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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK; et al.,	)	CIVIL NO. 12-00184 JMS/RLP
	)	
Plaintiffs,	)	(THREE-JUDGE COURT (28
	)	U.S.C. § 2284))
v.	)	
	)	**PLAINTIFFS'**
SCOTT T. NAGO, in his official	)	**MEMORANDUM IN**
capacity as the Chief Election	)	**OPPOSITION TO**
Officer State of Hawaii; et al.,	)	**DEFENDANTS' MOTION**
	)	**FOR SUMMARY JUDGMENT;**
Defendants.	)	**CERTIFICATE RE: WORD**
	)	**LIMITATION (LR 7.5);**

) **CERTIFICATE OF SERVICE**
)
) Hearing Date: Jan. 14, 2013
) Time: 10:00 a.m.
) Judges: Hon. Margaret
) McKeown, Hon J. Michael
) Seabright, Hon. Leslie E.
) Kobayashi

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The State of Hawaii's classifying its residents into two categories—"permanent residents," and everyone else—and the resulting exclusion from the reapportionment population of 108,767 persons deemed by the State to have not exhibited the intent to remain in Hawaii "permanently," does not survive close constitutional scrutiny. The State has not met its burden to show a "substantial and compelling reason" for excluding nearly 8% of its actual population from equal representation, and its motion for summary judgment should be denied.

The 2012 Plan denies representational equality to a huge proportion of Hawaii's actual population, all of whom have a substantial presence here, and who are counted by the Census as "usual residents" of Hawaii. The right to be represented in Hawaii's legislature is a fundamental right protected by the Equal Protection Clause on a coequal basis with the right to vote. Thus, when the right to equal representation is burdened by Hawaii's choice of whom to count, this court applies a three-part test:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of

> the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972). These factors are evaluated by reviewing the classification with "close constitutional scrutiny," which places the burden squarely on the State to prove a "substantial and compelling reason," *id.* at 336, supporting "[a]n appropriately defined and uniformly applied requirement." *Id.* at 342.

The State cannot meet this burden because the 2012 Plan's definition and application of "permanent resident" is based on several assumptions the State has failed to validate, and which it applies unevenly:

- Hawaii assumes servicemembers counted by the Census as "usual residents" of Hawaii, but who did not designate Hawaii to withhold taxes from their pay on a military tax form (DD2058) have no intent to remain in Hawaii and are transients. In effect, this imposes a poll tax on servicemembers, by tying their representation in the Hawaii legislature to their willingness to pay Hawaii income taxes. The State asks this of no one else.

- Hawaii assumes spouses and dependents of servicemembers have the same intent to remain as their military sponsors, an unwarranted assumption without factual foundation.

- The 2012 Plan's treatment of servicemembers and their families is predicated upon outdated and inaccurate assumptions about the military, with no attempt to satisfy

the State's weighty burden to justify its denial representative equality under present-day facts.

- The State assumes students who did not qualify for in-state tuition have no intent to remain, in effect imposing a durational residency requirement on the right to be represented.

Hawaii's exclusionary policy treats these people as if they did not exist, which grossly distorts the boundaries and actual population of every Oahu district.

The State's willingness to ignore the requirements of the Equal Protection Clause is exemplified by the massive overall ranges in ideal district size in both houses (Senate: 44.22%; House: 21.57%). Even if Hawaii were justified in excluding the military and students, the 2012 Plan still fails because these ranges far exceed the 10% deviations the Supreme Court has established for presuming a plan is unconstitutional.

The Equal Protection Clause requires states to apportion their legislatures so that the population of each district is roughly equal to other districts across the state. Hawaii, however, holds itself to different standards and for more than half a century, it has found a way to count nearly everyone but the men and women serving in the armed forces

who live here, even while it counts aliens, minors, prisoners, those who don't vote, and those who pay no taxes.

This case presents three critical questions:

- When a state chooses to exclude persons from equal representation, does it have the burden to show a "substantial and compelling reason" for the classification of its residents? Put another way, what latitude does Hawaii have to choose how to define "permanent resident," and how to apply that standard?

- What is the "relevant 'population' that States and localities must equally distribute among their districts[?]" *See Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of cert.).

- Are deviations of 44.22% and 21.57% simply too high to be constitutionally tolerable?

In this memorandum, we set forth the answers to these questions, and demonstrate why the State's motion for summary judgment must be denied.

II. FACTS

Plaintiffs incorporate the Statement of Facts in their Separate Concise Statement of Facts (CM/ECF Doc. 68), and as set forth in their Motion for Summary Judgment (CM/ECF Doc. 67).

III. SUMMARY JUDGMENT STANDARD

The Rule 56 standard for summary judgment is well-established and will not be repeated here in great detail. Suffice it to say that trial is unnecessary when the material facts are not disputed and the law can be applied to those facts to render judgment. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The State carries the burden of showing that its classification survives close constitutional scrutiny. *Dunn*, 405 U.S. at 336. The State acknowledged the 2012 Plan is "*prima facie* discriminatory and must be justified by the state." 2012 Plan at 9.

IV. ARGUMENT

A. Hawaii's Test For Permanent Residents Does Not Survive Close Constitutional Scrutiny

Hawaii's 2012 Reapportionment Plan placed conditions on the right to be represented equally in the Hawaii Legislature: (1) a resident must not be in the military and have indicated on DD2058 that she wants another state to withhold taxes from her pay; (2) a resident must not be a dependent of a servicemember who has so indicated; and (3) a university student must not pay nonresident tuition. According to the

State, these tests demonstrate a person's intent to not remain permanently in Hawaii.

This case is an Equal Protection challenge to Hawaii's choice to include in its reapportionment population only those it deems to have exhibited the intent to remain in Hawaii, or more accurately, to exclude from equal representation those whom it selected out as *not* having demonstrated this intent. To determine which "usual residents" of Hawaii counted by the Census have not met Hawaii's tests for "intent to remain," the 2012 Commission targeted certain groups *only* (military, military dependents, and students),[1] then applied to these groups only, the three conditions above, and excluded 108,767 persons from its reapportionment population. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court set forth a three-part analysis to test under the Equal Protection Clause a state's classification of its residents:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests

[1] *See* "Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting – *Final,"* ("similar to 1991 and 2001, the-permanent populations to be considered for the exclusion included non-permanent military personnel including their dependents and non-permanent students."). Exhibit "A" at E-7. It appears that the electronically filed version of Exhibit "A" is incomplete. An errata to Exhibit "A" will be filed concurrently herewith.

> affected by the classification; and the governmental interests asserted in support of the classification. *Cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved. First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.

Id. at 335 (footnote omitted). This three-part test demonstrates why the State is not entitled to summary judgment; it cannot meet its burden to show a "substantial and compelling reason" for excluding nearly 8% of its actual population from equal representation.

