No. ____

In The
Supreme Court of the United States

JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN, EDWIN J. GAYAGAS, ERNEST LASTER, and JENNIFER LASTER,

Appellants,

v.

SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION; *et al.*,

Appellees.

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

JURISDICTIONAL STATEMENT

ROBERT H. THOMAS
Counsel of Record
ANNA H. OSHIRO
MARK M. MURAKAMI
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Appellants

QUESTIONS PRESENTED

1. Equal representation. At the direction of the Hawaii Supreme Court, the 2011 Hawaii Reapportionment Commission (Commission) determined that 108,767 residents—nearly 8% of Hawaii's Census-counted population—were not "permanent residents," and thus could be excluded from Hawaii's body politic because they did not intend to remain permanently: (1) active duty military personnel who indicated on a federal form that another state should withhold taxes, (2) their spouses and children, and (3) students who did not qualify for in-state tuition. The Commission acknowledged those whom it "extracted" were not counted anywhere else, and that they were not represented equally in Hawaii. The District Court refused to apply close constitutional scrutiny, and concluded Hawaii's "permanent resident" population basis was a rational means of protecting other residents' voting power, which superseded the extracted classes' right to equal representation. The Commission counted others who could not intend to remain permanently (*e.g.*, undocumented aliens), or whose inclusion diluted voting power because they were not qualified to vote (prisoners, minors). The first question presented:

Does the Equal Protection Clause's requirement of substantial population equality mandate that representational equality take precedence over voting power as held by the Ninth Circuit, or is the choice of whom to count left entirely to political processes, as held by the Fourth and Fifth Circuits and the District Court, and has Hawaii appropriately defined and uniformly applied "permanent residents" to deny the extracted persons equal representation?

2. Extreme deviations. The Commission recognized that with overall deviations of 44.22% in the Senate and 21.57% in the House of Representatives—the product of Hawaii's prohibition of "canoe districts" (districts spanning more than a single county)—the 2012 Reapportionment Plan was presumptively discriminatory. This Court has never upheld a reapportionment plan with deviations in excess of 16%, which "may well approach tolerable limits." The District Court accepted these substantial departures from population equality because Hawaii is geographically and culturally different. The second question presented:

Is Hawaii's prohibition on legislators representing people in more than one county a "substantial and compelling" justification rendering the 44.22% and 21.57% deviations "minor," or are these deviations too large to be constitutionally acceptable?

PARTIES TO THE PROCEEDINGS

The Appellants are Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster.

The Appellees are Scott T. Nago in his official capacity as the Chief Election Officer State of Hawaii, the State of Hawaii 2011 Reapportionment Commission and its members in their official capacities: Victoria Marks, Lorrie Lee Stone, Anthony Takitani, Calvert Chipchase IV, Elizabeth Moore, Clarice Y. Hashimoto, Harold S. Matsumoto, Dylan Nonaka, and Terry E. Thomason.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

JURISDICTIONAL STATEMENT

Appellants submit this jurisdictional statement supporting their appeal of a decision of the three-judge U.S. District Court for the District of Hawaii.

OPINIONS BELOW

The District Court's opinion (July 11, 2013) (App. 1-91) is not yet reported. The order denying a preliminary injunction (May 22, 2012), is reported at 878 F. Supp. 2d 1124 (App. 92-172).

JURISDICTION

The district court denied Appellants' request for a preliminary injunction, and their motion for summary judgment, and granted summary judgment to Appellees. The court entered final judgment on July 11, 2013. Appellants filed a timely notice of appeal on August 9, 2013. App. 173-76. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions involved are reproduced in the Appendix. App. 177-79.

INTRODUCTION

1. This case presents stark contrasts. Hawaii's 2012 Supplemental Reapportionment Plan (2012 Plan)[1] denied equal legislative representation to virtually all of the men and women serving in the Armed Forces who reside in Hawaii, because they did not meet its unequally-applied criteria for state citizenship by demonstrating the intent to remain in Hawaii permanently. The State also excluded their families—primarily women and children—and students whom universities identified as out-of-state. It claimed that to have included these three classes in reapportionment would have diluted the voting power of everyone else. However, it automatically counted as Hawaii citizens others who had no intent to remain, or whose inclusion diluted voting power, such as undocumented aliens, prisoners, minors, and the hundreds of thousands of Hawaii residents who, although qualified, simply do not register or vote (Hawaii has among the worst voter participation statistics in the country).

The Equal Protection Clause guarantees all "person[s] within [Hawaii] the equal protection of the laws," and Hawaii cannot refuse to count someone simply because she serves in the military. *Davis v. Mann*, 377 U.S. 678 (1964). Hawaii no longer expressly does so, *Travis v. King*, 552 F. Supp. 554, 558 & n.13 (D. Haw. 1982), but in the half-century since statehood, it has always found a way to exclude ser-

[1] A complete copy of the 2012 Plan is available at http://hawaii.gov/elections/reapportionment/2011/documents/2012ReapportFinalReport_2012_03_23.pdf.

vicemembers whom it considers outlanders—*haole*[2]—even though they live, work, and are counted nowhere else but Hawaii. It took a civil war and amendments to the Constitution to exorcise the demon of not respecting everyone equally for purposes of Congressional apportionment, and while the situation here is much less dramatic, the stakes are no less important. If the excluded persons are denied equal representation in Hawaii's legislature, they have no representation *anywhere*.

Congressional apportionment requires use of total population. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1984) ("the People" means everyone). But this Court has never required states to apportion their legislatures using total population, although it is "the de facto national policy." Joseph Fishkin, *Weighless Votes*, 121 Yale L.J. 1888, 1891 (2012). However, if a state bases reapportionment on some other population, it must prove the resulting plan is "substantially similar" to one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens. *Burns v. Richardson*, 384 U.S. 73, 93 (1966). It does so by employing "[a]n appropriately defined and uniformly applied requirement" when deciding whom to count and whom to exclude. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

Hawaii's intent-to-remain test for "permanent resident" was neither. *First*, it was not appropriately defined, but was based on a procession of assumptions:

---

[2] "[F]ormerly any foreigner, foreign, introduced, of foreign origin . . ." Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 58 (Rev. ed. 1986).

- 42,332 resident servicemembers were deemed to not have the intent to remain permanently in Hawaii based only on a federal tax form on which they designated another state as their residence for income tax withholding purposes.
- 53,115 military family members were excluded simply because they were associated with an extracted servicemember.
- 13,320 students were removed because they had not qualified to pay in-state tuition, or listed a non-Hawaii "home address."

The Commission asserted the extraction of military, families, and students, was required because they are transients, and their inclusion would impact the voting power of those who were counted.

Second, the permanent resident test was unequally applied. The Commission made no effort to determine anyone else's state of mind or whether they paid Hawaii income taxes, and they were automatically counted. The Commission also counted those whose presence skewed voting power because they were not entitled to vote in Hawaii, such as prisoners, aliens, and minors.

These extractions should have been subject to close constitutional scrutiny. The District Court, however, held Hawaii need only demonstrate a rational basis for these classifications, and that its preference for voting power over representational equality was a matter for political determination. This issue has been addressed in various ways by the lower courts. The Ninth Circuit favors representational equality over voting power, while the Fourth and Fifth Circuits, allow states to freely choose whom to count and

whether to exclude. Appellants do not suggest that states must use total population, but urge a more pragmatic rule: they ask this Court to hold, simply and only, that if Hawaii insists on excluding a large percentage of its Census-counted residents, then the reviewing court must apply heightened scrutiny, and Hawaii should have been required to show a well-defined and uniformly applied standard, because its choice of reapportionment population deprived Appellants and others of representational equality.

2. The District Court also concluded Hawaii overcame the presumption of unconstitutionality resulting from the 2012 Plan's deviations from statewide population equality grossly in excess of this Court's 10% threshold. The 44.22% and 21.57% deviations were the result of the prohibition of "canoe districts" (where a single legislator represents constituents in more than one county). Only twice has this Court sustained a deviation in excess of 10% when measured against such "traditional districting principles"—political boundaries, contiguity, and community—and neither came anywhere close to approving the percentages here. Moreover, some departures from population equality are so extreme that they can *never* be justified, and 44.22% and 21.57% certainly qualify. The District Court, however, established an unprecedented standard and new national high water mark by endorsing deviations that make a mockery of the 10% threshold.

But when arguments of the kind the District Court validated have been presented—that Hawaii is so geographically and culturally different that it deserves special rules not applicable anywhere else in the Union—this Court has roundly rejected them. *See, e.g.*,

Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (when Congress apologized for the overthrow of the Hawaiian Kingdom it did not limit the State's ability to act in a sovereign capacity like every other state). As this Court reminded when it rejected Hawaii's argument that its unique history exempted it from race-neutral voting:

> As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Rice v. Cayetano, 528 U.S. 495, 524 (2000).

This Court has never upheld deviations anywhere near those in Hawaii's 2012 Plan, especially on so thin a justification as "we're different." It should not do so now.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Reapportionment in Hawaii

This appeal is the latest chapter in a reapportionment controversy that began more than a half-century ago when Hawaii joined the Union. The ink was barely dry on the Admissions Act when the new state began excluding servicemembers from its body politic, and since 1959, Hawaii has always found a way to avoid including military personnel as part of its state apportionment population.[3] Initially, it counted registered voters, which excluded most servicemembers because generally, they did not register to vote in Hawaii. *Holt v. Richardson*, 238 F. Supp. 468, 470-71 (D. Haw. 1965). In *Burns v. Richardson*, 384 U.S. 73 (1966), this Court upheld this count, but only because there was no showing that counting registered voters resulted in a plan different than one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens. *Id.* at 93. The Court held there was no proof the plan based on registered voters was different than a plan based on "state citizens," or total population. *Id.* at 94-95. This was a time when 87.1% of Hawaii's voting-age population registered to vote, the highest percentage in the nation, so there was a high correlation among registered voters, total population, and state citizens. *Burns* also noted that states need not include "aliens, transients, short-term or temporary residents, or persons denied the vote." *Id.* at 92.

---

[3] Servicemembers are counted as part of Hawaii's population for purposes of Congressional apportionment, and the military's presence aids Hawaii in achieving an additional seat in the House of Representatives. *Travis*, 552 F. Supp. at 571.

By 1982, however, voter registration and participation numbers had declined so precipitously that the registered voter population no longer was a valid proxy for either state citizens or total population,[4] and plans based on registered voters and "civilians" were invalidated, and the District Court imposed canoe districts to lessen the deviations. *Travis*, 552 F. Supp. at 558 & n.13 ("civilian population is not a permissible population base").[5] As a consequence, in 1992 Hawaii amended its constitution to count "permanent residents." Haw. Const. art. IV, § 4 (App. 177-78). After the extractions, and allocation of the 25 Senate seats and 51 House seats among the four counties (labeled "basic island units"), the Hawaii Constitution requires population equality only within each county, and not within each district. *Id.* § 6.

B. Census: 1,360,301 "Usual Residents"

The decennial Census has used the standard of "usual residence" since the first Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 804-05 (1992). Usual residence "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. Currently, it is the "the place where a person lives and sleeps most of the time. It is not the same as the person's voting residence or legal residence." *See* U.S. Census Bureau, Residence Rule and

---

[4] By the 2010 Census, Hawaii's voter participation levels had plummeted to a dismal 48.3%. U.S. Census Bureau, Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010.

[5] *Travis* details the multiple challenges to Hawaii's reapportionment over the years. *Id.* at 556 & n.2 (noting "numerous attacks in both state and federal courts").

Residence Situations for the 2010 Census (2010). Servicemembers stationed within the United States were "usual residents" of the state where they were stationed. Those deployed outside the U.S. were counted as "overseas population" and attributed to a state. The Census counted transients such as tourists and servicemembers in-transit, in their states of usual residence. *See* App. 151, ¶ 5.

Thus, the 2010 Census "usual resident" population of Hawaii included servicemembers, their families, university students, aliens (documented and otherwise), persons in Hawaii pursuant to the Compact of Free Association (COFA migrants), minors, and prisoners, regardless of their intent.[6] Most critically, those who were usual residents of Hawaii were not counted in any other state. App. 182, ¶ 3. The Census reported the total population of Hawaii as 1,360,301.

C. Hawaii's Military

Fifty years ago, this Court agreed that Hawaii's military was mostly transient. *Burns*, 384 U.S. at 94. It noted "the military population in the State fluctuates

---

[6] In 2010, an estimated 40,000 undocumented aliens resided in Hawaii. Pew Hispanic Center, Unauthorized Immigrant Population: National and State Trends, 2010 at 23 (2011) (http://www.pewhispanic.org/files/reports/133.pdf). The Census estimated 12,215 COFA migrants resided in Hawaii in 2008. U.S. Census Bureau, 2008 Estimates of Compact of Free Association (COFA) Migrants 3 (2009) (http://www.uscompact.org/FAS_Enumeration.pdf). Currently an estimated 303,818 minors reside in Hawaii. *See* Resident Population Estimates by Single Years of Age for the State of Hawaii: 2010 to 2012 (2012) (http://files.hawaii.gov/dbedt/census/popestimate/2012-state-characteristics/Res_pop_single_year_10_12_hi.pdf). Hawaii's prison population was 6,037 in 2011. *See* U.S. Dep't of Justice, Prisoners in 2012 – Advance Counts, at 3 (2013).

violently as the Asiatic spots of trouble arise and disappear." *Id*. The preceding 25 years had witnessed massive population swings as draftees flowed in and out of Hawaii during World War II, the Korean conflict, and the early days of Vietnam. For example, at the peak of World War II, 400,000 servicemembers comprised nearly 50% of Hawaii's population. *Id*. at 94 n.24. By 1950 that number had shriveled nearly twenty-fold to 21,000. It then swelled again during the Korean conflict. *See* Thomas Kemper Hitch, Islands in Transition: The Past, Present and Future of Hawaii's Economy 199 (Robert M. Kamins ed., 1993).

But Hawaii's "special population problem" of a half-century ago no longer exists, and today's servicemembers cannot be so casually labeled "transients." The military is vastly different, and our all-volunteer force has served worldwide with no violent swings in Hawaii's military population even remotely comparable to the twenty-fold surge confronting the Court in *Burns*. *See* James Hosek, *et al*., How Much Does Military Spending Add to Hawaii's Economy 28 (2011) (http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf).

The military is no longer separate from the community as so vividly described by James Jones in *From Here to Eternity*. They own and rent homes and apartments off-base. Many pay property taxes. They patronize businesses in the community and pay Hawaii General Excise Tax. Their families work in the community and pay Hawaii taxes. Their children attend Hawaii public and private schools, and their families use and pay for roads and other services. They serve as elected officials on Neighborhood Boards. Their presence brings an additional seat to

Hawaii in the U.S. House of Representatives. Hawaii politicians aggressively pursue the massive economic benefits their presence brings, and campaign on the promise of maintaining the flow of federal dollars from Washington that come with it. A study prepared for the Secretary of Defense estimated the military's presence injects $12 billion into the state, comprising nearly 18% of Hawaii's economy. *Id.* at 21.

D. 2011 Plan Extracted A Handful

In August 2011, the Commission proposed a plan that included all Census-counted residents. This plan contained maps with district lines, but was not adopted. The following month, the Commission adopted the 2011 Final Report and Reapportionment Plan (2011 Plan) extracting 16,458 servicemembers and university students from the 2010 Census population, resulting in a population basis of 1,343,843. This extraction was not substantial enough to result in significantly different district boundaries than the first proposed plan.

E. 2011 Plan Invalidated: Hawaii Supreme Court Adopted An Intent-to-Remain Test

In October 2011, a senator from the County of Hawaii (the "Big Island") who stood to lose her seat under the 2011 Plan filed suit in the Hawaii Supreme Court to compel even more extractions. Most servicemembers, their families, and students resided on Oahu, the location of major military installations such as Pearl Harbor and Schofield Barracks, and the main campus of the University of Hawaii. Eliminating them from the reapportionment population would shift a Senate seat to the Big Island.

Three months later, in an unsigned opinion the court agreed and voided the 2011 Plan. *Solomon v. Abercrombie*, 270 P.3d 1013 (Haw. 2012). It ordered the Commission to "extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population" because they "declare Hawaii not to be their home state." *Id.* at 1022. It also ordered military family members extracted because "the majority . . . are presumably the dependents of the 47,082 active duty military . . . ." *Id.* The Hawaii Constitution does not define "permanent resident," and the court held it means "domiciliary." *Id.* (citing *Citizens for Equitable & Responsible Gov't v. Cnty. of Hawaii*, 120 P.3d 217, 221 (Haw. 2005)). A domiciliary is a person who has both a substantial physical presence in Hawaii and who has demonstrated the intent to remain. It "means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights." *Id.* at 221 (quoting *In re Irving*, 13 Haw. 22, 24 (1900)). The court relied on a passage from *Citizens* for several unsupported assumptions:

> Generally, college students from outside Hawaii County who lack a present intent to remain in the county for a period of time beyond their date of graduation would not be considered residents. Their presence in Hawaii County is primarily for educational purposes which is "transitory in nature." Likewise, ordinarily the transitory nature of military personnel from outside Hawaii County is apparent. Normally, military personnel and their dependents are temporarily stationed in the county by the United States military. Military personnel may have little say in deciding the location of their assignment. As a result, generally

> speaking, members of the military are in Hawaii County involuntarily, as opposed to persons who choose to live in the county.

Citizens, 120 P.3d at 222. The court shifted the burden to the extracted persons to demonstrate a "present intent to remain" if they wish to be counted. *Id.* at 222 n.5. It concluded "[t]he plain meaning of '*resident* populations' avoids the anomalous result of counting nonresidents in the reapportionment plan when those nonresidents, pursuant to [Haw. Rev. Stat.] § 11-13, cannot register to vote." *Id.* at 224.[7] The court did not require extraction of prisoners, aliens, or minors, none of whom can register to vote.

Solomon ordered the Commission to apply these standards, and after extraction of servicemembers, military families, and students, the court ordered it to apportion legislative seats "among the four counties" with each county having at least one whole legislator. *Solomon*, 270 P.3d at 1022. Finally, the court ordered the Commission to "apportion the senate and house members among nearly equal numbers of permanent residents *within* each of the four counties," and not on the basis of *statewide* district equality. *Id.* at 1024 (emphases added).

F. 2012 Plan Extracted 8% Of The Population

More than two months later, in March 2012, the Commission adopted the 2012 Plan that excluded 108,767 servicemembers, families, and students.

---

[7] Nothing prohibits a servicemember from registering to vote immediately upon her arrival at her new duty station in Hawaii.

1. Servicemembers

The Commission asked the U.S. Pacific Command for information on servicemembers who were not "legal residents" of Hawaii. Pacific Command provided a spreadsheet of data from Defense Manpower Data Center of those who had completed Form DD2058, which is used to designate the state to withhold taxes from servicemembers' pay. *See* DD Form 2058, State of Legal Residence Certificate (http://www.armymwr.com/UserFiles/file/All_Army_Sports/dd2058.pdf) ("Information is required for determining the correct State of legal residence for purposes of withholding State income taxes from military pay.") The Commission extracted those servicemembers who denoted a state other than Hawaii as their "legal residence" for state tax withholding purposes. There may be little correlation between where servicemembers pay taxes and where they are actually located. The form states that information may be disclosed to tax authorities, but servicemembers were not notified it would be used to determine residency for representational purposes. Moreover, there was no way to confirm the servicemembers who were extracted based on this data had actually been in Hawaii on Census Day and thus included in the total population. The Commission extracted 42,332 servicemembers based solely on DD2058 responses.

2. Military Families

The Commission extracted 53,115 military spouses and children "associated or attached to an active duty military person who had declared a state of legal residence other than Hawaii." It had no information about the permanence of their residency, or their

mental states. It did no survey, nor did the military provide data. The Commission simply assumed families had the same intent as an associated servicemember.

3. Students

The Commission extracted 13,320 students, relying on information provided by schools not related to data gathered on Census Day. For example, the University of Hawaii identified students as "nonresidents" based on its count of those enrolled for spring 2010 semester (not necessarily students who were enrolled on Census Day) who had not qualified to pay in-state tuition because they had not met a one-year durational residency requirement. Other schools used "home address." Accordingly, the Commission might have extracted students not counted because they had not been present on Census Day. Also, the Commission did not seek information from every school, but limited its inquiry to the University of Hawaii, Hawaii Pacific University, and Brigham Young University-Hawaii.

4. No Other Inquiry

The Commission made no attempt to inquire about the intent of hundreds of thousands of others such as aliens, COFA migrants, prisoners, or federal civilian workers who were "stationed" in Hawaii.

G. Senate Seat To Hawaii County, Excessive Deviations

These extractions resulted in 1,251,534 permanent residents as the 2012 Plan's population basis. This shifted a Senate seat from Oahu to the Big Island, the goal of *Solomon*. The ideal size of Senate districts

statewide was 50,061, and the ideal population for House districts was 24,540.

1. Senate Deviation: 44.22%

The 2012 Plan's largest Senate district (Senate 8; Kauai) contains 66,805 permanent residents, a deviation of +16,744, or +33.44% more than the statewide ideal. The smallest Senate district (Senate 1; Hawaii) contains 44,666, a deviation of -5,395, or -10.78% less than the ideal. The sum of those deviations (the "overall range") is 44.22%.

2. House Deviation: 21.57%

The largest House district (House 5; Hawaii) contains 27,129 permanent residents, a deviation of +2,589, or +10.55% more than the statewide ideal. The smallest (House 15; Kauai) contains 21,835 permanent residents, a deviation of -2,705, or -11.02% less than the ideal. The overall range in the House is 21.57%.

H. Commission Ignored Federal Standards, Acknowledged Presumptive Unconstitutionality

The Commission, however, actually reported that the 2012 Plan's deviations were *lower and below* the 10% invalidity threshold. It did so by comparing districts only *within* each county. *See* 2012 Plan at 15-18 (Tables 1-8). It reported lower deviations by dismissing this Court's requirement of *statewide* district equality, and it acknowledged its methodology did not comply with equal protection requirements. *Id.* at 18 ("The Commission is aware that federal courts generally review reapportionment and redistricting plans under a different methodology than set forth above."). It also recognized that because the statewide devia-

tions exceed 10%, the 2012 Plan is "prima facie discriminatory and must be justified by the state." *Id.* at 9. The Commission's justification was that it was protecting the rights of permanent residents to electoral equality, because their voting power would have been diluted by the inclusion of these transients.

II. PROCEEDINGS BELOW

In April 2012, Appellants sought a preliminary injunction prohibiting implementation of the 2012 Plan. In May 2012, the District Court denied Appellants' motion. App. 92-172. Later, on cross-motions for summary judgment, the District Court concluded Hawaii properly excluded the extracted classes from its reapportionment population, and that it overcame the presumption of unconstitutionality resulting from the 44.22% and 21.57% deviations. App. 1-92.

REASONS TO NOTE PROBABLE JURISDICTION

I. HEIGHTENED SCRUTINY FOR POPULATION COUNTS THAT DEPART FROM EQUAL PROTECTION PRINCIPLES

A. The Lower Courts Are Divided On The Role Of Representational Equality

Choosing whom to count when reapportioning state legislatures goes to the very heart of representative government because it determines who constitutes the body politic. From "We the People" to the Equal Protection Clause, our traditions and this Court's rulings have viewed "person" expansively, culminating with *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), which held that state reapportionment must be accomplished so that districts are "as nearly of equal population as is practicable."

Although "one-person, one-vote" suggests that equality of voting power is the goal, the text of the Equal Protection Clause itself ("any person"), and this Court's decisions reveal the representational equality principle is its indispensable purpose. *See, e.g.*, *id.* at 560-61 ("the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *Yick Wo v. Hopkins*, 118 U.S. 356, 359 (1886) (aliens guaranteed equal protection). As one commentator notes:

> The court-ordered apportionment plan showed how two prized American values, electoral equality and equal representation, can conflict in areas with large noncitizen populations. Electoral equality rests on the principle that

> the voting power of all eligible voters should be weighted equally and requires drawing voting districts to include equal numbers of citizens. The slightly different concept of equal representation means ensuring that everyone—citizens and noncitizens alike—is represented equally and requires drawing districts with equal numbers of residents. Equal representation is animated by the ideal that all persons, voters and nonvoters alike, are entitled to a political voice, however indirect or muted.

Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 Yale L. J. 1441, 1446-47 (1995) (footnotes omitted). *See also* Fishkin, *Weightless Votes*, 121 Yale L. J. at 1907 ("each legislator ought to be responsible for bringing resources home to roughly the same number of persons. Children—and for that matter resident aliens—need roads, bridges, schools, and Teapot Museums as much as the rest of us do, if not more.") (footnote omitted). This means that *persons*—not "permanent residents," "civilians," "taxpayers," "counties," or "basic island units"—are presumptively entitled to be represented equally in Hawaii's legislature. This is especially important in districts such as those in which Appellants reside which contain large populations of servicemembers and students whom Hawaii claims are not truly residents, and thus not persons who count. Appellants and the extracted servicemembers are U.S. citizens, and are entitled to be represented *somewhere*, and Hawaii is the only place in the nation they can be, but the 2012 Plan treats them as invisible, and grossly distorts districts on Oahu. It forces Appellants to compete with more people to gain the attention of their representative than those in

other districts. Every person residing in Hawaii has a right to be represented in the legislature regardless of intent, and "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Garza*, 918 F.2d at 775 (quoting *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). *See also* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269, 1281 (2002) (each representative should have equal numbers of constituents).

The District Court discounted these bedrock principles, concluding that Hawaii need only show a rational basis to prefer the voting power of those it defines as permanent residents (including aliens, nontaxpayers, prisoners, minors, and all others whom the Commission included without any inquiry into their intent to remain permanently in Hawaii), over the rights of servicemembers, military families, and students to be represented equally. The District Court refused to apply the "close constitutional scrutiny" test of *Dunn*, 405 U.S. at 335, drawing an unnecessary distinction between individual voting rights and the right to equal representation. *See* App. 38 ("The Supreme Court applies this higher standard to cases alleging infringement of the fundamental right to vote, in contrast to equal representation or equal voting power challenges in the context of reapportionment. In practice, the standard for this latter category approximates rational-basis review."). The 2012 Plan's unjustifiable defect is that it takes no account of the guarantee that all residents of Hawaii must be represented equally in the legislature, and if voting power conflicts with representation, the Equal Protection principle that "government should repre-

sent *all* the people" predominates. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

The District Court followed two circuits which defer to state political processes when deciding whom to count. *See Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011) (equal protection does not prohibit use of total population and does not require counting citizen voting-age population), *cert. denied*, 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (counting total population is rational), *cert. denied*, 532 U.S. 1046 (2001); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (electoral equality not necessarily superior to representational equality). The Ninth Circuit, however, applies a contrary rule. In *Garza*, it held total population is required if counting a lesser population results in dilution of representational equality, "because equal representation for all persons more accurately embodies the meaning of the fourteenth amendment." John Manning, *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*, 25 Suffolk U. L. Rev. 1243, 1244 (1991) (footnote omitted). Thus, the Ninth Circuit held that states *must* use total population, while the Fourth and Fifth Circuit held they merely *may*.

The District Court's opinion actually creates a three-way conflict. Although it applied the same deferential scrutiny as *Chen* and *Daly*, those cases did so only when evaluating use of total Census-counted population with no extractions, the population basis

subject to the least manipulation.[8] Rational basis review made sense there, because it was clear the equal protection goal of equal representation was met by counting everyone. Thus, neither representational equality, nor the level of scrutiny to be applied when a state does not count everyone, was at issue in *Chen* or *Daly*. These issues are squarely presented here, because the District Court deferred to a plan that excluded a huge number of residents.

The conflict is a result of this Court having never determined what "population" must be equalized. *See Chen*, 532 U.S. at 1046 (Thomas, J., dissenting from denial of certiorari) ("We have never determined the relevant 'population' that States and localities must equally distribute among their districts."). The conflict is sourced in confusion over *Burns*, which did not require states to count total population, but allows the count of some lesser basis, but only if the state shows the plan upholds equal protection principles by proving it is not "substantially different" than one based on a "permissible population basis." *Burns*, 284 U.S. at 91-92. If it satisfies that burden, the state's decision about whom to count "involves choices about the nature of representation." *Id.* at 92. The Court identified several permissible population bases, but noted it "carefully left open the question what population was being referred to" when it required substantial "population" equality. *Id.* Consequently, a state may choose to count nearly any population, provided it proves the resulting plan advances equal protection principles. However, the more the alternative

[8] For example, *Burns* noted that a count of registered voters is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation." *Id.*

basis strays from one that is "appropriately defined and uniformly applied," *Dunn*, 405 U.S. at 343, and the more subject to manipulation it is, the more scrutiny a court should apply.[9]

This appeal affords an excellent vehicle for this Court to affirm the place of representational equality in the Equal Protection canon. The Court should resolve the lower court conflict and confirm that although there may be no absolute requirement to count everyone, if Hawaii excludes some of its residents and thereby denies them equal representation, it bears the burden of justifying those exclusions. Because Hawaii did not include everyone, its choice must pass "close constitutional scrutiny" and meet the three-part test outlined in *Burns*, which required the Commission to: (1) identify the permissible population basis to which permanent residents is comparable, (2) demonstrate that counting permanent residents resulted in a plan that is a "substantial duplicate" of one based on a permissible population basis, and (3) show the classification is not "one the Constitution forbids." *Id.* at 93-94.

---

[9] Two of the three permissible population bases identified in *Burns*—total population and U.S. citizens—are well-defined and uniformly applied, so rational basis is the appropriate standard of review. The third *Burns* population basis—state citizens—*might* qualify under *Dunn* if the state has, unlike Hawaii, adopted a clear definition of "state citizen" and applied it to all. Thus, New York could conceivably count Yankees fans, provided it could show that the districting resulting from such a count was substantially the same as districting based on a permissible population basis.

B. The 2012 Plan Failed The Three-Part *Burns* Analysis

1. The District Court, however, took a strikingly contrary approach and upheld the 2012 Plan even though the Commission did not identify a permissible population basis to which to measure its count of permanent residents. In *Burns*, Hawaii identified both citizen and total population as the bases against which registered voters could be compared for equality. *Id*. at 92. However, there is nothing in the 2012 Plan or in the records of the 1992 constitutional amendment even hinting of a similar population basis to which the 2012 Plan can be compared. We simply don't know if it approximated a plan based on state citizens or U.S. citizens, for example. We do know it resulted in a plan with districting nowhere near that which would have resulted from using total population (the 2011 Plan, and the August 2011 proposed plan). Having not identified a comparative population, the Commission provided no tools for the District Court to determine whether it took proper account of representational equality, and the court should have invalidated it.

The court instead concluded "permanent residents" was simply another way of describing "state citizens." But the 1950 Hawaii constitutional convention rejected a count of the population of "state citizens" as too difficult to determine. Indeed, to this day there is no definition of state citizenship in Hawaii law. In the absence of a clear definition, the District Court fell back on a tautology. It relied on the statement in *Burns* that the Commission need not count "aliens, transients, short-term or temporary residents, or persons denied the vote," *id.* at 92, to conclude that Hawaii's use of "permanent resident" has already been

validated by this Court, because "permanent" is obviously the opposite of "temporary."

> Because *Burns* recognizes Hawaii's prerogative to exclude the temporary populations of non-resident servicemembers, their dependents, and non-resident students from the definition of "permanent residents," Hawaii's definition of "permanent residents" constitutes "state citizens" by another name. The State need not demonstrate that its plan under the "permanent residents" standard is a duplicate of a plan made on another permissible basis.

