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SCOTT T. NAGO, STATE OF HAWAII 2011  
REAPPORTIONMENT COMMISSION,  
VICTORIA MARKS, LORRIE LEE STONE,  
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HAROLD S. MASUMOTO, DYLAN NONAKA, and  
TERRY E. THOMASON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

SCOTT T. NAGO, in his official

Civil No. CV 12-00184 JMS-LEK-  
MMM

MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT;  
DECLARATION OF JOHN F. MOLAY;  
DECLARATION OF DAVID  
ROSENBROCK; DECLARATION OF  
SENATOR RONALD D. KOUCHI;  
EXHIBIT NN; CERTIFICATE OF  
SERVICE

capacity as the Chief Election Officer  
State of Hawaii; STATE OF HAWAII  
2011 REAPPORTIONMENT  
COMMISSION, VICTORIA MARKS,  
LORRIE LEE STONE, ANTHONY  
TAKITANI, CALVERT CHIPCHASE  
IV, ELIZABETH MOORE, CLARICE  
Y. HASHIMOTO, HAROLD S.  
MASUMOTO, DYLAN NONAKA,  
and TERRY E. THOMASON, in their  
official capacities of members of the  
State of Hawaii 2011 Reapportionment  
Commission; and DOE DEFENDANTS  
1-10,

Defendants.

Hearing:

Date: January 14, 2013

Time: 10:00 a.m.

Judges: Hon. Margaret M. McKeown,  
Hon. J. Michael Seabright,  
Hon. Leslie E. Kobayashi

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MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants submit this memorandum in opposition to Plaintiffs' Motion for Summary Judgment.<sup>1</sup> For the reasons already stated in our own motion for summary judgment, both of Plaintiffs' claims in this case are legally and factually without merit.<sup>2</sup> First, as this Court recognized in its order denying a Plaintiffs' motion for preliminary injunction, there is nothing unconstitutional about including only permanent residents as the population base for the State's 2012 Reapportionment Plan, nor is there anything problematic about the way the State went about identifying that population. Moreover, none of the plaintiffs has standing to claim they have been denied equal representation in the State Legislature by that decision. Second, the Court should also reject Plaintiffs' voter dilution claim. To begin with, Plaintiffs lack standing to challenge the largest disparity – that created by the creation of a single Senate district covering all of Kauai – because none of them lives there. In any event, the disparities in the maps are amply justified by neutral state policies rooted in the unique geography and history of this State.

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<sup>1</sup> Unless stated otherwise, Defendants' citations to the Record are to the exhibits Defendants offered in their Motion for Summary Judgment, filed October 1, 2012.

<sup>2</sup> Plaintiffs have implicitly abandoned their Third Cause of Action, Gerrymandering, by asking for Summary Judgment rather than Partial Summary Judgment.

I. The Extraction of Non-Resident Military, Military Dependents and University Students from the Total Population Base Was Proper and Does Not Violate Equal Protection.

Plaintiffs' primary argument remains that the final reapportionment Plan prepared by the 2011 Reapportionment Commission (Commission), presented to the Legislature on March 30, 2012 ("2012 Plan"), violates equal protection because non-resident military and their dependents, and non-resident university students were extracted from the population base used to create the 2012 Plan, and "are represented nowhere: because: . . . they are not counted anywhere else."

Initially, to the extent Plaintiffs' first claim is that the extraction of non-resident military and their dependents, and non-resident students violates their right to representation in the State Legislature and thus their right to equal protection, they lack standing to assert that claim.

The doctrine of standing arises from Article III of the United States Constitution which limits the power of federal courts to deciding actual cases and controversies. U.S. CONST. art., III §2, cl. 1; *see also Wright v. Dougherty County*, 358 F.3d 1352, 1355 (11<sup>th</sup> Cir. 2004). To establish standing a plaintiff must prove 1) "injury in fact" which is defined as an invasion of a concrete and particularized legally protected interest, 2) a causal connection between the injury in fact and the defendant's actions, and 3) that it is likely the injury will be

redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43 (1995).

