nation.” 44 Fed. Reg. 1075; see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) (“[p]olitical recognition [of a government] is exclusively a function of the Executive”). In his memorandum, President Carter also stressed that the “American people will maintain commercial, cultural, and other relations with the people on Taiwan without official government representation and without diplomatic relations.” 44 Fed. Reg. 1075. In an executive order in 1996, the executive further spelled out the manner in which the United States is to maintain unofficial relations with the people of Taiwan. See Executive Order No. 13014 (August 15, 1996). That executive order also specified that the “[a]greements and arrangements referred to in paragraph (B) of President Carter’s memorandum of December 30, 1978, entitled ‘Relations With the People on Taiwan’ (44 FR 1075) shall, unless otherwise terminated or modified in accordance with law, continue in force.” Id.

Besides issuing executive orders and presidential memorandums concerning the status of Taiwan, the United States also issued a series of joint communiques between 1972 and 1982 with the People's Republic of China ("PRC"). Those communiques included discussion of the status of Taiwan. In the February 28, 1972, Communique, the United States acknowledged "that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China." See United States of America-People's Republic of China Joint Communique of Feb. 27, 1972 [The Shanghai Communique]--U.S. Department of State Bulletin, Vol. 66 (1972), No. 1708, at 435 (attached as Exhibit 2). In 1979, the two countries issued another Joint Communique regarding the establishment of diplomatic relations between the PRC and the United States. See United States of America-People's Republic of China Joint Communique of January 1, 1979 on Establishment of Diplomatic Relations--U.S. Department of State Bulletin, Vol. 79 (1979), No. 2022, at 25 (attached as Exhibit 3). In that Communique, the United States again acknowledged the "Chinese position that there is but one China and Taiwan is part of China." Id. In the third Communique, in 1982, the United States agreed that "[r]espect for each other's sovereignty and territorial integrity and non-interference in each other's internal affairs constitute the fundamental principles guiding United States China relations." See United States of America-People's Republic of China Joint Communique of Aug. 17, 1982--Weekly Compilation of Presidential Documents (August 23, 1982), at 1039 (attached as Exhibit 4). The two sides also "agreed that the people of the United States would continue to maintain cultural, commercial, and other unofficial relations with the people of Taiwan." Id.

The political branches also made clear that the United States does not exercise sovereignty over Taiwan through the Taiwan Relations Act of 1979, 48 U.S.C. § 3301, which

was passed by Congress and signed into law by the president. Congress found that the enactment of this statute was “necessary - (1) to help maintain peace, security, and stability in the Western Pacific; and (2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people of Taiwan.” See 22 U.S.C. § 3301(a). Furthermore, it declared that the policy of the United States is, inter alia, “to make clear that the United States decision to establish diplomatic relations with the People’s Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means.” 22 U.S.C. § 3301(b)(3). More importantly for this case, Congress specifically stated in the Taiwan Relation Act that it approved “the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.” See 22 U.S.C. § 3303(c) (emphasis added). This undermines the foundation of the plaintiff’s complaint that the United States has retained control over Taiwan since General MacArthur’s Order in 1945. Thus, the United States did not exercise sovereignty over Taiwan prior to the Taiwan Relations Act,<sup>4</sup> nor does it currently exercise such sovereignty. The United States now

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<sup>4</sup>The Mutual Defense Treaty signed between the United States and the Republic of China in 1954, after MacArthur’s General Order No. 1, specified that “the terms ‘territorial’ and ‘territories’ shall mean in respect of the Republic of China, Taiwan and the Pescadores: and in respect of the United States of America, the inland territories in the West Pacific under its jurisdiction. See Mutual Defense Treaty, Article VI, Treaties and International Acts Series 3178 (1955). In 1979, President Carter terminated the Mutual Defense Treaty, but that does not negate the fact that prior to 1979, it was clear United States policy that the Republic of China exercised sovereignty over Taiwan. See U.S. Department of State Bulletin, Vol. 79 (1979), No. 2023 at 25.

exercises nonofficial relations with Taiwan through the American Institute in Taiwan. See 22 U.S.C. § 3310a (“[t]he American Institute of Taiwan shall employ personnel to perform duties similar to those performed by personnel of the United States and Foreign Commercial Service.”).

Plaintiffs request this Court to ignore this intricate relationship and issue a ruling that the United States has sovereignty over Taiwan based on an order regarding the manner in which the Japanese troops surrendered to the Allied Powers. See Compl. at ¶ 2. For this Court to issue such a ruling in this case would have the “potentiality of embarrassment from multifarious pronouncements by various departments on one question.” See Baker v. Carr, 369 U.S. at 217. The Executive and Congress have spoken consistently about the United States relations with Taiwan. This Court would have to make an “initial policy determination of a kind clearly for nonjudicial discretion” to go beyond the path chosen by the political branches of the government, which would be a “lack of the respect due coordinate branches of government.” See id. Furthermore, due to the delicate relationship between the United States and the PRC, and the need to preserve the stability and peace in the Taiwan Strait, there is “an unusual need for unquestioning adherence to a political decision already made.” See id. In addition, it is unclear what “judicially discoverable and manageable standard” this Court would use in determining the default status of a territory that was referenced by MacArthur’s General Order dictating the terms of a surrender. See id. These issues are directly related to the prominence of a “demonstrable constitutional commitment of [the determination of who is a sovereign of a territory] to a coordinate political department.” See id.