App. 41-42. *See also* App. 125-26 ("the Supreme Court has explicitly affirmed that a state may legitimately restrict the districting base to citizens, which in this case, corresponds to permanent residents").

Under the District Court's rationale, undocumented aliens, COFA migrants, and prisoners are "Hawaii citizens," but servicemembers residing in Hawaii and their families are somehow not. The court's reasoning falls apart, however, because the Commission did not show the assumptions it made about military and student states-of-mind survived the close scrutiny necessary to provide assurances that Hawaii based its extractions only on a desire to exclude transients, and not on prohibited reasons. Under the District Court's rationale, however, if Hawaii defined "temporary residents" as those residing in Hawaii less than 10 years, that choice would only be subject to rational basis review, because *Burns* already upheld the extraction of "temporary residents."

The Census already excluded transients and short-term residents such as tourists and in-transit mili-

tary personnel, who were counted where they usually resided. Hawaii, however, simply assumed servicemembers were transients based on their DD2058 responses, and excluded them despite their long-term presence (tours of duty generally range from 18 months to two or more years) and "usual resident" qualifications.[10] The Commission suggested that the extracted persons hold themselves apart from the community as shown by their failure to register to vote, and if they desired to be permanent residents, they could signal their intent by registering to vote. Because they largely have not, it argued, it was rational to consider them virtually represented by their permanent resident neighbors. *See* Fishkin, *Weightless Votes*, 121 Yale L. J. at 1904 ("Today, only children, noncitizens, most felons, some ex-felons, and very few others are virtually represented by the voting-age citizens who happen to live in their communities."). But the Commission unquestioningly included everyone else without requiring they demonstrate intent. Moreover, registering to vote or voting has never been a condition of a right to representation, and it cannot be used here, especially when only 48.3% of Hawaii's voting-age population registers. If servicemembers and their families are not "state citizens"

---

[10] *Burns*, like all reapportionment cases, was a decision driven by the circumstances existing at the time, and the Court's conclusion was based on a factual record vastly different than that presented today. There was no dispute that Hawaii then had a "special population problem" due to large concentrations of military and "other transient populations," and "the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear." *Id.* at 94. Here, the District Court discounted as irrelevant the fact that Hawaii did not seriously dispute that the servicemember population no longer "wildly fluctuates" as it did 50 years ago.

because they don't register, then neither are 51.7% of the citizen voting-age population.

2. Even if Hawaii had identified "state citizens" as the comparative population as the District Court inferred it did, the Commission made no attempt to show the 2012 Plan was a substantial duplicate of a plan that counted state citizens. *Burns* noted the 1950 Hawaii constitutional convention discussed total population, state citizens, and registered voters as possible baselines. *Burns*, 284 U.S. at 93. The 1950 convention concluded that counting registered voters would be "a reasonable approximation of both citizen and total population." *Id.* Registering to vote after all, is certainly a strong indicia of state citizenship, however that term might be defined. *Id.* At that time, the percentage of Hawaii's population registered to vote and who actually voted was high, and there was a high correlation between registered voters, state citizens, and total population. *Id.* at 95 & n.26.

Thus in *Burns*, unlike here, Hawaii identified the population against which its choice of registered voters could be compared, and despite misgivings that a count of registered voters was subject to manipulation, this Court concluded it would reasonably approximate the districting that would have resulted from counting that population. Here, however, the Commission made no attempt to relate permanent resident to state citizens, except with the self-proving statement that "state citizens" are all persons who were not extracted. The District Court concluded the Commission "need not demonstrate that its plan under the 'permanent residents' standard is a duplicate of a plan made on another permissible basis." App. 42. The purpose of the *Burns* test, however, is to protect equal protection principles by forcing the state to

justify its choice of population basis if it counts less than all residents by applying vague and underinclusive standards which are based on assumptions.

3. This Court also held that a state's population choice may not be based on classifications "the Constitution forbids." *Id.* at 93-94. For example, a count of "civilians" is prohibited. *Davis*, 377 U.S. at 691; *Travis*, 552 F. Supp. at 558 & n.13. Here, Hawaii's rejection of the extracted classes' personhood was more subtle. Lurking behind the facially-neutral test of "permanent resident" was Hawaii's exclusionary history, which, if heightened scrutiny were applied, would have revealed that the 2012 Plan was not the product of a disinterested search for transients, but was targeted at servicemembers and their families, and students:

- The records of the 1992 adoption of permanent resident incorporate a 1991 report in which the only consistent theme is a desire to identify and exclude the military.
- The Hawaii Supreme Court directed the Commission to subject only "non-permanent university student residents and non-permanent active duty military residents, as well as . . . the dependents of the 47,082 non-permanent active duty military residents," to the intent/domicile purity test and did not require the Commission to apply it to anyone else. *Solomon*, 270 P.3d at 1022-23.
- The Hawaii advisory council expressly declared its desire to exclude "only nonresident military." *Id.* at 1016 n.4.

The failure to make a serious attempt to identify other populations who could not have an intent to re-

main permanently, or whose inclusion affected voting power, is one more reason the District Court should have questioned the reasons for the Commission's extractions more deeply. A population basis that on its face may be neutral, invites heightened scrutiny when it somehow always results in a narrow class being excluded.

In *Evans v. Cornman*, 398 U.S. 419 (1970), this Court explained how the District Court should have evaluated the Commission's claim it was not discriminating against servicemembers and their families: when fundamental rights such as the right to equal representation and the right to petition on an equal basis are impacted, the court should have applied "close constitutional scrutiny," and not mere rational basis. The 2012 Plan should not have survived such scrutiny. Only servicemembers are asked where they pay state taxes. Indeed, they are not actually asked at all: their DD2058 information was simply disclosed to the Commission, which could not show that a servicemember's declaration on a tax form about "legal residence" has any relation to where she intended to remain permanently. The families of servicemembers—primarily women—were also the only classification of residents subject to the outdated assumption that spouses have no independent intent or identity. *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (gender classifications must provide an exceedingly persuasive justification and cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."). The assumptions that students had not demonstrated an intent to remain permanently because they listed a non-Hawaii "home address," or had not been in Hawaii for the requisite year to qualify for in-state tui-

tion have even less relation to intent. These assumptions and the resulting exclusions should have strongly suggested to the District Court that instead of a disinterested effort to include only those who qualified for representation in Hawaii's legislature, the extraction process focused more on removing military and students, than on an effort to avoid wrongly counting transients. Hawaii's professed assumptions about military and student states-of-mind should have been subject to more exacting scrutiny. The District Court, however, simply accepted the Commission's assertions that servicemembers, their families, and students are not truly part of Hawaii's community and its "people." They don't belong: bring your $12 billion, but don't expect to be counted.

II. DEVIATIONS OF 44.22% AND 21.57% ARE BEYOND TOLERABLE LIMITS

Absolute statewide population parity is not required, and a plan may make "minor" deviations from the ideal statewide district size. *Mahan v. Howell*, 410 U.S. 315 (1973). But a plan is presumed unconstitutional when it contains an overall range (the difference between the largest and the smallest deviation from the ideal district population) of more than 10%. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). "[T]his Court has recognized that a state legislative apportionment scheme with a maximum population deviation exceeding 10% creates a prima facie case of discrimination."). *Id.* at 850 (O'Connor, J., concurring). The 2012 Plan has overall ranges that wildly exceed that threshold. The Senate's overall range of 44.22%, and the House's 21.57% range placed the burden squarely on the Commission to justify diluting equal representational power based upon a prohi-

bition on "canoe districts," and using "basic island unit"—and not persons—as the basis for measuring equality. The Commission acknowledged the 2012 Plan is "*prima facie* discriminatory and must be justified by the state." 2012 Plan at 9. *See Kilgarlin v. Hill,* 386 U.S. 120, 122 (1967) (per curiam) ("[I]t is quite clear that unless satisfactorily justified by the court or by the evidence of record, population variances of the size and significance evident here [26.48%] are sufficient to invalidate an apportionment plan."); *Chapman v. Meier,* 420 U.S. 1, 27 (1975) ("We believe that a population deviation of that magnitude [20.14%] in a court-ordered plan is constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance.").

The Commission offered only two justifications: (1) it could exclude servicemembers and others as long as it did so on the avowed basis of a permanence requirement, and (2) preservation of the integrity of political subdivisions could be an overriding concern such that population equality was only required *within each county*, and not statewide. 2012 Plan at 9-10.

The District Court concluded that deviations of 44.22% and 21.57% were the best the Commission could do because Hawaii is so graphically and culturally unique that the usual threshold of 10% cannot apply unless islanders are subject to "unpopular" canoe districts that would require residents of one county to be represented together with residents of another by a single representative. The District Court concluded that the prospect of multi-county districts are simply so unpalatable that this Court's 10% threshold is virtually meaningless in Hawaii. But the

Commission could not show that Hawaii is so geographically and culturally different that a plan better respecting equal protection's goals was simply impossible to implement.

A. Geography Does Not Excuse Compliance With The Constitution

The 2012 Plan, by preferring representation of "basic island units" (a different way of saying "counties") rather than people, flies in the face of *Reynolds*, which held that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds*, 377 U.S. at 56). Hawaii is not so unique that it is simply impossible to produce a reapportionment plan that better represents people and produces deviations that at least are closer to the 10% threshold. The District Court concluded that Hawaii's geography and history immunize it from such review, and that it is *just so different* from the other 49 states that it need not adhere to the Constitution as closely as they do.

Yes, Hawaii is comprised of islands, and a canoe district would mean that a representative would need to travel across water to represent his or her district on more than one island. But we no longer travel by canoes, and the mere fact that islands are involved is insufficient justification for failing to adhere to equal representation principles, and does not excuse the 2012 Plan's severe deviations from population equality. Indeed, other states could easily claim to have *more* pronounced geographical and cultural differences than the supposed differences between Hawaii's islands. Yet these states produce plans in which districts span geographic, cultural, and political boundaries. Alaska, for example, does not impose

a "no kayak district" rule, despite the obvious fact that several of its districts span islands, insular in nature, that are separated by deep water, with different cultures on each. *See* Alaska Reapportionment Map 2011 (http://www.akredistricting.org/Files/AMENDED_PROCLAMATION/Statewide.pdf). One factor the Alaska courts use is the availability of air service between the disparate parts of a geographically diverse district. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987). Similarly, every Hawaiian island is served by regular airline service, and it is a fact of modern life that we travel interisland with relative ease, as well as easily communicate worldwide and nearly instantaneously. *See also Hickel v. Southeast Conference*, 846 P.2d 38, 45-47 (Alaska 1992) (absolute contiguity is impossible in Alaska owing to archipelagoes); *In re 2003 Legislative Apportionment*, 827 A.2d 810, 816 (Me. 2003) (islands pose contiguity challenges); *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002) (intervening land masses pose challenges to contiguity principles, not intervening water). Similarly, other states treat islands or land masses divided by rivers as being contiguous as if the water did not exist. *See Mader v. Crowell*, 498 F. Supp. 226, 229-30 (M.D. Tenn. 1980) (river dividing district did not violate contiguity principles of reapportionment); *Bd. of Supervisors v. Blacker*, 52 N.W. 951, 953-54 (Mich. 1892) (state constitutional requirement of contiguity satisfied by grouping islands although "separated by wide reaches of navigable deep waters"). Other states combine political districts which encompass cultures that are at the very least as diverse as those found on the several Hawaiian islands. *See, e.g.*, Montana Reapportionment Map 2011 (encapsulating Indian reservations within dis-

parate counties) (http://leg.mt.gov/css/publications/research/past_interim/handbook.asp).

The District Court also ignored the fact that the canoe district prohibition is not inviolate, undermining even further its reliance on their supposed unpopularity, and demonstrating that when needed, they can be implemented without issue. For example, the "basic island unit" of Maui is coterminous with the County of Maui, which is comprised of the islands of Maui, Lanai, and uninhabited Kahoolawe, along with Molokai (a portion of which comprises the separate County of Kalawao), and has a multi-island canoe district. The County of Maui is a legal construct, because each of its component islands has a separate history and very distinct culture. If the bodies of deep water and historic, cultural, and political differences among these islands that also exist can be overlooked to achieve a cohesive and acceptable district that spans more than one island, why is it that such differences become intolerable with respect to the rest of the state? Neither the Commission nor the District Court ever answered that question, except by asserting that canoe districts were *really* unpopular (overlooking also that Congressional District 2 has been a massive canoe district for decades with no uproar). Surely popularity is not the measure of compliance with the Constitution.

The District Court, however, accepted the Commission's claim that residents of one island are just so culturally and politically incompatible with residents of others that they could never tolerate sharing a representative. The court should have rejected this argument. First, local parochialism is never a valid state interest. The Commission wrongly assumed there was some inherent rationality in a reappor-

tionment plan attempting to insure that a representative does not have diverse interests to represent, but instead that a plan must strive to allow a representative to have constituents who supposedly think alike about a particular issue. This of course is nonsense; representatives routinely deal with constituents who have diverse political and cultural viewpoints, because they represent people, not "interests." *Reynolds*, 377 U.S. at 562. Second, this argument fails to recognize that a canoe district would actually *increase* representation, by giving residents on one island a share of an additional legislator to hear minority or other concerns. For example, Kauai has 66,805 residents, and one senator and three representatives. Were canoe districts used, these residents would be apportioned one senator and part of a second, and two representatives and part of a third.

Ultimately, the purported differences among Hawaii residents that the District Court enshrined as the hallmark of equal protection are the last vestiges of an earlier time when we were not so interconnected, but the islands were separate and parochial. Hawaii is different, for sure. But residents of other states that do not find it impossible to adhere to equal protection's requirements, probably also hold similar sentiments about their respective states and the geographic and cultural differences within them. Regardless of Hawaii's geography and culture and its desire to be subject to different standards, it must still adhere to the Equal Protection Clause.

B. Hawaii's Deviations Are Too Large To Ever Be Justified

Finally, even if Hawaii met its burden of addressing the 2012 Plan's presumed unconstitutionality,

44.22% and 21.57% deviations are simply too large to be justifiable. *Mahan,* 410 U.S. at 328 (some deviations are just so great they "exceed constitutional limits"). There are "tolerable limits" for any plan that deviates too far from the requirement of substantial population equality. *Id.* (although "the 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House . . . *may well approach tolerable limits,* we do not believe it exceeds them.") (emphasis added); *Brown*, 462 U.S. at 849-50 (O'Connor, J., concurring) ("there is clearly some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications"). Thus, regardless of the claimed justification for population deviations, ultimately the Commission never answered whether they were within tolerable limits. Noticeably absent from the District Court's opinion was reference to *any* case in which a deviation of the magnitude present here was sanctioned by this Court. Because there are none.

Instead, the 2012 Plan admittedly bases the apportionment on other factors such as insuring that each county is represented by a whole number of senators or representatives, and, in the most blatant example of ignoring this Court's and equal protection's requirements, attempted to minimize the deviations in each chamber with sleights-of-word, combining the two separate houses in an attempt to show that over- or under- represented districts are not impacted as severely because they have substantial equality "per *legislator*."

> [E]quality of representation as it related to reapportionment among the basic island units has been measured by determining whether the total

> number of legislators (both House and Senate) representing each basic island unit is fair from the standpoint of population represented per legislator.

2012 Plan at 21-22. Thirty years ago, the combination "per legislator" approach of measuring equality was determined to be unconstitutional, yet Hawaii persists in using it. *Travis*, 552 F. Supp. at 563 ("The state is unable to cite a single persuasive authority for the proposition that deviations of this magnitude can be excused by combining and figuring deviations from both houses."). It also flies in the face of the fact that Hawaii has a bicameral legislature, and substantial population equality is measured in *each* house, not by a method that violates even Hawaii's constitutional structure, and is based on equal representation for an "island unit," not for its people.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

ROBERT H. THOMAS
Counsel of Record
ANNA H. OSHIRO
MARK M. MURAKAMI
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Appellants

OCTOBER 2013.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN, EDWIN J. GAYAGAS, ERNEST LASTER, and JENNIFER LASTER, Plaintiffs, vs. SCOTT T. NAGO, in his official capacity as the Chief Election Officer of the State of Hawaii; STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION; VICTORIA MARKS, LORRIE LEE STONE, ANTHONY TAKITANI, CALVERT CHIPCHASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MASUMOTO, DYLAN NONAKA, and TERRY E. THOMASON, in their official capacities as members of the State of Hawaii 2011 Reapportionment Commission, Defendants.	CIVIL NO. 12-00184 MMM-JMS-LEK (THREE-JUDGE COURT) OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; APPENDICES "A" & "B" (Filed Jul. 11, 2013)

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before: M. Margaret McKeown, Circuit Judge; J. Michael Seabright and Leslie E. Kobayashi, District Judges.

PER CURIAM:

The Hawaii Constitution specifies the use of permanent residents as the relevant population base in apportioning state legislative seats. In a 2012 decision, the Hawaii Supreme Court laid out the appropriate method for determining permanent residents by extracting non-resident military personnel, their dependents, and non-resident students from the total population count. The Hawaii Reapportionment Commission adopted a new legislative apportionment plan to comply with that directive.

This suit asks us to consider the constitutionality of Hawaii's 2012 Reapportionment Plan under the Equal Protection Clause of the United States Constitution. Previously, we considered a motion for a preliminary injunction seeking to halt implementation of the 2012 Reapportionment Plan and to enjoin conducting the 2012 elections under that plan. On May 22, 2012, we denied that request, concluding that the citizens' group seeking the injunction had not established a likelihood of success on the merits of its claim that the permanent resident population basis violates equal protection. Nor did the equities and

public interest weigh in favor of an injunction that risked jeopardizing the 2012 primary and general elections. *See Kostick v. Nago*, 878 F. Supp. 2d 1124 (D. Haw. 2012).

We now consider the equal protection challenges on cross motions for summary judgment – the citizens' group asks us to declare that the 2012 Reapportionment Plan violates equal protection, and the government seeks judgment in its favor as to those questions. Following extensive briefing and a January 14, 2013 hearing on the cross motions, we DENY Plaintiffs' Motion for Summary Judgment and GRANT Defendants' Motion for Summary Judgment.

For the reasons that follow, we conclude that the 2012 Reapportionment Plan does not violate the United States Constitution. The Commission's reliance on a permanent resident population base, as ordered by the Hawaii Supreme Court, is permissible under the Equal Protection Clause. Likewise, the disparities in the size of the Commission's legislative districts pass constitutional muster.

I. INTRODUCTION

In our May 22, 2012 Order Denying Plaintiffs' Motion for Preliminary Injunction, we extensively reviewed the historical and evidentiary record at that stage. The current record has not changed appreciably, and the cross motions for summary judgment

ultimately turn on legal arguments applied to undisputed facts. Accordingly, we draw heavily on the May 22, 2012 Order in explaining the background and context for this apportionment challenge. Where appropriate, we incorporate parts of the May 22, 2012 Order in addressing the cross motions.

Hawaii reapportions its state legislative and federal congressional districts every ten years, after the decennial United States Census (the "Census"), based upon changes in population. *See* Haw. Const. art. IV, § 1. The Hawaii Constitution as amended in 1992 requires that reapportionment of Hawaii's state legislative districts be based upon "permanent residents," *id.* § 4, as opposed to the Census count of "usual residents." Any resulting reapportionment is subject to the constitutional principles of "one person, one vote." *Reynolds v. Sims*, 377 U.S. 533, 557-58 (1964) (citing *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

In this action, Plaintiffs Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster (collectively, "Kostick" or "Plaintiffs") challenge aspects of the March 30, 2012 Supplement to the 2011 Reapportionment Commission Final Report and Reapportionment Plan (the "2012 Reapportionment Plan"), which Hawaii implemented in 2012 and utilized in its recent 2012 primary and general elections. The Defendants are the members of the 2011 Reapportionment Commission in their official capacities; the Commission itself; and Scott T.

Nago, in his official capacity as secretary to the Commission and Hawaii's Chief Elections Officer (collectively, "the Commission" or "Defendants").

The 2012 Reapportionment Plan – fulfilling a mandate from the Hawaii Supreme Court in *Solomon v. Abercrombie*, 270 P.3d 1013 (Haw. 2012) – "extracted" 108,767 active-duty military personnel, military dependents, and university students from Hawaii's reapportionment population base. Kostick claims that this extraction by itself, and the 2012 Reapportionment Plan's subsequent apportionment of the resulting population base, violate the Equal Protection Clause of the Fourteenth Amendment and "one person, one vote" principles.

Kostick asks the court to (1) declare the 2012 Reapportionment Plan unconstitutional; (2) order the 2011 Hawaii Reapportionment Commission (the "Commission") to formulate and implement a reapportionment plan using the 2010 Census count of "usual residents" of Hawaii as the population base; and (3) order the use of an August 2011 proposed reapportionment plan, which utilized a population base that *includes* the now-extracted 108,767 people. In addition, Kostick seeks an order requiring an apportionment of state legislative districts that are "substantially equal in population."[1]

---

[1] The First Amended Complaint also asserted a separate claim under state law (Count Five), which has been dismissed by stipulation.

As in our May 22, 2012 Order, we again emphasize that this Opinion addresses only the legal considerations underlying the challenged actions – not whether extracting certain "non-permanent" residents from Hawaii's reapportionment population base is good public policy and not whether Hawaii could or should use "usual residents" as that base. Hawaii has long debated these important and difficult questions, which involve political judgments and require consideration and balancing of competing legislative interests – tasks for which courts are ill suited. *See*, *e.g.*, *Perry v. Perez*, 565 U.S. ___, 132 S. Ct. 934, 941 (2012) (per curiam) ("[E]xperience has shown the difficulty of defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.") (citations omitted).

In short, we express no opinion as to how Hawaii should define its reapportionment base, but instead examine only the challenged aspects of the 2012 Reapportionment Plan itself. We certainly do not pass on what no one here disputes: Hawaii's military personnel constitute a significant and welcome presence in Hawaii's population.

II. BACKGROUND[2]

This reapportionment challenge raises issues that are best understood by first examining the historical context. We begin by reviewing the historical and legal factors that the Commission faced in crafting the 2012 Reapportionment Plan. We then set forth the details of Kostick's challenge to the Plan and recount the procedural history of this case.

A. Historical and Legal Context

1. The Census as Population Baseline

The Census counts the "usual residents" of a state. *See*, *e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992) ("'Usual residence' . . . has been used by the Census Bureau ever since [the first enumeration Act in 1790] to allocate persons to their home States.").

The Census defines "usual residence" as "the place where a person lives and sleeps most of the

---

[2] This background section is based on the parties' "Stipulated Facts Re: the Motion for Preliminary Injunction in Response to Court Order," Doc. No. 26, parts of which Plaintiffs have also incorporated into their Separate and Concise Statement of Facts ("CSF"), Doc. No. 68. Defendants do not contest Plaintiffs' CSF, at least to the extent it does not state legal conclusions. Doc. No. 71. The court thus deems admitted the factual statements in Plaintiffs' CSF. *See* LR 56.1(g). Likewise, Plaintiffs have not challenged the factual basis for Defendants' CSF and its corresponding exhibits. Doc. Nos. 65, 66. Ultimately, the historical factual record is undisputed.

time" and "is not necessarily the same as the person's voting residence or legal residence." Doc. No. 26, Parties' Stipulated Facts re: the Motion for Preliminary Injunction in Response to Court Order ("Stip.Facts") ¶ 1; Doc. No. 68, Pls.' Separate and Concise Statement of Facts ("CSF") No. 2. The definition thus excludes tourists and business travelers. Stip. Facts ¶ 5; Doc. No. 28-16, Pls.' Ex. H ("Ex.H") at 3. The 2010 Census counted people at their usual residence as of April 1, 2010. Stip. Facts ¶ 2; Pls.' CSF No. 1. Active duty military personnel who were usual residents of Hawaii on April 1, 2010 were or should have been counted by the 2010 Census as part of its count for Hawaii. Stip. Facts ¶ 3; Pls.' Ex. H at 8-9. Similarly, students attending college away from their parental homes are counted where they attend school (*i.e.*, where they "live and sleep most of the time"). Pls.' Ex. H at 5. Students enrolled at a Hawaii university or college who were usual residents of Hawaii on April 1, 2010 were or should have been counted by the 2010 Census as part of the 2010 Census count for Hawaii. Stip. Facts ¶ 4. According to the 2010 Census, Hawaii has a population of 1,360,301 usual residents. Doc. No. 32, First Am. Compl. ("FAC") ¶ 30; Stip. Facts ¶ 32.

After each Census, Hawaii establishes a Reapportionment Commission to implement a reapportionment. *See* Haw. Const. art. IV, § 2; Haw. Rev. Stat. ("HRS") § 25-1 (2012). The Commission uses the Census's "usual residents" figure as Hawaii's total population for purposes of apportioning Hawaii's

federal congressional districts. *See* Haw. Const. art. IV, § 9; HRS § 25-2(b) (2012) (requiring use of "persons in the total population counted in the last preceding United States census" as the relevant population base). But the Commission does not use the Census figure as the population base for state legislative districts. Instead, Hawaii uses a "permanent residents" count as the relevant population base.

2. Hawaii's Reapportionment Population Base Dilemma

Defining the reapportionment population base for Hawaii's legislative districts has long presented a dilemma, primarily because Hawaii's population has historically contained a large percentage of military personnel – many of whom claim residency in other states and do not vote in Hawaii elections. *See*, *e.g.*, *Burns v. Richardson*, 384 U.S. 73, 94 (1966) (referring to "Hawaii's special population problems" stemming from "the continuing presence in Hawaii of large numbers of the military"). The Supreme Court in *Burns* noted that "at one point during World War II, the military population of Oahu constituted about one-half the population of the Territory." *Id.* at 94 n.24. More recently, well after statehood, the 1991 Reapportionment Commission found that nonresident military personnel constituted "about 14% of the population of Hawaii" with "[a]bout 114,000 nonresident military and their families resid[ing] in this state, primarily on the Island of Oahu." Doc. No. 65-9, Defs.' Ex. G at 6, State of Hawaii 1991

Reapportionment Comm'n, Final Report and Reapportionment Plan at 23; *Solomon*, 270 P.3d at 1015.[3]

The vast majority of military and their families live on Oahu because of its many military installations, including Joint Base Pearl Harbor-Hickam, Schofield Barracks, and Kaneohe Marine Corps Air Station. Regardless of whether these individuals claim residency in Hawaii, Hawaii's elected officials still represent them – it is a fundamental constitutional principle that elected officials represent all the people in their districts, including those who do not or cannot vote. *See*, *e.g.*, *Garza v. Cnty. of L.A.*, 918 F.2d 763, 774 (9th Cir. 1990).

A dilemma thus arises because imbalances of potential constitutional magnitude are created whether or not Hawaii's non-resident military and family members are factored into the apportionment base.

If the group is *included* in the population base but votes elsewhere, Oahu voters potentially have greater "voting power" than residents of other

[3] The percentage of the population of military personnel and military families in Hawaii in 2010 is not clear from the record, but some data indicate as many as 153,124 military and military dependents. Doc. No. 28-12, Pls.' Ex. D at 13; Stip. Facts ¶ 6. This figure includes military members who are deployed – and thus are not counted as "usual residents" – and their dependents who live in Hawaii (and thus may indeed have been counted as "usual residents"). As detailed later, the Commission eventually "extracted" 42,332 active duty military personnel and 53,115 of their associated dependents as "non-permanent" Hawaii residents. Stip. Facts ¶¶ 8, 10.

counties. *See*, *e.g.*, *Reynolds*, 377 U.S. at 568 ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). That is, the vote of an Oahu voter could count more than that of a non-Oahu voter. *See*, *e.g.*, *Bd. of Estimate v. Morris*, 489 U.S. 688, 698 (1989) ("[A] citizen is . . . shortchanged if he may vote for . . . one representative and the voters in another district half the size also elect one representative."); *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000) ("If total population figures are used in an area in which potentially eligible voters are unevenly distributed, the result will necessarily devalue the votes of individuals in the area with a higher percentage of potentially eligible voters.").

But if this group is *excluded*, then Oahu residents (particularly residents in an Oahu district with large concentrations of non-resident military) may have diluted representation. *See*, *e.g.*, *Garza*, 918 F.2d at 774 ("Residents of the more populous districts . . . have less access to their elected representative. Those adversely affected are those who live in the districts with a greater percentage of non-voting populations. . . ."); *Chen*, 206 F.3d at 525 ("[T]he area with the smaller number of voters will find itself relatively disadvantaged. Despite the fact that it has a larger population – and thus perhaps a greater need for government services than the other community –

it will find that its political power does not adequately reflect its size.").

3. The Population Base's Impact on Basic Island Unit Autonomy

The Commission was also driven by a geographic constraint – grounded in Hawaii's history and its Constitution as explained below – to apportion among "basic island units," which correspond to Hawaii's counties. *See* Appendix B (Hawaii map from National Atlas of the United States, March 5, 2003, http://nationalatlas.gov). And Hawaii's choice of a reapportionment population base has the potential to affect the distribution of political power among these basic island units. Excluding large numbers of nonresidents, most of whom live on Oahu, from the population base can – as it did in this instance – result in a gain or loss of legislators (here, Hawaii County gained a State Senate seat that the City and County of Honolulu lost). Stip. Facts ¶ 40. Thus, including or excluding nonpermanent residents could contribute to a subtle shift in power among the counties.

Historically, residents of each basic island unit "have developed their own and, in some instances, severable communities of interests" resulting in "an almost personalized identification of the residents of each county – with and as an integral part of that county." *Burns v. Gill*, 316 F. Supp. 1285, 1291 (D. Haw. 1970) (three-judge court). County residents

"take great interest in the problems of their own county because of that very insularity brought about by the surrounding and separating ocean." *Id.* And forty-three years after *Gill*, many individuals still identify themselves in relation to their island. *See*, *e.g.*, Doc. No. 66-3, Defs.' Ex. Y, Solomon Decl. ¶ 9 (noting "socio-economic and cultural differences . . . that predated statehood" between parts of Maui and the Big Island (as Hawaii Island is often called)).

The integrity of the basic island units reaches back centuries. A three-judge court explained in 1965:

> Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu.

Holt v. Richardson, 238 F. Supp. 468, 470-71 (D. Haw. 1965) (internal citation omitted), *vacated by Burns*, 384 U.S. 73. Likewise, at the 1968 Hawaii Constitutional Convention when implementing apportionment provisions in the Hawaii Constitution, committee members incorporated the concept that:

> (1) Islands or groups of islands in Hawaii have been separate and distinct fundamental

> units since their first settlement by human beings in antiquity. . . . The first constitution of the nation of Hawaii granted by King Kamehameha III in 1840, provided that there would be four governors "over these Hawaiian Islands – one for Hawaii – one for Maui and the islands adjacent – one for Oahu, and one for Kauai and the adjacent islands." . . . Thereafter in every constitution of the nation, the territory and the state, the island units have been recognized as separate political entities.
>
> (2) . . . Each of the islands has had its unique geographic, topographic and climatic conditions which have produced strikingly different patterns of economic progress and occupational pursuits. Thus each unit of government has its own peculiar needs and priorities which in some instances may be quite different from any other county.

Doc. No. 65-13, Defs.' Ex. K at 26-27, Standing Comm. Rpt. at 261-62. *See also* Doc. No. 66-14, Defs.' Ex. KK, McGregor Decl. ¶¶ 5-11 (explaining that each basic island unit's history indicates each was a separate society or community with unique identities and indicating that by the year 1700 each unit was a separate kingdom).

