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

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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Hawaii's "permanent resident" population basis was a rational means of protecting other residents' voting power, which superseded the extracted classes' right to equal representation.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.

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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 equally 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:

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[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.

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[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

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[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

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[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.

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[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.

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[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"

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[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.

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