

No. 13-456

In The
Supreme Court of the United States

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

v.

SCOTT T. NAGO, in his official capacity as the Chief
Election Officer State of Hawaii; STATE OF HAWAII
2011 REAPPORTIONMENT COMMISSION; *et al.*,
Appellees.

**On Appeal from the United States District
Court for the District of Hawaii**

BRIEF OPPOSING MOTION TO AFFIRM

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**THE QUESTIONS PRESENTED
ARE SUBSTANTIAL**

“Nothing to see here folks, move along” is the State’s central theme in its response to this appeal. In Hawaii’s view, *Burns* gives it the unreviewable discretion to define and apply “permanent resident” virtually any way it chooses. And 44.22% and 21.57% deviations—percentages that blow by this Court’s 10% threshold, and make the existing high-water mark of 16% look downright amateurish? *Pshaw!* Hawaii is just so different from the other 49 states, it posits, *we won’t tolerate canoe districts, and these deviations are the best we have to do.*

Belying this narrative is the fact the State believed it necessary to add to its response a platoon of heavy-hitters, even though its arguments remain essentially unchanged from those it advanced in the District Court. But beyond the Motion to Affirm’s marquee, the State adds nothing new, and avoids the two fundamental issues presented by this appeal which challenges Hawaii’s 2012 Supplemental Reapportionment Plan (2012 Plan).

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ARGUMENT

I. THE 2012 PLAN IS ENTITLED TO RATIONAL BASIS REVIEW ONLY AFTER HAWAII HAS MET *BURNS*’S TESTS TO SHOW ITS COUNT OF “PERMANENT RESIDENTS” UPHOLDS EQUAL PROTECTION PRINCIPLES

The first issue to which the State fails to respond is: when a state chooses to count less than all of its actual residents—which, as a general principle, it un-

doubtedly may—is the criteria for judging whom the state targets for exclusion subject only to rational basis review, when these exclusions admittedly result in representational inequality? The State argues the 2012 Plan¹ is entitled to total deference, but overlooks the critical element of representational equality. Hawaii ignores the *Burns* three-part analysis, which puts the burden squarely on it to demonstrate any exclusions do not offend Equal Protection’s fundamental purpose of insuring equal representation. The State’s reading of *Burns* glosses over this Court’s analysis. Instead, like the District Court, it retreated to a tautology, assuming that because *Burns* approved excluding “aliens, transients, short-term or temporary residents, or persons denied the vote,” and since Hawaii limits its reapportionment count to “permanent residents,” then by definition all is well and a reviewing court need go further. *Burns v. Richardson*, 384 U.S. 73, 92 (1966). “Permanent,” after all, is the opposite of “temporary” or “transient.”

This asks too much. Under Hawaii’s theory, for example, its definition of “permanent resident” (which supposed the extracted persons do not have an intent to remain in Hawaii permanently because of information on a federal tax form, their familial relationships with a servicemember, or their not paying in-state tuition), also gives it the latitude to decide that “permanent residents” are only persons who have remained in the state at least 10 years. Or 50 years. Or only those born-and-raised here. In the State’s view, subjecting only servicemembers, their families,

¹ The complete 2012 Plan is available at http://hawaii.gov/elections/reapportionment/2011/documents/2012ReapportFinalReport_2012_03_23.pdf.

and students to assumptions about their supposed mental states, while automatically including aliens, prisoners, minors and others in the population without question, are merely “choices about the nature of representation.” *Id.* at 92. Since giving states the unfettered ability to exclude whomever they want surely was not what this Court intended in *Burns*, how else can such choices be evaluated for whether they support Equal Protection principles, except by applying a degree of scrutiny higher than rational basis?

Counting everyone plainly upholds representational equality, and it is never a violation to base reapportionment on all Census-included residents. Certain lesser population bases have also been deemed consistent with Equal Protection, and if a state counts U.S. citizens, that is also subject to rational basis review, because it too upholds the representational equality principle. But beyond those two populations, this Court has never given a state *carte blanche* to count a smaller population without inquiry, as the State argues. Thus, Hawaii’s count of permanent residents should have to meet the standards set forth in *Burns*.