Besides considering the long history of the basic island units in addressing apportionment, Hawaii's 1968 Constitutional Convention also considered the effect of Hawaii's centralized state government, which performs many functions that other states have

delegated to local government units. The Convention's apportionment committee explained:

> In every other state in the union there are numerous minor governmental units – towns, cities, school districts, sewer districts and the like – which exercise power and in which the people may obtain local representation for local matters. Hawaii has none of these. Although Hawaii has major political units called counties, these units have substantially less power and authority over local affairs than in most other states. The result is that Hawaii's legislature deals exclusively with, or at least effectively controls, many matters which are normally considered typically local government services.

Doc. No. 65-13, Defs.' Ex. K at 27, Standing Comm. Rpt. at 262. The committee gave examples of centralized services such as (1) public education; (2) highways, harbors, and airports; (3) administration and collection of taxes; (4) health and welfare activities; (5) the judicial system; (6) land use districts; (7) fishing, forestry, minerals, agriculture, and land; and (8) labor and industrial relations. *Id.* These examples of state-wide control largely still exist today.

The committee's conclusion was "obvious and inescapable: if a voter of the State of Hawaii is to have meaningful representation in any kind of government, he must have effective representation from his own island unit in the state legislature." *Id.* at 28, Standing Comm. Rpt. at 263.

4. The Hawaii Constitution

Crafted to protect basic island unit autonomy, the present-day Hawaii Constitution requires that the population be apportioned on the basis of permanent residents. It also requires that "[n]o district shall extend beyond the boundaries of any basic island unit." Haw. Const. art. IV, § 6. This second requirement is often described as a policy of avoiding "canoe districts," a term that describes legislative districts spanning two basic island units (Counties) separated by ocean. *See* Doc. No. 65-24, Defs.' Ex. V, Masumoto Decl. ¶ 3.[4]

Specifically, the Hawaii Constitution provides:

> The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of *permanent residents* in each of the basic island units. . . .

Haw. Const. art. IV, § 4 (emphasis added). After such allocation, the Commission is then required to apportion members of the Hawaii Legislature within those basic island units as follows:

---

[4] An example would be a single district containing parts of Kauai and Maui Counties.

Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of *permanent residents* per member in each district is as nearly equal to the average for the basic island unit as practicable.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.

2. No district shall be so drawn as to unduly favor a person or political faction.

3. Except in the case of districts encompassing more than one island, districts shall be contiguous.

4. Insofar as practicable, districts shall be compact.

5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.

> 6. Where practicable, representative districts shall be wholly included within senatorial districts.
>
> 7. Not more than four members shall be elected from any district.
>
> 8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Haw. Const. art. IV, § 6 (emphasis added).

The basic island units correspond to Hawaii's Counties: Hawaii County Hawaii Island); Kauai County (the islands of Kauai and Niihau); Maui County (the islands of Maui, Molokai, Kahoolawe, and Lanai); and the City and County of Honolulu (the island of Oahu).[5] *See* Appendix B. Hawaii's Constitution provides for a bicameral Legislature consisting of

---

[5] Hawaii law recognizes a fifth County, "Kalawao County," which is part of the island of Molokai. Kalawao County is "commonly known or designated as the Kalaupapa Settlement," HRS § 326-34(a), and is "under the jurisdiction and control of the [state] department of health and [is] governed by the laws, and rules relating to the department and the care and treatment of persons affected with Hansen's disease." HRS § 326-34(b). According to the Census, the population of Kalawao County is 90. *See* http://quickfacts.census.gov/qfd/states/15/15005.html (last visited July 3, 2013). For present purposes, it is included in the Maui County basic island unit.

25 senators and 51 representatives. Haw. Const. art. III, §§ 1-3.

The Hawaii Constitution's apportionment provisions have stood since 1992, when Hawaii voters approved a constitutional amendment substituting as the relevant apportionment population base for Hawaii's legislative districts the phrase "the total number of permanent residents" in place of "on the basis of the number of voters registered in the last preceding general election" in Article IV, § 4. *See* 1992 Haw. Sess. L. 1030-31 (H.B. No. 2327); *Solomon*, 270 P.3d at 1014-15.

Prior applications of a "registered voter" population base were the subject of litigation and, as analyzed further in this Opinion, ultimately entail many of the same fundamental questions that arise in this action.[6] *See*, *e.g.*, *Burns*, 384 U.S. at 97 (upholding a Hawaii apportionment plan based on registered voters that approximated a plan based on population); *Travis v. King*, 552 F. Supp. 554, 572 (D. Haw. 1982) (three-judge court) (striking down a Hawaii

[6] Notably, "[t]he historical background demonstrates that issues which are traditionally important in other jurisdictions, such as the 'gerrymandering' of communities or the submergence of ethic [sic] minorities, have not been issues in Hawaii simply because its geography and population distribution alone create difficult problems of districting." Doc. No. 65-6, Defs.' Ex. D, R. Schmitt, *A History of Recent Reapportionment in Hawaii*, XXIII Haw. B.J. at 172 (1990). Likewise, the current action raises no arguments that the Commission improperly considered factors such as race or ethnicity in the 2012 Reapportionment Plan.

apportionment plan based on registered voters, primarily because of insufficient justifications for wide disparities in allocation). Indeed, the 1991 Reapportionment Commission utilized a population base of "permanent residents" (extracting – similar to the present action-114,000 non-resident military members and their families), despite the Hawaii Constitution's (pre-1992 amendment) provision to use "the number of voters registered in the last preceding general election" as the base. This approach was apparently adopted at least in part because of equal protection concerns. *See* Doc. No. 65-9, Defs.' Ex. G at 4-7, State of Hawaii 1991 Reapportionment Comm'n, Final Report and Reapportionment Plan at 21-24; *Solomon*, 270 P.3d at 1014-15.

Likewise, the 2001 reapportionment, to which we now turn, extracted nonresident military personnel, their dependents, and non-resident college students as "non-permanent" residents. *Solomon*, 270 P.3d at 1016-20.

B. Steps Leading to the 2012 Reapportionment Plan

1. The August 2011 Plan

The Commission was certified on April 29, 2011, and promptly began the 2011 reapportionment process. The Hawaii Supreme Court in *Solomon* describes in exacting detail the process the Commission took in formulating initial and revised apportionment plans. *Solomon*'s description is consistent with the

record before this court, and we thus draw extensively from *Solomon* here:

> The Commission, at its initial organizational meetings, adopted "Standards and Criteria" that it would follow for the 2011 reapportionment of the congressional and state legislative districts. The "Standards and Criteria" for the state legislative districts stated:
>
> *Standards and criteria that shall be followed:*
>
> > The population base used shall be the "permanent resident" population of the State of Hawaii. The permanent resident population is the total population of the State of Hawaii as shown in the last U.S. census less the following: non-resident students and non-resident military sponsors.
>
> At meetings on May 11 and 24, 2011, the Commission was briefed on Hawaii's population growth since the 2001 reapportionment, the history of Hawaii's reapportionment, and the constitutional and statutory provisions governing reapportionment. It was provided with data from the 2010 Census showing a 12% increase in the state's total population consisting of increases of 24% in Hawai'i County, 21% in Maui County, 15% in Kauai County, and 9% in Oahu County. It was informed of article IV, section 4 and 6's permanent resident basis for apportioning the state legislature and informed – by counsel to the

> 2001 Reapportionment Commission – that the 2001 Commission computed the permanent residence base by excluding nonresident military personnel and their dependents, and nonresident college students. It was informed by Commission staff that data on Hawaii's nonresident military population had been requested from the Defense Manpower Data Center (DMDC) through the U.S. Pacific Command (USPACOM) and that Hawaii's nonresident student population would be identified by their local addresses and assigned to specific census blocks. The Commission, at the conclusion of the May meetings, solicited advice from the apportionment advisory councils as to whether nonresident military and nonresident students should be excluded from the permanent resident base.

270 P.3d at 1016 (internal footnote omitted).

The data obtained in May and June 2011 from the military on Hawaii's nonresident military population were apparently deemed insufficient. "The Commission, at its June 28, 2011, meeting, voted 8-1 to apportion the state legislature by using the 2010 Census count – without exclusion of nonresident military and dependents and nonresident students – as the permanent resident base." *Id.* at 1017.

The Commission staff explained:

> The non-permanent resident extraction model used in 1991 and 2001 [reapportionments] relied on receiving location specific (address

> or Zip Code) residence information for the specific non-permanent residents to be extracted.
>
> In 2011, the data received from DMDC does not provide residence information for military sponsors nor does it provide specific break-downs of permanent and non-permanent residents by location.
>
> This lack of specific data from DMDC does not allow the model used previously to be used at this time.

Id. at 1018 (brackets in original).

Because of the gaps in the DMDC data, the Commission's August 3, 2011 apportionment plan ("August 3, 2011 Plan") was based on 2010 Census figures without any extractions. Stip. Facts ¶ 27. The Chair of the Commission explained that this August 3, 2011 Plan was "preliminarily accepted for the purpose of public hearings and comment," because of the impending September 26, 2011 statutory deadline for a final plan and the statutory requirement of conducting public hearings. Doc. No. 65-18, Defs.' Ex. P, Marks Decl. ¶ 7.

2. The September 26, 2011 Plan

Further proceedings followed the Commission's initial decision to use the 2010 Census figures without extractions. The Commission was provided with additional data from military sources on Hawaii's "non-permanent military resident population and

from Hawai'i universities on non-permanent student resident population." *Solomon*, 270 P.3d at 1017.

> Commission staff thereafter developed its own "model" for the "extraction of non-permanent residents" for the 2011 reapportionment. Commission staff operated on the premise that non-permanent residents – active duty military who declare Hawai'i not to be their home state and their dependents, and out-of-state university students – were to be identified according to the specific location of their residences within each of the four counties. Because the 2010 Census data and the university data did not include the residence addresses for all of the non-permanent active duty military residents and their dependents and the out-of-state university students, Commission staff identified three groups of non-permanent residents: Extraction A, Extraction B, and Extraction C. The groups were based on the level of "certainty in determining [the residents'] non-permanency and location." Extraction A were residents whose specific locations were certain and included out-of-state university students with known addresses and active duty military, with "fairly certain non-permanent status," living in military barracks. Extraction B included all residents in Extraction A, plus active duty military and their dependents, with "less certain non-permanent status," living in on-base military housing. Extraction C included all residents in Extraction A and Extraction B,

> plus out-of-state university students with addresses identified only by zip code.

Id. at 1018 (brackets in original). The Commission staff's "Extraction A" listed 16,458 active duty military, their dependents, and out-of-state university students (mostly on Oahu); its "Extraction B" listed 73,552; and its "Extraction C" listed 79,821. *Id.* Additionally, an "August 17, 2011 'Staff Summary' show[ed] a state population of 47,082 non-permanent active duty military residents, 58,949 military dependents, and 15,463 out-of-state university students" totaling 121,494 "nonpermanent" residents. *Id.* at 1019.

The Commission held a September 13, 2011 public hearing in Hilo, Hawaii. It received testimony from State Senator Malama Solomon ("Solomon") and three members of the Hawaii County Democratic Committee, advocating extraction of the 121,494 "non-permanent" residents from the apportionment population base. Such an extraction would increase Hawaii County's Senate seats from three to four. *Id.* Hawaii Governor Neil Abercrombie also supported that extraction, indicating that based upon the State Attorney General's preliminary view, "counting nonresidents is not warranted in law." *Id.*

On September 19, 2011, after much debate, "[t]he Commission adopted a final reapportionment plan that computed the permanent resident base by excluding 16,458 active duty military and out-of-state university students from the 2010 census population

of 1,330,301." *Id.* at 1020; Stip. Facts ¶ 32.[7] That is, it chose "Extraction A," primarily because of the certainty of that data. The resulting apportionment allocated "as to the senate, 18 seats to Oahu County, 3 seats for Hawai'i County, 3 seats for Maui County, and 1 seat for Kauai County." *Solomon*, 270 P.3d at 1020. The Commission filed this plan on September 26, 2011 ("the September 26, 2011 Plan"). *Id.*; Stip. Facts ¶ 32.

3. Challenges to the September 26, 2011 Plan: Solomon v. Abercrombie; *and* Matsukawa v. State of Hawaii 2011 Reapportionment Commission

On October 10, 2011, Solomon and the three members of the Hawaii County Democratic Committee filed a petition in the Hawaii Supreme Court, challenging the September 26, 2011 Plan. *Solomon*, 270 P.3d at 1020. The next day, Hawaii County resident Michael Matsukawa filed a similar petition in the Hawaii Supreme Court. *Id.;* Stip. Facts ¶ 33. Among other claims, these petitions asserted that the Commission violated the Hawaii Constitution's requirement to base a reapportionment on "permanent residents" by failing to extract all nonresident

---

[7] The *Solomon* decision states the 2010 Census population as 1,330,301 while the parties' Stipulated Facts state it as 1,360,301. The latter figure appears to be correct, as it agrees with the number provided in the 2012 Reapportionment Plan. *See* Doc. No. 65-22 at 7, 17, 23.

military, their dependents, and non-resident students. *Solomon*, 270 P.3d at 1020. Solomon's petition asserted that the Commission knew that extracting only 16,000 non-residents would not trigger the loss of an Oahu-based Senate seat, and that "the fear of Oahu's loss of this senate seat was the driving force" for the extraction. *Id.* They sought an order requiring the Commission to prepare and file a new reapportionment plan for the State legislature that uses a population base limited to "permanent residents" of the State of Hawaii. Stip. Facts ¶ 33.

On January 4, 2012, the Hawaii Supreme Court issued orders in the *Solomon* and *Matsukawa* proceedings that invalidated the September 26, 2011 Plan as having disregarded Article IV, § 4 of the Hawaii Constitution. The Hawaii Supreme Court, among other things, ordered the Commission to prepare and file a new reapportionment plan allocating members of the State legislature among the basic island units using a permanent resident population base. *Id.* ¶ 34. On January 6, 2012, the Hawaii Supreme Court issued an opinion covering both the *Solomon* and *Matsukawa* proceedings. *Id.* ¶ 35.

As for the requirement in Article IV, §§ 4 and 6, for the Commission to apportion the State legislature by using a "permanent resident" base, the opinion held that the requirement "mandate[s] that only residents having their domiciliary in the State of Hawai'i may be counted in the population base for the purpose of reapportioning legislative districts."

Solomon, 270 P.3d at 1022 (quoting *Citizens for Equitable & Responsible Gov't v. Cnty. of Hawaii*, 120 P.3d 217, 221 (Haw. 2005)). To determine "the total number of permanent residents in the state and in each county," the Commission was required "to extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population." *Id.* It directed that,

> [i]n preparing a new plan, the Commission must first – pursuant to article IV, section 4 – determine the total number of permanent residents in the state and in each county and use those numbers to allocate the 25 members of the senate and 51 members of the house of representatives among the four counties. Upon such allocation, the Commission must then – pursuant to article IV, section 6 – apportion the senate and house members among nearly equal numbers of permanent residents within each of the four counties.

Id. at 1024. It appears that the parties did not raise, and the Hawaii Supreme Court did not address, equal protection concerns.

4. The 2012 Reapportionment Plan

Soon after *Solomon* was issued, the Commission commenced a series of public meetings and obtained additional information regarding military personnel, their family members, and university students. The

Commission eventually extracted 42,332 active duty military personnel, 53,115 military dependents, and 13,320 students from the 2010 Census population of "usual residents." Stip. Facts ¶¶ 8, 10, 14, 36. This extraction totaled 108,767 persons, resulting in an adjusted reapportionment population base of 1,251,534. *Id.* ¶ 37.

Active duty military included in the 2010 Census were extracted if they "declared a state other than Hawaii as their home state for income tax purposes." Doc. No. 28-12, Pls.' Ex. D at 8. That is, they were extracted "based on military records or data denoting the personnel's state of legal residence." Stip. Facts ¶ 8.

The extracted military family members were identified by associating them with their active duty military sponsor. In other words, the Commission extracted military dependents who were associated with or attached to an active duty military person who had declared a state of legal residence other than Hawaii. *Id.* ¶ 10. The military did not provide the Commission with any data regarding the military dependents' permanent or non-permanent residency other than their association or attachment to an active duty military sponsor who had declared a state of residence other than Hawaii. *Id.* ¶ 12.

The students were extracted solely on the basis of (a) payment of nonresident tuition or (b) a home address outside of Hawaii. *Id.* ¶¶ 14, 18-19. The students were from the University of Hawaii System,

Hawaii Pacific University, Chaminade University, and Brigham Young University Hawaii. *Id.* ¶ 15.

After extraction, the Commission reapportioned the adjusted population base of 1,251,534 "permanent residents" by dividing the base by the constitutionally-defined 25 Senate seats and 51 House seats. *Id.* ¶ 37. This resulted in an ideal Senate district of 50,061 permanent residents, and an ideal House district of 24,540 permanent residents. *Id.* The Commission then reapportioned within the four basic island units as set forth in Article IV, § 6 of the Hawaii Constitution, and as guided by the criteria set forth in that provision.

As for the Senate districts, under the 2012 Reapportionment Plan: (a) the largest Senate district (Senate district 8, Kauai basic island unit) contains 66,805 permanent residents, which is 16,744 (or 33.44 percent) higher than the ideal Senate district of 50,061 permanent residents; and (b) the smallest Senate district (Senate district 1, Hawaii basic island unit) contains 44,666 permanent residents, which is 5,395 fewer (or 10.78 percent less) than the ideal. *Id.* ¶ 38. Thus, the maximum deviation for the Senate districts is 44.22 percent. The 2012 Reapportionment Plan resulted in one Senate seat moving from the Oahu basic island unit to the Hawaii basic island unit. *Id.* ¶ 40.

As for House districts: (a) the largest House district (House district 5, Hawaii basic island unit) contains 27,129 permanent residents, which is 2,589

(or 10.55 percent) higher than the ideal House district of 24,540 permanent residents; (b) the smallest House district (House district 15, Kauai basic island unit) contains 21,835 permanent residents, which is 2,705 fewer (or 11.02 percent less) than the ideal. *Id.* ¶ 39. The maximum deviation for the House districts is 21.57 percent.[8]

As explained more fully when we address Kostick's malapportionment claim, the extent of the deviations is driven primarily by the Commission's decision to continue to avoid canoe districts. *See* Doc. No. 65-22, Defs.' Ex. T at 32, 2012 Reapportionment Plan at 21. Canoe districts were eliminated in the 2001 reapportionment, after being imposed in 1982 when a three-judge court found a 1981 reapportionment plan to be unconstitutional and ordered use of an interim plan that utilized canoe districts. *See* Doc. No. 65-4, Defs.' Ex. C-1 (April 27, 1982 Final Report and Recommendations of Special Masters in *Travis v. King*). The 2001 Reapportionment Commission eliminated canoe districts, concluding after experience and public input that such districts were ineffective. *See*, *e.g.*, Doc. No. 65-15, Defs.' Ex. M at 11, 2001 Reapportionment Plan at 25; *id.* at 14, 2001 Reapportionment Plan at A-209.

---

[8] The breakdown of deviations for all House and Senate districts is set forth in Tables 9 and 10 of the 2012 Reapportionment Plan, and is reproduced as Appendix A to this Opinion.

The 2012 Reapportionment Plan was adopted and filed on March 8, 2012, with notice published on March 22, 2012. Stip. Facts ¶ 36.

C. Procedural History

This action was filed on April 6, 2012. The Complaint requested a three-judge district court pursuant to 28 U.S.C. § 2284. On April 10, 2012, Judge J. Michael Seabright granted the request for a three-judge district court, determining that the constitutional claims were "not insubstantial," as necessary to convene such a court. *See*, *e.g.*, *Goosby v. Osser*, 409 U.S. 512, 518 (1973). On April 17, 2012, the Chief Judge of the Ninth Circuit Court of Appeals appointed the present panel, Ninth Circuit Judge M. Margaret McKeown, and District Judges J. Michael Seabright and Leslie E. Kobayashi.

Kostick filed a Motion for Preliminary Injunction on April 23, 2012, which we heard on May 18, 2012, and denied on May 22, 2012. *See* Doc. No. 52 (*Kostick*, 878 F. Supp. 2d 1124). The cross motions for summary judgment were filed on October 1, 2012. Doc. Nos. 64, 67. Oppositions were filed on October 29, 2012, Doc. Nos. 72, 74, and corresponding Replies were filed on November 19, 2012, Doc. Nos. 76, 77. The court heard oral argument from the parties on January 14, 2013.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Rule 56(a) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999).

As noted earlier, the relevant historical facts are undisputed: "Where a case turns on a mixed question of law and fact and, as here, the only disputes relate to the legal significance of undisputed facts, 'the controversy collapses into a question of law suitable to disposition on summary judgment.'" *Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1115 (9th Cir. 2011) (quoting *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003)).

IV. DISCUSSION

Kostick makes a bifurcated equal protection challenge to Hawaii's reapportionment plan.[9] He first

[9] The First Amended Complaint includes five Counts: Equal Protection (Equal Representation) (Count One); Equal Protection (Malapportionment) (Count Two); Civil Rights (42 U.S.C.

(Continued on following page)

protests the extraction of non-resident military personnel, their dependents, and non-resident students. He argues that using a population base that does not include the extracted individuals violates equal protection. Next, even if such an extraction is allowed, Kostick claims that deviations in the 2012 Reapportionment Plan exceed constitutional limits.

Before turning to these claims, we address the threshold issue of standing. The Commission argues that Plaintiffs lack standing to assert either claim because they have suffered no injury.[10] It is enough, for justiciability purposes, that at least one party with standing is present. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999).

With regard to Count One, the result of the challenged extraction of military and other residents was the loss of an Oahu Senate seat. Stip. Facts ¶ 40. All Plaintiffs were "usual residents" of Oahu with a

---

§ 1983) (Count Three); Civil Rights Attorney's Fees (42 U.S.C. § 1988) (Count Four); and State Law Claims (Count Five). Doc. No. 32. As noted earlier, Count Five was dismissed by stipulation. Thus, we refer to Counts One and Two as the bifurcated equal protection challenge, with Counts Three and Four providing the remedies for the alleged equal protection violations.

[10] The parties do not dispute that the other requirements for standing are present. *See Levine v. Vilsack*, 587 F.3d 986, 991-92 (9th Cir. 2009) (explaining that plaintiffs must show they have suffered an injury in fact that is fairly traceable to the challenged conduct and likely to be redressed by a favorable court decision).

military connection (aside from Walden). FAC ¶¶ 1-8; Doc. No. 38-4, Gayagas Decl. ¶ 5. Some of those with military connections, such as Jennifer Laster, were or may have been "extracted" from the reapportionment base despite being permanent residents of Hawaii. Because these individuals have suffered the injury of losing a representative, Plaintiffs have standing to bring Count One.

With regard to Count Two, the Commission argues that Plaintiffs lack standing to challenge the apportionment deviations because no Plaintiff resides on Kauai, the island that is most under-represented in the State Senate. *See* Doc. No. 72 at 19, Defs.' Opp'n at 12. *Id.* What the Commission overlooks is that three of the Plaintiffs – Kostick, Walden, and Veray – do live in underrepresented districts, albeit not on Kauai. They have standing to challenge the Commission's apportionment plan, which disadvantages them compared to residents of over-represented districts. Although the decisions cited by the Commission support the proposition that residents of overrepresented districts cannot challenge reapportionment plans, the same logic does not support the Commission's argument that residents of an underrepresented district cannot challenge a reapportionment plan as a whole. *See Fairley v. Patterson*, 493 F.2d 598, 603-04 (5th Cir. 1974) (holding that an intervenor from an underrepresented district "had standing to attack the original malapportioned *districts*," including two others in which he did not reside) (emphasis added).

A. Count One (Equal Protection Challenge: Population Basis)

Count One centers on Hawaii's apportionment of its population on a permanent resident basis, extracting non-resident military, their dependents, and non-resident students. At the preliminary injunction stage, we found that Kostick was unlikely to succeed on the merits of this issue. Kostick proffers very little new evidence in support of his position on summary judgment, and the facts are not in dispute.

We conclude that Hawaii's choice of a permanent resident population base is constitutionally permissible. There is no evidence that Hawaii discriminated unreasonably among non-resident groups; rather, the State extracted all nonpermanent populations that exist in sufficient numbers to affect the apportionment of districts and about which it could obtain relevant, reliable data. Neither is there evidence that Hawaii's method of extraction was irrational. The Commission reasonably relied upon available statistics. Nothing suggests that the methods resulted in the exclusion of permanent residents from the population basis in numbers sufficient to affect legislative apportionment.

1. Standard Governing Choice of Population Basis

The Supreme Court has emphasized that "'the Equal Protection [Clause's requirement] that the

seats in both houses of a bicameral state legislature must be apportioned on a population basis' . . . requires only 'that a State *make an honest and good faith effort* to construct districts . . . as nearly of equal population as is practicable,' for 'it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents, or citizens, or voters.*'" *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Reynolds v. Sims*, 377 U.S. 533, 568, 577 (1964)) (emphasis added). By recognizing the alternative population bases of "residents, or citizens, or voters," *id.*, the Court contemplated that a state's redistricting efforts would entail not only the line-drawing necessary to create districts, but also the choice of how to define the population.

Kostick's argument that the governing standard is "close constitutional scrutiny," requiring a "substantial and compelling reason" for extracting segments of the total population, finds no support in precedent. Doc. No. 74 at 9-10, Pls.' Opp'n at 1-2. He draws this requirement from *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). The *Dunn* decision, however, is inapposite because it considered a challenge not to state reapportionment, but to a state's durational residency requirement for the right to vote. Similar voting rights cases upon which Kostick relies are likewise inapt. *See*, *e.g.*, *Evans v. Cornman*, 398 U.S. 419 (1970) (applying close constitutional scrutiny to

Maryland's denial of voting rights to residents of a National Institutes of Health enclave).[11]

The Supreme Court applies this higher standard to cases alleging infringement of the fundamental right to vote, in contrast to equal representation or equal voting power challenges in the context of reapportionment. In practice, the standard for this latter category approximates rational-basis review. *See Brown*, 462 U.S. at 844 (upholding a Wyoming reapportionment plan because it resulted from "the consistent and nondiscriminatory application of a *legitimate* state policy") (emphasis added). We invoke the *Brown* standard here.

2. Use of Permanent Resident Population Base

In considering Kostick's claim, we have the benefit of longstanding Supreme Court precedent, including the 1966 decision stemming from Hawaii's earlier apportionment plan – *Burns v. Richardson*, 384 U.S. 73 (1966). Just two years earlier, in *Reynolds v. Sims*, the Court decided a seminal case on the "right of a citizen to equal representation." 377 U.S. at 576. The *Reynolds* decision reasoned that under

---

[11] Hawaii does not place any impediment to the right of servicemembers, their dependents, or students to vote in state elections. *See* HRS § 11-13(2) (2012) (providing that one may register to vote if a person is resident in Hawaii with the "present intention of establishing the person's permanent dwelling place within [the] precinct").

the Equal Protection Clause, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568. The Court accordingly held that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *id.*, but "carefully left open the question what population was being referred to." *Burns*, 384 U.S. at 91.

This question did not remain unaddressed for long. In *Burns*, the Court considered whether it was permissible for Hawaii to use registered voters rather than a broader population as the basis for districting. In discussing *Reynolds*, the Court "start[ed] with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured." *Id.*

The *Burns* decision explained what constitutes a "permissible population basis." *Id.* at 91-93. One such permissible population basis, discussed in *Reynolds*, was the total population. Had *Burns* left the matter there, Kostick might have a different case. However, in *Burns* the Court went on to acknowledge the power of states to "[ex]clude aliens, transients, short-term or temporary residents" from "the apportionment base," noting that "[t]he decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no

constitutionally founded reason to interfere." *Id.* at 92.

Although Hawaii earlier chose to use the registered voter base, the Court foreshadowed Hawaii's later decision to shift to a permanent resident base: "Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison." *Id.* at 94. The Court went on to quote the district court's finding that "[i]f total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow." *Id.* Such results derived from Hawaii's "large numbers of the military" as well as "tourists" – both of which "tend to be highly concentrated on Oahu and, indeed, are largely confined to particular regions of that island." *Id.* Accordingly, "[t]otal population figures may thus constitute a substantially distorted reflection of the distribution of *state citizenry.*" *Id.* The Court concluded that "[i]t is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base." *Id.* at 95. In short, the Court specifically sanctioned the use of an "approximate[ ] distribution of state citizens" as a "permissible population base." *Id.*[12]

---

[12] We do not agree with Kostick's interpretation that *Burns* depended entirely on outdated factual circumstances regarding

(Continued on following page)

Kostick argues that the 2012 Reapportionment Plan is not sanctioned by *Burns* because it does not identify the "permissible population base" that the "permanent residents" standard approximates, and, even if "state citizens" is the permissible comparable basis, it is not a substantial duplicate of a plan constructed on that basis. Doc. No. 67 at 38, Pls.' Mot. at 27. Neither of these arguments is persuasive.

Because *Burns* recognizes Hawaii's prerogative to exclude the temporary populations of non-resident servicemembers, their dependents, and non-resident students from the definition of "permanent residents," Hawaii's definition of "permanent residents"

---

the character of the military in Hawaii. Doc. No. 67 at 21-22, Pls.' Mot. at 10-11. It is true that *Burns* considered the fact that the military population at the time fluctuated wildly in response to World War II, the Korean War, and other engagements in the Pacific, *Burns*, 384 U.S. at 94, and that in recent decades, by contrast, the population has been relatively stable, *see* Doc. No. 67 at 23, Pls.' Mot. at 12, Figure 2.1 (Defense Personnel in Hawaii, 1982-2009). And it may be that, as Kostick argues, today's military is more involved in the surrounding community. Doc. No. 74 at 39, Pls.' Opp'n at 31. But these changed circumstances, which Defendants do not dispute, do not undermine *Burns*'s holding that a state is free to exclude temporary residents from total population for reapportionment purposes. Although *Burns* considered the highly variable nature of the military population to be a factor that contributed to Hawaii's "special population problems," *Burns*, 384 U.S. at 94, the Court did not attribute dispositive significance to the fact that the population was not only large and temporary but also variable. *Id.* at 92. Use of the resulting Census figures in this case could still "constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94.

constitutes "state citizens" by another name. The State need not demonstrate that its plan under the "permanent residents" standard is a duplicate of a plan made on another permissible basis. *Burns* explicitly benchmarked the registered voter population basis against a "state citizen population," which was extrapolated by effectively deducting the "military population of Oahu" from the "total population." *Burns*, 384 U.S. at 95. The plan before us does the same thing, but in a manner more finely tuned than the plan considered in *Burns* – it does not deduct the entire "military population" but only *non-resident* military personnel and dependents, as well as non-resident students, to approximate the permanent resident base.[13]

Kostick argues that "state citizen" is defined under the Fourteenth Amendment as ordinary residents of a state, which Kostick contends includes military and excludes aliens – the opposite of the 2012 Reapportionment Plan. Doc. No. 74 at 31-32, Pls.' Opp'n at 23-24; *see* U.S. Const. amend. XIV (providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction therefore, are *citizens* of the United States and *of the*

[13] The *Travis v. King* court sanctioned a similar approach: The special masters appointed by the court recommended a plan using "total population minus non-resident military personnel and their dependents" as an approximation of the state "citizen population." Doc. No. 65-4, Defs.' Ex C-1 at 32, 35, April 27, 1982 Final Report and Recommendations of Special Masters at 24, 27.

State wherein they reside") (emphasis added). Nowhere in *Burns*, however, did the Court suggest that the "state citizen population" it considered a permissible basis for apportionment was that defined by Kostick's interpretation of the Fourteenth Amendment. To the contrary, when *Burns* approved of "state citizenry" as a permissible population base, it understood that the term could exclude the military stationed in Hawaii. *Burns*, 384 U.S. at 94.

