IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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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 HAWAIʻI REAPPORTIONMENT COMMISSION AND ITS MEMBERS; THE STATE OF HAWAIʻI OFFICE OF ELECTIONS; and SCOTT NAGO, in his official capacity as Chief Elections Officer, State of Hawaiʻi, Respondents.

SCPW-22-0000078

ORIGINAL PROCEEDING

MAY 9, 2022

RECKTENWALD, C.J., NAKAYAMA, AND EDDINS, JJ.; WITH McKENNA, J., CONCURRING SEPARATELY AND DISSENTING, WITH WHOM WILSON, J., JOINS; AND WILSON, J., ALSO DISSENTING SEPARATELY[1]

OPINION OF THE COURT BY EDDINS, J.

Article IV of the Hawaiʻi Constitution concerns

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[1] At the time of this opinion's publication, Justice Wilson's dissent is forthcoming.

reapportionment, the process through which the state's legislators are distributed and its political districts redrawn.

It provides that every ten years a nine-member reapportionment commission (the commission) shall determine the total number of state representatives to which each basic island unit[2] is entitled. Haw. Const. art. IV, §§ 1, 2 & 4. This determination is made "using the total number of permanent residents in each of the basic island units" and with the "method of equal proportions." Id.

Once the commission determines how many representatives each basic island unit is entitled to, it must apportion those representatives within the basic island units. Id. at § 6. If there have been population shifts in the decade since the last reapportionment, the commission must redraw district lines to ensure that the "number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable." Id.

The commission is also tasked with redrawing congressional district lines. Id. at § 9.

Article IV, section 6 provides eight criteria that the commission "shall be guided by" in effecting redistricting. The

[2] The four basic island units are: (1) the island of Hawaiʻi, (2) the islands of Maui, Lānaʻi, Molokaʻi and Kahoʻolawe, (3) the island of Oʻahu and all other islands not specifically enumerated, and (4) the islands of Kauaʻi and Niʻihau. Haw. Const. art. IV, § 4.

sixth is that: "[w]here practicable, [state] representative districts shall be wholly included within [state] senatorial districts" (the constitutional district within district guideline). Id. at § 6. Hawaiʻi Revised Statutes (HRS) Section 25-2(b)(5) (Supp. 2021) (the statutory district within district guideline) similarly requires that "[w]here practicable, state legislative [representative and senatorial] districts shall be wholly included within [U.S.] congressional districts."

On January 28, 2022, the 2021 Hawaiʻi Reapportionment Commission (the Commission) approved the 2021 Final Legislative Reapportionment Plan (the Plan).

The Plan places 33 of 51 house districts (64.7%) into two or more senate districts. It also places four Oʻahu house districts and five Oʻahu senate districts into both U.S. congressional districts.

Petitioners, who are registered voters in the State of Hawaiʻi, argue that the Plan is invalid because it does not give adequate effect to article I, section 6's guidance that "[w]here practicable, representative districts shall be wholly included within senatorial districts." See Haw. Const. art. IV, § 6. They also argue that the Plan violates HRS § 25-2(b)(5) by placing nine Oʻahu legislative districts into both congressional

districts.[3] Petitioners say they submitted two plans to the Commission that not only complied with the district within district guidelines, but also had a lower average per-district population deviation than the Plan. Petitioners say the Commission could have complied with article IV, section 6 and HRS § 25-2(b)(5), it just didn't want to. Petitioners also argue that less than perfect compliance with one of the district within district guidelines may *only* be justified by the need to comply with the other constitutional and statutory guidelines that govern reapportionment.

The Commission says it satisfied its obligations under article IV, section 6 and HRS § 25-2(b) by considering the constitutional and statutory district within district guidelines (collectively the district within district guidelines) in developing the Plan. It says Petitioners have not demonstrated that the Commission abused its discretion in discharging its duties and adopting the Plan.

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[3] Petitioners also make a third argument. They claim the Commission unconstitutionally delegated much of its redistricting work and decision making to a committee that consisted of just four of the Commission's nine members. This argument lacks merit. The record shows that the Plan was considered by all nine members of the bipartisan Commission and that all nine members of the Commission participated in the vote regarding the adoption of the Plan (eight commissioners voted to adopt the Plan and one voted not to). The establishment of the technical committee did not represent an unconstitutional delegation of the Commission's power. To the extent Petitioners raise claims under the Sunshine Law, they are not entitled to mandamus relief because those claims could have been brought in circuit court under HRS § 92-12(c)(2012).

We agree. The constitution and HRS § 25-2(b) mandate that, in redistricting, the commission "shall be guided" by certain enumerated criteria, among them the district within district guidelines. The commission is not required to give the district within district guidelines any particular effect. Nor is it required to disregard factors *other than* the criteria enumerated in article IV, section 6 or HRS § 25-2(b) in redrawing district lines. So the Commission discharged its obligations under article IV, section 6 and HRS § 25-2(b) by considering the district within district guidelines alongside other policy objectives. And, by extension, the Plan is valid.

I. BACKGROUND

At its May 17, 2021 meeting, the Commission formed a "technical" committee consisting of four commissioners. The Commission tasked the technical committee with drafting proposed reapportionment plans for the Commission's consideration.

The technical committee presented its proposed reapportionment plans to the Commission at the Commission's January 13, 2022 meeting.[4]

At that same meeting, there was public testimony demanding that the Commission explain its failure to better effectuate the

[4] The technical committee had previously presented other reapportionment plans to the Commission. But these earlier plans had to be amended as a result of updated data received from the military in December 2021 that impacted the Commission's assessment of the number of permanent versus nonpermanent residents in the state.

district within district guidelines.

Responding to this public testimony, Commissioner Nonaka explained that because of the incongruity between the population bases used in congressional districts and those used in state legislative districts, it was not possible, let alone practicable, to have all state districts wholly within a congressional district.

Later at the same meeting, Commission Chair Mugiishi stressed that the Commission was holistically evaluating the constitutional and statutory requirements governing reapportionment and trying to balance them in a way that responded to community concerns. He explained:

> [W]e are as a Commission considering all of those statutory requirements and constitutional requirements that that [sic] is asked of us and we are doing our best to make sure to the extent that it's practicable that we are following them. But sometimes they're in conflict with each other and that's where that's why we have a commission rather than a computer program drawing these lines. It's because human beings who are going to care about people and individual neighborhoods, are going to make judgment calls on what's the best way to make a practical decision about a conflict between two principles. And that's why I think again, and I've said it about four times already, but I really do appreciate the work of the technical committee because they've been doing this now for weeks, months, and for the last few days every single hour of the day to try and consider all of those factors. Because we're going to affect people and that's so we're going to follow the constitution, we're going to follow the law and we're going to do our best to take care of people.

The Commission also met on January 20, 21, 22, and 26, 2022.

At the Commission's January 20, 2022 meeting, Chair Muguiishi read the article IV, section 6 guidelines aloud and

explained 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." Commissioners Ono, Nonaka, and Nekota agreed with the Chair's assessment. Commissioner Nekota added "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."

During the January 26, 2022 meeting, the technical committee presented and discussed a new version of its proposed final legislative reapportionment plans; the only change it had made to the proposed maps since January 13, 2022, was to the boundaries of House Districts 48 and 49 on Oʻahu.

At the January 28, 2022 Commission meeting, the Commission discussed, and then voted to approve, the January 26, 2022 version of the legislative reapportionment plans. In explaining his support for the motion to approve the Plan, Commissioner Chun pointed to the Commission's commitment to ensuring that its redistricting decisions were made in the context of the article IV, section 6 guidelines:

> 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 [to adopt the Plan].

Shortly after adopting the final reapportionment plan, the Commission authorized staff to make non-substantive changes, including changes to better align the representative district, Senate district, and council district lines. The staff made changes to the Plan so that it would better adhere to the constitutional district within district guideline; following these changes, there are thirty-three (33) House districts that are not wholly inside Senate districts.

Petitioners challenge the Plan on the grounds that it violates article IV, section 6 and HRS § 25-2(b)(5) by failing to place districts within districts even where it would have been practicable to do so. They argue the Commission erred by adopting a Plan that fell short of perfect adherence to the district within district guidelines without justifying the Plan's noncompliance in terms of the need to comply with the other reapportionment "requirements" enumerated in article IV, section 6 and HRS § 25-2(b).

II. DISCUSSION

We hold that neither article IV, section 6 nor HRS § 25-2(b)(5) places concrete limits on the Commission's discretion to craft a reapportionment plan. The Commission must *consider* the district within district guidelines when redrawing district

lines. But it is not required to give them any particular effect in redistricting.

The existence of alternative plans that hew closer to the district within district guidelines is immaterial to our analysis. Our task is not to consider the Plan's relative merits in comparison to other options the Commission could have, but did not, adopt. We consider only whether the Plan is constitutional under article IV, section 6 and legal under HRS § 25-2(b)(5). See McNeil v. Legis. Apportionment Comm'n of N.J., 828 A.2d 840, 858 (N.J. 2003) ("The judiciary is not justified in striking down a plan, otherwise valid, because a 'better' one, in its opinion, could be drawn." (Cleaned up.)).

Petitioners have not shown that the Commission abused its discretion by disregarding or ignoring the district within district guidelines. To the contrary, the record suggests that the Commission was aware of, discussed, and considered the district within district guidelines in redrawing district lines and adopting the Plan. So even though we agree with Petitioners that the Plan does not give full effect to the constitutional district within district guideline,[5] we hold that the Commission

[5] Petitioners' argument that the Plan does not give substantial effect to the statutory district within district requirement is less convincing than its arguments concerning the constitutional district within district guideline: the Plan places 88 percent of state house and senate districts wholly within a single congressional district.

did not abuse its discretion in developing and adopting the Plan.

1. Standards of Review

a. We answer questions of constitutional law de novo

"Issues of constitutional interpretation present questions of law that are reviewed de novo." League of Women Voters of Honolulu v. State, 150 Hawaiʻi 182, 189, 499 P.3d 382, 389 (2021) (cleaned up). This court is the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaiʻi Constitution." See Ka Paʻakai O Ka ʻAina v. Land Use Comm'n, 94 Hawaiʻi 31, 41, 7 P.3d 1068, 1078 (2000) (cleaned up). "We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case." State v. Hanapi, 89 Hawaiʻi 177, 182, 970 P.2d 485, 490 (1998) (cleaned up). Here, this means we give no deference to the constitutional interpretations the Commission implicitly operationalized in developing the Plan.

b. We review the Commission's exercise of its discretion using the abuse of discretion standard

We review the discretionary decisions of public bodies using the abuse of discretion standard. See Kawamoto v. Okata, 75 Haw. 463, 467, 868 P.2d 1183, 1186 (1994). In the context of this case, this means we will not substitute our judgment for that of the Commission *with respect to the Commission's exercise*

of discretion given to it by the Hawai'i Constitution. Instead, our determination of whether the Commission has complied with article IV, section 6 and HRS § 25-2(b) and other applicable laws will hinge on whether the record demonstrates that the Commission either did not consider criteria it was required to consider or, having considered all relevant criteria, made a decision that disregarded the law or exceeded the bounds of reason.[6]

2. Reapportionment commissions must consider the district within district guidelines when redrawing districts

Both the constitution and HRS § 25-2(b) frame the district within district guidelines as discretionary, describing them as "criteria" that the commission "shall be guided by" in effecting redistricting. See article IV, section 6; HRS § 25-2(b).

In Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102 Hawai'i 465, 479, 78 P.3d 1, 15 (2003), we considered whether Honolulu's city council erred in zoning land as "country" where

[6] This approach is consistent with that used by other courts reviewing the discretionary acts of state reapportionment commissions. See, e.g., Hartung v. Bradbury, 33 P.3d 972, 981 (Or. 2001) (en banc) (considering constitutional challenges to reapportionment plan and explaining that it would void the plan only if it could "say from the record that the Secretary of State [the reapportioning body] either did not consider one or more criteria or, having considered them all, made a choice or choices that no reasonable Secretary of State would have made"); Jamerson v. Womack, 423 S.E.2d 180, 182 (Va. 1992) ("In this particular litigation, it should be remembered that reapportionment is, in a sense, political, and necessarily wide discretion is given to the legislative body. An abuse of that discretion is shown only by a grave, palpable and unreasonable deviation from the principles fixed by the Constitution." (Cleaned up.)).

only two of the four statutory guidelines provided for identifying potential "country" district lands were met. We concluded that while the "'use' or consideration" of the statutory guidelines was mandatory, "the ultimate designation decision arising out of that mandatory consideration must, of necessity, involve the exercise of discretion." Id. We explained that "guidelines," as used in the statute, "denote[d] individual factors that are not mandatory in themselves, but instead provide direction or guidance with respect to the ultimate decision." Id.

