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SCPW No. \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

WILLIAM M. HICKS; RALPH BOYEA;  
MADGE SCHAEFER; MICHAELA  
IKEUCHI; KIMEONA KANE; MAKI  
MORINOUE; ROBERTA MAYOR;  
DEBORAH WARD; JENNIFER  
LIENHART-TSUJI; LARRY S. VERAY; and  
PHILIP BARNES,

Petitioners,

vs.

THE 2021 HAWAI‘I REAPPORTIONMENT  
COMMISSION AND ITS MEMBERS; THE  
STATE OF HAWAI‘I OFFICE OF  
ELECTIONS; and SCOTT NAGO, in his  
official capacity as Chief Elections Officer,  
State of Hawai‘i,

Respondents.

ORIGINAL PROCEEDING

**PETITION OF REGISTERED VOTERS FOR**

- (1) A DECLARATORY JUDGMENT THAT THE FINAL LEGISLATIVE REAPPORTIONMENT PLAN ADOPTED BY THE 2021 HAWAI‘I REAPPORTIONMENT COMMISSION AND FILED ON JANUARY 28, 2022, IS INVALID;**
- (2) A WRIT OF MANDAMUS DIRECTING THE 2021 HAWAI‘I REAPPORTIONMENT COMMISSION TO PREPARE AND FILE A NEW REAPPORTIONMENT PLAN FOR THE STATE LEGISLATURE THAT COMPLIES WITH THE CRITERIA OF ARTICLE IV, SECTION 6 OF THE**

**HAWAI‘I STATE CONSTITUTION AND HAWAI‘I REVISED STATUTES  
SECTION 25-2;**

- (3) **A WRIT OF MANDAMUS DIRECTING THE CHIEF ELECTION OFFICER  
TO RESCIND THE PUBLICATION OF THE LEGISLATIVE  
REAPPORTIONMENT PLAN FILED ON JANUARY 28, 2022; AND**
- (4) **A TEMPORARY ORDER ENJOINING THE STATE OF HAWAI‘I OFFICE  
OF ELECTIONS AND THE CHIEF ELECTION OFFICER FROM  
ACCEPTING NOMINATING PAPERS FOR OFFICE IN THE STATE  
LEGISLATURE.**

**STATEMENT OF FACTS; STATEMENT OF ISSUES AND RELIEF SOUGHT; AND  
STATEMENT OF REASONS FOR GRANTING RELIEF SOUGHT**

**APPENDICES A THROUGH S**

**DECLARATION OF WILLIAM M HICKS**

**DECLARATION OF RALPH BOYEA**

**DECLARATION OF MATEO CABALLERO**

and

**CERTIFICATE OF SERVICE**

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- (4) **A TEMPORARY ORDER ENJOINING THE STATE OF HAWAI‘I OFFICE OF ELECTIONS AND THE CHIEF ELECTION OFFICER FROM ACCEPTING NOMINATING PAPERS FOR OFFICE IN THE STATE LEGISLATURE**

COME NOW Petitioners WILLIAM M. HICKS, RALPH BOYEA, MADGE SCHAEFER, MICHAELA IKEUCHI, KIMEONA KANE, MAKI MORINOUE, ROBERTA MAYOR, DEBORAH WARD, JENNIFER LIENHART-TSUJI, LARRY S. VERAY, and PHILIP BARNES, all of whom are registered voters in the State of Hawai‘i, by and through their undesigned counsel, and respectfully petition this Honorable Court pursuant to Article 4, Section 10 of the Hawai‘i Constitution; Hawai‘i Rules of Appellate Procedure Rules 17 and 21; Hawai‘i Revised Statutes Chapter 632-1; and Hawai‘i Revised Statutes Section 602-5(a), in this original proceeding for relief as follows:

**1. As to the 2021 Final Legislative Reapportionment Plan**

That this Court declare that the 2021 Final Legislative Reapportionment Plan is constitutionally defective and invalid, because it does not comply with the requirement under Section 6, Article IV of the Hawai‘i Constitution that house districts be wholly within senate districts, where practicable, and the Hawai‘i Revised Statutes Section 25-2 requirement that legislative districts be wholly within congressional districts, where practicable. Additionally, that this Court declare that the 2021 Final Legislative Reapportionment Plan is unconstitutional and invalid, because the 2021 Hawai‘i Reapportionment Commission impermissibly delegated the redistricting process to a technical committee permitted interaction group in violation of Article

IV, Sections 2, 6, and 10 of the Hawai‘i Constitution.

**2. As to Respondent the 2021 Hawai‘i Reapportionment Commission**

That this Court issue a writ of mandamus directing the 2021 Hawai‘i Reapportionment Commission to prepare and file a new reapportionment plan for the State Legislature by a date certain that (1) complies with the standards and provisions of Article IV, Section 6 of the Hawai‘i Constitution and Hawai‘i Revised Statutes Section 25-2, and (2) without impermissibly delegating the redistricting process to a technical committee permitted interaction group.

**3. As to Respondent Scott Nago, Chief Elections Officer, State of Hawai‘i**

That this Court issue a writ of mandamus directing Scott Nago, Chief Elections Officer, State of Hawai‘i, to rescind the publication of the 2021 Final Legislative Reapportionment Plan filed on January 28, 2022, pursuant to Hawai‘i Revised Statutes Section 25-2(a).

**4. As to Respondents Scott Nago, Chief Elections Officer, State of Hawai‘i and the State of Hawai‘i Office of Elections:**

That this Court enter an order temporarily enjoining Scott Nago, Chief Elections Officer, State of Hawai‘i, and the State of Hawai‘i Office of Elections from accepting nominating papers for office in the State Legislature until this matter is resolved.

**5. Other Relief**

That Petitioners be provided such further relief as may be appropriate pursuant to Article IV, Section 10 of the Hawai‘i Constitution “to correct or effectuate the purposes of the reapportionment provisions contained in the Constitution.” Haw. Const. art. IV, § 10.

DATED: Honolulu, Hawai‘i, February 23, 2022

Respectfully submitted,

/s/ Mateo Caballero

MATEO CABALLERO

Attorney for Petitioners

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**STATEMENT OF FACTS; JURISDICTIONAL STATEMENT; STATEMENT OF  
ISSUES AND RELIEF SOUGHT; AND STATEMENT OF REASONS FOR GRANTING  
RELIEF SOUGHT**

**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. STATEMENT OF FACTS ..... 3**

A. Petitioners Are a Group of Registered Voters With Diverse Interests and Backgrounds United by Their Shared Complaints About the 2021 Reapportionment Process and Final Legislative Plan. .... 3

B. Lack of Transparency and Other Irregularities Infected the 2021 Reapportionment Process from its Inception. .... 10

C. Proposal and Adoption of the Technical Committee PIG’s Initial Legislative Plan Ignored Public Testimony and District within District Requirements Without an Adequate Discussion or Explanation..... 12

D. Revisions to Permanent Resident Population Base Provided an Opportunity to Revise the Legislative Plan to Conform with All Constitutional Standards and Public Testimony. .... 17

E. Proposal and Adoption of the Technical Committee PIG’s Modified Legislative Plan Ignored Public Testimony and District within District Requirements Without an Adequate Justification. .... 18

**III. JURISDICTIONAL STATEMENT ..... 27**

**IV. STATEMENT OF ISSUES AND RELIEF SOUGHT ..... 27**

A. Issues Presented..... 27

B. Relief Sought..... 28

**V. STATEMENT OF REASONS FOR GRANTING RELIEF SOUGHT ..... 29**

A. The Hawai‘i Constitution Requires that the Final Legislative Reapportionment Plan Follows All Constitutional Redistricting Standards to Ensure Impartiality and Objectivity in the Drawing of the Legislative Plan. .... 29

1. Plain Constitutional Language Requires that House Districts Be Wholly Included Within Senate Districts Whenever It is Practicable. .... 29

2. The redistricting standards of Article IV, Section 6 seek to ensure impartiality and objectivity in the drawing of districts and to provide this Court with a standard to review claims of gerrymandering, unfair or partial redistricting, such as in Petitioner’s claims. .... 32

3. Deviation from the Article IV, Section 6 redistricting standards must be justified in relation to a compelling need to comply with other constitutional standards or provisions. .... 34

B.	Hawai‘i Revised Statutes Section 25-2 Also Requires that Legislative Districts Be Wholly Included Within Congressional Districts.....	35
C.	The Final Legislative Reapportionment Plan Failed to Follow the District within District Requirements under the Hawai‘i Constitution and Hawai‘i Revised Statutes..	38
1.	The Final Reapportionment Plan substantially deviated from the constitutional district within district requirement .....	38
2.	The Final Legislative Reapportionment Plan deviated from the statutory district within district requirement .....	39
3.	Alternative plans submitted by the public show that it was practicable to wholly include House districts within Senate districts and Legislative districts within Congressional districts. ....	39
D.	The Final Legislative Reapportionment Plan Failed to Adequately Justify the Non-Compliance with the Constitutional Requirement that House Districts be wholly Included in Senate Districts and the Statutory Requirement that Legislative Districts Be Wholly Included Within Congressional Districts.....	41
1.	This Court, not the 2021 Hawai‘i Reapportionment Commission, is the final arbiter of the meaning and application of Article IV, Section 6 of the Hawai‘i Constitution and HRS Section 25-2. ....	41
2.	Substantial deviations from district within district requirements lacked adequate justification and rendered the 2021 Final Legislative Reapportionment Plan invalid.....	42
3.	If the Court chooses to apply a deferential standard of review, the 2021 Final Legislative Reapportionment Plan is still unconstitutional and illegal. ....	46
E.	The Constitutional Requirement that House Districts Be Wholly Included within Senate Districts Not Only Protects the Integrity of the Reapportionment Process but Also Ensures More Stable and Better Representation for Hawai‘i Residents. ....	50
F.	The Commission Unconstitutionally Delegated One of Its Core Responsibilities to its Technical Committee PIG. ....	52
G.	To Maintain the Status Quo, Avoid Irreparable Harm, and Protect the Public Interest, this Court Should Preliminarily Enjoin the State of Hawai‘i Office of Elections and the Chief Election Officer from Accepting Nominating Papers for Office in the State Legislature. ....	56
<b>VI.</b>	<b>CONCLUSION</b> .....	<b>58</b>

**TABLE OF AUTHORITIES**

**Cases**

*Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787,  
135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015) ..... 1

*Blair v. Cayetano*, 73 Haw. 536, 836 P.2d 1066 (1992)..... 56

*Brown v. Thomson*, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983)..... 44

*Citizens for Equitable & Responsible Gov't v. Cty. of Hawai'i*, 108 Haw. 318,  
120 P.3d 217 (2005) ..... 39

*Dep't of Com. v. New York*, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019) ..... 50, 51

*Gao v. State, Dep't of Att'y Gen.*, 137 Haw. 450, 375 P.3d 229 (2016)..... 48

*Green Party of Hawaii v. Nago*, 138 Haw. 228, 378 P.3d 944 (2016)..... 49

*Hawai'i ex rel. Connors v. Haw. 2021 Reapportionment Comm'n*,  
SCPW-21-342 (July 7, 2021) ..... 13

*Kawamoto v. Okata*, 75 Haw. 463, 868 P.2d 1183 (1994) ..... 30, 48

*KNG Corp. v. Kim*, 107 Haw. 73, 110 P.3d 397 (2005) ..... 49

*Kolio v. Hawai'i Pub. Hous. Auth.*, 135 Haw. 267, 349 P.3d 374 (2015)..... 49, 50

*League of Women Voters of Honolulu v. State*, 150 Haw. 182, 499 P.3d 382 (2021)..... 31

*Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 363 P.3d 224 (2015)..... 51

*Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 277 P.3d 279 (2012)..... 33

*Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Hawai'i (HCDCH)*,  
117 Haw. 174, 177 P.3d 884 (2008) ..... 58

*Sierra Club v. Dep't of Transp.*, 120 Hawai'i 181, 202 P.3d 1226 (2009) ..... 32, 43

*Solomon v. Abercrombie*, 126 Haw. 283, 270 P.3d 1013 (2012) ..... passim

**Statutes**

1979 Haw. Sess. Laws Act 51, § 1 ..... 37

Haw. Rev. Stat. § 12-2.5 ..... 56

Haw. Rev. Stat. § 12-6 ..... 57

Haw. Rev. Stat. § 25-2 .....	36, 39, 40, 41
Haw. Rev. Stat. § 92-2.5 .....	10, 15, 55
<b>Other Authorities</b>	
Black’s Law Dictionary (11th ed. 2019).....	31
Merriam-Webster Online Dictionary .....	31
Stand. Comm. Rep. No. 46, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978 (1980).....	37
Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1968 (1973).....	passim
<b>Constitutional Provisions</b>	
Haw. Const. art. III, § 4 (1968).....	32, 36
Haw. Const. art. IV, § 2 .....	52
Haw. Const. art. IV, § 4 .....	3
Haw. Const. art. IV, § 6 .....	passim
Haw. Const. art. IV, § 9 .....	37

[It is] the core principle of republican government . . . that the voters should choose their representatives, not the other way around.

*Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 824, 135 S. Ct. 2652, 2677, 192 L. Ed. 2d 704 (2015) (J. Ginsburg)

## I. INTRODUCTION

Petitioners are a group of registered voters deeply concerned about their ability to democratically address the growing challenges that their islands and communities will face during the next ten years. While their interests and backgrounds are diverse, Petitioners came together through civic engagement to ensure that Hawai‘i voters during the next ten years “chose their representatives, not the other way around.”

Most of the Petitioners were enthusiastically engaged in the reapportionment and redistricting process for their islands this cycle, attending hearings, submitting written and oral testimony, and even preparing their own reapportionment plans. This level of inspiring engagement was not reciprocated by the 2021 Hawai‘i Reapportionment Commission (the “*Commission*”). During the course of 17 meetings, the Commission made a number of arbitrary decisions based on off-the-record conversations and a secretive redistricting process to ultimately adopt the 2021 Final Legislative Reapportionment Plan, which, without adequate explanation, ignored the criteria set by the Hawai‘i Constitution and Hawai‘i Revised Statutes (“*HRS*”).

