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No. SCPW-22-0000078

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

**RESPONDENTS' ANSWER TO PETITION OF REGISTERED VOTERS  
FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, AND  
TEMPORARY INJUNCTION FILED ON FEBRUARY 23, 2022**

**DECLARATION OF DIANE T. ONO**

**DECLARATION OF DYLAN NONAKA**

**DECLARATION OF ROYCE A. JONES**

**DECLARATION OF SCOTT T. NAGO**

**DECLARATION OF DAVID J. ROSENBROCK**

**DECLARATION OF LORI N. TANIGAWA**

**EXHIBITS "1" – "7"**

**APPENDICES "A" – "E"**

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Elections, and Scott Nago, in his official capacity as  
Chief Elections Officer

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RESPONDENTS' ANSWER TO PETITION OF REGISTERED VOTERS  
FOR DECLARATORY JUDGMENT, WRIT OF MANDAMUS, AND  
TEMPORARY INJUNCTION FILED ON FEBRUARY 23, 2022

I. INTRODUCTION

Notwithstanding an unprecedented delay in the census data and an eleventh-hour revision of the military's data, the 2021 Reapportionment Commission adopted a final reapportionment plan which faithfully adheres to constitutional and statutory mandates, is responsive to extensive public input, and satisfies its foremost objectives of effecting apportionment and ensuring voter equality. In short, the final plan achieves fair and effective representation for all of Hawai'i's residents. Petitioners nevertheless ask the Court to discard the final plan and to further delay 2022 election operations – not because they are concerned about the apportionment of seats or voter equality (they have no such concerns) – but because Petitioners believe that their methodology and their maps are better. In other words, Petitioners ask the Court to substitute their judgment for that of the constitutionally-created, balanced bipartisan Reapportionment Commission. But other than communicating their dissatisfaction with the final reapportionment plan, Petitioners offer no evidence or binding authority demonstrating entitlement to mandamus relief. The Court should therefore summarily deny the Petition<sup>1</sup> in its entirety and immediately vacate its February 24, 2022 Order<sup>2</sup> temporarily enjoining the State of Hawaii Office of Elections and Chief Election Officer from making available nomination papers.

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<sup>1</sup> The Respondents designated in the Petition are “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 as Respondents.” *See* Dkt. 1. Petitioners failed, however, to identify the members of the 2021 Hawai'i Reapportionment Commission by name, even though their identities are readily ascertainable. As a result, the Commissioners are not proper parties to this action.

<sup>2</sup> The February 24, 2022 Order (Dkt. 28) was clarified by a February 25, 2022 Order (Dkt. 34).

## II. BACKGROUND

### A. Legislative Reapportionment

In reapportionment years,<sup>3</sup> the Hawai‘i Constitution tasks the Reapportionment Commission (“Commission”) with legislative reapportionment, congressional redistricting, and assigning staggered terms for State Senate seats. *See* Haw. Const. art. IV, §§ 2, 4, 6, and 8-9.

The Commission is structured as an independent, balanced bipartisan body empowered to establish its own procedures:

The president of the senate and the speaker of the house of representatives shall each select two members. Members of each house belonging to the party or parties different from that of the president or the speaker shall designate one of their number for each house and the two so designated shall each select two members of the commission. The eight members so selected, promptly after selection, shall be certified by the selecting authorities to the chief election officer and within thirty days thereafter, shall select, by a vote of six members, and promptly certify to the chief election officer the ninth member who shall serve as chairperson of the commission.

...

The commission shall act by majority vote of its membership and shall establish its own procedures, except as may be provided by law.

*Id.* at § 2.

In effecting legislative reapportionment, the Commission is to “reapportion the members of each house of the legislature on the basis, method, and criteria prescribed by the Constitution of the United States and article IV of the Hawaii Constitution.” Haw. Rev. Stat. § 25-2(a). The “basic aim of legislative reapportionment” is achieving “fair and effective representation for all citizens.” *Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S.Ct. 1362, 1383 (1964). Legislative reapportionment involves apportionment and redistricting, two processes which are “inextricably interrelated and are indeed complex and difficult to comprehend in their entirety.” Supp. Stand.

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<sup>3</sup> “The year 1973, the year 1981, and every tenth year thereafter shall be reapportionment years.” Haw. Const. art. IV, § 1.

Comm. Report No. 58, in 1 Proceedings of the Constitutional Convention of Hawaii of 1968, at 245 (1973), attached hereto as Appendix “A”.

“Apportionment of seats in legislative bodies is not a simple matter, to be accomplished by mathematical calculations.” *Chikasuye v. Lota*, 50 Haw. 511, 516, 444 P.2d 904, 907 (1968). Rather, it is the “involved and time-consuming” process of “allocating numbers of representatives or senators to various districts within the State according to an apportionment base[.]” *See id.*; *see also* Supp. Stand. Comm. Report No. 58, at 241. “[A]s a [federal] constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” *Reynolds*, 377 U.S. at 568, 84 S.Ct. at 1385. Consistent with the *Reynolds* mandate, the Hawai‘i Constitution provides for the apportionment of the State Legislature using a “permanent resident” base in a two-step process: (1) apportionment among the four basic island units<sup>4</sup> pursuant to article IV, section 4;<sup>5</sup> and (2) apportionment within the four basic island units, pursuant to article IV, section 6. *See Solomon v. Abercrombie*, 126 Hawai‘i 283, 292, 270 P.3d 1013, 1022 (2012); *see also* Haw. Const. art. IV, §§ 4 and 6.

Redistricting is “the difficult and thankless task [ ]” of “drawing lines on a map which enclose a geographic area. . . . called either representative or senatorial districts [with] the number of legislators allocated to a particular district depend[ing] on the number of [persons in

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<sup>4</sup> The basic island units are: (1) the island of Hawai‘i, (2) the islands of Maui, Lanai, Molokai, and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau. Haw. Const. art. IV, § 4.

<sup>5</sup> Hawaii Revised Statutes (“HRS”) § 25(a)(2) provides in relevant part, For purposes of legislative reapportionment, a ‘permanent resident’ means a person having the person’s domiciliary in the State. In determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year.

the apportionment base] the district contains.” Supp. Stand. Comm. Report No. 58, at 241, 259. Often referred to as the ‘one man, one vote’ principle, it is well-established that the State must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable[ ]” because the “overriding objective” is to ensure that “the vote of any citizen is approximately equal in weight to that of any other citizen in the State.” *Reynolds*, 377 U.S. at 577-79, 84 S.Ct. at 1390.

Article IV, section 6 of the Hawai‘i Constitution encapsulates *Reynolds*’ sought-for ideal of ‘one man, one vote’ by requiring the Commission to “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.” See Supp. Stand. Comm. Report No. 58, at 245 (acknowledging that this requirement is “merely a restatement of the equal population principle enunciated by the United States Supreme Court in its apportionment decisions”). Article IV, section 6 further provides for eight criteria to be considered by the Commission when effecting redistricting. See Haw. Const. art. IV, § 6.

As part of the legislative reapportionment process, the Commission is required to “conduct public hearings and consult with the apportionment advisory council of each basic island unit.” Haw. Rev. Stat. § 25-2(a). Specifically, the Commission must give public notice of “a legislative reapportionment plan prepared and proposed by the commission” not more than 100 days from the date on which all members are certified, hold “[a]t least one public hearing on the proposed reapportionment plan . . . in each basic island unit,” and afford all interested persons “an opportunity to submit data, views, or arguments, orally or in writing, for consideration by the commission.” *Id.* The Commission shall then “determine whether the plan is in need of correction or modification, make the correction or modification, if any, and file with

the chief election officer, a final legislative reapportionment plan[ ]” no later than 150 days from the date on which all members are certified. *Id.*

B. Congressional Redistricting

Beginning in 1980, and every ten years thereafter, the U.S. Secretary of Commerce is required to take a decennial census of the population as of the first day of April of that year. 13 U.S.C. § 141(a). The tabulation of “the whole number of persons in each State” is required for the apportionment of U.S. House of Representatives in Congress among the states. *See* U.S. Const. amend XIV, § 2.