A similar analysis informs our interpretation of "guided by" as used in article IV, section 6 and HRS § 25-2(b): the reapportionment commission must consider the district within district guidelines and it must use them in developing and adopting congressional and legislative plans. But the guidelines are not mandatory "in themselves"; rather, they provide "direction or guidance with respect to the ultimate decision." See id.

The history of article IV, section 6 reflects that the constitutional district within district requirement was not intended to curb the reapportionment commission's discretion to redraw district lines. After noting that it placed "a number of guidelines for the reapportionment commission to follow when redistricting" into article IV, section 6, the Committee on

Legislative Apportionment and Districting clarified:

> 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 [including the district within district guideline] are standards which are not intended to be ranked in any particular order. Rather, your Committee believes that they are matters that should be considered in any decision concerning districting and that the balance to be struck among them is a matter for case-by-case determination. The inclusion of these guidelines is intended to aid the reapportionment commission in maintaining impartiality and objectivity in its own reapportionment plan and to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.

Supp. Stand. Comm. Report No. 58, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1968, at 265 (1973) (emphases added). Elsewhere in the same report, the Committee observed that the reapportionment plan it proposed substantially complied with the district within district guideline; but, it remarked, it adopted that criterion "in a more general, less restrictive manner for future reapportionment." Id. at 247.

Two aspects of this committee report support our conclusion that the constitutional district within district guideline is a factor the commission must consider, not a requirement it must meet.

First, the committee report describes the guideline as a criterion "that should be considered" and recognizes that the extent to which it will be followed in any given reapportionment year is a "matter for case-by-case determination." Id. at 265. It says it adopted the guideline in a "more general" and "less

restrictive manner for future reapportionment." Id. at 247. Collectively, this language indicates that while the commission must "be guided by" and consider the guideline, the decision to give it effect, or not, remains discretionary.

Second, the report indicates that, in the context of judicial review of reapportionment plans, the purpose of the district within district guideline is "to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan." Id. at 265. This language affirms that the district within district guideline is not an inflexible requirement that the reapportionment commission can fall short of by adopting a plan with too many house districts that span senate district lines. It suggests that the constitutional district within district guideline is, rather, a general guideline or a best practice.

This is not to say that the *effect* the reapportionment commission gives to the district within district guideline will always be immaterial to the question of a reapportionment plan's constitutionality. A reapportionment commission's failure to give full effect to the district within district guideline would be appropriately considered in the context of a claim that a reapportionment plan was unconstitutionally gerrymandered, biased, or otherwise contrary to the equal protection principles that animate article IV, section 6 and article I, section 5.

For example, the fact that a reapportionment commission placed nearly two thirds of house districts into two or more senate districts could, if presented alongside other credible evidence of bias, lend substantial support to a claim that a reapportionment plan was unconstitutionally partial to a particular person or party. But this does not mean that failure to substantially comply with the district within district guideline is, standing alone, a constitutional violation.[7]

Based on the plain language of article IV, section 6 and the framers' intent as revealed by legislative history, we conclude that reapportionment commissions do not have a constitutional obligation to give the district within district guideline any particular effect. They may not disregard or ignore the district within district guidelines (or the other reapportionment guidelines that are to be followed where "practicable" or "possible"). They must consider them when redistricting and should, where practicable, endeavor to

[7] Justice McKenna's dissent highlights the constitutional district within district guideline's role in "facilitating political organization and developing accountability of senators to communities of common interest." Dissent at 12.

We do not dispute the wisdom of the guideline from a policy perspective. But the question of whether compliance with the district within district guideline is "normal and preferable," see dissent at 11 (quoting Ethan Weiss, Partisan Gerrymandering and the Elusive Standard, 53 Santa Clara L.Rev. 693, 697 (2013)), is not before us. And the contention that, from a policy perspective, a reapportionment plan that gives full effect to the district within district guideline would be better than one that doesn't cannot curtail the reapportionment commission's ability to exercise discretion granted to it by the constitution.

effectuate them. But they have no rigid statutory or constitutional obligation to effectuate them. Put plainly, the guidelines must shape the reapportionment commission's exercise of its discretion, but they do not impose any hard limits on it.[8,9]

Petitioners' contention that the Commission must "justify" the level of consideration it gave, or did not give, to the district within district guidelines reflects a misunderstanding about both the scope of the Commission's discretion to develop and adopt reapportionment plans and this court's role in reviewing the constitutionality of reapportionment plans. Burns v. Richardson, 384 U.S. 73 (1966), is instructive.

In Burns, the Supreme Court considered the constitutionality of an interim Hawaiʻi state senate

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[8] This analysis concerns the non-mandatory guidelines of article IV, section 6 and HRS § 25-2(b) *only*. The reapportionment commission must give full effect to those constitutional and statutory requirements that are not modified by "where practicable" or "where possible," for example article IV, section 6's requirement that "[n]ot more than four members shall be elected from any district."

[9] We note that the constitutional district within district guideline is not a general principle bereft of legal force absent implementing laws or statutes. It is, rather, self-executing in that it "supplies a sufficient rule by means of which . . . the duty imposed may be enforced." See Morita v. Gorak, 145 Hawaiʻi 385, 392, 453 P.3d 205, 212 (2019) (cleaned up). The constitution imposes a duty on reapportionment commissions to "be guided" by the criterion that, "[w]here practicable, representative districts shall be wholly included within senatorial districts." Haw. Const. art. IV, § 6. It also provides the means for the enforcement of that duty. See Haw. Const. art. IV, § 10 ("Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan . . . .").

apportionment plan. A three-judge panel of the United States District Court for the District of Hawaiʻi had disapproved of the interim plan on the grounds that instead of accounting for population increases on Oʻahu by creating new single-member senatorial districts for the island, the plan merely increased the number of multi-member senatorial districts on Oʻahu from two to five. Id. at 82. The district court had concerns about "what it considered to be a difference in representational effectiveness between multi-member and single-members legislative districts." Id. at 86. The Supreme Court overruled the district court, explaining that absent evidence of an Equal Protection Clause violation, the district court was wrong to second-guess the legislature's exercise of its discretion to redistrict.[10] The Court said that given the absence of a showing that the interim reapportionment plan raised equal protection concerns, the district court should not have even required the legislature to justify its reliance on multi-member legislative districts:

[10] The Court explained:

> In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting.

Burns, 384 U.S. at 88-89.

> Indeed, while it would have been better had the court not insisted that the legislature 'justify' its proposal, except insofar as it thus reserved to itself the ultimate decision of constitutionality vel non, the legislature did assign reasons for its choice. Once the District Court had decided, properly, not to impose its own senate apportionment but to allow the legislature to frame one, such judgments were exclusively for the legislature to make. They were subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.

Id. at 89 (emphases added) (footnote omitted).

This court plays a critical role in ensuring that the voters of our state "choose their representatives, not the other way around." Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (cleaned up). We have intervened, and will continue to intervene, when necessary to ensure that Hawai'i's reapportionment commission creates reapportionment plans that comply with the Equal Protection Clause, the four *mandatory* requirements in article IV, section 6, and all other constitutional and statutory mandates concerning redistricting. Cf. Solomon v. Abercrombie, 126 Hawai'i 283, 270 P.3d 1013 (2012) (holding that reapportionment plan was invalid under article IV, section 4 of our constitution because it included non-permanent residents in the population base for reapportionment). But as Burns makes clear, absent a showing that a reapportionment plan is unconstitutional or illegal we should not second-guess the reapportionment

commission's exercise of its discretion to redistrict. Cf. Supp. Stand. Comm. Report No. 58, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1968, at 266 (1973) ("Judicial review is provided in the form of a mandamus to require the commission to do its work, correct any error or effectuate the purposes of the reapportionment provisions contained in the Constitution.")

3. The Commission did not abuse its discretion in developing the Plan

Our constitution requires that the reapportionment commission consider the district within district guidelines. See supra section II(2). But it does not dictate what that consideration should look like. Decisions about when and how the guidelines ought to be considered are left to the discretion of the reapportionment commission.

The record in this case shows that the Commission did not abuse that discretion: it adequately considered the constitutional district within district guideline in developing and approving the Plan.

Chair Mugiishi's statements at the January 13, 2022 meeting concerning the Commission's commitment to "consider[ing] all of those factors," "follow[ing] the constitution," and doing its best to "take care of people" speaks to the fact that the constitutional district within district guideline was one of the

factors the Commission considered in exercising its discretion. As does Commissioner Chun's remark at the January 28, 2022 meeting that he had "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."

The Commission's consideration of the constitutional district within district guideline is also evidenced by the fact that after the January 28, 2022 approval of the Plan, Commission staff made minor changes to the Plan in order to improve its compliance with the constitutional district within district guideline. If the Commission was indifferent to the guideline it would not have tweaked the Plan to better comply with it.

Finally, declarations provided by members of the Commission's technical committee speak to the Commission's consideration of the district within district guidelines. Commissioner Nonaka declared that:

> the Technical Committee was guided by the applicable constitutional and statutory provisions, including the eight (8) criteria listed in Article IV, Section 6 of the Hawaiʻi Constitution. We considered the criteria to comply with the Constitution while striving to produce plans that would best serve the State as a whole. The Technical Committee also did its best to be responsive to public testimony while following the criteria.[11]

[11] In explaining why the Commission declined to more perfectly adhere to the constitutional district within district guideline, Commissioner Nonaka said that "it would be extremely difficult to consider other crtieria [sic] if that one principle was used as a guiding factor. The Commission would have to prioritize drawing arbitrary lines without regard for community input."

Commissioner Ono, who like Commissioner Nonaka was on the technical committee, declared that the committee considered the district within district guidelines in developing the Plan and that, in her opinion, the Plan "achieve[s] the overriding objective of voter equality and best represent[s] the balancing of constitutional and statutory redistricting criteria."

Petitioners may disagree with the weight the Commission assigned to the district within district guidelines, but they have not shown that the Commission disregarded them in developing and adopting the Plan. To the contrary, the record reflects that the Commission holistically considered the district within district guidelines when exercising its discretion to develop and adopt the Plan. The Commission's consideration of the district within district guidelines was thus adequate under both article IV, section 6 and HRS § 25-2(b)(5).[12]

[12] We base this holding solely on the information in the record concerning the Plan's development. The Commission's argument that the Plan is constitutional because the number of state house districts split by state senate districts in the Plan (33) is in line with that found in previous reapportionment plans lacks merit. The Commission is right that the Plan's compliance with the constitutional district within district guideline is similar to that of the 2012, 2001, and 1991 reapportionment plans, which split 30, 31, and 38 state house districts across state senate districts. But this fact has no bearing on our analysis: even the most longstanding practice cannot transform unconstitutional actions into constitutional ones.

4. The Commission did not abuse its discretion by considering factors other than those enumerated in article I, section 6 and HRS § 25-2(b)

The Commission must consider the article IV, section 6 and HRS § 25-2(b) guidelines in reapportionment. But it is not prohibited from pursuing other rational and non-discriminatory policy goals through its redistricting.[13] So Petitioners' claim that the Plan is invalid because the Commission unlawfully allowed its "preference" for preserving legacy districts to get in the way of drawing a reapportionment plan that better effectuated the district within district guidelines has no merit.

There are two reasons why the Commission did not abuse its discretion by crafting and adopting a plan that sought the preservation of legacy district boundaries.

First, the constitution explicitly contemplates that reapportionment will involve the redrawing of district lines.

[13] McNeil provides a good example of a rational state policy that the reapportionment commission must consider alongside article IV, section 6 and HRS § 25-2(b)'s requirements and guidelines: compliance with the federal Voting Rights Act. In McNeil, the New Jersey Supreme Court considered a challenge to the New Jersey constitution's requirement that no county or municipality should be divided between legislative districts. Under New Jersey's constitution, "[u]nless necessary to meet the [contiguity, compactness or equal population] requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the state." 828 A.2d at 845 (cleaned up). The court held this constitutional requirement was preempted by the federal Voting Rights Act, since full compliance with it would result in the "packing" of minority voters and the dilution of their electoral influence. Id. at 857.