Specifically, Article IV, Section 6 of the Hawai‘i Constitution requires that house districts be wholly included within senate districts, where practicable, and HRS Section 25-2 requires that legislative districts be wholly included in congressional districts, where practicable (together, the “*district within district requirements*”). The 2021 Final Legislative Reapportionment Plan overwhelmingly ignored these requirements, as 35 of 51 house districts

were not wholly included within a senate district and nine legislative districts out of 51 such districts on O‘ahu were not wholly included within congressional districts. *See* App. A-1–A4 (final district maps). More importantly, however, the plan ignored these district within district requirements, when for this reapportionment cycle, it was eminently practicable to put two house districts into a senate district, as demonstrated by the various redistricting maps submitted by Petitioners, using the Commission’s own maps as a starting point.

The Commission’s shifting explanations for ignoring the district within district requirements were not reasonable, grounded in the relevant criteria, or tailored to explain specific deviations from those criteria. These poor rationalizations were compounded by the Commission unconstitutionally delegating its authority to redistrict to four commissioners, while exempting that group of four from giving public notice, maintaining minutes, or holding open meetings. Thus, the legislative maps were drawn almost entirely in secret with little revealed about such process to the public, or even the remaining five commissioners during the Commission’s open meetings.

The end result was a final legislative reapportionment plan that excluded the public, ignored constitutional and statutory criteria, and was not justified by the public record, except for pro-incumbency comments made by commissioners about trying to keep historic district lines the same and avoiding changes to senate maps. In other words, the 2021 Final Legislative Reapportionment Plan was drawn almost exclusively behind closed doors and ignored the district within district requirements, seemingly to favor certain incumbent legislators in direct violation of Article IV, Section 6, which provides that “[n]o district shall be so drawn as to unduly favor a person or political faction.” Haw. Const. art. IV, § 6 (2<sup>nd</sup> criterion).

The Hawai‘i Constitution and laws promise the public a reapportionment process based on criteria and requirements that seek to ensure impartiality and objectivity in the preparation of reapportionment plans and to avoid gerrymandering, unfairness, and partiality in the final maps. Such promises are fundamental to our representative democracy, particularly in times of political division and cynicism, because they ensure proper and effective representation. Based on these promises, Petitioners ask this Court to void the 2021 Final Legislative Reapportionment Plan and its publication, direct the Commission to prepare a new constitutionally compliant plan, and enjoin the acceptance of nominating papers for office in the State Legislature, until this Petition is resolved. Only this Court, not the Commission, has the power to keep alive those promises.

## II. STATEMENT OF FACTS

### **A. Petitioners Are a Group of Registered Voters With Diverse Interests and Backgrounds United by Their Shared Complaints About the 2021 Reapportionment Process and Final Legislative Plan.**

Petitioners are a group of 11 registered voters spanning three different basic island units.<sup>1</sup> Six petitioners are from the island of Hawai‘i, four are from the island of O‘ahu, and one petitioner is from the island of Maui. While the petitioners all have diverse interests, affiliations, and backgrounds, they all share a deep appreciation for the importance of the reapportionment process in a democracy. They also all have serious complaints about the transparency and constitutionality of the 2021 reapportionment process and final legislative plan.

Petitioner William M. Hicks is a retired Navy Captain with a combined 48 years of service both on active duty in the U.S. Navy and as the civilian Director or Deputy Director of

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<sup>1</sup> For purposes of reapportionment, the Hawai‘i Constitution recognizes “four basic island units, namely: (1) the island of Hawai‘i, (2) the islands of Maui, Lāna‘i, Moloka‘i and Kahoolawe, (3) the island of O‘ahu and all other islands not specifically enumerated, and (4) the islands of Kaua‘i and Niihau.” Haw. Const. art. IV, § 4.

Submarine Operations at COMSUBPAC. Mr. Hicks has lived 28 of the last 36 years in the Enchanted Lake neighborhood in Kailua on O‘ahu. He has been registered to vote in Hawai‘i since around 2005, when he retired from active military duty and registered to vote soon thereafter. In the 2011 reapportionment, Mr. Hicks was assigned to House District 51 and Senate District 25. Mr. Hicks is also the Kailua Neighborhood Board Chair. Mr. Hicks first got involved in the 2021 reapportionment process when he learned that the Hawai‘i Reapportionment Commission had proposed that his House district wrap around beyond Makapu‘u Point into the Portlock neighborhood of Hawai‘i Kai. As further discussed below, Mr. Hicks submitted several proposed redistricting maps for O‘ahu to the Hawai‘i Reapportionment Commission for consideration. He did so to show both that the Makapu‘u wraparound House and Senate districts were unnecessary and that adhering to all constitutional criteria was both possible and preferable. His main complaint with the 2021 Final Legislative Reapportionment Plan is that it does not wholly include house districts within senate districts, making it less likely that elected officials will have a shared understanding of their community’s needs, complicating legislative coordination, and making it more difficult for neighbors to effectively advocate for their common interests to the Legislature. Altogether, these factors will diminish the effective representation of the people of Hawai‘i.

Petitioner Ralph Boyea was the Hawai‘i Division Chief of the Hawai‘i Government Employees Association when he retired. He has lived in Hawai‘i since 1974 and has been a politically involved registered voter since 1976. For over 45 years, he has lived on a two-acre lot in Puna on the Island of Hawai‘i. Since the 2011 reapportionment, Mr. Boyea has been assigned to House District 4 and Senate District 2. He first got involved in the 2021 reapportionment process when he learned that his rural community of large lots with no municipal sewage system,

paved roads, postal service, or high-speed internet would be part of a single house district together with parts of urban Hilo. Like Mr. Hicks, Mr. Boyea also submitted to the Commission various district maps for the island of Hawai‘i. These maps used the Commission’s proposed Senate maps as a starting point and divided each Senate district into two House districts that, unlike the 2021 Final Legislative Reapportionment Plan, did not submerge rural communities like his into urban areas, and did not cross senate lines. Mr. Boyea is particularly concerned about the 2021 Final Legislative Reapportionment Plan’s unexplained and arbitrary deviations from the constitutional criteria in Article IV, Section 6 of the Hawai‘i Constitution.

After retiring from a career in politics in California, Petitioner Madge Schaefer permanently moved to Hawai‘i 25 years ago. She now lives in Kihei on the island of Maui. Since moving to Hawai‘i, she has been registered to vote and has not missed an election. In the 2011 reapportionment, Ms. Schaefer was assigned to House District 11 and Senate District 6. While Ms. Schaefer was not particularly involved in the 2021 reapportionment process, she served in the Maui Advisory Council to the Hawai‘i Reapportionment Commission during the 2001 and 2011 reapportionment processes. Ms. Schaefer is bothered that the 2021 Final Legislative Reapportionment Plan does not include Maui’s house districts wholly within senate districts as the 2011 reapportionment plan did. She does not feel this discrepancy is in the best interest of her community, as legislation needs to pass both houses of the legislature, but under the new plan, the interests of her senator and house member will be, like the lines in their districts, misaligned.

Petitioner Michaela Ikeuchi was born and raised on the Island of Hawai‘i, where she still lives and is now a marketing manager. Upon turning 18, she registered to vote and was assigned to House District 5 and Senate District 3. As a Hawaiian and a Keauhou resident, Ms. Ikeuchi has deep concerns about the 2021 Final Legislative Reapportionment Plan and the submergence

of Native Hawaiian and poorer rural communities with wealthier coastal areas on the Kona coast. She wants her representatives to focus on increasing access to social services in underserved areas, ocean conservation, and water use issues, particularly in light of how overdevelopment and drought have led to sewage spills and water use restrictions in her community. Ms. Ikeuchi is also concerned that the 2021 reapportionment process disregarded residents' concerns about transparency and keeping communities together, and feels a responsibility to future generations to remedy that.

Petitioner Kimeona Kane, the director for community outreach at a local environmental non-profit and Waimānalo Neighborhood Board Chair, was born and raised on a dairy farm in the Waikupanaha area of Waimānalo on the island of O'ahu. While at first he was not interested in local politics, he began paying attention in 2018 and registered to vote for the first time around then. At that time, Mr. Kane was assigned to House District 51 and Senate District 25. Mr. Kane got involved in the 2021 reapportionment process because he wanted to ensure that Waimānalo and Native Hawaiians are properly and effectively represented at the Legislature and in Government. Like many in his community, he is fearful that rezoning will change the agricultural, conservation, and rural character of the lands in Waimānalo; that new luxury development across O'ahu will displace Native Hawaiian communities, including those living in homesteads; and that home values will make Waimānalo unaffordable to long-time residents and future generations of Waimānalo residents. Mr. Kane is concerned that the 2021 Final Legislative Reapportionment Plan squeezes Waimānalo between Hawai'i Kai and Kailua in the senate district, submerging his rural community into wealthier and more politically connected neighborhoods. He is also concerned that the 2021 Final Legislative Reapportionment Plan divides the Papakolea homestead into two separate house districts.

Petitioner Maki Morinoue is an artist, small business manager, and a fourth generation (Yonsei) Japanese-American from the Hōlualoa village on the island of Hawai‘i. After living in New York City for many years, she returned to Hōlualoa in 2016 and became a Hawai‘i registered voter shortly thereafter. Under the 2011 Final Legislative Reapportionment Plan, she was assigned to House District 6 and Senate District 3. Ms. Morinoue is concerned about preserving the agricultural character, water rights, and history of Hōlualoa as a village of farmers and paniolos, and part of the breadbasket of Hawai‘i. She is concerned that the 2021 Final Legislative Reapportionment Plan unnecessarily places Hōlualoa together with more dense coastal areas from Kailua-Kona to Hōnaunau, and that consequently rural and agricultural areas are not likely to be adequately represented at the Legislature.

Petitioner Roberta Mayor is a retired teacher and education administrator as well as the Hawai‘i Kai Neighborhood Board Chair. She was born and raised in Hawai‘i, but also lived and worked in California, and has been registered to vote in Hawai‘i ever since she returned to Hawai‘i after retiring in 2009. She was assigned to House District 17 and Senate District 25 by the 2011 Final Legislative Reapportionment Plan. The Hawai‘i Kai Neighborhood Board was the first to pass a resolution opposing the proposed 2021 Legislative Reapportionment Plan, which would have placed parts of Hawai‘i Kai in a house district together with Waimānalo and part of Kailua. As the Hawai‘i Kai Neighborhood Board Chair, she recognizes the importance of having senators and representatives who come from the Hawai‘i Kai community. For example, the 2011 Final Legislative Reapportionment Plan divided Hawai‘i Kai into two house districts and two senate districts, which, in turn, span three separate house districts each, with Hawai‘i Kai not having a plurality of the representation in either senate district. Thus, for the past ten years, her community has not had knowledgeable representation in the senate and she asserts that under the

2021 Final Legislative Reapportionment Plan that problem would continue for another ten years unless this court grants the relief requested in this Petition.

Petitioner Deborah Ward has lived in Hawai‘i for 55 years, including 40 years in Kurtistown on the island of Hawai‘i. She is a retired University of Hawai‘i extension educator and professor, a farmer of produce and ornamental plants, and recent chair of the Hawai‘i Island Group of the Sierra Club of Hawai‘i. Ms. Ward registered to vote around 1967 and worked on the campaign of Patsy Mink. Under the 2011 Final Legislative Reapportionment Plan, she was assigned to House District 3 and Senate District 2. She cares about the socio-economic challenges of her community, including homelessness, food insecurity, and lack of social services. She is concerned that the 2021 Final Legislative Reapportionment Plan would submerge rural communities on the island of Hawai‘i into urban communities with vastly different environmental and socio-economic interests.

Petitioner Jennifer Lienhart-Tsuji moved to Hawai‘i in 1995. She lives in Waikōloa Village on the Island of Hawai‘i and currently practices social work. She is keenly aware of the lack of resources outside of the urban centers of the island. For example, even though it is a growing residential area, Waikōloa lacks a library, a high school, and a police sub-station. High school students from Waikōloa have to travel by bus over 45 miles every day to the closest high school in Kailua-Kona. Waikōloa Elementary School is over-crowded and not prepared for the anticipated influx of new residents and children. The access roads to and from Waikōloa require much needed repairs and the formal establishment of safe evacuation routes, particularly because the community is at risk of wildfires nearly every year. The village is already growing exponentially south of Waikōloa Road. The 2021 Final Legislative Reapportionment Plan splits Waikōloa Village in half along that road. This is of great concern to Ms. Lienhart-Tsuji, as

Waikōloa Village’s growing needs would have less focused house representation because the community is divided between two districts. It is also her opinion that the Reapportionment Commission did not take the concerns of the community seriously and that the reapportionment process was unnecessarily opaque and unaccountable to the public.

Petitioner Larry S. Veray is a retired Navy Command Master Chief with a combined 52 years of both active duty in the U.S. Navy and as a Scientific Engineering Technical Advisor assigned to the U.S. Indo-Pacific Command. Mr. Veray, now fully retired, has lived in Hawai‘i for the past 34 years in the Waiau area of Pearl City. For the past 17 years, he has volunteered his time with the Pearl City Neighborhood Board, of which he is the current Chair. Mr. Veray got involved with the 2021 reapportionment process when he learned that the Hawai‘i Reapportionment Commission had proposed that Pearl City be divided into four house and four senate districts. Previously, Pearl City had two house and two senate districts, which were already too many. Mr. Veray repeatedly testified before the Hawai‘i Reapportionment Commission asking that Pearl City not be divided this way. He offered to discuss potential solutions with the Commission’s technical committee, but he was never contacted by anyone associated with the technical committee. Mr. Veray is greatly concerned that his community will now have to contend with eight legislators, none of whom will necessarily be from Pearl City or make Mr. Veray’s neighborhood their priority.

