

NO. SCPW-11-0000732

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Supreme Court
SCPW-11-0000732
21-NOV-2011
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IN THE SUPREME COURT OF THE STATE OF HAWAII

THE HON. MALAMA SOLOMON, Ph.D.,
State Senator, 1st Senatorial
District; LOUIS HAO; PATRICIA A.
COOK; AND STEVEN G. PAVAO,

Petitioners,

vs.

NEIL ABERCROMBIE, in his
official capacity as Governor
and Chief Executive Officer of
the State of Hawaii; THE STATE
OF HAWAII OFFICE OF ELECTIONS;
THE 2011 HAWAII REAPPORTIONMENT
COMMISSION AND ITS MEMBERS; THE
HONORABLE VICTORIA MARKS,
Circuit Court Judge of the First
Circuit (Ret.), CHAIRMAN; LORRIE
LEE STONE, ANTHONY TAKITANI,
CALVERT CHIPCHASE IV, ELIZABETH
MOORE; CLARICE Y. HASHIMOTO,
HAROLD S. MASUMOTO, DYLAN
NONAKA, and TERRY E. THOMASON,
in their official capacities;
and SCOTT NAGO, in his official
capacity as Chief Elections
Officer, State of Hawaii,

Respondents.

ORIGINAL PROCEEDING

PETITION OF THE HON. MALAMA
SOLOMON, Ph. D, State Senator,
1st Senatorial District; LOUIS
HAO; PATRICIA A. COOK and STEVEN
G. PAVAO'S FOR:

- 1) ORIGINAL JUDICIAL REVIEW
REGARDING THE CONSTITUTIONALITY
OF THE FINAL REAPPORTIONMENT
PLAN APPROVED AND ADOPTED BY THE
2011 HAWAII REAPPORTIONMENT
COMMISSION
- 2) DECLARATORY JUDGMENT FILED ON
SEPTEMBER 26, 2011, IS INVALID
- 3) AN ORDER DIRECTED TO SCOTT
NAGO, CHIEF ELECTIONS OFFICER,
STATE OF HAWAII FILED ON
SEPTEMBER 26, 2011
- 4) AN ORDER THAT DIRECTS THE
RESPONDENTS STATE OF HAWAII 2011
REAPPORTIONMENT COMMISSISON TO
PREPARE AND TO FILE A NEW
LEGISLATIVE REAPPORTIONMENT PLAN
FOR THE SENATE OF THE STATE
LEGISLATURE THAT COMPLIES WITH
THE REQUIREMENTS OF ARTICLE 4,
§§4,6 OF THE HAWAII STATE
CONSTITUTION
- 5) AN ORDER THAT RESPONDENT
REAPPORTIONMENT COMMISSION PAY
PETITIONERS' REASONABLE FEES AND
COSTS

RESPONDENT GOVERNOR ABERCROMBIE'S
ANSWER TO PETITION FILED OCTOBER 10, 2011

EXHIBIT "A"

CERTIFICATE OF SERVICE

CHARLEEN M. AINA 1988
HARVEY E. HENDERSON, JR. 0929
Deputy Attorneys General
425 Queen Street
Honolulu, Hawai'i 96813
Tel. No.: (808) 586-1292
Fax. No.: (808) 586-1239
E-Mail: Charleen.m.Aina@hawaii.gov
Harvey.E.Hendersonjr@hawaii.gov

Attorneys for Respondent
Governor Neil Abercrombie

RESPONDENT GOVERNOR ABERCROMBIE'S
ANSWER TO PETITION FILED OCTOBER 10, 2011

Pursuant to the Order filed on November 1, 2011, and Haw. R. App. Proc. 21 and 16, Respondent Governor Neil Abercrombie answers the Petition filed by Malama Solomon, State Senator, 1st Senatorial District, Louis Hao, Patricia A. Cook, and Steven G. Pavao filed on October 10, 2011 ("Petition"), as follows:

I. CONSTITUTIONAL FRAMEWORK FOR REAPPORTIONMENT

1. Article IV, section 1 of the State Constitution entitled "Reapportionment Years," designates "the year 1981, and every tenth year thereafter . . . reapportionment years."

2. Article IV, section 2 of the State Constitution establishes a reapportionment commission for each reapportionment year and assigns it the following responsibilities:

REAPPORTIONMENT COMMISSION

Section 2. A reapportionment commission shall be constituted on or before May 1 of each reapportionment year and whenever reapportionment is required by court order.

. . .

Not more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law . . .

. . .

The chief election officer shall be secretary of the commission without vote and, under the direction

of the commission shall furnish all necessary technical services. . . .¹

3. Article IV, section 4 of the State Constitution directs that

APPORTIONMENT AMONG BASIC ISLAND UNITS

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

(Emphases added.)