See Haw. Const. art. IV, § 6 ("Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary [to equalize the population in each district as much as practicable]." (Emphasis added.)). This use of the word "redraw" presumes that existing districts may serve as the starting point for redistricting. The commission is required to consider the constitutional district within district guideline in adjusting district lines to account for population changes since the last reapportionment; but because it is tasked with redrawing it is also implicitly authorized to consider the boundaries of existing legislative districts.

Second, the Supreme Court has recognized that "preserving the cores of prior districts" is a legitimate state legislative policy that may justify minor deviations from the requirement that each district should have an equal population. In Karcher v. Daggett, 462 U.S. 725 (1983), the court explained that it was "willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." Id. at 740. The court continued, explicitly recognizing that keeping legacy districts intact was a "legitimate objective:"

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.

Id. (emphasis added)(citation omitted).

To the extent that the reapportionment commission sought to preserve legacy districts, that was a "legitimate objective." See id.; see also Chapman v. Meier, 407 F.Supp. 649, 664 (D.N.D. 1975) (adopting a court-ordered apportionment plan and explaining that though the court had "altered most of the existing legislative districts to comply with the one man-one vote standard" it also "endeavored to retain the core of existing districts in the new reapportionment plan" so that "extreme disruption in the election processes may be avoided").

We see no reason to conclude that article IV, section 6 or HRS § 25-2(b) limit the commission's discretion to craft a reapportionment plan that complies with constitutional equal protection mandates, strictly conforms to the mandatory requirements of article IV, section 6 and HRS § 25-2(b), and also seeks to promote stability by preserving legacy districts.

III. CONCLUSION

The Plan complies with article IV, section 6 and HRS § 25-2(b); Petitioners have not shown that they are entitled to the requested relief. The Petition is denied.

Mateo Caballero,
for petitioners

Lauren K. Chun
(Patricia Ohara, Lori N. Tanigawa, and Reese R. Nakamura on the briefs),
for respondents

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Todd W. Eddins

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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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 HAWAIʻI REAPPORTIONMENT COMMISSION AND ITS MEMBERS; THE STATE OF HAWAIʻI OFFICE OF ELECTIONS; and SCOTT NAGO, in his official capacity as Chief Elections Officer, State of Hawaiʻi, Respondents.

SCPW-22-0000078

ORIGINAL PROCEEDING

MAY 9, 2022

CONCURRING & DISSENTING OPINION OF McKENNA, J., IN WHICH WILSON, J., JOINS

I. Introduction

As the ultimate interpreter of the Constitution of the State of Hawaiʻi ("Hawaiʻi Constitution"), AlohaCare v. Dep't of Hum. Services, 127 Hawaiʻi 76, 87, 276 P.3d 645, 656 (2012), this

court has been called upon to construe article IV, section 6 regarding reapportionment of state legislative districts. At issue is whether the 2021 Reapportionment Commission ("Commission") properly addressed criterion 6 of article IV, section 6, which provides: "Where practicable, representative districts shall be wholly included within senatorial districts."

For the first time since Hawaiʻi adopted single-member legislative districts in 1982, it became practicable to effectuate this "district within district" provision for all 51 house and 25 senate seats. Yet, the Commission's 2021 Final Legislative Reapportionment Plan ("the Plan") placed 33 of 51 house districts into two or more senate districts.

Article IV, section 6 provides that the Commission "shall be guided by" eight enumerated criteria; four are mandatory in all circumstances and four, including the "district within district" provision, are to be applied when "practicable." The majority endorses the Commission's approach that all it had to do was "consider" the four non-mandatory criteria and it was not required to effectuate the "district within district" criterion even "where practicable." The majority says:

> Our constitution requires that the reapportionment commission consider the district within district guidelines. See supra section II(2). But it does not dictate what that consideration should look like. Decisions about when and how the guidelines ought to be considered are left to the discretion of the reapportionment commission.

The "shall be guided by" preface to the article IV, section 6 criteria, however, applies to all eight criteria, including the four criteria the majority acknowledges are mandatory. And the constitution requires that article IV, section 6 be effectuated "where practicable."

Hence, as more fully discussed below, in ruling that the Commission did not violate constitutional requirements, the majority fails to enforce the constitution's plain language. It also fails to properly apply other well-established principles of constitutional interpretation. I therefore respectfully but firmly dissent.

In this opinion, I set out how I believe future reapportionment commissions should construe and apply article IV, section 6. Nothing in the majority opinion prohibits future commissions from adopting the approach provided. It is my ardent hope that future reapportionment commissions will properly apply article IV, section 6 and more fully give effect to the intent of the people of Hawai'i as expressed in article IV, section 6 of the Hawai'i Constitution.

II. Discussion

A. Constitutional interpretation

1. Governing principles

In conducting our review, it is axiomatic that issues of constitutional interpretation present questions of law that this

court reviews de novo. League of Women Voters of Honolulu v. State, 150 Hawaiʻi 182, 189, 499 P.3d 382, 389 (2021) (hereinafter "League").

> Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawaiʻi 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.

Id. (cleaned up; emphases added).

In addition, as we have repeatedly and consistently held, we answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. See, e.g., Alexander & Baldwin, LLC v. Armitage, No. SCWC-16-0000667, 2022 WL 1012958, at *7 (Haw. Apr. 5, 2022) (quoting Onaka v. Onaka, 112 Hawaiʻi 374, 378, 146 P.3d 89, 93 (2006)).

2. The majority errs in its application of rules of constitutional interpretation

The majority cites to these fundamental principles, but fails to properly apply them. The majority says that as long as the Commission "considered" application of article IV, section 6

criteria that are to be applied "where practicable," it has discretion to not apply them.

The majority cites to Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (1994), for the proposition that the abuse of discretion standard applies to this court's review of discretionary actions taken by public bodies. (Citing Kawamoto, 75 Haw. at 467, 868 P.2d at 1186.) Kawamoto, however, was an administrative appeal concerning an interpretation of the Revised Charter of Honolulu and rules of the 1991 Council Reapportionment Committee regarding Honolulu city council districts. 75 Haw. at 465-66, 868 P.2d at 1185. Kawamoto did not involve an interpretation of the Hawai'i Constitution. In fact, we clearly stated that although city law governing reapportionment was similar to portions of article IV, sections 3 and 6 requiring contiguous and compact districts, these constitutional provisions did not apply to apportionment of city council districts. 75 Haw. at 468 n.6, 868 P.2d at 1186 n.6. And in referring to the abuse of discretion standard applicable to discretionary acts of public bodies, Kawamoto, 75 Haw. at 468, 868 P.2d at 1186, we referred to other cases involving administrative appeals,[1] for which the abuse of discretion

[1] Kawamoto, 75 Haw. at 467, 868 P.2d at 1186 (first citing Kaiser Foundation Health Plan, Inc. v. Department of Labor & Indus. Relations, 70 Haw. 72, 762 P.2d 796 (1988); and then citing Hoopii v. Sinclair, 40 Haw. 452 (Haw. Terr. 1954)).

standard of review sometimes applies.[2] But, as further discussed below, the abuse of discretion standard does not apply to this question of constitutional interpretation.

The majority states, "In the context of this case, this means we will not substitute our judgment for that of the Commission with respect to the Commission's exercise of discretion given to it by the Hawai'i Constitution." (Emphasis omitted.) The majority fails to properly apply the well-established precedent, cited above, that "[w]e answer questions of constitutional law [de novo] by exercising our own independent judgment based on the facts of the case."[3]

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[2] See Hawai'i Revised Statutes ("HRS") § 91-14(g) regarding "Judicial review of contested cases," which provides;

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g) (2012) (emphasis added).

[3] A Westlaw search reveals more than 80 Hawai'i Supreme Court cases citing to these principles of constitutional interpretation.

The problem is that the Commission and the majority misapprehend the Commission's discretion. As more fully discussed below, if constitutional criteria or considerations existed that rendered effectuation of the "district within district" criterion infeasible, then the Commission had the discretion to determine which criteria would be effectuated. But here, the Commission did not identify any constitutional considerations or criteria that would have rendered effectuation of the "district within district" criterion infeasible.

3. Article IV, section 6 is self-executing

The majority also incorrectly holds that article IV, section 6 does not "place[] concrete limits on the Commission's discretion to craft a reapportionment plan" and that "[t]he Commission must *consider* the district within district guidelines when redrawing district lines. But it is not required to give them any particular effect in redistricting."

By so holding, the majority fails to apply another fundamental tenet of constitutional interpretation, cited above, that "a constitutional provision must be construed in connection with other provisions of the instrument." The majority fails to properly apply Hawai'i Constitution, article XVI, section 16, which provides that "[t]he provisions of [our] constitution shall be self-executing to the fullest extent that their respective natures permit."

As explained in Morita v. Gorak, 145 Hawai'i 385, 453 P.3d 205 (2019), a constitutional provision is self-executing if it supplies a sufficient rule by means of which the duty imposed may be enforced. Morita, 145 Hawai'i at 392, 453 P.3d at 212. The hallmark sign of a non-self-executing constitutional provision is inclusion of the phrase that it is to be enforced "as provided by law." See id. Article IV, section 6 does not include such language. Rather, it provides that the Commission must be guided by delineated criteria in making redistricting decisions. See Haw. Const. art. IV, § 6 ("In effecting such redistricting, the commission shall be guided by the following criteria . . . ." (emphasis added)).

The language of article IV, section 6 also supplies sufficient rules by means of which the duties imposed upon the Commission may be enforced, as further explained in Section II.B.2-3 below. Article IV, section 6 is therefore self-executing. Pursuant to article XVI, section 16, the Commission was duty-bound to effectuate the criteria to "the fullest extent that their respective natures permit."

B. Because it was practicable to do so, the Commission was required to wholly include house districts within senate districts

The majority does not properly construe Article IV, section 6 pursuant to governing rules of constitutional interpretation. The provision should be interpreted as follows.

1. Article IV, section 6 was intended to effectuate the right to vote and to prevent against dilution of the weight of a vote

By way of background, a fundamental principle of constitutional interpretation is that in this court's exercise of its independent judgment in interpreting the Hawai'i Constitution, we are to construe a provision in light of the circumstances under which it was adopted and the history which preceded it. League, 150 Hawai'i at 189, 499 P.3d at 389.

In this regard, Anne Feder Lee, The Hawaii State Constitution: A Reference Guide 97-105 (Greenwood Press 1993) (hereinafter "Lee"), explains that reapportionment has long been a source of political and legal controversy in Hawai'i; although the Organic Act required periodic reapportionment, the territorial legislature failed to observe the mandate. Lee, at 97. From about 1950, districts for 25 senate seats (increased from 15) were based on geographical balance among the islands while the 51 house seats (increased from 25) were based on population. Id.

After statehood in 1959, the United States Supreme Court held in Reynolds v. Sims, 377 U.S. 533 (1964), that representation in state legislatures must be apportioned equally on the basis of population rather than geographical areas. Lee, at 97. The Hawai'i state attorney general then issued a series of opinions concluding that the legislature was malapportioned.

Id. "A period of complex maneuvers and events within the legislature, executive branch, state supreme court, and federal courts followed . . . . The 1968 convention was born from this struggle . . . ." Id.

The 1968 constitutional convention therefore focused significant attention on reapportionment. Id. Article IV, section 6 was one of the proposed constitutional amendments regarding reapportionment. Lee, at 102-03. The convention proceedings are replete with discussions regarding the need to comply with the requirements of Reynolds. 2 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 56, 121, 123, 126, 130, 135, 197-99, 220, 257, 299-300, 304, 307 (1972).

Thus, based on principles of constitutional interpretation, the issues Reynolds sought to address provide context for this court's de novo interpretation of article IV, section 6. Reynolds was concerned with gerrymandering and providing equal weight to votes. It also focused heavily on the right to vote, and pointed out that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds, 377 U.S. at 554-55.

Thus, the criteria within article IV, section 6 were intended to prevent gerrymandering and ensure equal weight of votes. Such goals are critical to the fundamental right to

vote, which will be further discussed by Justice Wilson in his additional dissent to follow.