The Ninth Circuit's decision in *Garza* further confirms that a state need not apportion on the basis of total population. Kostick characterizes *Garza* as "holding that if there is a conflict between voting equality and representational equality, the latter prevails." Doc. No. 74 at 21, Pls.' Opp'n at 13. Although the court noted and discussed the tension between these two principles, the decision upholding a judicially-imposed plan for Los Angeles County based on Census population did not mandate use of total population in all circumstances. Notably, the court stated that while *Burns* permitted states to consider the distribution of the voting population as well as that of total population, "[i]t does not, however, *require* states to do so." *Garza*, 918 F.2d at 774; *see also Daly v. Hunt*, 93 F.3d 1212, 1225 (4th Cir. 1996) (explaining that "[t]he more important lesson that may be gleaned from *Burns* is that courts should generally defer to the state to choose its own apportionment base, provided that such method yields acceptable results"). In *Garza*, California law expressly required Los Angeles County to redistrict on the

basis of total population. *Garza*, 918 F.2d at 774 (citing California Elections Code § 35000). By contrast, as discussed above, the Hawaii Constitution, as interpreted by the Hawaii Supreme Court, requires use of a "permanent resident" population basis rather than total population.

3. Discrimination Among Non-Resident Groups

To be sure, if Hawaii's exclusion was carried out with an eye to invidiously targeting only certain non-resident groups, it would raise serious constitutional concerns. *See Carrington v. Rash*, 380 U.S. 89, 95 (1965) (holding that discrimination against the military in provision of the right to vote is unconstitutional); *Burns*, 384 U.S. at 95 & n.25 (suggesting that *Carrington* required equal treatment of the military for the purpose of reapportionment). Kostick, however, provides no evidence that Hawaii's exclusion of non-resident servicemembers, their dependents, and non-resident students was carried out with any aim other than to create a population basis that reflects Hawaii's permanent residents. Notably, the Hawaii Supreme Court's decision that prompted the current plan faulted the Commission, not for failing to exclude specific groups in the redistricting effort, but for failing to exclude all "non-permanent residents" for which the State had data. *Solomon*, 270 P.3d at 1021.

The Commission's reapportionment efforts over the years reflect its general concern with excluding non-permanent residents from the population basis, rather than with invidiously targeting certain groups. For example, in 1991, the Commission initially excluded minors as well as the military and their dependents. Doc. No. 34-20, Defs.' Ex. 30 at 3, 1991 State of Hawaii Reapportionment Comm'n, Final Report and Reapportionment Plan at 21. The Commission also sought to exclude aliens, but was informed that no data was available to do so. *Id.* at 22. The Commission noted at that time that "[o]ther groups, such as nonresident students, are statistically insignificant and cannot be easily placed in specific census blocks. The Commission, therefore, decided to eliminate those transients which could be identified to a particular census block and which constituted the vast majority of transients included in the census counts: nonresident military." *Id.* at 23.

Since the efforts of the 1991 Commission, the State has diligently considered how and whether other non-permanent resident groups could be removed from the population base. Subsequent commissions have considered excluding aliens, but have been unable to do so because of lack of data. *See* Doc. No. 34-21, Defs.' Ex. 30 at 22, 2001 State of Hawaii Reapportionment Comm'n Reapportionment Plan at A-226; Doc. No. 33-5, Rosenbrock Decl. ¶ 15 (discussing 2011 Commission). Although data regarding aliens was in short supply, the Commission in 2011 conscientiously renewed contacts with university

officials and successfully obtained data to exclude non-resident students. Doc. No. 33-6, Marks Decl. ¶¶ 18, 20.

Kostick nonetheless criticizes the fact that the State extracted military personnel, their dependents and students, but not illegal aliens, minors, federal workers, and prisoners, institutionalized persons, and even the unemployed. Doc. No. 74 at 11-12, Pls.' Opp'n at 3-4. Several of these comparator groups are not relevant: Kostick does not seriously suggest that minors, the unemployed, and prisoners are not generally Hawaii residents who lack the "present intention of establishing [their] permanent dwelling place" in Hawaii. HRS § 11-13(2) (2012).[14] The Commission tried – but was unable – to get information regarding aliens, as discussed above. Doc. No. 65-18, Defs.' Ex. P, Marks Decl. ¶ 4; *see also* Doc. No. 65-16, Defs.' Ex. N, Rosenbrock Decl. ¶ 8, 15 (noting the Commission's understanding that prior efforts had shown that "reliable information that identified the number or census block location of aliens in Hawaii" was lacking). Kostick's passing argument with reference to federal workers is unavailing: he presents no evidence as to the number of federal workers in Hawaii,

[14] At the preliminary injunction phase, the Commission explained that because it does not import prisoners from elsewhere, non-resident prisoners are not extracted because "convicted felons in Hawaii are . . . highly likely to be 'permanent residents.'" Doc. No. 33 at 32 n.6, Defs.' Opp'n to Mot. for Prelim. Inj. at 26 n.6.

nor does he seriously contend that the vast majority of these workers are anything but bona fide State residents. The record provides no indication that these aliens, minors, or incarcerated populations are concentrated in areas of the State in such a way as to affect the apportionment of districts.

To summarize, the 2012 Reapportionment Plan resulted from a careful and comprehensive process free from any taint of arbitrariness or invidious discrimination against minority groups or the military. And the record is likewise clear that the Commission faced a mathematical reality – the inclusion or exclusion of non-permanent military and military dependents causes an equal imbalance in either representational equality or electoral equality.

Over and over, the Supreme Court has explained that reapportionment involves fundamental choices about the nature of representation, where states have discretion (absent discrimination) to exercise political judgment to balance competing interests. *See*, *e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Brown*, 462 U.S. at 847-48; *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Perry*, 132 S. Ct. at 941; and *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012). Given the record presented to us, we simply have "no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92.

In the absence of discrimination, this principle of deference is dispositive. *Daly* was apt in applying this

"overriding theme in the Court's prior apportionment cases weighing against judicial involvement," when it reiterated that "[t]his is a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment." 93 F.3d at 1227 (citing *Burns*, 384 U.S. at 92). *See also Chen*, 206 F.3d at 528. The choice facing the Commission – between representational or electoral equality – was quintessentially political, requiring "the sort of policy judgments for which courts are, at best, ill suited." *Perry*, 132 S. Ct. at 941.

4. Implementation of Extraction

Kostick claims that even if the chosen permanent resident base is permissible, the extraction mechanism does not pass constitutional muster because it also eliminates from the reapportionment basis some Hawaii citizens, such as plaintiff Jennifer Laster. But Hawaii's methods need not have "'[m]athematical exactness;'" rather Hawaii must simply employ procedures that "make an honest and good-faith effort to construct . . . districts" in such a way that the number of permanent residents in each district are as "'equal . . . as is practicable.'" *Gaffney*, 412 U.S. at 743 (quoting *Reynolds*, 377 U.S. at 577). The method adopted must yield "a reasonable approximation of," and track the distribution of, a permissible population basis. *Burns*, 384 U.S. at 92-93, 95. In other words, it is not enough for Kostick to show that the extraction excluded some State citizens: he must also show that the exclusion was egregious enough to

result in an unequal distribution of the citizen population base among the various districts. He has not done so.

a. Military

To extract non-resident military, Hawaii used the servicemember's chosen state for taxation to determine residency. Doc. No. 28-9, Pls.' Mot. Ex. A at 10-11, Office of Elections, Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting – Addendum D-8 to D-9. Servicemembers are not automatically excluded from residency. They are given an opportunity to identify their state of residence for purposes of taxation. *See* Doc. No. 34-7, Defs.' Ex. 17 at 1 ("Instructions of Certification of State of Legal Residence."). By designating a state other than Hawaii as their state of taxation, servicemembers avoid paying Hawaii resident state taxes. HRS § 235-7 (2012). Servicemembers are informed that state residency requires "physical presence . . . with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile." Doc. No. 34-7, Defs.' Ex. 17 at 1. This language tracks the residency requirement under Hawaii law, which requires a "present intention of establishing the person's permanent dwelling place" in the State. HRS § 11-13(2) (2012). By indicating a different state for the purposes of taxation, a servicemember declares that he or she has no present intention of establishing his "permanent dwelling place" in Hawaii.

Reliance on this declaration is a rational means of determining a servicemember's residence under Hawaii law. *See Burns*, 384 U.S. at 92 n.21 ("The difference between exclusion of all military and military-related personnel, and exclusion of *those not meeting a State's residence requirements* is a difference between an arbitrary and a constitutionally permissible classification.") (emphasis added). Hawaii does nothing to prohibit members of the military from establishing residency in the State. Because, on this record, Hawaii does not resort to overbroad means to exclude non-resident servicemembers, the extraction is permissible. *See id.* at 95 (noting that there was no attempt to disenfranchise the military by preventing them from becoming State residents).

Kostick's criticism of the means by which the Commission identified nonpermanent servicemembers repeats arguments made at the preliminary injunction stage and fares no better this time. He asserts that "[t]here may be little correlation between the place where a servicemember pays state taxes, and where she is actually located. Nor does the DD2058 form ask the servicemember to declare where they are located, or where they intend to remain." Doc. No. 67 at 28, Pls.' Mot. at 17. No one disputes that many extracted servicemembers are actually located in Hawaii. That fact alone does not establish that they are permanent residents. And, as noted above, the form does in fact inquire regarding a servicemember's intent to remain in Hawaii.

Kostick also attacks the information from the Defense Manpower Data Center that was utilized to extract military personnel as being not detailed enough to provide the State with a reasonable basis for determining who to extract. *Id.* Specifically, he contends that the information provided no way to confirm that the servicemembers extracted based on the data were in Hawaii on Census day and included in the "usual residents" count from which the extractions were taken. *Id.* The possibility that some servicemembers extracted on the basis of the Defense Manpower Data Center statistics were not present on Census day does not render the Commission's methodology unreasonable. In this context, Hawaii's extraction methods need not have "'[m]athematical exactness.'" *Gaffney*, 412 U.S. at 743.

For similar reasons, Kostick's criticism of the extraction based upon its effect in other states is unavailing. Because every state other than Hawaii and Kansas uses the actual Census count for reapportionment, he contends "those individuals who were counted by the Census as Hawaii residents, but extracted from the Hawaii population for reapportionment purposes, are not counted anywhere for state reapportionment." Doc. No. 74 at 30, Pls.' Opp'n at 22. This observation is an insufficient reason to conclude that Hawaii's reapportionment methods were unreasonable. Inherent in the Supreme Court's reasoning that "the decision to include or exclude [groups such as transients, short-term or temporary residents]" is generally a question "about the nature

of representation with which we have been shown no constitutionally founded reason to interfere," *Burns*, 384 U.S. at 92, is that different states may provide different answers to that question.[15]

b. Military Dependents

The Commission presumed that all dependents of non-resident servicemembers are also non-residents. Kostick points to plaintiff Jennifer Laster – and only to Jennifer Laster – to argue that this approach improperly eliminates residents and registered voters from the population base. Doc. No. 35-13, Defs.' Ex. 44 at 15. This evidence fails to show that Hawaii's exclusion is overbroad. The record shows otherwise – the military informed Hawaii in 1991 that 98 percent of families of non-resident servicemembers had the same residency as that of the servicemember. Doc.

[15] Kostick criticizes reliance on DD Form 2058 as improper because it was acquired in violation of the Privacy Act. Doc. No. 74 at 40-41, Pls.' Opp'n at 32-33. The form indicates as its purpose as "determining the correct State of legal residence for purposes of withholding State income taxes from military pay" and its "routine uses" that the information "will be furnished to State authorities and to Members of Congress." Doc. No. 66-9, Defs.' Ex. FF. It is unclear whether the disclosure here could be construed as a routine use. *See* 5 U.S.C. § 552a(a)(7). Regardless, liability for a Privacy Act violation rests with the disclosing agency-not the requesting party. *See* 5 U.S.C. § 552a(g)(1). Kostick hardly has standing to claim a violation for others nor is it part of his claims. Even if the Defense Department failed to comply with the Act – a distinct claim not presented by this case – it does not implicate the Commission's reliance on the data.

No. 34-20, Defs.' Ex. 30 at 3, 1991 State of Hawaii Reapportionment Comm'n, Final Report and Reapportionment Plan at 21. Defendants submit that a 2012 Defense Department paper on the concerns that military spouses possess with respect to state occupational licensing laws notes that military spouses were ten times as likely as their civilian counterparts to have moved across state lines in the past year. Doc. No. 66-16, Defs.' Ex. MM at 3. Kostick presents no new evidence since the preliminary injunction stage that the status quo has changed. Given this failure, the record supports finding that Hawaii's assumptions about dependents were rational and support the extraction.

c. Students

Hawaii extracted students from Brigham Young University Hawaii, Hawaii Pacific University, Chaminade University, and the University of Hawaii System. Doc. No. 33-5, Rosenbrock Decl. ¶ 9. Other than noting that students from other universities were not included, the record is bereft of evidence to suggest that the number of students at any remaining universities was substantial enough to make any difference. Rather, the evidence indicates that these universities are the four "major colleges in Hawaii." *Id.* As *Gaffney* suggests, the Commission need not have considered small institutions that are attended by too few non-resident students to affect the allocation of state residents.

The tests established for excluding non-resident students within the four universities were reasonably designed to meet the goals of identifying nonresidents. For Brigham Young University Hawaii, Hawaii Pacific University, and Chaminade University, a student is considered a non-resident if the student lists a "home address" outside Hawaii. It falls within the State's discretion to use this method to determine which individuals are transient residents. Identifying a home address in Hawaii fairly reflects a "present intention of establishing the person's permanent dwelling place" in the State, as required for residency under Hawaii law. HRS § 11-13(2).

For the University of Hawaii System, any student paying out-of-state tuition is considered a nonresident. The essential requirements for establishing residency for tuition purposes for the University of Hawaii System are (1) bona fide residency, shown by various methods, most importantly, registering to vote and paying state taxes, (2) for a period of twelve months. Haw. Admin. Rules § 20-4-6. Kostick takes issue with the year-long residency requirement: a student is not counted as a Hawaii resident for the purposes of redistricting unless he has been a resident for one year. Doc. No. 36 at 20, Pls.' Rep. at 15 & n.5. He reminds us that in *Dunn*, the Supreme Court held that imposing a year long durational requirement for the purposes of *voting* was constitutionally impermissible. *Dunn*, 405 U.S. at 360.

As we explained above, the standard applicable to impediments on the fundamental right to vote

differs from that applicable to the right to equal representation for purposes of state legislative apportionment. Kostick provided no evidence at the preliminary injunction stage of even a single student who had become a resident of Hawaii within the one-year period but was excluded from the population basis. The same evidence is missing at this stage. As with the military extraction, the possibility of some mathematical imprecision does not render the methodology constitutionally unsound, particularly in the absence of any evidence that the discrepancy would affect apportionment. For the same reason, the fact that Hawaii based the extraction on spring 2010 enrollment, rather than enrollment on Census day, is of no moment.

In sum, Hawaii's decision to extract three categories of non-permanent residents was legitimate and its methods of extraction were reasonable. Defendants are therefore entitled to judgment as a matter of law on Count One.

B. Count Two (Equal Protection Challenge: Mal-Apportionment)

In Count Two, Kostick contends that the Commission violated the Equal Protection Clause by apportioning Hawaii's legislative districts unequally – leading to a maximum deviation of approximately 44 percent for Hawaii's Senate districts and approximately 22 percent for its House districts. We first summarize applicable apportionment standards and

then analyze the 2012 Reapportionment Plan in that light.

1. Legal Requirements for Apportionment

The "basic aim of legislative apportionment" is achieving "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565-66. "[I]t was for that reason that [*Reynolds*] insisted on substantial equality of populations among districts." *Gaffney*, 412 U.S. at 748. Thus, equality of population among state legislative districts is the ideal. *See Reynolds*, 377 U.S. at 560-61 ("[R]epresentative government in this country is one of equal representation for equal numbers of people. . . ."). For state and local elections, "substantial" (not exact) equality is required. *Gaffney*, 412 U.S. at 748. Recognizing that legislative districts with an "identical number of residents, or citizens, or voters" are "a practical impossibility," the Supreme Court has held that the Equal Protection Clause requires only "that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577.[16]

---

[16] Similarly, for congressional districting, Article I, § 2, of the United States Constitution requires "as nearly as is practicable" one person's vote "to be worth as much as another's." *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)). Unlike with state legislative redistricting, "population alone has been the

(Continued on following page)

This "honest and good faith effort" standard recognizes that some deviations from population equality may be necessary to allow states to pursue other legitimate objectives, such as "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory." *Id.* at 578. And so, "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination." *Gaffney*, 412 U.S. at 745. The Court in *Brown v. Thomson* reiterated that an "unrealistic overemphasis on raw population figures . . . may submerge these other considerations . . . that in day-to-day operation are important to an acceptable representation and apportionment arrangement." 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 749).

In this regard, "as a general matter . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) (quoting *Brown*, 462 U.S. at 842). On the other hand,

---

sole criterion of constitutionality in congressional redistricting," *Mahan v. Howell*, 410 U.S. 315, 322 (1973), requiring much more precision for congressional districts. Nevertheless, *Tennant* recently reiterated "that the 'as nearly as is practicable' standard does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the state justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" 133 S. Ct. at 5 (quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983)).

a "plan with larger disparities in population . . . creates a prima facie case of discrimination and therefore must be justified by the State." *Id.* The burden thus shifts to the Commission to demonstrate legitimate considerations "incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. The policy must be applied in a manner "free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964).

In *Mahan v. Howell*, the Supreme Court laid out a two-part test for evaluating the constitutionality of a reapportionment plan for which a state must justify the deviations. First, can the legislature's plan "reasonably be said to advance [a] rational state policy"? *Mahan*, 410 U.S. at 328. Second, if so, do "the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits"? *Id.* In addition to the size of the population disparities, courts should also consider the "consistency of application and the neutrality of effect of the nonpopulation criteria." *Brown*, 462 U.S. at 845-46.

The Supreme Court has repeatedly struck down reapportionment plans for which states failed to justify the population disparities among the districts. For example, in *Swann v. Adams*, 385 U.S. 440, 445, 446 (1967), the Court disapproved a Florida plan with variations of 30 percent in one house and 40 percent in the other because the state made "no attempt to justify any particular deviations, even the larger ones." The Court explained that "[*d*]*e minimis* deviations are unavoidable, but variations of 30% among

senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved *without a satisfactory explanation* grounded on acceptable state policy." *Id.* at 444 (emphasis added). Similarly, *Kilgarlin v. Hill* held that "it is quite clear that *unless satisfactorily justified* by the court or by the evidence of record, population variances of the size and significance evident here [26.48%] are sufficient to invalidate an apportionment plan." 386 U.S. 120, 122 (1967) (emphasis added). Although Texas asserted a justification of respecting county boundaries where possible, the Court was "not convinced that the announced policy . . . necessitated the range of deviations between legislative districts which is evident here." *Id.* at 123. Two rejected plans also respected county lines but "produced substantially smaller deviations." *Id.* at 124.

In contrast, in *Mahan*, the Court upheld a Virginia reapportionment plan with a maximum deviation of 16.4 percent where the state asserted a justification of maintaining the integrity of political subdivision lines. 410 U.S. at 319, 325. Unlike the Texas plan at issue in *Kilgarlin*, the Virginia plan "produce[d] the minimum deviation above and below the norm, keeping intact political boundaries." *Id.* at 326 (citation and internal quotation marks omitted). The court-imposed plan created by the district court (which struck down the Virginia plan as unconstitutional) made "readily apparent" that applying a test

of absolute equality "may impair the normal functioning of state and local governments." *Id.* at 323. Under the district court's plan, Scott County was divided between two districts. Its "representation was thereby substantially reduced in the first district, and all but nonexistent in the second district. The opportunity of its voters to champion local legislation relating to Scott County [was] virtually nil." *Id.* at 323-24. Virginia Beach "saw its position deteriorate in a similar manner under the court-imposed plan," and the residents transferred to another district in which they amounted to only 8.6 percent of that district's population complained that they were "effectively disenfranchised." *Id.* at 324.

Similarly, in *Brown*, the Court held constitutional the additional deviations from population equality caused by granting a representative to Wyoming's least populous county, Niobrara County, where Wyoming offered as a justification its "longstanding and legitimate policy of preserving county boundaries" in drawing representative districts. 462 U.S. at 846-47. Recognizing the "peculiar size and population of the State and the nature of its governmental structure," this policy had "particular force." *Id.* at 844. The Court also found it "noteworthy" that the policy was applied nondiscriminatorily. *Id.* at 848. Were the alternative plan, which called for combining Niobrara County with a neighboring county, to be implemented, Niobrara County would be deprived of its own representative "even though the remainder of the House of Representatives would be constituted so as

to facilitate representation of the interests of each county." *Id.* And "considerable population variations" in the state would remain even under the alternative plan. *Id.* at 847.

The Court has emphasized that there must be *some* limit to permissible population disparities. *See id.* at 845 ("Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds'* mandate of fair and effective representation if the population disparities are excessively high."). But, beyond the prima facie 10 percent threshold, the Supreme Court has never "define[d] the precise point at which a state may no longer justify its plan – the point at which population inequalities undermine the 'substantial equality' standard."[17] *Gorin v. Karpan*, 775 F. Supp. 1430, 1438

---

[17] In support of his position that the variations here exceed constitutional limits, Kostick cites to *Chapman v. Meier*, which held that North Dakota's goal of observing geographic boundaries and existing political subdivisions was insufficient to necessitate a 20 percent variance in an apportionment plan. *Chapman v. Meier*, 420 U.S. 1, 24 (1975). *Chapman*, however, reviewed a court-ordered reapportionment plan, which "must be held to higher standards than a State's own plan." *Id.* at 26. Although *Chapman* stated in dicta that "[t]he plan . . . would fail even under the criteria enunciated in [*Mahan*] and [*Swann*]," it reemphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 26-27 (citations omitted). And most importantly, *Chapman* reiterated that "each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others." *Id.* at 22. In particular, *Chapman* observed:

(Continued on following page)

(D. Wyo. 1991) (three-judge court). "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." *Mahan*, 410 U.S. at 329.

So far, *Mahan*'s 16.4 percent maximum deviation is the high-water mark for a plan approved by the Supreme Court. The Court noted that "this percentage may well approach tolerable limits," but "we do not believe it exceeds them." 410 U.S. at 329. Given the Court's case-by-case approach, this figure is helpful but not determinative. *Brown*, too, provides limited guidance as to the maximum possible deviation. Although the Wyoming plan in *Brown* resulted in an 89 percent maximum deviation, the Court emphasized that it was not deciding the question of whether the 89 percent deviation as a whole was justified, but only whether the *additional* deviation

---

> We believe that a population deviation of [20 percent] in a court-ordered plan is constitutionally impermissible *in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance.*

Id. at 24 (emphasis added). Thus, Chapman exemplifies the analysis relevant to the first prong of the *Mahan* test: Have Defendants demonstrated "significant state policies or other acceptable considerations that require adoption of a plan with so great a variance"? *Id.*

caused by granting a representative to Niobrara County was justified. 462 U.S. at 846. And in *Morris*, the Court cited to the limiting language in *Brown* in support of its statement that "no case of ours has indicated that a deviation of some 78% could ever be justified." 489 U.S. at 702.

The only clear rule that emerges from the Supreme Court's cases as to the permissible population deviation is that "each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others." *Chapman*, 420 U.S. at 22. "[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." *Swann*, 385 U.S. at 445. A state's particular circumstances factor into what deviation may be permissible. *See id.* (citing *Reynolds*, 377 U.S. at 578). It appears, too, that the greater the deviation, the stronger the justification required. *See Morris*, 489 U.S. at 702 ("At the very least, the local government seeking to support [a 78 percent deviation] between electoral districts would bear a very difficult burden. . . .").

2. Constitutionality of Apportionment in 2012 Reapportionment Plan

We have carefully reviewed the Commission's reasons for the challenged population deviations, and the sizable (and uncontested) evidentiary record supporting the Commission's choices. After considering

the entire record before us (with no contradicting evidence), we conclude that the Commission's justifications embody rational, legitimate, and substantial State policies. The 2012 Reapportionment Plan reasonably advances those policies in a neutral and nondiscriminatory manner. *See Mahan*, 462 U.S. at 326. We recognize that the maximum deviations here are significant. We do not suggest that any other state could justify deviations of this magnitude – in fact, it is possible that no other state could do so. Hawaii's geography, history, culture, and political structure set it apart. Given Hawaii's unique circumstances, the deviations here are justified. The Commission has met its burden to demonstrate the 2012 Reapportionment Plan's constitutionality.

a. Deviations Stemming from Maintaining the Integrity of Basic Island Units

The Commission offered numerous explanations for the deviations in the 2012 Reapportionment Plan, but the policy that drove the bulk of the deviations was maintaining the integrity of the basic island units, which also make up Hawaii's four counties. Unlike the counties of any other state, Hawaii's basic island units are all separated by 30 to 70 miles of open ocean. Doc. No. 65-13, Defs.' Ex. K at 26, Standing Comm. Rpt. at 261. Creating districts of equal population would require canoe districts spanning the ocean and comprised of different basic island units.

i. Background of Decision to Maintain Basic Island Unit Integrity

As summarized earlier, from its inception in April 2011, the Commission recognized that one of the overriding concerns and goals of the 2011 Reapportionment was to comply with the Hawaii Constitution's criterion that "no district shall extend beyond the boundaries of any basic island unit" as provided in Article IV, § 6. *See*, *e.g.*, Doc. No. 65-24, Defs.' Ex. V, Masumoto Decl. ¶¶ 3-8. On June 9, 2011 – after considering past experience and Hawaii's Constitution – the Commission formally declared its intent to avoid "canoe districts" between basic island units. *See id.* ¶ 5. It made this decision after hearing much public testimony against canoe districts. *See*, *e.g.*, Doc. No. 66-6, Defs.' Ex. CC at 3 ("The [Kauai Island Advisory] Council strongly recommends AGAINST the use of canoe districting. . . . Our island's past experience with the use of canoe districts has shown that representation in this manner does not work."); Doc. No. 66-7, Defs.' Ex. DD at 2 ("Members of the [Hawaii Island Advisory Council] voted NO to canoe district[s].").

The adherence to districts contained within basic island units comported with the elimination of canoe districts as a major revision in the *prior* reapportionment in 2001. *See* Doc. No. 65-15, Defs.' Ex. M at 11, 2001 Final Report and Reapportionment Plan at 25 (setting forth justification for elimination of canoe districts in 2001). The 2012 Reapportionment Plan summarizes:

> The Commission decided not to use "canoe districts" because of the State of Hawaii's long-standing policy of protecting the integrity of basic island units and the overwhelming public sentiment voiced against the use of "canoe districts" at the Commission's public hearings and meetings. The State's policy of protecting the integrity of the basic island units is evidenced by Article IV, Section 6 of the State Constitution, the proceedings of the Hawaii Constitutional Conventions, the work of prior reapportionment commissions, and the general history of reapportionment in the State. Based on universal dissatisfaction with canoe districts and in the absence of any supporting testimony, the 2011 Reapportionment Commission voted against the use of canoe districts.

Doc. No. 65-22, Defs.' Ex. T at 32, 2012 Reapportionment Plan at 21.

With the State constitutional standard of protecting the integrity of basic island units as a starting point, and factoring in the historical realities of island autonomy, the challenged disparities in district population sizes are driven by a single and unalterable fact: the permanent resident population of Kauai is 66,805. Given a mathematically ideal population for a State Senate district of 50,061 (with the non-permanent resident extraction), Kauai necessarily has an additional 16,744 residents in its single Senate district. Alternatively, Kauai could have two State Senate seats, but this would cause the opposite

imbalance: *two* districts of about 33,400 residents, each deviating by 16,661 *below* the mathematical ideal. Without being part of a canoe district, Kauai is either underrepresented or overrepresented in the State Senate.

As it stands, Kauai's single Senate district is responsible for 33.44 percent of the challenged deviation and is alone enough to shift the burden to the Commission to demonstrate valid reasons for the deviation. *See* Doc. No. 65-22, Defs.' Ex. T at 31, 2012 Reapportionment Plan at 20. The 33 percent figure cannot be changed without using canoe districts.[18] (The other 11 percent of the challenged 44 percent deviation comes from a Senate district seat on the Big Island with a deviation of 10.78 percent.) *Id.* As drawn, all four Big Island Senate districts have populations from approximately 6 to 11 percent below the Statewide mathematical ideal – disparities that likely result from the additional Senate seat created by extracting the large block of non-permanent residents from Oahu. *Id.*

Similarly, much of the challenged 21.57 percent disparity in State House districts results from

---

[18] The 2001 and 2011 Reapportionment Commission's project manager, David Rosenbrock, explains that "[w]hether or not the Census total population or the Commission's permanent resident population is used, in order to keep statewide deviations in the State legislature under 10% will require more than one canoe district." Doc. No. 65-16, Defs.' Ex. N, Rosenbrock Decl. ¶ 33 (second of two paragraphs numbered 33).

Kauai's House districts 14, 15, and 16, which are all underpopulated as compared to the mathematically ideal State House district size. *See id.* at 30, 2012 Reapportionment Plan at 19. In particular, State House district 15 contains a population of permanent residents that is 2,705 below the mathematically ideal size of 24,540 – or 11.02 percent below that benchmark. *Id.* These underpopulated districts result from the Commission's decision to allot an additional House seat to Kauai given the overpopulated Senate district – that is, to help address concerns about equal representation that arise from a State Senate seat that is 33 percent above the ideal. The Commission explained:

> Following the U.S. Supreme Court's statements [in *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 735 n.27 (1964),] that underrepresentation of an area in one house can be balanced with overrepresentation of that area in the other house, the 2011 Commission again assigned three House of Representative seats to Kauai, which resulted in Kauai being overrepresented in the House of Representatives by -10.20%, balanced with underrepresentation in the Senate by +33.44%.

Id. at 32, 2012 Reapportionment Plan at 21. The Commission, when measuring disparities among *all* legislators (the 76 House and Senate seats combined) by basic island unit, indicates a statewide deviation from an ideal of only 5.62 percent. *Id.* at 34, 2012 Reapportionment Plan at 23.

In short, the choice is straightforward: Either keep Kauai as a single Senate district (with correspondingly large deviations) or require canoe districts (to balance populations more equally).

This is not to say canoe districts are impossible. Prior to their elimination in the 2001 reapportionment, such districts were used in the 1982 and 1991 reapportionments, primarily to equalize populations among districts. In 1982, the *Travis* three-judge district court ordered the use of an interim plan that utilized canoe districts. *See* Doc. Nos. 65-4, 65-5, Defs.' Exs. C-1, C-2, April 27, 1982 Final Report and Recommendations of Special Masters. *Travis*'s court-ordered interim plan, however, had no choice but to use canoe districts. The court plan did not have the flexibility to exceed even de minimis population deviations that legislatively-initiated plans ordinarily have. *See*, *e.g.*, *Connor v. Finch*, 431 U.S. 407, 415 (1977). *Connor* reiterated that a "court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation.'" *Id.* at 417 (quoting *Chapman*, 420 U.S. at 26-27). "Court-ordered districts are held to higher standards of population equality than legislative ones." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). This is because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality," whereas federal courts "possess no distinctive

mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 414-15.

