No. 12-15672

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C. KAUI AMSTERDAM,

Plaintiff-Appellant,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii

The Honorable David Alan Ezra

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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DEFENDANT-APPELLEES' ANSWERING BRIEF

Defendants-Appellees Office of Hawaiian Affairs ("OHA"), Haunani Apoliona, individually and in her capacity as Chairperson and Trustee of OHA, and the Trustees of OHA, in their individual and official capacities (collectively, "OHA Appellees"), respond to Plaintiff-Appellant Kaui C. Amsterdam's Informal Brief, filed October 9, 2012.

I. STATEMENT OF JURISDICTION

Plaintiff-Appellant Kaui C. Amsterdam ("Amsterdam") neither asserted a basis for the district court's subject matter jurisdiction nor this Court's appellate jurisdiction pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure ("FRAP") and Circuit Court Rule 28-2.2. However, the OHA Appellees do not contest the district court's jurisdiction pursuant to 28 USC § 1331 and this Court's jurisdiction pursuant to 28 U.S.C. § 1291.

On February 27, 2012, the district court granted the OHA Appellees' Motion for Judgment on the Pleadings on Plaintiff C. Kaui Jochanan Amsterdam's Third Amended Complaint, Filed September 14, 2011. OHA Appellees' Supplemental Excerpts of Record ("SER") at 2. That same day, the district court entered its Judgment in a Civil Case in favor of the OHA Appellees and against Amsterdam. SER at 3. Amsterdam filed his Notice of Appeal on March 23, 2012. SER at 4. Amsterdam's filing of the Notice of Appeal was timely pursuant to FRAP Rule

4(a)(1)(A), which requires the notice of appeal to be filed "within 30 days after the judgment or order appealed from is entered."

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court err in granting judgment on the pleadings in favor of the OHA Appellees and against Amsterdam on his third amended Complaint, filed September 14, 2011 ("Third Amended Complaint"), when:

A. binding precedent by the Court has determined that the OHA Appellees have broad discretion to expend Section 5(f) trust funds, so long as the expenditures relate to one or more enumerated purposes under the Admission Act;

B. Amsterdam has failed to properly state claims for relief that the OHA Appellees violated his Fourteenth or First Amendment rights;

C. OHA and the remaining OHA Appellees, in their official capacities, are state agencies entitled to sovereign immunity from Amsterdam's claims; and

D. Apoliona and the other Trustees' qualified immunities insulate them from liability for Amsterdam's claims?

III. STATEMENT OF THE CASE

In the Third Amended Complaint, Amsterdam maintains that the OHA Appellees should be required to expend funds received by OHA that are derived from the lands subject to the trust established by the Hawaii Admission Act to

support "The Interim Government of the Kingdom of Hawaii" and the "Kanaka Maoli People." SER at 1-7. He alleges that the OHA Appellees' "refusal" to provide these funds to him purportedly "weakened and damaged the organizational structure and function of the entity of Plaintiff Amsterdam, namely the Interim Government of The Kingdom of Hawaii and thereby has left the Plaintiff and associate Officers unable to effectively advance and fulfill its worthwhile and important aims previously described [in the Third Amended Complaint]." SER at 1-5. As a result, the OHA Appellees purportedly committed a breach of trust and violated Amsterdam's First and Fourth Amendment rights. SER at 1-7.

On December 1, 2011, the OHA Appellees filed a Motion for Judgment on the Pleadings on Amsterdam's Third Amended Complaint, SER at 4, on the basis that Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010) determined federal law cannot interfere with the OHA Appellees' decision to allocate or refrain from allocating trust proceeds as long as OHA uses the funds for the enumerated purposes under the Admission Act.

On February 27, 2012, the district court issued its Order Granting Defendants' Motion for Judgment on the Pleadings, relying on the principles articulated by this Court in Day and further holding that Amsterdam's claims that the OHA Appellees somehow violated his First and Fourteenth Amendment rights lack merit. SER at 2.