Petitioner Philip Barnes is a retired teacher who has lived in Hawai‘i since 1998 and in Hilo for the past 10 years. Even though Mr. Barnes’ home sits just across the Wailuku River—a mere three blocks away from Hilo’s Post Office and Public Library—the 2021 Final Legislative Reapportionment Plan places him in a house district that runs from northern Hilo all the way to Waipi‘o Valley, a distance of some 50 miles. From his perspective, his urban interests are out of

sync with the more rural interests of the rest of the Hāmākua coast, which is decidedly not urban. Mr. Barnes strongly believes the rural and agricultural areas, which historically have been submerged to Hilo and Kailua-Kona-centric political interests, should finally have adequate representation in the Legislature, so that they can receive much needed government support to achieve the unfulfilled promise of food sustainability in Hawai‘i.

**B. Lack of Transparency and Other Irregularities Infected the 2021 Reapportionment Process from its Inception.**

Beginning with its very first meeting, the 2021 Hawai‘i Reapportionment Commission suffered from various irregularities that seriously call into question the Commission’s independence, transparency, and accountability to the public throughout the entire reapportionment process.

The 2021 Hawai‘i Reapportionment Commission had its first meeting on April 13, 2021, for the purpose of appointing and electing the Chair. *See* App. B-2 (item IV); *see also* April 13, 2021, HRC Meeting Video at 16:07:12—16:31:00, *available at* [https://youtu.be/SF6K7IoVY\\_0](https://youtu.be/SF6K7IoVY_0). A mere seven minutes into the meeting, Commissioner Nonaka was ready to nominate HMSA CEO, Mark Mugiishi for the post, explaining that he had private “initial conversations” with other commissioners about it already. April 13, 2021, HRC Meeting Video at 16:09:18—16:13:30.<sup>2</sup> In addition, in advocating for Mr. Mugiishi’s neutrality, Commissioner Nonaka admitted that “this is obviously a political process and there’s a lot of interest that, you know, weigh on the different members.” April 13, 2021, HRC Meeting Video at 16:10:42—16:10:01. After the nomination was made, the Commission on a five to three vote rebuffed Commissioner

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<sup>2</sup> While Hawai‘i Revised Statutes allow for two or more members of a board, but less than a quorum, to discuss the selection of the board’s officers, this action went beyond the mere selection of officers as they were in fact also appointing a new board member. *See* HRS § 92-2.5(c).

Kennedy’s efforts to allow an opportunity to consider other nominees. April 13, 2021, HRC Meeting Video at 16:24:29—16:28:39. After that, without any significant discussion about his qualifications, the Commission voted six to two to appoint Mr. Mugiishi as Chair. April 13, 2021, HRC Meeting Video at 16:11:39—16:12:15, 16:22:56—16:23:15, 16:28:39—16:30:28.

After the vote, Commissioner Kennedy remarked in disbelief:

I can’t imagine that that was a legal way to do that, so only because again we don’t have the opportunity to nominate anybody else. You just nominate one person and then we vote and they win and that other people don't get consideration. So I'm just going to put that on the record that I’m not sure that that was handled correctly. You can add it to the minutes.

April 13, 2021, HRC Meeting Video at 16:30:28—16:31:02.

The appointment of Mr. Mugiishi as Chair based on private, off-the-record conversations was not the only irregular and secret action taken early on by the Commission. On its very next meeting, Chair Mugiishi proposed the formation of two permitted interaction groups (“*PIG*”), one to draft rules for the 2021 Reapportionment Commission based on the rules of the 2011 reapportionment process, and a second technical committee *PIG* for, according to the agenda, the “Preparation of Proposed Reapportionment Plans.” App. B-4 (item VII). In discussing these committees, Chair Mugiishi emphasized the importance that no more than four members be part of any committee in accordance with Sunshine laws pertaining to public meetings: “I can appoint you to those [committees]. However, because of Sunshine law rules, there can only be four commissioners on the committee . . . . Because there can only be four, I would ask that only one member from each appointing authority join any committee so that we will only have a maximum of four.” App. D-1:16-21. Some Commissioners then admitted that they had already spoken in advance about who would be in each committee. App. D-3:12-13. Commissioner Kennedy, who once again had not been part of the conversations among commissioners between

official meetings, then remarked with pointed concern: “How do you guys all know you’re supposed to talk before the meetings about things?” App. D-3:15-16. After voting on the creation of the two committees, Chair Mugiishi appointed Commissioners Nekota, Nonaka, Ono, and Rathbun to the technical committee PIG and Commissioners Kennedy, Chin, Chipchase, and Rathbun to the rules committee PIG. App. D-5:1-5.

A major change that avoided the application of Sunshine rules was introduced at the next meeting on July 6, 2021. The rules committee PIG proposed changes to the 2011 reapportionment rules so that PIGs would not have to meet publicly or be subject to notice, public comment, and record keeping, like they were supposed to do in 2011. App. H-14 (Rule 18). At the next meeting on July 20, 2021, the Commission received significant testimony raising concerns about secrecy, which Chair Mugiishi admitted had “a common theme about transparency.” July 20, 2021, HRC Meeting Video at 09:14:17, *available at* <https://youtu.be/ieL8vpM2HVY>. The Commission nevertheless approved the proposed rules without any open discussion about these major changes to the 2011 process. App. C-10 (item V); July 20, 2021, HRC Meeting Video at 09:17:00—09:33:42 (with almost 15 minutes in executive session). Thus, in a matter of three back-to-back meetings following the rushed appointment of Chair Mugiishi, a group of four commissioners from the technical committee PIG was put in charge of the Commission’s main constitutional mandate of preparing proposed reapportionment plans, while shielding the PIG from public view, record keeping, and accountability.

**C. Proposal and Adoption of the Technical Committee PIG’s Initial Legislative Plan Ignored Public Testimony and District within District Requirements Without an Adequate Discussion or Explanation.**

Due to COVID-19 delays in the Census data, on July 7, 2021, this Court granted the Commission two extensions: (1) to issue public notice of the Commission’s proposed legislative

and congressional reapportionment plans until January 8, 2022, and (2) to file the Commission’s final legislative and congressional reapportionment plans with the Chief Election Officer no later than February 27, 2022. *See Hawai‘i ex rel. Connors v. Haw. 2021 Reapportionment Comm’n*, SCPW-21-342, Dkt. No. 3 (July 7, 2021). The Census Bureau released its data to the states on August 12, 2021, and on August 26, 2021, the Commission held a meeting to review that data. App. B-10 (item VI).

During the meeting, reapportionment staff made a presentation explaining their method for extracting non-permanent residents from the Census data in accordance with this Court’s decision in *Solomon v. Abercrombie*, 126 Haw. 283, 270 P.3d 1013 (2012). App. C-12. The presentation proposed extracting 64,415 non-permanent military residents and their dependents. App. I-1. This was a significant departure from the 2011 data, which had extracted 95,447 non-permanent military residents and their dependents. App. J-1–J-2. Thus, Commissioner Kennedy raised questions about the data’s accuracy and asked whether “anyone [had] ask[ed] why 30% drop in military numbers since 2010?” *See* Aug. 26, 2021, HRC Meeting Video at 11:53:15—12:05:15, available at <https://youtu.be/zJIEaUx4Ip0>. Since no commissioner on the technical committee PIG had seriously inquired about the discrepancy, Commissioner Kennedy took it upon herself to do so. *Id.*

On September 9, 2021, the Commission held a meeting where the Commission voted to accept the permanent resident population base (and extractions) presented at the August 26, 2021, meeting. App. C-12 (item V). At that same meeting, there was a presentation on two proposed congressional reapportionment plans: (1) a plan that maintained precisely the same congressional districts approved in 2011 and (2) a plan that shifted a few census blocks around the Ko Olina and Barber’s Point area from Congressional District 1 into Congressional District 2

to slightly lower the population deviation. *See* Sep. 9, 2021, HRC Meeting Video at 16:23:00 (slide), *available at* <https://youtu.be/GvQ90kYoBUU>. Finally, the Commission also voted on the Standards and Criteria for the reapportionment of congressional and legislative districts. App. C-15 (item VII); K-1–K-6. In addition to adoption of the constitutional and statutory criteria, including the district within district requirements, the standards and criteria for both the legislative and congressional maps added a preference for maintaining district lines, which presumably would benefit incumbents: “While not mandatory, it is beneficial in the development of plans if the existing boundaries can be used as a starting [point] which can be adjusted to reflect current data. This will facilitate tracking where changes have been made.” App. K-6.

At the next meeting, on October 14, 2021, the Commission approved the second congressional reapportionment plan with the lower population deviation. App. C-18 (item VI). At that meeting, there was also a presentation on the proposed legislative reapportionment plan. *Id.* (item VII). The presentation emphasized the bipartisan nature of the process, with “give and take from both parties,” and explained that “[t]he technical permitted interaction group worked very hard to minimize changes to existing district lines,” and used current districts “as their starting point.” *See* Oct. 14, 2021, HRC Meeting Video at 13:19:20—13:19:42 (Commissioner Ono discussing bipartisan nature of process), 13:25:40-13:26:00 (reapportionment staff discussing maintenance of existing lines), 13:28:30—13:28:39 (reapportionment staff discussing use of existing districts as starting point), 14:01:50—14:02:00 (Commissioner Nakota discussing give and take from both parties); 14:02:58—14:03:16 (Commissioner Nonaka discussing collaborative bipartisan process) *available at* <https://youtu.be/JaasLoc8FQI>. Discussion of the guidelines followed, including various constitutionally required standards—such as compactness, contiguousness, and non-submergence—but it was not mentioned that the technical committee

PIG considered or tried to follow the district within district requirements. Oct. 14, 2021, HRC Meeting Video at 13:44:20—13:46:35. The presentation and discussion also did not disclose with whom the technical committee PIG had communicated, what type of community outreach it had done, any fact findings supporting deviation from the constitutional and statutorily required standards, or details about what considerations the committee may have given more weight and why.

At the next meeting, on October 28, 2021, although the proposed plans had already elicited significant testimony against them, the Committee adopted the proposed legislative reapportionment plan without making any changes. App. C-20 (item VII). While various commissioners, including Commissioner Kennedy, expressed reservations about the proposed legislative plan, the vote was presented as an opportunity to move the process forward and trigger the 20-day notice period for public comment. Otherwise, they claimed if they made further changes and did “not approve the proposed maps [that day, they would] have to have a minimum of two more commission meetings before [they could] do it.” Oct. 28, 2021, HRC Meeting Video at 14:30:54—14:31:20, 14:36:00—14:39:30, available at <https://youtu.be/sqIqGwHca3Q>. This “problem” was created by the technical committee PIG, which, under Sunshine law, required the PIG “to bring another proposed plan [to the Commission, which would] then vote on it on a subsequent meeting.” *Id.* at 14:30:54—14:31:20; *see* HRS § 92-2.5(b)(1)(C) (requiring that deliberation and decision making on a matter investigated by a PIG take place at a duly noticed meeting subsequent to the meeting at which the findings and recommendations of the investigation are presented).

After holding 11 public hearings and receiving overwhelming testimony against the proposed legislative reapportionment plan, including from 11 neighborhood boards representing

about 300,000 people on O‘ahu, on December 22, 2021, the technical committee PIG presented a revised proposed legislative reapportionment plan. App. C-22 (item VIII); App. L-1–L25. Once again, the presentation did not disclose the individuals with whom the PIG had communicated, the type of community outreach it had done, any fact findings supporting deviation from the required standards and from public testimony, or details about the considerations to which the committee had given most weight.

With one minor exception, the revised plan made no changes to the senate maps for any island unit. *See* Dec. 22, 2021, HRC Meeting Video at 15:28:21—15:35:21, *available at* <https://youtu.be/9ApGyxKAu04>. The revised plan also made no changes to the house map for Kaua‘i, and it made only relatively small changes to the house maps for Maui and the Island of Hawai‘i, thus ignoring significant testimony in opposition from the latter island. *Id.* While the house map for O‘ahu did include some material changes—correcting, for example, the division of Mānoa Valley down the middle into two separate house districts—the maps did not address various issues raised by the neighborhood boards, including the proposal to have House District 51 wrap around Makapu‘u Point, joining parts of Kailua, Waimanalo, and Hawai‘i Kai together. App. M-1.

In defending the wraparound house district against significant testimony in opposition, Chair Mugiishi remarkably explained:

About House District 51, so one of the comments that Commissioner Ono made at the beginning was that this map creates some synergy between the senate map and the house map. And I guess what I’m trying to understand is why people would object to having a senator and a representative unified and representing their district. Because the legislative process, in order for anything to happen, you need both houses, both chambers of the legislature, to agree. And so, if you have a district that has synergy between the representative getting elected by the same constituency as the senator, you have a much better chance of

affecting meaningful change for your community. And so I guess I'm trying to understand why people would object to aligning their senate map and their house map. I would think that would be a wonderful thing to do.

App. D-6:1-10. After Commissioner Kennedy proposed changing the senate map to also fix the “horrible mistake” of making the senate district also a wraparound district 20 years ago, Chair Mugiishi defended the decision to not make any changes to the senate maps in cryptic, pro-incumbent terms: “Again, changing the senate map would be massively disruptive, right? Because, as you know, there are much fewer senators. So if you’re going to start to change the senate map, the whole island of O‘ahu will explode.” App. D-6:21-23.

**D. Revisions to Permanent Resident Population Base Provided an Opportunity to Revise the Legislative Plan to Conform with All Constitutional Standards and Public Testimony.**

Commissioner Kennedy’s request for additional information about the non-permanent resident military numbers proved constructive. After receiving additional data in October and November 2021 that cast doubt upon the initial military extraction numbers, on December 29 and 31, 2021, the Commission received additional data from the U.S. Department of Defense’s Defense Manpower Data Center (“*DMDC*”) confirming that there were around 99,967 military non-permanent residents that needed to be extracted from the Census data. App. N-1.

