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

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

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

) **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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

I. SUMMARY OF THE ISSUES 1

II. THE STATE HAS NOT SUPPORTED THE MASSIVE DEVIATIONS IN THE 2012 PLAN 3

A. The State Has Not Proven Hawaii Is So Unique That Canoe Districts Are Necessary 4

B. The State Has Not Addressed Whether The Extreme Deviations Are Beyond Tolerable Limits 14

C. Plaintiffs Have Been Injured, And Correcting The Deviations Will Remedy Their Injuries 20

III. THE STATE HAS NOT MET ITS BURDEN TO SHOW A COMPELLING REASON TO DENY THE FUNDAMENTAL RIGHT OF EQUAL REPRESENTATION 20

A. The State Has Not Shown That Military Populations Wildly Fluctuate 21

B. The State Has Not Attempted To Extract Easily Identifiable Nonresident And Nonvoting Classes 23

C. Administrative Ease Is No Excuse For Singling Out Particular Classes For Extraction 27

D. The Plaintiffs Were Injured By The Extractions 31

IV. CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

1000 Friends of Kauai v. Dep't of Transp.
No. 28845, 2009 WL 281949 (Haw. App. Feb. 6, 2009) 9

Bd. of Supervisors v. Blacker, 52 N.W. 951 (Mich. 1892) 7

Brown v. Thomson, 462 U.S. 835 (1983) 14, 16, 17

Burns v. Richardson, 384 U.S. 73 (1966) 21, 22

Carrington v. Rash, 380 U.S. 89 (1965) 28, 29

Chapman v. Meier, 420 U.S. 1 (1975) 4

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 31

Connor v. Finch, 431 U.S. 407 (1977) 14

Dunn v. Blumstein, 405 U.S. 330 (1972) 1, 29, 31

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 20, 31

Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) 13

Heiner v. Donnan, 285 U.S. 312 (1932) 28

Hickel v. Southeast Conference, 846 P.2d 38 (Alaska 1992) 5, 6

In Re 2003 Legislative Apportionment, 827 A.2d 810 (Me. 2003) 7

Kenai Peninsula Borough v. State, 743 P.2d 1352 (Alaska 1987) 6

Kilgarlin v. Hill, 386 U.S. 120 (1967) 4

TABLE OF AUTHORITIES—CONTINUED

Page

Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980) 7

Mahan v. Howell, 410 U.S. 315 (1972) 1, 14, 16, 17

Reynolds v. Sims, 377 U.S. 533 (1964)..... 4-5, 9, 14

Rice v. Cayetano, 528 U.S. 495 (2000) 2, 13

Sierra Club v. Dep't of Transp., 202 P.3d 1226 (Haw. 2009)..... 9

Travis v. King, 552 F. Supp. 554 (D.Haw. 1982) 2, 5, 18, 19, 20

Wilkins v. West, 571 S.E. 2d 100 (Va. 2002) 7

OTHER AUTHORITIES

Alaska Reapportionment Map 2011 6-7

Montana Reapportionment Map 2011..... 7

Jeffrey S. Passle, D'Vera Cohn,
A Portrait of Unauthorized Immigrants in the United States (Apr. 14, 2009)..... 26-27

State of Hawaii's Memorandum in Support of Motion to Dismiss,
Korab v. Koller, Civ. No. 10-483 JMS/KSC (Sep. 9, 2010)..... 26

U.S. Dep't of Commerce,
Final Report, 2008 Estimates of Compact of Free Association (COFA) Migrants (Apr. 2009)..... 24-25

TABLE OF AUTHORITIES—CONTINUED

Page

U.S. Gov't Accountability Office,
Compacts of Free Association: Improvements Needed to Assess and Address Growing Migration (Nov. 2011)..... 25

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. SUMMARY OF THE ISSUES

Hawaii may be different, but it is not so different as to be exempt from the requirements of the Constitution. The State has not met its burden of justifying the two major defects in its 2012 Reapportionment Plan:

1. It has not shown a "substantial and compelling reason" that supports its exclusion of 108,767 persons assumed by the State using "[a]n appropriately defined and uniformly applied requirement" to have not exhibited the intent to remain in Hawaii permanently. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