IV. STATEMENT OF FACTS

A. Trust Lands Under The Admissions Act

Although not a model of clarity, Amsterdam's Third Amended Complaint relies upon the provisions of Sections 4 and 5(f) of the Admission Act relating to lands conveyed to the State of Hawaii by the United States as a "public trust" at the time of statehood in 1959. Specifically, Section 5(f) of the Admission Act states:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[1]

[1] Section 5(b) of the Admission Act relates to the United States granting title to the State of Hawaii upon its admission into the Union to all public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended ("HHCA"). Section 5(g) of the Admission Act defines "public lands and other public property" as meaning and being limited to, "the lands and properties that were ceded to the

The "public trust" provisions set forth in the Admission Act were not, however, self-executing and expressly contemplated further action on the part of the State of Hawaii to enact appropriate constitutional mandates and statutory requirements. As the Hawaii Supreme Court noted in OHA v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987), "[b]efore 1978, the only references in the State Constitution to the trust created by section 5(f) of the Admission Act were to be found in article X, section 5 and article XIV, section 8 thereof." Id. at 161, 737 P.2d at 450. Article X, section 5 restated the object of the trust as follows: "The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with the procedures and limitations prescribed by law." Id. Article XIV, section 8 likewise contained no specific mandates on how the public trust lands were to be used and simply left it to the legislature to devise "appropriate legislation" that would comply with the trust provisions of the Admission Act. Id.

United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded." Under the Joint Resolution, also referred to as the "Newlands Resolution," the Republic of Hawaii ceded all former Crown, government and public lands to the United States. As the United States Supreme Court noted in Rice v. Cayetano, 528 U.S. 496, 505, 120 S. Ct. 1044, 1051 (2000): "The [joint] resolution further provided that revenues from the public lands were to be 'used solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes.'"

B. OHA's Constitutional Mandate, and The Attendant Duties and Obligations of the OHA Trustees

Article XII, section 5 of the Hawaii Constitution provides: "[t]he Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in in trust for native Hawaiians and Hawaiians. . . ." Similarly, Article XII, section 6 of the Hawaii Constitution provides that OHA Trustees shall exercise power:

> to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians . . . and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians.[2]

The purposes of OHA, and the powers and duties of its trustees set forth in Chapter 10 of the Hawaii Revised Statutes, likewise serve to reinforce the fact that the OHA Trustees are bound to uphold the constitutional and statutory mandates to

[2] Article XII, section 4 of the Hawaii Constitution states:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7 of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

"manage, invest and administer the proceeds from the sale or other disposition of lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred in section 10-3." Haw. Rev. Stat. § 10-5(1).[3] In sum, as previously noted by this Court, "OHA is a Hawaii state agency that administers a portion of the § 5(f) trust's proceeds as well as some other funds." Day, 616 F.3d at 921.

C. Procedural Background

On September 13, 2010, Amsterdam initiated this action by filing his Complaint and Motion for Temporary Restraining Order against OHA and Apoliona. SER at 5-9. Amsterdam also filed a Motion for Leave to Proceed in

[3] Haw. Rev. Stat. Section 10-3 states in pertinent part:

The purposes of the office of Hawaiian affairs include:

> (1) The betterment of conditions of native Hawaiians. A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. . . ;
>
> (2) The betterment of conditions of Hawaiians;
>
> (3) Serving as the principle public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians . . . .;

Forma Puperis. The district court denied Amsterdam's Motion for a Temporary Restraining Order on September 17, 2010, but granted his Motion for Leave to Proceed in Forma Puperis. SER at 5-8.

The OHA Appellees answered Amsterdam's Complaint on October 25, 2010. See id. Later that day, the OHA Appellees filed their Motion for Judgment on the Pleadings on Amsterdam's first Complaint. See id. On March 3, 2011, the district court denied the OHA Appellees' motion without prejudice, but dismissed the Complaint without prejudice pursuant to Rule 8 of the Federal Rules of Civil Procedure. SER at 5-7. Mr. Amsterdam filed an amended Complaint later that same day. SER at 5-6.

On April 5, 2011, the OHA Appellees filed a Motion for Judgment on the Pleadings on Amsterdam's "second" Complaint. SER at 5-6. On August 16, 2011, the district court issued an order (1) dismissing Amsterdam's "first amended" Complaint without prejudice—again for failing to comply with Rule 8, (2) denying without prejudice Defendants' Motion for Judgment on the Pleadings, and (3) striking Amsterdam's "second amended" Complaint, SER at 5-5, permitting Amsterdam a third bite at the apple.