Resolving the merits of this action would not just intrude on the delicate relationship between the United States and the PRC, but would also “require the court to determine the

effects on [] agreements on the rights of [] citizens with respect to events occurring outside the United States.” See Hwang Geum Joo v. Japan, 413 F.3d at 51, 53 (holding that it is a non-justiciable political question to decide “whether the governments of the [plaintiffs in the case] resolved their claims in negotiating peace with Japan” following World War II) (citation omitted). For this Court to decide this case, it would need not only to look to the treaties and agreements involving the United States but would also have to interpret the treaty between the ROC and Japan. See Compl. at ¶ 42 (“[t]he Treaty of Peace between the ROC, which was signed on April 28, 1952, and entered into force on August 5, 1952 (the “Treaty of Taipei”), did not transfer sovereignty over Taiwan (Formosa) from Japan to China”). Given that this case not only presents questions best left to the political branches of the United States but also involves diplomatic relations between other countries, this action should be dismissed as being a non-justiciable political question.

**C. The Statutes Cited by Plaintiffs Do Not Confer Jurisdiction on This Court**

**1. The Little Tucker Act is Not Applicable; Plaintiffs are not seeking Monetary Damages**

In their complaint, plaintiffs list two statutory bases for jurisdiction, 28 U.S.C. §§ 1331 and 1346(a)(2). See Compl. at ¶ 16. The latter can be disposed of quickly. Section 1346(a)(2) is also known as the “Little Tucker Act.” See Van Drasek v. Lehman, 762 F.2d 1065, 1067 n. 1 (“[t]he Tucker Act consists of 28 U.S.C. § 1491, which sets out the jurisdiction of the [Court of Federal Claims], and § 1346(a)(2), which gives concurrent jurisdiction to the district courts for claims not exceeding \$10,000.”). For a claim to fall under the Tucker Act, it “must be for money damages against the United States.” United States v. Mitchell, 463 U.S. 206, 217 (1983) (citing United States v. King, 395 U.S. 1, 2-3 (1969)); see also Van Drasek v. Lehman, 762 F.2d at 1068

(same). Plaintiffs' action is brought for declaratory relief. See Compl. at ¶ 18. Because plaintiffs are not seeking any monetary relief, the Tucker Act provides no basis for jurisdiction in this case.

## 2. This Court Has No Federal Question Jurisdiction

Plaintiffs' other statutory basis for jurisdiction, federal question jurisdiction under 28 U.S.C. § 1331, meets the same fate. A district court has jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiffs bring this action based on General MacArthur's General Order No. 1 that he issued as Supreme Commander for the Allied Powers in the Pacific, not on the Constitution, laws, or treaties of the United States. See Compl. at ¶ 46 ("[f]rom 1945 to the present, Taiwan has been an occupied territory of the United States"); see also Compl. at ¶ 47 ("[t]he agency relationship between the United States, the principal, and the ROC, its agent in Taiwan, never terminated. General Douglas MacArthur's General Order No. 1 empowering the government of ROC to accept the surrender of the Japanese troops in Taiwan and to occupy Taiwan on behalf of the Allied Powers (led by the United States) following the Pacific War is still valid.").

A claim that purportedly arises under MacArthur's General Order is certainly not a claim that arises under a law of the United States. As plaintiffs maintain in their complaint, General MacArthur issued General Order No. 1 as the "Supreme Commander for the Allied Powers." See Compl. at ¶ 1 (emphasis added). General MacArthur's authority was not based on power being exercised by the United States, but rather by that of the Allied Powers. See Japanese Order (the order stated that the Japanese were to "surrender unconditionally to commanders acting on behalf of the United States, the Republic of China, the United Kingdom and the British

Empire, and the Union of Soviet Socialist Republic, as indicated hereafter or as may be further directed by the Supreme Commander for the Allied Powers.”); see also Hirota v. General of the Army MacArthur, 338 U.S. 197, 198 (1948) (finding that the tribunal established by the Allied Powers is “not a tribunal of the United States” and that the “military tribunal . . . has been set up by General MacArthur as the agent of the Allied Powers) (emphasis added).

Even if the General Order was issued by the United States, this Court would not have federal question jurisdiction. An order designed to establish the surrender terms for an opposing force performs more of an administrative housekeeping function than even Executive Orders, and those are not necessarily considered laws for purposes of conferring jurisdiction under 28 U.S.C. § 1331. See Local 1498, Am. Federation of Government Emp. v. American Federation of Government Emp., AFL/ CIO, 522 F.2d 486, 491 (3<sup>rd</sup> Cir. 1975) (finding that the Executive Order at issue did not constitute a “‘law of the United States’ within the meaning of s 1331”). An Executive Order falls only within the meaning of section 1331 when it is “designed to implement and effectuate the statutes under which they were promulgated.” Compare id. and Stevens v. Carey, 483 F.2d 188 (7<sup>th</sup> Cir. 1973) with Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5<sup>th</sup> Cir. 1967) and Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3<sup>rd</sup> Cir. 1964). MacArthur’s General Order did not implement or effectuate any statute; it merely instructed Japan on how to order its troops to surrender to the Allied Powers.

