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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-LEK-   |
|                                  | ) | MMM                           |
| Plaintiffs,                      | ) |                               |
|                                  | ) | <b>PLAINTIFFS' SEPARATE</b>   |
| v.                               | ) | <b>AND CONCISE STATEMENT</b>  |
|                                  | ) | <b>OF FACTS IN SUPPORT OF</b> |
| SCOTT T. NAGO, in his official   | ) | <b>MOTION FOR SUMMARY</b>     |
| capacity as the Chief Election   | ) | <b>JUDGMENT; DECLARATION</b>  |
| Officer State of Hawaii; et al., | ) | <b>OF ANNA H. OSHIRO;</b>     |
|                                  | ) | <b>EXHIBITS "1" – "2";</b>    |
| Defendants.                      | ) | <b>CERTIFICATE OF SERVICE</b> |
|                                  | ) |                               |

) **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.

|   | <b>FACT</b>   | <b>EVIDENCE</b>   |
|---|---|---|
| 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.              | <i>See Franklin v. Massachusetts</i> , 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  | Stip. Facts at 2, ¶¶ 1-33, 6-7  |

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|   | they are stationed, but not in any other state.  |  |
| 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.”  | <i>Id.</i> at 3, ¶ 5.  |
| 8 | The court in <i>Burns v. Richardson</i> 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. | <i>Burns v. Richardson</i> , 384 U.S. 73, 95 (1966); <i>citing Holt v. Richardson</i> , 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  | THOMAS KEMPER HITCH, ISLANDS IN TRANSITION: THE PAST, PRESENT AND  |

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|    | the Korean War.  | 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.   | <a href="http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf">http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf</a> , 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.   | <i>Id.</i> 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   | <i>Id.</i> at ¶ 10.   |

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|    | schools. In all other states families living on-base pay no property taxes and do not financially support their schools.   |   |
| 14 | Military families on Oahu live in urban areas, next to residential and commercial facilities.  | <i>Id.</i> 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.  | <i>Id.</i> 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 his 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 <i>Solomon</i> case did not raise Equal Protection arguments, and as a consequence, the court did not consider the effect of federal law.                              | <i>Solomon v. Abercrombe</i> , 126 Haw. 283, 292, 270 P.3d 1013, 1022 (2012); Court Order Denying Plaintiffs' Motion for Preliminary Injunction, page 22. |

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| 19 | On March 8, 2012, the Commission adopted the Final Report and Reapportionment Plan (2012 Supplement) (“2012 Plan”) that, in conformity with <i>Solomon</i> , removed 108,767 servicemembers, families, and students from the population basis, nearly 8% of Hawaii’s actual population. | <i>Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting—Addendum</i> (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 <u>non-resident tuition</u> . <u>BYU Hawaii, Hawaii Pacific, and Chaminade</u> used “home address.”           | Stip. Facts at 4-5, ¶¶14, 19, Ex. “F” to Exhibit List.  |
| 26 | The Commission “assumed” that   | Stip. Facts at 3-4, ¶10.  |

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|    | 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.”  |                                    |
| 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 <i>Solomon</i> and <i>Matsukawa</i> 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 | Stip. Facts ¶ 38.                  |

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|    | of those deviations (the “overall range” of the plan) is 44.22%.   |  |
| 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 “ <i>prima facie</i> discriminatory and must be justified by the state.” | Ex. “A” to Exhibit List, 2012 Plan at 15-18 (Tables 1-8); <i>Id.</i> 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.

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/s/ Robert H. Thomas

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