1. Character Of The Classification: An Attempt To Distinguish Between Permanent Residents And Transients Based On Exhibited Intent

The "character of the classification" is Hawaii's division of its residents into two classes: "permanent residents" and everyone else, and its exclusion from its reapportionment population of 108,767 persons it deemed to not have adequately exhibited the intent to remain permanently, with the resulting effect that "Oahu residents (and residents in an Oahu district with large concentrations of non-resident military) may have diluted representation." *See* Order Denying

Plaintiffs' Motion for Preliminary Injunction (May 22, 2012) at 13 (CM/ECF Doc. 53) ("Order"). The classification must also be viewed in light of the State's historical efforts over the last half-century to exclude servicemembers from representation.

Two background principles should be kept in mind as the court considers the character of the classification. *First*, the touchstone of a state legislative reapportionment plan is "population." *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). The Equal Protection Clause protects all "persons"—

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV. The "person" standard means that both houses of a state legislature must be apportioned substantially on a population basis, and states may not maintain a legislature modeled on the federal system in which one house represents political divisions, while only the seats in the other house are determined by population. *Reynolds*, 377 U.S. at 560-61. The principle of equality is often referred to as the "one person, one vote" standard, but because it applies to all "persons," it also guarantees *representational* equality. *See Garza v. County of Los*

Angeles, 918 F.2d 763, 774 (9th Cir. 1990).[2] This means that persons—not "citizens," "permanent residents," "registered voters," "taxpayers," "counties," or "basic island units"—are entitled to be counted and represented equally. There is no question that all "usual residents" of Hawaii as reported in the 2010 Census—including everyone extracted by the 2012 Plan—are "persons" within the jurisdiction of Hawaii and entitled to the equal protection of the laws and equal representation in the Hawaii legislature. Moreover, they are not represented in any other state legislature: the Census counts them *only* as residents of Hawaii, which means that because Hawaii does not count them for purposes of apportioning legislative representation, they are not represented

[2] In *Travis v. King*, this court acknowledged these principles: (1) actual population is the "starting point" and "overarching principle." 552 F. Supp. 554, 559 (D. Haw. 1982) (citing *Reynolds*, 377 U.S. at 567); (2) "*minor*" deviations may be allowed, provided they are "free from any taint of arbitrariness or discrimination." *Travis*, 552 F. Supp. at 559 (emphasis original) (quoting *Mahan v. Howell*, 410 U.S. 315, (1972)); (3) even when a state has a clearly rational policy to afford counties "a certain degree of representation *as* political subdivisions," population cannot be "submerged as the controlling consideration." *Travis*, 552 F. Supp. at 559 (quoting *Reynolds*, 377 U.S. at 581); and (4) "extreme deviations" will render a plan void even if the state meets its burden under "this limited exception." *Travis*, 552 F. Supp. at 559.

anywhere. "The Census goal was to count once, only once, and in the right place."[3]

Second, it is unconstitutional for a state to deny legislative representation to servicemembers merely because they are in the military. In *Davis v. Mann*, 377 U.S. 678 (1964), the Supreme Court rejected the argument that it was constitutional for districts to be underrepresented because those districts contained large numbers of servicemembers:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.

Id. at 691. *See also Travis*, 552 F. Supp. at 558 & n.13 ("civilian population is not a permissible population base").

2. Individual Interest: The Right To Equal Representation

The second part of the Equal Protection test is the "individual interest affected by the classification." *Dunn*, 405 U.S. at 335. Here, it is the fundamental right of all persons present in Hawaii to be equally represented in Hawaii's legislature. *Reynolds,* 377 U.S. at 560-61 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Garza*, 918

[3] http://2010.census.gov/2010census/about/cqr.php (last viewed Oct. 29, 2012).

F.2d 763, 774. The right to be represented in the state legislature on the same basis as other persons is a coequal right to equal voting power. *Garza,* 918 F.2d at 775.

In *Garza*, the Ninth Circuit held that equal representation is the dominant Equal Protection principle, "holding that total population provides the appropriate basis for reapportionment of the county supervisor districts, 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 L. REV. 1243, 1244 (1991) (footnote omitted). In *Garza,* the Ninth Circuit concluded that Equal Protection requires use of actual population as the population basis to insure that all persons actually present are equally represented, regardless of their voting registration, or even their eligibility to vote. As a remedy for Voting Rights Act and Equal Protection violations, the district court created a county apportionment plan that used total population as the population basis (which included legal and illegal aliens, and children), and created districts of nearly equal numbers of persons, but sharply unequal numbers of citizens. *Id.* at 773, 774 n.4-5. The county appealed, arguing that as a matter of law

actual population was an erroneous standard, and that it was entitled to use "voting population" to insure the "one person, one vote" principle. *Id.* The county argued that *Burns* "seems to permit states to consider the distribution of voting population as well as that of the total population in constructing electoral districts." *Id.* at 774.

The Ninth Circuit generally agreed with that statement, but cautioned that Equal Protection protects both the voting power of citizens, *and* the right of equal representation in the legislature for all persons. *Id.* at 775 ("The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'") (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). In situations where equal voting power may conflict with equal representation, the Equal Protection principle that "government should represent *all* the people" is dominant. *Id.* at 774 (emphasis original). The court highlighted this "fundamental principle of representative government," and held that *Reynolds* "recognized that the people, including those who are ineligible to vote, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment." *Id.*

The court reasoned that every person has a right to be represented in the legislature, and "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 775 (quoting *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). In addition, the "right to petition is an important corollary to the right to be represented." *Garza*, 918 F.2d at 775. The court recognized that non-citizens have the right to petition the government. *Id.*

This court must follow *Garza*'s holding that if there is a conflict between voting equality and representational equality, the latter prevails. *Garza,* 918 F.2d at 775. Recognizing that the purpose of redistricting is to ensure "equal representation for equal numbers of people," the court in *Garza* held that by refusing to count people, the county redistricting plan at issue "ignores these rights in addition to burdening the political rights of voting age citizens in affected districts." *Id.* at 775. In the Order, this court considered *Garza*'s conclusion regarding representational equality *dicta* because the issue of representational equality was considered in addition to the court's acknowledgment that California law required apportionment based upon total population. *Id.* at 774. However, as the Supreme Court made

clear in *United States v. Title Insurance & Trust Co.,* 265 U.S. 472 (1924), "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter,* but each is the judgment of the court and of equal validity with the other." *Id.* at 486 (quoting *Union Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co.,* 199 U.S. 160, 166 (1905)). The *Garza* court's conclusion regarding representational equality was therefore not *dicta*, because the court's ruling was based upon both the existing California statute as well as the "*even more important consideration*" of representational equality. *Garza*, 918 F.3d at 776 (emphasis added).