On September 14, 2011, Amsterdam filed the Third Amended Complaint against the OHA Appellees. SER at 5-5. The Third Amended Complaint alleges that Amsterdam is a native Hawaiian and as such is a beneficiary of the 5(f) trust.

SER at 1-2 to 1-3. It further alleges that Amsterdam purportedly serves as the Prime Minister of the Interim Government of The Kingdom of Hawaii, which has the goal of working

> toward the advancement of Native Hawaiian self-determination and development, the restoration and advancement of The Kingdom of Hawaii and Monarchial features in honor of Queen Liliuokalani and perpetuation of Hawaiian culture, tradition, identity, and self esteen, [sic] which is necessary in light of the disadvantage status of many Native Hawaiians, all of which [sic] are to achieve a main purpose of the "betterment and actualization of the condition of Native Hawaiians."

SER at 1-3. Amsterdam claims that "[s]uch a purpose is consistent with those stated purposes for which Ceded Land Funds are to be utilized" as stated in the Admissions Act. See id.

In 2005, Amsterdam submitted a letter to OHA "requesting funds for organizing and holding Election of Officers from amongst our Hawaiian Community to restore and advance The Kingdom of Hawaii wherewithal to advance education and self-determination." SER at 1-4. On February 14, 2011, Amsterdam submitted a second letter to OHA seeking funds to travel to Washington, D.C. "to secure assistance of US Congressional Representatives for self-determination of the Hawaiian People through restoration and advancement of The Kingdom of Hawaii." See id. Amsterdam alleges that OHA did not respond to this request. See id.

The crux of Amsterdam's argument in the Third Amended Complaint is that OHA's refusal to provide Section 5(f) trust funds violated his rights under the First and Fourteenth Amendment of the U.S. Constitution and is a "Breach of Trust." SER at 1-7. Amsterdam requested that the district court order the OHA Appellees to provide him with

> a fair and reasonable amount of funds to advance Election of Officers for the restored Kingdom of Hawaii, to advance self-determination of Native Hawaiians through the restoration and advancement of The Kingdom of Hawaii with the assistance of The Interim Government of The Kingdom of Hawaii, and to travel to Washington D.C. to freely meet and speak with US Congressional Representatives in order to obtain their support, resources, and opportunities and thereby equal protection.

See id.

On December 1, 2011, the OHA Appellees filed a Motion for Judgment on the Pleadings on the Third Amended Complaint. This time, the district court granted the motion, holding in its order dated February 27, 2012 that (i) pursuant to Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010), OHA does not commit a breach of trust provided it uses the Section 5(f) trust funds for an enumerated purpose set forth therein; (ii) Amsterdam has not alleged facts demonstrating that he is being intentionally discriminated to state a claim under the Fourteenth Amendment; and (iii) Amsterdam has not stated a cognizable claim under the First Amendment. SER at 2.

V. STANDARD OF REVIEW

The Court reviews the grant of a motion for judgment on the pleadings *de novo*. United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1053 (9th Cir. 2011). This Court "may affirm the district court on any ground supported by the record, even if the ground [was] not relied on by the district court." Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1076-1077 (9th Cir. 2003) (citation omitted).

Rule 12(c) states, "[a]fter the pleadings are closed-but early enough not to delay trial-a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). "The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing. Because the motions are functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c) analog." Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1192 (9th Cir. 1989); see also McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988). As a result, a motion for judgment on the pleadings for failure to state a claim may be granted "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." McGlinchy, 845 F.2d at 810 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

Thus, "[a] judgment on the pleadings is properly granted when, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a

matter of law." Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 528 (9th Cir. 1997) (citation omitted). "Not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff." McGlinchy, 845 F.2d at 810.

To survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting, in part, Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting, in part, Twombly, 550 U.S. at 557).

As the Supreme Court recently explained in Iqbal, two principles underlie the decision in Twombly. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. (citing Twombly, 550 U.S. at 556 and quoting in part Rule 8(a)(2)).