This action also does not arise under the Constitution, even though plaintiffs “filed this action to have this Court determine what fundamental rights, if any, they may have under United States laws.” See Compl. at ¶ 3. Plaintiffs rely on their alleged status as “persons subject to the jurisdiction of the United States” as the basis for this Court “to preserve [their] Constitutional

rights.” See Compl., Relief Requested. Plaintiffs therefore acknowledge that they are not entitled to these Constitutional rights if they are not subject to the jurisdiction of the United States. See, e.g., Compl., Relief Requested at (a) (“[p]laintiffs, by virtue of living in a territory subject to the jurisdiction of the United States, have fundamental rights under United States laws, including the United States Constitution”) (emphasis added). Furthermore, while plaintiffs reference treaties, they do not rely upon them as a basis for jurisdiction. Rather, they maintain that the General Order created the supposed agency relationship between the United States and the ROC concerning Taiwan and that “[n]either the Treaty of San Francisco nor the Taiwan Relations Act nor any other legal instrument terminated the agency relationship between the United States and the ROC for the purpose of the occupation and administration of Taiwan.” See Compl. at ¶ 47 (emphasis added). Again, plaintiffs rely solely on the General Order as the instrument that they assert establishes United States sovereignty over Taiwan.

Therefore, this action does not arise under any of the different bases for federal question jurisdiction. Without any statutory basis for jurisdiction, this Court lacks subject matter jurisdiction in the present case. See Insurance Corp. of Ireland, LTD. v. Compagnie des Bauxites de Guinee, 456 US at 701 (“[j]urisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction”).

**D. THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FOR THIS ACTION**

As sovereign, absent its consent, the United States is immune from being sued. See F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (explaining that sovereign immunity is jurisdictional in nature and that “[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction”) (citations

omitted). A court does not have jurisdiction in an action against the United States unless the United States has explicitly waived its sovereign immunity. See United States v. King, 395 U.S. 1, 4 (1969) (a waiver of sovereign immunity “cannot be implied but must be unequivocally expressed”); see also Dorsey v. U.S. Dept. of Labor, 41 F.3d 1551, 1555 (D.C. Cir. 1994) (“federal government's waiver of sovereign immunity must be unequivocally expressed”) (internal quotation marks omitted). That waiver must be based on “specific statutory consent.” See United States v. Shaw, 309 U.S. 495, 500-501 (1940) (“without specific statutory consent, no suit may be brought against the United States”); see also Jackson v. Bush, 448 F.Supp. 2d 198, 200 (D.D.C. 2006) (“doctrine of sovereign immunity bars those suits against the United States that are not specifically waived by statute”).

In this action, there is no statutory authority that provides a waiver of sovereign immunity by the United States.<sup>5</sup> Without a waiver of sovereign immunity, this Court has no jurisdiction over this action.

## **II. PLAINTIFFS FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

A complaint “fails to state a claim upon which relief may be granted” if “there is no private cause of action” authorized by Congress. See Stanford v. Potomac Elec. Power Co., 394 F.Supp.2d 81, 90 n. 10 (D.D.C. 2005) (“defendant correctly asserts in its motion to dismiss that this claim fails to state a claim upon which relief may be granted because there is no private cause of action under [the statute]”). The Supreme Court has stated that without a private right of action, “a cause of action does not exist and courts may not create one, no matter how

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<sup>5</sup>As explained in the discussion of the Little Tucker Act, that statute is not applicable in this case because plaintiffs are not seeking any monetary damages against the United States.

desirable that might be as a policy matter, or how compatible with the statute.” See Alexander v. Sandoval, 532 U.S. 275, 286-87 (1999). Furthermore, “private rights of action to enforce federal law must be created by Congress.” Id. at 286. This doctrine applies to all actions, not just those arising under statutes. For example, “[a]bsent express language in a treaty providing for particular judicial remedies, the federal court will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution.” See United States v. Emuegbunam, 268 F.3d 377, 390 (6<sup>th</sup> Cir. 2001); see also Hanoch Tel-Oren v. Libyan Arab Republic, 517 F.Supp. 542, 546 (D.D.C. 1981) (“treaties must provide expressly for a private right of action before an individual can assert a claim thereunder in federal court.”) (aff’d 726 F.2d 774 (D.C. Cir.1984)). The same is even true for Executive Orders. See Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) (“[a]n Executive Order devoted solely to the internal management of the executive branch-and one which does not create any private rights-is not, for instance, subject to judicial review.”). Because plaintiffs point to no basis for a private right of action, this action should be dismissed for failure to state a claim upon which may be granted.

**CONCLUSION**

For the reasons stated above, defendant respectfully requests this Court to grant its motion to dismiss.

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