At the January 3, 2021, meeting, staff made a presentation to the Commission on the new DMDC numbers, explaining that the larger extraction would result in the shift of a house district from O‘ahu to the Island of Hawai‘i. App. N-1; App. C-24 (item VI). At the following meeting on January 6, 2022, Petitioner Hicks testified in detail about how the proposed maps failed to satisfy the constitutional criteria, including the district within district requirement:

The Constitution discusses wholly including house districts within a single senate district. On O‘ahu, the technical committee's final plan has four house districts that straddle four senate districts.

That's four cases where a single representative has to coordinate with four senators to represent the house district. There are another seven house districts on O'ahu that straddle three senate districts. In Maui County, there are three senate districts and six house districts, so it should be entirely practicable to exactly align two house districts fully within each senate district, but in no case was this done. Why not? Not once has an explanation been offered to the full commission or to the public as to why this constitutional provision has been disregarded.

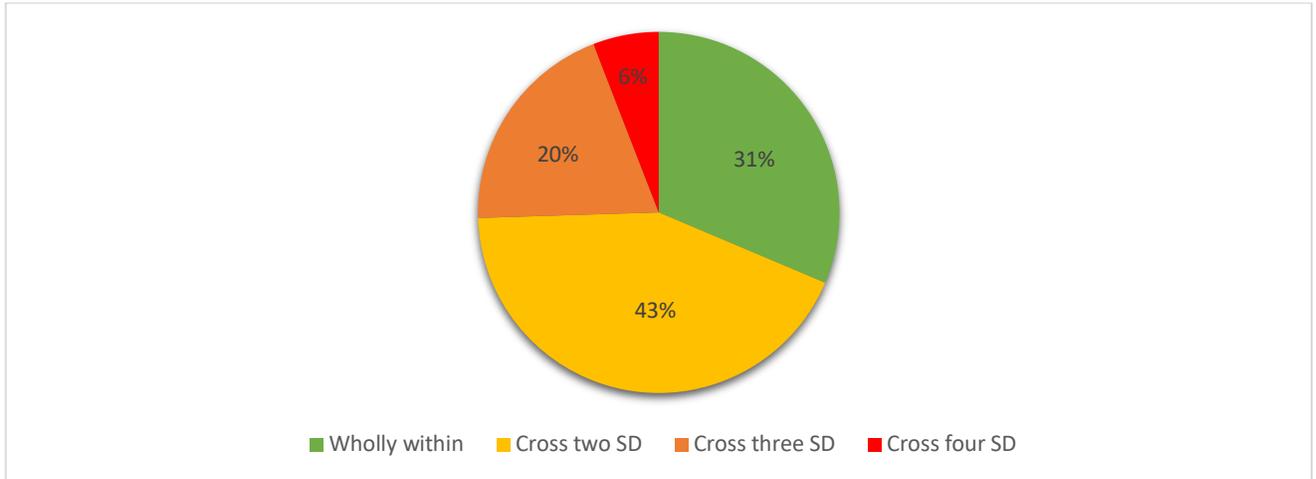
Jan. 6, 2022, HRC Meeting Video at 10:09:56—10:10:42, *available at*

<https://youtu.be/F4Of9MvQ5MA>. In turn, the Commission voted to accept the new extraction numbers and to revise all legislative maps. App. C-27–C-28 (items VI & VII). Thus, the Commission was given the perfect opportunity to listen to public testimony and conform its plans with all constitutional standards as Petitioner Hicks had just suggested. The commission failed to do so.

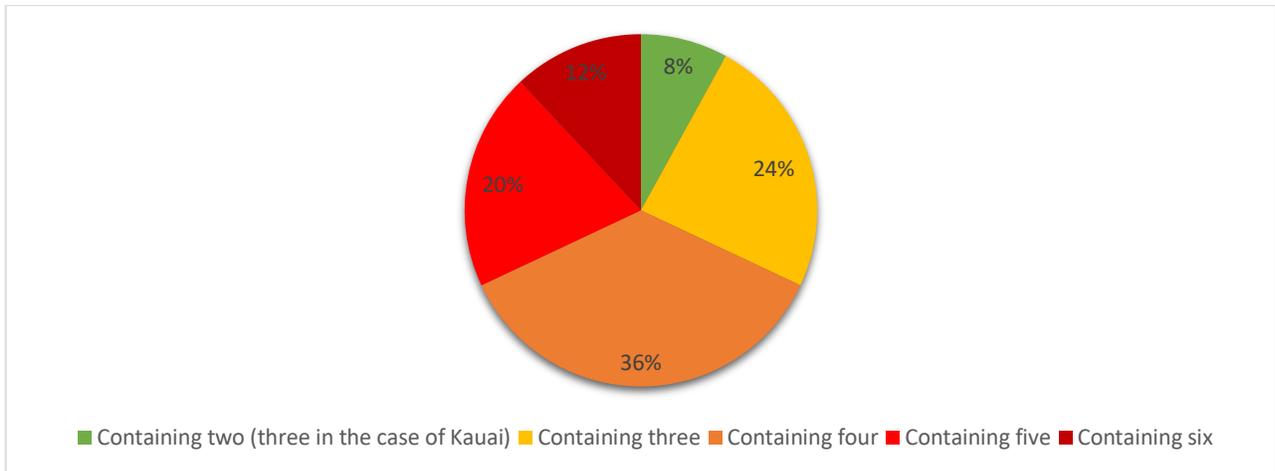
**E. Proposal and Adoption of the Technical Committee PIG's Modified Legislative Plan Ignored Public Testimony and District within District Requirements Without an Adequate Justification.**

On January 13, 2022, the technical committee PIG presented a new set of legislative plans to the Commission. The revised plans made no changes to the proposed legislative maps for Maui and Kaua'i, and also made no changes to the senate map for the Island of Hawai'i. App. O-1. Thus, the changes focused on the legislative maps for O'ahu and the house map for the island of Hawai'i. Only 16 out of 51 house districts (31%) and, by extension, two out of 25 senate districts (8%) satisfied the district within district constitutional requirement. App. P-1–P-2. Four house districts and five senate districts also crossed congressional lines. App. P-2.

Percentage of house districts that cross multiple senate districts



Percentage of senate districts containing two, three, four, five, or six house districts



At that January 13, 2022 meeting, several testifiers, including Petitioners Hicks and Boyea among others, testified against the revised plans and demanded an explanation for the Commission ignoring the district within district requirements. *See, e.g.*, Jan. 13, 2022, HRC Meeting Video at 13:34:40—13:38:00 (Petitioner Hicks testimony), 13:44:40--13:48:03 (Petitioner Boyea testimony), available at <https://youtu.be/p6JUITHMrfU>. In response to this chorus of complaints, various commissioners offered differing explanations for not wholly

including house districts within senate districts as required by the Constitution, none of them adequate, responsive, or compelling.

After presenting the revised plans, Commissioner Nonaka first attempted to explain the technical committee PIG's reasons for not following the district within district requirements. His explanation conflated facts and terms, making it difficult to follow and was nonsensical in the discussion of population imbalance and number of districts:

One more thing I wanted to just address and bring up for consideration. There was some comment made about the Congressional districts, not splitting house and senate districts, and house districts being inside of senate districts. And just from a practicality standpoint, the congressional districts are based on a dramatically different population base than the house and senate districts, right? So it's not possible, let alone practicable, to have the congressional districts wholly contain house and senate districts just because there's such an imbalance of population, right? Most of the population was extracted from CD1 and so you're going to have a big imbalance and it's just not going to match up to stay inside of the deviations. And the same is true of the house and the senate. We have an unequal amount of house and senate districts on O'ahu and so it's something that that would be difficult and you'd have to do it for some. It definitely wouldn't be possible for all. So if you start from that and make that a guiding principle, it's going to be hard to follow. So that's something that you know we're definitely aware of and we heard in the public comment process but was discussed and that's kind of conclusion we came to. It is not necessarily practical to make that happen.

App. D-8:1-14.

Following the public testimony, Commissioner Kennedy asked her colleagues for an explanation as to why the technical committee PIG did not follow the district within district requirements. This was the only substantive discussion that the Commission had in all of its 17 regular meetings about its reasons for ignoring the district within district requirement for 35 house districts and caused all but two senate districts to include more than the minimum number

of house districts. The discussion, which also did not adequately address these significant deviations in a meaningful or detailed way, is reproduced in full below:

Commissioner Kennedy: If I can get one of the commissioners from the technical committee to help us understand it, we'll stop moving forward a lot of testimony on that situation. So basically I'm just trying to make sure that the Commission—I wrote it down to make it easier—that we can address the senate districts crossing six house districts and vice versa, like with house 28 and 34. They're crossing four senate districts, right? So I feel like it would go a long way—Dyl or one of you guys—if you could just share that you actually did take that into consideration or if you didn't, why? Or how you guys put that together, just so everyone knows that you're looking at both sides of the law and trying to do this; you know to the best of your ability. But can you share your thoughts on how senate crossing house and house crossing senate was taken a look at?

Commissioner Nekota: I'd like to answer that Robin. Senator Kidani happens to be my senator. She now, in this right now, as we said, has five representatives in her senate district. They have worked very well together, done a whole lot of things for the community. And I just think having people working together like that is more important than just taking away numbers. I mean she will tell you quite honestly that it's worked very well for her. Got to know districts that maybe you would not know if you only had two. And I'm going to go back to what Clare [Tamamoto] said. We're one island, we all have one focus and it's to make life better. And she's brought up Red Hill and that is a huge, huge factor right now. Not only is it impacting Red Hill, but it's impacting all of our water and I think people are forgetting that that it's not just about one little community, but it is about the island.

Commissioner Nonaka: Let's also take into account that interpretation of the Constitution is everybody's opinion. And we can do all of the things that people say that or are commenting that are not constitutional. And then I can find six more reasons why once we make that change, it's not constitutional too. So again this goes back to not everybody's going to be happy. Clearly, after we address many things there's still many unhappy people, but I'm looking over the public submissions and I have been since they came in and you know I can point out just as many flaws and inconsistencies with the constitutional and statutory guidelines as anybody else can. I'm not going to individually criticize people's submissions, but the reality is that there are communities on those

maps that you know unite Hau‘ula with Waikele in central O‘ahu and I mean you do stuff like that, those communities would complain just as heavily as the ones that we’re hearing from in the last couple of months. So I just think there’s no way to satisfy everybody’s constitutional guideline or everybody’s interpretation of a constitutional guideline. And that’s why there’s “where practicable” language in the statute and we always got to make the best decision possible to meet those guidelines. And you know try and do the best job we can.

Commissioner Kennedy: I guess the bottom line is you guys did take that into consideration, it just wasn’t practicable.

Commissioner Nonaka: Yeah, you have to do it, you have to do a lot of arbitrary splitting. I mean there’s areas in these maps, where Waikele for example, in central O‘ahu is split into three different house districts. So again it just depends on where you’re looking. If you focus in on one area you can find things to criticize, you can find something in the constitution that it violates. But if you're trying to do where practicable, all the way around deal with deviations, deal with keeping communities together. There’s a lot of communities who like the district that they have and don't want to see it change very much and that's something that we have to take into consideration too. If we just arbitrarily stick districts within other districts, it's going to greatly change the historic districts that have existed for decades and so that’s another consideration that’s got to be taken into account. We don’t just arbitrarily draw lines to fit population bases and constitutional requirements that you know, our interpretation of a constitutional requirement, we got to take a lot of other things into account. And I fully respect everybody’s opinion that our job wasn't perfect, but I don’t think anybody’s would be in everybody’s eyes.

Commissioner Kennedy: That’s awesome, thank you.

Chair Mugiichi: I think, you know, Commissioner Nakota, Commissioner Kennedy, Commissioner Nonaka, thanks for that discussion. Because I think what it articulates well is that we are as a Commission considering all of those statutory requirements and constitutional requirements that that is asked of us and we are doing our best to make sure to the extent that it's practicable that we are following them. But sometimes they're in conflict with each other and that's where that's why we have a commission rather than a computer program drawing these lines. It’s because human beings who are going to care about people and individual neighborhoods, are going to make judgment calls on what's the

best way to make a practical decision about a conflict between two principles. And that's why I think again, and I've said it about four times already, but I really do appreciate the work of the technical committee because they've been doing this now for weeks, months, and for the last few days every single hour of the day to try and consider all of those factors. Because we're going to affect people and that's so we're going to follow the constitution, we're going to follow the law and we're going to do our best to take care of people. So thank you again. Commissioner Chun, you have your hand.

Commissioner Chun: Thank you, Mr. Chair. As you know I was not on the technical committee and I know the maps we're discussing have to do with the Big Island and O'ahu. But I just like to comment on this topic. I'd just like to comment on a generalization, an assumption concerning Maui that was raised in testimony that I would like to clarify and it kind of speaks to this discussion. So here on Maui, as an example, shifts in population and differing rates of growth in population between Central Maui and West Maui have necessitated the movement of a house district lines across large expanses of unpopulated lands essentially connecting Wailuku with Lahaina. And that said, the public in central Maui, which of course is our population center, has expressed an interest in at least at minimum having representation by a central Maui house member or a central Maui senator. So in order to meet this goal on Maui, it became infeasible to neatly and nicely align two house districts with one senate district as has been the case in the past and still meet the mandate of balancing populations between districts. So I would just submit on that it's not practicable or even preferable necessarily to be hamstrung with the idea of you know aligning two house districts and one senate district in every instance throughout the state of Hawai'i.

App. D-8:17–D11:7.

After the January 13, 2022, meeting, Petitioners Hicks and Boyea submitted two plans to the Commission for consideration: a senate map for O'ahu submitted on January 16, 2022 (the "**Hicks Plan**") and a house map for the Island of Hawai'i submitted on January 19, 2022 (the "**Boyea Community Plan**").<sup>3</sup> App. E-1, F-1. Both plans were constructed in similar fashion. The

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<sup>3</sup> Both petitioners had previously submitted other plans, but this Petition will focus on these last plans submitted by each petitioner.