2. Nor has the State met its burden to justify the "*prima facie* discriminatory" rule against "canoe districts" which results in overall deviations that exceed the 10% threshold for presuming a plan is unconstitutional. It has not shown the Senate deviation of 44.22% and the House deviation of 21.57% are "minor" deviations that advance a rational state policy *and* do not otherwise "exceed constitutional limits." *Mahan v. Howell*, 410 U.S. 315, 328 (1972). The no "canoe district" rule results in "basic island units" being considered more important than

persons, which "emasculate[s] the goal of substantial equality" and violates the Equal Protection Clause. *Travis v. King*, 552 F. Supp. 554, 560 (D.Haw. 1982) (citations omitted). The State has attempted to justify this policy by relying heavily upon our geographical, political, and cultural differences—differences that supposedly subject Hawaii to rules different than those applicable to every other state in the union. But, as Justice Kennedy reminded, "[t]he 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), and it is time that the State understand that the mere fact that we live on islands must yield to the Equal Protection Clause, and cannot be used to justify depriving residents of equal representation on a per-*person* basis. The ruling in *Travis* striking down the no "canoe district" policy was not an experiment that the State is free to reject as unpopular, but a Constitutional mandate that must be enforced.

This Reply Brief supports the Plaintiffs' motion for summary judgment (Doc. 67) and responds to the State's opposition brief (Doc. 72) with two main points:

1. The State has not met its burden to justify the massive deviations in the overall ranges in the Senate and House reapportionments. We reply to this argument first because the State's opposition brief (Doc. 72) spends a majority of its pages attempting to prove that Hawaii is so different that the no "canoe district" rule passes muster under the Equal Protection Clause.

2. The State has not met its burden of showing that the exclusion of nearly 8% of its actual population furthers a compelling state interest and is narrowly drawn.

II. THE STATE HAS NOT SUPPORTED THE MASSIVE DEVIATIONS IN THE 2012 PLAN

The State attempts to support the no "canoe district" rule and justify the 2012 Plan's representation of "basic island units" instead of "persons" with exhibits that purportedly show that Hawaii is geographically and culturally different from every other state in the union. Thus, the State argues, the resulting deviations in the 2012 Plan—44.22% in the Senate and 21.57% in the House—do not fail the Supreme Court's test for constitutionality even though they wildly exceed the Court's 10% threshold. This argument fails for two reasons: first, the State has not met its burden to show that Hawaii is so unique

that "canoe districts" are absolutely necessary; and second, the State has not even attempted to show that the gross deviations are "beyond tolerable limits."

A. The State Has Not Proven Hawaii Is So Unique That Canoe Districts Are Necessary

The State has not met its burden of submitting introduce evidence overcoming the presumption of unconstitutionality which is the result of the 2012 Plan's deviations exceeding 10%. *See 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."); *Chapman v. Meier,* 420 U.S. 1, 22 (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.").

First, the no "canoe district" rule flies in the face of the Supreme Court's decision in *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 v. Sims*, 377 U.S. 533, 562 (1964).

The 2012 Plan, however, chooses "basic island units" as the primary measurement of what is being equally represented.

Second, Hawaii is not so unique that it is simply impossible to produce a reapportionment plan that better represents persons and produces deviations that at least are closer to the 10% threshold. This court need look no further than the plan Hawaii implemented to comply with this court's ruling in *Travis* for an example of a plan that is constitutional.

In response, the State argues that Hawaii's geography and history immunize it from such review, and that it is so different from the other 49 states that it need not adhere to the Constitution as closely as they do. Yes, Hawaii has islands, and having "canoe districts" would mean that a representative would need to travel across water to represent his or her district on more than one island. But that is insufficient justification for failing to adhere to Equal Protection principles, and does not excuse the 2012 Plan's severe deviations from population equality. In *Hickel v. Southeast Conference*, 846 P.2d 38, 46-47 (Alaska 1992) the Alaska Supreme Court acknowledged that it might be difficult to apportion to account for islands, and that other factors such as

compactness and socio-economic congruity may be considered. But the mere fact that islands are involved does not excuse the state from trying to accomplish population equality, and one factor the Alaska courts use is the availability of air service between the disparate parts of the district. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987). Similarly, every island in Hawaii is served by regular airline service, and it is a fact of modern life that we can communicate easily worldwide and nearly instantaneously, as well as travel interisland with relative ease; we no longer need canoes.