Once the total number of members of the U.S. House of Representatives which have been allocated to Hawai‘i is determined, the Commission is required to consider six criteria when “redraw[ing] congressional district lines” for “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.” Haw. Rev. Stat. § 25-2(b); *see also* Haw. Const. art. IV, § 9. The Commission is then required to comply with the same public notice and public hearing process prescribed for legislative reapportionment before “fil[ing] with the chief election officer, a final congressional reapportionment plan[ ]” no later than 150 days from the date on which all members are certified. *Id.*

C. Procedural Background

1. Formation of the 2021 Commission

2021 was a reapportionment year for the State. Haw. Const. art. IV, §1. In accordance with article IV, section 2, the President of the Hawai‘i State Senate, the Speaker of the House of Representatives, the leader of the minority party of the Senate, and the leader of the minority party of the House of Representatives, each appointed two persons to serve on the 2021

Reapportionment Commission (the “2021 Commission”):

<i>Appointing Authority</i>	<i>Commission Members Appointed</i>
President of the Senate	Charlotte Nekota Randall Nishimura
Speaker of the House of Representatives	Grant Y.M. Chun Diane T. Ono
Minority Party Leader, the Senate	Robin Kennedy Kevin Rathbun
Minority Party Leader, House of Representatives	Calvert Chipchase Dylan Nonaka

2021 Reapportionment Commission Final Report and Reapportionment Plan (“Final Report”) attached hereto as Exh. “1” at 10.<sup>6</sup> The initial eight members of the 2021 Commission held their first public meeting<sup>7</sup> on April 13, 2021 and, upon a majority vote, appointed Dr. Mark Mugiishi as their ninth member and Chairperson.<sup>8</sup> *Id.* at 36-38.

2. A six-month delay in census data severely restricts the 2021 Commission’s ability to begin the reapportionment process

The April 13, 2021 appointment of Dr. Mugiishi triggered a July 22, 2021 deadline for the 2021 Commission to issue public notice of its proposed reapportionment plans, and a September 10, 2021 deadline for the 2021 Commission to file its final reapportionment plans with the Chief Election Officer. *See* Haw. Const. art. IV, § 2; Haw. Rev. Stat. § 25-2(a).

<sup>6</sup> Citations to exhibits are formatted as Exh. “[exhibit number]” at [PDF page No.].

<sup>7</sup> Summaries and minutes for all of the 2021 Commission’s meetings are found at Exh. “1” at 36-208.

<sup>8</sup> Contrary to Petitioners’ assertion, Commissioner Nonaka did *not* say he had conversations with other Commissioners about nominating Dr. Mugiishi, *see* Dkt. 1 at 20; rather he stated that he had discussed the need, based on his previous experience as a Commission member, to move quickly to nominate a Chairperson to avoid delay. Video record of April 13, 2021 meeting at 16:09:53 – 16:10:42, available at [https://www.youtube.com/watch?v=SF6K7IoVY\\_0](https://www.youtube.com/watch?v=SF6K7IoVY_0). Moreover, even if he had a conversation, it should be noted that HRS § 92-2.5(c) *expressly provides* that, “[d]iscussions between two or more members of a board, but less than the number of members which would constitute a quorum for the board, concerning the selection of the board’s officers may be conducted in private without limitation or subsequent reporting.”

However, these deadlines would prove impossible to meet because of an unprecedented six-month delay in the delivery of the U.S. Census Bureau’s redistricting data. *See* SCPW-21-0000342; *see also* <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>. Therefore, at the 2021 Commission’s next meeting on May 17, 2021, it voted unanimously to ask the Attorney General to petition this Court for relief from the impossible-to-meet deadlines. Exh. “1” at 40. On July 7, 2021, this Court granted the petition for mandamus and ordered the 2021 Commission to (1) issue a public notice of its proposed reapportionment plans no later than January 8, 2022, and (2) file its final reapportionment plans with the Chief Election Officer no later than February 27, 2022. *See* SCPW-21-0000342, Dkt. 3.

3. Permitted interaction groups are created pursuant to HRS § 92-2.5(b)

Consistent with past practice,<sup>9</sup> the 2021 Commission established two permitted interaction groups to efficiently facilitate the 2021 Commission’s tasks, pursuant to Hawaii Revised Statutes (HRS) § 92-2.5(b). Exh. “1” at 40-41. HRS § 92-2.5(b) expressly authorizes the formation of a permitted interaction group, or “PIG,” of two or more members, but less than quorum, to discuss official board business outside of a duly noticed public meeting. Without these groups, the Commission could only carry out its many responsibilities at full commission meetings, which would be subject to HRS chapter 92 requirements, including quorum and six calendar days’ public notice. Haw. Rev. Stat. §§ 92-2; 92-7(b).

The 2021 Commission discussed the need to have two permitted interaction groups: a “rules committee” and a “technical committee.” Dkt. 6 at 3:2-3:6<sup>10</sup> The rules committee would be tasked with creating the rules of conduct for the 2021 Commission, (*id.* at 3:3-3:4;

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<sup>9</sup> *See* Declaration of David J. Rosenbrock, ¶¶29-30, attached hereto and incorporated by reference herein.

<sup>10</sup> Citations to the “rough transcripts” Petitioners filed as their Appendix D, Dkt. 6, are formatted as: Dkt. 6 at [PDF page No.]:[Line No.].

3:20-3:22), while the technical committee would be responsible for proposing the redistricting lines. *Id.* at 3:5-3:6; 3:15-3:17. As Commissioner Nonaka explained, the technical committee would be in charge of the time-consuming work of “put[ting] together the draft maps,” *id.* at 3:27-3:28, which he described as a “long arduous process” and a big commitment, *id.* at 3:27-4:2.

The 2021 Commission deliberated as to who should be on each committee and why (*id.* at 4:3-5:11),<sup>11</sup> ultimately reaching a consensus as to the members of each committee before voting unanimously to create the two committees. *Id.* at 5:17-5:29; *see also* Dkt. 5 at 6 (“Commissioner Nekota made a motion to form two committees – a Rules and Conduct Committee and a Technical Committee, which was seconded by Commissioner Nishimura, and approved unanimously by the Commission.”). Chair Mugiishi appointed Commissioners Nonaka, Nekota, Ono, and Rathbun to the technical committee and Commissioners Chipchase, Kennedy, Chun, and Nishimura to the rules committee. *Id.* at 6:3-6:5.

The rules committee presented proposed rules of conduct at the July 6, 2021 meeting, which were unanimously adopted by the 2021 Commission at the July 20, 2021 meeting. The final rules adopted by the 2021 Commission are included here as Exh. “2” at 12-25.

4. The 2021 Commission establishes the permanent resident population base using census data and promptly produces its first set of proposed legislative reapportionment plans

On August 12, 2021, the U.S. Census Bureau finally released its redistricting data. Exh. “1” at 57-58. At the August 26, 2021 meeting, staff presented a proposed extraction of

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<sup>11</sup> Again, contrary to Petitioners’ insinuations, there was no violation of the Sunshine Law. Commissioner Chipchase confirmed that he did not discuss committee assignments with Commissioner Nonaka. Dkt. 6 at 4:17-4:18. Although Commissioner Ono mentioned that she had spoken to one other Commissioner (Commissioner Chun) about committee assignments (*id.* at 4:12-4:13), the Sunshine Law permits two members to discuss official board business as between themselves. *See* Haw. Rev. Stat. § 92-2.5(a).

non-permanent residents from the census data as required by *Solomon v Abercrombie*, for the 2021 Commission’s consideration. *Id.* at 59-60. At that time, available data indicated that there were 64,415 military members and 7,250 students statewide. *Id.* at 76. On September 9, 2021, the 2021 Commission unanimously approved the extraction of these 71,665 non-permanent residents from the census data, leaving a permanent resident base of 1,383,606. *Id.* at 75-77.

On October 14, 2021, the technical committee presented its proposed legislative reapportionment plans. *Id.* at 88-91. At the meeting, Commissioner Ono explained that “the Technical Group could not look at one district at a time as there is a ripple effect to the changes across the basic island unit.” *Id.* at 89. It was explained that the public could propose changes to the plans using a publicly available online tool and that hard copies would also be available. *Id.* at 91.

5. The 2021 Commission adopts a proposed congressional reapportionment plan with a lower deviation

Because the congressional plan must be based on the total population counted in the U.S. Census (as opposed to a “permanent resident” base),<sup>12</sup> the technical committee was able to work quickly to develop two alternative proposed congressional reapportionment plans for the 2021 Commission’s review and consideration: (1) a plan which maintained the existing congressional district lines, with a deviation of 0.6% between the populations in the two districts; and (2) a plan which moved portions of Ko Olina from existing Congressional District 1 to Congressional District 2, thereby lowering the deviation to 0.34%. *See Rosenbrock Dec.*, ¶34. The technical committee presented the plans at the September 9, 2021 meeting, and the plans were disseminated for public review and comment, including online. Exh. “1” at 80-81.

No public comments were submitted in opposition to either of the proposed congressional

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<sup>12</sup> *See* Haw. Rev. Stat. § 25-2(b).

reapportionment plans. *See* Rosenbrock Dec, ¶36. On October 14, 2021, the 2021 Commission voted unanimously to adopt the alternative plan with the lower deviation as its proposed congressional reapportionment plan. Exh. “1” at 88.