Even the *Travis* court, which adopted recommendations of special masters, recognized that canoe districts were contrary to Hawaii's history, tradition, and its Constitution.[19] The special masters recommended,

---

[19] The *Travis* special masters reluctantly recommended a plan using canoe districts, noting that:

> [s]ince at least the turn of the 20th century, Hawaii as a Territory, and then as a State, has recognized and sought to protect the uniqueness of each of its island counties by allocating representation so as to honor their boundaries.

Doc. No. 65-4, Defs.' Ex. C-1 at 3, April 27, 1982 Final Report and Recommendation of Special Masters at ii. The special masters presciently recognized the drawbacks of such districts:

> [T]he geographic location of the islands makes certain groupings, although reasonable on socio-economic grounds, inadvisable because of distance, including international waters; campaigning in multi-county district (multi-island) is bound to be less convenient and more expensive for candidates who must rely on commercial aviation for travel within their districts; the "fragmentation" of a county's legislative delegation may lead to less effectiveness in representing the viewpoint of the only political subdivision (county) in the State; [and] the probability that a legislator from a multi-county district may experience more conflict-of-interest situations than others from single-country districts.

Id. at ii-iii. They summarized:

(Continued on following page)

> in view of the creation of multi-county districts for the first time in Hawaii's legislative history, that the State be encouraged to design and undertake a comprehensive study of the effects of multi-county districts on 1982 campaigns and elections. The results . . . may enable the State to formulate new value [parameters] which will govern how different counties are to be joined in representation, or alternatively, provide convincing evidence that observance of the county unit rule is essential to legislative reapportionment in Hawaii.

Doc. No. 65-5, Defs.' Ex. C-2 at 13 (April 27, 1982 Final Report and Recommendation of Special Masters at 41).

The 1991 Reapportionment Plan continued to use canoe districts to balance populations, mindful of equal protection concerns and Article IV, § 6, of the Hawaii Constitution. The 1991 Reapportionment Commission reported that it was "constrained to breach the boundaries of certain basic island units and create 'canoe' districts as necessary in order to

---

> The natural ocean boundaries not only physically separate the counties but also have contributed to the development of different traditions and lifestyles in each county. To involve parts of different counties in a single electoral district on a strict interpretation of the "one man, one vote" principle does violence, in all probability, to the representative district principles of contiguity, compactness, and non-submergence.

Id. at iii.

comport with the demands of the Equal Protection Clause." 1991 State of Hawaii Reapportionment Comm'n, Final Report and Reapportionment Plan, at 18 (available at Hawaii Legislative Reference Bureau).

The evidence presented leads to but one conclusion – Hawaii's two-decade canoe-district experience was perceived as a failure by constituents and representatives alike. *See*, *e.g.*, Doc. No. 65-24, Defs.' Ex. V, Masumoto Decl. ¶¶ 10-12; Doc. No. 65-16, Defs.' Ex. N, Rosenbrock Decl. ¶ 12; Doc. No. 65-23, Defs.' Ex. U (articles documenting canoe district experiences). That is, the uncontested evidentiary record establishes that using canoe districts to balance populations creates, at the very least, a perception of unfair and ineffective representation for Hawaii's citizens.

Harold Masumoto, a Commission member both in 2001 and 2011, listed the primary reasons that he heard for people disliking canoe districts:

> (a) they don't feel they are or would be well represented by a legislator who came from or resided on a different island than they do;
>
> (b) they feel that the legislator has or would favor the basic island unit that he or she resides on or that has the most voters in the district; and
>
> (c) their interests aren't or won't be well represented since their legislator is or would be trying to represent multiple differing and

> perhaps conflicting interests from two separate communities.

Doc. No. 65-24, Defs. Ex. V, Masumoto Decl. ¶ 11.

The experiences of legislators who represented canoe districts bear out these concerns. Malama Solomon (a current State Senator from the Big Island and a Senator from a canoe district from 1983 to 1990) stated that it was "impossible to properly represent all of [her] constituencies with a 'canoe' district." Doc. No. 66-3, Defs.' Ex. Y, Solomon Decl. ¶ 11. For one thing, because "capital improvement project (CIP) funds are allocated in caucus on a per legislator basis, rather than on a per island basis," constituents on one or both islands of a canoe district "were disappointed because only half of two roads could be fixed, or only one school or other community facility in the district could be repaired." *Id.* ¶ 5. In addition, Solomon, who lived on Hawaii, was unable to spend as much time on Maui as on her home island. *Id.* ¶ 7. When in Maui, she did not have staff or a fixed place to meet constituents. *Id.* Solomon suspects that it would have been difficult for a representative to be elected from Maui because "twice as many people live in the Hawaii portion of the district as in the Maui portion." *Id.* ¶ 8. Constituents approached Solomon to "express their disappointment that [she] was unable to fully represent *them*." *Id.* ¶ 11.

Former representative Hermina Morita, who represented a Kauai/Maui canoe district from 1996 to

2002, tells a similar story. In her district, Kauai had a voter ratio of two to one over Maui, and no one from Maui ran against her or the other candidates from Kauai between 1996 and 2002. Doc. No. 70-1, Defs.' Ex. Z, Morita Decl. ¶ 5. Like Solomon, Morita spent little time on Maui, and she also "came to the conclusion that [she] was not representing [her] constituents from Maui effectively." *Id.* ¶¶ 6-8. She faced difficulties related to securing grants-in-aid for two counties that "may have taken conflicting positions on the same issues, or prioritized and focused on different aspects of the same issue." *Id.* ¶ 9. According to Morita, the constituents were disappointed with a representative "who was unable to devote all of his or her time and energy to advancing and protecting their interests and needs because they were from two different island communities with different wants, interests and resources." *Id.* ¶ 12. Other representatives had similar experiences. *See*, *e.g.*, Doc. No. 39-13, Apo Decl.

Although the people of Kauai are arguably those most affected by "underrepresentation" in the Senate, they strongly disfavor canoe districts, at least as measured by the record before the court.[20] For instance, the current Kauai State Senator, Ronald Kouchi, who was a Kauai County Councilmember when Kauai was represented in a canoe district, noted that the 2012 Reapportionment Plan's statements that there was

[20] *See* Doc. No. 70-1, Defs.' Ex. Z, Morita Decl. ¶ 12; Doc. No. 72-3, Kouchi Decl. ¶ 9.

"'overwhelming public sentiment'" against the use of canoe districts during the 2011 reapportionment proceedings, with "'universal dissatisfaction'" with canoe districts "echoe[d] [his] personal experience." Doc. No. 72-3, Kouchi Decl. ¶¶ 7-8. Kouchi "cannot recall receiving any input in support of canoe districts." *Id.* ¶ 8. He explained that there "are numerous issues facing residents of Kauai County that are unique to Kauai County" and that there is an "impression that the Kauai residents' needs would not be adequately addressed and/or protected by a canoe district legislator as it is very difficult for one legislator to physically be on three different islands (*i.e.*, Kauai, Maui, and Oahu.)." *Id.* ¶ 9.

ii. Analysis of Basic Island Unit Integrity Justification

Under *Mahan*, we must determine whether the 2012 Reapportionment Plan "may reasonably be said to advance [a] rational state policy." 410 U.S. at 328. The first question, then, is whether maintaining the integrity of the basic island units is a rational state policy. We conclude that it is. Hawaii's goal of maintaining the integrity of its basic island units is precisely the kind of "legitimate objective" articulated in *Reynolds*. *See* 377 U.S. at 578 (noting that "maintain[ing] the integrity of various political subdivisions" and "provid[ing] for compact districts of contiguous territory" are legitimate aims); *cf. Tennant*, 133 S. Ct. at 8 (reiterating that avoiding splitting of political subdivisions is a "valid, neutral state

districting polic[y]"). *Reynolds* explained that "insuring some voice to political subdivisions, as political subdivisions," is important because in many states, "much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." 377 U.S. at 580-81. As in *Brown*, the policy of keeping the counties intact "has particular force, given the peculiar size and population of the State and the nature of its governmental structure." *Brown*, 462 U.S. at 844.

Because Hawaii's government is highly centralized and the State legislature controls many matters typically left to local governments, ensuring that political subdivisions have a voice in the State legislature is particularly important in Hawaii. Like Virginia Beach and Scott County under the court-imposed plan in *Mahan*, the constituents in the less-populated portion of canoe districts felt effectively disenfranchised. *See* 410 U.S. at 323-24. Former canoe district representatives felt unable to meet the needs of multiple islands, and it appears that the home islands of these representatives benefitted at the expense of the other islands.

While ensuring a voice to political subdivisions may be a legitimate policy for any state, Hawaii's unique geography, history, and culture give additional weight to the Commission's decision to maintain the integrity of the basic island units. *Reynolds* stated that political subdivisions "have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out

of state governmental functions." 377 U.S. at 575. But Hawaii's basic island units were not created for the convenience of the State; rather, they predate statehood. Culturally and historically, the island units are stand-alone geographic and physical units and were distinct Kingdoms at the time of Western Contact in 1778, having been ruled by different chiefs and possessing distinct language variations and traditions. Doc. No. 66-14, Defs.' Ex. KK, McGregor Decl. ¶¶ 5-10. "[I]t is reasonable to posit that each basic island unit has an innate sense of individuality and separateness that is traceable to antiquity because each was organized independent of each other, in response to each island's geography, resources, and how their communities were governed." *Id.* ¶ 14.

Hawaii's Constitution was amended in 1968 specifically to preserve this historical and culturally-based basic island unit autonomy: "The local issues in any island unit are unique and typically bear very little similarity to those in the next island unit. Our conclusion [in the 1968 Constitutional Convention] was that for an island resident in Hawaii to have meaningful representation in the State Legislature, the representative must be from that resident's island unit." Doc. No. 66-12, Defs.' Ex. II, Schulze Decl. ¶ 14 (statement of Richard Schulze, Delegate to the 1968 Hawaii Constitutional Convention, and Chair of the Committee on Legislative Apportioning and Districting). Basic island units have been and continue today to be "separate societies or communities, with aspects and identities unique to themselves and distinct from

each other." Doc. No. 66-14, Defs.' Ex. KK, McGregor Decl. ¶ 5.

Of course, other states have districts that struggle to meet the different needs of distinct communities – for example, districts that combine both rural and urban populations. But in no other state is each county separated from the others by 30 to 70 miles of ocean. Creating multi-county districts presents very different challenges for Hawaii than it would for any other state. It creates logistical, as well as political, problems. Former canoe district representatives were unable to spend as much time on their non-home islands as on their home islands. In addition, Ronald Kouchi, the current Senator from Kauai, notes that, were Kauai to become part of a canoe district, "the rising cost of air travel and lodging . . . would put an additional burden on limited state resources" because he would have "to work in Honolulu and travel to two islands that comprised [his] district." Doc. No. 72-3, Kouchi Decl. ¶ 14.

Like the Court in *Mahan*, we "are not prepared to say that the decision of the people of the [State] to grant the [legislature] the power to enact local legislation dealing with the political subdivisions is irrational." 410 U.S. at 325-26. The question, then, is "whether it can reasonably be said that the state policy urged by [Hawaii] to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature." *Id.* at 326. By maintaining basic island unit integrity, the 2012 Reapportionment Plan clearly

furthers the goal of giving a voice to the political subdivisions.

Given Hawaii's geographical constraints, the deviations do not appear to be significantly "greater than necessary to preserve" the basic island unit. *Brown*, 462 U.S. at 844; *cf. Karcher*, 462 U.S. at 741 (considering lack of "availability of alternatives" as a consideration). As explained earlier, the bulk of the deviations among both the House and Senate districts stems from Kauai, which is underrepresented in the Senate and overrepresented in the House. And 33.44 percent of the 44.22 percent Senate deviation is entirely unavoidable without resorting to canoe districts. The 2012 Commission believed that "the district boundary lines contained in the 2012 Supplemental Report were the best lines that could be drawn, given the dual goals of providing appropriate representation to the residents of the State of Hawaii and minimizing the population variance between the various State legislative districts." *See* Doc. No. 72 at 45, Defs.' Opp'n at 38.

Finally, the Commission emphasizes that it balanced the underrepresented Kauai Senate district by allocating an additional House seat to Kauai, thus slightly over-representing Kauai in the House. Although not a constitutional solution standing alone, such an apportionment scheme can factor into our determination of whether an honest and "good faith effort to establish districts substantially equal in population has been made." *Lucas*, 377 U.S. at 735 n.27. *Lucas* reasoned that "a court must necessarily

consider a State's legislative apportionment scheme as a whole." *Id.*

> Only after an evaluation of an apportionment plan in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause. Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house.

Id.; *see also Reynolds*, 377 U.S. at 577 ("Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. . . . [A]pportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other.").

Thus, the 33.44 percent deviation in Kauai's Senate district is tempered by the Commission's allotment of an additional House seat. This creates a deviation of 5.62 percent among basic island units when considering *total* legislators (House and Senate). *See* Doc. No. 65-22, Defs.' Ex. T at 34, 2012 Reapportionment Plan at 23. Hawaii has used this scheme since 1968 as at least one means of equalizing representation among the State's residents. *See Gill*, 316 F. Supp. at 1298 (approving of such a plan, reasoning that "Kauai's senatorial voters, at first glance,

seem more seriously shortchanged, but . . . [a]ny such 'loss' however was deliberately and meaningfully compensated for by providing 3 representatives for those same Kauai voters"); *see also Blair v. Ariyoshi*, 515 P.2d 1253, 1255-56 (Haw. 1973) (approving of the assignment of an additional House seat to Kauai to account for underrepresentation in the Senate).[21] Standing alone, this equalization effort would be insufficient to justify the deviation. However, this strategy to equalize total representation, *in combination* with the other factors analyzed above, demonstrates that the Commission made an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577.

In sum, Hawaii's choice of basic island unit autonomy (*i.e.*, no canoe districts) is grounded in the Hawaii Constitution, Hawaii's unique geography,

---

[21] The court in *Travis* commented in 1982 that "[t]he state is unable to cite a single persuasive authority for the proposition that deviations of this magnitude can be excused by combining and figuring deviations from both houses." 552 F. Supp. at 563. The three judge district court's opinion in *Travis* is not binding on our three-judge court. More importantly, the record in *Travis* was quite different from the record before us. The court in *Travis* obviously did not have evidence of the State's failed attempt to use canoe districts. Nor, in that case, did the State even attempt to justify the deviations that were not related to maintaining the integrity of basic island units. *Id.* at 561. It rested solely on its basic island unit justification (which had not yet been tested) and its argument that the deviations in the two houses were largely offsetting.

cultural history (running back to before Hawaii was a Kingdom), governmental organization (with centralized statewide services in many areas of traditionally municipal-level control), and a two-decade failed experiment with canoe districts that has proven antithetical to the basic aim set forth in *Reynolds* of achieving "fair and effective representation for all [Hawaii's] citizens." 377 U.S. at 565. This choice is not only rational – it is substantial and has considerable force. And where an apportionment plan is justified by a "longstanding and legitimate policy of preserving county boundaries," *Brown*, 462 U.S. at 847, and absent any taint of discrimination, "substantial deference is to be accorded the political decisions" of the people of Hawaii. *Id.*

b. Other Disparities

The policy of keeping basic island units together does not explain all of the deviations in district size. Because the total deviations exceed 10 percent, the "entire plan is thus suspect and all deviations substantially adding to the maximum deviation must be justified with expressed reasons." *Travis*, 552 F. Supp. at 561.

In this regard, Kostick challenges the maximum population deviations *within* Oahu's districts of 8.89 percent (for Oahu's House seats) and 9.53 percent (for Oahu's Senate seats). *See* Doc. No. 65-22, Defs.' Ex. T

at 26-28, 2012 Reapportionment Plan at 16-17.[22] He argues that the deviations within Oahu should be "minimal," and contends the 2012 Reapportionment Plan "provides no other reasons for these intraisland deviations." Doc. No. 67 at 67, Pls.' Mot. at 56 (citation, internal quotation marks, and brackets omitted); *see also* Doc. No. 74 at 61, Pls.' Opp'n at 53.

In *Travis*, the court struck down a plan with similar ranges of intra-island deviations. 552 F. Supp. at 561. But there, Hawaii provided "no other reason for these deviations." *Id.* There was no evidence showing that Hawaii could not have drawn districts of equal populations on Oahu. *Id.* The State wrongly contended that, because the *intra*-island deviations were under 10 percent, they were de minimis and needed no justification. *Id.* As the court in *Travis* explained, "there is no support for the state's proposition that this standard can be used to compare and justify deviations between or within the geographical or political subdivisions of a state." *Id.*

In contrast, here the Commission has amply justified the deviations within Oahu. These deviations – like those on the other islands – are due in large part to "drawing district boundaries that adhere

---

[22] These are deviations from ideal population for Oahu only. The Commission computed mathematically-ideal populations for districts within each basic island unit (distinct from the mathematically-ideal population for each district on a statewide basis) and then measured deviations from that ideal. *See* Doc. No. 65-22, Defs.' Ex. T at 26-28, 2012 Reapportionment Plan at 15-16.

to permanent and easily recognized geographical features," "avoiding the submergence of areas in larger districts with different socio-economic interests," and "trying to maintain existing district boundaries" to "avoid disruption and confusion." Doc. No. 72 at 57, Defs.' Opp'n at 50; *see also* Doc. No. 65-22, Defs.' Ex. T, 2012 Reapportionment Plan at 11 (describing effort with regard to Oahu, complicated by the shift in population).

With regard to Oahu specifically, the Commission explained that the census block sizes posed a major challenge. Because Hawaii relies on data from the United States Census Bureau in apportioning districts, the Commission could not split census blocks when drawing the district lines. Doc. No. 72-2, Rosenbrock Second Supp. Decl. ¶¶ 13. Many census blocks on Oahu contain more than 2,000 residents – approximately 10 percent of the number of permanent residents in the average House district – and moving a single census block could cause the variances to exceed 10 percent. *Id.* In addition, drawing districts in Oahu was complicated by the significant population shifts that have occurred over the past ten years. Doc. No. 66-4, Defs.' Ex. AA, Nonaka Decl. ¶ 7 (describing how growth in west and central Oahu "required that two State House seats and one State Senate seat shift from urban Honolulu to west Oahu").

Although Kostick does not specifically mention deviations outside of Oahu that were not based on

canoe districts, the Commission justified each county, house by house, explaining the choices it made in drawing district lines. *See* Doc. No. 72 at 39-61, Defs.' Opp'n at 32-54. We conclude that these justifications embody rational state policies, and that "the state polic[ies] urged by [Hawaii] to justify the divergences" are, "indeed, furthered by the plan adopted by the legislature." *Mahan*, 410 U.S. at 326; *see also Brown*, 462 U.S. at 843; *cf. Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) (noting traditional districting principles such as maintaining communities of interest and traditional boundaries).

Kostick's challenge to the other deviations therefore fails.

c. Size of Maximum Deviations

The final step in the *Mahan* test is whether "the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." 410 U.S. at 328. Here we find ourselves in uncharted waters, but we look to the Supreme Court's guidance that "each case must be evaluated on its own facts." *Chapman*, 420 U.S. at 22. We recognize that deviations of this magnitude have yet to be countenanced by the Court. But we also recognize that the Court has yet to deal with this issue vis-à-vis Hawaii. We conclude that, given Hawaii's unique history, culture, and geography, the deviations of 44.22 percent in the Senate and 21.57 percent in

the House do not exceed constitutional limits. We emphasize that our holding is specific to the facts before us. We do not hold that Hawaii's documented rationales – strong as they are – could justify any deviation, no matter how large. Nor do we suggest that Hawaii's state constitutional mandate trumps the Equal Protection Clause.

This court has intervened before in Hawaii's legislative reapportionment, to little benefit and much dissatisfaction. Perhaps such intervention was warranted in 1982 on the record before the court in *Travis*. But on the extensive record before us, which evidences Hawaii's thoughtful and deliberative attempt to adequately represent its citizens in the face of unique challenges, we come to a different conclusion. Crediting the strength of the Commission's rationales and the uncontradicted evidentiary support in the record, the 2012 Reapportionment Plan's deviations pass constitutional scrutiny. The Commission created a reapportionment plan that was implemented in a manner consistent with principles of equal representation. The 2012 Reapportionment Plan complies with *Reynolds*'s ultimate aim – to achieve and assure "fair and effective representation for all citizens." 377 U.S. at 565-66.

Thus, Defendants are entitled to judgment as a matter of law on Count II.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment, Doc. No. 67, is DENIED; and Defendants' Motion for Summary Judgment, Doc. No. 64, is GRANTED. Judgment shall issue in favor of Defendants on Counts One through Four of the First Amended Complaint. There being no remaining claims, the Clerk of Court shall issue final judgment and close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 11, 2013.

[SEAL]

/s/ M. Margaret McKeown
M. Margaret McKeown
United States Circuit Judge

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

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

APPENDIX A

2011 Reapportionment Commission Final Report and Reapportionment Plan 2012 Supplement

Table 9 – House Statewide Targets and Deviations

House District	Statewide Target Population	District Population	Deviation From State Target Population	Deviation % From State Target Population
House 1	24,540	26,553	2013	8.20%
House 2	24,540	25,652	1112	4.53%
House 3	24,540	25,935	1395	5.68%
House 4	24,540	26,990	2450	9.98%
House 5	24,540	27,129	2589	10.55%
House 6	24,540	25,239	699	2.85%
House 7	24,540	26,098	1558	6.35%
House 8	24,540	26,857	2317	9.44%
House 9	24,540	26,976	2436	9.93%
House 10	24,540	24,541	1	0.00%
House 11	24,540	24,705	165	0.67%
House 12	24,540	25,509	969	3.95%
House 13	24,540	25,956	1416	5.77%
House 14	24,540	22,718	-1822	-7.42%
House 15	24,540	21,835	-2705	-11.02%
House 16	24,540	22,252	-2288	-9.32%
House 17	24,540	23,468	-1072	-4.37%
House 18	24,540	23,382	-1158	-4.72%
House 19	24,540	23,221	-1319	-5.37%
House 20	24,540	23,798	-742	-3.02%
House 21	24,540	23,451	-1089	-4.44%
House 22	24,540	23,395	-1145	-4.67%
House 23	24,540	23,259	-1281	-5.22%
House 24	24,540	23,524	-1016	-4.14%

House 25	24,540	23,134	-1406	-5.73%
House 26	24,540	23,209	-1331	-5.42%
House 27	24,540	23,129	-1411	-5.75%
House 28	24,540	23,277	-1263	-5.15%
House 29	24,540	23,178	-1362	-5.55%
House 30	24,540	23,625	-915	-3.73%
House 31	24,540	23,507	-1033	-4.21%
House 32	24,540	23,261	-1279	-5.21%
House 33	24,540	23,495	-1045	-4.26%
House 34	24,540	25,101	561	2.29%
House 35	24,540	24,076	-464	-1.89%
House 36	24,540	25,209	669	2.73%
House 37	24,540	25,128	588	2.40%
House 38	24,540	25,190	650	2.65%
House 39	24,540	25,272	732	2.98%
House 40	24,540	25,239	699	2.85%
House 41	24,540	25,217	677	2.76%
House 42	24,540	25,280	740	3.02%
House 43	24,540	25,076	536	2.18%
House 44	24,540	25,219	679	2.77%
House 45	24,540	24,133	-407	-1.66%
House 46	24,540	25,037	497	2.03%
House 47	24,540	25,175	635	2.59%
House 48	24,540	25,238	698	2.84%
House 49	24,540	25,206	666	2.71%
House 50	24,540	24,498	-42	-0.17%
House 51	24,540	23,982	-558	-2.27%
Total		1,251,534		
Statewide Deviation House-All				21.57%

Table 10 – Senate Statewide Targets and Deviations

District	Statewide target pop	District population	Deviation from target pop	Deviation % from target
Senate 1	50,061	44,666	-5,395	-10.78%
Senate 2	50,061	46,808	-3,253	-6.50%
Senate 3	50,061	47,218	-2,843	-5.68%
Senate 4	50,061	44,904	-5,157	-10.30%
Senate 5	50,061	53,833	3,772	7.53%
Senate 6	50,061	49,246	-815	-1.63%
Senate 7	50,061	51,465	1,404	2.80%
Senate 8	50,061	66,805	16,744	33.44%
Senate 9	50,061	51,322	1,261	2.52%
Senate 10	50,061	51,745	1,684	3.36%
Senate 11	50,061	51,900	1,839	3.67%
Senate 12	50,061	52,195	2,134	4.26%
Senate 13	50,061	51,206	1,145	2.29%
Senate 14	50,061	48,386	-1,675	-3.35%
Senate 15	50,061	52,090	2,029	4.05%
Senate 16	50,061	48,778	-1,283	-2.56%
Senate 17	50,061	47,729	-2,332	-4.66%
Senate 18	50,061	51,689	1,628	3.25%
Senate 19	50,061	47,450	-2,611	-5.22%
Senate 20	50,061	47,556	-2,505	-5.00%
Senate 21	50,061	48,311	-1,750	-3.50%
Senate 22	50,061	47,729	-2,332	-4.66%
Senate 23	50,061	47,993	-2,068	-4.13%
Senate 24	50,061	51,053	992	1.98%
Senate 25	50,061	49,457	-604	-1.21%
Total		1,251,534		
Statewide Deviation Senate-All				44.23%

nationalatlas.gov™
Where We Are

HAWAII

APPENDIX B

NIIHAU
Kauai
KAUAI
Honolulu
OAHU
Kalawao
MOLOKAI
LANAI
Maui
MAUI
KAHOOLAWE
Hawaii
HAWAII
PACIFIC OCEAN

MILES
0 20 40 60 80
Albers equal area projection

U.S. Department of the Interior
U.S. Geological Survey

The **National Atlas** of the United States of America®

pagecnty_hi2.pdf INTERIOR-GEOLOGICAL SURVEY, RESTON, VIRGINIA-2004

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN, EDWIN J. GAYAGAS, ERNEST LASTER, and JENNIFER LASTER, Plaintiffs, vs. SCOTT T. NAGO, in his official capacity as the Chief Election Officer of the State of Hawaii, STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION; VICTORIA MARKS, LORRIE LEE STONE, ANTHONY TAKITANI, CALVERT CHIPCHASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MASUMOTO, DYLAN NONAKA, and TERRY E. THOMASON, in their official capacities as members of the State of Hawaii 2011 Reapportionment Commission; and DOE DEFENDANTS 1-10, Defendants.	CIVIL NO. 12-00184 JMS-LEK-MMM (THREE-JUDGE COURT) ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; APPENDIX "A"

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before: M. Margaret McKeown, Circuit Judge; J. Michael Seabright and Leslie E. Kobayashi, District Judges.

The Hawaii Constitution specifies the use of permanent residents as the relevant population base in apportioning state legislative seats. In a 2012 decision, the Hawaii Supreme Court laid out the appropriate method for determining permanent residents by extracting non-resident military personnel and their dependents, and non-resident students from the base count. The Reapportionment Commission adopted a new plan to comply with that directive.

This electoral challenge asks us to consider the constitutionality of the reapportionment under the Equal Protection Clause of the United States Constitution. We do so here in the context of a motion for a preliminary injunction requesting that we enjoin implementation of the 2012 Reapportionment Plan and enjoin conducting the upcoming elections under that plan. This challenge raises an issue of significant importance to Hawaii residents. Following a hearing on this matter on May 18, 2012, we conclude that the request for an injunction should be denied. In light of *Burns v. Richardson,* 384 U.S. 73 (1966), at this preliminary stage of the proceedings, the plaintiffs have not established a likelihood of success on the merits of their claim that the permanent resident

population basis violates equal protection. Nor do the equities and public interest weigh in favor of an injunction that risks jeopardizing the primary election scheduled for August 11, 2012, and even the general election scheduled for November 6, 2012. Although we recognize that the right to representation is fundamental, "a federal court cannot lightly interfere with or enjoin a state election." *Sw. Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

I. INTRODUCTION

Hawaii reapportions its state legislative and federal congressional districts every ten years, after the decennial United States Census ("the Census"), based upon changes in population. *See* Haw. Const. art. IV, § 1. The Hawaii Constitution as amended in 1992 requires reapportionment of Hawaii's legislative districts to be based upon "permanent residents," *id.* § 4, as opposed to the Census' count of "usual residents." And to pass constitutional muster, any resulting reapportionment must comply with the principles of "one person, one vote." *Reynolds v. Sims,* 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders,* 372 U.S. 368, 381 (1963)).

In this action, Plaintiffs Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster (collectively, "Kostick") challenge aspects of the March 30, 2012 Supplement to the 2011

Reapportionment Commission Final Report and Reapportionment Plan ("the 2012 Reapportionment Plan"), which Hawaii has begun implementing for its 2012 primary and general elections. The 2012 Reapportionment Plan – upon direction from the Hawaii Supreme Court in *Solomon v. Abercrombie,* 126 Haw. 283, 270 P.3d 1013 (2012) – "extracted" 108,767 active-duty military personnel, military dependents, and university students from Hawaii's reapportionment population base. Kostick claims that this extraction by itself, or the 2012 Reapportionment Plan's subsequent apportionment of the resulting population base, violates the Equal Protection Clause of the Fourteenth Amendment and "one person, one vote" principles.

Kostick moves for a preliminary injunction, seeking:

(1) to enjoin Defendant Scott T. Nago, in his official capacity as the Chief Election Officer of the State of Hawaii ("Nago"), from "further implementation" of the 2012 Reapportionment Plan, and thus to enjoin conducting the upcoming elections in accordance with that Plan;

(2) to order the 2011 Hawaii Reapportionment Commission ("the Commission") to formulate and implement a reapportionment plan using the 2010 Census' count of "usual residents" of Hawaii as the population base; and

(3) to order the use of an August 2011 proposed reapportionment plan, which utilized a population base that *includes* the now-extracted 108,767 people.

Secondarily, Kostick seeks an order requiring an apportionment of state legislative districts that are "substantially equal in population."[1]

We pause to emphasize what is *not* before us. To begin, we are not making any final determination of the merits of Kostick's challenge, a decision that must await further proceedings. Further, this Order addresses only the legal considerations underlying the challenged actions – not whether extracting certain "non-permanent" residents from Hawaii's reapportionment population base is good public policy, and not whether Hawaii could or should use "usual residents" as that base. Hawaii has long-debated these questions and Hawaii's legislature considered them again in its just-completed session. *See* Doc. No. 50-7, Pls.' Ex. AAAA (S.B. No. 212, 26th Leg. Sess. 2012) (proposing to define "permanent resident" as a "usual resident" under the Census). These are important and difficult questions, involving political judgments and requiring consideration and balancing of competing interests – tasks for which courts are not suited. *See, e.g., Perry v. Perez,* 565 U.S. ___, 132 S. Ct. 934, 941 (2012) ("Experience has shown the difficulty of

[1] The First Amended Complaint also asserts a claim under state law, which is not at issue in the Motion for Preliminary Injunction.

defining neutral legal principles in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.") (citations omitted).

In short, we express no opinion as to how Hawaii should define its reapportionment base, but instead examine only the challenged aspects of the 2012 Reapportionment Plan itself. And we certainly do not pass on what no one here disputes: Hawaii's military personnel constitute a significant and welcome presence in Hawaii's population.

For the reasons that follow, we conclude it is unlikely Kostick will succeed on the merits of the constitutional claim regarding the population base. The equities and public interest weigh heavily against Kostick. We do not consider the likelihood of success on Kostick's mal-apportionment claim, as he acknowledged there is no realistic or effective remedy that could be accomplished before the primary election. Accordingly, Kostick's Motion for Preliminary Injunction is DENIED.