1. As an initial matter, Hawaii must identify the “permissible population basis” against which its choice is to be compared. As noted above, this Court has only validated total population and U.S. citizens as *per se* permissible population bases. Here, unlike *Burns*, the State has not even fulfilled this initial step. The District Court simply concluded that “permanent resident” really means “Hawaii state citizen” and thus has already been deemed an acceptable population under *Burns*, even though for more than fifty years, Hawaii’s lawmakers have studiously

avoided defining state citizen because doing so would be too politically problematic (for example, it would mean that persons who may not even be entitled to remain in Hawaii at all, those who desire a separate sovereign status, and COFA migrants to whose presence the State has objected are all “Hawaii state citizens”).

2. The State’s Motion also has no answer to the most critical requirement of *Burns*: that it demonstrate the 2012 Plan is a “substantial duplicate” of one based on a permissible population basis. *Id.* at 93-94. In *Burns*, this Court approved of Hawaii’s use of registered voters only because there was no showing the resulting reapportionment plan did not approximate a plan based on total population, or citizens. *Id.* at 93. Here, by contrast, the State acknowledges the 2012 Plan is “prima facie discriminatory and must be justified by the state,” and that “federal courts generally review reapportionment and redistricting plans under a different methodology,” *See* 2012 Plan at 9, 18. Yet, it never made any effort to show that its exclusion of 108,767 Census-counted residents results in a plan similar to one based on an approved population basis, or in any other way upholds either of the two principles underlying Equal Protection. Indeed, it cannot: it admits that the 2012 Plan results in representational *inequality*, and the sole rationale it advanced in support of the exclusions—protection of everyone else’s voting power—falls under its own weight because the State automatically counts huge numbers of persons who cannot or do not vote such as aliens, prisoners, and minors, and thus possess no interest the State conceivably could be protecting.

3. The State asserts the 2012 Plan’s exclusions were not designed to exclude servicemembers, military families, and students as such, only as nonpermanent residents. But the exclusions were far from the result of a neutral effort to exclude all those who do not have the intent to remain forever. The State overlooks the fact that the Hawaii Supreme Court, in ruling on a state senator’s lawsuit, invalidated the first reapportionment plan and ordered the Commission to “extract non-permanent military residents and non-permanent university student residents from the state’s and the counties’ 2010 Census population” because they “declare Hawaii not to be their home state.” *Solomon v. Abercrombie*, 270 P.3d 1013, 1022 (Haw. 2012). It also ordered military families extracted because “the majority . . . are presumably the dependents of the 47,082 active duty military. . . .” *Id.*² In its subsequent written opinion, the court did not order any inquiry about other populations, equally numerous, that may not have the intent to remain permanently. Because the Hawaii Constitution does not define “permanent resident,” *Solomon* carried over the definition from an earlier case which concluded the phrase “equal resident populations” in the

² The State here also relies on a 1991 report to support its spouse-follows-sponsor approach. See Motion at 21 (citing App. 52). The Court should be rightly skeptical about a blanket exclusion of spouses—mostly women—based on assumptions about their mental states. See *United States v. Virginia*, 518 U.S. 515, 531 (1996). Moreover, making assumptions about the ever-evolving relationship of military spouses to servicemembers may not be accurate in the age of rapidly-changing military norms. Just a few years ago, for example, it would have been a stretch to imagine that the cadet chapel at West Point would be witnessing same-sex marriages, and that women soldiers and Marines would be training for service in the combat arms.

County of Hawaii Charter means “domiciliary.” *Citizens for Equitable & Responsible Gov’t v. Cnty. of Hawaii*, 120 P.3d 217, 221 (Haw. 2005). There, the court held that phrase “excludes nonresident college students and nonresident military personnel and their dependents from the population base for purposes of reapportioning county council districts of the County[.]” *Id.* at 219. When the State only looks at certain classes, but does not attempt to make the same inquiry to other equally-sized populations, it should not be surprising that it reaches the same result it has time and time again since statehood: that servicemembers do not merit inclusion.