Plaintiffs Kostick, Takai, Bronstrom, Veray, Walden, and Gayagas, are permanent residents and were not extracted from the population base used to create the 2012 Plan. They are also all registered voters in the State of Hawaii, and have elected and will be electing a state senator and a state representative to represent them in the State Legislature at the 2012 General Election on November 6, 2012. Moreover, they have not nor cannot claim that the presence of extracted military members and their dependents in their current or 2012 senate or house districts would adversely affect their access to their elected senators or representatives.<sup>3</sup> Further, while Ms. Lester was extracted from the population base used to establish the 2012 Plan (because her husband is a non-resident military person), that has not barred her from being representation in the State Legislature. She nonetheless will be represented in the State Legislature because she is a registered voter and will have voted for a state senator and a state representative in the 2012 general election. Further, as noted *infra.*, both she and her husband are living in both a senate and house district that will be substantially overrepresented under the 2012 Plan. Finally, while the reasons Mr. Lester lacks standing are not as readily

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<sup>3</sup> Even when non-permanent resident military members and their dependents are included in the population counts (statewide and for each of their respective basic island unit House and Senate districts) used to calculate vote dilution, these resident registered voters are overrepresented, *not* underrepresented.

apparent, they are no less compelling. He lacks standing because he has not and cannot prove that the extraction diminished his access to the State Legislature. He will not be represented not because he claimed residency in Texas for tax purposes and was extracted from the population base, but instead because he has opted to vote in Colorado, and is disqualified from voting in Hawaii pursuant to HRS § 11-13(7) and HRS § 11-15(c). In addition, he has provided no evidence to establish that his inclusion in the population base will improve his access to the State Legislature, particularly as a registered voter of Colorado, who declares that he is a resident of Texas for purposes of paying taxes. He simply cannot claim that the extraction in and of itself deprived him of representation in the State Legislature.

“To exclude or not to exclude” that is a question that has plagued Hawaii’s reapportionment commissions for nearly half a century. “Defining the reapportionment population base . . . has long-presented a dilemma, primarily because Hawaii’s population has historically contained a large percentage of military personnel—many of whom claim residency in other States and do not vote in Hawaii.” Order Denying Plaintiffs’ Motion for Preliminary Injunction (Order) at 10-11 citing *Burns v. Richardson*, 384 U.S. 73, 94, n.24 (1966). Fully aware of its “special population problems”, Hawaii has diligently studied and vigorously debated the use of various reapportionment population bases since 1968,

considering total population, permanent resident, state citizen, registered voter, eligible voter, and civilian population bases.

In 1968 in *Burns v. Gill*, 316 F. Supp. 1285, 1290 (D. Haw. 1970), this Court noted that the 1968 Convention had “studiously and with due deliberation” studied the various methods of apportioning Hawaii’s state legislators, and that “several possible bases were recommended to your Committee [total population, permanent population, civilian population, citizen population, eligible voter population, and registered voter population] and were, thoroughly studied . . .” (Def. MSJ Ex. K at 241-243)

The 1981 Reapportionment Commission studied total population, and state citizen, eligible voter, and registered voter populations, concluding that the use of a total population base may result in a distortion of representation in certain areas where there are high concentrations of temporary residents such as military personnel and students. It stated that “The nominal population of a district, as computed by total population may be large, but the number of persons with a real interest in, or an ability to participate in the political process may be significantly smaller.” (Def. MSJ Ex. F at 7)

The 1991 Reapportionment Commission considered three possible population bases, total population, permanent residents, and a variation of permanent residents, after having received information on others such as civilian,

eligible voter, and registered voter population bases. It carefully selected a permanent resident population base (Defendants' MSJ Ex. G at 21-23")

In 2011 the Commission considered the Census information on total population, Hawaii's history of reapportionment, the constitutional and statutory provisions pertaining to reapportionment, how the 2001 Reapportionment Commission computed "permanent residents", and data available from the military and the universities to assist the Commission in determining the "permanent population base". The Commission also sought advice from the BIU Advisory Councils about whether non-resident military, their dependents, and students should be extracted from the total population base. (Order at 16-17 citing *Solomon v. Abercrombie*, 126 Haw. 283, 286 (2012). It adopted a method of identifying permanent residents by excluding those military personnel and students who have not chosen to establish residency here.