¹Haw. Rev. Stat. § 25-2(a) directs each reapportionment commission to hold public hearings, prepare a proposed reapportionment plan, give the public notice of the proposed plan, allow the public "an opportunity to submit data, views, or arguments, orally or in writing, for consideration by the commission."

It also specifies how the reapportionment plan is to be finalized, published, and become effective:

[N]o . . . later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the [proposed] plan is in need of correction or modification, make the correction or modification, if any, and file with the chief election officer, a final legislative reapportionment plan. Within fourteen days after the filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final legislative reapportionment plan which, upon public notice, shall become effective as of the date of filing

4. Article IV, section 6 of the State Constitution requires a second apportionment within each basic island unit, and redistricting if necessary:

APPORTIONMENT WITHIN BASIC ISLAND UNITS

Section 6. Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable.

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

. . . .

5. Article IV, section 10 of the State Constitution provides:

Mandamus and Judicial Review

Section 10. Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or person to perform their duty or to correct any error made in a reapportionment plan, or it may take such other action to effectuate the purposes of this section as it may deem appropriate. Any such petition shall be filed within forty-five days of the date specified for any duty or within forty-five days after the filing of a reapportionment plan.

II. PERTINENT FACTS

6. The Governor asserts and admits that the following facts are pertinent to this original action:

7. The legislative history of H.B. No. 2327, 1992 Session Laws of Hawaii at page 1030, which amended article IV, section 4 of the State Constitution in 1992, to prescribe that a "permanent resident," rather than a "registered voter" population base be used to allocate the seats of the State Legislature, indicates that subsequent reapportionment plans are to be based on the total number of permanent residents counted in the last preceding U.S. Census, and that subsequent commissions should apply the reasons set out in Chapter III of the Final Report of the 1991 Reapportionment Commission to adjust the census totals, to establish the "permanent resident" population base that is to be used to allocate legislative districts to the four basic island units. See e.g., S. Stand. Comm. Rept. No. 2287, Haw. S.J. at page 1048 (1992), attached to the Petition as Petitioners' Exhibit B.

8. Chapter III of the Final Report of the 1991 Reapportionment Commission, see Petitioners' Exhibit A, outlines how that reapportionment commission adjusted the U.S. Census data to establish the permanent resident population base it used to reallocate the seats of the State Legislature in 1991.

9. The 2010 U.S. Census population totals for Hawaii and the four basic island units were:

State	1,360,301
Hawaii	185,079

Maui	154,924
Oahu	953,207
Kauai	67,091

See Presentation of Technical Committee (8-3-2011) at page 3,
<http://hawaii.gov/elections/reapportionment/2011/documents/Presentation%20of%20the%20Technical%20Committee%20-%202011-08-3.pdf>

10. In the Reapportionment Staff Presentation on Permanent Resident Population Adjustment (08-17-2011), at page 1, the staff reported that it asked "for non-permanent population data from the historical data sources to accomplish the constitutionally required population adjustment in determining the permanent resident population," including "a data set [from USPACOM] of Active Duty personnel and dependents who declare a state other than Hawaii as their home state, [and t]he data was provided segregated by U.S. Postal Zip codes." See <http://hawaii.gov/elections/reapportionment/2011/documents/Permanent%20Resident%20Population%20Adjustment%20-%2008-17-2011.pdf>

11. The 08-17-2011 report continued:

USPACOM provided the following counts:

Active Duty:

Declares state other than Hawaii as home state	47,082
Declares Hawaii as their home state	933
[Total active duty military personnel]	48,015
Active Duty dependents in Hawaii	58,949

We are in the process of evaluating the data to determine where these people live. We are then trying to place them

in Group Quarters on base; base housing on base or off-base housing through the reported U.S. Zip Code. We are trying to accomplish this in a reasonable and appropriate process.

The staff requested the universities throughout the state to provide data of students who pay out of state tuition.

The universities provided the following counts:

Hawaii Pacific University international and mainland students by address. Some of these addresses are associated with military bases or commands	3,203
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Brigham Young University Hawaii international and non-international students by address	627
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University of Hawaii System students by U.S. Zip Codes	10,493
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Chaminade University did not report From their website total enrollment of 2,781 59% Hawaii resident 41% other than Hawaii	1,140
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12. The Reapportionment Staff Presentation on Permanent Resident Population Adjustment Alternative Extraction Methods (9-6-2011), at page 5, indicates that the 2011 Reapportionment Commission did not use the non-permanent resident extraction model the 1991 and 2001 commissions used to adjust the U.S. Census totals to establish the permanent resident population base for the 2011 reapportionment. See [http://hawaii.gov/elections/reapportionment/2011/documents/Reapportionment%20Staff%20Presentation%20on%20Permanent%20Resident%20Population%20Adjustment%20-%20Alternative%20Extraction%20Methods%20\(9-6-2011\).pdf](http://hawaii.gov/elections/reapportionment/2011/documents/Reapportionment%20Staff%20Presentation%20on%20Permanent%20Resident%20Population%20Adjustment%20-%20Alternative%20Extraction%20Methods%20(9-6-2011).pdf)

13. With respect to permanent and non-permanent military residents, the Reapportionment Staff noted:

In 2011, the data received from the Defense Manpower Data Center (DMDC) does not provide residence information for military sponsors nor does it provide specific breakdowns of permanent and non-permanent residents by location.