I note, however, that the "district within district" criterion is a commonly required neutral redistricting criterion also referred to as "nesting." See Bruce E. Cain & Karin MacDonald, The Implications of Nesting in California Redistricting, at 2 (2007), available at https://statewidedatabase.org/resources/redistricting_research/Nesting_&_Redistricting.pdf, also available at https://perma.cc/NY2X-VZTW ("The term nesting refers to the incorporation of two Assembly districts within the boundaries of a single Senate district.").

As explained in Ethan Weiss, Comment, Partisan Gerrymandering and the Elusive Standard, 53 Santa Clara L. Rev. 693 (2013) (hereinafter "Weiss"):

> Sometimes, legislatures adhere to traditional redistricting criteria. These requirements can include, but are not limited to: geographic contiguity, geographic compactness, preserving communities of interest, and nesting. The only redistricting requirement legislatures must adhere to under the Constitution is the "one person, one vote" requirement, though compliance with the above factors is considered normal and preferable.

Weiss, at 697 (cleaned up); see also Robert Colton, Note, Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering, 86 Fordham L. Rev. 1303, 1307 (2017) ("[R]edistricting often includes geographic contiguity,

geographic compactness, preserving communities of interests, and nesting[.]").

As further explained by Gary Michael Parsons, The Institutional Case for Partisan Gerrymandering Claims, 2017 Cardozo L. Rev. de novo 155 (2017) (hereinafter "Parsons"):

> Neutral criteria (such as compactness, adherence to political subdivisions, and nesting) are important in redistricting because they further the neutral and legitimate purposes of a geographic system of representation (accountability, ease of political organization and election administration, etc.). See, e.g., Karcher v. Daggett, 462 U.S. 725, 756 (1983) (Stevens, J., concurring) (noting that "geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation"); id. at 758 (noting that political subdivision boundaries "tend to remain stable over time," adherence to these boundaries make districts "administratively convenient and less likely to confuse the voters," and "[r]esidents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services"); id. at 787 n.3 (Powell, J., dissenting) (noting that "[m]ost voters know what city or county they live in," and adherence to subdivision boundaries "would lead to more informed voting" and would "lead to a representative who knows the needs of his district and is more responsive to them") . . . .

Parsons, at 161 n.41 (emphasis omitted).

Thus, the "district within district" criterion of article IV, section 6 furthers the important purposes of facilitating political organization and developing accountability of senators to communities of common interest. This leads to more informed voting, and provides equal weight to the vote of members of contiguous house districts.

2. Article IV, section 6 in general

The most fundamental principle of constitutional interpretation, however, as cited above, is that the intent of a constitutional provision is to be found in the language of the instrument itself.

Article IV, section 6 provides in its entirety:

> **Section 6.** Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable.
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> In effecting such redistricting, the commission shall be guided by the following criteria:
> 1. No district shall extend beyond the boundaries of any basic island unit.
> 2. No district shall be so drawn as to unduly favor a person or political faction.
> 3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
> 4. Insofar as practicable, districts shall be compact.
> 5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.
> 6. Where practicable, representative districts shall be wholly included within senatorial districts.
> 7. Not more than four members shall be elected from any district.
> 8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.[4]

As we explained in Solomon v. Abercrombie, 126 Hawai'i 283, 270 P.3d 1013 (2012):

[4] As explained in Anne Feder Lee, The Hawaii State Constitution: A Reference Guide 102 (Greenwood Press 1993), in 1992, Hawai'i voters ratified an amendment substituting "registered voters" with the "permanent residents" language that now appears.

> Article IV, sections 4 and 6 provide a two-step process for apportionment of the state legislature: apportionment among the four counties, followed by apportionment within the four counties. Article IV, section 4 first requires the Commission to "allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, . . . using the total number of permanent residents in each of the basic units and computed by the method known as the method of equal proportions[.]" Upon such allocation, article IV, section 6 then requires the Commission to "apportion the members among the districts therein" and "redraw district lines where necessary in such manner that for each house the average number of permanent residents per member of each district is as nearly equal to the average for the basic island unit as practicable."
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> As explained at the constitutional convention proceeding on apportionment of the state legislature, "[a]pportionment [under article III, section 4, now article IV, section 4] is the process of allocating numbers of representatives or senators to various districts within the State. Districting [under article III, section 4, now article IV, section 6] is the process of making those districts. These are quite different activities." Debates in Committee of the Whole on THE LEGISLATURE—Apportionment and Districting, II Proceedings of the Constitutional Convention of Hawaii of 1968, at 204 (1972).

Abercrombie, 126 Hawai'i at 292, 270 P.3d at 1022.

In other words, "[a]pportionment of the state legislature in 2011 required the Commission, in step one, to allocate the 25 members of the senate and 51 members of the house of representatives among the four counties. The Commission was then required, in step two, to apportion the senate and house members within county districts." Id. The 2021 Reapportionment Commission was required to follow the same process.

The language of article IV, section 6 provides that in effecting redistricting, the Commission shall be guided by the eight criteria delineated above. As the majority acknowledges, the criteria numbered 1, 2, 3, and 7 are mandatory and must be

applied in all circumstances. Criterion 7, "Not more than four members shall be elected from any district[,]" no longer has any practical effect, as Hawai'i eliminated multi-member districts in 1982. But in applying article IV, section 6, the Commission was first required to ensure that (1) no district extend beyond the boundaries of any basic island unit; (2) no district be so drawn as to unduly favor a person or political faction; and (3) districts are contiguous, except in the case of districts encompassing more than one island.

Next, article IV, section 6 provides that criteria 4, 5, 6, and 8 be effectuated by the Commission where "practicable."[5] Based on principles of constitutional interpretation, these words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them. League, 150 Hawai'i at 189, 499 P.3d at 389.

The majority continuously refers to the "district within district" criterion as a "guideline," based on the "guided by" preface to article IV, section 6. The "guided by" language, however, applies to all eight criteria within article IV, section 6, including the four criteria the majority acknowledges are mandatory. Thus, this provision is not merely a "guideline" that must be "considered" but can then be disregarded. The

[5] As noted above, pursuant to article XVI, section 16, constitutional provisions are self-executing.

plain language of the constitution requires that the "district within district" criterion be effectuated "where practicable."

Properly applying rules of constitutional interpretation, in the natural sense, "practicable" means "reasonably capable of being accomplished; feasible in a particular situation." Black's Law Dictionary (11th ed. 2019) In the context of article IV, section 6, its criteria are "practicable" if (1) they are reasonably capable of being accomplished; and (2) other constitutional criteria or considerations do not render their effectuation infeasible.

The expressed intent of the framers, another principle of constitutional interpretation, is consistent with this approach. The Committee on Legislative Apportionment and Districting ("Committee") stated:

> 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 [including the district within district guideline] are standards which are not intended to be ranked in any particular order. Rather, your Committee believes that they are matters that should be considered in any decision concerning districting and that the balance to be struck among them is a matter for case-by-case determination. The inclusion of these guidelines is intended to aid the reapportionment commission in maintaining impartiality and objectivity in its own reapportionment plan and to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.

Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 265 (1973) (hereinafter "Committee Report").

The Committee stated that although criteria 4, 5, 6, and 8 are not mandatory, the "balance to be struck among them" was to be determined on a "case-by-case" basis. A case-by-case determination is required because applying criteria 4, 5, 6, and 8 may not always be "practicable" because (1) their application may not be reasonably capable of being accomplished; and (2) other constitutional criteria or considerations may render their effectuation infeasible. But "striking a balance" among these criteria indicates the framers thought they were to be applied, if practicable. The Committee also indicated the guidelines were intended to aid reapportionment commissions to avoid challenges to reapportionment plans and to provide courts with a standard of review. If the criteria were not intended to be applied where practicable, they would not be helpful in this regard. Thus, the framers' intent, also relevant to constitutional interpretation, further indicates the criteria were intended to be applied to the extent practicable.

If the Committee Report created ambiguity as to whether the criteria must be applied where practicable, another principle of constitutional interpretation renders the constitutional language controlling. As stated in United Public Workers Local 646 v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002), constitutional intent "is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in

construing it, is not at liberty to search for its meaning beyond the instrument." 101 Hawai'i at 50, 62 P.3d at 193 (quoting State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981)).[6]

But all in all, the language of article IV, section 6 is not ambiguous. Criteria 4, 5, 6, and 8 must be applied where "practicable."

3. Application of steps to the "district within district" provision

Thus, criteria 4, 5, 6, and 8 of article IV, section 6 must be applied where practicable. With respect to criterion 6, the "district within district" provision, application of this criterion is "practicable" if (1) it is reasonably capable of being accomplished; and (2) other constitutional criteria or considerations do not render its effectuation infeasible.

To effectuate this criterion to the fullest extent as its nature permits, the Commission was first required to draw the lines for house districts, then "wholly include" those house districts within senatorial districts, if practicable. With

[6] In this regard, the majority also states that "[e]lsewhere in the same report, the Committee observed that the reapportionment plan it proposed substantially complied with the district within district guideline; but, it remarked, it adopted that criterion 'in a more general, less restrictive manner for future reapportionment.'" (Quoting Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 247 (1973)). The Committee, however, calls for "striking a balance," not ignoring criteria that can be effectuated, as the majority would allow.

respect to the first prong of the "practicability" analysis, the Commission was reasonably capable of wholly including house districts within senate districts. The issue is whether "constitutional criteria or considerations" rendered this effectuation infeasible.

From Hawai'i's 1982 adoption of single-member house and senate districts, Lee, at 100-01, until the 2021 reapportionment, it was never "practicable" to completely effectuate the "district within district" criterion of article IV, section 6, subsection 6 because it was "infeasible" to do so. This was because Reynolds v. Sims, 377 U.S. 533 (1964), held that the Fourteenth Amendment's Equal Protection Clause requires states to establish legislative electoral districts roughly equal in population, while subsection 1 of article IV, section 6 prohibits senatorial districts extending beyond basic island units.

From 1982, the number of O'ahu house seats to which O'ahu was entitled based on its population never doubled its appropriately allocated number of senate seats.[7] Thus, until the

[7] Article IV, section 1 was amended in 1978 to read, "The year 1973, the year 1981, and every tenth year thereafter shall be reapportionment years." Lee, at 98. Thus, the 1988, 1998, 2008, and 2018 legislatures reflect the number of house and senate seats for each basic island unit as determined by the 1981, 1991, 2001, and 2011 Reapportionment Commissions, after any constitutional challenges. In 1988, 1998, 2008, and 2018, O'ahu had the following numbers of house to senate seats, respectively: 39 to 14, 37 to 18, 35 to 18, 35 to 17. See 1988, 1998, 2008, and 2018 House and Senate Journals' List(s) of Members.

2021 reapportionment, it was infeasible to have house districts wholly included in senate districts. In order to have senate districts roughly equal in population to satisfy the United States Constitution, they would have had to contain house districts from more than one basic island unit, which would violate the Hawaiʻi Constitution. Thus, the second prong of the "practicability" requirement could not be met, as other constitutional criteria or considerations rendered effectuation of criterion 6 infeasible.

But this situation changed as of the 2021 reapportionment. Unfortunately, this reality did not become clear until the Commission received data on December 31, 2021, which significantly changed the number of military personnel to be extracted for state legislative reapportionment purposes.[8] The new military personnel numbers reduced Oʻahu's legislative population and required the Commission to reallocate one state house seat from Oʻahu to Hawaiʻi Island. Until the new military numbers were received, Oʻahu had been allocated 35 house seats and Hawaiʻi Island seven. But based on the revised military numbers, Oʻahu ended up with 34 house seats and 17 senate seats;

[8] See Solomon v. Abercrombie, 126 Hawaiʻi 283, 270 P.3d 1013 (2012) (holding 2011 reapportionment plan for the state legislature invalid because it disregarded the express mandate of article IV, section 4 that only permanent residents be counted in the population base for the state legislature).