Every one of the 108,767 persons extracted by Hawaii are entitled to petition their state representatives on an equal basis, and to be represented therein on equal footing. The 2012 Plan, by ignoring their presence and treating them as invisible, grossly distorts districts on Oahu. It forces the Plaintiffs, who live in districts in which large numbers of extracted servicemembers, families, or students reside, to compete with more of their neighbors to gain the attention of their legislator than others in districts in which extracted persons are not concentrated. Discussing *Garza*, one commentator wrote:

> 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 Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L. J. 1441, 1446-47 (1994-1995) (emphasis added) (footnotes omitted). Substitute "permanent residents" for "citizens" and "voters," and you have the situation presented in this case. Hawaii's use of "permanent resident," and its application in a way that excludes only those whom the State selectively deems do not have exhibited the intent to remain in Hawaii permanently, completely ignores the right to equal representation.

Moreover, the Ninth Circuit is not alone in reaching this conclusion. The Fourth Circuit also recognizes that bundled up with the right to vote is the right to equal representation. *Daly v. Hunt*, 92 F.2d 1212 (4th Cir. 1996). Indeed, in reviewing the one person, one vote cases from the Supreme Court, the Fourth Circuit held the principles of electoral

equality and representational equality go "hand in hand." *Daly*, 92 F.3d at 1223. It found representational equality to be at the essence of a "representative government." *Id.* at 1226. Representational equality has two facets: the right to petition, as expounded in *Garza*; and the power that the representatives wield in the governing body on behalf of his or her constituents. *Id.* at 1226. The court stated:

> The central power of the governing entity should, in theory, be divided equally among each representative. Although the overall power of the governing body is generally not divisible, each representative individually should have the same ability to influence the actions performed by the governing body as a whole. *These representatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative.* Although the overall power of the governing body is generally not divisible, each representative individually should have the same ability to influence the actions performed by the governing body as a whole. These representatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative .... Representational equality serves the function of equalizing this second power among all people.

Id. at 1226-27 (emphasis added). In contrast to the present case, the apportionment plsn challenged in *Daly* was based on total population and resulted in a less than 10% deviation. *Id.* at 1228. The plaintiff asserted that voting age population should have been used instead,

because it would have produced a *more* constitutionally apportioned populace. The Fourth Circuit disagreed, noting that all of the population group choices had shortcomings and none was perfect, but that total population was "constitutionally unassailable." *Id.* at 1227. The court rejected the argument that the Equal Protection Clause requires a count of persons that results in the "best" plan, and remanded for a determination of whether the deviation (less than 10%) was the result of bad faith, arbitrariness or invidious discrimination. *Id.* at 1228. Indeed, this court has already acknowledged the 2012 Plan's representational dilution: "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* Order at 13 (emphasis added).

The 2012 Plan's takes no account of the Equal Protection guarantee of equal representation of all persons to be represented in the Hawaii legislature, regardless of where they are registered to vote, or to what state they pay taxes. *Garza*, 918 F.2d at 774 ("the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government"). The state's categorical exclusion of persons whom the Census recorded as being "usual

residents" of Hawaii cannot be justified without the state meeting a weighty burden of demonstrating why the exclusion is necessary. No such attempt has been made in this case. The State relies exclusively on the statement in *Burns v. Richardson*, 384 U.S. 73 (1966), that it need not include "transients, short-term or temporary residents" within its population count. The idea that *Burns* must stand for all time as a bar against questioning the wholesale extraction of classes of people from population rolls, without renewed inquiry as changes in facts and demographics dictate, is repugnant to the idea of representative government upon which the Constitution was founded. American colonists protesting taxation of their tea and paper were not protesting the taxes alone; they were protesting the British parliament's imposition of taxation, without representation.[4]

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[4] When the Fourteenth Amendment was debated in the Senate, Senator Latham of West Virginia weighed in as follows in response to a proposal to base representation upon suffrage instead of aggregate numbers:

> I confess I am more doubtful of the merits of this as a distinct proposition. . . . taxation and representation are principles the separation of which has never before been attempted or for a moment countenanced by the American people. Their attempted separation by the British Parliament precipitated the American Revolution, and their union was the one principle upon which our forefathers were

3. State's Interest: Exclude Transients

Hawaii's asserted interest in its classification is to limit representation in its legislature to those who reside permanently in Hawaii, and who are not "transients, short-term or temporary residents." *Burns v. Richardson*, 384 U.S. 73 (1966). While this may be a legitimate state interest, Hawaii's use of "intent to remain" test, and its method of distinguishing between those who it asserts do not intend to remain, do not survive close constitutional scrutiny. It is not merely the State's choice to use "permanent resident" as its population basis that is before this court, but rather whether the "intent to remain" test is a "appropriately defined and uniformly applied requirement." *Dunn*, 405 U.S. at 342.

> united throughout the bloodiest conflicts and darkest hours of that ever-memorable struggle. It is the principle which was submitted to "wager of battle," vindicated by the sword, and baptized with the best of patriots' blood. . . . Suffrage has never in the history of the world been made the basis of representation, at least by any Government which does not itself prescribe the qualifications of electors. And, for one, I should hesitate before throwing what I believe would prove so corrupting an influence upon the political morals of the country."

Cong. Globe, 39th Cong., 1st Sess. 3029 (1886).

Because the benefit withheld by the classification is the fundamental right to be represented equally in the Hawaii legislature, this court must review the classification with "close constitutional scrutiny." *Id.* at 336 ("But, as a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'") (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)). *See also Obama for America v. Husted*, 2012 U.S. App. LEXIS 20821, at *27 (6th Cir. Oct. 5, 2012), *stay denied*, (Oct. 6, 2012) (*citing Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Harper v. Va. State Bd. Of Elections,* 383 U.S. 663 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Crawford v. Marison Cty Election Bd.,* 553 U.S. 181, 190 (2008) (applying balancing test to identification requirement for voting)). As the Sixth Circuit recently concluded, "[u]nder the *Anderson-Burdick* standard, we must weigh 'the character and magnitude of the asserted injury' against the 'precise interest put forward by the State. . . taking into consideration the extent to which

those interests make it *necessary* to burden the plaintiff's rights." *Obama for America*, 2012 U.S. App. LEXIS 20821, at *27.

"Close constitutional scrutiny" is required here because, as noted above, the right to be represented equally in the Hawaii legislature is a coequal, if not primary, right under the Equal Protection Clause. Applied to the present case, this means Hawaii must show "show a substantial and compelling reason for imposing" its tests for permanent resident. *Dunn*, 405 U.S. at 335. It must also show that its tests are "uniformly applied." *Id.* at 342. Put another way, "'the Court must determine whether the exclusions are *necessary* to promote a compelling state interest.'" *Id.* at 337 (quoting *Kramer v. Union School Dist.*, 395 U.S. 621, 627 (1969)) (emphasis added).