This lack of specific data from DMDC does not allow the model used previously to be used this time.

Id., at page 5.

14. With respect to permanent and non-permanent student residents, the staff applied a disaggregation model to assign Zip Code-level non-permanent populations to individual census blocks in proportion to the total population of each census block in areas surrounding college campuses. Id., at page 9.

15. The staff developed three new models for extracting non-permanent residents from the U.S. Census Data:

Extraction A:
Census block location known, fairly certain non-permanent status
Students with full addresses
Military in Group Quarters

Extraction B:
Census block location known, less certain non-permanent status
Military living On-Base

Extraction C:
Census block location not known, fairly certain non-permanent status
Students with only Zip Codes

Id., at page 15.

16. Using each of these extraction models, the staff extracted the following non-permanent resident military-associated and university students from the 2011 U.S. Census totals to establish the 2011 permanent resident reapportionment population bases for the four basic island units:

Extraction A:

Honolulu	-15,660	937,547
Hawaii	-793	184,286
Maui	-4	154,920
Kauai	-1	67,090

Extraction B (includes Extraction A):

Honolulu	-72,609	880,598
Hawaii	-796	184,282
Maui	-4	154,920
Kauai	-143	66,948

Extraction C (includes Extraction B):

Honolulu	78,524	874,683
Hawaii	-921	184,158
Maui	-178	154,746
Kauai	-198	66,893

Id., at p. 16.

17. The staff published a third report, Reapportionment Staff Presentation on Permanent Resident Population Adjustment Alternative Extraction Methods (9-19-2011), that revised other portions of the prior two reports but did not change the extraction models or the extraction totals for the four basic island units. See <http://hawaii.gov/elections/reapportionment/2011/documents/AlternativeExtractionMethods9.19.2011.pdf>

18. The minutes of the September 19, 2011 meeting of the 2011 Reapportionment Commission indicate that by a 5-3 vote, the Commission opted to rely only on Extraction A to adjust the 2010 U.S. Census totals to establish the "permanent resident" population base for the 2011 reapportionment. See Petitioners' Exhibit T, at p. 23;
<http://hawaii.gov/elections/reapportionment/2011/documents/ReapportionmentCommissionMeetingMaterials.2011.09.23.pdf>

19. An excerpt from the Capitol TV recording of the September 19, 2011 meeting, see Petitioners' Exhibit W, also indicates that the Commission's staff acknowledged that approximately 23,000 of the 58,949 dependents of the active duty military personnel stationed in Hawaii were the spouses of the 48,015 active duty military personnel (of which 47,082 declared a state other than Hawaii as their home state), see paragraph 11 *supra*.

20. The 2011 Reapportionment Commission approved the Final 2011 Reapportionment Plan at its meeting on September 26, 2011.

21. The presentations and reports of the Commission staff, the minutes of the Commission's meetings, and the Final 2011 Reapportionment Report (some of which are reproduced here, and all of which are published on the Office of Elections' webpage) indicate that

Up to as many as 122,427 persons who are affiliated with the military in Hawaii or who are students at four of Hawaii's universities, may not be permanent residents of Hawaii;

At least 47,082 of the 122,427 persons who are affiliated with the military are active duty personnel who have declared that Hawaii is not their home state; and

Approximately 23,000 active duty dependents are the spouses of the 48,015 active duty military personnel, and could be married to the 47,082 active duty personnel who have declared that Hawaii is not their home state.

22. Those presentations, reports and minutes of Commission meetings, also indicate that only 16,458 of the 122,427 military affiliated persons and university students who are likely not permanent residents of Hawaii were extracted from the 2010 U.S. Census population of the four basic island units used to establish the Final 2011 Reapportionment Plan.

III. JURISDICTION

23. The Governor admits that Petitioner Solomon presently serves as a member of the Senate of the Twenty-Sixth Legislature of the State of Hawaii, and is a registered voter in the 1st State Senatorial District, but is without sufficient information or knowledge to form a belief as to whether Petitioners Hao, Cook, and Pavao are registered voters.