Hawai'i Island with eight house seats and four senate seats; Maui with six house seats and three senate seats; and Kaua'i with three house seats and one senate seat.[9]

Hence, for the first time since the 1968 adoption of what is now article IV, section 6 and the 1982 advent of single-member state legislative districts, the numbers of house and senate seats allocated to basic island units made it practicable for representative districts to be wholly included in senatorial districts by combining contiguous house districts to form senate districts. This was because (1) the Commission was reasonably capable of combining two house districts from each basic island unit to form senate districts;[10] and (2) no other constitutional criteria or considerations were identified that rendered this effectuation infeasible, as in past reapportionments.

With respect to the "district within district" provision at issue, the Commission never stated whether it attempted to

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[9] Blair v. Ariyoshi, 55 Haw. 85, 515 P.2d 1253 (1973), upheld the distribution of three House seats to Kaua'i in order to minimize Kaua'i's underrepresentation in the state legislature.

[10] The exception would be Kaua'i, for which the three house districts would be combined into one senate district. See supra note 9.

effectuate it.[11] The Commission did not state it attempted to follow criterion 6 by combining contiguous house districts within basic island units to form senate districts, but that other constitutional considerations or criteria rendered it infeasible to do so.[12] With respect to article IV, section 6 criteria, after the December 13, 2021 receipt of the revised military personnel numbers, Commission Chair Mugiishi stated on January 13, 2022:

> 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.

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[11] On January 13, 2022, the following statement was made by a Commissioner with respect to Maui:

> So here on Maui, as an example, shifts in population and differing rates of growth in population between Central Maui and West Maui have necessitated the movement of a house district lines across large expanses of unpopulated lands essentially connecting Wailuku with Lahaina. And that said, the public in central Maui, which of course is our population center, has expressed an interest in at least, at minimum having representation by a central Maui house member or a central Maui senator. So in order to meet this goal on Maui, it became infeasible to neatly and nicely align two house districts with one senate district as has been the case in the past and still meet the mandate of balancing populations between districts. So I would just submit on that it's not practicable or even preferable necessarily to be hamstrung with the idea of you know aligning two house districts and one senate district in every instance throughout the state of Hawaiʻi.

The expressed desire of certain voters to be represented by someone who lives near them is not a constitutional consideration that can override article IV, section 6 requirements.

[12] The Commission was not required to enter written findings as HRS Chapter 91, the Hawaiʻi Administrative Procedure Act, does not apply to it. HRS § 91-1 (2012) defines an "agency" to which the chapter applies to include commissions "authorized by law" to make rules or adjudicate contested cases. "Authorized by law" means authorized by statute. Thus, Chapter 91 requirements do not apply to the Commission. This contrasts with the discussion of Chapter 92 in Section II.D.2 infra.

> 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. . . . .

This statement indicates the Commission believed it merely needed to "consider" the constitutional criteria of article IV, section 6. But these self-executing provisions must be effectuated where practicable. There is nothing in the record to indicate why it was not completely practicable to effectuate the "district within district" criterion while also effectuating the other criteria. If constitutional criteria or considerations existed that rendered effectuation of the "district within district" criterion infeasible, then the Commission had the discretion to determine which criteria would be effectuated. But here, the Commission did not identify any constitutional considerations or criteria that would have rendered effectuation of the "district within district" criterion infeasible, and I see none in the record.

Thus, pursuant to article XVI, section 16 the Commission was required to give effect to article IV, section 6 to the

fullest extent possible. It did not do so. The Commission did not meet its constitutional obligation.

C. Other issues in the majority's analysis

1. The majority undermines the Hawai'i Constitution

In direct contravention of the language of article IV, section 6, which expresses the intent of Hawai'i's people, as confirmed by the expressed intent of the framers, the majority rules that criteria 4, 5, 6, and 8 need not be enforced as long as they were "considered" by the Commission. The majority indicates that the court need only address a failure to effectuate these provisions if there is a specific "claim that a reapportionment plan was unconstitutionally gerrymandered, biased, or otherwise contrary to the equal protection principles that animate article IV, section 6 and article I, section 5."

The majority states that Burns v. Richardson, 384 U.S. 73 (1966) is instructive in this regard, and provides a lengthy analysis of that case. The majority states that "Burns makes clear[that] absent a showing that a reapportionment plan is unconstitutional or illegal we should not second-guess the reapportionment commission's exercise of its discretion to redistrict based on speculation."

But Burns was a 1966 opinion construing a reapportionment plan before the major 1968 Hawai'i constitutional amendments governing reapportionment. Burns did not address the specific

criteria delineated in article IV, section 6. As explained in Section II.B.1 above, article IV, section 6 was specially promulgated by the people of Hawai'i to reduce the possibility of gerrymandering or inequality in the weight of votes. And, to the extent Burns counsels against second-guessing a reapportionment commission's discretionary decisions, the majority acknowledges its holding only applies "absent a showing that a reapportionment plan is unconstitutional or illegal . . . ." (Emphasis added.)

As explained, "[t]he 1968 convention was born from th[e] struggle[s]" resulting from the "discretion" previously exercised by reapportionment commissions, which led to "complex maneuvers and events within the legislature, executive branch, state supreme court, and federal courts[,]" including the Burns opinion. See Lee, at 97. As indicated by the Committee, article IV, section 6 was promulgated to eliminate or at least minimize the possibility of claims of gerrymandering or unfair representation. Article XVI, section 16 renders the provision self-executing. Burns specifically notes that a commission's discretion is limited by constitutional requirements. Thus, Burns, which preceded article IV, section 6, recognizes that a reapportionment commission's failure to effectuate a criterion by which it was required to be guided and to apply, where practicable, can be unconstitutional and not within a

commission's discretion.

The majority errs in ruling that criteria 4, 5, 6, and 8 need not be implemented as long as they were "considered" and unless gerrymandering or unfair representation are alleged. The majority in effect says Burns permits provisions within our constitution to be ignored. But this court is the ultimate arbiter of the Hawai'i Constitution. The Commission and this court must give effect to this self-executing provision. The majority undermines the Hawai'i Constitution.

2. Save Sunset Beach did not involve constitutional interpretation

The majority also cites to Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 78 P.3d 1 (2003), as justification for its opinion that "shall be guided by" merely means that the criteria provide "direction or guidance" to the Commission and that as long as the Commission "considers" the "district within district" criterion, it is not required to follow it.

Save Sunset Beach, however, involved interpretation of guidelines within a county ordinance. 102 Hawai'i at 468, 78 P.3d at 4. The ordinance at issue concerned zoning of "country" designated lands, and specifically stated: "The following guidelines shall be used to identify lands which may be considered for this [country] district[.]" 102 Hawai'i at 469

n.5, 78 P.3d at 5 n.5 (quoting Revised Ordinances of Honolulu § 21-5.30(c)). Thus, Save Sunset Beach did not involve an issue of constitutional interpretation. Ordinances are not self-executing. Moreover, the ordinance at issue specifically provided "[t]he following guidelines shall be used to identify lands which may be considered" and specifically uses the word "considered." Id.

Additionally, as noted, the majority gives too much weight to "guided by" when it is clear the "practicable" language is determinative here. The "guided by" language applies to all eight of the criteria in article IV, section 6, including the four criteria the majority acknowledges are mandatory. Taking the majority's interpretation of Save Sunset Beach at face value, it would appear none of the eight criteria should be mandatory. Thus, the difference between criteria 1, 2, 3, and 7, on the one hand, and 4, 5, 6, and 8, on the other, must be derived solely from the "practicable" language, not the "guided by" language.

In sum, principles of constitutional interpretation provide that the intent of a provision is to be gleaned from its own language and article XVI, section 16 requires that constitutional provisions be effectuated to "the fullest extent that their respective natures permit." Article IV, section 6 provides that the Commission shall be guided by the criteria

contained therein; the Commission was required to effectuate the language to the fullest extent possible.

D. Other issues raised by petitioners

1. Petitioners' claim regarding congressional reapportionment was properly dismissed

I concur with the majority's denial of the petition with respect to congressional reapportionment. Hawai'i Revised Statutes ("HRS") § 25-2(b)(5) (2009) provides that, "[w]here practicable, state legislative [representative and senatorial] districts shall be wholly included within [U.S.] congressional districts." The Plan places four O'ahu house districts and five O'ahu senate districts into both U.S. congressional districts. HRS § 25-2(b) required the Commission to use a "total population" basis in determining reapportionment for congressional seats, which differs from the "permanent resident" basis used for state legislative seats.

2. "Permitted interaction groups"

I also concur with the majority that the Commission did not unconstitutionally delegate its redistricting work to a committee of four of its members. Article IV, section 2 provides that the Commission shall establish its own procedures, except as may be provided by law. "As may be provided by law" means as provided by the legislature. See, e.g., Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 189, 277 P.3d 279, 283

(2012). The "permitted interaction group" was authorized by HRS § 92-2.5(b) (2012).

III. Conclusion

For the reasons above, I respectfully dissent from the majority opinion with respect to whether the Commission was required to wholly include state house districts within senatorial districts. I would have required the Commission to file a new reapportionment plan for the state senate by combining contiguous house districts within each basic island unit to form the 25 senate districts.

In this opinion, I have set out how future reapportionment commissions should construe and apply article IV, section 6. Nothing in the majority opinion prohibits future commissions from adopting the approach provided. It is my hope that future reapportionment commissions will give effect to the intent of the people of Hawai'i as expressed by the language of article IV, section 6 of the Hawai'i Constitution.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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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.

SCPW-22-0000078

ORIGINAL PROCEEDING

JUNE 14, 2022

DISSENTING OPINION OF WILSON, J.

I. Introduction

I join Justice McKenna's concurring and dissenting opinion. I dissent separately to contextualize how the Majority's opinion fails to protect the people of Hawaii's fundamental right to vote.

In the wake of the 2020 census and the resulting 2022 reapportionment maps being drawn across the country,

numerous claims of unconstitutional maps are being brought by groups of concerned citizens in sister states.[1] The majority of cases feature complaints of unconstitutional partisan gerrymandering and racial discrimination.[2] The United States Supreme Court has specifically foreclosed the federal courts as a venue for adjudicating claims of political gerrymandering, the specter of which has been raised by the Petitioners in the instant case. See Rucho v. Common Cause, 139 S.Ct. 2484, 2506 (2019).

State courts are the only venue for citizens to bring complaints against this particular kind of attack on the power of their vote, which impairs the fundamental right upon which it stands. By this case, the people of Hawai'i—through a diverse group of concerned citizens, united in their quest to secure constitutionally compliant legislative and state senate

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[1] According to the Brennan Center for Justice:

> As of June 8, 2022, a total of 72 cases have been filed challenging congressional and legislative maps in 26 states as racially discriminatory and/or partisan gerrymanders. Litigation has resulted in orders from state courts to redraw legislative and/or congressional maps in Alaska, Florida, Maryland, New York, North Carolina, and Ohio in time for the 2022 election cycle (the Florida redraw has since been put on hold by an appellate court). In addition, South Carolina has agreed to amend its new state house map without a court order, but that revised map will not take effect until 2024. A total of 45 cases remain pending at either the trial or appellate levels.

Brennan Center for Justice, Redistricting Litigation Roundup (June 8, 2022), https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 [https://perma.cc/EZ2H-SAEJ].

[2] Id.

district maps—have sounded this alarm of encroachment upon their right to vote, and the Majority has failed to heed their profound call for protection of this right upon which all others depend.

Petitioners assert that the 2021 Reapportionment Commission ("Commission") produced maps that fail to comply with criterion six of article IV, section 6 of the Constitution of the State of Hawaiʻi ("Hawaiʻi Constitution"), which provides: "Where practicable, representative districts shall be wholly included within senatorial districts." Haw. Const. art. IV, § 6.

This criterion, along with all enumerated criteria in article IV, section 6, is specifically designed to guard against "gerrymandering or other unfair or partial result" in the apportionment plan. Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1968, at 265 (1973).

Respectfully, the Majority endorses an unconstitutional redistricting process that undermines the right to vote in Hawaiʻi.

II. Discussion

A. The Constitutional Right to Vote

1. The People's Government and the Enumerated Right

The Hawaiʻi Constitution begins with "We, the people of Hawaiʻi[.]" Haw. Const. pmbl. It then sets forth the

principle that "[a]ll political power of this State is inherent in the people" and that "the responsibility for the exercise thereof rests with the people. All government is founded on this authority." Haw. Const. art. I, § 1.