6. Public participation is facilitated by island advisory councils

At the same time the Commission was formed, four apportionment advisory councils (one for each island unit) were also formed. *See* Haw. Const. art. IV, § 2; Haw. Rev. Stat. § 25-7. The advisory councils facilitated public engagement and feedback by presenting information to the public so that they could prepare to participate in the reapportionment process. Exh. “1” at 5. The 2021 Commission therefore invited the four advisory councils to advise on matters affecting their respective islands, and starting at the October 14, 2021 meeting, included a standing agenda item for reports from the advisory councils. *Id.* at 87 (Chair Mugiishi explaining that advisory councils would make recommendations on the matters affecting each basic island unit and would be allowed to present at the Commission meetings).

7. The Commission adopts the technical committee’s proposed legislative redistricting plan and initiates public hearings

On October 28, 2021, the 2021 Commission unanimously approved the adoption of the proposed legislative reapportionment plans, thereby initiating the public hearings process required by HRS § 25-2.<sup>13</sup> *Id.* at 104. A public notice of the 2021 Commission’s proposed legislative and congressional plans was issued on November 3, 2021. *See* Declaration of Scott T. Nago, ¶23, attached hereto and incorporated herein by reference; *see also* Exh. “3” (November 3, 2021 Public Notice).

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<sup>13</sup> The proposed plans which were approved on October 28, 2021 are publicly available at <https://elections.hawaii.gov/about-us/boards-and-commissions/reapportionment/>. *See* Declaration of Lori N. Tanigawa at ¶2.

Although HRS § 25-2(a) only requires one public hearing on each island unit, the 2021 Commission maximized public participation by holding eleven public hearings via remote conferencing technology from November 30, 2021 to December 10, 2021 – one on Kaua‘i, two on Hawai‘i Island, one each on Lana‘i and Moloka‘i, two on Maui, and four on O‘ahu . Exh. “1” at 16-17.

8. The Commission revises its proposed maps based on public input

After the public hearings were concluded, the technical committee presented its proposed final legislative and congressional reapportionment plans on December 22, 2021, explaining in detail the changes made since the October 28, 2021 presentation.<sup>14</sup> Exh. “1” at 115-116. Commissioner Ono stated that they “listened carefully to the public comments and written testimony and made their best attempts to incorporate the suggestions.” *Id.* at 116.

Clearly, a point of contention at the December 22, 2021 meeting was whether the Waimanalo and Hawai‘i Kai communities should be grouped together. Exh. “1” at 117 (Commissioner Kennedy arguing for the separation of the two communities). The dialogue that followed demonstrates why the Commission’s job is an art, not a science. For instance, Commissioner Nishimura drew attention to the fact that the east side of O‘ahu has had stagnant population growth while west and central O‘ahu need more representation, and advocated that “the Commission should not take care of the population on O‘ahu’s East and Windward side at the expense of the population on the West side of O‘ahu.” *Id.* at 118. More than one Commissioner brought up that altering one area of the map would necessarily impact other areas. *Id.* at 117-118. Commissioners Ono and Nonaka explained that keeping Waimanalo and Hawaii

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<sup>14</sup> The congressional plan, the Senate and House district plans for Hawai‘i Island, and the Senate and House district plans for O‘ahu which the technical committee presented on December 22, 2021 are attached hereto as Exh. “4.” *See* Tanigawa Dec. at ¶8.

Kai together would give Waimanalo more representation within its district. *Id.* at 118. Chair Mugiishi observed that having synergy between a House and Senate district could be beneficial, but also acknowledged testimony which “noted the benefits of having multiple representatives for the communities.” *Id.* at 118-119.

The 2021 Commission noted, however, that it would not finalize the maps until it received clarification from the military about the number of non-permanent military residents that should be extracted from the census count. *Id.* at 114-115, 119. Commissioner Kennedy confirmed that the Commission had been proactive in trying to get these numbers. *Id.* at 115.

9. The Commission is forced to redo its Oahu and Hawai‘i Island maps because of updated military data
  - a. A House district is moved from O‘ahu Hawai‘i Island due to the extraction of additional non-permanent residents from the population base

On December 31, 2021, the 2021 Commission received updated data from the military, which prompted the need to re-determine the permanent resident population base to be used for apportionment and redistricting. *Id.* at 128. At the January 3, 2022 meeting, staff presented a new permanent resident population base of 1,348,054, based on an extraction of 99,967 military non-permanent residents and 7,250 university non-permanent residents from the census population count of 1,455,271. *Id.* at 128, 139. Also on January 3, 2022, the Chief Election Officer urged the Commission to file its final plans *by the end of January 2022* in order to avoid adversely affecting election deadlines and operations. *Id.* at 129-130.

On January 6, 2022, the 2021 Commission approved the new permanent resident base presented by staff at the January 3, 2022 meeting. *Id.* at 139-140. Due to the new numbers, *one House seat moved from Oahu to Hawai‘i Island*, giving the Hawai‘i Island eight (8) House districts and Oahu thirty-four (34) districts. Exh. “5” (January 6, 2022 meeting materials) at 40.

b. The technical committee presents updated Oahu and Hawai'i Island plans on January 13, 2022

Using the new permanent resident population base, the technical committee worked diligently to develop modified proposed final legislative reapportionment plans, which were presented at the Commission's January 13, 2022 meeting.<sup>15</sup> At the meeting, Commissioner Nonaka explained how adding a House district to Hawai'i Island meant that districts had to be consolidated around population centers, and how communities within districts should be connected by roads, not just geographical proximity. *See* video record of January 13, 2022 meeting at 13:11:22 – 13:15:42,<sup>16</sup> *available at* <https://www.youtube.com/watch?v=p6JUIThMrfU>. He also gave insight into how the chosen starting point affects how the rest of the map “shakes out.” *Id.* For the O'ahu Senate district map, he explained how the extraction of non-permanent military residents from the east side of O'ahu caused ripple effects in all other districts, as districts in east, north, and central O'ahu then had to “expand” to take in more of the population. *Id.* at 13:16:51 – 13:19:33.

Commissioner Ono emphasized that the committee took public testimony to heart in keeping the Hawaii Kai community in one district. *Id.* at 13:28:15 – 13:29:12. She also noted that the committee had responded to public input by keeping Manoa valley within one district, and McCully-Moiliili within one district. *Id.* at 13:29:20 – 13:29:50. She also gave an example of how the public helped the committee to draw the maps, noting that they heard from a woman living in an area where the census said no one lived, and that they kept her area in the Makakilo district because her area could only be accessed from Makakilo. *Id.* at 13:30:35 – 13:31:12.

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<sup>15</sup> Attached hereto as Exh. “6” is the congressional plan, the Senate and House district plans for Hawai'i Island, and the Senate and House district plans for O'ahu which the technical committee presented on January 13, 2022.

<sup>16</sup> Official timestamps appear at the bottom right corner of the videos.

c. Petitioners first raise the district-within-district issue

At the January 13, 2022 meeting, there was public testimony requesting that the 2021 Commission place each state House or Senate district completely within a congressional district, and each state House district completely within a state Senate district. *See id.* at 13:34:41 – 13:38:00 (testimony of Petitioner Hicks). Commissioner Nonaka spoke directly to the impracticability of the “district-within-district” criteria. *Id.* at 13:31:28 – 13:32:48. He explained that because the congressional districts are based on a *dramatically* different population base than the state legislative districts (which, under *Solomon*, must be based on only non-permanent residents), and because most of the extracted (i.e. non-permanent residents) were from Congressional District 1, it just wasn’t *possible*, let alone practicable to have all state districts wholly within a congressional district. *Id.* at 13:32:28 - 13:32:17.

As for keeping House districts completely within Senate districts, he said: “even if you could 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.” *Id.* at 13:32:17- 13:32:37. Nevertheless, he stated that the issue was “*something that . . . we’re definitely aware of and we heard in the public comment process but was discussed and that’s kind of the conclusion we came to. It is not necessarily practicable to make that happen.*”<sup>17</sup> *Id.* at 13:32:37 – 13:32:48.

The 2021 Commission circled back to the “district-within-district” issue later in the meeting. Commissioner Kennedy stated: “I guess the bottom line is [the technical committee] did take that into consideration, it just . . . wasn’t practicable.” *Id.* at 14:50:18 – 14:50:25. Commissioner Nonaka added that there are a lot of districts that do not want their district changed very much, which the committee took into consideration, and that arbitrarily keeping

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<sup>17</sup> Petitioner misquotes this section of Commissioner Nonaka’s statement in its Petition and Exhibit D. *See* Dkt. 1 at 30; Dkt. 6 at 9:9-9:14.

districts within other districts would disrupt historical district lines. *Id.* at 14:50:56 – 14:51:35.

Chair Mugiishi then took the time to emphasize that:

[W]e are as a Commission considering all of those statutory requirements and constitutional requirements 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 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 practicable decision about a conflict between two principles. . . .