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.[1] *See also Hickel*, 846 P.2d at 45-47 (absolute contiguity is impossible in Alaska owing to archipelagoes); *In*

[1] http://www.akredistricting.org/Files/AMENDED_PROCLAMATION/Statewide.pdf.

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 does 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 disparate counties).[2]

[2] http://leg.mt.gov/css/publications/research/past_interim/handbook.asp ("Although the Indian population in Montana is highly concentrated in a few counties, Indians live in all 56 counties of the state, ranging from a small percentage of less than 1% in 19 counties to 1% to 10% of the population in 29 counties. There are eight counties in which Indians compose from 11% to 56% of the total population.").

The State also ignores the fact that its rule is not inviolate, and the "basic island unit" of Maui includes the islands of Maui, Molokai, Lanai (and uninhabited Kahoolawe). If the bodies of deep water and historic, cultural, and political differences between these islands that surely must 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? The State has not answered this question, except by asserting that "canoe districts" are unpopular. But popularity is not the measure of compliance with the Constitution.

The State makes spurious arguments that the people of one island are just so culturally and politically incompatible with those on the others that they would never tolerate sharing a representative. For example, the State argues that if the residents of Kauai had a representative whose district included residents of another island, that representative would have been conflicted about whether to oppose the Superferry. *See* Doc. 72 at 29-30.[3] According to the State, this

[3] For the benefit of Judge McKeon who may not be as keenly attuned to local issues as Judges Seabright and Kobayashi, the "Hawaii Superferry" involved a controversial attempt by a private service to

representative would have divided and conflicting interests to contend with, because the residents of Kauai were against the Superferry, while the residents of other islands were for it. This argument should be rejected for two reasons.

First, local parochialism is never a valid state interest. The State's argument assumes wrongly there is some inherent rationality in a reapportionment plan that attempts 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 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, putting aside the issue of whether these assumed generalized facts are even true (that Kauai residents generally opposed

---

operate high-speed vehicle ferries between Oahu and Maui, and Oahu and Kauai. Legal challenges by Maui residents and the Sierra Club eventually shut down the service permanently after two visits to the Hawaii Supreme Court. *See Sierra Club v. Dep't of Transp.*, 202 P.3d 1226 (Haw. 2009). The separate legal challenge to the Superferry filed by Kauai residents was dismissed, although the ferry's visits to Kauai were met with protests. *See 1000 Friends of Kauai v. Dep't of Transp.*, No. 28845, 2009 WL 281949 (Haw. App. Feb. 6, 2009).

the ferry, while residents of other islands did not), this argument has it backwards because it fails to recognize that a Kauai "canoe district" might actually *increase* Kauai's representation, by giving Kauai a share of an additional legislator to hear minority or other concerns. Kauai, you see, has 67,091 residents, which means that were "canoe districts" used, Kauai would be apportioned one Senator and part of a second, and two Representatives and part of a third. However, under the no "canoe district" rule, Kauai is deprived of this extra representation. Are those who live on Kauai so irreconcilably "different" than those who live, say, in Leeward Oahu that it justifies depriving Kauai residents of 20% of a representative? The State's backwards characterization of Hawaii's culture is not grounded in history or evidence. The "evidence" that the State submits is a double-edged sword that could be tailored to justify nearly anything. It essentially asks this court to make factual findings that residents of Kauai are irreconcilably different than residents of all other islands, and that the twain shall never meet.[4]

---

[4] One might just as easily claim that cultural history demonstrates that the two islands share a common heritage, because according to legend, *Pohaku o Kauai* ("Rock of Kauai") located off Oahu's Kaena Point is a chunk of Kauai which the demigod Maui snagged with his fish hook and dragged over to Oahu.