II. BACKGROUND[2]

This reapportionment challenge raises issues that are best understood by first examining the historical context. We begin by reviewing some of the historical and legal factors that the Commission faced in crafting the 2012 Reapportionment Plan. We then set forth specific details – many of which are stipulated facts – of Kostick's challenge to the Plan, and recount the procedural posture of the current Motion.

A. The Basic Historical and Legal Context

The Census counts the "usual residents" of a state. *See, e.g., Franklin v. Massachusetts,* 505 U.S. 788, 804-05 (1992) ("'Usual residence' . . . has been used by the Census Bureau ever since [the first enumeration Act in 1790] to allocate persons to their home States."). The 2010 Census counted people at their usual residence as of April 1, 2010. Doc. No. 26, Parties' Stipulated Facts re: the Motion for Preliminary Injunction ("Stip. Facts") ¶ 2. According to the 2010 Census, Hawaii has a population of 1,360,301 usual residents. Doc. No. 32, First Am. Compl. ("FAC") ¶ 30; Stip. Facts ¶ 32.

---

[2] This background is based on the parties' Stipulated Facts in the Motion for Preliminary Injunction, which is attached as Appendix A, the exhibits and filings related to the preliminary injunction motion, and Nago's testimony at the preliminary injunction hearing.

The Census defines "usual residence" as "the place where a person lives and sleeps most of the time" and "is not necessarily the same as the person's voting residence or legal residence." Stip. Facts ¶ 1. The definition thus excludes tourists or business travelers. *Id.* ¶ 5; Doc. No. 28-16, Pls.' Mot. Ex. H ("Ex. H"), at 3. Active duty military personnel who were usual residents of Hawaii on April 1, 2010 were or should have been counted by the 2010 Census as part of its count for Hawaii. Stip. Facts ¶ 3; Ex. H, at 8-9. Similarly, students attending college away from their parental homes are counted where they attend school (*i.e.,* where they "live and sleep most of the time"). Ex. H, at 5. Students enrolled at a Hawaii university or college who were usual residents of Hawaii on April 1, 2010 were or should have been counted by the 2010 Census as part of the 2010 Census count for Hawaii. Stip. Facts ¶ 4.

After each Census, Hawaii establishes a Reapportionment Commission to implement a reapportionment. *See* Haw. Const. art. IV, § 2; Haw. Rev. Stat. § 25-1. The Defendants in this action are the members of the Commission in their official capacities; the Commission itself; and Nago, who serves as secretary of the Commission in addition to his duties as Hawaii's Chief Election Officer. *See* Haw. Const. art. IV, §§ 2, 3; Haw. Rev. Stat. § 11-2. Where appropriate, we refer to all Defendants as "the Commission," although we sometimes refer to Nago separately.

The Commission uses the Census' "usual residents" figure as Hawaii's total population for purposes of apportioning Hawaii's federal congressional districts. *See* Haw. Const. art. 4, § 9; Haw. Rev. Stat. § 25-2(b) (requiring use of "persons in the total population counted in the last preceding United States census" as the relevant population base). But the Commission does not necessarily use the Census figure as the population base for State legislative reapportionment. Instead, Hawaii uses a count of "permanent residents" as the relevant population base. Specifically, the current Hawaii Constitution provides:

> The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of *permanent residents* in each of the basic island units[.]

Haw. Const. art. 4, § 4 (emphasis added). After such allocation, the Commission is then required to apportion members of the Hawaii Legislature within those "basic island units" as follows:

> Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein

and shall redraw district lines where necessary in such manner that for each house the average number of *permanent residents* per member in each district is as nearly equal to the average for the basic island unit as practicable.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.

2. No district shall be so drawn as to unduly favor a person or political faction.

3. Except in the case of districts encompassing more than one island, districts shall be contiguous.

4. Insofar as practicable, districts shall be compact.

5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.

6. Where practicable, representative districts shall be wholly included within senatorial districts.

7. Not more than four members shall be elected from any district.

> 8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Haw. Const. art. IV, § 6 (emphasis added).[3] The "basic island units" correspond to Hawaii's Counties: Hawaii

---

[3] The Hawaii Constitution's apportionment provisions were changed in 1992, when Hawaii voters approved a constitutional amendment substituting the phrase "the total number of permanent residents" for "on the basis of the number of voters registered in the last preceding general election" in Article IV, § 4, as the relevant apportionment population base for Hawaii's legislative districts. *See* 1992 Haw. Sess. L. 1030-31 (H.B. No. 2327); *Solomon,* 126 Haw. at 285, 270 P.3d at 1015.

Prior applications of a "registered voter" population base were the subject of litigation and, as analyzed further in this Order, ultimately entail many of the same fundamental questions that arise in this action. *See, e.g., Burns,* 384 U.S. at 97 (upholding a Hawaii apportionment plan based on registered voters that approximated a plan based on population); *Travis v. King,* 552 F. Supp. 554 (D. Haw. 1982) (three-judge court) (striking a Hawaii apportionment plan based on registered voters, primarily because of insufficient justifications for wide disparities in allocation). Indeed, in Hawaii's 1991 reapportionment, the 1991 Reapportionment Commission utilized a population base of "permanent residents" (extracting – similar to the present action – 114,000 non-resident military members and their families), despite the requirement of the Hawaii Constitution (pre-1992 amendment) to use "the number of voters registered in the last preceding general election" as the base. This approach was apparently adopted at least in part because of equal protection concerns. *See* Doc. No. 34-20, Defs.' Ex. 30, at 3-6 (State of Hawaii 1991 Reapportionment Comm'n, Final Report and Reapportionment Plan, at 21-24); *Solomon,* 126 Haw. at 284-85, 270 P.3d at 1014-15. Likewise, the 2001 reapportionment (after the 1992 State Constitutional amendment) extracted

(Continued on following page)

County (the island of Hawaii or "the Big Island"); Kauai County (the islands of Kauai and Niihau); Maui County (the islands of Maui, Molokai, Kahoolawe, and Lanai); and the City and County of Honolulu (the island of Oahu).

Defining the reapportionment population base for Hawaii's legislative districts has long-presented a dilemma, primarily because Hawaii's population has historically contained a large percentage of military personnel – many of whom claim residency in other States and do not vote in Hawaii elections. *See, e.g., Burns,* 384 U.S. at 94 (referring to "Hawaii's special population problems" stemming from "the continuing presence in Hawaii of large numbers of the military"). *Burns* noted that "at one point during World War II, the military population of Oahu constituted about one-half the population of the Territory." *Id.* at 94 n.24. More recently, well after statehood, the 1991 Reapportionment Commission found that non-resident military constituted "about 14% of the population of Hawaii" with "[a]bout 114,000 nonresident military and their families resid[ing] in this state, primarily on the Island of Oahu." Doc. No. 34-20, Defs.' Ex. 30, at 5 (State of Hawaii 1991 Reapportionment Comm'n, Final Report and Reapportionment Plan, at 23); *Solomon,* 126 Haw. at 285, 270

---

non-resident military personnel, their dependents, and non-resident college students as "non permanent." *Solomon,* 126 Haw. at 286, 270 P.3d at 1016.

P.3d at 1015.[4] The vast majority of military and their families live on Oahu because of its many military installations including Joint Base Pearl Harbor-Hickam, Schofield Barracks, and Kaneohe Marine Corps Air Station. But, whatever their percentage, Hawaii elected officials still represent them – it is a fundamental Constitutional principle that elected officials represent all the people in their districts, including those who do not or cannot vote. *See, e.g., Garza v. Cnty. of L.A.,* 918 F.2d 763, 774 (9th Cir. 1990).

A dilemma thus arises because imbalances of potential constitutional magnitude are created whether or not Hawaii's non-resident military and family members are factored into the apportionment base.

If they are *included* in the population base but vote elsewhere, Oahu voters potentially have greater

---

[4] The percentage of the population of military and military families in Hawaii in 2010 is not clear from the record, but some data indicates as many as 153,124 military and military dependents. Doc. No. 28-12, Pls.' Mot. Ex. D, at 13; Stip. Facts ¶ 6. This figure includes military members who are deployed – and thus are not counted as "usual residents" – and their dependents who live here (and thus may indeed have been counted as "usual residents"). As detailed below, the Commission eventually "extracted" 42,322 active duty military personnel, and 53,115 of their associated dependents as "non-permanent" Hawaii residents. Stip. Facts ¶¶ 8, 10. Regardless of the percentage, the military continues to constitute a significant and important presence in Hawaii's population.

"voting power" than residents of other counties. *See, e.g., Reynolds,* 377 U.S. at 568 ("[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State[.]"). That is, a vote of an Oahu voter could count more than that of a non-Oahu voter. *See, e.g., Bd. of Estimate of City of N.Y. v. Morris,* 489 U.S. 688, 698 (1989) ("[A] citizen is . . . shortchanged if he may vote for . . . one representative and the voters in another district half the size also elect one representative."); *Chen v. City of Houston,* 206 F.3d 502, 525 (5th Cir. 2000) ("If total population figures are used in an area in which potentially eligible voters are unevenly distributed, the result will necessarily devalue the votes of individuals in the area with a higher percentage of potentially eligible voters.").

But if this group is *excluded*, then Oahu residents (and residents in an Oahu district with large concentrations of non-resident military) may have diluted representation. *See, e.g., Garza,* 918 F.2d at 774 ("Residents of the more populous districts . . . have less access to their elected representative. Those adversely affected are those who live in the districts with a greater percentage of non-voting populations[.]"); *Chen,* 206 F.3d at 525 ("[T]he area with the smaller number of voters will find itself relatively disadvantaged. Despite the fact that it has a larger population – and thus perhaps a greater need for government services than the other community – it

will find that its political power does not adequately reflect its size.").

There are also political dimensions. Excluding large numbers of nonresidents, most of whom live on Oahu, from the population base can – as it did in this instance – result in a gain or loss of legislators between the basic island units (here, the Big Island gained a State senate seat that Oahu lost). Stip. Facts ¶ 40. Thus, including or excluding non-resident military and dependents could contribute to a subtle shift in power among the Counties. Historically, residents of each basic island unit "have developed their own and, in some instances severable communities of interests" resulting in "an almost personalized identification of residents of each county – with and as an integral part of that county." *Burns v. Gill,* 316 F. Supp. 1285, 1291 (D. Haw. 1970). Forty-two years after *Gill,* many individuals still identify themselves in relation to their Island. County residents "take great interest in the problems of their own county because of that very insularity brought about by the surrounding and separating ocean." *Id. See, e.g.,* Doc. No. 39-12, M. Solomon Decl. ¶ 9 ("There were also socio-economic and cultural differences between the two parts of my canoe district [on Maui and the Big Island] that predated statehood.").[5]

---

[5] The integrity of "basic island units" reaches far back. A three-judge court explained in 1965:

(Continued on following page)

> Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu. All this resulted in a strongly centralized form of government.

Holt v. Richardson, 238 F. Supp. 468, 470-71 (D. Haw. 1965), *vacated, Burns,* 384 U.S. 73. Likewise, at the 1968 Hawaii Constitutional Convention when implementing apportionment provisions in the State Constitution, committee members took into account the concept that:

> (1) Islands or groups of islands in Hawaii have been separate and distinct fundamental units since their first settlement by human beings in antiquity. . . . The first constitution of the nation of Hawaii granted by King Kamehameha III in 1840, provided that there would be four governors "over these Hawaiian Islands – one for Hawaii – one for Maui and the islands adjacent – one for Oahu, and one for Kauai and the adjacent islands." . . . Thereafter in every constitution of the nation, the territory and the state, the island units have been recognized as separate political entities.
>
> (2) . . . Each of the islands has had its unique geographic, topographic and climatic conditions which have produced strikingly different patterns of economic progress and occupational pursuits. Thus each unit of government has its own peculiar needs and priorities which in some instances may be quite different from any other county.

Doc. No. 35-6, Defs.' Ex. 37 at 261-62. *See also* Doc. No. 39-15, D. McGregor Decl. ¶¶ 5-11 (explaining belief that each basic island unit's history indicates each was a separate society or community

(Continued on following page)

Notably, the Hawaii Constitution in Article IV, § 6, "recognizes the geographic insularity and unique political and socio-economic identities of the basic island units." Doc. No. 28-3, Pls.' Mot. Ex. A, at 35 (2012 Reapportionment Plan, at 23). And thus the Hawaii Constitution requires that in apportioning a population base "[n]o district shall extend beyond the boundaries of any basic island unit." Haw. Const. art. IV, § 6. The Commission articulated this interest as a justification for population deviations among state districts – avoiding bi-County districts (often referred to as "canoe districts" because they are separated by water) where a legislator represents people in different Counties. Doc. No. 28-3, Pls.' Mot. Ex. A, at 33 (2012 Reapportionment Plan, at 21).[6]

---

with unique identities, and indicating that by the year 1700 each unit was a separate kingdom).

[6] Besides considering the long history of the basic island units in addressing apportionment, the 1968 Constitutional Convention also considered political factors – Hawaii's centralized state government, which performs many functions that other states have delegated to local government units. The apportionment committee explained:

> In every other state in the union there are numerous minor governmental units – town, cities, school districts, sewer districts and the like – which exercise power and in which the people may obtain local representation for local matters. Hawaii has none of these. Although Hawaii has major political units called counties, these units have substantially less power and authority over local affairs than in most other states. The result is that Hawaii's legislature deals exclusively with, or at least effectively controls, many

(Continued on following page)

The Commission considered these and other factors in creating the 2012 Reapportionment Plan, the specifics of which we turn to next.

B. Steps Leading to the 2012 Reapportionment Plan

1. The August 2011 Plan

The Commission was certified on April 29, 2011, and promptly began the 2011 reapportionment process. The Hawaii Supreme Court in *Solomon* describes in exacting detail the process the Commission took in formulating initial and revised apportionment plans. *Solomon*'s description conforms to the record before this court, and we thus draw extensively from *Solomon* here:

> The Commission, at its initial organizational meetings, adopted "Standards and Criteria" that it would follow for the 2011

---

matters which are normally considered typically local government services.

Doc. No. 35-6, Defs.' Ex. 37 at 262. The committee gave examples of centralized services such as (1) public education; (2) highways, harbors, and airports; (3) administration and collection of taxes; (4) health and welfare activities; (5) the judicial system; (6) land use districts; (7) fishing, forestry, minerals, agriculture, and land; and (8) labor and industrial relations. *Id.*

The committee's conclusion was "obvious and inescapable: if a voter of the State of Hawaii is to have meaningful representation in any kind of government, he must have effective representation from his own island unit in the state legislature." *Id.* at 263.

reapportionment of the congressional and state legislative districts. The "Standards and Criteria" for the state legislative districts stated:

Standards and criteria that shall be followed:

> The population base used shall be the "permanent resident" population of the State of Hawaii. The permanent resident population is the total population of the State of Hawaii as shown in the last U.S. census less the following: non-resident students and non-resident military sponsors.

At meetings on May 11 and 24, 2011, the Commission was briefed on Hawaii's population growth since the 2001 reapportionment, the history of Hawaii's reapportionment, and the constitutional and statutory provisions governing reapportionment. It was provided with data from the 2010 Census showing a 12% increase in the state's total population consisting of increases of 24% in Hawai'i County, 21% in Maui County, 15% in Kauai County, and 9% in Oahu County. It was informed of article IV, section 4 and 6's permanent resident basis for apportioning the state legislature and informed – by counsel to the 2001 Reapportionment Commission – that the 2001 Commission computed the permanent residence base by excluding nonresident military personnel and their dependents, and nonresident college students. It was

> informed by Commission staff that data on Hawaii's nonresident military population had been requested from the Defense Manpower Data Center (DMDC) through the U.S. Pacific Command (USPACOM) and that Hawaii's nonresident student population would be identified by their local addresses and assigned to specific census blocks. The Commission, at the conclusion of the May meetings, solicited advice from the apportionment advisory councils as to whether nonresident military and nonresident students should be excluded from the permanent resident base.

126 Haw. at 286, 270 P.3d at 1016 (internal footnote omitted).

The data obtained in May and June 2011 from the military on Hawaii's nonresident military population was apparently deemed insufficient. "The Commission, at its June 28, 2011 meeting, voted 8-1 to apportion the state legislature by using the 2010 Census count – without exclusion of nonresident military and dependents and nonresident students – as the permanent resident base." *Id.* at 287, 270 P.3d at 1017.

> Commission staff provided the following explanation as to "permanent and non-permanent military residents."
>
> > The non-permanent resident extraction model used in 1991 and 2001 [reapportionments] relied on receiving location specific (address or Zip Code) residence

> information for the specific non-permanent residents to be extracted.
>
> In 2011, the data received from DMDC does not provide residence information for military sponsors nor does it provide specific breakdowns of permanent and non-permanent residents by location.
>
> This lack of specific data from DMDC does not allow the model used previously to be used at this time.

Id. at 288, 270 P.3d at 1018 (square brackets in original).

And so, an initial apportionment plan was developed and accepted by the Commission on or before August 3, 2011 that was based on 2010 Census figures. The parties have stipulated that "[t]he State legislative reapportionment plan accepted by the Commission for public hearings and comment on August 3, 2011 ('August 2011 Plan') did not extract from the 2010 Census count, any active duty military personnel, military dependents, or students." Stip. Facts ¶ 27. The Chair of the Commission explains that this August 2011 Plan was "preliminarily accepted for the purpose of public hearings and comment," because of the impending September 26, 2011 statutory deadline for a final plan and the statutory requirement of conducting public hearings. Doc. No. 39-6, V. Marks Decl. ¶ 7. This plan is apparently the August 2011 proposed reapportionment plan that Kostick seeks to have implemented.

2. The September 26, 2011 Plan

Further proceedings followed the Commission's June 28, 2011 decision to use 2010 Census figures, and its corresponding development of the August 2011 Plan. The Commission was provided with additional data from military sources on Hawaii's "non-permanent military resident population and from Hawaii universities on non-permanent student resident population." *Solomon,* 126 Haw. at 287, 270 P.3d at 1017.

> Commission staff thereafter developed its own "model" for the "extraction of non-permanent residents" for the 2011 reapportionment. Commission staff operated on the premise that non-permanent residents – active duty military who declare Hawaii not to be their home state and their dependents, and out-of-state university students – were to be identified according to the specific location of their residences within each of the four counties. Because the 2010 Census data and the university data did not include the residence addresses for all of the non-permanent active duty military residents and their dependents and the out-of-state university students, Commission staff identified three groups of non-permanent residents: Extraction A, Extraction B, and Extraction C. The groups were based on the level of "certainty in determining [the residents'] non-permanency and location." Extraction A were residents whose specific locations were certain and included out-of-state

> university students with known addresses and active duty military, with "fairly certain non-permanent status," living in military barracks. Extraction B included all residents in Extraction A, plus active duty military and their dependents, with "less certain non-permanent status," living in on-base military housing. Extraction C included all residents in Extraction A and Extraction B, plus out-of-state university students with addresses identified only by zip code.

Id. at 288, 270 P.3d at 1018. The Commission staff's "Extraction A" listed 16,458 active duty military, their dependents, and out-of-state university students (mostly on Oahu); its "Extraction B" listed 73,552; and its "Extraction C" listed 79,821. *Id.* Additionally, an "August 7, 2011 'Staff Summary' showed a state population of 47,082 non-permanent active duty military residents, 58,949 military dependents, and 15,463 out-of-state university students" totaling 121,494 "non-permanent" residents. *Id.* at 289, 270 P.3d at 1019.

The Commission held a September 13, 2011 public hearing in Hilo, Hawaii. It received testimony on behalf of State Senator Malama Solomon ("Solomon") and three members of the Hawaii County Democratic Committee, advocating extraction of the 121,494 "non-permanent" residents from the apportionment population base. Such an extraction would increase Hawaii County's senate seats from three to four. *Id.* Hawaii Governor Neil Abercrombie also supported that extraction, indicating that based upon

the State Attorney General's preliminary view, "counting nonresidents is not warranted in law." *Id.*[7]

On September 19, 2011, after much debate, "[t]he Commission adopted a final apportionment plan that computed the permanent resident base by excluding 16,458 active duty military and out-of-state university students from the 2010 census population of 1,330,301." *Id.* at 290, 270 P.3d at 1020; Stip. Facts ¶ 32. That is, it chose "Extraction A," primarily because of the certainty of that data. The resulting apportionment allocated "as to the senate 18 seats to Oahu County, 3 seats for Hawaii County, 3 seats for

---

[7] *Solomon* also references a letter from the Attorney General to Hawaii County legislator Robert Herkes opining that "the Hawaii Supreme Court would likely hold that to the extent they are identifiable, nonresident college students and nonresident military members and their families *cannot* properly be included in the reapportionment population base the Commission uses to draw the legislative district lines this year." 126 Haw. at 287, 270 P.3d at 1017.

> The [Attorney General] opinion was based on the legislative history of the 1992 'permanent resident' amendment to article IV, section 4, and the Hawaii Supreme Court's interpretation [in *Citizens for Equitable & Responsible Gov't v. County of Hawaii,* 108 Haw. 318, 120 P.3d 217 (2005)] of 'resident population,' as used [in] the Hawaii County Charter, as excluding nonresident college students and nonresident military personnel and their dependents from the population base for purposes of apportioning county council districts. The opinion was forwarded to the Commission.

Id. (footnote omitted).

Maui County, and 1 seat for Kauai County." *Solomon,* 126 Haw. at 290, 270 P.3d at 1020. The Commission filed this plan on September 26, 2011 ("the September 26, 2011 Plan"). *Id.;* Stip. Facts. ¶ 32.

3. The September 26, 2011 Plan is Challenged: Solomon v. Abercrombie; *and* Matsukawa v. State of Hawaii 2011 Reapportionment Commission

On October 10, 2011, Solomon and the three members of the Hawaii County Democratic Committee filed a petition in the Hawaii Supreme Court, challenging the September 26, 2011 Plan. The next day, Hawaii County resident Michael Matsukawa filed a similar petition in the Hawaii Supreme Court. Stip. Facts ¶ 33. Among other claims, these petitions asserted that the Commission violated the State Constitutional requirement to base a reapportionment on "permanent residents" by failing to extract all non-resident military, their dependents, and non-resident students. Solomon's petition asserted that the Commission knew that extracting only 16,000 non-residents would not trigger the loss of an Oahu-based senate seat, and that "the fear of Oahu's loss of this senate seat was the driving force" for the extraction. *Solomon,* 126 Haw. at 290, 270 P.3d at 1020. They sought an order requiring the Commission to prepare and file a new reapportionment plan for the State legislature that uses a population base limited to "permanent residents" of the State of Hawaii. Stip. Facts ¶ 33. As far as we can discern, however, the

parties did not raise constitutional equal protection arguments.

On January 4, 2012, the Hawaii Supreme Court issued orders in the *Solomon* and *Matsukawa* proceedings that invalidated the September 26, 2011 Plan as having disregarded Article IV, § 4 of the Hawaii Constitution. The Hawaii Supreme Court, among other things, ordered the Commission to prepare and file a new reapportionment plan that allocates members of the State legislature among the basic island units using a permanent resident population base. Stip. Facts ¶ 34. On January 6, 2012, the Hawaii Supreme Court issued *Solomon* – an opinion covering both the *Solomon* and *Matsukawa* proceedings. *Id.* ¶ 35.

As for the requirement in Article IV, §§ 4 and 6, for the Commission to apportion the state legislature by using a "permanent resident" base, *Solomon* held that the requirement "mandate[s] that only residents having their domiciliary in the State of Hawaii may be counted in the population base for the purpose of reapportioning legislative districts." *Solomon,* 126 Haw. at 292, 270 P.3d at 1022 (quoting *Citizens for Equitable & Responsible Gov't,* 108 Haw. at 322, 120 P.3d at 221). To determine "the total number of permanent residents in the state and in each county," the Commission was required "to extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population." *Id.* It directed that

> [i]n preparing a new plan, the Commission must first – pursuant to article IV, section 4 – determine the total number of permanent residents in the state and in each county and use those numbers to allocate the 25 members of the senate and 51 members of the house of representatives among the four counties. Upon such allocation, the Commission must then – pursuant to article IV, section 6 – apportion the senate and house members among nearly equal numbers of permanent residents within each of the four counties.

Id. at 294, 270 P.3d at 1024.

4. The 2012 Reapportionment Plan

Soon after *Solomon* was issued, the Commission commenced a series of public meetings and obtained additional information regarding military personnel, their family members, and university students. The Commission eventually extracted 42,332 active duty military personnel, 53,115 military dependents, and 13,320 students from the 2010 Census population of "usual residents." Stip. Facts ¶¶ 8, 10, 14, 36. This extraction totaled 108,767 persons, resulting in an adjusted reapportionment population base of 1,251,534. *Id.* ¶ 37.

The active duty military were extracted if they "declared a state other than Hawaii as their home state for income tax purposes," and if they were included in the 2010 Census. Doc. No. 28-12, Pls.'

Mot. Ex. D, at 2-2. That is, they were extracted "based on military records or data denoting the personnel's state of legal residence." Stip. Facts ¶ 8.

The extracted military family members were identified by associating them with their active duty military sponsor. In other words, the Commission extracted military dependents who were associated with or attached to an active duty military person who had declared a state of legal residence other than Hawaii. Stip. Facts ¶ 10. The military did not provide the Commission with any data regarding the military dependents' permanent or non-permanent residency other than their association or attachment to an active duty military sponsor who had declared a state of residence other than Hawaii. *Id.* ¶ 12.

The students were extracted solely on the basis of (a) payment of nonresident tuition, or (b) a home address outside of Hawaii. *Id.* ¶¶ 14, 18-19. The students were from the University of Hawaii System, Hawaii Pacific University, Chaminade University, and Brigham Young University ("BYU") Hawaii. *Id.* ¶ 15. No other Hawaii universities provided data to the Commission. *Id.* ¶ 16.

After extraction, the Commission reapportioned the adjusted population base of 1,251,534 "permanent residents" by dividing the base by 25 Senate seats and 51 House seats. *Id.* ¶ 37. This resulted in an ideal Senate district of 50,061 permanent residents, and an ideal House district of 24,540 permanent residents. *Id.* The Commission then reapportioned within the

four basic island units as set forth in Article IV, § 6 of the Hawaii Constitution, and as guided by the criteria set forth in that provision.

Under the 2012 Reapportionment Plan: (a) the largest Senate District (Senate District 8, Kauai basic island unit) contains 66,805 permanent residents which is 16,744 (or 33.44 percent) higher than the ideal Senate district of 50,061 permanent residents; and (b) the smallest Senate District (Senate District 1, Hawaii basic island unit) contains 44,666 permanent residents which is 5,395 (or 10.78 percent) less than the ideal. *Id.* ¶ 38. Thus, the range for the Senate Districts is 44.22 percent. The 2012 Reapportionment Plan resulted in one Senate seat moving from the Oahu basic island unit to the Hawaii basic island unit. *Id.* ¶ 40.

As for the House districts, under the 2012 Reapportionment Plan: (a) the largest House District (House District 5, Hawaii basic island unit) contains 27,129 permanent residents which is 2,589 (or 10.55 percent) higher than the ideal House district of 24,540 permanent residents; and (b) the smallest House District (House District 15, Kauai basic island unit) contains 21,835 permanent residents which is 2,705 (or 11.02 percent) less than the ideal. *Id.* ¶ 39. The range for the House districts is 21.57 percent.

The extent of the deviations is driven largely by a Commission decision to continue to avoid canoe districts. *See* Doc. No. 28-3, Pls.' Mot. Ex. A, at 33 (2012 Reapportionment Plan, at 21). Canoe districts

were eliminated in the 2001 reapportionment, after being imposed in 1982 when, as noted earlier, a three-judge court in *Travis v. King,* 552 F. Supp. 554 (D. Haw. 1982), found a 1981 reapportionment plan to be unconstitutional, and ordered use of an interim plan that utilized canoe districts as recommended by special masters. *See* Doc. No. 34-17, Defs.' Ex. 27 (April 27, 1982 Final Report and Recommendations of Special Masters, *Travis v. King*). The 2001 Reapportionment Commission did away with canoe districts, concluding after experience and public input that such districts were ineffective. *See, e.g.,* Doc. No. 34-21 at 10 (2001 Reapportionment Plan, at 25); *id.* at 13 (2001 Reapportionment Plan, at A-209).

The 2012 Reapportionment Plan was adopted and filed on March 8, 2012, with notice published on March 22, 2012. Stip. Facts ¶ 36. It was presented to the Legislature on March 30, 2012. Doc. No. 32, FAC ¶ 45.

C. Procedural History

Soon after the 2012 Reapportionment Plan was presented to the Legislature, this action was filed on April 6, 2012. The Complaint requested a three-judge district court pursuant to 28 U.S.C. § 2284. On April 10, 2012, Judge J. Michael Seabright granted the request for a three-judge district court, determining that the constitutional claims are "not insubstantial," as necessary for such a court. *See, e.g., Goosby v. Osser,* 409 U.S. 512, 518 (1973). On April 17, 2012,

the Chief Judge of the Ninth Circuit Court of Appeals appointed the present panel, Ninth Circuit Judge M. Margaret McKeown, and District Judges J. Michael Seabright and Leslie E. Kobayashi.

Kostick filed the Motion for Preliminary Injunction on April 23, 2012. An Amended Complaint was filed on April 27, 2012, which added two Plaintiffs to the action, Ernest and Jennifer Laster, but otherwise did not substantially differ from the original Complaint. An Opposition was filed on May 3, 2012, and a Reply on May 8, 2012. We heard the Motion on May 18, 2012, and admitted evidence without objection, most of which had previously been submitted as exhibits already entered on the court's docket. We also heard live testimony from Nago, and considered extensive oral argument from the parties. We have considered the evidentiary record, and oral and written argument of counsel, and rule as follows.

III. STANDARD OF REVIEW

There are two types of preliminary injunctions – a prohibitory injunction "preserve[s] the status quo pending a determination of the action on the merits," whereas a "mandatory injunction orders a responsible party to 'take action.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 879 (9th Cir. 2009) (citations and quotations omitted). "A mandatory injunction 'goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Id.* (quoting *Anderson v. United*

States, 612 F.2d 1112, 1114 (9th Cir. 1980)). The remedies Kostick seeks here include both types of preliminary injunction.

A preliminary injunction "'is an extraordinary remedy never awarded as of right.'" *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter,* 555 U.S. at 20. A decisive showing as to all factors is not required: under the "sliding scale" or "serious questions" approach to preliminary injunctions, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Alliance for the Wild Rockies,* 632 F.3d at 1131 (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir. 2003)). However, the Supreme Court emphasized in *Winter* that a preliminary injunction is not appropriate when there is only a "possibility of some remote future injury." *Winter,* 555 U.S. at 22 (citations omitted). Kostick must show that the conduct of the Commission is *likely* to cause him constitutional harm. *Id.*

Where a plaintiff seeks a mandatory injunction, "courts should be extremely cautious about issuing a preliminary injunction," and "should deny such relief 'unless the facts and law clearly favor the moving party.'" *Stanley v. Univ. of S. Cal.,* 13 F.3d 1313, 1319-20 (9th Cir. 1994) (quoting *Anderson,* 612 F.2d at 1114). Generally, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson,* 612 F.2d at 1115; *see also Little v. Jones,* 607 F.3d 1245, 1251 (10th Cir. 2010) (describing that "the movant must make a heightened showing of the four factors" (citation and quotation signals omitted)). "The burden of proof at the preliminary injunction phase tracks the burden of proof at trial." *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1116 (9th Cir. 2011). The parties challenging state apportionment legislation bear the burden of proving disparate representation. *Karcher v. Daggett,* 462 U.S. 725, 730-731 (1983). It falls on Kostick to show that he is likely to establish a constitutional violation at trial.