[W]e're going to follow the law and we're going to do our best to take care of people.

*Id.* at 14:51:48 – 14:52:50.

- d. After facilitating additional public input, the Commission adopts a final reapportionment plan on January 28, 2022

To allow as much public input on these maps as possible (*see* Exh. “1” at 115), the 2021 Commission held a series of three back-to-back meetings on January 20, 21, and 22, 2022. *See* Exh. “1” at 152-174. At the January 20, 2022 meeting, Chair Mugiishi discussed each of the eight constitutional criteria and reiterated that the technical committee considered and balanced all of the guidelines before concluding that their modified proposed plans best comply with those guidelines. Video record of the January 22, 2022 meeting at 14:45:35 to 14:49:00, *available at* <https://www.youtube.com/watch?v=aGfH7BvkqRE>; *see also* Exh. “1” at 158.

The staff and the technical committee presented once again on January 26, 2022. The only change that had been made to the proposed maps since January 13, 2022, was a change to the boundaries of House Districts 48 and 49 on Oahu. Video record of the January 26, 2022 meeting at 13:55:13 – 13:55:36, *available at* [https://www.youtube.com/watch?v=VYggM\\_0zOQc](https://www.youtube.com/watch?v=VYggM_0zOQc); *see also* Exh. “1” at 182. Commissioner

Nonaka again explained why the committee could not just redraw the maps to ensure that the “district-within-district” criteria was strictly met, stating: “that would essentially be a redraw of the whole map and we’d have to start over[.]” Video record of the January 26, 2022 meeting at 14:04:35-14:05:18. He also explained that when neither the Senate or the House maps are perfect, sometimes a solution that bridges the gap between them is the best.<sup>18</sup> *Id.* at 14:05:30 – 14:06:14. He reiterated that the committee looked at the issue. *Id.*

The maps were brought to a vote at the January 28, 2022 meeting. In supporting the technical committee’s proposed maps, Commissioner Chipchase stated that he was satisfied that the maps “considered all constitutional criteria as practicable rather than favoring any one or ignoring any condition.” Dkt. 6 at 18:25-18:28. Commissioner Chun echoed his comments by stating that he too “observed complete objectivity and clear commitment to ensuring that good decisions were made in the context of these guidelines[.]” *Id.* at 19:20-19:22. Chair Mugiishi also agreed that the technical committee followed the constitution (*id.* at 20:11-20:15) and said:

we have eight commissioners, four of whom are Republican and four of whom are Democrat, but you know what, all eight of whom I’ve had the privilege to get to know and find out that they all love Hawai‘i and they care about Hawai‘i they are here in Hawai‘i and they care about the people of Hawai‘i. So as they are looking at what's happening, they are not here to push a single agenda. They're here to make sure that we are paying attention to the constitution, to the people, and then to having a fair and well-run election over the next 10 years. So I just want to thank all the commissioners for giving me total faith in the people in Hawai‘i who choose to serve on commissions like this.

*Id.* at 21:29 – 22:6.

The 2021 Commission voted to adopt the technical committee’s modified proposed final

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<sup>18</sup> See e.g., *Blair v. Ariyoshi*, 55 Haw. 85, 515 P.2d 1253 (1973) (acknowledging that where the basic island unit of Kauai was underrepresented in the State Senate, the Reapportionment Commission could balance off such underrepresentation by allocating the last State House seat, otherwise allocable to the basic island unit of Oahu, to the basic island unit of Kauai).

reapportionment maps as the 2021 Commission’s final reapportionment plan, with eight Commissioners voting in favor and one against.<sup>19</sup> Exh. “1” at 193.

Shortly after adopting the final reapportionment plan, the Commission authorized staff to make non-substantive changes, *including changes to realign lines to match the representative district, Senate district, and council district.* *Id.* at 194. Staff was allowed to make changes that would affect fewer than 200 people and would not cause the basic island unit deviations to exceed plus or minus 4.9%. *Id.* During the precincting process, 11 non-substantive changes were made to better align the boundaries. Jones Dec. at ¶17. Following the changes, there are now only thirty-three (33) House districts that are not wholly inside Senate districts.

### III. APPLICABLE STANDARDS

A writ of mandamus “is an extraordinary remedy that will not issue unless the petitioner demonstrates a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action.” *Kema v. Gaddis*, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999); *see Oamilda v. 2011 Council Reapportionment Comm’n, et al.*, No. SCPW-12-0000058, 2012 WL 432272, at \*1 (Haw. Feb. 10, 2012) (Order) (denying petition for writ of mandamus as to relief against the 2011 Council Reapportionment Commission where petitioner failed to demonstrate clear and indisputable right to relief), attached hereto as Appendix “B.”

Where the subject matter of the writ concerns the discretionary acts of a public body, the Court is to “measure the [public body’s] actions . . . using the abuse of discretion standard of review.” *Kawamoto v. Okata*, 75 Haw. 463, 467, 868 P.2d 1183, 1186 (1994). Under the abuse

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<sup>19</sup> Attached hereto as Exh. “7” is the congressional plan, the Senate and House district plans for Hawai‘i Island, and the Senate and House district plans for O‘ahu which the 2021 Commission voted to adopt on January 28, 2022.

of discretion standard, a public body's exercise of discretion may not be overturned unless it is determined that the public body's action was arbitrary or capricious, or characterized by clearly unwarranted exercise of discretion. *See Paul's Elec. Serv., Inc. v. Befitel*, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2004); *see also Kawamoto*, 75 Haw. at 476, 868 P.2d at 1190 (denying petition challenging a council reapportionment plan after finding that the selection of the plan was discretionary and there was no evidence that the Committee abused its discretion or acted in an arbitrary or capricious manner). An abuse of discretion occurs where an agency's determination clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party. *See Kolio v. Hawaii Public Hous. Auth.*, 135 Hawai'i 267, 271, 349 P.3d 374, 378 (2015) (citation omitted).

Petitioners are not entitled to relief. As will be further discussed below, there is no abuse of discretion by the 2021 Commission; the final reapportionment plan is consistent with all applicable constitutional and statutory requirements.

#### IV. PETITIONERS ARE NOT ENTITLED TO A WRIT OF MANDAMUS CONCERNING THE 2021 COMMISSION'S DISCRETIONARY ADOPTION OF THE FINAL REAPPORTIONMENT PLAN

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Petitioners are not entitled to the extraordinary relief they seek. Petitioners' challenge to the validity of the final reapportionment plan fails for three reasons. First, while article IV, section 6 and HRS § 25-2(b) mandate the 2021 Commission's consideration of the constitutional and statutory district-within-district guidelines, it vests the 2021 Commission with the discretion to determine their effect, if any. Second, the extensive record demonstrates that the 2021 Commission faithfully adhered to article IV, section 6 and HRS § 25-2's mandates by giving the district-within-district guidelines due consideration and, although not required, significant effect. And third, Petitioners cannot demonstrate, and have not demonstrated, that the 2021 Commission

clearly exceeded the bounds of reason in discharging its duties and adopting the final reapportionment plan.

Moreover, there would be severe ramifications if the final reapportionment plan is invalidated. In addition to continuing to prolong candidate filing for districts affected by the reapportionment plan, delays associated with the invalidation of the final reapportionment plan pose a risk to the precincting process, which is the cornerstone of the administration of elections. The Petition should therefore be summarily denied and the temporary injunction precluding the State of Hawai'i Office of Elections and Chief Election Officer from making nomination papers available issued on February 24, 2022 should be immediately vacated, thereby allowing candidate filing to proceed forthwith.

A. Article IV, Section 6 Only Mandates the Constitutional District-Within-District Guideline's Consideration, Not Its Effect

The crux of Petitioners' case rests on the faulty premise that, "Article IV, Section 6 mandates that house districts shall be wholly included within senate districts for all island units, where practicable." *See* Dkt. 1, at 29. Article IV, section 6 says no such thing. To be sure, the Commission must construct districts which satisfy *Reynolds'* voter equality mandate and consider eight criteria in achieving that objective, but at no time does article IV, section 6 mandate compliance with the district-within-district criterion, let alone in the manner and degree asserted by Petitioners.

As this Court has long recognized,

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.

The 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.

*Kaheawa Wind Power, LLC v. County of Maui*, 146 Hawai‘i 76, 87-88, 456 P.3d 149, 160-61 (2020) (alteration adopted, citation omitted). “When interpreting a constitutional provision, every word is presumed to have meaning.” *Id.* at 87-90, 456 P.3d at 163.

Article IV, section 6 provides in relevant part that the Commission:

*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 recognizable 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.
8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

(Emphases added.)