Our Nation was founded on this very principle—that "Governments . . . deriv[e] their just powers from the consent of the governed[.]" The Declaration of Independence para. 2 (U.S. 1776). The phrase "no taxation without representation" was the rallying cry for American revolutionaries, and many gave their lives pursuing the ideals embodied by it. This slogan encapsulated the American colonists' resentment towards having taxes levied upon them by a distant British Parliament that lacked American—elected legislators who represented the interests of the colonists.

A burning desire for elected, accountable representation was the driving force behind our nation's birth. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). Thus, a government "of the people, by the people, for the people" was born. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

Elections are the means by which this government "of the people, by the people, for the people" is effectuated. As such, "[t]he right to vote is of fundamental importance." Green Party of Hawaii v. Nago, 138 Hawai'i 228, 240, 378 P.3d 944, 956 (2016) (citing Hayes v. Gill, 52 Haw. 251, 269, 473

P.2d 872, 883 (1970)). The Hawai'i Constitution enshrines the right to vote in article I, section 8 ("No citizen shall be disfranchised, or deprived of any right or privileges secured to other citizens, unless by the law of the land") and article II, section 1 ("Every citizen of the United States who shall have attained the age of eighteen years, have been a resident of this State not less than one year next preceding the election and be a voter registered as provided by law, shall be qualified to vote in any state or local election[]") as well as through the adoption of the United States Constitution, and its protections of the same.[3] Yet, constitutional protection of the right to vote was not a foregone conclusion; today's protections are the fruits of momentous struggle against discriminatory voting practices, including gerrymandered redistricting.

2. Historic Struggles to Secure the Right to Vote

Let us not forget that until the ratification of the fifteenth amendment of the United States Constitution in 1870[4]

[3] Article fifteen of the United States Constitution, ratified in 1870, gave African American men the right to vote; article nineteen, ratified in 1920, gave American women the right to vote; article fourteen, ratified in 1964, eliminated poll taxes; and article sixteen, ratified in 1971, lowered the voting age for all elections to age eighteen years.

[4] U.S. Const. art. XV, § 1 provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

and the nineteenth amendment in 1920,[5] citizens of the United States could be denied the right to vote on the basis of their race and/or gender. Even with these amendments in place, African Americans, women, and other historically excluded groups were prevented from registering to vote through abuses of the voter registration process, including literacy tests, violence, threats of violence, and economic coercion.[6] The poll tax and whites-only primaries further limited minority participation in the electoral process.[7]

In 1957, Dr. Martin Luther King Jr. delivered his "Give Us the Ballot" address on the steps of the Lincoln Memorial. His speech laid bare the empty promise of constitutional amendments and desegregation case law that languished without structured processes and methods to make the franchise real:

> [A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition. And so our most urgent request to the president of the United States and every member of Congress is to give us the right to vote.

Rev. Martin Luther King, Jr., "Give Us the Ballot—We Will Transform the South," (May 17, 1957) (emphases added).

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[5] U.S. Const. art. XIX provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this article by appropriate legislation."

[6] Dep't of Just. Manual Resource, Title 8 Civil Rights: VOTING RIGHTS ACT OF 1965--HISTORY AND OVERVIEW §19 (4th ed. 2022-3)

[7] Id.

The Voting Rights Act of 1965 finally delivered on the promise of the fifteenth and nineteenth amendments by creating structures and procedures specifically designed to give them effect.

3. The Voting Rights Act of 1965 – Procedurally Securing the Right to Vote

The Voting Rights Act of 1965 was enacted to end the whites—only electoral system followed by much of the South, as the remedies provided by earlier civil rights acts (in 1957, 1960, and 1964) and the organizing work of the civil rights movement had been unable to open the franchise to African Americans in many areas. See Dep't of Just. Manual Resource, Title 8 Civil Rights: Voting Rights Act of 1965—History and Overview §19 (4th ed. 2022-3). It was not until President Lyndon Baines Johnson signed the Voting Rights Act of 1965 that specific laws, remedies, methods and procedures were implemented to realize the promise of the fifteenth and nineteenth amendments:

> The Voting Rights Act banned the use of literacy tests (Section 4), authorized federal registration of voters where local registrars had refused voter registration to African Americans (Section 6), authorized the appointment of federal observers to monitor polling place activities on election day to assure that the newly enfranchised African Americans would be permitted to vote and that their votes would be counted (Section 8), and allowed new laws affecting voting to be implemented only if they were proven not to have a discriminatory purpose or effect (Section 5). By means of a formula set out in the Act, these special provisions applied (initially for a five-year period) to areas with a record of discrimination (Section 4), while general anti-discrimination provisions applied to the nation as a whole.

Id. (cleaned up)

This legislation, and all the affirmative mechanics it puts into place to realize the right to vote, illustrate the fragility of the right itself—that despite constitutional protections granting the right to vote, the strength of the right is only as viable as the methods and procedures giving it effect. Apportionment is a core process of protection, and any claims of a failure of the apportionment process to give effect to the constitutional protections of the right to vote must be analyzed against the backdrop of these historical struggles to make the right to vote real. The district—within—district criteria is specifically equipped to prevent gerrymandering,[8] and failure to give it effect opens the door to dilution of the right to vote.

B. The Specter of Gerrymandering and Vote Dilution

1. Gerrymandered Districts Dilute Voting Strength

The right to vote is of fundamental importance. Green Party, 138 Hawai'i at 240, 378 P.3d at 956. "No right is more precious in a free country than that of having a voice in the election of those who make laws; other rights, even the

[8] See Sophia Caldera, Daryl DeFord, Moon Duchin, Samuel C. Gutekunst & Cara Nix, Mathematics of Nested Districts: The Case of Alaska, Statistics and Public Policy, 7:1, 39-51 (2020) available at https://mggg.org/uploads/Alaska.pdf (last visited June 7, 2022) ("From the perspective of redistricting, nesting means that the composition of one house of the legislature massively constrains the space of possible districting plans for the other, arguably cutting down the latitude for gerrymandering.") (emphasis added).

most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

Any attempt to dilute the power of a vote erodes the fundamental right standing behind the vote itself. Reynolds v. Sims, 377 U.S. 533 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.")

A gerrymandered redistricting plan dilutes voting strength. It is such an effective vote-dilution device that Section 2 and Section 5 of the Voting Rights Act[9] prohibit the use of any voting practices or procedures, including redistricting plans, that dilute minority voting strength.[10] In the instant case, Petitioners allege the record reflects that Hawai'i's constitutional criteria designed to prevent gerrymandered districts have been discarded in favor of illegitimate reapportionment factors, the consequences of which would be likely to benefit incumbents.

Petitioners make clear the grave consequences of such a gerrymandered redistricting process, and the responsibility of this court to prevent it:

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[9] 42 U.S.C. § 1973.

[10] While the Petitioners do not raise a claim under the Voting Rights Act nor allege a specific dilution of minority voting strength, the criteria in article IV section 6 are specifically designed to prevent gerrymandering (alongside other unjust outcomes), and the dilutive effect of a gerrymandered reapportionment process impacts each resulting vote.

> [L]egislators who benefit from specific maps have little to no electoral incentive to appoint commissioners who will objectively apply the constitutional criteria, if doing so could jeopardize their chances of re-election. In turn, gerrymandered communities will not be able to vote out such legislators, as their voting power would be diluted through the reapportionment process." In other words, it is this Court's responsibility to ensure that the Commission follows the reapportionment criteria, so that it is the people who "choose their representatives, not the other way around.

(emphases added).

2. Illegitimate Reapportionment Factors in the Record

Petitioners have shown that the Commission failed to give effect to criterion six because of a preference for preserving "historic districts that have existed for decades."[11] In addition, the record reflects that despite the practicability of following the district-within-district criteria in this year's maps, the Commission opted not to

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[11] Petitioners argue in their petition:

> This "preference" for preserving historic districts, which was also offered as an explanation for not complying with the district within district requirements, is not supported by the relevant constitutional and statutory provisions, and would be likely to benefit incumbents. The drawing of boundaries to the advantage of individuals or political parties is explicitly prohibited by Article IV, Section 6, and this requirement, which is mandatory, applies to incumbents as a group as well.
>
> Instead, it would appear that this "preference" was deemed by the Commission to be more important than the district within district requirements and consequently, the Commission was compelled to make dramatic changes to house districts due to population changes, but did not adjust senate districts accordingly, in an apparent effort to keep senate district lines the same. Chair Mugiishi admitted as much when he stated: "Again, changing the senate map would be massively disruptive, right? Because, as you know, there are much fewer senators. So if you're going to start to change the senate map, the whole island of O'ahu will explode." This is precisely the type of gerrymandering, unfair, and partial result that the constitutional and statutory criteria was intended to avoid.

because "[C]hanging the senate map would be massively disruptive, right? Because, as you know, there are much fewer senators. So if you're going to start to change the senate map, the whole island of O'ahu will explode."

These justifications for choosing to preserve state senate districts—that they have "existed for decades" and that to make changes would "be massively disruptive"—are inapposite in view of the constitutional criteria, and are brazen in their consequential effect to protect the status quo. As the record is devoid of any legitimate considerations for failing to give effect to criterion six, this posture of preserving the state senate status quo translates into protecting incumbent state senators. This potentiality strikes at the heart of the founders' specific concerns about "gerrymandering, unfair, and partial results"—the precise outcomes Constitution's article IV section 6 criteria are designed to prevent.

The likelihood that gerrymandering is behind the failure to give criterion six effect is heightened by the staggering percentage of state senate districts that fail to comply with the district—within—district criteria, which—at 64.7%—is an extreme deviation in view of the Hicks plan, which has demonstrated compliance is practicable.[12]

[12] Majority Opinion at 3.

3. The Commission's Constitutional Obligation to Protect the Right to Vote

The Constitution protects the right to vote. Haw. Const. art. I, § 8; art. II, § 1. The right to vote is exercised during elections. Various methods and procedures are required to structure and facilitate elections and ensure fair elections. Such methods and procedures affect a person's ability to exercise the right to vote. See Green Party, 138 Hawai'i at 241, 378 P.3d at 957 (finding that "the method used for calculating the number of sufficient ballots required for an election affects a person's ability to exercise the right to vote."). Flawed election methods and procedures "may result in the deprivation of the right to vote[.]" See id. at 240, 378 P.3d at 956. It is axiomatic that the constitutional right to vote must be protected by any constitutionally designed method or procedure essential for structuring and facilitating elections.

Reapportionment is one such procedure. Article IV of the Hawai'i Constitution sets forth and governs reapportionment. Article IV, section 2 provides for a reapportionment process that creates a commission of nine members who "shall act by majority vote of its membership and shall establish its own procedures, except as may be provided by law." Haw. Const. art. IV, § 2. (emphasis added).

Under article IV, the commission must act in accordance with the apportionment obligations set forth in

sections 2 through 9. This includes Article IV, section 6, which provides that the commission, in carrying out its apportionment and redistricting duties, "shall be guided by" eight enumerated criteria; four are mandatory in all circumstances and four, including the "district within district" provision, are mandatory to be applied whenever "practicable." See McKenna Concur and Dissent at 2.

An apportionment commission's failure to perform its duties and/or generate a constitutionally sound reapportionment plan is subject to this court's original jurisdiction, whereby the court "may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan, or it may take such other action to effectuate the purposes of this section as it may deem appropriate." Haw. Const. art. IV, § 10.

Given the constitutional obligations imposed on the Commission to carry out its duties set forth under article IV section 6, and in full view of the constitutionally protected right to vote, the Commission must be understood to be constitutionally obligated to protect the right to vote in every aspect of carrying out its mandate.

The Majority incorrectly holds that "[t]he Commission must *consider* the district within district guidelines when redrawing district lines. But it is not required to give them any particular effect in redistricting."

Respectfully, such a holding is fundamentally at odds with the constitutional mandate that, if practicable, senate districts must contain congressional districts.

I join Justice McKenna's analysis that in view of settled principles of constitutional interpretation, article IV, section 6 is self-executing, and that "[p]ursuant to article XVI, section 16, the Commission was duty-bound to effectuate the criteria to 'the fullest extent that their respective natures permit.'" McKenna Concur and Dissent at 18.