Refuting the State's argument is the fact that Hawaii residents appear to be overwhelmingly politically homogeneous, and have few differences: they voted for the Democratic candidate in the last presidential election by a landslide, the State's entire congressional delegation are members of the Democratic Party, major Republican candidates for federal office were resoundingly defeated, and there is but a single Republican in the State Senate. This is not to make a value judgment about these facts, just to observe that the residents of Hawaii certainly seem to have much more in common than the State argues.

The State offers various declarations of former representatives of canoe districts as supposed proof that it is difficult to represent citizens in North Kauai and Hana. The Plaintiffs have two responses. First, of course it may be difficult to represent Hana, a locale hard to reach from just about *everywhere*, and whose residents, because of their isolation on the far side of Maui—accessible only by air, the famous Hana Highway, or a harrowing four-wheel drive journey—likely do not share common interests (as the State defines them) with anyone, even other Maui residents. But "difficulty" is not the standard by which compliance with the Equal Protection guarantees is measured. Second, by drawing the

district in such a manner that made it about as difficult as possible for a representative (the northwest side of Kauai was put together in a district with the far east side of Maui), this district was destined—perhaps even designed—to disappoint. Those earlier commissions might have created districts that were easier to travel between, and that had more in common, but instead lumped North Kauai together with Hana (rather than putting North Kauai with Leeward Oahu, or putting two areas near airports together, for example).

Ultimately, the purported differences between Hawaii residents that the State seeks to enshrine as the hallmark of equal representation are the last vestiges of an earlier time when we were not so interconnected, but the islands were separate and parochial.[5] Hawaii is different, for sure. But residents of other states that do not find it impossible to adhere to the Equal Protection Clause's requirements probably also feel the same way about their respective states and the geographic and cultural divides within them. Regardless of Hawaii's geography and culture and its desire to be subject to different

[5] Indeed, the State's argument that Hawaii has a strong central state government and relatively weak county governments, cuts against its arguments that each island is politically separate, rather than for it.

standards, it must still adhere to the Equal Protection Clause. As the Court reminded when presented with the argument that Hawaii's history somehow made it exempt from the Constitution:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations, and their dismay may be shared by many members of the larger community. ... Likewise, as the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with the 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) (emphasis added). When arguments of the kind the State makes in the case at bar have been presented to the Supreme Court (Hawaii is "different" and can be treated differently), that Court has rejected them. *See*, *e.g.*, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (unanimous Court held that resolution in which Congress apologized for the overthrow of the Hawaiian government had no legal effect, and did not prohibit the State from acting in a sovereign capacity to alienate its land): *Rice*, 528 U.S. at 511 (rejecting the State's argument that Hawaii's unique history entitled it to an exemption from the Fifteenth Amendment's requirement of race-neutral voting).

The State has not even attempted to explain how its no "canoe district" rule—which subsumes equal representation in the state legislature for persons, to an island-by-island identity—does not fly in the face of the Supreme Court's longstanding rule that geographic and political concerns and the desire to maintain traditional boundaries must place second to population equality. *See Reynolds*, 377 U.S. at 560-61 ("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*") (emphasis added).

B. The State Has Not Addressed Whether The Extreme Deviations Are Beyond Tolerable Limits

Even if the State has met its burden of showing the no "canoe district" rule and the deviations are the result of a rational state policy, it does not address the third requirement of the *Mahan* test, that the deviations do not "exceed constitutional limits." *Mahan,* 410 U.S. at 328. The State misreads the Supreme Court's requirements regarding permissible deviations, arguing that the Court holds there are no upper limits on maximum population deviations. *See* Doc. 72 at 17 (citing *Brown v. Thomson,* 462 U.S. 835 (1983)). To the contrary, the Court

holds that a 10% deviation is a threshold, above which a reapportionment plan is presumed unconstitutional. *Connor v. Finch,* 431 U.S. 407, 418 (1977) ("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"). The 2012 Plan expressly recognized this, and the State cannot now argue otherwise. *See* 2012 Plan at 9 (2012 Plan is "*prima facie* discriminatory and must be justified by the state"); *Brown*, 462 U.S. at 842-43 (10% threshold).

