DEPARTMENT OF THE ATTORNEY GENERAL

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For Immediate Release
August 5, 2016

News Release 2016-50

9TH CIRCUIT UPHOLDS DISMISSAL OF CHALLENGE TO MARRIAGE EQUALITY ACT

HONOLULU – On August 4, the Ninth Circuit Court of Appeals issued an opinion upholding the dismissal of a challenge to the state's Marriage Equality Act by plaintiff Kaui Amsterdam. In its opinion, the court found that Hawai‘i District Court Judge Susan Mollway "properly dismissed Amsterdam’s action because Amsterdam’s moral and cultural objections to same-sex marriages are generalized grievances and are insufficient to confer Article III standing." Judge Mollway found that Amsterdam lacked standing because he failed to show he suffered any injury as a result of the Marriage Equality Act.

A copy of the Ninth Circuit Court's decision and Judge Mollway's earlier order dismissing the case are attached.

# # #

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FILED

AUG 04 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C. KAUI JOCHANAN AMSTERDAM, Plaintiff - Appellant, v. DAVID Y. IGE,* Governor of the State of Hawaii; et al., Defendants - Appellees.	No. 14-15377 D.C. No. 1:13-cv-00649-SOM-KSC MEMORANDUM**

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, Chief Judge, Presiding

Submitted July 26, 2016***

Before: SCHROEDER, CANBY, and CALLAHAN, Circuit Judges.

C. Kaui Jochanan Amsterdam appeals pro se from the district court's judgment dismissing for lack of standing his action seeking to enjoin the

* David Y. Ige is substituted for his predecessor, Neil Abercrombie, as Governor of the State of Hawaii under Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

enforcement of Hawaii's Marriage Equality Act of 2013. We review de novo, *Hayes v. County of San Diego*, 736 F.3d 1223, 1228 (9th Cir. 2013), and we affirm.

The district court properly dismissed Amsterdam's action because Amsterdam's moral and cultural objections to same-sex marriages are generalized grievances and are insufficient to confer Article III standing. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662-63 (2013) (a "generalized grievance, no matter how sincere, is insufficient to confer standing"; "Article III standing is not to be placed in the hands of concerned bystanders who will use it simply as a vehicle for the vindication of value interests" (citation and internal quotation marks omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (constitutional standing requires an "injury in fact," causation, and redressability).

Amsterdam's contention that the district court ignored his amended reply is without merit.

We do not consider issues or arguments not specifically and distinctly raised and argued in the opening brief, or arguments raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

C. KAUI JOCHANAN AMSTERDAM, Plaintiff, vs. NEIL ABERCROMBIE; CLAYTON HEE; JOSEPH SOUKI; DONNA MERCADO KIM; and KARL RHOADS, in their individual and official capacities, Defendants.	CIVIL NO. 13-00649 SOM-KSC ORDER GRANTING MOTION TO DISMISS AND DENYING AS MOOT ALL OTHER PENDING MOTIONS

ORDER GRANTING MOTION TO DISMISS AND DENYING AS MOOT ALL PENDING MOTIONS

I. INTRODUCTION.

On November 26, 2013, this court dismissed Plaintiff C. Kaui Johanan Amsterdam's Complaint, which sought to enjoin a recently enacted state law that allows same-sex couples to marry. ECF No. 7. Because the law was about to take effect, this court treated Amsterdam's motion for "immediate temporary injunction" as a request for a temporary restraining order and reviewed the claims in Amsterdam's Complaint posthaste. The court noted that it was "required sua sponte to examine jurisdictional issues such as standing," D'Lil v. Best W. Encina Lodge & Suites, 538 F.3d 1031, 1035 (9th Cir. 2008) (internal quotation omitted), and held that Amsterdam failed to assert a claim for which he had standing. The court gave Amsterdam leave to amend his Complaint

to assert the particularized injury he would allegedly suffer, or to clarify any constitutional claims he sought to bring.