In *Solomon*, after the senator instituted the original action in the Hawaii Supreme Court, the governor intervened in support. The attorney general’s office attacked the plan as invalid because the Commission had not extracted enough servicemembers, families, and students. Defending the Commission’s inclusionary plan were other deputies attorneys general.³ Within hours of oral argument, the court issued an order striking down the inclusionary plan. The Com-

³ See *Solomon*, 270 P.3d at 1014 (“Russell A. Suzuki, Diane Erickson, and Robyn B. Chun, Deputy Attorneys General, for respondents Chief Election Officer Scott Nago, State of Hawaii 2011 Reapportionment Commission, . . . Charlene M. Aina and Harvey E. Henderson, Deputy Attorneys General, for respondent Governor Neil Abercrombie.”). This led the Commission Chair, a retired state judge, to comment, “I wish the lawyer that represented the commission had understood the record better and had responded to some of the questions with better data.” See *Court voids voting district plans*, Honolulu Star-Advertiser (Jan. 5, 2012) (http://www.staradvertisr.com/newspremium/20120105__Court_voids_voting_districts_plan.html?id=136723273&id=136723273&c=n&c=n).

mission's chair also noted, "the commission understood the constitutional mandate, but had concerns about basing the exclusion on unreliable data. 'I think you're opening yourself up to a federal lawsuit if you exclude (military) dependents on an across-the-board basis,' she said, noting that some dependents are licensed nurses and public school teachers here." *Court voids voting district plans*, Honolulu Star-Advertiser (Jan. 5, 2012) (http://www.staradvertiser.com/newspremium/20120105__Court_voids_voting_districts_plan.html?id=136723273&id=136723273&c=n&c=n).

Thus, only after Hawaii has satisfied *Burns's* criteria (and the resulting assurance that its population basis of "permanent residents" is indeed a "choice[] about the nature of representation"), is it entitled to the dispositive deference the District Court gave it.

Next, we respond to the State's assertion that the lower courts are in harmony regarding what population may be counted. This 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 certiorari). This may be because the opportunity has not arisen since *Burns*, as every state but Hawaii and Kansas apportion their legislature by using Census-counted residents as the population basis.⁴ Even so, questions re-

⁴ Kansas excludes nonresident military and students. *See Essex v. Koback*, 874 F. Supp. 2d 1069, 1075 (D. Kan. 2012). But rather than basing exclusions on a set of assumptions like Hawaii, Kansas relies upon its own surveys which asks servicemembers and students whether they consider themselves Kansas residents. Most of these go unanswered, and thus Kansas ends up

garding the place of representational equality in Equal Protection's one-person-one-vote canon are growing, and the lower courts are reaching different results. *See, e.g., Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (representational equality is paramount, and city must include total population), *cert. denied*, 498 U.S. 1028 (1991); *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011) (plaintiffs asserted that one-person-one-vote meant that voting equality is paramount, and that city must count only citizen voting-age population), *cert. denied*, 133 S. Ct. 1725 (2013). The Court's long absence from the field has resulted in the definitive and growing lower court split about what population basis states and municipalities *may* use, what basis they *must* use, and the appropriate status of representational equality. The Ninth Circuit concludes that representational equality is the paramount goal of Equal Protection, while the Fourth and the Fifth Circuits leave the choice between representational and voting equality to state politics. The present appeal is the best vehicle presented in years for the Court to revisit and clarify that *Burns* does not give states and municipalities a totally free hand: the issue was definitively decided by the court below on a complete record, and it arises from the same jurisdiction as *Burns*, which means the parties are intimately familiar with the relevant history of Hawaii's reapportionment efforts over the 50 years since and thus will be better able to assist the Court in its deliberations.

extracting very few. *See Summary of the State of Kansas Adjustment to Census Figures for Reapportionment* (Sep. 12, 2011) (<http://hawaii.gov/elections/reapportionment/2011/staffreports/KansasAdj.pdf>).

Ultimately, as an appeal from a District Court under 28 U.S.C. § 1253, it matters not whether there is a lower court conflict. That there is only adds to the appropriateness of this Court's full review on the merits.