Plaintiffs seem to make three arguments in an attempt to show that this population base is not constitutionally permissible. First, they question whether permanent residency in the State is the same as being a "state citizen" – a term the Supreme Court used in *Burns v. Richardson*, 384 U.S. 73, 92, 93 (1966), in discussing the constitutional options available to a State. *See id.* at 92 (we have never "suggested that the States are required to include aliens, transients, short-term or temporary residents . . . in the apportionment base"). But as this Court has

already recognized in the preliminary injunction order, there is no meaningful difference between these terms. Order at 35 (Plaintiffs have made “no showing that the extraction of non-permanent residents is anything other than a *Burns*-sanctioned extraction to determine a citizen base”). A person becomes a citizen of a state by choosing to take up residency there on a permanent basis. There is no other way. Moreover, as *Burns* makes clear, there is no basis for a federal court to second-guess a state’s reasonable choice in this regard.<sup>4</sup>

Second, Plaintiffs argue that the justifications for doing an extraction have evaporated because today’s military presence in Hawaii has changed, i.e. lessened, since *Burns* was decided. But based on the evidence that is not the case.

In 1991, long after WWII, Korea, and Vietnam, there were 114,000 non-resident military and their families living on Oahu, and today, there may be “as

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<sup>4</sup> See also the following cases regarding the Supreme Court’s deference to the states regarding reapportionment and redistricting: *Garza v. County of Los Angeles*, 918 F. 2d 763, 774 (9<sup>th</sup> Cir. 1990) (where the court acknowledged the latitude the Supreme Court afforded state and local governments to depart from strict total population equality where significant state policies were involved) Order pp. 37-38; *Burns*, 384 U.S. at 92 (where the Court addressed the inherently political nature of the state apportionment process and held “the matter is a political one best left to the states. It is hardly up to us to meddle in a state choice with which the Supreme Court as well as Circuit Courts have deemed no constitutionally founded reason to interfere.”) Order at 38; *Perry v. Perez*, 565 U.S. \_\_\_, 132 S. Ct. 934, 941 (2012) (where reapportionment and redistricting are found to be important and difficult questions involving political judgment and the balancing of competing interests for which the courts are not suited; and redistricting criteria and standards are typically weighed and evaluated by the elected branches, in the exercise of their political judgment.) Order at 5.

many as 153,124.”<sup>5</sup> Order at 10, n.3 and 11, n.4, citing *Solomon*, 270 P.3d at 1014-1015 (2012).<sup>6</sup> Furthermore, in the Order this Court concluded that: “Regardless of the percentage, the military continues to constitute a significant and important presence in Hawaii’s population.”<sup>7</sup> Order at 11, n.4.

The reasons the military maintains an ongoing and significant presence in Hawaii to this day, and is likely to do so in the foreseeable future are two-fold: first, Hawaii remains the only military outpost strategically located in the middle of the Pacific Ocean, and thus, plays a critical role in our nation’s defense system<sup>8</sup>; and second, military populations by their very nature fluctuate, at times violently, because in order to protect our nation’s security military servicemembers must relocate, on demand, whenever they are called, to wherever they are needed.

Finally, Plaintiffs attack the particular method used to extract non-permanent-resident military personnel and students from the population base. But

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<sup>5</sup> “The percentage of the population of military and their families in 2010 is not clear from the record, but some data indicates there may be as many as 153,124.” Order at 11.

<sup>6</sup> See Def. MSJ Exhibit K at 241 for a more detailed discussion by committee members at the 1968 Constitutional Convention, of the impacts of WWII, the Korean conflict, and the Vietnam crisis on the non-resident military population on Oahu.

<sup>7</sup> Order at 6: “. . . no one here disputes: Hawaii’s military personnel constitute a significant and welcome presence in Hawaii’s population.”

<sup>8</sup> See Exhibit NN, which notes the Navy’s plan to shift a greater percentage of its fleet to the Pacific.

as this Court has already found, Order at 42-47, the approach adopted by the Commission was eminently reasonable.

In *Solomon*, 126 Haw. at 292, 270 P.3d at 1022, the Hawaii Supreme Court, citing *Citizens for Equitable & Responsible Gov't v. County of Hawaii*, 108 Haw. 318 (2005), ordered the Commission to count only residents who have their domiciliary in Hawaii, in the population base for the purpose of reapportioning legislative districts. Order at 21. The Commission complied by extracting all non-residents who existed in sufficient numbers to affect the apportionment of districts, and for which it could obtain reliable data. For example, the Commission tried but was unable to get data regarding aliens, and there was no evidence in the record that civilian federal workers existed in such numbers that extracting them would impact redistricting. Order at 40-41, 47.

As the Court knows, for military personnel, the State relied on the elections they made on the federal DD 2058 form. Plaintiffs argue that when military personnel fill out the DD 2058 Form declaring their legal residence they do so only for state income tax purposes. But the evidence simply does not support this claim.