The State rests its entire argument on its overly broad reading of *Burns*. That case, however, did not definitively resolve the issue presented in the case at bar: whether the 2012 Plan's exclusion of those whom the State deemed to not have exhibited the intent to remain in Hawaii permanently survives close constitutional scrutiny. In *Burns*, the Court recognized that states are not required to use the Census population as the basis for reapportionment and may employ some other count, but may do so only if the resulting plan is not

"substantially different" than one based on a "permissible population basis." *Burns*, 284 U.S. at 91-92. Every state other than Hawaii and Kansas now relies upon the actual Census count. 2011 Reapportionment Comm'n Final Report and Reapportionment Plan at 30. This is crucial because its means 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. While the *Burns* court did not require the states to use total population as their population basis, it did impose conditions upon a state's divergence from counting all persons within their jurisdictions. Thus, a state may choose to count nearly any population, with two limitations: *first*, whatever metric is selected, the result must approximate the plan that would have resulted if the state counted a "permissible population basis;" and *second*, that metric must still satisfy constitutional scrutiny. The Court identified as possible permissible population bases actual population and state citizens, but noted it has "carefully left open the question what population was being referred to" when it required substantial "population" equality. *Burns*, 384 U.S. at 91-92. A careful reading of *Burns* reveals that the Court established a three-part test to measure

the constitutionality of a state's choice of whom to count, and that the 2012 Plan fails each of them.

a. The 2012 Plan Fails To Identify The "Permissible Population Basis" To Which To Compare Its Count Of "Permanent Residents"

The State fails the first step in the *Burns* analysis because it has not identified the "permissible population basis" against which its choice of "permanent resident" is to be measured. In *Burns*, the Court identified and ratified (based upon the facts at the time), both *state citizen population* and *total population* as "permissible population" bases against which Hawaii's choice of registered voters could be compared for equality. *Id.* at 92. The State argues that the 2012 Plan accomplishes this by using "permanent resident" as its base, apparently equating "permanent resident" with either "state citizen population," or by arguing that *Burns* has already validated "permanent resident" (because "permanent" is the opposite of "temporary"). The State has not supported either basis.

First, "permanent residents" is not the equivalent of "state citizens." Section 1 of the Fourteenth Amendment defines "state citizens" for Equal Protection purposes, and provides that "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*." U.S. CONST. AMEND XIV (emphasis added). As applied to the 2010 Census,[5] all servicemembers and their families, and U.S. citizen students attending college in Hawaii are Hawaii "state citizens" under the Fourteenth Amendment. Conversely, transients (who were not counted by the Census) and aliens would not be Hawaii citizens. Yet, huge numbers of servicemembers, their families, and citizen students were extracted by Hawaii from its population plan because they were not deemed "permanent residents." At the same time, the State did not extract aliens, legal or illegal, who under the Fourteenth Amendment are *not* state "citizens." In other words, "permanent residents" cannot be equated with "state citizens."

Second, the 2012 Plan makes no attempt to relate "permanent resident" to any other benchmark except the statement in *Burns* that a state may permissibly exclude "transients, short-term or temporary

[5] The Census counted military personnel and their family stationed in Hawaii on Census day, as "usual residents" of Hawaii, which means that they have "more than mere physical presence, and [have an] … allegiance or enduring tie to a place." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). Servicemembers on temporary duty in Hawaii, or who were passing through, were not counted by the Census as Hawaii "usual residents."

residents" from its population count. The 2012 Plan offers nothing to show that its standards for discriminating between those residents who have demonstrated the "intent to remain" and those who have not is designed to actually achieve this result, except with the self-proving assertion that the opposite of "transient and temporary residents" is "permanent residents," and that Hawaii's population basis is defined as all persons who were not extracted because they do not meet the state's test of "permanent resident." Thus, the State's argument goes, *Burns* has already validated the 2012 Plan's approach. Logical syllogisms, however, are no substitute for the requirement that the 2012 Plan provide the court with the population basis against which "permanent resident" (and its application) is to be measured.

The State has not produced any evidence to support its assumption that "permanent residents" is the same as "state citizens" or some other permissible population basis, and in prder to pass the first test of *Burns* it was incumbent upon the 2012 Plan to identify the population base against which "permanent residents" was being measured, and it failed to do so. As set forth above, "permanent resident" is synonymous with neither "state citizen" nor "total

population," so the State has failed the first test and the Court need go no further.

b. State's Failed To Show The 2012 Plan Is A Substantial "Duplicate" Of A Plan Based On A Permissible Basis

Even assuming the State had identified "state citizens" as the permissible population basis against which to compare its count of permanent residents, it has not met its burden to show that counting "permanent residents" results in a plan that is a substantial "duplicate" of a count of state citizens. *See Travis*, 552 F. Supp. at 564. *Burns* noted that the 1950 Hawaii constitutional convention discussed total population, citizen population, and registered voter population as the possible baselines. *Burns*, 384 U.S. at 93. The convention rejected total population as too difficult to fit to local boundaries. It rejected state citizens as too difficult to determine. Critically, the convention concluded that counting registered voters would be "a reasonable approximation of both citizen and total populations." At that time, the percentage of Hawaii's population who registered to vote and who actually voted was very high, so there was a high correlation between registered voters, state citizens (however that was defined), and total population. *Burns,* 384 U.S. 73 at 95, n.26. "Only because on this record

it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

Thus, unlike here, the State in *Burns* satisfied its burden to identify the permissible population basis against which its choice of registered voters was to be measured, and concluded that it would reasonably approximate the districting that would result from applying that basis.

We do know that measuring permanent resident against total population results in reapportionment plans that are wildly different: a plan based on population has a distribution of 18 Senators for Oahu and 3 for the Big Island, while the 2012 Plan resulted in 17 Oahu Senators and 4 for the Big Island. In other words, the method of counting directly affected the nexus of political power in Hawaii, as it was expressly designed to do. *Travis* also applied this test, and came to the same result. Defining "state citizen" as set forth in the Fourteenth Amendment would result in a population basis that includes the military and their families, but does not include aliens. Needless to say, the resulting plan would be vastly different from the "permanent

resident" standard currently applied which excludes military, but includes aliens.

c. The State Has Not Shown Its Outdated Assumptions About Military Service Remain Correct Today

The State's answer to the representational equality question is that despite the undisputed impact on the representation rights of the extracted persons, it can extract servicemembers, their families, and students because they do not meet Hawaii's test for having exhibited the intent to remain in Hawaii, and are thus "transients" the *Burns* court stated it was constitutionally acceptable to exclude. According to the State, its only burden, if any, is to demonstrate that its efforts to exclude them were carried out diligently and in good faith.