"The language of article IV, section 6 is not ambiguous: criteria four, five, six and eight must be applied where 'practicable.'" Id. (emphasis added). Article IV, section 6 provides that the Commission shall be guided by the criteria contained therein. Criterion six provides "[w]here practicable, representative districts shall be wholly included within senatorial districts." (emphasis added). The word "shall" in both article IV, section 6 and criterion six creates an imperative command. See McKenna Dissent at 18. Further—"[i]t is well-established that, where a statute contains the word "shall," the provision generally will be construed as mandatory." Malahoff v. Saito, 111 Hawai'i 168, 191, 140 P.3d 401, 424 (2006) (citations omitted).

The Hicks plan demonstrated it was "practicable" for representative districts to be wholly included within

senatorial districts, therefore the Commission was mandated to give criterion six effect.

The Commission's failure to give effect to criterion six amounts to a failure to fulfil its constitutional obligations set forth under article IV, section 6. As discussed herein, criterion six is specifically equipped to prevent gerrymandering, which is a scourge on the electoral process that dilutes the power of a vote. Any attempt to dilute the power of a vote erodes the fundamental right standing behind the vote itself. Reynolds, 377 U.S. at 554-55. Therefore, the Commission's failure to give effect to criterion six in the execution of its duties is a failure of its constitutional obligation to protect the right to vote.

C. Alaska, Maryland, and North Carolina: Courts finding maps unconstitutional political gerrymanders, as demonstrated by measurable deviations from constitutional criteria

1. Alaska

In February 2022 the Alaska Supreme Court found that the Alaska Redistricting Board's 2021 plan featured an unconstitutional political gerrymander, and remanded to the board for further proceedings to correct the unconstitutional plan. See In the Matter of the 2021 Alaska Redistricting Cases, No. S-18332 (Alaska, Mar. 25, 2022).

Notably, Alaska's constitution mandates the "district—within—district" or "nesting" criteria; state legislative districts must be nested, so that one Senate district is composed of two-House districts. Alaska Const.

art. VI, § 6. Four petitions filed by Alaskan voters and municipalities (consolidated) challenged the 2021 Alaska Redistricting Board's plan on the basis that the pairing of two particular house districts—House District 21 (South Muldoon) and House District 22 (Eagle River Valley) into one state senate district (Senate District K) violated the constitution as a political gerrymander. Specifically, the plaintiffs argued before the trial court[13] that without any legitimate purpose, the pairing "dilutes the voting power of the Muldoon voters." In the Matter of the 2021 Redistricting Plan, No. 3AN-21-08869CI (Feb.15, 2022). In finding for the plaintiffs, the Alaska Supreme Court affirmed the trial court's conclusion that Senate District K was in fact a political gerrymander. It is important to note that the trial court, in its findings of fact and conclusions of law, measured deviations in increments as small as tenths of a percentage point as part of its analysis finding the pairing unconstitutional.

In examining the pairing, part of the trial court's analysis looked at whether the pairing was justified as a means for increasing representation for both districts (by way of reducing the overall representational deviation of both districts). The court examined the deviations as follows:

[13] The consolidated cases were heard by Superior Court Judge Thomas Matthews of the third judicial district at Anchorage.

> Turning to proportionality, Eagle River Valley and North Eagle River/Chugiak are both underrepresented by -1.65% and -0.71 % respectively. South Muldoon is underrepresented by -1.70%. Pairing Eagle River Valley with South Muldoon creates an average deviation of -1.68%, whereas pairing both Eagle River districts creates an average deviation of -1.18%. Thus, the Board's choice to pair Eagle River Valley with South Muldoon does not lead to more proportional representation.

In the Matter of the 2021 Redistricting Plan, No. 3AN-21-08869CI (Feb.15, 2022) at 70-71.

Here, the Alaska courts draw constitutionally based conclusions by comparing right—to—vote deviations in amounts as small as tenths of a percentage point. The Alaska courts do so as part of their analysis in determining whether a particular district-within-district pairing is an unconstitutional political gerrymander. This concern for and close analysis of deviation percentage points in a constitutional gerrymander/right-to-vote case is instructive. Both the -1.68 deviation and the -1.18% deviation are presumed constitutional as they fall well under the 10% threshold for proportionality analysis. That both deviations are still so closely examined for the purposes of deciding which deviation would best protect the right to vote stands in stark contrast from the instant case before our Court, where a 64.7% deviation from a constitutionally required criteria—specifically equipped to guard against gerrymandering—has been allowed to stand.

2. Maryland

The State of Maryland presents another instance where 2021 maps have been found unconstitutional on the basis of political gerrymandering. On March 25, 2022, the trial

court struck down Maryland's new congressional map, finding that the map "is an 'outlier,' an extreme gerrymander that subordinates constitutional criteria to political considerations." See Szeliga v. Lamone, No. C-02-CV-21-001816 (Mar. 25, 2022) and Parrott v. Lamone, No. C-02-CV-21-001773 (Mar. 25, 2022). Underlying that finding, according to the court, is the map's "substantial deviation from 'compactness' as well as [its] failure to give 'due regard' to 'the boundaries of political subdivisions' as required by [the Maryland Constitution][.]" Id.

Part of the court's analysis focused on expert testimony with regards to deviations from the 'compactness' criteria as evident by examining model maps. The court's findings of fact notably cite just a 4.4% difference as evidence sufficient to support its finding of a "substantial deviation from 'compactness'":

> With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with map where President Joe Biden carried all eight districts."
>
> With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

Id. at 63-64. (emphases added).

Here, Maryland's court is flagging a 4.4% chance of a particular outcome as clear evidence of a deviation from the

constitutionally required redistricting criteria of 'compactness.' Put another way, 95.6% of model maps in this case show a different outcome if you control for partisanship. The court rightfully characterizes this outcome as an "extreme gerrymander" that is a "substantial deviation" from constitutionally required criteria.

In the instant case, our 64.7% deviation from criterion six is far more akin to Maryland's unconstitutional maps—an "extreme" example of a "substantial deviation" that absent a justifiable rationale, only increases the likelihood that gerrymandering is in play.

3. North Carolina

On February 4, 2022, North Carolina's Supreme Court also struck down new congressional and legislative maps, finding they were a partisan gerrymander in violation of the North Carolina Constitution's free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause. Harper v. Hall, 867 S.E.2d 554, 558 (N.C. 2022). Because of pressing timing issues, the court struck down the maps via order, with an opinion to follow. Id. The order affirmed the trial court's findings that "the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation." Id. at 557. (emphasis added). Pending an opinion, the order is still instructive as it sets forth the following categories of quantifiable data from which deviations from constitutional

right—to—vote protections may be measured, including unconstitutional partisan gerrymanders: "There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria . . ." Id.

In view of Alaska, Maryland and North Carolina courts close analysis of the deviations from constitutionally required reapportionment criteria, the 64.7% deviation from criterion six in this instant case is extreme, especially as evidenced by the Hicks and Boyea Plans' demonstration of the practicality of compliance.

4. An Extreme Deviation at 64.7%

Population deviation cases may be instructive in assessing just how extreme the 64.7% deviation is in the instant case. For purposes of determining whether a plan complies with the requirement that "the average number of permanent residents per member in each district [be] as nearly equal to the average for the basic island unit as practicable," deviations of more than 10 percent from the

target population base are treated as constitutionally suspect.[14]

This 10% threshold for population deviation analysis is, at its core, a specific protection of the "one-person, one vote" doctrine—the right-to-vote doctrine designed 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 579. Applying the 10% population deviation framework to the instant case, this court faced a prima facie discriminatory plan that far exceeded 10.01%. As the record fails to justify the Commission's deviation from criterion six, the 64.7% deviation—in full view of the demonstrated practicability of near 100% compliance—can only be understood as a glaring constitutional violation.

Further, while this case primarily concerns the Commission's failure to give effect to criterion six, it is important to note that a number of the Petitioners expressed concern that the 2021 reapportionment plan also failed to avoid submergence in a number of districts. The term "submergence" refers to the pernicious phenomenon whereby "one

[14] See Haw. Const. art IV, § 6; cf. Citizens for Equitable & Responsible Gov't v. Cty. of Hawai'i, 108 Haw. 318, 336, 120 P.3d 217, 225 (2005), amended (Sept. 22, 2005) (In a case involving county districts, not legislative districts, "an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate." (citations omitted)).

socio-economic group [is] disadvantaged by reason of its placement in a district in which another socio-economic class heavily predominates." Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 246 (1973). Petitioners raised specific concerns that impoverished rural communities were submerged with wealthier coastal areas, and that the rural and agricultural communities were unnecessarily submerged with urban areas and vice versa.[15]

Criterion eight of article IV, section 6 is designed to guard against this type of reapportionment outcome, and provides that "[w]here practicable, submergence of an area in a larger district wherein substantially different

[15] See also discussion infra Part II.E.2-12, wherein Petitioners set forth concerns about the following specific instances of submergence:

> Petitioner Michaela Ikeuchi has deep concerns about the submergence of Native Hawaiian and poorer rural communities with wealthier coastal areas on the Kona coast; Petitioner Kimeona Kane is concerned that the 2021 Final Legislative Reapportionment Plan squeezes Waimānalo between Hawai'i Kai and Kailua in the senate district, submerging his rural community into wealthier and more politically connected neighborhoods; Petitioner Deborah Ward is concerned that the plan would submerge rural communities on the island of Hawai'i into urban communities with vastly different environmental and socio-economic interests; and Petitioner Philip Barnes strongly believes that rural and agricultural areas, which historically have been submerged to Hilo and Kailua-Kona-centric political interests, should finally have adequate representation in the Legislature, so that they can receive much needed government support to achieve the unfulfilled promise of food sustainability in Hawai'i.

socio-economic interests predominate shall be avoided." While it can be factually determined that the Commission produced an unacceptable 64.7% deviation from the "districts—within—districts" criteria, deviations from criterion eight are more difficult to quantify. Unlike criterion six, which can objectively be measured, criterion eight "is, admittedly, not a precise criterion, but it does delineate an undesirable condition which should be considered in selecting districts." Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 246 (1973).

Here, the Petitioners recognize that the Commission at least discussed "non-submergence" at the October 14, 2022 meeting, but highlight the Commission's failure "to disclose with whom the technical committee [permitted interaction group] had communicated, what type of community outreach it had done, any fact findings supporting deviation from the constitutional and statutorily required standards, or details about what considerations the committee may have given more weight and why." While criterion eight recognizes that some degree of submergence may be unavoidable in a reapportionment process, the Commission here failed to provide any compelling evidence that any submergence was necessary in the 2021 reapportionment plan. Even if the Commission had put forth such justification, it would be subject to careful and meticulous review for any unconstitutional impairment on the right to vote.

The record here reflects an extreme 64.7% deviation from criterion six, and an unexplained deviation from criterion eight. Alaska, Maryland and North Carolina provide instructive examples of how analysis of deviations from constitutional criteria can lead to the discovery—and rejection of—unconstitutionally gerrymandered maps. The deviations in the instant case, in light of the demonstrated practicability of compliance with criterion six, further demonstrate that the Commission failed in its obligation to protect the right to vote in the execution of its duties.

D. The Hicks and Boyea Plans Demonstrate the Practicability of Compliance

Petitioners Hicks and Boyea submitted two plans to the Commission for consideration: a senate map for Oʻahu submitted on January 16, 2022 (the "Hicks Plan") and a house map for the Island of Hawaiʻi submitted on January 19, 2022 (the "Boyea Plan"). The Hicks Plan took the Commission's last proposed house map for Oʻahu as a starting point and then created senate districts simply by joining two house districts together. The Boyea Plan took the Commission's last proposed senate map for the Island of Hawaiʻi and then drew lines to divide each senate district into two roughly equally populated house districts while trying to keep communities together. The plans showed that including exactly two-house districts within each senate district was not only practicable, but it was straightforward. Put differently, both the Hicks Plan and

the Boyea Plan demonstrate it is both possible, and practicable, to have 100% compliance with criterion six. Further—both the Hicks and Boyea plans created maps with lower overall population deviations than the deviations in the technical committee plans.[16] The hard work undertaken by Hicks and Boyea in drawing maps to demonstrate the practicability of compliance with criterion six illustrates the lengths to which they and their fellow Petitioners had to—and were willing to—go to protect the right to vote for themselves and their fellow citizens.