On the information sheet provided by the military the term legal residency is used interchangeably with the term domicile and “refers to a place where a military member intends to return to and live after discharge or retirement, the place they

consider their permanent home.”<sup>9</sup> Legal residency, according to the information sheet, determines what state tax laws a military member is subject to, and which city, county, and state elections they may vote in. When military personnel declare their state of legal residence on the DD 2058 Form, they are made aware that in addition to where they are required to pay state taxes, if they choose a legal residence in another state, they are declaring they have no present intent to establish their permanent residence in Hawaii. Order at 41.

Based on the above, this Court found using a servicemember’s chosen state of legal residence for state taxation purposes was a reasonable method of identifying a servicemember’s state of residency, and we urge the Court to do so again.<sup>10</sup> Order at 44. There is no reason to change course now.

Similarly, Defendants urge the Court to reaffirm its findings and conclusions set forth in its Order concerning extraction of active duty military dependents and non-resident university students. *See* Order at 25, 45-47; *see also* Def. MSJ Ex. “G”. The Supreme Court has not rejected Burns, nor replaced or qualified

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<sup>9</sup> *See* Def. MSJ Ex. “BB”.

<sup>10</sup> Reliance on the DD Form 2058 is a rational means of determining a servicemember’s residence under Hawaii law. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (where the court held it is permissible for a state to require a person who enters the state to make a declaration of his intent to become a citizen before he can have the right to be registered as a voter and to vote in the state, quoting *Pope v. Williams*, 193 U.S. 621 (1904) Order at 44.

*Reynolds*' one person/one vote principle by mandating that state legislatures be apportioned on the basis of total population only. *Chen v. City of Houston*, 206 F.3d 502, 522-528 (5<sup>th</sup> Cir. 2000). The Supreme Court has yet “to speak clearly” “either for or against either [a representational or electoral] theory of political equality,” or “mandate the use of total population figures on equal protection grounds.” *Id.* at 528. *See also Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) (inasmuch as the Supreme Court has not made a “clear pronouncement” that equal protection mandates representational or electoral equality, “where electoral equality and representational equality cannot be achieved simultaneously,” the federal courts should defer to a state’s clearly articulated policy for apportionment.)

Exhibit 1 to David Rosenbrock’s Declaration graphically demonstrates why it is important to extract the non-residents. Calling the Court’s attention to pages 20-27, it can easily be seen that the vast majority of person extracted were from Oahu, primarily on or near military installations. Even on Oahu, the level of extraction per Block Group varied dramatically from as few as 1 non-permanent resident per Block Group to as many as 6000 non-permanent residents per Block Group. It is intuitively obvious that had the extractions not occurred, entire districts could be predominated by persons registered to vote in other states, with legislators elected by a handful of permanent residents, greatly undermining the

effort to allocate voting power equally and fairly. Conversely, if the non-permanent residents did vote in large numbers, they would be able to control the outcome in the district long after their tour ended and they left for their next duty station.

In sum, Defendants urge the Court to reaffirm its previous findings of fact and conclusions of law, and issue an order upholding the 2012 Plan (which extracted non-resident military, their dependents, and students) as constitutional.

II. Reynolds, Brown and Their Progeny Permit the District Deviations in the 2012 Plan.

A. The Plaintiffs Lack Standing to Bring a Vote-Dilution Challenge to Over-populated Districts in Which They Do Not Reside.

The question of standing to sue is an important “threshold jurisdictional question.” *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1006 (D. Mont. 2002), *aff’d Old Person v. Brown*, 312 F.3d 1036 (9<sup>th</sup> Cir. 2002) citing *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 102, 118 S.Ct. 1003 (1998).

In order to have standing in a vote dilution case the plaintiff must reside in an under-represented district. “[I]njury results only to those persons domiciled in the underrepresented districts.” *Wright v. Dougherty County*, 358 F.3d at 1355 (citing *Fairley v. Patterson*, 493 F.2d 598, 603 (5<sup>th</sup> Cir. 1974)) [other citations omitted]. Moreover, a plaintiff residing in an over-represented district is barred

from bringing suit on behalf of residents in an under-represented district. *Id.* at 604.