The plain language of this provision clearly provides that: (1) where *necessary*, the Commission is to *redraw* district lines and construct districts with substantial equality of

population, and (2) the Commission is to be “guided” by eight criteria in effecting redistricting. In particular, the phrase “shall be *guided* by the following criteria” plainly and unambiguously provides that the district-within-district criterion is a “guideline,” not a hard and fast “requirement” as alleged by the Petitioners, and that its “consideration” in effecting redistricting is what is mandated, not its strict application. *See Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Hawai‘i 465, 479, 78 P.3d 1, 15 (2003) (concluding that an ordinance requiring that “guidelines shall be used” to identify potential county district lands does not denote individual factors which are mandatory in themselves, but instead mandates consideration of the guidelines in the ultimate designation decision).

Further, the phrase “where practicable” confirms that the 2021 Commission is vested with the discretion to determine whether the guideline’s effect is desirable. *See Mutual Tel. Co. v. Hawaiian Contracting Co.*, 31 Haw. 296, 307 (1930) (acknowledging “the word ‘practicable’ has different meanings[,]” such as “‘desirable’ and ‘advantageous,’” and that “[i]ts use has been upheld as conferring certain discretion.”); *see also Save Sunset Beach*, 102 Hawai‘i at 479, 78 P.3d at 15 (Because guidelines “presuppose the exercise of discretion,” a decision arising out of their “mandatory consideration must, of necessity, involve the exercise of discretion.”). Simply put, article IV, section 6 mandates consideration, but not effect.

This interpretation is affirmed by the manifest intent of the framers:

Your Committee has also placed in this section a number of *guidelines* for the reapportionment commission to follow when redistricting. . . . 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.

See Supp. Stand. Comm. Report No. 58, at 265 (emphases added).

The framers state, in no uncertain terms, that the criteria are “guidelines” which were “not intended . . . to be absolute restrictions[,]” but rather “considered” by the Commission. *Id.* This makes sense because the framers knew full well that, “[w]henver redistricting (as opposed to simple reapportioning) is to take place, there is a *wide range of discretion and judgment required.*” *Id.* at 259 (emphasis added). The framers further make clear that only numbers 1, 2, 3, and 7 were stated in “mandatory terms.” *Id.* The obvious corollary being that numbers 4, 5, 6, and 8 were *not* stated in mandatory terms and should *not* be construed as “mandatory.” Inasmuch as it is undisputed that the eight criteria have not changed since 1968, *see* Dkt. 1, at 32, this directly undermines Petitioners’ assertion that it is a “requirement” because the district-within-district criterion is, and has always been, number 6.

Petitioners nevertheless urge the Court to recognize the eight criteria, including the district-within-district guideline, as “standards that must and should be followed when practicable” in order to “guard against gerrymandering, submergence, unfairness, and partiality.” *See* Dkt. 1, at 34. The Court should decline the Petitioners’ invitation to rewrite the Constitution. If the framers intended the district-within-district guideline to be a mandatory requirement, they would have specified so. *See Hanabusa v. Lingle*, 105 Hawai‘i 28, 33, 93 P.3d 670, 675 (2004) (“If the framers intended the governor [to] give notice by a particular time of day, they would have expressly specified such time in the provisions of article III, section 16.”). But they did not. Instead, they expressly provided that it is one of eight guidelines to be “considered” by the Commission and one of four guidelines which they purposefully refrained from stating in mandatory terms. *See* Supp. Stand. Comm. Report No. 58, at 265.

Even if the Court could alter or amend the Constitution (which it cannot), there is no indication that compliance with the district-within-district guideline guards against gerrymandering, submergence, unfairness, and partiality. For instance, the framers noted that a criterion regarding districts being contiguous and compact insofar as possible “serves as a guide for any future reapportionment of the state legislature to help gerrymandering from occurring.” *See* Supp. Stand. Comm. Report No. 58, at 246. The framers also expressly provided for criteria to address submergence (criterion number 8) and unfairness or partiality (criterion number 2).

But with respect to the district-within-district guideline, the framers simply noted that:

[t]he 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.***

*Id.* at 247 (emphasis added). Thus, not only did the framers confirm that this guideline was adopted to adhere to a traditional concept of bicameralism – as opposed to gerrymandering, submergence, unfairness or partiality – but the framers confirmed that they did not intend it to be mandatory. *Id.* The Court should therefore reject the Petitioners’ construction of the district-within-district guideline as inconsistent with the plain language and intent of article IV, section 6.

B. HRS § 25-2(b) Only Mandates the Statutory District-Within-District Guideline’s Consideration, Not Its Effect

The Court should likewise reject the Petitioners’ construction of the district-within-district criterion in HRS § 25-2(b) pertaining to congressional redistricting. Similar to article IV, section 6, the criteria set forth in HRS § 25-2(b) are guidelines, not requirements, and their consideration is what is mandated, not their effect.

Statutory construction is guided by established rules:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

*Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of the City & County of Honolulu*,  
114 Hawai'i 184, 193-94, 159 P.3d 143, 152-53 (2007) (citation omitted).

HRS § 25-2(b) provides in relevant part,

*the commission shall redraw congressional district lines for the district 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 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.

(Emphases added.)

The plain language of this provision clearly mandates that the Commission is to construct districts with substantial equality of population and is to be “guided” by six criteria in effecting redistricting. The fact that the six criteria largely mirror the criteria set forth in article IV, section 6 is no accident. HRS § 25-2(b) was enacted to “conform the Hawaii Revised Statutes to the Hawaii State Constitution as amended by the Constitutional Convention of 1978 and ratified by the electorate on November 7, 1978,” *see* 1979 Haw. Sess. Laws Act 51, § 1, attached hereto as Appendix “C.” The framers’ intent is therefore instructive in the construction of this statutory guideline: consideration is mandated, but not effect. *See infra*.

C. The 2021 Commission’s Adoption of the Final Reapportionment Plan is Subject to the Abuse of Discretion Standard

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Contrary to Petitioners’ contentions that there is no apparent standard, the 2021 Commission’s adoption of the final reapportionment plan is subject to the deferential abuse of discretion standard. As discussed above, article IV, section 6 and HRS § 25-2(b) mandate the Commission’s consideration of the district-within-district guidelines in achieving the overriding objective of voter equality, but do not mandate their effect. *See infra* Section IV.A and B. Their effect, if any, is entrusted to the 2021 Commission’s broad discretion. Supp. Stand. Comm. Report No. 58, at 258-59; *see also Save Sunset Beach*, 102 Hawai‘i at 479, 78 P.3d at 15. Thus, to the extent Petitioners challenge the 2021 Commission’s exercise of discretion in adopting the final reapportionment plan, the abuse of discretion standard applies. *Kawamoto*, 75 Haw. at 467, 868 P.2d at 1186.

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D. Petitioners Cannot Demonstrate an Abuse of Discretion

1. The 2021 Commission faithfully adhered to article IV, section 6 and HRS § 25-2(b)

Petitioners contend that there was “total disregard for and lack of an honest and good faith effort” on the 2021 Commission’s behalf to comply with the constitutional and statutory district-within-district guidelines and a lack of adequate justification.<sup>20</sup> See Dkt. 1, at 38, 42-46. The record belies Petitioners’ meritless contentions. Time and time again, the 2021 Commission explained how it gave the redistricting criteria, including the district-within-district guidelines, due consideration in effecting redistricting:

COMMISSIONER NONAKA: One more thing I wanted to just address and bring up for consideration. There was some comment made about the Congressional districts, notsplitting 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.*

See January 13, 2022 Reapportionment Commission Meeting, starting at timestamp 13:31:27 (emphasis added).<sup>21</sup>

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 Oahu. But I’d just like to comment on, speaking to 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*

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<sup>20</sup> There is nothing in article IV, section 6 which requires the 2021 Commission to issue findings, point to evidence, or provide justification of the final reapportionment plan in order for it to be valid.

<sup>21</sup> Video record of January 13, 2022 Reapportionment Commission Meeting, available at <https://www.youtube.com/watch?v=p6JUITHMrfU>.

*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. Thank you.*

*See id.*, starting at timestamp 14:53:03 (emphasis added).

CHAIR MUGUIISHI: . . . [T]here were some questions regarding the constitutional guidelines that govern legislative redistricting. And so I wanted to take a little bit of time to reiterate what those guidelines are, and summarize what I interpret what I heard at our last meeting that was discussed by the commission regarding article 4 section 6 of the state constitution. So there are eight guidelines and what the constitution says is in effecting such redistricting, the commission shall be guided by the following criteria: . . .