Hicks Plan took the technical committee PIG's last proposed house map for O'ahu as a starting point and then created senate districts simply by joining two house districts together. *See* Dec. of William M. Hicks at ¶¶ 7-8. The Boyea Community Plan, in turn, took the technical committee PIG's last proposed senate map for the Island of Hawai'i and then drew lines to divide each senate district into two roughly equally populated house districts while trying to keep communities together. *See* Dec. of Ralph Boyea at ¶¶ 7-8. The plans showed that including exactly two house districts within each senate district was not only practicable, but it was straightforward. In fact, both the Hicks and Boyea plans created maps with lower overall population deviations than the deviations in the technical committee plans. Furthermore, both the Hicks and Boyea plans provided for greater community continuity than did the technical committee plans.

On January 20, 2022, overwhelming testimony was presented against the technical committee's proposed plans, which included continued requests from residents that the district within district requirements be followed, and a request that the professional staff make a side-by-side comparison of the two O'ahu senate plans. Petitioner Hicks also submitted a PowerPoint presentation explaining his methodology for preparing the Hicks Plan and explaining how his plan better met the constitutional criteria. App. R-1–R-36. In response, the Commission had a general, non-substantive discussion that did not specifically address the statutory and constitutional requirements. App. D-12:1–D-14:7. Significantly, the Chair of the Hawai'i Advisory Council, Steven Pavao, testified about the Boyea Community Plan, acknowledging that it was a good, practicable plan that met the requisite constitutional requirements:

Good afternoon chair and commissioners. I just wanted to report that we did have a meeting [Hawai'i Advisory Council] on Tuesday night the 18<sup>th</sup> of January and that the majority testimony and testifiers were in favor of the Boyea plan for the Hawai'i

island. The commission had a lot of discussion about it. We did not vote to endorse any specific plan, but the commission did note that the plan does well meet the criteria. It does well in keeping communities intact. It does a good job of keeping two house districts in each senate district. The advisory commission noted all of that and thought that the plan, all in all, was a good plan and that it did meet the criteria. I realize that the criteria and constitution are guidelines. But where practical, what that plan presents to me is that it is practicable to meet most of the criteria. Given the reality of that plan, the commission noted the effort of the community that put the time and energy to create the plan. And again, as I said, we didn't endorse any specific plan, but we did acknowledge that the plan meets the majority of the criteria and does a good job in redistricting the eight house districts for the Big Island. Thank you.

App. D-14:12-25.

During the next two meetings, on January 21 and 22, 2022, the Commission continued to receive overwhelming testimony against its last proposed legislative plan, including from several of the Petitioners to this action. Several testifiers continued to question the Commission's failure to adhere to the constitutional district within district requirements. The Commission, however, did not respond to the testifiers or further comment on those legal requirements during either of these meetings. *See* Jan. 21 and 22, 2022, HRC Meeting Videos, *available at* <https://youtu.be/CAEYGuEa3Bk> and <https://youtu.be/aGfH7BvkqRE>.

On January 26, 2022, the technical committee PIG proposed a revised legislative reapportionment plan that only made very minor revisions to House Districts 48 and 49 from the maps they proposed on January 13, 2022. App. Q-1. In discussing the practicability of including house districts wholly within senate districts, like the Hicks and Boyea Community Plans did, Commissioners Kennedy and Nonaka had the following exchange. In doing so, Commissioner Nonaka apparently conceded that the Hicks and Boyea Community Plans were doable, but were

somehow now untimely, despite the fact that they were based on the technical committee's own plans for O'ahu house and Big Island senate districts.

Commissioner Kennedy: Dyl, I was just wondering is there any way, because obviously you guys have done a great job of handling the Makapu'u Point thing, Kailua, Waimanalo, Hawai'i Kai [relating to the house district, but not the senate district], you guys listened and we appreciate that. Is there any opportunity for any of the technical committee to please just try to communicate the whole Senate and House practicability, because I think that's obviously now we've moved on to that, you know, the majority of speakers are talking about. Is there anything you guys can help them understand so it can be less adversarial as far as why we couldn't follow those constitutional criteria, or that criteria? Is there anything you guys can help them understand with that?

Commissioner Nonaka: That essentially would be a redraw of the whole map and we'd have to, and we'd have to start over, and we would have a whole separate set of issues to deal with in terms of opposition to certain parts of it and details that people would have different opinions on. So I mean I get it, I totally understand the desire to do it. It's never been done in the past, and it's, you know, it's never had a crushing effect on elections or communities, so yeah, I think it's the more of an issue of timing and do we want to go down that road and redraw the whole map and start over again and, you know, potentially raise other issues, a whole set of separate issues that could come up.

Commissioner Kennedy: So when you take a look at Bill Hicks's or Mr. Boyea's, neither of those, because they've already done it, that doesn't help you guys? You'd really have to start over?

Commissioner Nonaka: We haven't had any public input on those maps, you know, I mean, the public hasn't looked at those and said, hey this is something I like or I don't like. I mean, there's people advocating for it, but they haven't examined in a close way just to criticize whether or not they, you know, it works and again, there's a whole separate set of issues when the Senate map's not perfect, the House maps is not perfect, and maybe some place in between works, right, a solution that bridges the gap in between the two, in between both of them. So, it was looked at, it's just, I mean, I think, do we really want to start over and pose a whole different map right now and not give the public time to comment on it.

App. D-15:3–29.

On January 28, 2022, after a thirteen-minute discussion, the Commission voted to approve the January 26, 2022, legislative reapportionment plan with Commissioner Kennedy as the only no vote against the plan. App. C-42 (item VI), D-17:1–D-21:15. During that brief discussion, Commissioner Nishimura, truthfully stated: “I would like to point out to everyone that we on Kaua‘i have been fortunate that we are probably one of the few that meet all of the criteria of the constitution, whether it be a guideline or a dictate.” App. D-20:6-8. Petitioners, who live in the other three island units, filed the instant petition not only to share in Commissioner Nishimura’s good fortune, but more importantly, to benefit from the proper application of Hawaii’s Constitutional and statutory law pertaining to redistricting.

### **III. JURISDICTIONAL STATEMENT**

Because this matter arises under Article IV, Section 6 of the Hawai‘i Constitution and Petitioners are all registered voters who seek to compel the 2021 Reapportionment Commission to perform their duty and correct errors made in the legislative reapportionment plan, this Court has original jurisdiction under Article IV, Section 10 of the Hawai‘i Constitution to consider this Petition and take the necessary actions to grant effective relief under these sections.

### **IV. STATEMENT OF ISSUES AND RELIEF SOUGHT**

#### **A. Issues Presented**

1. Without a compelling justification may the 2021 Final Legislative Reapportionment Plan violate Article IV, Section 6 of the Hawai‘i Constitution by substantially deviating from the requirement that house districts be wholly included in senate districts?

2. Without a compelling justification may the 2021 Final Legislative Reapportionment Plan violate Hawai‘i Revised Statutes Section 25-2 by deviating from the statutory requirement that legislative districts be wholly included in congressional districts?

3. Did the 2021 Reapportionment Commission violate its mandate under Article IV, Section 6 of the Hawai‘i Constitution by delegating the redistricting process to the technical committee PIG?

## **B. Relief Sought**

### **1. As to the 2021 Final Legislative Reapportionment Plan**

First, Petitioners request a judicial determination that the 2021 Final Legislative Reapportionment Plan is constitutionally defective and invalid, because it does not substantially comply with the constitutional requirement that house districts be wholly within senate districts, where practicable, and the statutory requirement that legislative districts be wholly within congressional districts, where practicable. Additionally, Petitioners request a judicial determination that the 2021 Final Legislative Reapportionment Plan is unconstitutional and invalid, because the 2021 Hawai‘i Reapportionment Commission impermissibly delegated the redistricting process to a technical committee permitted interaction group.

### **2. As to Respondent the 2021 Hawai‘i Reapportionment Commission**

Second, Petitioners request a writ of mandamus directing the 2021 Hawai‘i Reapportionment Commission to prepare and file a new reapportionment plan for the State Legislature by a date certain that (1) complies with the standards and provisions of Article IV, Section 6 of the Hawai‘i Constitution and Hawai‘i Revised Statutes Section 25-2, including the district within district constitutional and statutory requirements, and (2) without impermissibly delegating the redistricting process to a technical committee permitted interaction group.

**3. As to Respondent Scott Nago, Chief Elections Officer, State of Hawai‘i**

Third, Petitioners request a writ of mandamus directing Scott Nago, Chief Elections Officer, State of Hawai‘i, to rescind the publication of the 2021 Final Legislative Reapportionment Plan filed on January 28, 2022, pursuant to Hawai‘i Revised Statutes Section 25-2(a).

**4. As to Respondents Scott Nago, Chief Elections Officer, State of Hawai‘i and the State of Hawai‘i Office of Elections**

Fourth and last, to both maintain the status quo and avoid irreparable harm, Petitioners request that this Court enter an order temporarily restraining Scott Nago, Chief Elections Officer, State of Hawai‘i, and the State of Hawai‘i Office of Elections from accepting nominating papers for office in the State Legislature until this matter is resolved.

**V. STATEMENT OF REASONS FOR GRANTING RELIEF SOUGHT<sup>4</sup>**

**A. The Hawai‘i Constitution Requires that the Final Legislative Reapportionment Plan Follows All Constitutional Redistricting Standards to Ensure Impartiality and Objectivity in the Drawing of the Legislative Plan.**

**1. Plain Constitutional Language Requires that House Districts Be Wholly Included Within Senate Districts Whenever It is Practicable.**

Article IV, Section 6 mandates that house districts shall be wholly included within senate districts for all island units, where practicable. The plain meaning of this section requires that the legislative reapportionment plan include house districts within senate districts, without house districts spanning two or more senate districts, whenever it is practicable.

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<sup>4</sup> Since this is an original proceeding, there is no applicable standard of review. *Kawamoto v. Okata*, 75 Haw. 463, 467, 868 P.2d 1183, 1186 (1994) (“Kawamoto’s application implicates the original jurisdiction of this court, and his equal protection argument presents a question of law. Therefore, there is no standard of review.”). In addition, because this Petition does not concern a legislative enactment by a co-equal branch of government, Petitioners should not be required to demonstrate a violation of the Hawai‘i Constitution beyond a reasonable doubt. *See Solomon*, 126 Haw. at 293, 270 P.3d at 1023 (holding that error in population base rendered the 2011 final reapportionment plan invalid).

Article IV, Section 6 of the Hawai‘i Constitution provides in full:

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:

1. No district shall extend beyond the boundaries of any basic island unit.
2. No district shall be so drawn as to unduly favor a person or political faction.
3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
4. Insofar as practicable, districts shall be compact.
5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams, and clear geographical features, and, when practicable, shall coincide with census tract boundaries.
6. Where practicable, representative districts shall be wholly included within senatorial districts.
7. Not more than four members shall be elected from any district.<sup>5</sup>
8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Haw. Const. art. IV, § 6. This case primarily concerns the sixth criterion listed.

The canons of constitutional construction that apply to Article IV, Section 6 are clear:

Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawai‘i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.

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<sup>5</sup> This refers to multimember districts, *i.e.*, a single district electing two or more representatives or senators.

[T]he general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.

Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

*League of Women Voters of Honolulu v. State*, 150 Haw. 182, 189, 499 P.3d 382, 389 (2021), *as corrected* (Nov. 4, 2021) (brackets in original) (quoting *Sierra Club v. Dep't of Transp.*, 120 Hawai'i 181, 196, 202 P.3d 1226, 1241 (2009)).

The meaning of the sixth criterion following the “where practicable” clause is plain enough: house district lines should not cross senate district lines and cannot lie in two or more senate districts. Even the Commission’s own standards and criteria make that clear. App. K-6 (“The state house of representative districts should be wholly included within the state senate districts. In other words, a representative district should not lie partly in one senate district and partly within another senate district.”).

In turn, the ordinary and legal meanings of the word “practicable” coincide. *Compare* PRACTICABLE, Black’s Law Dictionary (11th ed. 2019) (“reasonably capable of being accomplished; feasible in a particular situation”) *with* PRACTICABLE, Merriam-Webster Online Dictionary (“capable of being put into practice or of being done or accomplished : FEASIBLE”), *available at* <https://www.merriam-webster.com/dictionary/practicable>. Thus, the natural reading of the sixth criterion is that the house districts shall be wholly contained within senate districts where that is capable of being accomplished or feasible or being done, *i.e.*, doable. Conversely, an unexcused failure to follow this criterion, where it was practicable to do

so, as it was in this case, violates Article IV, Section 6 of the Hawai‘i Constitution and renders a reapportionment plan constitutionally invalid. *See Solomon*, 126 Haw. at 293, 270 P.3d at 1023 (invalidating the reapportionment plan because it did not utilize the total number of permanent residents under Article IV, Section 4 of the Hawai‘i Constitution).

**2. The redistricting standards of Article IV, Section 6 seek to ensure impartiality and objectivity in the drawing of districts and to provide this Court with a standard to review claims of gerrymandering, unfair or partial redistricting, such as in Petitioner’s claims.**

The intent of the framers of Article IV, Section 6, as evidenced by the relevant constitutional convention papers, further supports the proposed plain language interpretation of the district within district requirement.

“In order to give effect to the intention of the framers and the people adopting a constitutional provision, an examination of the debates, proceedings and committee reports is useful.” *Nelson v. Hawaiian Homes Comm’n*, 127 Hawai‘i 185, 198, 277 P.3d 279, 292 (2012) (citations omitted). Here, the eight criteria of Article IV, Section 6 were first enacted with the Hawai‘i Constitution of 1968 and have not changed since. *Compare* Haw. Const. art. III, § 4 (1968) (subsection on “Apportionment within basic island units”) *with* Haw. Const. art. IV, § 6.