In this case, several of the plaintiffs lack standing because they do not reside in under-represented districts, namely Mr. Brostrom, Mr. Takai, Mr. Gayagas, and Mr. and Mrs. Lesser. *See* Declaration of David Rosenbrock. The remaining plaintiffs, Mr. Kostick (Senate District 11), Mr. Walden (Senate District 11), and Mr. Veray (House District 34) appear to reside in under-represented districts on the island of Oahu. However, none of the plaintiffs reside in under-represented districts on the basic island units of Hawai'i, Maui and Kauai. *See* Rosenbrock Declaration.

While these three plaintiffs have standing to bring vote dilution challenges concerning their own districts on the island of Oahu (Senate District 11 and House District 34), they lack standing to challenge under-represented districts on the other basic island units of Hawai'i, Maui, or Kauai. Persons living in one under-represented district do not have standing to bring vote dilution claims on behalf of *all* persons living in *all* under-represented districts. *See Wright*, 358 F.3d at 1356; *see also Old Person*, 182 F. Supp. 2d at 1006 (rejecting claim that plaintiffs who had standing to challenge vote dilution as to their own districts could also challenge vote dilution in other districts in which they did not reside). Nor may such persons bring a generalized grievance of malapportionment as to the

statewide redistricting plan. *See id.*; *see also Hays*, 515 U.S. at 743 (“The rule against generalized grievances applies with as much force in the equal protection context as in any other.”). Rather, a vote dilution claim must be made solely to an under-represented district and can be made solely by a plaintiff who lives in that district. *See Wright*, 358 F.3d at 1356; *Old Person*, 182 F. Supp. 2d at 1006; *Fairley*, 493 F.2d at 603-04.

In particular, there is no plaintiff with standing to challenge the largest disparity in population in the Senate district map – that between the Kauai district and the smallest district in the map on the island of Hawaii. None of the plaintiffs is injured by that population disparity. Nor would they benefit in any way from the relief they seek with regard to that population disparity.

This is no mere technicality. One of the purposes of the standing requirement is to allow the persons with a real stake in the outcome to choose whether to assert a given legal claim. As the Supreme Court noted in *Baker v. Carr*, 369 U.S. 186, 204 (1962), the “gist of the question of standing” is whether the plaintiffs have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” Here, the evidence makes very clear that there would be no “concrete adverseness” since the population of Kauai would oppose an alteration of the map

to reduce the under-representation of the Kauai Senate district through the creation of a “canoe district” spanning Kauai and another island.

Finally, if a plaintiff does not have standing to bring a claim, “it does not have standing to amend the complaint or control litigation by substituting new plaintiffs . . .” *Wright v. Dougherty County*, 358 F.3d at 1355 (citing *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1282 (5<sup>th</sup> Cir. 1981).

B. The Supreme Court Has Not Set An Upper Limit On Deviations.

The Supreme Court, in *Reynolds v. Sims*, 377 U.S. 533 (1965) held that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Reynolds, supra*, at 577; further, “So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to apportionment of seats in either or both of the two houses of a bicameral state legislature.” *Id.* at 579. While the Court held that “Considerations of area alone provide an insufficient justification for deviations from the equal-population principle” (*Id.* at 580), it further held:

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. . . . Local governmental entities are frequently charged with various

responsibilities incident to the operation of state government. In many states, much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a state may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

*Id.* at 580-81 (emphasis added).

*Reynolds* expressly permits Hawaii's departure from a strictly total population standard:

Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151, these governmental units are “created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,’ and the ‘number, nature, and duration of the powers conferred upon (them) \* \* \* and the territory over which they shall be exercised rests in the absolute discretion of the state.”

*Id.* at 575.

Unlike any other state, Hawaii's counties were at one time sovereign entities. They were not created as mere conveniences by the state government. They were created by geological forces and historical events that pre-dated the formation of the United States.

This principle was reaffirmed in *Mahan v. Powell*, 410 U.S. 315, (1973), where the court upheld Virginia's reapportionment statutes maintaining the integrity of traditional county and city boundaries while reapportioning House of

Delegates districts in a manner resulting in a percentage variation of 16.4% from the ideal district.<sup>11</sup> The Court held that Virginia's policy of maintaining the integrity of political subdivision lines is a rational one; that the plan can be reasonably said to advance that policy; and that population disparities were within tolerable limits. *Id.* at 329.<sup>12</sup>

Most pertinently, in *Brown v. Thompson*, 462 U.S. 835 (1983), the Court upheld Wyoming's policy of using counties as legislative districts and ensuring that each county had at least one representative, even though the plan had a maximum deviation of 89%, where the policy had been followed since statehood, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. *Id.* at 483-86.