VI. SUMMARY OF ARGUMENT

The district court did not err in granting judgment on the pleadings in favor of the OHA Appellees on Amsterdam's Third Amended Complaint. First, binding precedent set forth by this Court states that the OHA Appellees have broad discretion to expend trust funds, so long as the expenditures relate to one or more enumerated purposes under the Admission Act. Second, the district court correctly held that Amsterdam has not alleged facts demonstrating that he is being intentionally discriminated against to state a claim under the Fourteenth Amendment or that his First Amendment rights were violated. Third, OHA and the remaining OHA Appellees in their official capacities are state agencies entitled to sovereign immunity from Amsterdam's claims. Fourth, Apoliona and the other Trustees' qualified immunities insulate them from liability. Accordingly, the district court properly granted this motion for judgment on the pleadings in favor

of the OHA Defendants as to all claims in Amsterdam's Third Amended Complaint.

VII. ARGUMENT

A. The District Court Correctly Held That *Day* Disallows Interference By The Federal Court In The Proper Administration Of The Section 5(f) Trust

Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010) held that the Admission Act enumerated five purposes for which the Section 5(f) Trust funds may be used: (1) "for the support of the public schools and other public educational institutions"; (2) "for the betterment of the conditions of native Hawaiians"; (3) "for the development of farm and home ownership on as widespread a basis as possible"; (4) "for the making of public improvements"; and (5) "for the provision of lands for public use." Id. at 921 (quoting § 5(f) of the Admission Act). "So long as trust funds are used for 'one or more' of the enumerated purposes . . . Congress intended to leave the manner in which the trust is managed in Hawaii's sovereign control." Id. at 925 (quoting Section 5(f) of the Admission Act) (emphasis added). This Court found it "implausible that Congress gave Hawaii discretion to choose how to manage the trust yet provide[] for federal intervention to enforce those choices, whatever they might be." Id. Indeed, "the only restriction that [§5(f)] places on § 5(f) trustees, including the OHA trustees with respect to the portion of the § 5(f)

trust they administer, is that they use trust funds for enumerated purposes." Id. (emphases added).

Accordingly, this Court in Day made clear that "[s]o long as OHA trustees spend § 5(f) funds on any of the five enumerated purposes, they have not breached their federal trust obligations." Id. This Court further held that "[t]o establish a breach of trust under [§ 5(f)] . . . plaintiffs must prove that trust funds were used for a purpose not enumerated in [that section]." Id. at 926. By extension, the OHA Appellees have not violated any federal law or Constitutional right by not distributing Section 5(f) Trust proceeds to Native Hawaiians. If the OHA Appellees enjoy broad discretion to determine how to use Section 5(f) trust funds within the trust purposes, this discretion necessarily includes choosing what not to fund.

To conclude otherwise would result in the unintended consequence of mandating a complete federal oversight over the administration of the Section 5(f) Trust, including a ruling that OHA must distribute funds in the way a private citizen sees fit. This type of ruling would strip the OHA Trustees of their discretion, resulting in an absurd and unenforceable precedent requiring the Trustees to distribute funds to every Native Hawaiian (or possibly every private citizen) who claims that his or her cause is within the goal of bettering the Native Hawaiian population. This cannot happen. Therefore, Amsterdam's claims lack

merit, and the district court did not err in granting judgment on the pleadings in favor of the OHA Appellees on all of Amsterdam's claims.

B. The District Court Correctly Held That Amsterdam Failed to State a Claim Under the Fourteenth and First Amendments in His Third Amended Complaint

1. Fourteenth Amendment

Amsterdam complains that his right to equal protection under the law as provided by the Fourteenth Amendment of the United States Constitution was violated by OHA's actions in providing Akaka Bill proponents funding to travel to Washington, D.C. and not providing Amsterdam with travel funds to meet with U.S. Congressional representatives to "secure support to advance self-determination and restoration of a governing structure of the Kingdom of Hawaii[.]" SER at 1-4.

The Equal Protection Clause commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570-71 (9th Cir. 1990) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). An equal protection claim may be established by showing that the defendant intentionally discriminated against the plaintiff based on the plaintiff's membership

in a protected class, Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003), Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Lazy Y Ranch, Ltd., v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

Nowhere in the Third Amended Complaint does Amsterdam allege any facts that he was being intentionally discriminated against on the basis of his membership in a protected class, or that he is being intentionally treated differently than other similarly situated individuals without a rationale relationship to a legitimate state purpose. SER at 1. Accordingly, the district court did not err in granting judgment on the pleadings in favor of the OHA Appellees on this claim.