IV. DISCUSSION

Kostick makes a bifurcated equal protection challenge to Hawaii's reapportionment plan. He first protests the extraction of non-resident military personnel, their dependents, and non-resident students. He argues that using a population base that does not include the extracted individuals violates

equal protection. Next, even if such an extraction is allowed, Kostick argues that deviations in the 2012 Reapportionment Plan's subsequent reapportionment of the resulting population base are constitutionally problematic. We now turn to these claims.

A. Count One (Equal Protection Challenge: Population Basis)

We first address the overriding question of constitutional injury, and conclude that Kostick has not demonstrated that he is likely to succeed on the merits. Even if Kostick were able to make this threshold showing, we find that the equities tip decisively in the Commission's favor. The record shows that the remedy Kostick seeks would require postponement of the state primary election, an integral part of the electoral process, and even put the general election in jeopardy.

1. Likelihood of Success on the Merits

Kostick argues that by seeking to apportion based only on a permanent resident basis, and extracting non-resident military, their dependents, and non-resident students from the apportionment population base, Hawaii violated the principle of equal representation. On this record, Kostick fails to meet his preliminary injunction burden. To begin, the Supreme Court has explicitly affirmed that a state may legitimately restrict the districting base to citizens, which in this case, corresponds to permanent

residents. Discriminating *among* non-resident groups in the course of extraction may be problematic – yet, the record reveals that Hawaii extracted all non-resident populations that exist in sufficient numbers to affect the apportionment of districts, and regarding which it could obtain reliable data without discriminating among them. Kostick does not show that Hawaii attempted to single out non-resident servicemembers, servicemember dependents, or non-resident students for any reason other than their lack of permanent residency. Finally, the record shows that the means Hawaii chose to achieve the result were rational and, even using the standard urged by Kostick, pass close constitutional scrutiny. There is no indication that Hawaii's methods resulted in the exclusion of state residents from the population basis sufficient to affect legislative apportionment.

a) Use of Permanent Resident Population Base

In considering Kostick's claim, we have the benefit of longstanding Supreme Court precedent, including the 1966 case stemming from Hawaii's earlier apportionment plan – *Burns v. Richardson.* Just two years earlier, in *Reynolds v. Sims,* the Court decided a seminal case on the "right of a citizen to equal representation." Elaborating on that principle, *Reynolds* explained that under the Equal Protection Clause, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with

votes of citizens living in other parts of the State." 377 U.S. at 568, 576. *Reynolds* held that "the seats . . . of a . . . state legislature must be apportioned on a population basis," *id.* at 568, but "carefully left open the question what population was being referred to." *Burns,* 384 U.S. at 91.

This question did not remain unaddressed for long. In *Burns,* the Court considered whether it was permissible for Hawaii to use registered voters rather than a broader population as the basis for districting. In discussing *Reynolds,* the Court "start[ed] with the proposition that the Equal Protection Clause does not require States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is measured." *Id.* Although the Court had concerns over the use of only registered voters as the population basis, it held that "on [the *Burns*] record . . . [the] distribution of legislators" using the registered voter basis was "not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

Importantly for our purposes, the Court set out guidelines for this "permissible population basis." One such permissible population basis, discussed in *Reynolds,* was the total population. Had *Burns* left the matter there, Kostick might have a different case. However, in *Burns* the Court went on to acknowledge the power of states to "[ex]clude aliens, transients, short term or temporary residents" from "the apportionment base," noting that "[t]he decision to exclude

any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* at 92.

Although Hawaii earlier chose to use the registered voter base, the Court foreshadowed Hawaii's later decision to shift to a permanent resident base: "Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison." *Id.* at 93. And the Court went on to quote the district court's finding that "[i]f total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow." *Id.* Specifically, the Court was solicitous of "Hawaii's special population problems" caused by "large numbers of the military" as well as "tourists" both of which "tend to be highly concentrated in Oahu, and indeed are largely confined to particular regions of that island." *Id.* at 94. Accordingly, "[t]otal population figures may thus constitute a substantially distorted reflection of the distribution of *state citizenry*" and "[i]t is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base." *Id.* (emphasis added). In light of the failure of the total population distribution to track state citizens, the Court specifically sanctioned the use of an "approximate[ ] distribution of state citizens" as a "permissible population base." *Id.* at 95.

Kostick conceded at oral argument that a citizen population basis is permissible under *Burns*. However, for the first time, he sought to distinguish a permanent resident population basis from a citizen population basis, and argued that *Burns*'s approval of a citizen population basis was therefore irrelevant. According to Kostick, if the state does not use total population as identified in the Census, then the state bears the burden to prove that the population base that it does use – for example, registered voters in *Burns* – tracks apportionment under a permissible population base.

This argument claims too much. To start, the Court approved a citizen base as a permissible base and its opinion is clear that a state could achieve such a base through extracting various groups – such as temporary residents – from the total population. Ultimately, Kostick's argument regarding benchmarks is one of nomenclature rather than substance. He makes no showing that the extraction of non-permanent residents is anything other than a *Burns*-sanctioned extraction to determine a citizen base. *Burns* explicitly benchmarked the registered voter population basis against a "state citizen population" which was extrapolated by considering the "military population of Oahu" against the "total population," effectively deducting the former from the latter. 384 U.S. at 95. And the Commission's plan before us tracks Hawaii permanent residents in a manner more finely tuned than the plan considered in *Burns* – it deducts, not the entire "military population" but only

non-resident military personnel and dependents, as well as non-resident students, to approximate the permanent resident base. *Travis* sanctioned a similar approach: the special masters appointed by the *Travis* court recommended a "total population less non-resident military and dependents" as an approximation of the state "citizen population." Doc. No. 34-17, at 13, 31 (Final Report and Recommendations of Special Masters Submitted Pursuant to Order of Court, at 6, 24); Doc. No. 34-18 (Order implementing Special Masters' recommendations).

Thus *Burns* – involving the same equal protection challenge to a redistricting base, the same state, and a similar excluded group of individuals – speaks presciently to the issue we face here. There is no indication that the numbers of military personnel, or the other excluded groups in this case, are no longer "large" or "concentrated," such that a basis which included these groups would reflect the distribution of Hawaii's "state citizenry." *Id.* As noted in *Burns,* the vast majority of these individuals remain concentrated on Oahu. *See Solomon,* 126 Haw. at 288, 270 P.3d at 1018.

Next, Kostick relies heavily on *Garza,* 918 F.2d 763, to argue that the Commission should have redistricted using the total population basis without exclusions. Doc. No. 28-1 at 28-32, Mot. at 21-25. Kostick misreads the import of *Garza.* In *Garza,* Hispanic residents challenged Los Angeles County supervisor districts. The district court found that the county's plan intentionally discriminated against

Hispanic individuals, ruled in favor of the challengers, and ordered redistricting based on the total population of the county, rather than on eligible voter population. 918 F.2d at 766, 773. The Ninth Circuit affirmed the district court's decision to use a total population rather than an eligible voter districting base.

Although *Garza* approved the district court's use of a total population, it did little more. *Garza* provides limited foundation for Kostick's argument. Nothing in *Garza* compels a state to adopt a total population base rather than a different permissible population base. Importantly, *Garza* noted at the beginning of its analysis that *Burns* was permissive. *Burns* "seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. It does not, however, require states to do so." 918 F.2d at 774. *Garza* acknowledged the "latitude" the Supreme Court had "afford[ed] state and local governments to depart from strict total population equality . . . in light of 'significant state policies,'" but noted that California law required the use of a strict total population basis. *Id.* Although in responding to the dissent, *Garza* suggests in dicta that "requir[ing] districting on the basis of voting capability" would create equal protection problems, its analysis ultimately begins with, and stands upon, the proposition that *Burns* permitted use of either the total population *or* the citizen population. *Id.* at 776. Nothing in *Garza* is at odds with the Commission's approach.

In recent years, various courts have considered whether the citizen population is an acceptable districting basis and have held that under *Burns,* the matter is a political question best left to states. *See Daly v. Hunt,* 93 F.3d 1212, 1227 (4th Cir. 1996); *Chen,* 206 F.3d at 526. It is hardly up to us to meddle in a state choice with which the Supreme Court as well as circuit courts have deemed "no constitutionally founded reason to interfere." *Burns,* 384 U.S. at 92.[8]

---

[8] Kostick's Reply relies heavily on *Evans v. Cornman,* 398 U.S. 419 (1970), for the argument that "all persons" who were counted as Hawaii residents in the Census are entitled to be counted as part of the population basis. Doc. No. 36 at 13-14, Reply at 8-9. *Evans,* however, addressed a different issue. In *Evans,* the Court rejected the argument that the residents of a National Institutes of Health ("NIH") enclave, who were denied the right to vote, were nonresidents of Maryland. *Evans* did not sub silentio overrule *Burns*'s determination that permanent residents or citizens are a permissible districting basis. The NIH employees were concededly residents of the enclave, which the Court held was part of the state and therefore the employees could not be forbidden from voting as state residents. *Evans,* 398 U.S. at 421-22. Contrary to Kostick's reading of the case, the Court also reaffirmed prior holdings that permit the imposition of bona fide residency requirements to permit voting, and explained that the right to be counted existed " 'if [NIH employees] are in fact residents, with the intention of making [the State] their home indefinitely.' " *Id.* (quoting *Carrington v. Rash,* 380 U.S. 89, 96 (1965)). Similarly, Hawaii permissibly seeks to count all of those – and only those – who have "the intention of making [the State] their home indefinitely."

b) Discrimination Among Non-Resident Groups

To be sure, if Hawaii's exclusion was carried out with an eye to invidiously targeting only certain non-resident groups, it could raise serious constitutional concerns. *Carrington,* 380 U.S. at 95 (holding that discrimination against the military in provision of the right to vote is unconstitutional); *Burns,* 384 U.S. at 95 & n.25 (suggesting that *Carrington* required equal treatment of the military for the purpose of reapportionment). Kostick provides no evidence that Hawaii's exclusion of non-resident servicemembers, their dependents, and non-resident students was carried out with any aim other than to create a population basis that reflects the state citizenry, or state permanent residents. Notably, the Hawaii Supreme Court's decision, which prompted the current plan, faulted the Commission, not for failing to exclude certain groups in the redistricting effort, but for failing to exclude all "[n]on-[p]ermanent [r]esidents" for which the State had data. *Solomon,* 126 Haw. at 291, 270 P.3d at 1021.

The Commission's reapportionment efforts over the years reflect its primary concern with excluding non-permanent residents from the population basis, rather than with invidiously targeting certain groups. For example, in 1991, the Commission initially excluded minors as well as the military and their dependents. Doc. No. 34-20, Defs.' Ex. 30, at 3 (1991 State of Hawaii Reapportionment Comm'n, Final Report and Reapportionment Plan, at 21). The Commission

also sought to exclude aliens, but was informed that no data was available to do so. *Id.* at 22. Similarly, the Commission noted that "[o]ther groups, such as nonresident students, are statistically insignificant and cannot be easily placed in specific census blocks. Therefore, the Commission decided to eliminate those transients which could be identified to a particular census block and which constituted the vast majority of transients included in the census counts: nonresident military." *Id.* at 23.

Since the efforts of the 1991 Commission, the state has diligently considered how and whether other non-permanent resident groups could be removed from the population base. Subsequent commissions have considered excluding aliens, but have been unable to do so because of lack of data. *See* Doc. No. 34-21, Defs.' Ex. 30, at 22 (2001 State of Hawaii Reapportionment Comm'n Reapportionment Plan, at A-226); Doc. No. 33-5, D. Rosenbrock Decl. ¶ 15 (discussing 2011 Commission). Although data regarding aliens was in short supply, the Commission in 2011 conscientiously renewed contacts with university officials and successfully obtained data to exclude non-resident students. Doc. No. 33-6, V. Marks Decl. ¶¶ 18, 20.

Kostick nonetheless raises concerns that the state extracted military personnel, their dependents and students, but not illegal aliens, minors, federal workers, prisoners, institutionalized persons, and even the unemployed. Doc. No. 28-1 at 36-38, Mot. at 29-31. Several of these comparator groups are not

relevant: Kostick does not seriously suggest that minors, the unemployed, and prisoners are not generally Hawaii residents who lack the "present intention of establishing [their] permanent dwelling place" in Hawaii. Haw. Rev. Stat. § 11-13(2).[9] The Commission tried – but was unable – to get information regarding aliens, as discussed above. Kostick's single, passing argument with reference to federal workers is unavailing: he presents no evidence as to the number of federal workers in Hawaii, nor does he seriously contend that the vast majority of these workers are anything but bona fide permanent residents.

c) Implementation of Extraction

Kostick claims that even if using a permanent resident base is a permissible aim, the extraction mechanism fails because it also eliminates some Hawaii citizens, such as Plaintiff Jennifer Laster, from the reapportionment basis. Doc. No. 28-1 at 39, Mot. at 32; Doc. No. 36 at 20, Reply at 15. In implementing redistricting using only permanent residents, Hawaii's methods need not have "'[m]athematical exactitude;'" rather Hawaii must simply employ procedures that "make an honest and good-faith effort to construct . . . districts" in such a way that the number of permanent residents in each

[9] The Commission explains that because it does not import prisoners from elsewhere, non-resident prisoners are not included because "convicted felons in Hawaii are highly likely to be 'permanent residents.'" Doc. No. 33, Opp'n at 26 n.6.

district are as "'equal . . . as is practicable.'" *Gaffney v. Cummings,* 412 U.S. 742, 744 (1973) (quoting *Reynolds,* 377 U.S. at 577). As noted in *Burns,* using a smaller group of individuals, such as registered voters, as the districting base is problematic – unless the method is adopted "as a reasonable approximation for," and tracks the distribution of, a permissible population basis. 384 U.S. at 92-93, 95. In other words, to show that the Commission's methods were problematic, it is not enough for Kostick to show that it excluded some citizens from the reapportionment base: he must also show that the exclusion was egregious enough to result in an unequal distribution of the citizen population base among the various districts. At this preliminary injunction stage, Kostick fails to demonstrate that he will be likely to make this showing on the merits.

Hawaii's 2012 Reapportionment Plan extracts three non-resident groups: non-resident military personnel, their dependents, and non-resident university students. To extract non-resident military, Hawaii used the servicemember's chosen state for taxation to determine residency. Doc. No. 28-9, Pls.' Mot. Ex. A at 10-11 (Office of Elections, Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting – Addendum D-8 to D-9). This was a reasonable method of identifying a servicemember's state of residence.

Servicemembers are not excluded from residency. They are given an opportunity to identify their state of residence for the purposes of taxation. *See* Doc. No.

34-7, Defs.' Ex. 17, at 1 ("Instructions of Certification of State of Legal Residence."). By designating a state other than Hawaii as their state of taxation, servicemembers avoid paying Hawaii resident state taxes. Haw. Rev. Stat. § 235-7. Servicemembers are informed that state residency requires "*physical presence . . . with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile.*" Doc. No. 34-7, Defs.' Ex. 17, at 1 (emphasis in original). This language tracks the residency requirements under Hawaii law, that require a "present intention of establishing the person's permanent dwelling place." Haw. Rev. Stat. § 11-13(2) (setting forth test for establishing residency). By indicating a different state for the purposes of taxation, a servicemember declares that he or she has no present intention of establishing his "permanent dwelling place" in Hawaii. Reliance on this declaration is a rational means of determining a servicemember's residence under Hawaii law. *Cf. Dunn v. Blumstein,* 405 U.S. 330, 337 (1972) (stating that it is permissible for a state to "requir[e] a person who enters the State to make a 'declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State.'" (quoting *Pope v. Williams,* 193 U.S. 621 (1904))). Hawaii does nothing to prohibit members of the military from establishing residency in Hawaii. Because, on this record, Hawaii does not resort to overbroad means to exclude non-resident servicemembers, its means of excluding servicemembers survive constitutional scrutiny. *Cf. Burns,* 384 U.S. at

95 (noting that there was no attempt to disenfranchise the military by preventing them from becoming state residents).

Next, the Commission presumes that all dependents of non-resident servicemembers are also non-residents. Kostick points to Jennifer Laster – and only to Jennifer Laster[10] – to argue that this approach improperly eliminates residents and registered voters from the population base. Doc. No. 35-13, Defs.' Ex. 44, at 15. This evidence is hardly sufficient to show that Kostick is likely to be able to demonstrate that Hawaii's exclusion is overbroad. The record shows otherwise – the military informed Hawaii in 1991 that in 98 percent of families of non-resident servicemembers, dependents had the same residency as that of the servicemember. Doc. No. 34-20, Defs.' Ex. 30 at 3 (1991 State of Hawaii Reapportionment Comm'n, Final Report and Reapportionment Plan, at 21). *See also* Doc. No. 35-12, U.S. Departments of Treasury and Defense, Supporting our Military Families: Best Practices for Streamlining Occupational

[10] In its opposition, the Commission suggests that the Kostick plaintiffs lack standing. Doc. No. 22-23, Opp'n at 16-17. However, the Commission concedes that the Lasters, consisting of a non-resident servicemember and his resident wife, have standing with respect to Count One, and certain other Plaintiffs have standing with respect to Count Two. *Id.* This concession dooms this standing argument. The "presence of one party with standing assures that [the] controversy before [the] Court is justiciable." *Dep't of Commerce v. United States House of Representatives,* 525 U.S. 316, 328 (1999).

Licensing Across State Lines at 3-4 (2012) (service-member spouses are far more likely to relocate than civilian spouses). Kostick presents no evidence that the status quo has changed, or that Jennifer Laster is not a member of a small minority of dependents who have a different residence from that of the service-member. Kostick certainly fails to show that the resulting districting scheme fails to equally apportion districts among citizens or permanent residents.

Turning to the extraction of students, Hawaii extracted students from BYU Hawaii, Hawaii Pacific, Chaminade and the University of Hawaii System. Doc. No. 33-5, D. Rosenbrock Decl. ¶ 9. Other than noting that students from other universities were not included, the record is bereft of evidence to suggest that the number of students at any remaining universities was substantial enough such that the resulting plan disproportionately allocated permanent residents. Rather, the evidence indicates that these universities are the four "major colleges in Hawaii." *Id.* As *Gaffney* suggests, the Commission need not have considered small institutions which are attended by too few non-resident students to affect the allocation of state residents.

Next, the two tests established for excluding non-resident students within the four universities were reasonably designed to meet the goals of identifying nonresidents. For BYU Hawaii, Hawaii Pacific, and Chaminade, a student is considered a non-resident if the student lists a "home address" outside Hawaii. It falls within the state's discretion to use this method

to determine which individuals are transient residents. *See, e.g., Pope,* 193 U.S. 621 (permitting a declaration of residency requirement).

In the University of Hawaii System, any student paying out-of-state tuition is considered a non-resident. The essential requirements for establishing residency for tuition purposes in the University of Hawaii System are (1) bona fide residency, shown by various methods, most importantly, registering to vote and paying state taxes, (2) for a period of twelve months. Haw. Admin. R. § 20-4-6. Kostick appears troubled by the year-long residency requirement: a student is not counted as a Hawaii resident for the purposes of redistricting unless he has been a resident for one year. Doc. No. 36 at 20, Reply at 15 & n.5. He reminds us that in *Dunn,* the Supreme Court held that imposing a year long durational requirement for the purposes of *voting* was constitutionally impermissible. 405 U.S. at 360.

Had Kostick provided even some evidence that Hawaii's mechanism unfairly excluded Hawaii resident students from the population base, however *long* they had been residents, he would be on more solid ground. Kostick points to not a single student who has become a resident of Hawaii, but who has not been counted as part of the population base.

Accordingly, Kostick has not shown a likelihood of succeeding on his claim that use of a permanent resident base, coupled with extraction of military

personnel, their dependents, and students, constitutes an equal protection violation.

2. Irreparable Harm and Other Equitable Considerations

Having failed to establish the first factor of the preliminary injunction standard, likelihood of success on the merits, Kostick likewise "fail[s] to establish that irreparable harm will flow from" the denial of a preliminary injunction. *Hale v. Dep't of Energy,* 806 F.2d 910, 918 (9th Cir. 1986). Although these determinations doom Kostick's motion for a preliminary injunction, we discuss the other equitable factors because of the public significance of the challenge.

In considering the equities and the public interest, we balance Kostick's constitutional concerns against the consequences of the remedy he seeks. Though Kostick does not explicitly ask to postpone the primary election, we find that postponement is the practical result of Kostick's proposed remedies.[11] Any effort to implement an alternative plan at this stage would result in significant delay, grave confusion and potential chaos at the polls. Such a result is directly contrary to the powerful public interest in avoiding disruption of the primary election, which

[11] In oral argument Kostick explicitly indicated that he does not seek a bifurcated election where state and local elections would be held on a separate date from the federal election.

"is an integral part of the entire election process." *Burdick v. Takushi,* 504 U.S. 428, 439 (1992).

Even if Kostick could establish the likelihood of a constitutional violation – which he has not – a federal court preliminary injunction that has the net effect of interrupting the election would be ill advised. According to the Supreme Court,

> under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. at 585. "The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." *Sw.*

Voter Registration Educ. Project, 344 F.3d at 918 (citing *Ely v. Klahr,* 403 U.S. 108, 113, 115 (1971); *Whitcomb v. Chavis,* 396 U.S. 1055 (1970); *Kilgarlin v. Hill,* 386 U.S. 120, 121 (1967) (per curiam)). We find Nago's explanation of the drastic consequences of a preliminary injunction to be persuasive, particularly in the absence of any evidence to the contrary. The equities and the public interest tip decisively against Kostick.

Hawaii's electoral timeline is constrained by statutory and practical considerations. The state and federal primary elections, as well as special county elections, are scheduled for August 11, 2012. Haw. Rev. Stat. § 12-2. The general election is scheduled for November 6, 2012. Haw. Const. art. II, § 8; 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7. A critical part of the election process is precincting, which is both staff and time intensive. Doc. No. 33-9, Nago Decl. ¶ 34-35. This year, because of the late breaking *Solomon* decision, the Office of Elections completed the precincting process on an expedited basis in approximately five weeks. Doc. No. 28-11, Nago Depo. 30. Nago testified at the May 18 hearing that it would be difficult, if not impossible, to do it any faster should the court order a revision of the apportionment process. Five weeks from the date of the hearing is June 22. Only after the precincting process is complete can the county clerks begin the process of assigning each of the individual 600,000 or so voters to a polling place. Doc. No. 33-9, Nago Decl. ¶¶ 44-46. This process takes approximately ten weeks. Defs.' Ex. 66. Ten weeks

from the optimistic June 22 estimate would extend the process to August 31.

In fact, there are numerous other crucial deadlines that inevitably would be interrupted by a preliminary injunction.

- May 26: Office of Elections publishes the precincts. Haw. Rev. Stat. § 11-91.
- June 5: Candidate nomination papers for state offices due. *Id.* § 12-6(a).
- June 12: Written objections to candidate nomination papers due. *Id.* § 12-8.
- June 13: Printing of voter ballots begins and counties start assigning voters to precincts. Doc. No. 28-11, Nago Depo. 41-43.
- June 27: Last date to mail overseas ballots. 42 U.S.C. § 1973ff-1(a)(8).
- July 2: Counties mail postcards to voters indicating their registration status and polling location. Doc. No. 28-11, Nago Depo. 45. (Not a legal requirement, but a standard practice that is a valuable part of ensuring an orderly election.)
- July 30: Absentee polling places open. Haw. Rev. Stat. § 15-7(b).

Nago also explained at the hearing that his office needs to sequester and recycle the voting machines following the primary election, a process that takes one to two months. Thus, a court-ordered districting

plan would, at a bare minimum, make the August 11 primary impossible and spill over to disrupt the general election. Not surprisingly, in the face of the practical mechanics of running the machinery of an election, Kostick offered no suggested timetable to accomplish these tasks.

Although Kostick's counsel opined at the hearing that the task would be "mission difficult, not mission impossible," we disagree. The above chronology leaves little doubt that, at this late date,[12] there is no room for judicial intervention without significantly interrupting the election process. Spawning chaos rather than confidence in the election process is a result we cannot endorse. Absent compelling evidence that the election will not be interrupted, we find that the equities and public interest weigh decisively against granting the preliminary injunction.

B. Count Two (Equal Protection Challenge: Mal-Apportionment)

Count Two contends that the Commission violated the Equal Protection Clause by apportioning

---

[12] The timing of this suit and request for relief also weigh against an injunction. Kostick could have brought his basic challenge after the September 2011 Plan was published. Although the number of people extracted from the total population was significantly lower under the September 2011 Plan than under the 2012 Plan, Kostick's core constitutional claim was cognizable at least at that early date, when there would have been time for a full consideration of the issues.

the State's legislative districts unequally – a total deviation of over 44 percent off the ideal population for Hawaii's Senate districts and over 21 percent for the House – after extracting the 108,767 military personnel, military dependents, and students. Kostick contends that the high deviations are inconsistent with the constitutional principle that "representative government in this country is one of equal representation for equal numbers of people." *Reynolds,* 377 U.S. at 560-61.

This question is not new. The Commission has always acknowledged that complying with the Hawaii Constitution's criteria that "no district shall extend beyond the boundaries of any basic island unit" as provided in Article IV, § 6 – i.e., avoiding canoe districts – may not be possible without relatively high deviations from a mathematical ideal. The issue has been "ever present in [Hawaii's] reapportionment cases." *Gill,* 316 F. Supp. at 1288. And the parties appear to agree that the choice is straightforward: Either keep Kauai as a single district (but cause large deviations) or require canoe districts (to balance populations equally). *See* Doc. No. 28-3, Pls.' Mot. Ex. A, at 33 (2012 Reapportionment Plan, at 21).

But we need not evaluate the merits of this claim now. It is undisputed that if preliminary relief were granted on Count Two – that is, even assuming that the 2012 Reapportionment Plan's statewide deviations exceed constitutional limits – then redistricting must begin anew. Kostick conceded at the May 18 hearing that there are no existing plans such as the

August 2011 Plan or the September 26, 2011 Plan that we could order Nago to begin implementing. The Commission would be required to start from scratch, creating canoe districts and re-balancing populations. Given this backdrop, Kostick forthrightly admitted during the hearing that if we denied the preliminary injunction as to Count One, the Commission and Nago would not have sufficient time to implement a remedy as to Count Two. That is, Kostick concedes that it is too late to re-draw districts and implement that new plan for the 2012 election cycle.

Again, it bears emphasizing that we face a Motion for Preliminary Injunction, and are applying preliminary-injunction standards. We are not tasked with making final decisions on the merits. Given Kostick's admission that the relief he seeks as to Count Two (after having not prevailed on Count One) is impossible at this preliminary injunction stage, it follows that the Motion for Preliminary Injunction must be denied. In short, we need not reach the question whether there is a likelihood of success on the merits as to Count Two, and this Order should not be read as any preliminary indication of our views as to the merits of Count Two.

V. CONCLUSION

Kostick has failed to show likelihood of success on the merits on Count One, and has conceded that, absent success on Count One, we need not reach Count Two. Further, the equities and public interest

tip overwhelmingly in the Commission's favor. Any preliminary relief at this stage would significantly upend the election process, delay the primary election scheduled for August 11, 2012, and even jeopardize the November 6, 2012 general election. The Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 22, 2012

/s/ M. Margaret McKeown
M. Margaret McKeown
United States Circuit Judge

[SEAL]

/s/ J. Michael Seabright
J. Michael Seabright
United States Circuit Judge

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

Appendix A

DAVID M. LOUIE 2162
Attorney General of Hawaii

BRIAN P. ABURANO 3154
JOHN F. MOLAY 4994
SARAH R. HIRAKAMI 6919
Deputy Attorneys General
Department of the Attorney
General, State of Hawaii

425 Queen Street
Hnonolulu [sic], Hawaii 96813
Telephone: (808) 586-1494
Facsimile: (808) 586-1369
E-Mail: John.F.Molay@Hawaii.gov

Attorneys for Defendants
SCOTT T. NAGO, STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION, VICTORIA MARKS, LORRIE LEE STONE, ANTHONY TAKITANI, CALVERT CHIPCASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MASUMOTO, DYLAN NONAKA, and TERRY E. THOMASON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK; KYLE MARK TAKAI; DAVID P. BROSTROM; LARRY S. VERAY; ANDREW WALDEN; and EDWIN J. GAYAGAS, Plaintiffs, vs. SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION, VICTORIA MARKS, LORRIE LEE	Civil No. CV 12-00184 JMS-RLP PARTIES' STIPULATED FACTS RE: THE MOTION FOR PRELIMINARY INJUNCTION IN RESPONSE TO COURT ORDER [DOCKET 16]; EXHIBIT "A"; CERTIFICATE OF SERVICE

STONE, ANTHONY TAKITANI, CALVERT CHIPCASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MASUMOTO, DYLAN NONAKA, and TERRY E. THOMASON, in their official capacities of members of the State of Hawaii 2011 Reapportionment Commission; and DOE DEFENDANTS 1-10,

Defendants.

PARTIES' STIPULATED FACTS RE: THE MOTION FOR PRELIMINARY INJUNCTION IN RESPONSE TO COURT ORDER [DOCKET 16]

The parties have stipulated to the following facts with respect to the Motion for Preliminary Injunction:

1. The U.S. Census ("Census") counts people at their "usual residence." "Usual residence" is defined by the Census as the place where a person lives and sleeps most of the time. It is not necessarily the same as the person's voting residence or legal residence. A true and correct copy of information from the Census about how it counts people at their "usual residence" is attached as Exhibit A.

2. The 2010 Census counted people at their "usual residence" as of April 1, 2010 ("Census Date").

3. All active duty military personnel who on the Census Date were usual residents of the State of Hawaii ("Hawaii" or "State") under the Census' usual residence definition, were or should have been counted by the 2010 Census as part of the Hawaii population.

4. All students who on the Census Date were enrolled at a Hawaii university or college and were usual residents of Hawaii under the Census' usual residence definition, were or should have been counted by the 2010 Census as part of the Hawaii population.

5. Tourists who on the Census Date were in Hawaii but away from their place of usual residence were not or should not have been counted by the 2010 Census as part of the Hawaii population.

6. All active duty military personnel who on the Census Date were deployed outside of Hawaii were not or should not have been counted as usual residents of Hawaii for the purpose of State legislative reapportionment.

7. In the data that the Commission received from the military, active duty military personnel who were deployed on or about the Census Date were identified on a spread sheet.

8. To establish the permanent resident population base used for the 2012 Reapportionment plan[1] that is being challenged in this lawsuit, the

---

[1] The 2012 Reapportionment Commission is defined in Stipulated Facts No. 36.

Commission extracted 42,332 active duty military personnel from the 2010 Census count based on military records or data denoting the personnel's state of legal residence.

9. The Commission received testimony and documents during its public meetings and hearings regarding active duty military in Hawaii. Commission staff reviewed Census data regarding active duty military in Hawaii. Commission staff also reviewed the State Data Book regarding active duty military in Hawaii. The State Data Book does not contain information regarding the permanent or non-permanent residency of active duty military in Hawaii. Other than the foregoing and the information and data provided to the Commission by the military, the Commission did not perform any independent investigation regarding the permanent or non-permanent residency of the active duty military personnel extracted from the 2010 Census count.