[\*reads eight constitutional guidelines in article IV, section 6\*]

So commissioners, at our last meeting, including those from the technical committee spoke to the constitutional guidelines. In my, to what I heard, there were two important points made which I would like to reiterate here. I tried to summarize it then, but I want to reiterate it again here today. *The first is that there has been consideration by the technical committee of all the constitutional guidelines. The commissioners verbalized at that meeting that they did not pick and choose among their criteria. They considered them all. Consideration is required and due consideration is being given. The second is that after due consideration the members of the technical committee believed that the modified proposed plans represent what they the technical committee deemed to be the best, best complies with the constitutional guidelines.* The point is that the need to balance the eight requirements of the constitution is why many of the guidelines are modified by the phrases where possible and where practicable. That is what I heard the commissioners speak to at our last meeting. Now, following the public's input with testimony over the next few days, the technical committee is planning to meet again to consider whether there will be any changes to the proposed maps, and the final proposed maps are planned to be presented at the January 26th meeting.

These guidelines will continue to be followed throughout that process as well. So now what I would like to do is invite the commissioners, or any commissioner and the members of the technical committee especially, to confirm if I've accurately summarized what was represented at the last meeting and what's being done in our process to date. Yes, Commissioner Ono.

COMMISSIONER ONO: *Chair Mugiishi, yes, that accurately summarizes where we're at[.] . . .*

COMMISSIONER NONAKA: *I would agree with Commissioner Ono[.] . . .*

. . .

COMMISSIONER NEKOTA: I'm going to – this is Commissioner Nekota – *I'm going to agree with Commissioner Ono and Nonaka. We really did take public testimony to heart. We did not just go draw lines to draw lines. We really did and follow the Constitution, as we perceive it to be, along with our legal counsel[.]*

See January 20, 2022 Reapportionment Commission Meeting, starting at timestamp 14:45:35

(emphases added).<sup>22</sup>

COMMISSIONER ONO: But I did want to say as a commission, as the technical committee, *I believe that we have taken all of eight constitutional criteria to heart. We have taken everything into consideration and tried to balance all of them. So while they may not appear to neatly fall, you know, two House districts into one Senatorial district, a lot of this has to do with balancing and, you know, looking at neighborhoods and communities as they function, and I feel that the maps are the best we could do under the circumstances.*

See January 26, 2022 Reapportionment Commission Meeting, starting at timestamp 14:55:36

(emphasis added).<sup>23</sup>

COMMISSIONER CHIPCHASE: Chair, this is Commissioner Chipchase. I'll speak briefly to the motion. I do support the motion and I support that the maps, the maps as revised that have come to us from the

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<sup>22</sup> Video record of January 20, 2022 Reapportionment Commission Meeting, available at <https://www.youtube.com/watch?v=Zj9I6McPgJc>.

<sup>23</sup> Video record of January 26, 2022 Reapportionment Commission Meeting, available at [https://www.youtube.com/watch?v=VYggM\\_0zOOc](https://www.youtube.com/watch?v=VYggM_0zOOc).

technical committee and that have been reviewed most recently in our meetings. They follow a long iteration of taking into account the best available data that we've received, and that has changed and it's changed the way that we approach the mapping, and the maps that we produced and have been responsive to community concerns and questions, where practicable. And if you look back to where we begin, Chair, where we began, the maps have changed quite a bit from where we started this journey, and I believe that those iterations have been appropriate and have been responsive as I say to the data and to the comments that we've received. *Having looked at the maps and having considered the community's comments over these many weeks, I am satisfied that the technical committee and that this Commission has considered all of the constitutional criteria as practicable rather than favoring any one or ignoring any condition.* And so I do support the maps and I do support the work that this commission has done. Thank you.

See January 28, 2022 Reapportionment Commission Meeting, starting at timestamp 14:02:14 (emphasis added).<sup>24</sup>

COMMISSIONER CHUN: . . . This process has been educational for me in terms of the reapportionment. First, in arriving at an understanding that our constitution provides for standards and criteria pertaining to extraction that are not necessarily in sync with data that is maintained by either the military or the U.S. Census Bureau. Secondly, arriving at an understanding as well as to the guidelines that are set forth in the constitution pertaining to redistricting. *The constitution states that in effecting such redistricting, the commission shall be guided by the following criteria. It sets forth guidance rather than inflexible standards so as to ensure reasonableness and fairness are always a part of the equation in arriving at redistricting determinations. I have observed complete objectivity and clear commitment to ensuring that good decisions were made in the context of these guidelines and as they were applied to the redistricting maps,* so I will be pleased today to support the motion.

See *id.*, starting at timestamp 14:04:21 (emphasis added).

In addition, one such example of the 2021 Commission applying the guidelines involves the House districts for Windward O'ahu and Hawaii Kai. See Declaration of Diane T. Ono, ¶12, attached hereto and incorporated by reference herein. Based on August 2021 U.S. Census data,

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<sup>24</sup> Video record of January 28, 2022 Reapportionment Commission Meeting, available at <https://www.youtube.com/watch?v=DV1rylrkv2I>.

the technical committee understood that the Waimanālo population would comprise approximately 40% of any house district in which it was placed. *Id.* On October 14, 2021, the technical committee proposed including Waimanālo in a new House District 51, that wrapped around Makapuu Point. *Id.* at ¶13. In doing so, the technical committee sought to balance several constitutional redistricting guidelines. *Id.* First and foremost, the population of proposed House District 51 should be approximately equal to the average population for the house districts according to the apportionment base. *Id.* Other redistricting guidelines that were considered included the geographical feature guideline, the “no submergence” guideline, and the district-within-district guideline. *Id.* By population, proposed House District 51 would be comprised of roughly 40% Waimanālo’s residents, 25% Portlock residents, and 35% Kailua residents. *Id.* at ¶14. As a result, no single area would be entirely submerged in an area wherein different socio-economic interests predominate, giving effect to the “no submergence” guideline. *Id.* In addition, the proposed House District 51 mirrored Senate District 25, as drawn by the 2011 Reapportionment Commission, thereby giving effect to the district-within-district guideline. *Id.* at ¶15. On October 28, 2021, the 2021 Commission voted unanimously to adopt the legislative re-district plan proposed by the technical committee. *Id.* at ¶16.

The 2021 Commission subsequently received substantial oral and written public comments in connection with the public hearings, some of which was submitted by the named Petitioners, asking the 2021 Commission to jettison the wrap-around house district, and to reinstate Makapuu Point as a district boundary. *Id.* at ¶17. One of the reasons cited in the public testimony was the concern that the socio-economic interests in Hawaii Kai would predominate over those of Waimanālo and dilute Waimānalo residents’ representation. *Id.* In response to the concern raised by the public testimony, the technical committee decided to use Makapuu Point as

a district boundary in its proposed final legislative plan which it presented to the Commission on January 13, 2022 and which the 2021 Commission ultimately adopted. *Id.* at ¶18.

Indeed, the final reapportionment plan reflects due consideration for the district-within-district guidelines. As the following table reflects, the final reapportionment plan resulted in 9 state legislative districts (5 Senate and 4 House) being split among by the congressional district line and 33 House districts being split by Senate district lines in a number that appears to generally comport with historic results in prior reapportionment years:

	2022	2012	2001	1991
	=====	=====	=====	=====
State Senate split by Congressional	5	5	3	3
State House split by Congressional	4	6	5	2
State House split by State Senate	33	30	31	38

*See* Declaration of Royce A. Jones, ¶¶16-17, attached hereto and incorporated by reference herein. This means that 67 Senate and House districts were wholly included in congressional districts and 18 House districts were wholly included in Senate districts. Calculated as a percentage, it is readily apparent that the final reapportionment plan gave significant effect to the guidelines:

State Senate & House Wholly Included in Congressional: 88%

State House Wholly Included in State Senate: 35%

The evidence in the record therefore conclusively demonstrates that the 2021 Commission not only satisfied the mandates of article IV, section 6 and HRS § 25-2(b) in considering the district-within-district guidelines, but adopted a final reapportionment plan which gave them significant effect despite being under no obligation to do so.

2. Petitioners' ability to achieve a near perfect effect does not evidence an abuse of discretion

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Petitioners contend that achieving a near perfect effect for the constitutional district-within-district guideline is “doable,” and urge the Court to find that “the Commission’s failure to follow the district within district constitutional requirement in a super majority of the districts ‘clearly exceeded bounds of reason[.]’” *See* Dkt. 1, at 48. Petitioners’ position fails for three reasons. First, article IV, section 6 only mandates consideration of the district-within-district guideline, not effect. *See infra* Section IV.A. There can be no “failure” where there is no express mandate to begin with. *See Save Sunset Beach*, 102 Hawai‘i at 479, 78 P.3d at 15 (concluding that “the City Council must apply all the guidelines [in identifying potential county district lands], but it is not restricted in approving a rezoning application that does not satisfy all four of them.”); *cf Solomon*, 126 Hawai‘i at 293, 270 P.3d at 1023 (invalidating reapportionment plan which “disregard[ed] the *express mandate* of article IV, section 4 that only permanent residents be counted in the population base for the purpose of reapportionment of the state legislature.”) (emphasis added).