2. First Amendment

The district court did not err in entering judgment on the pleadings in favor of the OHA Appellees on Amsterdam's First Amendment claim. The First Amendment prohibits laws "abridging freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I. The First Amendment is applicable to the states and local governments through the Due Process Clause of the Fourteenth

Amendment. Menotti v. City of Seattle, 409 F.3d 1113, 1140 n.51 (9th Cir. 2005) (citing De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

The basis of Amsterdam's First Amendment claim is OHA's "refusal" to fund Amsterdam. However, "[a]lthough [Amsterdam] does not have as much money as [he] wants, and thus cannot [purportedly] exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983) (citing Harris v. McRae, 448 U.S. 297, 318 (1980)). In other words, OHA is not required to subsidize Amsterdam's lobbying activities. Id. Therefore, the district court did not err in finding that Amsterdam failed to state a cognizable claim under the First Amendment.

3. There Can Be No First or Fourteenth Amendment Violations Given OHA's Unfettered Discretion to Distribute Trust Funds

Assuming, arguendo, Amsterdam is correct and the OHA Appellees have committed First or Fourteenth Amendment violations by the actions described in the Third Amended Complaint, OHA's unfettered discretion over how to allocate its portion of Section 5(f) trust proceeds would be null. See Engquist v. Or. Dep't of Agric., 553 U.S. 591, 603 (2008) (where some forms of state action involve discretionary decisionmaking based on subjective, individualized assessments,

"allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."). Under Day, this cannot be, and therefore, the district court correctly granted judgment on the pleadings in the OHA Appellees' favor and against Amsterdam on these claims.

C. OHA, Apoliona, And The Other Trustees, In Their Official Capacities, Are Entitled To Sovereign Immunity From Suit Brought In Federal Court

Amsterdam's claims against OHA, Apoliona, and the other Trustees in their official capacities are barred. OHA is a State agency formed by the 1978 Hawaii Constitutional Convention, see Haw. Const., Art. XII, § 5, which administers programs for the benefit of Native Hawaiians. Rice v. Cayetano, 528 U.S. 495, 499 (2000). Specifically, OHA administers programs for the benefit of two subclasses of the Hawaiian citizenry: (1) "native Hawaiians" defined by statute as descendants of not less than one-half part of the races inhabiting the Hawaiian islands prior to 1778, Hawaii Revised Statutes ("HRS") § 10-2 (1993); and (2) "Hawaiians," defined as those who are descendants of people inhabiting the Hawaiian islands prior to 1778. See id.

Amsterdam's claims against Apoliona and the Trustees in their official capacities should be treated as claims against OHA. Ky. v. Graham, 473 U.S. 159, 166 (U.S. 1985) ("As long as the government entity receives notice and an

opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.") (quoting Brandon v. Holt, 469 U.S. 464 (U.S. 1985)).

The United States Constitution specifically recognized the States as sovereign entities. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996). As an arm of the State of Hawaii, OHA, Apoliona, and the other Trustees in their official capacities are afforded immunity from suit in the courts of the United States unless they consent to such a suit. See Alden v. Maine, 527 U.S. 706, 715, 756 (1999) (recognizing that the sovereign immunity of the State extends to the arms of the State and holding that "[a]lthough the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."); see also Hans v. Louisiana, 134 U.S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.").

The Eleventh Amendment to the United States Constitution "makes explicit reference to the States' immunity from suits 'commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of

any Foreign State.'" Alden, 527 U.S. at 712 (quoting U.S. Const. amend. XI). The Supreme Court has, however, recognized that the States' immunity from suit neither derives from nor is limited by the Eleventh Amendment, as "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." Id. at 713. Indeed, the somewhat narrow language of the Eleventh Amendment has been broadened by the Supreme Court to reflect that pre-Constitutional understanding of sovereign immunity—that States are protected from all private suits in courts of the United States, whether brought by a citizen of that state or a citizen of another state. See Alden, 527 U.S. at 723-24; Hans, 134 U.S. at 14-15.