Not so. *Burns* may have exempted the State from answering the "why" behind its extractions (it's permissible to exclude transients), but it did not exempt it from justifying under the close constitutional scrutiny standard the method by which it purports to achieve this goal. See *Dunn*, 405 U.S. at 342 (state required to show "[a]n appropriately defined and uniformly applied requirement"). This is especially critical for the servicemembers and their families who were extracted by the State, since the nature of military service and military family life are

quite different today than they were nearly fifty years ago when *Burns* was considered. The State simply cannot assume that the same facts that validated the use of "registered voters" in *Burns* continue to exist today; and the State has the burden to prove it. Based upon present-day facts, the State must answer the question "why" these individuals must still be extracted, when they are undisputedly residents of this State according to the Census, Hawaii state citizens under the Fourteenth Amendment, consistent contributors to this State, and perhaps most importantly, are counted by no other state because they don't reside anywhere but Hawaii. Because the State has not demonstrated why their rights to representation are being ignored, its motion for summary judgment must be denied, and the 2012 Plan must be held unconstitutional. The State has not even attempted to do so, much less satisfied its "weighty burden" of demonstrating why these individuals' fundamental rights to representative equality was burdened.

The plaintiffs in *Burns* did not dispute that Hawaii had "special population problems" due to "large concentrations of military and other transient populations," and that "the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear." *Burns*, 384 U.S. at 94. Thus, "[t]otal population figures may thus

constitute a substantially distorted reflection of the distribution of state citizenry." *Id*. To add confusion to these observations, the trial court in *Burns* erroneously suggested that, along with tourists, all military personnel, including transient military residing on boats passing through the islands, were *included* in the Census count. *See Holt v. Richardson*, 238 F. Supp. 468, 474-75 (D. Haw. 1965). In fact, neither tourists nor transient military personnel temporarily in Hawaii are counted as "usual residents" of Hawaii by the Census.

The State has not even attempted to demonstrate that the same conditions that dictated *Burns*'s conclusions in 1966 continue to exist today. The 2012 Plan fails to show that the numbers of servicemembers in Hawaii "wildly fluctuates" as they did a half-century ago during the buildup to the Vietnam conflict. Today's military population is relatively stable, does not "wildly fluctuate," and Hawaii is no longer the major stepping-off point for servicemembers bound from the mainland to the "Asiatic spots of trouble." Moreover, there is no dispute that only resident military were counted in the most recent Census, and transient military were already excluded because they are not "usual residents" of Hawaii.

Even the demographic makeup of the military has changed dramatically since the *Burns* decision was issued. Perhaps the greatest influence has been the end of conscription. Today's all-volunteer force is made up of professionals, who is more likely than ever before to (1) be more highly educated than the general public;[6] and (2) have a family. "The all-volunteer military is more educated, more married, more female, and less white than the draft-era military." DAVID R. SEGAL AND MACY WECHSLER SEGAL: AMERICA'S MILITARY POPULATION, POPULATION BULLETIN VOL. 59, NO. 4 (December 2004), *available at* *http://www.prb.org/Publications/PopulationBulletins/2004/AmericasMilitaryPopulationPDF627KB.aspx*. As of 2006, 43% of the active duty force had one or more children.[7] Of the spouses of active duty enlisted servicemembers, 46% are employed in the civilian labor force. *Id*.

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[6] 82.8% of U.S. military officers in 2010 had at least a bachelor's degree, compared to 29.9 percent of the general population. 93.6% of enlisted soldiers had at least a high school diploma, compared to 59.5% of the U.S. population. U.S. Dep't of Defense: "Demographics 2010: Profile of the Military Community."

[7] Department of Defense, Profile of the Military Community, DoD 2006 Demographics at 50 (2006), available at http://www.militaryhomefront.dod.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Reports/2006%20Demographics.pdf.

Nor has the State met its burden of showing that a servicemember's declaration on a military tax form about "legal residence" has any relation to whether the servicemember has demonstrated the intent to remain permanently in Hawaii. The state's assumption is unreasonable and, ultimately, unsupported. The DD2058 form is only for tax withholding purposes, and there is nothing that would prevent a servicemembers who indicated on her DD2058 that she pays state taxes in a state other than Hawaii from forming an intent to remain in Hawaii, registering to vote in Hawaii, from renting or owning property in Hawaii, or undertaking any other activity that would qualify as "domiciling" in Hawaii under the *Citizens* test.

Moreover, although personally-identifiable information was apparently not disclosed, *see* section 552a(a)(4), servicemembers were "extracted" and denied representation by virtue of personal data they provided, which was supposed to be disclosed only to the taxing state (not Hawaii), and only for tax withholding purposes. Disclosure of information for Hawaii reapportionment was not disclosed to servicemembers, and that use may even have violated the Privacy Act. *See* Exhibit "E", SOF ¶ 21-23. ("PURPOSE: Information is required for determining the correct State of legal residence for purposes of

withholding State income taxes from military pay.").[8] A reapportionment plan cannot be predicated on an illegal act, the state's wrongful use of the information in the DD2058. The military had no business turning over this information to the state.

Hawaii simply could not know whether a servicemember who completed a DD2058 intends to remain here. The DD2058 form cannot be treated as a declaration by servicemembers that they are not "permanent residents" of Hawaii or that they have no intent to remain in Hawaii. This assumption resulted in the Hawaii Supreme Court's unsupported conclusion that "most military personnel considered Hawaii a temporary home and only 3% opted to become Hawaii citizens." *Solomon v. Abercrombie*, 270 P.3d 1013, 1015 (Haw. 2012).

Limiting the fundamental right to representation to state taxpayers would effectively impose a poll tax, and would be unconstitutional (especially since the State imposes no such burden on

[8] Kansas, the only other state that does not use the Census as the population basis, avoids the Privacy Act issues by doing its own survey of military personnel. It ends up extracting very few, because most military personnel do not respond to the survey. *See Summary of the State of Kansas Adjustment to Census Figures for Reapportionment* (Sep. 12, 2011), *available at* http://hawaii.gov/elections/reapportionment/2011/staffreports/KansasAdj.pdf.

other non-taxpayers). *Harper v. Virginia Bd. Of Elections* 393 U.S. 663, (1966).

As to military families' supposed lack of connections to Hawaii, the facts refute the State's bias. These families use (and pay for) roads and schools. They pay Hawaii General Excise Tax. Many pay property taxes. They serve on Neighborhood Boards. They live, work, rent, own homes, and patronize businesses in Hawaii. These activities apparently qualify others as "permanent residents," but only servicemembers are excluded. A study prepared for the Secretary of Defense estimated the presence of the military is responsible for injecting $12 billion into the state, or up to 18% of Hawaii's economy. *See* James Hosek, *et al*., HOW MUCH DOES MILITARY SPENDING ADD TO HAWAII'S ECONOMY? 21 (2011).[9] Local and national politicians run on platforms built on the promise of keeping the military presence in Hawaii strong, and keeping the federal dollars to support them flowing from Washington. Yet, even as Hawaii aggressively pursues the massive benefits their presence brings, it keeps finding ways to exclude them. Hawaii cannot choose to exclude

[9] *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf

persons who are admittedly "usual residents" and who are not transients, and whom no one disputes have substantial physical and continuing presences here.