24. The Governor admits that this Court has jurisdiction pursuant to article IV, section 10 of the State Constitution and Haw. R. App. Proc. 17, to compel the Respondents, the 2011 State

Reapportionment Commission and each of its members (collectively "Commission"), and the State's Chief Election Officer, to correct any error made in the Final 2011 Reapportionment Plan the Commission filed on September 26, 2011 ("2011 Plan").

25. The Governor also asserts, however, that the Court does not have jurisdiction to adjudicate the Petitioners' claims under 42 U.S.C. § 1983 or Haw. Rev. Stat. "chapter" or § 632-1. Those civil actions can be considered by a state appellate court without the action of a trial court or agency, only upon an agreed statement of facts of the parties under Haw. R. App. Proc. 18, and this proceeding was not initiated under that rule.

IV. FAILURE TO STATE A CLAIM.

26. Petitioners do not claim that they have been deprived of any right, privilege, or immunity secured by the federal Constitution or laws, and thus fail to state a claim under 42 U.S.C. § 1983. Because Petitioners do not have a claim under 42 U.S.C. § 1983, Petitioners cannot have a claim for an award of attorney's fees under 42 U.S.C. § 1988.

27. Similarly, awards of attorney's fees may be made against the State only if the Legislature has waived the State's sovereign immunity and expressly authorized fees to be imposed against the State, or a state official or state agency. No provision of the State Constitution, or state statute or law authorizes an award of attorney's fees against any or all of the

respondent state agencies or state officials sued in their official capacities here.

V. ADMISSIONS AND DENIALS.

28. In response to the allegations contained in paragraph P1² of the Petition, the Governor incorporates and restates his admissions, denials, and other responses from paragraphs 23 through 27 immediately above. The Governor admits that this Court has jurisdiction pursuant to article IV, section 10 of the State Constitution and Haw. R. App. Proc. 17, to compel the Commission, each of its members, and the State's Chief Election Officer, to correct any error made in the 2011 Plan, denies that this Court has jurisdiction to adjudicate any claim under Haw. Rev. Stat. "chapter" or section 632-1, or 42 U.S.C. § 1983 or 1988, and is without sufficient information or knowledge to form a belief as to the truth of any and all other remaining claims and allegations in paragraph P1, and denies the same.

29. With respect to the allegations in paragraph P2 of the Petition, the Governor (a) asserts that by its own admission, the Commission did not extract all of the non-resident university students, and active duty military personnel and their dependents who declared themselves to be residents of

²Attached to this Answer as Exhibit A is a copy of the Petition to which handwritten sequential designations, i.e., "P1," "P2," etc, have been added, to identify the allegations to which the Governor's specific admissions and denials respond.

other states, from the population base it used to develop the Final 2011 Reapportionment Plan it approved and filed with the Chief Election Officer; (b) agrees with Petitioners that the 2011 Reapportionment Commission did not use the correct population base to allocate the seats of the State Senate (and the State House) under article IV, section 4 of the State Constitution, and that the Commission must be compelled to correct this error and prepare a revised Final Reapportionment Plan; and (c) denies any and all of the remaining allegations and claims in paragraph P2 of the Petition.

30. In response to the allegations and claims in paragraphs P3, P4, P5, and P6, the Governor asserts that the Commission should be compelled to (a) create a permanent resident population base for each of the four basic island units that does not include nonresident students or active duty military personnel (and their dependents) who have declared that Hawaii is not their home state; (b) use the re-created permanent resident population bases to allocate the seats of the Senate and the House to the four basic island units; (c) redraw the boundaries for the districts of the newly allocated seats; and (d) file a corrected Final 2011 Reapportionment Plan. In addition, the Governor is without sufficient information or knowledge to form a belief as to the truth of any and all other

allegations contained in paragraphs P3, P4, P5, and P6 of the Petition, and denies the same.

31. The Governor denies any and all claims and allegations in paragraph P7 of the Petition.

32. The Governor is without sufficient information or knowledge to form a belief as to the truth of any and all claims and allegations in paragraphs P8 and P9 of the Petition, and denies the same.

33. Any claim or allegation in the Petition not previously admitted, denied, or otherwise responded to in this Answer is hereby denied, and

VI. CONCLUSION.

The Governor respectfully requests that this Court compel the 2011 Reapportionment Commission to do everything necessary, including re-creating "permanent resident" population bases for the four basic island units, to correct the 2011 Reapportionment Plan it filed with the Chief Elections Officer, and assure that it complies with article IV, section 4 of the State Constitution.

DATED: Honolulu, Hawaii, November 21, 2011.

/s/Charleen M. Aina
Charleen M. Aina
Harvey E. Henderson, Jr.

Attorneys for
Respondent Governor Abercrombie