Second, even assuming that the 2021 Commission was required to give effect to the district-within-district guideline, the Court should reject Petitioners’ proposed “super-majority” standard because it runs afoul of the plain language and intent of article IV, section 6, is arbitrary, and is unduly restrictive. Imposing a “super-majority” standard would improperly elevate what is concededly a “less restrictive” criterion to an “absolute restriction,” in direct contravention of the framers’ express intent. *See infra* Section IV.A. And to the extent Petitioners propose utilizing a standard expressed as a percentage, such a standard is arbitrary because it does not reflect the degree to which a House district may fall outside a Senate district. For instance, a single census block with little to no population may be the only part of a House

district which is not “wholly included” in a Senate district. *See Jones Dec*, ¶17 at pp. 5-17. In other words, even if a House district is 99.9% within a Senate District, it would still count in Petitioners’ arbitrary “super-majority” standard. Moreover, adopting an unduly restrictive “super-majority” standard would only endanger the basic aim of legislative reapportionment, as explained by the U.S. Supreme Court:

Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurrently removed from legislative hands and performed by [ ] courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan.

*Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S.Ct. 2321, 2329 (1973).

Third, Petitioners’ ability to achieve a near perfect effect for a single guideline does not, in and of itself, demonstrate that the final reapportionment plan clearly exceeded the bounds of reason. Just as courts reviewing a challenged state legislative apportionment plan must consider the scheme as a whole in determining whether the plan meets federal constitutional requirements, so, too, should this Court consider the scheme as a whole in determining whether the final reapportionment plan meets state constitutional requirements. *See Burns v. Richardson*, 384 U.S. 73, 83, 86 S.Ct. 1286, 1292 (1966) (“[A] court in reviewing an apportionment plan must consider the scheme as a whole.”) (citation omitted); *see also Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673, 84 S.Ct. 1429, 1428 (1964) (“[T]he proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State’s voters, in both houses of a bicameral state legislature.”).

When considering the 2021 Commission’s final reapportionment plan as a whole, it is evident that it achieves the “basic aim” of “fair and effective representation for all citizens.” *Reynolds*, 377 U.S. at 565-66, 84 S.Ct. at 1383. The final reapportionment plan satisfies the foremost objectives of effecting apportionment in the manner prescribed by the Hawai‘i Constitution and ensuring voter equality. *See Solomon*, 126 Hawai‘i at 293, 270 P.3d at 1023 (“Article IV, sections 4 and 6 provide for apportionment of the state legislature by using a ‘permanent resident’ base.”); *see also Reynolds*, 377 U.S. at 579, 84 S.Ct. at 1390 (“Whatever the means of accomplishment, the *overriding objective* must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”) (emphasis added). This much is not in dispute. At no time have Petitioners suggested that the 2021 Commission failed to properly effect apportionment or that the 2021 Commission failed to make a good faith effort to construct districts which ensure voter equality. *See e.g.*, Petition, at 38 n.8 (“[T]he Petition does not challenge the population deviations for the final districts[.]”). Nor have Petitioners alleged that the final reapportionment plan fails with respect to the other seven guidelines.<sup>25</sup> Taken together with the significant effect given to the district-within-district guidelines, Petitioners simply cannot demonstrate that the final reapportionment plan was clearly erroneous.

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<sup>25</sup> Petitioners insinuate that preserving existing district boundaries wherever possible is “likely to benefit incumbents[.]” but at no time assert that it serves as a basis for invalidating the final reapportionment plan. *See* Dkt. 1, at 28.

3. Even by the Petitioners’ measure, there was no abuse of discretion with respect to the statutory district-within-district guideline

Petitioners take issue with the effect given to the statutory district-within-district in final reapportionment plan, but do not go so far as to allege that it rises to the level of abuse of discretion. For good reason: the final reapportionment plan results in a whopping 88% of legislative districts being wholly included in congressional districts. *See infra* Section IV.D.1. Petitioners conveniently focus on the converse by stating that 11.8% of legislative districts are “non-compliant,” but then immediately suggest that “a better measure of compliance” would be to focus on Oahu’s districts alone (to the exclusion of the other basic island units), which increases the “non-compliance” to 17.6% . *See* Dkt. 1, at 39. Petitioners’ attempt to reframe and artificially increase the alleged statutory district-within-district “deviation” is telling. This is because regardless of which measure Petitioners use, the final reapportionment plan results in either an 88% or 82% “compliance” measure, thereby meeting (maybe even exceeding) the “super-majority” standard Petitioners urge this Court to apply in determining whether there is an abuse of discretion. Thus, by Petitioners’ own standard, the final reapportionment plan does not clearly exceed the bounds of reason with respect to the statutory district-within-district guideline.

4. Petitioners fail to demonstrate that the 2021 Commission unduly favored incumbents

Petitioners allege that an expressed “preference” to use the existing district boundaries as a starting point and/or to preserve existing boundaries wherever possible likely “benefit[s] incumbents,” thereby insinuating that the 2021 Commission unduly favored certain individuals or political parties. But insinuation is all Petitioners offer. Petitioners do not offer an explanation as to how such use/preservation of existing district boundaries necessarily evidences

an intent to favor incumbents, to the exclusion of all other considerations.<sup>26</sup> Nor do Petitioners identify the individuals or political parties they believe have been favored or offer any evidence that the 2021 Commission considered the incumbents' interests. The Court should therefore disregard Petitioners' unsupported allegations. *See Kawamoto*, 75 Haw. at 467, 868 P.2d at 1186 (concluding that petitioner failed to present sufficient evidence that the Committee favored any incumbent or acted improperly where petitioner only pointed to the fact that all but one new council districts have incumbents and did not present evidence that Committee even considered the incumbents' interests).

5. Invalidating the Final Reapportionment Plan Will Impact 2022 Election Operations

The constitutional timeline for reapportionment has always been understood to be part of the overall constitutional and statutory framework of our elections. *See Nago Dec*, ¶6, attached hereto and incorporated by reference herein. There is a multitude of tasks that must be completed to conduct the elections by both the Office of Elections (“OE”) and the county clerks, such as candidate filing and voter registration, which cannot be completed without the final reapportionment plan. *Id.* at ¶¶8-9. Once the final plans are adopted, OE begins drawing precinct lines and updating the statewide voter registration system to correctly assign all voters to their proper precinct, which we refer to as the “precincting” process. *Id.* at ¶10. These precincts have their own boundaries that must take into account the boundaries of the districts

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<sup>26</sup> In considering a single-member districting system, the framers determined that: [i]f the single-member districting system were adopted, it appears that the small size of the districts and the mobility and instability of the island population will require at each reapportionment of the Hawaii legislature violent changes in the district boundary lines. Voters accustomed to voting with one group of people will find themselves voting with a new group of people; voters accustomed to voting for legislators from among candidates familiar to them will find themselves voting for legislators from among candidates who are new to them. This might alienate many eligible voters who are otherwise highly motivated.

established by the redistricting process for federal, state, and county districts, where applicable by county redistricting commissions. *Id.* at ¶11. This process in the past has taken up to a month to complete and impacts OE’s ability to conduct candidate filing and the ballot access rights of candidates. *Id.* at ¶12.

Additionally, the county clerks, who are responsible for voter registration, need time to perform voter registration list maintenance which federal law mandates must be completed no later than the 90th day prior to the Primary Election, which in this case is May 15, 2022. *Id.* at ¶15. This process starts once the precincting and updating of the statewide voter registration is completed. *Id.* at ¶16. Any delay in this process undermines OE’s ability to meet this deadline and to correspondingly update and ensure the ongoing integrity of the voter registration rolls. *Id.* Simply put, precincting is one of the cornerstones of the administration of elections. *Id.* at ¶19. Elections cannot be conducted without precincts and any delay in the reapportionment process delays OE’s ability to conduct the precincting process and everything that relies upon it. *Id.*

V. PETITIONERS ARE NOT ENTITLED TO A WRIT OF MANDAMUS CONCERNING THE TECHNICAL COMMITTEE PERMITTED INTERACTION GROUP CREATED IN ACCORDANCE WITH LAW

The Court cannot grant, and should dismiss, the Petition to the extent it seeks to invalidate the final reapportionment plan based on the 2021 Commission’s alleged improper delegation of authority “to a technical committee permitted interaction group.” *See* Dkt. 1, at 28. As discussed above, mandamus “will not issue unless the petitioner demonstrates a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action.” *Kema*, 91 Hawai‘i at 204, 982 P.2d at 338. Petitioners’ challenge must fail for two reasons. First, Petitioners cannot demonstrate “a clear and indisputable right to the relief requested” because the 2021 Commission strictly adhered to

the Sunshine Law in creating the technical committee and in receiving and acting upon the technical committee's recommendations. Second, Petitioners cannot demonstrate "a lack of other means to redress adequately the alleged wrong or to obtain the requested action," because under the Sunshine Law, Petitioners are entitled to seek redress through an enforcement action filed in circuit court.