d. The State's Unequal Application

The fact that the Commission only sought to extract military, families, and students (*see* 2012 Plan at ii), while counting and assigning representatives on behalf of others who have no legal presence in Hawaii at all such as illegal aliens (who cannot form an intent to remain permanently in Hawaii), and did not extract federal workers and their families who are "stationed" in Hawaii in much the same manner as military personnel, is an arbitrary and discriminatory practice such that, even if the State could demonstrate the military personnel and families it extracted are "transients" unentitled to representation (which Plaintiff disputes), the State's practice would still fail to pass constitutional muster. In this case, the State has elected to burden the representational equality of only certain classes instead of all persons who might fail the State's "intent to remain" test for "permanent" residents. This is unacceptable:

> These two strands are part of the same equal protection analysis. If the State merely placed "nonsevere, nondiscriminatory restrictions" on all voters, the restrictions

> would survive if they could be sufficiently justified. . .On the other hand, if the State merely classified voters disparately but placed no restrictions on their right to vote, the classification would survive if it had a rational basis. . . However, the State has done both; it has classified voters disparately and has burdened their right to vote. Therefore, both justifications proffered by the State must be examined to determine whether the challenged statutory scheme violates equal protection.

Obama for America, 2012 U.S. App. LEXIS 20821, at *23.

The State argues that the reason it extracts only the military, their families, and non-resident tuition-paying students, is because it is too difficult to isolate other groups of non-permanent residents. This "low hanging fruit" argument does not comply with the Constitution. *See Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."). There must be some substantial reason for burdening the rights of some, but not all allegedly non-permanent residents. Moreover, the State has not even attempted to conduct extractions of other non-permanent residents, and targeted extraction has been the State's practice for the past three decades. *See Travis*, 552 F. Supp. at 558 & n.13 ("civilian population is not a permissible population base").

e. The State Fails To Support Its Flawed Search For Intent

In accordance with the Hawaii Supreme Court's mandate in *Solomon*, the 2012 Plan simply accepted that if a servicemember declared their desire to pay taxes in a state other than Hawaii on DD2058, that person cannot be a Hawaii "permanent resident" and has not exhibited an intent to remain. In other words, Hawaii presumes that military personnel who do not pay Hawaii income taxes do not intend to remain here, because paying taxes elsewhere conclusively reveals they are "merely transitory." *See Citizens for Equitable and Responsible Gov't v. County of Hawaii*, 120 P.3d 217, 222 (Haw. 2005) (domiciled means someone who "occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature.").

As set out above, a servicemember's completion of a military tax form is no basis from which the State could rationally conclude that the servicemember had not demonstrated an intent to remain in Hawaii.

Moreover, the 2012 Plan simply assumed that students who pay nonresident tuition or who listed a "home address" elsewhere failed the "permanent resident" test, another unwarranted and irrational assumption. For example, the University of Hawaii imposes a durational residency requirement of one year in order to begin to qualify for resident tuition. *See Hawaii Residency Requirements* ("you must have been a bona fide resident of Hawaii for at least one calendar year (365 days) prior to the semester for which you want resident tuition status").[10] A student can demonstrate a bona fide intent to make Hawaii his permanent home by paying Hawaii income taxes, registering to vote, opening a local bank account, signing a lease, buying property, or being employed here. *Id.* None of these tests are employed to confirm the domicile of others who were counted by the Commission as "permanent residents," and indeed, this test is more stringent than the domicile test of the *Citizens* case, which does not contain any durational residency requirement.

Finally, and perhaps most egregiously, the Commission simply "assumed" without inquiry that spouses and other military family

[10] *available at* http://manoa.hawaii.edu/admissions/undergrad/financing/residency.html.

members are of the same legal residency as their military spouses and sponsors. 2012 Plan at B-53, B-54. Such a presumption regarding the relationship between spouses is parochial, irrational, and overbroad. The decision to extract military families based on whether the sponsor pays out of state taxes ignores contrary indicators such as the purchase or lease of a Hawaii home, off-base employment, and enrollment in local schools, any of which would verify "permanent residence." If the permanent resident standard were equally applied, such indicators would lead to the family (and the military sponsor) not being extracted.

Burns does not allow Hawaii to deny all usual residents legislative representation because it deems them not to be "permanent" using standards that are vague, underinclusive, presumptive, and admittedly do not result in a plan even coming close to one based on population (the most obvious impact of the 2012 Plan is that it deprives Oahu residents of a Senate seat). *See also* 2012 Plan at 23 ("Under the methodology generally used by federal courts, the size of deviations, particularly as they relate to … Kauai, is substantial."). First, the touchstone of *Burns* remains population: the Court upheld the use of "registered voters" *only* because there was no evidence that the resulting plan differed substantially from a plan based on population, a contrary situation than

presented in the case at bar. *See id.* at 9 (statewide deviations exceed 10%, so the 2012 Plan is "*prima facie* discriminatory"). Second, because *Burns* only involved a claim of equal voting power, the right of equal representation was not raised, and thus never considered by the Court. Third, as Justice Thomas has pointed out, the Court has "never determined the relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of cert.). *See also* Timothy M. Mitrovich, *Political Apportioning is Not a Zero-Sum Game: The Constitutional Necessity of Apportioning Districts to be Equal in Terms of Both Total Population and Citizen Voting-Age Population*, 77 WASH. L. REV. 1261, 1263 & n.14 (2002) ("The federal circuit courts are in conflict on this issue. In the Ninth Circuit, states must apportion according to total population in order to ensure representational equality.").

The failure to even attempt to identify others who may not be "permanent residents," and targeting only military, families, and students reveals the bias inherent in Hawaii's scheme. A population basis that on its face is neutral is suspect when it results in a narrow class always bearing the brunt of the exclusion. *See Travis*, 552 F. Supp.

at 559 ("*minor*" deviations may be acceptable, if "free from any taint of arbitrariness or discrimination") (emphasis original). A "higher degree of scrutiny" is also appropriate where, as here, the "deviations present begin to approach constitutional limits." *Id.* at 562 n.19. Here, they exceed them.