Indeed, the rule is precisely the opposite of the State's argument, and the Court holds that some deviations are simply too extreme and can *never* be justified, because there are "tolerable limits" for any plan that deviates from the requirement of substantial population equality. *Mahan,* 410 U.S. at 328 (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 (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 between districts, ultimately the State has not answered whether the 2012 Plan's deviations are "*within tolerable limits*." *Mahan,* 410 U.S. at 326 (emphasis added). Noticeably absent from the State's opposition is any reference to *any* case in which a deviation of the magnitude in the case at bar was sanctioned by the Court, and indeed, there are none.

The only case the State claims to support its argument is *Brown,* which a close reading reveals provides no such justification. In that case, the Court pointedly observed that it was not being called upon to adjudicate whether the deviation at issue in the case (89%) was constitutionally acceptable:

> 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.

Brown 462 U.S. at 846 (emphasis added). The State fails to recognize the third *Mahan* requirement, and its briefs simply do not address the need for substantial population equality, or the cases in which the Court has found that the deviations were just too large to accept. *Chapman,* 420 at 22 ("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).

Instead, the 2012 Plan admittedly bases the apportionment on other factors such as insuring that each "basic island unit" is represented by a whole number of Senators or Representatives (the no "canoe district" rule), and, in the most blatant example of ignoring the Court's and the Constitution's requirements, attempts to minimize the deviations in each chamber 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" —

> [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. The "per legislator" combination approach of measuring equality was rejected as unconstitutional in *Travis*, yet the State persists. *See 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 the Equal Protection Clause requires measuring substantial population equality in *each* house, not by a method that even violates the states' own constitutional structure, and is based on equal representation for an "island unit," not for its people.

Finally, the State cannot explain by what authority it revisited the issue of canoe districts in the first place. The last time the State attempted to justify its claim of basic island unit representation was in *Travis* in 1982. In that case, the State's argument for its no "canoe district" rule was roundly rejected by this court as a matter of federal constitutional law, because the deviations in that plan were simply too high. In that case, the State made the same arguments about cultural and political expediency it is making here, and this court rightly noted the same observation that is applicable today: "In light of the many

post-*Reynolds* decisions which have discussed and refined the concept of minimal population deviations, however, it cannot be seriously contended that the gross deviations presented in the 1981 Plan qualify as "minor inequities." *Travis*, 552 F. Supp. at 563. As here, the State in *Travis* was unable to cite a single case for the proposition that deviations of magnitudes present could be excused by combining and figuring deviations from both houses. *Id.* at 562. This court accordingly held "that the total deviation present in the senate reapportionment plan [43.18%] exceeds the limitation allowable under the equal protection clause." *Id.*

The *Travis* court was not merely urging the State to "try out" canoe districts and experiment in good faith to see if they were acceptable, with the State being free to discard canoe districts if it found them unpopular. Rather, it was a definitive finding by a federal court, applying the requirements of the Equal Protection Clause, that there are constitutional limits to population deviations and at 43.18%, these limits are exceeded and not justified by the State's reasons. Yet in the 2012 Plan, the deviations are similar and the State's reasons have not changed. The State has not provided any explanation why, given

the clear holding of *Travis,* that the State has chosen to thumb its nose at a still-controlling court ruling and adopt an apportionment plan that replicated the deviation previously rejected by the court as constitutionally impermissible *regardless* of any claimed justification.

C. Plaintiffs Have Been Injured, And Correcting The Deviations Will Remedy Their Injuries

The Plaintiffs are Oahu residents, and the State claims that only Kauai residents haves standing to raise the issue of the gross deviations in the 2012 Plan. However, each of the Plaintiffs has been injured and has standing to raise the claim. In the Kauai "combined" process noted above, the Commission allowed Kauai to be overrepresented in the House in exchange for Kauai's underrepresentation in the Senate. The "extra" Kauai House seat was taken away from Oahu, which injured in fact Oahu residents, who therefore have standing.

III. THE STATE HAS NOT MET ITS BURDEN TO SHOW A COMPELLING REASON TO DENY THE FUNDAMENTAL RIGHT OF EQUAL REPRESENTATION

The State of Hawaii does not contest that equal representation is a fundamental right. *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990). The Equal Protection Clause's fundamental premise is that all "persons" are entitled to a voice in government. This right

cannot be denied to military, their families, and students, without inquiry into why it is necessary that these groups be so deprived, and whether the state is justified in unequally enforcing its claimed rules.