On December 24, 2013, Amsterdam filed his First Amended Complaint ("FAC"), along with a "motion for an immediate temporary injunction" and a "motion for judgment." ECF Nos. 9, 15, 16. On January 14, 2014, the State filed a motion to dismiss Amsterdam's FAC. ECF No. 29. Because Amsterdam continues to provide insufficient allegations of individualized injury giving him standing to challenge Hawaii's marriage equality law, the court grants the motion to dismiss and denies as moot all other pending motions. Noting that there is no indication that Amsterdam will be able to cure the FAC's deficiencies by further amendment, this court concludes that any future amendment would be futile.

II. BACKGROUND.

On November 13, 2013, Governor Neil Abercrombie signed into law Senate Bill 1 from the 2013 Special Session of the Hawaii Legislature. That new law, known as the Hawaii Marriage Equality Act of 2013, took effect on December 2, 2013, and provides same-sex couples with the same rights, benefits, protections, and responsibilities of marriage that opposite-sex couples enjoy.

Amsterdam, a Native Hawaiian, claims to be an "officer of The Interim Government of The Kingdom of Hawaii" and a "leader

in the Native Hawaiian and Jewish communities." FAC 1-2, ECF No. 9. Amsterdam seeks to enjoin the Hawaii Marriage Equality Act as violating various laws that recognize the "unique [] political status of Native Hawaiians." Id. at 3. In his original Complaint, Amsterdam largely relied on section 5(f) of the Admission Act as the legal basis for his claim. Amsterdam argued that section 5(f) was violated "because the majority of Native Hawaiians who testified during the legislative process were against [marriage equality] and [had] requested that their cultural and spiritual beliefs be respected." ECF No. 7 at 4. This court, having been called upon in prior cases to construe section 5(f), is conscious that it says nothing about marriage at all.

This court noted that Amsterdam had "fail[ed] to show a legally cognizable injury caused by Defendants' conduct that th[e] court could redress." Id. at 5. The court also noted, "Although it [wa]s not entirely clear from the Complaint, Amsterdam may believe that the Hawaii Marriage Equality Act of 2013 violates his federal constitutional rights under the Freedom of Religion Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment." Id. However, the court stressed that Amsterdam "allege[d] no facts supporting any such claim" and did not "even sufficiently allege that he practices a religion affected by the Hawaii Marriage Equality Act

of 2013 or that he is a member of a protected class that is being treated less favorably than another." Id. The court then noted that "[i]n case Amsterdam intended to assert violations of his First and Fourteenth Amendment rights under the United States Constitution, [he should] file a First Amended Complaint no later than December 24, 2013." Id. at 6.

On December 24, 2013, Amsterdam filed his First Amended Complaint, along with a "motion for an immediate temporary injunction" and a "motion for judgment." ECF Nos. 9, 15, 16. With the Hawaii Marriage Equality Act already in effect, the court saw no need to take immediate action. See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty., 415 U.S. 423, 439 (1974) ("[U]nder federal law [temporary restraining orders] should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."). On January 14, 2014, the State filed a motion to dismiss Amsterdam's FAC on the grounds of lack of standing and failure to state a claim.

III. LEGAL STANDARD

"Rule 12(b)(1) jurisdictional attacks can be either facial or factual." White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their

face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)

When, as here, the challenge is facial rather than factual, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Fed'n of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). In a facial attack on jurisdiction, the court "confin[es] the inquiry to allegations in the complaint." Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty., 343 F.3d 1036, 1040, n.2 (9th Cir. 2003).[1]

IV. ANALYSIS

As this court said in its order dismissing Amsterdam's original Complaint, Amsterdam must establish standing by showing that: 1) he suffered a "concrete and particularized" and "actual or imminent" (as opposed to "conjectural or hypothetical") injury-in-fact; 2) his injury is causally connected to the conduct complained of; and 3) it is likely (not merely speculative) that the injury will be "redressed by a favorable

[1] Although the State also moves to dismiss the FAC under Rule 12(b)(6), this court does not reach that issue and therefore does not include here the legal standard for such a motion.

decision." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996); accord Ass'n of Pub. Agency Customers v. Bonneville Power Admin., 733 F.3d 939, 950 (9th Cir. 2013). "At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing." Townley v. Miller, 722 F.3d 1128, 1133 (9th Cir. 2013) (internal quotation omitted).