The standing committee report on reapportionment from the 1968 constitutional convention explains the following about these criteria:

Your Committee has also placed in this section a number of guidelines for the reapportionment commission to follow when redistricting. These are largely the same as the criteria initially adopted by your Committee for its own districting and discussed in section III, subsection 7 (b), *supra*. It is not intended that these guidelines be absolute restrictions upon the commission excepting for numbers 1, 2, 3 and 7 which are stated in mandatory terms. The remainder are standards which are not intended to be ranked in any particular order. Rather, your Committee believes that they are matters that should be considered in any decision concerning districting and that the balance to be struck among them is a matter

for case-by-case determination. The inclusion of these guidelines is intended to aid the reapportionment commission in maintaining impartiality and objectivity in its own reapportionment plan and to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.

Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968 ("*Proceedings*"), at 265 (1973).<sup>6</sup>

From this history, it is clear that the redistricting standards of Article IV, Section 6 seek to maintain impartiality and objectivity in the redistricting process. Proceedings at 265. While

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<sup>6</sup> The relevant portion in section III, subsection 7(b) of the Committee Report referenced in this paragraph provides the following about the district within district requirement as the Committee applied it to its own redistricting efforts:

*Except where districts constitute entire islands or counties, the senate districts should be larger than representative districts, and senate district lines should avoid cutting across a house district.* The traditional concept of bicameralism that senate districts shall be larger than house districts was retained by your Committee. Your Committee, however, sought to draw senate district lines in such a fashion that they fell along representative district lines and cut across no representative district. The adopted plans successfully follow this policy, except in one minor instance. This criterion is adopted in a more general, less restrictive manner for future reapportionment.

Proceedings at 247 (italics in original). From this paragraph, it is clear that the Committee on reapportionment sought to strictly follow the district within district requirement in drawing lines "except in one minor instance." Thus, Commissioner Nonaka's comment that placing house districts within senate districts has "never been done in the past" is simply wrong. App. D-15:14-15. Admittedly, the Committee also adopted this standard "in a more general, less restrictive manner for future reapportionment." Proceedings at 247. This makes sense, because there are situations where it is simply not possible to wholly fit house districts within a senate district. For example, when there are seven house districts and four senate districts, as was the case on the Island of Hawai'i after the 2011 reapportionment. That being said, this does not mean that this requirement can simply be ignored. Instead, as the Committee Report explains it "should be considered in any decision concerning districting" and be considered by this Court "to review of claims of gerrymandering or other unfair or partial result in the apportionment plan." Proceedings at 265.

the criteria, including the district within district requirement, are not all meant as “absolute restrictions,” these standards must and should be followed when practicable, because they “provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.” *Id.* This same purpose is also evidenced by the other criteria.<sup>7</sup>

For instance, the second criterion in Section 6 states that “[n]o district shall be so drawn as to unduly favor a person or political faction.” *See* Haw. Const. Art. IV, § 6. While this standard is mandatory, it is also difficult to enforce, because a plan favoring a person or political faction will not necessarily be obvious on the face of the plan. On the other hand, lack of compliance with the district within district requirement is rather obvious, as it is an entirely objective criterion, which this Court can easily assess. Thus, compliance with it and the remaining criteria is important, as the unexplained failure to follow them when practicable likely entails that the final plans, in fact, tend to favor a person or political faction. In other words, as the Constitutional Convention’s Committee Report explains, this Court must assess a reapportionment plan’s level of compliance with each of the criteria to guard against gerrymandering, submergence, unfairness, and partiality.

**3. Deviation from the Article IV, Section 6 redistricting standards must be justified in relation to a compelling need to comply with other constitutional standards or provisions.**

The Constitutional Convention’s Committee Report also makes clear that deviations from the Article IV, Section 6 redistricting standards should be justified in relation to a compelling

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<sup>7</sup> While Article IV, Section 6 provide that “the commission shall be guided by [the] criteria,” the Constitutional Convention’s Committee Report makes clear that this guidance was not merely directory as four of the criteria are strictly mandatory and the rest have to be followed unless not practicable because they conflict with other constitutional criteria. Proceedings at 265.

need to comply with other constitutional standards. In other words, this Court and the Reapportionment Commission should not look beyond those standards and the Constitution, or create their own standards, to justify deviations from what is required by law.

While four of the criteria are mandatory, the report states that “[t]he remainder are standards which are not intended to be ranked in any particular order” and that “the balance to be struck *among them* is a matter for case-by-case determination.” Proceedings at 265 (emphasis added). Thus, the use of the word “practicable” and “possible” in different criteria are not meant to rank the standards in any way. Additionally, while not all of the standards are mandatory, the Constitutional Convention Committee recognized that there could be trade-offs and a balance to be struck *among* the remaining standards. Thus, any deviations from the Article IV, Section 6 redistricting standards should be justified in relation to a compelling need to comply with other constitutionally mandated requirements. This means that in reviewing this Petition, this Court should not accept as justification from the Commission any rationale for not following the district within district requirement that is not firmly grounded in the need to comply with other constitutional criteria. *See* Proceedings at 265 (“The inclusion of these guidelines is intended to aid the reapportionment commission in maintaining impartiality and objectivity in its own reapportionment plan and to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.”).

**B. Hawai‘i Revised Statutes Section 25-2 Also Requires that Legislative Districts Be Wholly Included Within Congressional Districts.**

The Hawai‘i Revised Statutes chapter on reapportionment also imposes a duty on the Reapportionment Commission to follow certain criteria for effecting the redistricting of congressional districts. In this respect, HRS Section 25-2(b) provides in the relevant part:

Congressional reapportionment. At times that may be required by the Constitution and that may be required by law of the United States, the commission shall redraw congressional district lines for the districts from which the members of the United States House of Representatives allocated to this State shall be elected. The commission shall first determine the total number of members to which the State is entitled and shall then apportion those members among single member districts so that the average number of persons in the total population counted in the last preceding United States census per member in each district shall be as nearly equal as practicable. In effecting the reapportionment and districting, the commission shall be guided by the following criteria:

- (1) No district shall be drawn so as to unduly favor a person or political party;
- (2) Except in the case of districts encompassing more than one island, districts shall be contiguous;
- (3) Insofar as practicable, districts shall be compact;
- (4) Where possible, district lines shall follow permanent and easily recognized features such as streets, streams, and clear geographical features, and when practicable, shall coincide with census tract boundaries;
- (5) Where practicable, state legislative districts shall be wholly included within congressional districts; and
- (6) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

HRS § 25-2(b). These are the same criteria from Article IV, Section 6 of the Constitution with only two criteria missing: (1) the requirement that district lines do not extend beyond basic island units, which would not be feasible for two congressional districts and four basic island units, and (2) the requirement that no more than four members be elected from a single district, which would not be applicable. *See* Haw. Const. art. IV, § 6, criteria 1 & 7. Thus, the statute seeks to apply to congressional redistricting the same criteria that apply to legislative redistricting.

The legislative history of HRS Section 25-2 confirms these central principles. The 1968 Hawai‘i Constitution did not delegate the drawing of congressional district lines to the Reapportionment Commission. *See* Haw. Const. art. III, § 4 (1968). The 1978 Hawai‘i

Constitution changed that by moving the reapportionment section from Article III and adding the following provision to a new Article IV: “The commission shall, at such times as may be required by this article and as may be required by law of the United States, redraw congressional district lines for the districts from which the members of the United States House of Representatives allocated to this State by Congress are elected.” Haw. Const. art. IV, § 9; *see also* Stand. Comm. Rep. No. 46, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 601 (1980) (“Section 4 was removed from Article III because your Committee amended the section to empower the reapportionment commission to redraw congressional districts in addition to the reapportionment of the state legislature.”). After this change, in 1979, the Legislature amended the Hawai‘i Revised Statutes Section 25-2, adding the six criteria listed above for congressional redistricting, for the explicit purpose of “conform[ing] the Hawai‘i Revised Statutes to the Hawai‘i State Constitution as amended by the Constitutional Convention of 1978.” 1979 Haw. Sess. Laws Act 51, § 1 at 94. Thus, the congressional districting criteria in HRS Section 25-2(b) must be interpreted in tandem with the legislative criteria in Article IV, Section 6 of the Hawai‘i Constitution.

Pursuant to the prior analysis, this means that under the plain reading of the statute, legislative districts must be wholly contained in congressional districts whenever feasible, *i.e.*, doable, and that deviations from this standard must be justified in reference to the need to follow other constitutional or statutory standards.

**C. The Final Legislative Reapportionment Plan Failed to Follow the District within District Requirements under the Hawai‘i Constitution and Hawai‘i Revised Statutes.**

**1. The Final Reapportionment Plan substantially deviated from the constitutional district within district requirement**

The 2021 Final Legislative Reapportionment Plan places 35 house districts (68.6%) in two or more senate districts, and, by analogy, all but two senate districts (92%), one being Kauai, do not satisfy the district within district requirement. App. A-1–A4; P-1–P-2.<sup>8</sup> Here, more than 68 percent of house districts do not comply with the district within district requirement, and, by extension 92 percent of senate districts contain more than the minimum achievable number of house districts. Given that all 51 House districts are reasonably able to be fully contained within one senate district, due to each island group other than Kaua‘i having an even number of House districts for the 2021 reapportionment cycle, the fact that 35 House districts are not compliant with the standard demonstrates a total disregard for and lack of an honest and good faith effort to comply with the constitutional requirement to draw house districts wholly within senate districts where practicable. *Cf. Solomon*, 126 Haw. at 294, 270 P.3d at 1024 n. 8 (“Apportionment under article IV, section 6 requires the Commission to make an honest and good faith effort to construct districts as nearly of equal population as is practicable.” (cleaned up)).

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<sup>8</sup> While the Petition does not challenge the population deviations for the final districts, population deviation cases may be instructive in assessing compliance with the district within district requirements. For purposes of determining whether a plan complies with the requirement that “the average number of permanent residents per member in each district [be] as nearly equal to the average for the basic island unit as practicable,” deviations of more than 10 percent from the target population base are treated as constitutionally suspect. *See* Haw. Const. art IV, § 6; *cf. Citizens for Equitable & Responsible Gov’t v. Cty. of Hawai‘i*, 108 Haw. 318, 336, 120 P.3d 217, 225 (2005), *amended on reconsideration in part* (Sept. 22, 2005) (in a case involving county districts, not legislative districts, “an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate.” (citations omitted)).

**2. The Final Legislative Reapportionment Plan deviated from the statutory district within district requirement**

The 2021 Final Legislative Reapportionment Plan also places four O‘ahu house districts and five O‘ahu senate districts into both congressional districts. App. A-4; P-2. This amounts to 11.8 percent of all legislative districts not complying with the statutory district within district requirement. However, because neighbor island districts do not touch the border between Hawaii’s two congressional districts, a better measure of compliance would be based on the 51 legislative districts on O‘ahu, in which case, the percentage of non-compliant districts increases to 17.6 percent. While not quite as dramatic as the non-compliance percentage for the district within district constitutional requirement, the number and percentage of legislative districts that do not comply with HRS § 25-2(b)(5) one in six on O‘ahu—is substantial.

**3. Alternative plans submitted by the public show that it was practicable to wholly include House districts within Senate districts and Legislative districts within Congressional districts.**

While placing all house districts wholly within senate districts may not always be doable for every island unit, in this current reapportionment cycle, it is. Indeed, where there are an even number of house districts in an island unit, it will generally be feasible, *i.e.*, doable, to put exactly two house districts together to form each senate district as the Hicks Plan for O‘ahu senate districts and Boyea Community Plan for the Island of Hawai‘i house districts do. App. E-1, F-1. Doing so makes sense, because if the proposed house and senate districts satisfy the remainder of the requirements, as the 2021 Reapportionment Commission claims they do, then drawing the senate map based on the house map or vice versa is relatively straightforward and quite practicable. Indeed, the 2021 Final Legislative Reapportionment Plan’s non-compliance with the district within district requirements are particularly egregious when examined next to the Hicks Plan for the O‘ahu senate districts, the Boyea Community Plan for the Island of

Hawai‘i house districts, and the Reapportionment Commission’s 2012 Legislative Plan for Maui County, where all house districts are fully contained within a senate district.

Similarly, building the congressional districts using the legislative districts will cause all but one house or senate district to be wholly contained within a congressional district. In this current reapportionment cycle, it is practicable and easily doable to use exactly 25 O‘ahu house districts to form Congressional District 1 and utilize exactly 9 O‘ahu house districts to form the O‘ahu portion of Congressional District 2. Thus, it is practicable and doable for all 51 house districts and 24 of 25 senate districts to be wholly contained within a congressional district.

Petitioner Hicks demonstrated this in the submission of his own congressional map based on the house districts drawn by the 2021 Reapportionment Commission.<sup>9</sup> *See* App. G-1. The construction of a congressional plan in this manner further demonstrates that drawing a congressional map that complies with HRS Section 25-2(b)(5) is not only relatively simple, but is also practicable.<sup>10</sup> Notwithstanding the commissioners’ vague statements to the contrary, there is no conflict or trade-off between the district within district requirements and the rest of the constitutional and statutory criteria.

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<sup>9</sup> Due to the difference in population bases used for congressional and legislative reapportionment, Petitioner Hicks’ congressional map is able to fit 25 house districts into Congressional District 1 and 26 house districts into Congressional District 2 while keeping the overall deviation under one percent. App. G-1. That being said, a single senate district from the Hicks Plan does cross over the congressional dividing line on O‘ahu. This constitutes a 1.9% deviation from the standard by looking at the legislative districts on O‘ahu alone.

<sup>10</sup> Based on Petitioner Hicks’ experience preparing alternative district maps, it is his strong opinion that the best sequence for developing the legislative and congressional plans is to draw the house districts first, applying all eight constitutional criteria, because they are the smallest districts and subsequent building blocks. Next, draw the senate districts, applying all eight criteria and, when there are an even number of house districts in an island group, using two adjacent house districts to form each senate district. Finally, construct the congressional districts by applying all six HRS Section 25-2 criteria and using the house districts as building blocks. If the congressional districts are built first, they impose unnecessary constraints upon the development of the legislative districts. Thus, it is likely desirable to redraw the congressional plan after the legislative plan is developed.