A. The State Has Not Shown That Military Populations Wildly Fluctuate

The State cannot dispute that by defining "permanent resident" to exclude military and their families and students, these people are left without representation in any state legislature, because the Census counted them nowhere else but as residents of Hawaii. The State argues that *Burns v. Richardson*, 384 U.S. 73 (1966) sanctioned exclusion of military personnel based upon assumptions which not only appear to have been incorrect when first made, but are certainly no longer applicable today. The State does not dispute this other than to claim the military still comprises a significant percentage of Hawaii's population, and because of this, and because other "non-resident" groups are too difficult to count, the military (and students) can be constitutionally singled out and excluded from representation in the Hawaii legislature.

This is not the point: the justification for exclusion in *Burns* was the unpredictable fluctuation in military populations that might have

skewed the population numbers upon which the State's reapportionment plans were based. This skewing, along with the transient "mindset" of tourists and sailors passing through the islands without sufficient interest in local politics to warrant inclusion thus militated against inclusion. But as detailed in the Plaintiff's briefs filed earlier in this case (Docs. 67 and 74), neither assumption holds true today.

Plaintiffs have already demonstrated the relative stability Hawaii's military population over the course of the last few decades, through military engagements, through war, through terrorist attack on the homeland. The State's sole answer to this is to point out that some portion of approximately 3,000 troops being relocated from other countries may end up in Hawaii. Doc. 72 at 8, n.8. Even if this relocation were to come to pass, however, it is a far cry from the hundreds of thousands of military personnel cited in *Burns,* and considering the growth in the Hawaii population generally since *Burns* was decided, this number barely registers as a blip on the overall population radar. *See* Doc. 67 at 22-23. Moreover, it does not even approximate the fluctuations in growth from Hawaii's burgeoning

immigrant population. *See* Doc. 36 at 12. As to the contribution of the military to the islands, the State cites this Court's finding that the military represents a "significant and welcome presence" in the island. Doc. 72 at 8.

B. The State Has Not Attempted To Extract Easily Identifiable Nonresident And Nonvoting Classes

Ultimately, the State's argument justifying extraction of military, their dependents, and students is predicated upon a "lesser of two evils" proposition—it has subordinated these individuals' rights to equal representation to its attempt to accommodate the constitutional principal of equal voting power. The State argues that because military, their families, and students are (1) numerous; (2) identifiable, and (3) largely non-voting their inclusion would skew voting populations in an identified district and negatively affect the right to equal voting power of Hawaii voters, and therefore it is proper to exclude them. This argument fails.

First, the mere fact that servicemembers, their families, and students exist in large numbers in Hawaii and largely do not vote does not mean they can be deprived of equal representation without a showing of compelling interest by the State. As we pointed out in our

earlier briefs, huge swaths of Hawaii's population do not vote, as evidenced by Hawaii's dismal voting percentages, currently dead last of all the states for voter participation. The State cannot single out specific groups for exclusion because they do not vote when the population at large also by and large does not vote either. Moreover, there are specific and countable groups that also do not (and cannot) vote. Where is this concern with respect to other non-voting groups who, under the State's theory, are subject to exclusion?

For example, by virtue of the Commission's use of the census report and by virtue of its decision to only exclude military and students, the Commission included nonimmigrants from the Freely Associated States of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. As recently as 2008, there were estimated to be 12,215 persons living in Hawaii who were classified as Compacts of Free Association ("COFA") migrants. *See* U.S. Dep't of Commerce, *Final Report, 2008 Estimates of Compact of Free Association* (COFA) *Migrants* at 3 (Apr. 2009), *available at* http://www.uscompact.org/FAS_Enumeration.pdf. This constitutes approximately one percent of the population of Hawaii. From 2003 to