In Hans, the Supreme Court held that sovereign immunity barred a citizen from suing his own state under the federal question prong of jurisdiction. Hans, 134 U.S. at 14-15. As in Hans, Amsterdam sued OHA by means of federal question jurisdiction, arguing violations of breach of trust and the First and Fourteenth Amendments of the United States Constitution. OHA, Apoliona, or the other Trustees have not consented to suit for the claims brought by Amsterdam in the federal courts. Accordingly, Amsterdam's claims against OHA and Apoliona and the other Trustees in their official capacities cannot survive.

Furthermore, in his Third Amended Complaint, Amsterdam appears to claim only monetary relief and not prospective injunctive relief. See SER 1-7

("[Amsterdam] asks the court to order the [OHA Appellants] to provide [Amsterdam] with a fair and reasonable amount of funds. . . ."). This Court has held that "[t]hough a § 1983 action may be instituted . . . [against state officials], a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." Wheaton v. Webb-Petett, 931 F.2d 613, 619 (9th Cir. 1991) (quoting Edelman v. Jordan, 415 U.S. 651, 677, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974)) (emphasis added). Even absent sovereign immunity, then, the Eleventh Amendment bars Amsterdam's § 1983 claims for monetary relief against OHA, Apoliona, and the other Trustees in their official capacities.

D. Apoliona and the Other Trustees Are Protected By Qualified Immunity From Amsterdam's Claims

Apoliona and the other Trustees are shielded from Amsterdam's claims in the Third Amended Complaint by means of qualified immunity. In the Third Amended Complaint, Amsterdam appears to allege a claim under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

> in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In this instance, Amsterdam's claim that the OHA Appellees misused Section 5(f) Trust funds would fall under an alleged violation of the Admission Act.

The qualified immunity doctrine protects government officials from their exercise of poor judgment and fails to protect only those who are "plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). "The purpose of qualified immunity is to protect officials from undue interference with their duties and from potentially disabling threats of liability." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1098 (9th Cir. 1994)).

The qualified immunity analysis involves a two-step process: (1) the Court examines whether, taking the facts as alleged, the defendant has violated a

constitutional or statutory right; and (2) if so, whether that constitutional or statutory right was clearly established such that a reasonable person would have known. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). The court may decide to consider either step first, but if the first part of the analysis is determined to be in the negative, the inquiry ends there. Id.

Although Amsterdam does not specifically allege that Apoliona and the Trustees "misused" Section 5(f) Trust funds, the Third Amended Complaint suggests that OHA has committed a breach of trust by failing to provide funds to Amsterdam, the "The Interim Government of the Kingdom of Hawaii," and the "Kanaka Maoli People." In other words, Amsterdam alleges that OHA must distribute money to him, the "The Interim Government of the Kingdom of Hawaii," and the "Kanaka Maoli People" to support their causes. By not providing funding, Amsterdam claims the OHA Defendants violated his First and Fourteenth Amendments, and possibly the Admission Act.

Yet, Amsterdam fails to point to a provision in the Admission Act, or Section 5(f) itself, that strips the OHA Trustees of their discretion and forces them to give money to any Native Hawaiian (or anyone for that matter) that seeks to support a particular political cause. As noted earlier, such an idea would turn Day on its head. Moreover, nothing in the Third Amended Complaint demonstrates

that the OHA Appellees are acting in bad faith or have an improper motive for denying Amsterdam access to Section 5(f) Trust funds. As such, Apoliona and the other Trustees are entitled to qualified immunity from all of Amsterdam's claims.

VIII. CONCLUSION

For all the aforementioned reasons, the record herein, and any oral argument by counsel, the OHA Appellees respectfully request that this Court affirm the district court's issuance of an order granting judgment on the pleadings in favor of the OHA Appellees.

DATED: Honolulu, Hawaii, November 13, 2012.

/s/Robert G. Klein
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Attorneys for Appellees

No. 12-15672

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C. KAUI AMSTERDAM,

Plaintiff-Appellant,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii

The Honorable David Alan Ezra

CERTIFICATE OF SERVICE

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I hereby certify that on November 13, 2012, a true and correct copy of the foregoing document was duly served upon the following person via U.S. Mail, postage prepaid as follows:

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