**D. The Final Legislative Reapportionment Plan Failed to Adequately Justify the Non-Compliance with the Constitutional Requirement that House Districts be wholly Included in Senate Districts and the Statutory Requirement that Legislative Districts Be Wholly Included Within Congressional Districts.**

- 1. This Court, not the 2021 Hawai‘i Reapportionment Commission, is the final arbiter of the meaning and application of Article IV, Section 6 of the Hawai‘i Constitution and HRS Section 25-2.**

Article IV, Section 10 and its constitutional history make abundantly clear that this Court, not the Reapportionment Commission, is the final arbiter of the meaning of Article IV, Section 6 of the Hawai‘i Constitution and HRS Section 25-2, as well as their application to the Final Legislative Reapportionment Plan.

In addition to explaining that the courts should use the constitutional criteria to ensure there is no “gerrymandering or other unfair or partial result in the apportionment plan,” the relevant 1968 Constitutional Convention Committee Report explains the purposes of now Section 10 of Article IV as follows: “Judicial review is provided in the form of a mandamus to require the commission to do its work, correct any error or effectuate the purposes of the reapportionment provisions contained in the Constitution. The grant of power to review is designedly broad, permitting the court to fashion its own remedies to fit the exigencies of the situation.” Proceedings at 266. Thus, as it is traditionally the case, it is this Court’s prerogative and responsibility to interpret the constitutional and statutory reapportionment criteria, ensure that the Commission properly did its work by following these requirements, and decide whether the final plans were drawn in an impartial and objective way. *See Sierra Club v. Dep’t of Transportation of State of Hawai’i*, 120 Haw. 181, 196, 202 P.3d 1226, 1241 (2009), as amended (May 13, 2009) (“Our ultimate authority is the Constitution; and the courts, not the legislature, are the ultimate interpreters of the Constitution. It is the concept of the Constitution as law, and

the judiciary as the institution with responsibility to interpret the law, which remains the cornerstone of judicial review today.” (citations omitted)).

**2. Substantial deviations from district within district requirements lacked adequate justification and rendered the 2021 Final Legislative Reapportionment Plan invalid.**

The 2021 Final Legislative Reapportionment Plan failed to substantially comply with the district within district requirements, even though it was fully practicable to do so. In the course of 17 meetings, the Reapportionment Commission did not offer any valid justification for such substantial deviation. Thus, this Court should find that the final legislative plan is invalid and direct the Commission to prepare a new plan. *See Solomon*, 126 Haw. at 293, 270 P.3d at 1023 (holding that error in population base rendered the 2011 final reapportionment plan invalid and directing commission to prepare a new plan).

As explained above, deviation from the constitutional and statutory standards should be justified in relation to the need to comply with other constitutional or statutory standards. Those are the only types of compelling interests that this Court should accept. Proceedings at 265; *cf.*, *Brown v. Thomson*, 462 U.S. 835, 845-46, 103 S.Ct. 2690, 2697-98, 77 L.Ed.2d 214 (1983) (requiring that population deviations of more than 10 percent be justified by a neutral and consistently applied legitimate government interest). Additionally, general and vague justifications that are not tailored to the need to comply with the competing standard should be rejected, particularly here, where the deviations from the district within district requirements are so significant. Otherwise, the standards would be rendered optional, and this Court would not be able to ensure there is no “gerrymandering or other unfair or partial result in the apportionment plan.” Proceedings at 265.

The Hicks and Boyea plans show that in this reapportionment cycle, there is little to no trade-off between the district within district requirements and the remainder of the statutory and constitutional criteria. Because there are an even number of house districts in each of the island units challenged by Petitioners,<sup>11</sup> so long as either the senate or house maps comply with the remaining criteria, as the Commission claims their maps do, it is easy to draw a complementary map that either divides the senate districts in half to create house districts as the Boyea Community Plan does for the Island of Hawai‘i, or connects two house districts to form the senate districts, as the Hicks Plan does for O‘ahu. Therefore, in this reapportionment cycle, there is no reason to not comply with the district within district requirements.

The Commission did not offer any specific criticisms of the Hicks Plan or the Boyea Community Plan. Nor could they; they would be criticizing *their own* House map for O‘ahu as well as *their own* Senate map for the Island of Hawai‘i, on which the Hicks and Boyea plans were based. The closest the Commission came to offering a reason for not using the Hicks and Boyea plans is that there was not enough time to do so, because these maps had not received sufficient public input. App. D-15:23-23. This “justification” is not persuasive for at least three reasons.

First, the Commission’s Senate map for the Island of Hawai‘i that the Boyea Community Plan was based on and the House map for O‘ahu that the Hicks Plan was based on had received substantial public input. Indeed, the Commission presented their Senate map for the Island of Hawai‘i on December 22, 2021, and their House map for O‘ahu on January 13, 2022.

Second, the Commission made significant changes to the redistricting House maps for the Island of Hawai‘i and O‘ahu after voting on changing the population base on January 6, 2022.

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<sup>11</sup> While on Kaua‘i there are three house districts, they all fit within its single senate district.

However, it was able to adopt a new plan by January 28, 2022, which was just over two weeks after their plans based upon the new population base were proposed on January 13, 2022. In other words, there was ample time to consider the Hicks and Boyea plans.

Third, timing cannot be a compelling reason to violate the constitution, particularly when the Commission was on notice regarding the constitutional deficiencies since at least January 6, 2022, and there was still plenty of time to make adjustments to the maps. *See* Jan. 6, 2022, HRC Meeting Video at 10:09:56—10:10:42 (Petitioner Hicks' testimony). Allowing the constitutional violations to persist because of lack of time would result in Hawai'i residents having to live with unconstitutional plans for the next ten years.<sup>12</sup>

Leaving aside platitudes about considering all the constitutional criteria and not being able to follow all of them at once, the Commission's justifications offered on the record also all fail, because they were not compelling, grounded in the relevant criteria, or tailored to a specific deviation. Indeed, the justifications are revelatory in how often they suggest consideration of the interests of incumbents.

Commissioner Nakota's statement that *her* senator, an incumbent with whom she claims to have had private discussions, likes working with five house district representatives is neither related to any compelling governmental or citizens' interest, nor grounded in the Constitution.

App. D-8:27–D-9:6. Similarly, Commissioner Nonaka's shifting explanations boil down to

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<sup>12</sup> To the extent this Court is also concerned about there being insufficient time to remedy the constitutional violations, Petitioners urge that for the reasons discussed there is still time to do so. Moreover, Petitioners have filed this Petition prior to the February 27, 2022, deadline for the Commission to file a final plan under this Court's order extending the Commission's deadline. That being said, if the Court is not inclined to intervene because of the upcoming election deadlines, Petitioners respectfully request that the Court retain jurisdiction to remedy the constitutional violations discussed in this Petition so that the elections in 2024 be held under revised reapportionment plans that comply with the district within district requirements.

(1) the population bases of congressional and legislative districts are different, which, as explained above, does not justify ignoring HRS Section 25-2, *see* App. D-8:3-7, *supra* at 40 n.9;

(2) “an unequal amount of house and senate districts on O‘ahu,” which possibly means that the numbers of house and senate districts do not allow for putting all house districts in senate districts, but in this reapportionment cycle the numbers allow doing so, *see* App. D-8:9-12; and

(3) the Commission’s unwillingness to “draw lines to fit population bases and constitutional requirements, [because the Commission] got to take a lot of other things into account,” which leaves to the imagination what those “other things” may be. App. D-10:3-5. Additionally, none of these explanations are specific to any identified constitutional deviation.

The closest to a justification for deviating from the district within district requirement for a specific district came from Commissioner Chun, who explained that shifts in population and the need to have “a central Maui house member or a central Maui senator” made it “infeasible to neatly and nicely align two house districts with one senate district as has been the case in the past and still meet the mandate of balancing populations between districts.” App. D-10:27–D-11:7. This is not true, however. For example, it would be easy to give central Maui both a house member and a senator by joining House Districts 9 and 10 in the Commission’s map for Maui to form Senate District 5, and then construct the remaining senate districts from house districts in the same manner as was employed in the 2012 reapportionment cycle. Doing so would not create unbalanced populations between districts, as Commissioner Chun claimed, because each house district has roughly the same population to begin with.

Commissioner Nonaka, the Commission’s guidelines, and even the Reapportionment Commission’s professional staff expressed a preference on the part of the Commission to preserve existing district boundaries wherever possible, with Commissioner Nonaka remarkably

claiming without any evidentiary basis that sticking districts together is “going to greatly change the historic districts that have existed for decades.” App. D-10:1-2, K-6; Oct. 14, 2021, HRC Meeting Video at 13:25:40-13:26:00 (reapportionment staff discussing maintenance of existing lines), 13:28:30—13:28:39 (reapportionment staff discussing use of existing districts as starting point). This “preference,” which was also offered as an explanation for not complying with the district within district requirements, is not supported by the relevant constitutional and statutory provisions and would be likely to benefit incumbents. The drawing of boundaries to the advantage of individuals or political parties is explicitly prohibited by Article IV, Section 6, and this requirement, which is mandatory, applies to incumbents as a group as well.

Instead, it would appear that this “preference” was deemed by the Commission to be more important than the district within district requirements and consequently, the Commission was compelled to make dramatic changes to house districts due to population changes, but did not adjust senate districts accordingly, in an apparent effort to keep senate district lines the same. Chair Mugiishi admitted as much when he stated: “Again, changing the senate map would be massively disruptive, right? Because, as you know, there are much fewer senators. So if you’re going to start to change the senate map, the whole island of O‘ahu will explode.” App. D-6:21-23. This is precisely the type of gerrymandering, unfair, and partial result that the constitutional and statutory criteria was intended to avoid.

**3. If the Court chooses to apply a deferential standard of review, the 2021 Final Legislative Reapportionment Plan is still unconstitutional and illegal.**

In *Solomon*, this Court did not apply any specific standard of review to determine that the Reapportionment Commission had erred in not utilizing the total number of permanent residents as the population base for reapportionment. *Solomon*, 126 Haw. at 293, 270 P.3d at 1023 (holding that error in population base rendered the 2011 final reapportionment plan invalid and

directing the commission to prepare a new plan); *see also Kawamoto*, 75 Haw. at 467 (holding that for cases implicating this Court’s original jurisdiction, there is no standard of review). Here too, the Court can hold, based on the analysis immediately above, that the Reapportionment Commission simply erred in unjustifiably failing to comply with the district within district requirements without giving any deference to the Reapportionment Commission or its justifications.<sup>13</sup>

However, if this Court were to review the Commission’s application of the statutory and constitutional criteria under a deferential standard of review,<sup>14</sup> such as good faith, substantial compliance or abuse of discretion,<sup>15</sup> the 2021 Final Legislative Plan would be unconstitutional and illegal, because the plan’s departure from the district within district requirements is not only substantial, as is explained above, but also not supported by any evidence, any specific findings, or any compelling explanation.

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<sup>13</sup> Not applying a standard of review to this Petition makes sense because the Reapportionment Commission is not a government agency with any particular expertise, and therefore, is not owed any deference by the courts. *See, e.g., Gao v. State, Dep’t of Att’y Gen.*, 137 Haw. 450, 454, 375 P.3d 229, 233 (2016) (“Ordinarily, deference will be given to decisions of administrative agencies acting within the realm of their expertise.”). The Commission is also not a co-equal branch of the government. *See supra* n. 4. Thus, this Court should be able to review the reapportionment plans essentially as a trial court would, in the first instance, to determine whether the plans and the Commission complied with the criteria set forth in the Hawai‘i Constitution. *See Proceedings* at 265 (“The inclusion of these guidelines is intended . . . to provide the courts with a *standard for review* of claims of gerrymandering or other unfair or partial result in the apportionment plan.” (emphasis added)).

<sup>14</sup> Strict scrutiny would only apply if a fundamental right or suspect classification was at stake. *See KNG Corp. v. Kim*, 107 Haw. 73, 82, 110 P.3d 397, 406 (2005) (“Strict scrutiny is ordinarily applied where laws involve suspect classifications or fundamental rights.”). Of course, “[t]he right to vote is of ‘fundamental importance.’” *Green Party of Hawaii v. Nago*, 138 Haw. 228, 240, 378 P.3d 944, 956 (2016) (cleaned up).

<sup>15</sup> Between these two standards, Petitioners propose that the good faith, substantial compliance standard would be better suited for the situation at bar, because it would have both an objective and subjective component to ensure the Commission’s compliance with the statutory and constitutional criteria. Conversely, because the Reapportionment Commission does not have the expertise of a government agency and may have incentives to draw lines for the benefit of a person or party, abuse of discretion is too deferential of a standard of review.

While the Commission is not a typical government agency, this Court’s opinions reviewing agencies’ decisions for abuse of discretion may be instructive. In determining whether an agency abused its discretion, courts “must first determine whether the agency determination under review was the type of agency action within the boundaries of the agency’s delegated authority. If the determination was within the agency’s realm of discretion, then the court must analyze whether the agency abused that discretion. If the determination was not within the agency’s discretion, then it is not entitled to the deferential abuse of discretion standard of review.” *Kolio v. Hawai‘i Pub. Hous. Auth.*, 135 Haw. 267, 271, 349 P.3d 374, 378 (2015).

By trying to keep historic district lines untouched at the expense of the relevant statutory and constitutional criteria, the Commission made a determination that was outside of its authority to make under the Hawai‘i Constitution and HRS Section 25-2. *See also* Haw. Const. art. IV, § 6 (“No district shall be so drawn as to unduly favor a person or political faction.”). Even if this Court were to review the Commission’s decision for abuse of discretion or good faith compliance, it should find that the Commission’s failure to follow the district within district constitutional requirement *in a super majority of the districts* “clearly exceeds bounds of reason [and] disregards rules or principles of law . . . to the substantial detriment” of the public and does not demonstrate good faith on the part of the Commission. *Kolio*, 135 Haw. at 271, 349 P.3d at 378.<sup>16</sup>

The plan’s departure from the district within district requirements exceeds the bounds of reason and good faith, because it was not adequately explained or supported by any specific findings, substantial evidence, or valid explanation. *See supra* 42-46; *see, e.g., Dep’t of Com. v.*

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<sup>16</sup> The secretive process used by the Commission to draw maps further demonstrates lack of an effort to comply with the district within district requirements in good faith.