Although Amsterdam lists many federal statutes that he says entitle him to relief, the FAC fails to cure the basic defect evident in the original Complaint: Amsterdam simply fails to articulate a legally cognizable injury. Amsterdam argues that the Act "is contrary to and undermines Hawaii's Motto and the religious, cultural moral values of the Plaintiff and the majority of Native Hawaiians." FAC at 6, ECF No. 9. Amsterdam further asserts that "[s]ame-sex sexual relations are . . . a desecration of the land and as such weaken[] and destroy[] the health and well-being of the land, the Native Hawaiian People, the population-at-large, and the Plaintiff." Id. at 7.

These generalized grievances reflect Amsterdam's disapproval of the legislature's judgment, not a concrete and particularized injury to him personally. "Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1441 (2011). The courts are not a "vehicle for the vindication of

value interests." Diamond v. Charles, 476 U.S. 54, 62 (1986), nor is their proper role to superintend the political judgment of democratically elected legislators. See Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598-99 (2007) ("[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the [lawfulness of] legislative or executive acts."). A plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy." Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013). A "generalized grievance, no matter how sincere, is insufficient to confer standing." Id.

Amsterdam does not even attempt to identify an injury unique to him; instead, quite to the contrary, Amsterdam styles himself as a representative of a Native Hawaiian community that he alleges disapproves of the State's policy. There is no authority for the proposition that Native Hawaiians are exempt from the ordinary rules of party standing applicable to all litigants in federal court. In failing to articulate an injury other than generalized disapproval of same-sex marriage, Amsterdam fails to meet his burden of showing that he has suffered an injury.

The closest Amsterdam comes to a particularized grievance is his claim that he is injured "as an [e]ducator"

because the "Hawaii Public School System . . . teaches eleven year olds about oral and anal sex and promotes and normalizes homosexual values and lifestyle," and his "cultural moral values of Righteousness . . . [make him] unable to teach such [information]." FAC at 10. However, the FAC does not actually allege that Amsterdam is a school teacher, only that he "received his Masters in Education at U.C.L.A." Id. In any event, Amsterdam fails to articulate any reason why the Hawaii Marriage Equality Act affects the classes taught in Hawaii's schools. That is, Amsterdam does not allege that, without same-sex marriage, schools would refrain from teaching about oral and anal sex or about what he calls "homosexual values and lifestyle." In fact, he appears to be complaining that such matters have been addressed in schools even before the law in issue took effect. Amsterdam's alleged injuries as an "educator," even if they were real, would not be redressable by a court order enjoining the Act. See Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123, 1125 (9th Cir. 2006) (noting that when there is "no redressability, [there is] no standing").

The State provides a series of alternative reasons to dismiss the Complaint, including Amsterdam's failure to state a claim under federal law, the improper naming of certain parties, and certain Defendants' immunity from suit. Because Amsterdam

lacks standing to bring his claims, the court does not address any of the State's nonjurisdictional arguments.

The State also asks the court to deny Amsterdam any further leave to amend. A district court's "discretion . . . [to deny leave] is particularly broad where, as here, a plaintiff previously has been granted leave to amend." Griggs v. Pace Am. Grp., Inc., 170 F.3d 877, 879 (9th Cir. 1999). "Dismissal without leave to amend is proper if it is clear that the complaint [cannot] be saved by amendment." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008). In dismissing his original Complaint, the court clearly informed Amsterdam that his abstract disapproval of the Hawaii legislature's judgment did not constitute sufficient Article III injury for him to challenge the Marriage Equality Act. Amsterdam has expounded on his disapproval of the law further in the FAC, but has not explained how he has suffered particularized injury. Moreover, based on the allegations in the FAC, the court cannot see how the Act's operation could possibly harm Amsterdam in a concrete and particularized way. The court therefore concludes that any further amendment by Amsterdam would be futile.

V. CONCLUSION.

The court grants the State's motion to dismiss, and denies as moot all other pending motions. The Clerk of Court is

directed to enter judgment for Defendants and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 19, 2014.

/s/ Susan Oki Mollway
Susan Oki Mollway
Chief United States District Judge