Nor can the State argue that its exclusions are to protect the right to equal voting power of those it defines as permanent residents. The State cannot argue that military personnel do not register to vote in sufficient numbers to warrant their being counted for legislative apportionment since hardly anyone else counted by the 2012 Plan register to vote either: census figures for 2010 indicate that only 48.3% of Hawaii's voting age population is registered to vote, the lowest in the nation. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 Table 400: P*ersons Reported Registered and Voted by State: 2010*. Hawaii also now ranks 50th—dead last—in voter turnout. *See* John D. Sutter, *Here's the list: Hawaii has the lowest voter turnout rate in the United States*, *available at* http://cnnchangethelist.tumblr.com/post/31526477522/heres-the-list-hawaii-has-the-lowest-voter-turnout; John D. Sutter, *Hawaii: The state that doesn't vote* (Oct. 24, 2012), *available at*

http://www.cnn.com/2012/10/21/opinion/change-the-list-voter-turnout-hawaii/index.html?iref=allsearch ("I came to the Aloha State not for the beaches, volcanoes and helicopter tours but because Hawaii has the lowest voter turnout rate in the nation. ... This is all the more shocking when you consider that more than 90% of registered voters in Hawaii participated in elections for several years after statehood in 1959. People cared about what their newborn state would turn into. Somewhere along the way, enthusiasm died."). Registering to vote or voting has never been a condition of a right to representation, and it cannot be used here, especially when the numbers demonstrate such a small percentage of the Hawaii population as a whole is participating in the process, and no one else is excluded on the basis of their voting record. If servicemembers and their families are not "state citizens" and are not sufficiently vested in the islands because they do not register to vote, then neither are 51.7% of the rest of the population. In short, the State cannot meet its burden of demonstrating a sufficiently weighty interest in excluding military members and their families, to justify the accompanying burden on their right to representation.

The 2012 Plan also made no attempt to extract minors or prisoners, none of whom are eligible to vote. *See* HAW. REV. STAT. § 831-2(a)(1)

(1993) ("A person sentenced for a felony, from the time of the person's sentence until the person's final discharge, may not … [v]ote in an election …"). This demonstrates that voting, registering, or even being eligible to vote has no connection to the "permanent residence" test.

When the extreme deviations in the 2012 Plan are viewed together with Hawaii's long history of excluding servicemembers from representation starting with its 1959 plan, even a facially neutral standard cannot survive. This court, however, need not make a determination that the state's use of "permanent resident" is a pretext to cover discrimination against the military as prohibited by *Davis*. The gross statewide population ranges in the 2012 Plan are sufficient to shift the burden to the state, which cannot justify completely ignoring the representational rights of all usual residents.

B. The 2012 Plan Exceeds Constitutionally Allowable Deviations and Violates the Equal Protection Clause

The Commission acknowledged the 2012 Plan is "*prima facie* discriminatory and must be justified by the state." 2012 Plan at 9. A plan apportioning seats may make "minor" deviations from the ideal statewide district size. *Mahan v. Howell*, 410 U.S. 315 (1972). A deviation is presumed unconstitutional when an apportionment plan

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).

The 2012 Plan results in overall ranges that wildly exceed that threshold. The Senate's overall range of 44.22%, and the House's 21.57% range render the 2012 Plan presumptively unconstitutional, and place the burden squarely on the State to justify (1) excluding "usual residents" from representational equality, and (2) dilution both equal representational power and voting strength based upon "basic island unit."

The 2012 Plan supported the deviations with only two justifications: (1) the state may exclude servicemembers and others as long as it does so on the avowed basis of a residence requirement; and (2) it argued that preservation of the integrity of political subdivisions can be an overriding concern such that population equality is only required *within each county*, and not statewide (*id* at 9-10). The first justification (servicemember extraction) is addressed above. As for the second, the State concedes its 2012 Plan, resulting in statewide deviations of 44.22% and 21.57, is presumptively unconstitutional. *Brown*, 462 U.S. at 842-43 (10% threshold); 2012 Plan at 9 (2012 Plan is

"*prima facie* discriminatory and must be justified by the state"). The State has attempted to justify its plan by relying heavily upon the claimed physical, political and cultural uniqueness of the islands that compel the deviations, and supposedly differentiate Hawaii from the other 49 states, and immunizes Hawaii from the requirements of the Constitution.

The Supreme Court has identified a three-part test that must be passed by the State once a *prima facie* showing of discrimination has been made. The State must (1) articulate a "rational state policy" that may justify the deviation; (2) explain how the apportionment plan "may reasonably be said to advance" the rational state policy; and (3) demonstrate that the resulting deviation does not "exceed constitutional limits." *Mahan v. Howell,* 410 U.S. 315, 328 (1973). "[N]o matter how rational a state justification may be, it "cannot constitutionally be permitted the emasculate the goal of substantial equality." *Travis*, 552 F. Supp. at 560 (citations omitted). The justifications in the 2012 Plan for the deviations are "geographic insularity and unique political and socio-economic identities of the basic island units," and the desire to avoid so-called "canoe" districts (a district that spans more than one island). 2012 Plan at 23, 21. The State's motion for summary judgment

discusses these claimed justifications at length, but in the end these arguments must fail, both because they do not rationally support the State's claims, and because the end result is a disparity of numbers that, if allowed to continue, will "emasculate the goal of substantial equality."

1. People Are Represented, Not Counties

In *Reynolds*, the Supreme Court made geographic and political concerns and the desire to maintain traditional boundaries secondary to population equality:

> the fundamental principle of representative government is one of equal representation for *equal numbers of people*, without regard to race, sex, or economic status, *or place of residence within a state*.

Reynolds, 377 U.S. at 560-61 (emphasis added). Thus, when a plan produces exaggerated population ranges between districts, concerns for political boundaries must yield to population equality.

2. There Are Limits to Allowable Deviations.

In seeking to justify the disparities inherent in its plan, the State makes an initial incorrect assumption about the *Mahan* test: it "fails to recognize that the first two prongs of the *Mahan* test do not exist to substantiate the third." *Regensburger v. Ohio*, 278 F.3d 588, 596 (2002).

Instead, as the *Mahan* court admonished, even if the state provides a good faith justification for diverging from equal population apportionment, "the inquiry then becomes whether it can reasonably be said that the state policy urged . . . to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan adopted by the legislature, and whether, *if so justified, the divergences are also within tolerable limits*". *Id.* at 326 (emphasis added). In short, even if the State's justifications for its plan were accepted (and Plaintiffs dispute that assumption), the State would still be required to demonstrate the resulting divergence passes constitutional muster, and this it cannot do.

The State mistakenly relies on *Brown v. Thomson,* 462 U.S. 835 (1983), to support its argument that there are no constitutional limits on divergence of equal populations. *Brown*, however, never dealt with the question of constitutionally permissible population deviations. Rather, it addressed whether Wyoming's plan for preserving boundaries justified the additional deviations from population equality resulting from a particular county's representation, focusing on the appellants' challenge to representation of that particular county and not on the deviations from ideal. *See id.* at 846. The Court held:

> Here we are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts. Appellants deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one representative given to Niobrara County. The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming's policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.

Id. On this point, the admonition contained in Justice O'Connor's concurring opinion is instructive:

> In short, as the Court observes, *ibid*., there is clearly some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications.