*New York*, 139 S. Ct. 2551, 2575, 204 L. Ed. 2d 978 (2019) (rejecting Department of Commerce’s explanation for adding citizenship question to the Census because agency’s explanation was “incongruent with what the record reveals about the agency’s priorities and decision making process”). Additionally, the Commission’s failure to consider the overwhelming testimony against the final plans and its unwillingness to make changes to its proposed plans in response to such testimony, suggests that the Commission inappropriately prejudged the matters pending before it. *See Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 389, 363 P.3d 224, 237 (2015) (holding that “due process of law generally prohibits decision makers from being biased, and more specifically, prohibits decision makers from prejudging matters and the appearance of having prejudged matters.”).

Moreover, the Commission disregarded the district within district requirements to the detriment of the members of the public. For example, under the Commission’s plan, a person living in House District 39 and Senate District 20—that is, people living in West Loch Estate in Ewa on O‘ahu—will have a representative who must work with four different senators, instead of one, and a senator whose attention will be divided among four house districts, instead of two. The unexplained decision of the Commission to place West Loch Estate residents and many others like them in similar districts, where their representation will be diffused in this manner, is arbitrary and capricious. *See, e.g., New York*, 139 S. Ct. at 2575–76 (“The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”).

**E. The Constitutional Requirement that House Districts Be Wholly Included within Senate Districts Not Only Protects the Integrity of the Reapportionment Process but Also Ensures More Stable and Better Representation for Hawai'i Residents.**

The policy reasons for this Court's intervention are also significant. First, the district within district requirement ensures that (1) the interests of the representatives and senator for a specific legislative district are aligned, thus ensuring better and more effective representation for their constituents, and (2) it will make representation more effective, as neighbors will only need to interact with a fixed number of legislators, who will likely be members of their community. Second, this Court's intervention is necessary to ensure that the reapportionment process is objective and impartial, as politically motivated maps cannot be effectively addressed through the democratic process, given the reasonable likelihood that maps will benefit the legislators in charge of appointing members to the Commission.

Before the district within district requirements were brought to the attention of the Commission, in defending the Makapu'u wraparound house district, Chair Mugiishi succinctly explained the power and importance of wholly including a house district within a senate district:

About House District 51, so one of the comments that Commissioner Ono made at the beginning was that this map creates some synergy between the senate map and the house map. And I guess what I'm trying to understand is why people would object to having a senator and a representative unified and representing their district. Because the legislative process, in order for anything to happen, you need both houses, both chambers of the legislature, to agree. And so if you have a district that has synergy between the representative getting elected by the same constituency as the senator, you have a much better chance of effecting meaningful change for your community. And so I guess I'm trying to understand why people would object to aligning their senate map and their house map. I would think that would be a wonderful thing to do.

App. D-6:1-10. The concept of aligning house and senate districts that Chair Mugiishi described is correct and generally applicable. In the specific argument about House District 51 at the time,

it was irrelevant, because whether the district ended at Makapu'u Point or Portlock, it would have been fully contained within Senate District 25, unlike 24 other O'ahu house districts at the time which crossed over two, three, or four senate districts.

In our bicameral system of government, in order for bills to become law, both chambers must agree to legislation, and the governor must sign. This process is critical every step of the way, as each legislator has a limited number of bills that they can introduce, each legislative committee has a limited number of bills it can consider, with most bills “dying” without a hearing. A bill must be considered by both the House and the Senate (and often undergo reconciliation as well) to become law. Without at least one senator and one house representative championing a bill in their respective chambers each step of the way, this successful completion of this process is unlikely. And yet the 2021 Final Legislative Plan makes it so that people in several house districts will need to coordinate with as many as four senators, none of whom will necessarily make a little corner of their district a priority. Imagine if in the U.S. Congress, Kaua'i residents were represented by a representative from Alaska whose district also included the island of Kaua'i!

Conversely, aligning senate and house districts will make it more likely that senators and representatives representing *the same area* will effectively work together, as they will often be members of the same community and will also have to answer to *the same people* at the ballot box. This “synergy,” as Chair Mugiishi called it, will indeed give the people “a much better chance of effecting meaningful change for [their] community.” App. D-6:8-9 In other words, it promotes a representative government that is more effective and responsive to the people it represents.

Remarkably, the Commission’s claimed interest in avoiding chaos and maintaining more stability over time is better addressed by including house districts within senate districts, as mandated by Hawai’i’s law. While lines will shift from time to time to adjust for population changes, *which is inevitable in any event*, those lines will move in a coordinated and orderly way, so that people and neighborhoods will only need to interact with a fixed number of legislators—two for most small towns—all of whom will be from the same communities.

Finally, this is not a matter that can be addressed at the ballot box and must rely instead on a Commission committed to serving the public interest. However, legislators who benefit from specific maps have little to no electoral incentive to appoint commissioners who will objectively apply the constitutional criteria, if doing so could jeopardize their chances of re-election. In turn, gerrymandered communities will not be able to vote out such legislators, as their voting power would be diluted through the reapportionment process. In other words, it is this Court’s responsibility to ensure that the Commission follows the reapportionment criteria, so that it is the people who “choose their representatives, not the other way around.”

**F. The Commission Unconstitutionally Delegated One of Its Core Responsibilities to its Technical Committee PIG.**

The Commission’s delegation of its redistricting powers under the Constitution to the Technical Committee PIG—a subset of commissioners exempted from even a modicum of transparency—was contrary to a constitutional design that seeks a fair, objective, and impartial reapportionment process.

Article IV, Section 2 of the Hawai’i Constitution provides for a Commission of *nine* members and provides that “[t]he commission shall act by majority vote of its membership and shall establish its own procedures, except as may be provided by law.” Haw. Const. art. IV, § 2. After providing that the Commission must apportion the members of the Legislature among

island units, Article IV, Section 6 provides: “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.” Haw. Const. art. IV, § 6. Thus, the responsibility and power to redistrict each island unit is delegated to all nine of the commissioners.

Here, after seemingly conducting deliberations outside of public view to appoint and elect the Chair,<sup>17</sup> it created a technical committee PIG under HRS Section 92-2.5 for the “Preparation of Proposed Reapportionment Plans.” App. B-4 (item VII). Chair Mugiishi stressed the need to keep the number of members in that committee under four commissioners, presumably to avoid the application of various Sunshine rules on open meetings, notice, and minutes. App. D-1:16-21. After creating the technical committee PIG, the Commission adopted rules that exempted the technical committee PIG from notice, public comment, and record keeping requirements, to which a similar committee had been subject during the 2011 reapportionment process. App. H14 (Rule 18). Thus, the Commission effectively delegated the bulk of its core redistricting responsibility under the Constitution to four commissioners, who were allowed to operate completely outside of the public’s view.

After drawing the maps in secret, the technical committee PIG then proceeded to present their maps to the Commission and the public without presenting findings of fact about specific districts, disclosing with whom the technical committee PIG had communicated, or describing what type of community outreach it had done, if any. Nor did the technical committee PIG

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<sup>17</sup> See *supra* n. 2.

disclose how it had sought to apply the constitutional and statutorily required standards, or details about what matters the committee may have assigned more weight to than others, and why. The Commission itself did not deliberate about these matters in a meaningful fashion or consider changes to the maps; instead, it completely relied on the technical committee PIG to make further changes behind closed doors and present its revised maps to the Commission, without any meaningful or public explanation for the changes made. For the most part, the Commission seemed to accept without question or meaningful discussion the technical committee PIG's redistricting maps and decisions made.

The reapportionment process as executed during this current cycle provided a recipe for abuse, gerrymandering, partiality, and public mistrust. The delegation of the bulk of the Commission's redistricting authority to the technical committee PIG was improper for at least three reasons.

First, it was contrary to the constitutional design and purpose, which not only delegated the redistricting power to the entire commission but set various criteria to make the process as impartial and objective as possible, as well as to avoid gerrymandering, unfairness, and partiality. Proceedings at 265; *cf. Blair v. Cayetano*, 73 Haw. 536, 550, 836 P.2d 1066, 1073 (1992) (holding that act's primary election procedure to select the constitutional amendment to be proposed in a general election "constitute[d] . . . an impermissible delegation of legislative authority to the electorate," even though the Legislature had authorized the primary procedure). The use of the technical committee PIG in this manner created opportunities to inject improper influences into the process.

Second, and relatedly, the deliberate use of a technical committee PIG hindered not only the public's ability to assess the Commission's work, but it is also likely to hinder this Court's

capacity to determine whether the Commission complied in good faith with the requisite constitutional and statutory criteria. How will this Court be able to determine whether there was gerrymandering or whether a specific criterion was followed, if the entirety of the drawing of district lines took place without notice, or a complete record, or substantial public transparency?

Third and finally, while the Constitution grants the Commission the power to “establish its own procedures, except as may be provided by law,” the Commission abused the PIG device under HRS Section 92-2.5, which specifically provides for the use of a PIG to “[i]nvestigate a matter.” HRS § 92-2.5(b)(1). Here, however, it is unclear what the investigation and matter to be investigated were, as final plans were simply presented to the Commission without any meaningful discussion about any investigation, the PIG’s findings, or the public presentation of legislative plan options to the Commission. In other words, the technical committee PIG was not used to investigate a discrete matter and report back with findings and recommendations, but instead it was used to allow a subset of commissioners behind closed doors to make most of the decisions about redistricting. The Petitioners are unaware, and there is no record to demonstrate, any instance where the technical committee PIG communicated with testifiers or experts or others. Such actions would have been appropriate fact finding for the PIG to be able to better understand suggestions and complaints that emanated from the public during testimony submitted at the meetings, the 11 public hearings, and in writing. The process chosen by the commission marginalized the participation, understanding, and meaningful ability of the five commissioners not on the technical committee to discharge their responsibilities. Therefore, the Petitioners urge this Court to rule that the Commission’s delegation of its redistricting authority to the technical committee PIG was unconstitutional and otherwise improper.

**G. To Maintain the Status Quo, Avoid Irreparable Harm, and Protect the Public Interest, this Court Should Preliminarily Enjoin the State of Hawai‘i Office of Elections and the Chief Election Officer from Accepting Nominating Papers for Office in the State Legislature.**

Unless this Court grants Petitioners request for temporary injunctive relief, the State of Hawai‘i Office of Elections and the Chief Election Officer will begin accepting nominating papers from candidates for legislative offices on March 1, 2022. *See* HRS § 12-2.5 (“Nomination papers shall be made available from the first working day of March in every even-numbered year.”). This Court has the power to grant temporary injunctive relief pursuant to Article IV, Section 10 of the Hawai‘i Constitution. A temporary order enjoining the State of Hawai‘i Office of Elections and the Chief Election Officer from accepting nominating papers until this Petition is resolved is necessary to maintain the status quo and avoid confusion to the public, candidates, campaigns, and other groups with respect to the candidates running for legislative offices.

“The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction.” *Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Hawai‘i (HCDCH)*, 117 Haw. 174, 211, 177 P.3d 884, 921 (2008), *rev'd on other grounds, Hawai‘i v. Off. of Hawaiian Affs.*, 556 U.S. 163, 129 S. Ct. 1436, 173 L. Ed. 2d 333 (2009).

This Petition has fully addressed the likelihood of success on the merits, which is high, given the Commission’s unjustified failure to follow the district within district requirements..

Concerning the balance of irreparable harms, if the Petition is successful on its merits, the failure to temporarily enjoin the State of Hawai‘i Office of Elections and the Chief Election Officer from accepting nominating papers will result in candidates having to file their papers a second time and potentially campaigning in different districts, which will result in confusion to

the public, candidates, their campaigns, and to others. Supporters will donate and spend time and money backing candidates who may ultimately not run in their district or decide to not run at all. In addition, without an injunction, candidates may file nominating papers for a district under the current reapportionment plan (filed January 28, 2021) and then fail to file nominating papers under the plans redrawn pursuant to this Court's order granting the Petitioners a measure of relief, but further creating confusion.

The harm to respondents, on the other hand, will not be as significant. The candidate filing deadline closes on June 7, 2022. *See* HRS § 12-6(a) (requiring that nomination papers be filed "not later than 4:30 p.m. on the first Tuesday in June"). Even if this Court were to issue an order directing the Commission to prepare new reapportionment plans by the end of April 2022, there would be at least one month for candidates to file their nominating papers without the need to adjust any other deadlines or cause delays in the primary elections and general elections to be held later this year. Thus, the balance of harms clearly favors the Petitioners.

Additionally, the public interest also supports this Court granting temporary injunctive relief to Petitioners. In addition to avoiding unnecessary and significant confusion, the temporary injunctive relief would avoid having to grant even more significant injunctive relief later to address the ensuing issues and unintended consequences of candidates submitting nominating papers under different reapportionment plans. Additionally, a temporary injunction would give an opportunity to the public to reengage in the reapportionment process and to the Commission to consider an alternative redistricting process, while this Petition is pending before this Court. Specifically, temporary injunctive relief would signal to the parties and members of the public that the Court is likely to accept jurisdiction in this matter and that the public and particularly the

Commission should remain engaged in the process and be ready to propose alternative plans that meet all constitutional and statutory criteria.

## **VI. CONCLUSION**

For the reasons presented, Petitioners respectfully urge that this Court void the 2021 Final Legislative Reapportionment Plan and its publication, direct the Commission to prepare a new constitutionally compliant plan, and enjoin the acceptance of nominating papers for office in the State Legislature until this Petition is resolved. Petitioners make such requests to give Hawai‘i residents a meaningful chance to democratically address the serious challenges that their communities and islands will face during the next ten years.

DATED: Honolulu, Hawai‘i, February 23, 2022

Respectfully submitted,

/s/ Mateo Caballero  
MATEO CABALLERO

Attorney for Petitioners