A. Petitioners Cannot Demonstrate a Clear and Indisputable Right to Relief

Petitioners' claim that the Committee's use of a permitted interaction group violated the Sunshine Law is belied by extensive record evidence of public presentations and public deliberation that show open government at work. From its initial appointment on May 17, 2021 to the final legislative plans proposed on January 13, 2022, the technical committee operated within the confines of the open meetings exemption for permitted interaction groups formed to investigate a matter on behalf of a board or committee. Haw. Rev. Stat. § 92-2.5(b). At no point during the entire reapportionment process did the 2021 Commission discuss or act on a report from the technical committee until another meeting "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." Haw. Rev. Stat. § 92-2.5(b)(1)(C).

1. HRS § 92-2.5(b) Authorizes the Commission to Create Permitted Interaction Groups to Investigate and Report on Designated Matters

"The legislature adopted § 92-2.5 in 1996, 'to expressly allow certain 'permitted interactions,' i.e., instances when board members can discuss or consider board business outside of a meeting, without notice and without public participation.'" *Kanahele v. Maui County Council*, 130 Hawaii 228, 253, 307 P.3d 1174, 1199 (2013), *as corrected* (Aug. 30, 2013) (citations omitted, cleaned up). *See* 1996 Haw. Sess. Laws Act 267, § 1 at 628 ("the purpose of this Act is to specify those instances and occasions in which members of a board may discuss

certain board matters ... in a manner that does not undermine the essence of open government”), attached hereto as Appendix “E”. “The ‘investigation’ permitted interaction,” authorized under HRS § 92-2.5(b)(1), “allows a group of board members constituting less than a quorum of a board to investigate a matter relating to the board's official business outside of a meeting.” OIP Op. Ltr. No. 06-02, 2006 WL 1308299, at \*2 (Apr. 28, 2006),<sup>27</sup> attached hereto as Appendix “D”.

For this type of permitted interaction group, “board members chosen to participate ... must be named at a board meeting and the scope of the investigation and each member's authority must be defined at that time.” *Id.* The permitted interaction group “must report back at a second meeting,” and “the board cannot discuss or act on that report until another meeting ‘held subsequent to the meeting at which the findings and recommendations ... were presented to the board.’” *Id.*

Although the Petition states a clear preference that the Commission should not use a permitted interaction group, a mere preference is not binding authority that prohibits the Commission from creating a permitted interaction group in accordance with law.<sup>28</sup> *See Haw.*

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<sup>27</sup> “The OIP is the agency charged with the responsibility of administering the Sunshine Law. As such, its opinions are entitled to deference so long as they are consistent with the legislative intent of the statute and are not palpably erroneous.” *In re Office of Info. Practices Opinion Letter No. F16-01*, 147 Hawaii 286, 298, 465 P.3d 733, 745 (2020) (quoting *Kanahele v. Maui County Council*, 130 Hawaii 228, 245, 307 P.3d 1174, 1191 (2013), *as corrected* (Aug. 30, 2013)).

<sup>28</sup> Petitioners’ assertion that the “use of the technical committee PIG ... created opportunities to inject improper influences[.]” Dkt. 1 at 54, is rank speculation, and another example of a policy preference that the Commission forego the use of permitted interaction group. “Courtrooms are not the place ‘to vindicate individual value preferences[.]’” *Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 207, 439 P.3d 127, 159 (2019) (citing *Hawai‘i’s Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989)). (Recktenwald, C.J., dissenting). Petitioners’ freestanding assertion obviously does not rise to the level of binding authority precluding the Commission from using a permitted interaction group in accordance with law.

Rev. Stat. § 92-2.5(b)(1)(A). And the contention that a permitted interaction group cannot be used by a board or commission because the authority is held by the board or commission alone would eviscerate the purpose behind “having a group of members constituting less than a quorum of a board ... investigate a matter relating to the board’s official business outside of a meeting.” OIP Op. Ltr. No. 06-02, 2006 WL 1308299, at \*2. Applying such a principle to a reapportionment commission would limit the use of permitted interaction group in a manner not addressed in article IV of the Hawaii Constitution, HRS Chapter 25, or HRS Chapter 92.

2. The technical committee was created and operated in accordance with the Sunshine Law

As Commissioner Nonaka explained at the May 17, 2021 meeting, the Commission placed the technical committee in charge of the time-consuming work of “put[ting] together the draft maps,” Dkt. 6, at 3:27-3:28, which he described as a “long arduous process” and a big commitment. *Id.* at 3:27-4:2; *see also* Nonaka Dec, at ¶7 (“The primary task of the Technical Committee was to propose, for the full Commission’s review and consideration, two sets of plans: (1) a legislative reapportionment plan based on the permanent resident base adopted by the Commission; and (2) a congressional reapportionment plan based on the total population counted in the 2020 United States Census.”); Ono Dec, at ¶6 (same). The 2021 Commission deliberated as to who should be on each committee and why (Dkt. 1, at 4:3-5:11), ultimately reaching a consensus as to the members of each committee before voting unanimously to create the two committees. *Id.* at 5:17-5:29. Chair Mugiishi appointed Commissioners Nonaka, Nekota, Ono, and Rathbun to the technical committee. *Id.* at 6:3-6:5. Extensive record evidence demonstrates that the Commission faithfully adhered to the Sunshine Law when it created the technical committee. Petitioners’ claim that “it is unclear what the investigation and the matter to be investigated were,” Dkt. 1, at 55, is belied by this record evidence.

The record evidence also demonstrates that the Commission consistently adhered to Haw. Rev. Stat. § 92-2.5(b)(1)'s two-step process of receiving recommendations by the technical committee at a regularly noticed Commission meeting, then deliberating and deciding upon matters presented by the technical committee at a regularly noticed Commission meeting held after the meeting at which the technical committee presented on the matter. *See Nonaka Dec.* at ¶¶11-13. Petitioners' baseless claims that the technical committee failed to make recommendations, and the Commission failed to deliberate upon its recommendations, are completely meritless.

3. Petitioners' attempt to undo the technical committee is time-barred under HRS § 92-11

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Undoing the Technical Committee now, only after the bi-partisan group of four Commissioners recommended congressional plans, drew and revised legislative plans following eleven public hearings, and again in response to new extraction figures, and after the Commission adopted the congressional and legislative plans, would cast doubt on the entire reapportionment process and could lead to an unprecedented delay in the elections. Petitioners may not really want what they say they want. Moreover, what Petitioners claim to want is in fact barred, at least in part, by the ninety-day time-bar to sue to void an agency action taken in violation of the open meeting and notice requirements in HRS §§ 92-3 and 92-7. *See Haw. Rev. Stat. § 92-11* ("Any final action taken in violation of" the open meeting and notice requirements in HRS §§ 92-3 and 92-7 "may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action."). Thus, to the extent Petitioners' claim is that the 2021 Commission failed to comply with open meeting and notice requirements when it created the technical committee at the May 17, 2021 meeting and the 2021

Commission’s action is therefore voidable, that claim is plainly time-barred. Haw. Rev. Stat. § 92-11.

B. Petitioners Can Obtain Redress Under HRS § 92-12

An alleged sunshine law violation concerning the formation or conduct of a permitted interaction group is capable of being redressed by a suit authorized under HRS § 92-12(c), which authorizes “[a]ny person” to “commence a suit in the circuit court... for the purpose of requiring compliance with or preventing violations of” the Sunshine Law. Haw. Rev. Stat. § 92-12(c). Here, the Petition seeks 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 ... without impermissibly delegating the redistricting process to a technical committee permitted interaction group.” Dkt. 1, at 28. Whether or not the Commission appropriately delegated authority to a permitted interaction group is a question that the circuit courts can resolve in a suit authorized under HRS § 92-12.<sup>29</sup> As a result, Petitioners cannot demonstrate “lack of other means [i.e., other than mandamus] to redress adequately the alleged wrong or to obtain the requested action.” *Kema*, 91 Hawai‘i at 204, 982 P.2d at 338.

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<sup>29</sup> The Legislature vested jurisdiction in the circuit courts “to enforce the provisions of [HRS Chapter 92, part I] by injunction or other appropriate remedy.” Haw. Rev. Stat. § 92-12(b).

VI. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny the Petition in its entirety and immediately vacate the February 24, 2022 Order temporarily enjoining the State of Hawaii Office of Elections and Chief Election Officer from making available nomination papers, thereby allowing candidate filing for the 2022 election to proceed forthwith.

DATED: Honolulu, Hawai'i, March 11, 2022.

/s/ Lori N. Tanigawa  
Lori N. Tanigawa  
Deputy Attorney General  
Attorney for Respondents  
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