2008, the number of COFA migrants living in Hawaii grew from approximately 1/2 a percent of total population to 1 percent of total population. U.S. Gov't Accountability Office, *Compacts of Free Association: Improvements Needed to Assess and Address Growing Migration*, at 17 (Nov. 2011), *available at* http://www.gao.gov/assets/590/586236.pdf. In 2003, ten percent of COFA migrants living in Hawaii cited medical reasons justifying their migration. *Id.* at 17-18. The State treats COFA migrants as "nonimmigrants" who are but temporarily in Hawaii.:

> COFA Residents are "nonimmigrants" who do not fall within any of the qualified alien categories and thus are not eligible for federal benefits under Medicaid. The Compacts for Free Association allow citizens of the Freely Associated States (FAS) to enter the United States as "nonimmigrant[s]." Pub. L. No. 99-239 § 141. *A nonimmigrant alien is a person admitted to the U.S. for a temporary period of time* and for a specific purpose, as set forth in the Immigration and Naturalization Act. 8 U.S.C. § 1101(a)(15). Examples of "nonimmigrants" are representatives of foreign governments, foreign students, and tourists. *Id.*
>
> *Under the immigration laws, "nonimmigrants" (including COFA Residents) are considered to have their permanent residence outside the United States and to be in this country only temporarily*. The Department of Homeland Security has confirmed that citizens of the FAS "may reside, work and study in the United States, but they are not lawful permanent residents." (U.S. Citizenship & Immigration Servs., Fact Sheet: Status of the Citizens of the Freely

> Associated States of the Federated States of Micronesia & the Republic of the Marshall Islands, Ex. A at 4-5, and Fact Sheet: Status of Citizens of the Republic of Palau, Ex. B at 3.).

State of Hawaii's Memorandum in Support of Motion to Dismiss at 9, *Korab v. Koller*, Civ. No. 10-483 JMS/KSC (Sep. 9, 2010). Like the 108,767 servicemembers, families, and students extracted by Hawaii, COFA migrants were included in the census count of Hawaii's actual population. However, unlike the extracted classes, COFA migrants were not extracted by the 2012 Plan, but rather were included in Hawaii's "permanent resident" population. In other words, the State counted as part of the population for reapportionment purposes (1) transients, who were (2) numerous; and (3) do not vote. But the 2012 Plan made no effort to identify and extract this class.

The immigrant population in Hawaii has undergone a 52.6% growth from 1990 to 2010, and Hawaii's illegal alien population is estimated to have gone through a 700% increase in the fifteen years from 1990 to 2005. As of 2008 (four years ago), it was estimated at 35,000. *See* Jeffrey S. Passle, D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Apr. 14, 2009), *available at* http://www.pewhispanic.org/files/reports/107.pdf. Hawaii's total

immigrant population grew by 52.6% between 1990 and 2010, *id.* at 39, and its illegal immigrant population by 700% in the same period. *Id.* at 34. Hawaii's illegal alien population is said to constitute 3.4% of the total population in 2004. *Id.* Yet, like COFA migrants, the 2012 Plan made no effort to identify and extract this class.

Thus, the State has not met its burden of showing that its exclusion of servicemembers, their families, and students is anything but a selective imposition of its criteria. According to the State, "transients" must not be counted because they are not sufficiently tied to the islands to be considered permanent residents. Yet the State includes a significant population of such transients. Non-voters must not be counted according to the State, because they may skew equal voting power. Yet, the 2012 Plan made no effort to exclude non-voters.

C. Administrative Ease Is No Excuse For Singling Out Particular Classes For Extraction

Nor can the State rely upon the fact that servicemembers, their families, and students are relatively easy to identify because the military and the universities provide information readily as the justification for singling them out for extraction. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court considered and rejected a similar

argument in support of a similar kind of conclusive presumption. There, the state argued it was difficult to tell whether persons moving to Texas while in military service were bona fide residents. Thus, the state argued, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemembers stationed in Texas. The presumption created there was conclusive—"'incapable of being overcome by proof of the most positive character.'" *Id*. at 96 (citing *Heiner v. Donnan*, 285 U.S. 312, 324 (1932)). The Court rejected this "conclusive presumption" approach as violative of the Equal Protection Clause. While many servicemen in Texas were not bona fide residents and therefore properly ineligible to vote, many servicemembers were bona fide residents. Since "more precise tests" were available "to winnow successfully from the ranks ... those whose residence in the State is bona fide," conclusive presumptions were impermissible in light of the individual interests affected. *Id*. at 95. "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Id*. at 96; *see also Dunn*, 405 U.S. at 350-51.