E. The Petitioners as Guardians of the Right to Vote

1. Engaged Citizens Sound the Alarm

The Petitioners in the instant case are registered voters—engaged citizens from a spectrum of racial, socioeconomic, geographic, and professional backgrounds, all of whom sought an honest ear from the Commission. In addition to their stalwart efforts to bring the instant case, most of these citizens were actively engaged in the 2021 reapportionment and redistricting process for their islands, and contributed heroic amounts of personal time and effort attending hearings, drafting and submitting written and oral testimony, and even preparing their own reapportionment

[16] Petitioner Hicks' congressional map is able to fit 25 house districts into Congressional District 1 and 26 house districts into Congressional District 2 while keeping the overall deviation under one percent.

plans.[17] Six Petitioners are from the island of Hawai'i, four are from the island of O'ahu, and one Petitioner is from the island of Maui. Their individual and collective contributions, as well as their concerns about the 2021 reapportionment process, are material to understanding the continuing need for citizens to stand guard over the right to vote here in Hawai'i.

2. Petitioner William M. Hicks

Petitioner William M. Hicks is a retired Navy Captain with a combined 48 years of service across active duty in the U.S. Navy and as the civilian Director or Deputy Director of Submarine Operations at COMSUBPAC.[18] Hicks attended and testified at ten reapportionment commission meetings and four public hearing meetings totaling over 27 hours in meeting attendance alone. Notably, this tally does not account for the quantum of time and effort Hicks poured into (1) preparing his own reapportionment plans, which have

[17] The 2021 Reapportionment Commission held nineteen meetings from April 13, 2021 – March 7, 2022. Additionally, the 2021 Reapportionment Commission held eleven Public Hearings across the islands from November 20, 2021 – December 10, 2021. Written summaries of these commission meetings and public hearings containing details regarding attendees, public testimony and meeting length, can be accessed at: https://elections.hawaii.gov/about-us/boards-and-commissions/reapportionment/[https://perma.cc/RCA2-4HX5]. Last accessed May 26, 2022.

All references in this section to Petitioner meeting attendance and public testimony are drawn from these records.

[18] COMSUBPAC is the acronym for Commander, Submarine Force, U.S. Pacific Fleet, which is the principal advisor to the Commander, United States Pacific Fleet for submarine matters.

demonstrated the practicability of adhering to criterion six, and (2) attending and leading Kailua Neighborhood Board meetings, so as to inform his community about this impending injustice, and sharing the solutions he crafted to mitigate it.

Hicks lives in Kailua on O'ahu, and in the 2011 reapportionment was assigned to House District 51 and Senate District 25. Hicks was deeply concerned that failing to comply with criterion six would make it less likely that elected officials will have a shared understanding of their community's needs, which in turn would complicate legislative coordination, and frustrate neighbors' efforts to effectively advocate for their common interests to the legislature.

3. Petitioner Ralph Boyea

Petitioner Ralph Boyea retired as the Hawaiʻi Division Chief of the Hawaiʻi Government Employees Association. Boyea attended and testified at eight reapportionment commission meetings and two public hearing meetings totaling over eighteen hours in meeting attendance. Like Hicks, Boyea invested laudable time and energy drafting and submitting his own redistrict maps for the reapportionment commission's review, and sharing his work with fellow citizens across the island of Hawaiʻi. Boyea, a resident in Puna on the Island of Hawaiʻi, has been assigned to House District 51 and Senate District 25 since the 2011 reapportionment. Boyea's proposed

maps, unlike the final 2021 reapportionment maps, complied with criterion six, and successfully avoided (1) submerging rural communities like his own into urban areas, and (2) crossing senate lines.

4. Petitioner Kimeona Kane

Petitioner Kimeona Kane ("Kane"), the director for community outreach at a local environmental non-profit and Chair of the Waimānalo Neighborhood Board, was born and raised on a dairy farm in the Waikupanaha area of Waimānalo on the island of Oʻahu. Kane, assigned to House District 51 and Senate District 25 since registering to vote in 2018, attended and testified at eleven reapportionment commission meetings and one public hearing meeting totaling over 26 hours in meeting attendance. Kane's involvement in the 2021 reapportionment process arose from his efforts to ensure that Waimānalo and Native Hawaiians are properly and effectively represented at the legislature and in government, and his grave concerns that gentrification will displace generations of Waimānalo residents, and submergence will erode their political power.

5. Petitioner Roberta Mayor

Petitioner Roberta Mayor ("Mayor"), a retired educator and the Hawaiʻi Kai Neighborhood Board Chair, served as a teacher, principal and superintendent in Hawaiʻi and California for forty-one years. Mayor, who was born and raised in Hawaiʻi, has been registered to vote in Hawaiʻi since

returning in 2009, and has been assigned to House District 17 and Senate District 25 since the 2011 reapportionment. Mayor's involvement in this process was driven by the outcome of the 2011 reapportionment, which divided Hawaiʻi Kai into two house districts and two senate districts, which, in turn, spanned three separate house districts each. This result left Hawaiʻi Kai without a plurality of representation in either senate district. Hoping to avoid this scenario for another ten years, Mayor attended and testified at seven reapportionment commission meetings and two public hearing meetings totaling almost eighteen hours in attendance. Notably, this amount of time does not include the hours and efforts Mayor has spent preparing her testimony, informing her community members and neighborhood board about the unconstitutional 2021 reapportionment maps, and mobilizing them to take official action rejecting them.

6. Petitioner Maki Morinoue

Petitioner Maki Morinoue ("Morinoue") is an artist, small business manager, and a fourth generation (Yonsei) Japanese-American from the Hōlualoa village on the island of Hawaiʻi. Under the 2011 reapportionment, she was assigned to House District 6 and Senate District 3. Morinoue attended and testified at four reapportionment commission meetings and one public hearing meeting totaling approximately 6 hours in attendance. Morinoue became involved due to her particular concerns about preserving the agricultural character, water

rights, and history of Hōlualoa as a village of farmers and paniolos, and part of the breadbasket of Hawaiʻi. Like many of her fellow Petitioners, Morinoue is also gravely concerned about the effect of submergence, specifically as it would undermine the quality of representation at the legislature for rural and agricultural areas.

7. Petitioner Larry S. Veray

Petitioner Larry S. Veray ("Veray") is a retired Navy Command Master Chief with a combined 52 years of both active duty in the United States Navy and as a Scientific Engineering Technical Advisor assigned to the United States Indo-Pacific Command. Veray has lived in Hawaiʻi for the past thirty four years in the Waiau area of Pearl City, and for the last seventeen years has volunteered with the Pearl City Neighborhood Board, of which he is the current Chair. Veray was greatly concerned that his community, as a result of the Commission's failure to give effect to criterion six, would be divided into four house and four senate districts, and have to contend with eight legislators, none of whom would necessarily come from Pearl City or make Veray's neighborhood their priority.

Veray attended and testified at four reapportionment commission meetings and one public hearing meeting for a total of over seven hours in attendance. Like his fellow Petitioners, Veray also committed untold hours and energy towards preparing testimony, and informing and mobilizing his

neighborhood board about the injustices at play and the consequences at stake. Notably, Veray observed that he offered to discuss potential solutions with the Commission's technical committee, but was never contacted by anyone associated with the technical committee.

8. Petitioner Philip Barnes

Petitioner Philip Barnes ("Barnes") is a retired teacher who has lived in Hawaiʻi since 1998, and in Hilo for the past ten years. Barnes, driven by his concern that the 2021 reapportionment plan would submerge his urban neighborhood's interests with those of the more rural interests of the Hāmākua coast, made his voice heard at the reapportionment's public hearing on December 2, 2021. It was Barnes' strong belief that rural and agricultural areas have historically been submerged to Hilo and Kailua—Kona—centric political interests, and that the 2021 reapportionment process should finally provide them with adequate representation in the legislature.

9. Petitioner Jennifer Lienhart-Tsuji

Petitioner Jennifer Lienhart-Tsuji ("Lienhart-Tsuji") moved to Hawaiʻi in 1995, and lives in Waikōloa Village on the Island of Hawaiʻi. A practicing social worker, Lienhart-Tsuji is particularly attuned to the lack of resources available to communities outside the urban centers of the island, and has serious concerns regarding the island's overcrowded schools and inadequate public infrastructure,

especially in the face of an anticipated influx of new residents and children. Lienhart-Tsuji joined the petition armed with concerns regarding the Commission's lack of transparency and accountability to the public, and her understanding that the 2021 reapportionment plan unnecessarily splits Waikōloa Village into two house districts, thereby diminishing its representation in the legislature.

10. Petitioner Deborah Ward

Petitioner Deborah Ward ("Ward") is a retired University of Hawaiʻi extension educator and professor, a farmer of produce and ornamental plants, and recent chair of the Hawaiʻi Island Group of the Sierra Club of Hawaiʻi. Ward has lived in Hawaiʻi for fifty-five years, including 40 years in Kurtistown on the island of Hawaiʻi. She was assigned to House District 3 and Senate District 2 under the 2011 reapportionment plan. As with many of her fellow Petitioners, Ward is concerned about the socio-economic challenges of her community, including houselessness, food insecurity, and lack of social services. To that end, Ward volunteered her time preparing for, attending and testifying at a reapportionment commission meeting and a public hearing meeting, where she voiced her concern that the final 2021 reapportionment plan would submerge rural communities on the island of Hawaiʻi into urban communities with vastly different environmental and socio-economic interests.

11. Petitioner Michaela Ikeuchi

Petitioner Michaela Ikeuchi ("Ikeuchi"), a marketing manager, was born and raised on the Island of Hawaiʻi, and is assigned to House District 5 and Senate District 3. As a Hawaiian and a Keauhou resident, Ikeuchi has deep concerns about the 2021 final reapportionment plan, and the submergence of Native Hawaiian and poorer rural communities with wealthier coastal areas on the Kona coast. Specifically, Ikeuchi wants her representatives to focus on increasing access to social services in underserved areas, ocean conservation, and water use issues, particularly in light of how overdevelopment and drought have led to sewage spills and water use restrictions in her community. Like many of her fellow Petitioners, Ikeuchi also has concerns about the Commission's lack of transparency and accountability to the community and feels a responsibility to future generations to remedy that.

12. Petitioner Madge Schaefer

Petitioner Madge Schaefer ("Shaefer") permanently moved to Hawaiʻi twenty-five years ago after retiring from a career in politics in California. She now lives in Kihei on the island of Maui, and since moving to Hawaiʻi she has been registered to vote and has not missed an election. In the 2011 reapportionment, Schaefer was assigned to House District 11 and Senate District 6. Schaefer is concerned that the 2021 final legislative reapportionment plan does not include Maui's house districts wholly within senate districts, as the 2011

reapportionment plan did. Schaefer is concerned that this discrepancy is not in the best interest of her community, as legislation needs to pass both houses of the legislature, but under the new plan, the interests of her senator and house member will be, like the lines in their districts, misaligned.

Together, these guardians rose, united, and spoke out as they watched a straight-forward constitutional protection of their most fundamental right—the right to vote—erode before them. Not only did they speak out—not only did they sound the alarm through their complaint to this court that the Commission failed to produce constitutionally compliant maps, but they went further: they demonstrated—through their own efforts, using the Commission's own data—that it was in fact practicable to give effect to Criteria six. The Hicks and Boyea plans unequivocally prove that the Commission's deviation in the face of this criteria—64.7%—is unconstitutional. And with the record devoid of any rationale in support of this deviation, indefensibly so.

III. Conclusion

For the reasons above, I respectfully dissent. The 2021 Reapportionment Maps failed to comply with the constitutional requirements specifically designed to protect the right to vote from the pernicious effects of gerrymandered apportionment.

As a result, for the next 10 years, Petitioners will suffer the unconstitutional dilution of their voting strength.

I join Justice McKenna's ardent hope that future reapportionment commissions will give effect to the intent of the people of Hawai'i as expressed by the language of article IV, section 6 of the Hawai'i Constitution. The resolute dedication of Petitioners is a historic demonstration of the necessity of citizens to remain vigilant in protecting their right to vote, and to hold all branches of government to account for any failure to deliver the constitutional promise of an effective right to the franchise. The failure of this court to heed their plea for protection of the right to vote should not hamper those in the future who stand guard over our most important guarantee of freedom.

/s/ Michael D. Wilson