10. To establish the permanent resident population base used for the 2012 Reapportionment Plan that is being challenged in this lawsuit, the Commission extracted 53,115 military dependents from the 2010 Census count who, according to data provided by the military, had an active duty military sponsor who had declared a state of legal residence other than Hawaii. In other words, the Commission extracted military dependents who were associated or attached to an active duty military person who had declared a state of legal residence other than Hawaii.

11. The Commission received testimony and documents during its public meetings and hearings regarding military dependents in Hawaii. Commission staff contacted the State of Hawaii Department of Commerce and Consumer Affairs ("DCCA") to obtain the number of persons in regulated occupations and professions who were military dependents. DCCA staff said that the DCCA does not collect this type of information. Commission staff contacted the State of Hawaii Department of Education ("DOE") to obtain the number of teachers who were military dependents. DOE staff said that the DOE does not collect this type of information. Commission staff conducted research on how many students attending Hawaii schools were military dependents and reviewed the State Data Book regarding military dependents in Hawaii, but these efforts did not assist the Commission in determining how many military dependents were permanent or non-permanent residents of Hawaii. Other than the foregoing and using military data to identify whether a military dependent was associated or attached to an active duty military person who had declared a state of legal residence other than Hawaii, the Commission did not conduct any independent investigation into the permanent or non-permanent residency of military dependents.

12. The military did not provide the Commission with any data regarding the military dependents' permanent or non-permanent residency other than their association or attachment to an active duty military sponsor who had declared a state of legal residence other than Hawaii.

13. The Commission's technical contractor informed the Commission that the military did not provide data that could identify military dependents as permanent or non-permanent residents, aside from their association or attachment to an active duty military sponsor that had declared a state of legal residence other than Hawaii.

14. To establish the permanent resident population base used for the 2012 Reapportionment Plan that is being challenged in this lawsuit, the Commission extracted 13,320 students from the 2010 Census count on the basis of: (a) payment of non-resident tuition; or (b) a home address outside of Hawaii.

15. The universities that provided data regarding non-resident students consisted of the University of Hawaii system-wide ("UH"), Hawaii Pacific University ("HPU"), Chaminade University ("Chaminade"), and BYU Hawaii ("BYUH").

16. Other than the universities identified above, no other Hawaii universities, private or public, provided data to the Commission.

17. The Commission did not seek data from universities other than the schools identified above.

18. The Commission relied upon information provided by UH regarding which students paid non-resident tuition. Other than this information, the Commission did not have any other information regarding non-permanent residency of the UH students who were extracted from the 2010 Census count as being non-permanent residents of the State.

19. The Commission relied upon information provided by HPU, Chaminade, and BYUH regarding the home address of their students. Other than this information, the Commission did not have any other information regarding non-permanent residency of the HPU, Chaminade, and BYUH students who were extracted from the 2010 Census count as being non-permanent residents of the State.

20. Other than active duty military and their dependents and university students, the Commission did not receive data from any source regarding any other potential non-permanent residents residing in the State who may have been counted in the 2010 Census as having their usual residence in the State. The Commission did receive information from Commission staff about what had been done in prior reapportionments to try and obtain data about aliens and other potential non-permanent residents residing in Hawaii.

21. Commission staff unsuccessfully tried to obtain data from the military about non-permanent military contractors and Department of Defense personnel in Hawaii. Aside from this, the Commission did not investigate or promulgate any investigation into whether any other potential non-permanent residents residing in the State may have been counted in the 2010 Census as having their usual residence in the State.

22. Other than active duty military and their dependents and university students, the Commission did not extract from the 2010 Census count

any other nonpermanent residents who may have been residing in the State.

23. The 2010 Census count may have included legal and illegal aliens whose usual residence was in Hawaii as of the Census Date. The Commission did not extract people from the 2010 Census count because they were legal or illegal aliens.

24. The 2010 Census count included convicted felons whose usual residence was in Hawaii as of the Census Date. The Commission did not extract people from the 2010 Census count because they were convicted felons.

25. The 2010 Census count included non-registered voters whose usual residence was in Hawaii as of the Census Date. The Commission did not extract people from the 2010 Census counts because they were nonregistered voters.

26. All persons extracted by the Commission were counted as part of the Hawaii population by the 2010 Census.

27. The State legislative reapportionment plan accepted by the Commission for public hearings and comment on August 3, 2011 ("August 2011 Plan") did not extract from the 2010 Census count, any active duty military personnel, military dependents, or students.

28. No definition of "permanent residents" as that term is used in article IV of the Hawaii State Constitution is provided by the Hawaii State Constitution.

29. The Commission has recommended that the State legislature initiate changes in the Hawaii Constitution and statutes to clarify the definition of permanent residents for the reapportionment population base.

30. Residence locations could not be determined for some persons identified as non-permanent residents and the Commission, therefore, could not place those persons in particular census blocks for purposes of redistricting. These non-permanent residents were allocated proportionally to census blocks in their basic island unit, using a disaggregation method. The Commission then extracted those non-permanent residents from the census block to which they had been allocated.

31. For purposes of the disaggregation method referred to above, the following proportions were used:

    One person was extracted per 19.12 persons on Oahu

    One person was extracted per 137.8 persons on Hawaii

    One person was extracted per 337 persons on Maui) [sic]

    One person was extracted per 300 persons on Lanai

    One person was extracted per 185 persons on Molokai

    One person was extracted per 131 persons on Kauai

32. On or about September 26, 2011, the Commission adopted and filed a reapportionment and redistricting plan for the State legislature ("2011 Final Reapportionment Plan") that extracted 16,458 people from the 2010 Census count or population of 1,360,301 persons. An amended version of the 2011 Final Reapportionment Plan (amending staggered terms portion) was filed on October 13, 2011.

33. On October 10, 2011 and October 11, 2011, two original proceedings were filed in the Hawaii Supreme Court challenging the 2011 Final Reapportionment Plan. *See Solomon et al. v. Abercrombie, et al.,* SCPW 11-0000732 ("*Solomon*") and *Matsukawa v. State of Hawaii* 2011 Reapportionment Commission, et al., SCPW 11-0000741 ("*Matsukawa*"). The Petitions in the *Solomon* and *Matsukawa* proceedings sought: a judicial determination that the 2011 Final Reapportionment Plan was constitutionally defective and invalid; an order to the Chief Elections Officer to rescind public notice of the Plan; and an order to the Commission to prepare and file a new reapportionment plan for the State legislature that uses a population base limited to "permanent residents" of the State of Hawaii.

34. On January 4, 2012, the Hawaii Supreme Court issued an Order Granting Petition for Writ of Mandamus and Judicial Review in the *Solomon* and *Matsukawa* proceedings that: (a) concluded that the 2011 Final Reapportionment Plan was constitutionally invalid; (b) concluded that the 2011 Final Reapportionment Plan disregarded article IV, section 4 of the Hawaii Constitution by

including non-permanent residents in the population base that the Commission used to allocate members of the State legislature among the basic island units; (c) invalidated the 2011 Final Reapportionment Plan; (d) ordered the Commission to prepare and file a new reapportionment plan that allocates members of the State legislature among the basic island units by using a permanent resident population base and then apportions the members among the districts as provided by article IV, section 6 of the Hawaii Constitution; and (e) ordered the Chief Election Officer to rescind publication of the 2011 Final Reapportionment Plan for the State legislature.

35. On January 6, 2012, the Hawaii Supreme Court issued an opinion in the *Solomon* and *Matsukawa* proceedings.

36. On March 8, 2012, the Commission adopted and filed a reapportionment and redistricting plan for the State legislature ("2012 Reapportionment Plan") that: (a) was designed to conform to the Hawaii Supreme Court's rulings in the *Solomon* and *Matsukawa* proceedings; and (b) extracted 108,767 active duty military personnel, military dependents, and university students from the 2010 Census population of 1,360,301. The Chief Election Officer published notice of the 2012 Reapportionment Plan on March 22, 2012.

37. The permanent resident population used by the Commission to reapportion the members of each house of the State legislature in the 2012 Reapportionment Plan was 1,251,534. Dividing 1,251,534 by 25 Senate seats or districts equals

approximately 50,061 permanent residents per Senate seat or district ("Senate statewide ideal or target district"), and dividing 1,251,534 by 51 House seats or districts equals approximately 24,540 permanent residents per House seat or district ("House statewide ideal or target district").

38. Under the 2012 Reapportionment Plan: (a) the largest Senate District (Senate District 8, Kauai basic island unit) contains 66,805 permanent residents which is +16,744 permanent residents or +33.44% more than the Senate statewide ideal or target district; and (b) the smallest Senate District (Senate District 1, Hawaii basic island unit) contains 44,666 permanent residents which is -5,395 or -10.78% less than the Senate statewide ideal or target district.

39. Under the 2012 Reapportionment Plan: (a) the largest House District (House District 5, Hawaii basic island unit) contains 27,129 permanent residents which is +2,589 permanent residents or +10.55% more than the House statewide ideal or target district; and (b) the smallest House District (House District 15, Kauai basic island unit) contains 21,835 permanent residents which is -2,705 permanent residents or -11.02% less than the House statewide ideal or target district.

40. The 2012 Reapportionment Plan resulted in one Senate seat moving from the Oahu basic island unit to the Hawaii basic island unit.

DATED: Honolulu, Hawaii, April 20,2012.

STATE OF HAWAII

DAVID M. LOUIE
Attorney General of Hawaii

/s/ Brian P. Aburano
BRIAN P. ABURANO
JOHN F. MOLAY
SARAH R. HIRAKAMI
Deputy Attorneys General

Attorneys for Defendants
SCOTT T. NAGO, STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION, VICTORIA MARKS, LORRIE LEE STONE, ANTHONY TAKITANI, CALVERT CHIPCASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MASUMOTO, DYLAN NONAKA, and TERRY E. THOMASON

EXHIBIT A

How We Count America – 2010 Census

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

Planners of the first U.S. decennial census in 1790 established the concept of "usual residence" as the

main principle in determining where people were to be counted. This concept has been followed in all subsequent censuses and is the guiding principle for the 2010 Census. Usual residence is defined as the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence.

Determining usual residence is easy for most people. Given our Nation's wide diversity in types of living arrangements, however, the usual residence for some people is not as apparent.A few examples are people experiencing homelessness, snowbirds, children in shared custody arrangements, college students, live-in employees, military personnel, and people who live in workers' dormitories.

Applying the usual residence concept to real living situations means that people will not always be counted at the place where they happen to be staying on Thursday, April 1, 2010 (Census Day). For example, people who are away from their usual residence while on vacation or on a business trip on Census Day should be counted at their usual residence. People who live at more than one residence during the week, month, or year should be counted at the place where they live most of the time. People without a usual residence, however, should be counted where they are staying on Census Day.

The Residence Rule

People Away From Their Usual Residence On Census Day

Visitors On Census Day

People Who Live In More Than One Place

People Without A Usual Residence Students

Movers On Census Day

People Who Are Born Or Die On Census Day

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

The residence rule is used to determine where people should be Granted during the 2010 Census. The rule says:

- Count people at their usual residence, which is the place where they live and sleep most of the time.
- People in certain types of facilities or shelters (i.e., places where groups of people live together) on Census Day should be counted at the facility or shelter.

- People who do not have a usual residence, or cannot determine a usual residence, should be counted where they are on Census Day.

The following sections describe how the residence rule applies for people in various living situations.

People Away From Their Usual Residence On Census Day

Visitors On Census Day

People Who Live In More Than One Place

People Without A Usual Residence

Students

Movers On Census Day

People Who Are Born Or Die On Census Day

Nonrelatives Of The Householder

U.S. Military Personnel

Merchant Marine Personnel On U.S. Flap Maritime/Merchant Vessels

---

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

People Away From Their Usual Residence On Census Day

People away from their usual residence on Thursday, April 1, 2010 (Census Day), such as on a vacation or a business trip, visiting, traveling outside the U.S., or working elsewhere without a usual residence there (for example, as a truck driver or traveling salesperson) – Counted at the residence where they live and sleep most of the time.

Visitors On Census Day

People Who Live In More Than One place

People Without A Usual Residence

Students

Movers On Census Day

People Who Are Born Or Die On Census Day

Nonrelatives Of The Householder

U.S. Military Personnel

Merchant Marine Personnel On U.S. Flag Maritime/Merchant Vessels

Foreign Citizens In The U.S.

U.S. Citizens And Their Dependents Living Outside The U.S.

People In Correctional Facilities For Adults

People In Group Homes And Residential Treatment Centers For Adults

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

People Away From Their Usual Residence On Census Day

Visitors On Census Day

Visitors on Thursday, April 1, 2010 (Census Day) who will return to their usual residence – Counted at the residence where they live and sleep most of the time.

Citizens of foreign countries who are visiting the US. on Thursday, April 1, 2010 (Census Day), such as on a vacation or a business trip – Not counted in the census.

People Who Live In More Than One Place

People Without A Usual Residence

Students

Movers On Census Day

People Who Are Born Or Die On Census Day

Nonrelatives Of The Householder

U.S. Military Personnel

Merchant Marine Personnel On U.S. Flag Maritime/Merchant Vessels

Foreign Citizens In The U.S.

U.S. Citizens And Their Dependents Living Outside The U.S.

People In Correctional Facilities For Adults

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

People Away From Their Usual Residence On Census Day

Visitors On Census Day

People Who Live In More Than One Place

People Without A Usual Residence

Students

Boarding school students living away from their parental home while attending boarding school below the college level, including Bureau of Indian Affairs boarding schools – Counted at their parental home rather than at the boarding school.

College students living at their parental home while attending college – Counted at their parental home.

College students living away from their parental home while attending college in the US. (living either on-campus or off-campus) – Counted at the on-campus or off-campus residence where they live and sleep most of the time.

College students living away from their parental home while attending college in the U.S. (living either on-campus or off-campus) but staying at their parental home while on break or vacation – Counted at the on-campus or off-campus residence where they live and sleep most of the time.

U.S. college students living outside the U.S. while attending college outside the U.S. – Not counted in the census.

Foreign students living in the US. while attending college in the US. (living either on-campus or off-campus) – Counted at the on-campus or off-campus residence where they live and sleep most of the time.

Movers On Census Day

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

People Away From Their Usual Residence On Census Day

Visitors On Census Day

People Who Live In More Than One Place

People Without A Usual Residence

Students

Movers On Census Day

People Who Are Born Or Die On Census Day

Nonrelatives Of The Householder

U.S. Military Personnel

U.S. military personnel living in military barracks in the U.S. – Counted at the military barracks.

U.S. military personnel living in the U.S. (living either on base or off base) but not in barracks – Counted at the residence where they live and sleep most of the time.

U.S. military personnel on U.S. military vessels with a U.S. homeport – Counted at the onshore U.S. residence where they live and sleep most of the time. If they have no onshore U.S. residence, they are counted at their vessel's homeport.

People in military disciplinary barracks and jails in the U.S. – Counted at the facility.

People in military treatment facilities with assigned active duty patients in the U.S. – Counted at the facility if they are assigned there.

US. military personnel living on or off a military installation outside the U.S., including dependents living with them – Counted as part of the U.S. overseas population. They should not be included on any U.S. census questionnaire.

U.S. military personnel on U.S. military vessels with a homeport outside the US. – Counted as part of the U.S. overseas population. They should not be included on any U.S. census questionnaire.

Merchant Marine Personnel On U.S. Flag Maritime Merchant Vessels

Foreign Citizens In The U.S.

U.S. Citizens And Their Dependents Living Outside The U.S.

People In Correctional Facilities For Adults

People In Group Homes And Residential Treatment Centers For Adults

People In Health Care Facilities

People In Juvenile Facilities

People In Residential School-Related Facilities

People In Shelters

People In Transitory Locations (eg., RV parks, campgrounds, marinas)

People In Religious-Related Residential Facilities

People In Workers' Residential Facilities

The census numbers tell us who we are and what we need.

Where You Are Counted Is Important

The Concept Of Usual Residence

The Residence Rule

People Away From Their Usual Residence On Census Day

Visitors On Census Day

People Who Live In More Than One Place

People Without A Usual Residence

Students

Movers On Census Day

People Who Are Born Or Die On Census Day

Nonrelatives Of The Householder

U.S. Military Personnel

Merchant Marine Personnel On U.S. Flap Maritime/Merchant Vessels

Foreign Citizens In The U.S.

U.S. Citizens And Their Dependents Living Outside The U.S.

People In Correctional Residential Facilities For Adults

People in correctional residential facilities on Thursday, April 1, 2010 (Census Day) – Counted at the facility.

People in federal detention centers on Thursday, April 1, 2010 (Census Day) – Counted at the facility.

People in federal and sick prisons on Thursday, April 1, 2010 (Census Day) – Counted at the facility.

People in local jails and other municipal confinement facilities on Thursday, April 1, 2010 (Census Day) – Counted at the facility.

People In Group Homes And Residential Treatment Centers For Adults

People In Health Care Facilities

People In Juvenile Facilities

People In Residential School-Related Facilities

People In Shelters

People In Transitory Locations (e.g., RV parks, campgrounds, marinas)

People In Religious-Related Residential Facilities

People In Workers' Residential Facilities

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
ANNA H. OSHIRO 5852-0
aho@hawaiilawyer.com
MARK M. MURAKAMI 7342-0
mmm@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Plaintiffs
JOSEPH KOSTICK, KYLE MARK TAKAI,
DAVID P. BROSTROM, LARRY S. VERAY,
ANDREW WALDEN, EDWIN J. GAYAGAS,
ERNEST LASTER, and JENNIFER LASTER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTIC; et al., Plaintiffs, vs. SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; et al., Defendants.	CIVIL NO. 12-00184 MMM-JMS-LEK THREE-JUDGE COURT (28 U.S.C. § 2284)) **NOTICE OF APPEAL TO THE U.S. SUPREME COURT; CERTIFICATE OF SERVICE** (Filed Aug. 9, 2013)

NOTICE OF APPEAL TO THE U.S. SUPREME COURT

Notice is given that the Plaintiffs Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster hereby appeal to the Supreme Court of the United States this court's Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment (July 11, 2013; Dkt 80), the court's Order Denying Plaintiffs' Motion for Preliminary Injunction (May 22, 2013; Dkt 52), and Judgment in a Civil Case (July 11, 2013; Dkt 81). Appeal is taken pursuant to 28 U.S.C. § 1253 (direct appeal from denial of injunction determined by a three-judge court).

DATED: Honolulu, Hawaii, August 9, 2013.

Respectfully submitted,

DAMON KEY LEONG
KUPCHAK HASTERT

/s/ Mark M. Murakami
ROBERT H. THOMAS
ANNA H. OSHIRO
MARK M. MURAKAMI
Attorneys for Plaintiffs
JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN, EDWIN J. GAYAGAS, ERNEST LASTER, and JENNIFER LASTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOSEPH KOSTIC; et al., Plaintiffs, vs. SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; et al., Defendants.	CIVIL NO. 12-00184 MMM-JMS-LEK THREE-JUDGE COURT (28 U.S.C. § 2284)) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the NOTICE OF APPEAL TO THE SUPREME COURT was duly served upon the following individuals by hand delivery as follows:

JOHN F. MOLAY, ESQ.
PATRICIA COOKSON
Deputy Attorneys General
Department of the Attorney General,
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Attorneys for Defendants
Scott T. Nago, State of Hawaii 2011
Reapportionment Commission, Victoria
Marks, Lorrie Lee Stone, Anthony Takitani,
Calvert Chipchase IV, Elizabeth Moore,
Clarice Y. Hashimoto, Harold S. Masumoto,
Dylan Nonaka, and Terry E. Thomason

DATED: Honolulu, Hawaii, August 9, 2013.

DAMON KEY LEONG
KUPCHAK HASTERT

/s/ Mark M. Murakami
ROBERT H. THOMAS
ANNA H. OSHIRO
MARK M. MURAKAMI
Attorneys for Plaintiffs
JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN, EDWIN J. GAYAGAS, ERNEST LASTER, and JENNIFER LASTER

The Petition Clause of the First Amendment:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

U.S. Const. amend. I.

The Equal Protection Clause of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Article IV, § 4 of the Hawaii Constitution:

> The [state reapportionment] commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions; except that no basic island unit

shall receive less than one member in each house.

Article IV, § 6 of the Hawaii Constitution:

> Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.

2. No district shall be so drawn as to unduly favor a person or political faction.

3. Except in the case of districts encompassing more than one island, districts shall be contiguous.

4. Insofar as practicable, districts shall be compact.

5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear

geographical features, and, when practicable, shall coincide with census tract boundaries.

6. Where practicable, representative districts shall be wholly included within senatorial districts.

7. Not more than four members shall be elected from any district.

8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
ANNA H. OSHIRO 5852-0
aho@hawaiilawyer.com
MARK M. MURAKAMI 7342-0
mmm@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
www. hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Plaintiffs
JOSEPH KOSTICK, KYLE MARK TAKAI,
DAVID P. BROSTROM, LARRY S. VERAY,
ANDREW WALDEN, EDWIN J. GAYAGAS
ERNEST LASTER, and JENNIFER LASTER

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK; et al.,	CIVIL NO. 12-00184 JMS-LEKMMM
Plaintiffs,	**PLAINTIFFS' SEPARATE AND CONCISE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; DECLARATION OF ANNA H. OSHIRO;**
v.	
SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; et al.,	
Defendants.	

EXHIBITS "1"-"2";
CERTIFICATE
OF SERVICE
THREE-JUDGE COURT
(28 U.S.C. § 2284)

Hearing:

Date: January 14, 2013
Time: 10:00 a.m.
Judges:
Hon. Margaret Mckeown
Hon. J. Michael Seabright
Hon. Leslie E. Kobayashi

PLAINTIFFS' SEPARATE AND CONCISE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR

Plaintiffs Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster ("Plaintiffs"), pursuant to Local Rule 56.1, hereby submits its Concise Statement of Facts in Support of its Motion for Summary Judgment, which is being filed contemporaneously.

	FACT	EVIDENCE
1	In April 2010, the U.S. Census Bureau conducted the decennial census ("Census"). The Census has used the standard of "usual residence" since the First Congress.	*See Franklin v. Massachusetts*, 505 U.S. 788, 804-05 (1992).

2	The Census defines "usual residence" as "the place where a person lives and sleeps most of the time. It is not the same as the person's voting residence or legal residence."	Stipulated Facts ("Stip. Facts") at 2, ¶ 1 (CM/ECF doc. 26, attached as Exhibit "B" to Preliminary Injunction Exhibit and Witness List ("Exhibit List")).
3	For military personnel stationed within the United States, they are counted as "usual residents" of the state in which they are stationed, but not in any other state.	Stip. Facts at 2, ¶¶ 1-33, 6-7
4	For military personnel and federal employees deployed, being transported, or assigned outside the country, they are counted as "overseas population" and are attributed to a state through a different mechanism than Census Day live counts.	*See* Ex. "H" to Exhibit List at 6-7.
5	As of the 2010 census, the percentage of voting population in Hawaii is 48.3% – the lowest in the country.	U.S Census Bureau Statistical Abstract of the United States: 2012; Table 400. Persons Reported Registered and Voted by State: 2010, Ex. "1" hereto.

6	The 2010 Census resident population of Hawaii included servicemembers, their families, university students, children, legal and illegal aliens, and prisoners incarcerated here, all irrespective of whether they pay state taxes, their eligibility to vote in Hawaii, or actual registration to vote.	Stip. Facts at 2-3, ¶¶1-3, 6-7.
7	The Census excluded transient military and tourists, who are counted in their state of "usual residence."	*Id.* at 3, ¶ 5.
8	The court in Burns v. Richardson decision noted the islands had seen massive swings in military populations as draftees flowed into military bases to fight WW2, Korea and the beginnings of Vietnam. At the peak of WW2, 400,000 military personnel comprised nearly 50% of the population of the Territory of Hawaii.	*Burns v. Richardson*, 384 U.S. 73, 95 (1966); *citing Holt v. Richardson*, 238 F. Supp. 468, 474 (D. Haw. 1965).

9	With post-war demobilization, that number shrank nearly 20 fold to 21,000 by 1950. It then swelled again during the Korean War.	THOMAS KEMPER HITCH, ISLANDS IN TRANSITION: THE PAST, PRESENT, AND FUTURE OF HAWAII'S ECONOMY 199 (Robert M. Kamins ed. 1993).
10	Today's military is different. The draft was abandoned in favor of an all-volunteer force at the close of the Vietnam conflict. The post-Vietnam all-volunteer military has fought in Lebanon, Kuwait, Bosnia, Somalia, Afghanistan, Iraq with no surge in Hawaii military population is not comparable to the 20-fold population shifts which confronted the Burns court.	http://www.rand.org/content/dam/rand/pubstechnical_reports/2011/RAND_TR996.pdf, Ex. "2" hereto.

11	The focus of military personnel stationed in Hawaii, is different from other states and fosters community involvement. Hawaii is unique in that all services, including construction and rental income, as well as goods, are taxed through the General Excise Tax (GET). The result of this is that the Department of Defense presence in Hawaii results in more revenue going to the state proportionally than in any other state.	Declaration of Thomas Smythe, filed herein with Plaintiffs' Witness Disclosure on May 10, 2012, at ¶ 8, also admitted into evidence herein as part of Ex. TTT to Exhibit List
12	A 2011 RAND Corporation Study commissioned by DOD showed that $4.074 billion was spent for personnel and $2.452 billion for procurement. DOD spending is approximately half of total federal spending in Hawaii, second only to the tourism industry in state revenue.	*Id.* at ¶ 9.

13	Hawaii is unique in funding K-12 public school system through general funds, not property taxes. Military personnel provide excise tax monies to the general fund and help to pay for the public schools. In all other states families living on-base pay no property taxes and do not financially support their schools.	*Id.* at ¶ 10.
14	Military families on Oahu live in urban areas, next to residential and commercial facilities.	*Id.* at ¶ 11.
15	Military personnel are involved in community activities including scouting leadership, coaching youth sports teams, public facility repair and maintenance, and beach and park clean-up events.	*Id.* at ¶ 12.
16	Plaintiff Jennifer Laster is a parent representative to the School Community Council. She has a Hawaii driver's license, is Honolulu Symphony violinist, teaches private lessons, is in the Musicians' Union, volunteers as the Oahu Civic Orchestra concert master, and is an active member of the Neighborhood Watch. She also votes here.	Declaration of Jennifer Laster, ¶¶ 5, 6, 7, 8, 9, 10 and 11. Ex. "UUU" to Exhibit List

17	Joseph Kostick while on active duty, owned his home and paid property taxes. He shopped off base and did most if not all of hos [sic] shopping locally. He and his wife both have Hawaii drivers' licenses, in cars registered in Hawaii.	Declaration of Joseph Kostick, Ex. "PPP" to Exhibit List
18	On January 4, 2012, the Hawaii Supreme Court ordered the Commission to extract servicemembers and their families, from the 2010 Census population. The parties in the Solomon case did not raise Equal Protection arguments, and as a consequence, the court did not consider the effect of federal law.	*Solomon v. Abercrombe*, 126 Haw. 283, 292, 270 P. 3d 1013, 1022 (2012); Court Order Denying Plaintiffs' Motion for Preliminary Injunction, page 22.
19	On March 8, 2012, the Commission adopted the Final Report and Reapportionment Plan (2012 Supplement) ("2012 Plan") that, in conformity with *Solomon,* removed 108,767 servicemembers, families, and students from the population basis, nearly 8% of Hawaii's actual population.	*Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting – Addendum* (Mar. 2012) (Ex. "D" to Exhibit List).

20	The Commission started with the 2010 Census population, which included all Census-counted "usual residents."	Stip. Facts at 3, ¶¶7-8, 10; 2012 Plan, Ex. "A" to Exhibit List, at B-12; Stip. Facts at 2-3, 5-6, ¶¶3, 5-6, 21-22.
21	Upon request, Pacific Command provided the Commission a spreadsheet of servicemembers who completed form DD2058 denoting a state other than Hawaii as their "legal residence" for state tax purposes.	Stip. Facts at 3, ¶7; Ex. "I" to Exhibit List
22	The DD2058 form is used to designate which state should withhold taxes from servicemembers' pay.	*See* Ex. "E" to Exhibit List
23	Using the DD2058 disclosure the Commission extracted 42,332 active duty military personnel.	Stip. Facts at 3-4, ¶¶ 8, 9, 10; 2012 Plan, Exhibit "A" to Exhibit List at B-47.
24	The Commission then extracted 53,115 military dependents. These dependents were not surveyed.	Stip. Facts at 3-4, ¶¶ 10-13; 2012 Plan, Ex. "A" to Exhibit List at B-12, 33, 47.
25	UH identified students as non-residents based on its count of those enrolled for spring 2010 semester (not necessarily students who were enrolled on Census Day) who paid *non-resident tuition. BYU Hawaii, Hawaii Pacific, and Chaminade used "home address."*	Stip. Facts at 4-5, ¶¶ 14, 19, Ex. "F" to Exhibit List.

26	The Commission "assumed" that dependents have the same legal residency as their military spouse. 2012 Plan at B-53, B-54, and extracted dependents "associated or attached to an active duty military person who had declared a state of legal residence other than Hawaii."	Stip. Facts at 3-4, ¶10.
27	The Commission's attempt to extract students relied on data from universities that was not related in any way to data gathered on Census Day, April 1, 2010.	Stip. Facts at 2-3, 4-5, ¶¶14, 18.
28	The Commission might have extracted persons who were not included in the Census because they were not present or were not usual residents on Census Day. Also, the Commission had data only from limited schools, and did not seek such data for other public and private colleges in Hawaii, such as Argosy, and Tokai University.	Stip. Facts at 5, ¶¶15-17.
29	Using this process, the Commission extracted 13,320 students from the Census.	Stip. Facts at 4, ¶14.

30	Excluding these 108,767 persons resulted in 1,251,534 "permanent residents" as the population basis. The 2012 Plan moved one Senate seat from Oahu to Hawaii, the result sought in the *Solomon* and *Matsukawa* lawsuits.	Stip. Facts ¶40.
31	Under the 2012 Plan, the largest Senate district (Senate 8; Kauai) contains 66,805 "permanent residents," which is a deviation of +16,744 or +33.44%, more than the statewide ideal; the smallest Senate district (Senate 1; Hawaii) contains 44,666 permanent residents, which is a deviation of -5,395, or -10.78% less than the ideal. The sum of those deviations (the "overall range" of the plan) is 44.22%.	Stip. Facts ¶38.
32	The largest (House 5; Hawaii) district contains 27,129 permanent residents, which is a deviation of +2,589, or +10.55%, more than the statewide ideal; the smallest House district (House 15; Kauai) contains 21,835 permanent residents, a deviation of -2,705, or -11.02% less than the ideal. The overall range in the House is 21.57%.	Stip. Facts ¶39.

33	The Commission, however, reported that the 2012 Plan's deviations were lower and below the 10% federal invalidity threshold when comparing districts within each county. It was able to reach this result by dismissing the statewide ideal as set out above. Because the statewide deviations exceed 10%, the 2012 Plan is "*prima facie* discriminatory and must be justified by the state."	Ex. "A" to Exhibit List, 2012 Plan at 15-18 (Tables 1-8); *Id.* at 9, 18.
34	On May 22, 2012, the court issued an order denying the motion for preliminary injunction.	CM/ECF doc. 52.

DATED: Honolulu, Hawaii, October 1, 2012.

DAMON KEY LEONG
KUPCHAK HASTERT

/s/ Robert H. Thomas
ROBERT H. THOMAS
ANNA H. OSHIRO
MARK M. MURAKAMI
Attorneys for Plaintiffs
JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM, LARRY S. VERAY, ANDREW WALDEN and EDWIN J. GAYAGAS ERNEST LASTER, and JENNIFER LASTER