The State cannot single out the military and students because it is administratively expedient to do so; it has demonstrated it is more than willing to forego its claimed constitutional concerns (preventing numerous, identifiably transient non-voters from skewing voting populations and thereby denigrating the equal voting power principle), by allowing statistically significant numbers of State-defined transient non-voters to be counted as part of the State's population for apportionment purposes. What this means is that the State is *not* carrying out its claimed purpose of protecting the equal voting power principle, but instead appears to be assuming that *Burns* gave the State *carte blanche* to define servicemembers and their families as transients for all time, and thereby deny fundamental rights to individuals who have earned the right to be represented by the government they have made it their occupation to serve. "The uniform of our country ... [must not] be the badge of disfranchisement for the man or woman who wears it." *Carrington,* 380 U.S. at 97. If indeed the State's extractions are predicated upon overarching concerns to protect equal voting power, it need only structure the districts at issue to accommodate the military presence therein. Having made no effort to do so, the State cannot be

heard to argue, in advance of such attempts, that the "extracted" districts currently in existence must forever dictate the fundamental constitutional rights of their inhabitants.

Moreover, the State's justifications for its presumptive extractions of both military and students do not meet its burden. Requiring predefined residency status as a predicate for equal representation is unacceptable, yet by basing extractions upon the definition of domicile in a tax form, and payment of out of state tuition, that is exactly what the State is doing:

> It may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally uninformed about election matters. But as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence

> requirements are necessary to further a compelling state interest.

Dunn, 405 U.S. at 360. When affecting the constitutional right to representation, the State cannot take a presumptive approach to extractions.

D. The Plaintiffs Were Injured By The Extractions

The Plaintiffs have standing to assert the State has not satisfied its burden of showing it may constitutionally exclude 108,767 persons from the population.

First, they are residents of Oahu, which because of the extraction, had one Senate seat move to the Big Island. With an additional Senate seat on Oahu, the Oahu districts would have been drawn differently. *See* Order Denying Plaintiffs' Motion for Preliminary Injunction at 13 (May 22, 2012) (Doc. 52) ("But if this group is *excluded*, then Oahu residents (and residents in an Oahu district with large concentrations of non-resident military) may have diluted representation.") (emphasis original) (citing *Garza*, 918 F.2d at 774); *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000)). Every resident of Oahu has been injured by the 2012 Plan, and Oahu residents have standing because the shifted Senate seat impacts every Oahu senatorial district.

Second, the Plaintiffs reside in districts where extracted persons also reside, which means that in Plaintiffs' districts, because of the extractions, there are a greater number of district residents competing for the attention of their representative. These are both direct injuries in fact that would be remedied by a decision that overturns the State's extractions. In the case of the Lasters (and particularly Mr. Laster), this is an even greater injury because she was likely extracted despite meeting the State's criteria for "permanent resident." The fact that Ms. Laster voted does not, as the State claims, somehow remedy the injury she has suffered as a result of her extraction. She has been treated by the State as an assumed non-voter, and assumed non-taxpayer, when she is neither. As a direct result of the State's extraction, Ms. Laster was not counted for apportionment, meaning that like Plaintiffs Kostick, Takai, Bronstrom, Veray, Walden, and Gayagas, her right to equal representation has suffered. The fact that she was extracted despite the fact that she actually participated in the election process, means only that she was injured more deeply, not less.

IV. CONCLUSION

The State has not met its high burden to justify excluding nearly 8% of its actual population from its population basis, and treating servicemembers, their families, and college students as if they do not exist. Nor has the state met its burden to justify its no "canoe district" rule, a rule which results in the gross deviations present in the 2012 Plan. This court should grant summary judgment to the Plaintiffs on Counts I and II of their First Amended Complaint.

DATED: Honolulu, Hawaii, November 19, 2012.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

/s/ *Mark M. Murakami*
ROBERT H. THOMAS
ANNA H. OSHIRO
MARK M. MURAKAMI

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