*Id.*at 849 (O'Connor, J., concurring). Indeed, the Court has consistently found that deviations are critical in determining whether the challenged legislative plan complies with the Equal Protection Clause. *See, e.g., Chapman v. Meier,* 420 U.S. 1, 22 (1975) ("While (m)athematical exactness or precision is not required, there must be substantial compliance with the goal of population equality.") (internal citation and quotation marks omitted); *Connor v. Finch,* 431 U.S. 407, 418 (1977) ("The maximum population deviations of 16.5% in the

Senate districts and 19.3% in the House districts can hardly be characterized as de minimis; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments."); *Chapman,* 420 U.S. at 22 ("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."); *Mahan,* 410 U.S. at 328 (noting that 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); *Kilgarlin v. Hill,* 386 U.S. 120, 122 (1967) ("[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.").

3. The State Has Not Met Its Burden

Even if the 2012 Plan could overcome its disqualifying population deviations, the State's justifications for its action do not pass muster. First, Plaintiffs do not accept the State's claims of physical impracticability. Although "canoe districts" may have been unworkable as a practical matter in the past, we no longer travel by canoes. Arguments that representatives are separated by bodies of water are much less compelling when they can take a less than an hour plane trip to visit their constituents. Hawaii is much more interconnected and unified and less insular than it has ever been before, with easy air travel between the islands, and direct flights to the mainland and internationally from every island unit. Technology has also contributed substantially to making each island less insular and remote, and it is very simple and inexpensive for those on one island to communicate with others across the state. Indeed, Congressional District 2 is a massive canoe district, yet it has not seemed to hamper either representative or constituent.

Although the State argues at length about the cultural and physical distances between islands that make Hawaii unique from other states, the same arguments can be made in nearly every state in the union.

Certainly Hawaii is a unique place. However, other states grapple with far greater geographic and cultural disparities than Hawaii, but somehow manage to remain constitutionally in check. Hawaii's uniqueness does not exempt it from the requirements of the Equal Protection Clause.

Moreover, the 2012 Plan does not do what the State says it does, and rigidly adhere to the anti-canoe district policy, as shown by Senate 7 and House 13, both of which are multi-island canoe districts encompassing Molokai, Lanai (and Kahoolawe), along with the distant east side of Maui. *Summaries by Basic Island Units* at 2, 6 (Mar. 8, 2102) (Exhibit "G".).[11]

The Commission also attempts to lessen the deviations in each house by combining them in an attempt to show that over- or under-represented districts are not impacted as severely because they have substantial equality "per legislator" (as opposed to per Senator, or per

[11] *Brown v. Thomson*, 462 U.S. 835 (1983) did not endorse massive deviations if arguably supported by legitimate state concerns. In *Brown*, the Court upheld a plan with an 89% deviation against a challenge to Wyoming's policy of affording each county at least one seat; the challenger did not assert the 89% range itself was unconstitutional. In *Board of Estimate v. Morris*, 489 U.S. 688, 702 (1989), the Court noted that "no case of ours has indicated that a deviation of some 78% could ever be justified."

Representative). 2012 Plan at 21-22 ("equality 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"). This court has already rejected this "combination" approach. *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.").

4. Oahu's Ranges Are Excessive

Next, *Travis* determined that Hawaii's desire to provide each island unit with representation is rational. The court concluded, however, that the plan did not serve to advance the policy because Oahu, with its large population and many seats, did not contain "the smallest deviation possible." The court held that the maximum deviations of 9.18% in Oahu's Senate districts, and 9.54% in Oahu's House districts were not justified by the policy of providing each island with representation, and invalidated the plan. *Id.* at 560-61.

The Oahu deviations in the present case are very similar: Oahu's Senate district overall range is 8.89% (2012 Plan at 15-16, Table 1), and

Oahu's House district overall range is 9.53% (*id.* at 16-17, Table 2). As in *Travis*, "it would seem that Oahu's legislative districts could have easily been drawn with only minimal population variations," and the 2012 Plan "provides no other reasons for these [intraisland] deviations." *Travis*, 552 F. Supp. at 561.

5. No Approximation Of Population-Based Plan

Finally, this court noted "it is clear from *Burns* that … the state is obligated to provide some degree of proof that the proposed plan approximates the results of a plan based on an appropriate population base." *Travis*, 552 F. Supp. at 565. The court found "the state's use of registered voters constitutionally impermissible" because the state did not show its plan was close to a population-based plan. *Id.* Here, it is beyond dispute that the 2012 Plan did not approximate a population-based plan. As set out earlier, such a plan would result in Oahu having 18 Senate seats, while it has only 17 seats under the 2012 Plan.

The rights to equal representation and to petition government on an equal basis are paramount constitutional rights:

> To refuse to count people in constructing a districting plan ignores these rights in addition to burdening the political rights of voting age citizens in affected districts.

Garza, 918 F.2d at 775.

The 2012 Plan dilutes Plaintiffs' right to equal representation, and their First Amendment rights to petition their government as guaranteed by the Due Process Clause of the Fourteenth Amendment, because it places them in districts in which they must compete with more people for the attention of their legislators than others in other districts.

V. CONCLUSION

Hawaii's claimed implementation of the State's permanent resident/domiciliary distinction does not satisfy its weighty burden to justify the State's extraction of persons whose inclusion in the census count represents acknowledgment of an element of allegiance and enduring tie to the state, and denial of their Equal Protection right to representation. "[P]ermanent residents" are not "citizens," since Hawaii does not extract noncitizens. It is not the same as "registered voter" or "eligible to vote" because Hawaii makes no attempt to extract non-voters, or those who are not eligible to vote such as aliens or minors. Moreover, the state cannot choose whom to count, and whom to extract, based on where or whether they pay state taxes, for doing so would be

restricting equal representation and the right to petition government on an equal basis by wealth.

DATED: Honolulu, Hawaii, October 29, 2012.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSEPH KOSTIC; et al.,	CIVIL NO. 12-00184 JMS/RLP
Plaintiffs,	(THREE-JUDGE COURT (28 U.S.C. § 2284))
v.	
SCOTT T. NAGO, in his official capacity as the Chief Election Officer State of Hawaii; et al.,	**CERTIFICATE RE: WORD LIMITATION (LR 7.5)**
Defendants.	

CERTIFICATE RE: WORD LIMITATION (LR 7.5)

Pursuant to LR 7.5(e), I hereby certify:

1. I am one of the attorneys for the Plaintiffs in the above-captioned action.

2. The foregoing Memorandum in Support of Motion for Preliminary Injunction was prepared in a proportionally-spaced face (Century Schoolbook), in 14-point size. It was prepared with Microsoft Word, and contains 11,148 words, inclusive of headings, footnotes, and quotations, but exclusive of case caption, table of contents, authorities, exhibits, declarations, certificates of counsel, and certificate of service.

3. I relied on the word count function of Microsoft Word to count the words in the document.

/s/ Mark M. Murakami
MARK M. MURAKAMI

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct of PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II OF THE FIRST AMENDED COMPLAINT; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE RE: WORD LIMITATION (LR 7.5) was duly served upon the following individuals electronically through CM/ECF and/or mailing said copy, postage prepaid, to last known address as follows:

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DATED: Honolulu, Hawaii, October 29, 2012.

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