II. THE 44.22% AND 21.57% DEVIATIONS ARE NOT THE SMALLEST PRACTICABLE

The State paints our position about the 2012 Plan's extreme deviations with too broad a brush. We do not assert that Equal Protection's requirement of "substantial population equality" with only "minor" departures is a Procrustean bed, a one-size-fits-all proposition that requires that state districting be accomplished without regard to locality. Nor do we suggest that, like Congressional apportionment, state districts must be of equal size. Only that, as this Court held in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), Hawaii's reapportionment must be accomplished so that districts are "as nearly of equal population *as is practicable*," and that the State did not meet its burden of showing that the obvious fact that Hawaii is comprised of islands means that 44.22% and 21.57% deviations are the best it can do, practically.

The State tacitly admits that creating districts of more equal size statewide is not impossible, or even that difficult, simply *undesirable* because the State's "experiment" with canoe districts was unpopular. It overlooks that districts encompassing more than a single island were not simply something the State tried out and didn't like, but were imposed by the District Court in *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982), to remedy the unconstitutionality of a plan with deviations similar to those presented

here. Moreover, unpopularity is no measure of compliance with Equal Protection's requirements. After all, desegregation must have been viewed as an unpopular by the majority in the Jim Crow south, but that did not make it any less of a constitutional imperative.

The northwest-Kauai/far-east-Maui district which the State holds up as the exemplar of unpopularity is perhaps the worst such district that could conceivably be constructed, as it combined remote parts of both islands. Hana, Maui is a locale that is difficult to access from just about *everywhere*, and whose residents, because of their isolation on the far side of Maui—accessible only by air, the narrow Hana Highway, or a harrowing four-wheel drive journey—likely do not share common interests (as the State defines them), even with other Maui residents. Moreover, by drawing the district in such a manner that made it about as difficult as possible for a representative to visit each, this district was destined to disappoint. Those commissions might have created districts that were easier to access, and that had more in common (putting North Kauai with Leeward Oahu, or putting two urban areas near airports together, for example).

The fundamental problem of the State's sole focus on avoiding canoe districts at all costs is that it places representation of *islands* above representation of *people*. See 2012 Plan at 9-10 (preservation of political subdivisions is of such concern that population equality is only required within each county). This turns *Reynolds'* rule that “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests,” upside down. *Reynolds*, 377 U.S. at 56. Contrary to the

State’s claim, if left standing, the deviations here will become the new national benchmark, and the District Court’s ruling will likely augur a race to the bottom as jurisdictions nationwide claim their own “uniqueness” entitles them to similar deviations.

III. THE STATE CONCEDED PLAINTIFFS HAVE STANDING

Finally, we address the State’s assertion that only Kauai County residents could have challenged the 2012 Plan’s gross deviations. However, as the District Court noted, the State “concede[d] . . . certain other Plaintiffs have standing with respect to Count Two [the deviations].” App. at 138 n.10. Thus, as the District Court correctly concluded, “[t]his concession dooms this standing argument.” *Id.* The State’s concession also prohibits it from raising the standing argument here anew, especially when it did not cross-appeal the District Court’s ruling as it could have under S. Ct. R. 18.4.

Even in the absence of the State’s concession and failure to cross-appeal, the District Court’s rationale for concluding that we have standing to challenge the deviations is correct, since Appellants reside in underrepresented districts, and a ruling in their favor would remedy this. As the court held:

[T]he Commission argues that Plaintiffs lack standing to challenge the apportionment deviations because no Plaintiff resides on Kauai, the island that is most under-represented in the State Senate. . . . What the Commission overlooks is that three of the Plaintiffs—Kostick, Walden, and Veray—do live in underrepresented districts, albeit not on Kauai. They have standing to challenge the Commission’s appor-

tionment plan, which disadvantages them compared to residents of over-represented districts. Although the decisions cited by the Commission support the proposition that residents of *overrepresented* districts cannot challenge reapportionment plans, the same logic does not support the Commission's argument that residents of an *underrepresented* district cannot challenge a reapportionment plan as a whole.

App. at 35 (emphasis added) (citing *Fairley v. Patterson*, 493 F.2d 598, 603-04 (5th Cir. 1974) (intervenor from underrepresented district "had standing to attack the original malapportioned districts," including two others in which he did not reside)).

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CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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