Indeed, the Court has not set an upper limit on deviations, or precluded this Panel from excluding a district, the Eighth Senatorial District (Kauai), from its *Reynolds* assessment of the 2012 Plan. And, *Reynolds* continues to allow Hawaii to advance its unique state interests and specific facts and circumstances to justify

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<sup>11</sup> The Court reasoned that application of the “absolute equality” test of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Wells v. Rockefeller*, 394 U.S. 542 (1969), to state legislative redistricting may impair the normal functioning of state and local governments.

<sup>12</sup> The Court distinguished *Swann v. Adams*, 385 U.S. 440 (1967), where a scheme having a maximum deviation of 26% was disapproved because the state offered no evidence to support the challenged variations.

its Plan's deviations, and most importantly, continues to permit deviations over 10% when justified by legitimate state interests.

C. Hawaii's Basic Island Units Have Always Been Its Basic Political Building Blocks.

1. The Basic Island Units Are Organic Political Structures.

Article IV, section 4, of the Hawaii State Constitution that the State Senate shall be composed of twenty-five members, and the State House of Representatives shall be composed of 51 members. In reapportioning and redistricting the State's legislative districts, Article IV provides a two-step process: the first step is the apportionment of the total number of members of each house of the State legislature among the four basic island units by the method of equal proportions, using the total number of permanent residents in each of the basic island units. The second step is drawing district lines so that the average number of permanent residents per member is as nearly equal as practicable to the average district population of each of the basic island units. See Article IV, section 6, of the Hawaii Constitution.

The basic island units described in Article IV of the Hawaii Constitution are also the State's political subdivisions, i.e., the four counties that comprise the State. *See Haw. Rev. Stat. ch. 46.*

2. Hawaii's Geography Established a Strong Tradition of Self-Reliance in Each of Hawaii's Basic Island Units.

Article IV, section 4, of the Hawaii Constitution was the result of the 1968 Constitutional Convention of Hawaii. The Standing Committee on Legislative Apportionment and Districting explained that apportioning seats among basic island units using the method of equal proportions was used to “reflect more clearly the fact that these areas are not only basic but are historical, geographical and political units with a strong identity of interest.” (Ex. K at 261). The Committee further explained that the heavy concentration of population on the island of Oahu means that a strict adherence to the “one-man, one-vote” principle would result in “depriving substantial elements of our population of any effective representation in the state legislature in matters of government.” *Id.* As discussed in the factual background of this Memorandum, the Committee explained Hawaii’s unique geographical characteristics, centralized government, and unique political history. The Committee thus concluded:

It is not possible, given Hawaii’s geography and its history, to manufacture tenable senatorial or representative districts by combining any parts of two counties. The result in any such case would always be the submergence and effective disenfranchisement of the voters in that county which constituted the lesser number. Consequently people living in any given Neighbor Island unit can attain effective representation only from persons elected within that unit.

*Id.* at 262.

As the Declaration of Richard P. Schulze, Jr., *see* (Ex. II), Chair of the Committee recounts with respect to the Committee’s adoption and use of the term “basic island unit,” the Committee was unanimous in its conclusion; “if a voter of the State of Hawaii is to have meaningful representation in any kind of government, he must have effective representation from his own island unit in the state legislature,” Ex. K at 263.

As described in great detail in the Committee Report and the factual background section of this Memorandum, what constitutes “real representation” in the Nation’s only island state is that each island unit have its own representatives because over time, stretching back well before Hawaii’s annexation each basic island unit developed a strong sense of self-reliance engendered by each unit’s geography. Each unit’s “insularity,” and distinctive “topographic and climatic conditions” “produced strikingly different patterns of economic and occupational pursuits,” generated governance interests and issues unique to each basis island unit that ~~and~~ typically bore very little similarity to those in the next island unit. The Committee’s conclusion was that for each basic island unit’s resident to be meaningfully represented in the State Legislature, the representative must be from that resident’s island unit.

3. Local Governments With Limited Powers.

Unlike almost every other state, Hawaii does not have a network of local governmental agencies such as townships, cities, school districts, and sewer districts through which local residents can exercise control over local issues. Ex. D at 182. There are only four counties which have considerably fewer powers over local matters than counties in the other 49 states. The State legislature, therefore, has substantial control over areas that are more commonly within the purview of local government in other states. *Id.*

The Standing Committee on Legislative Apportionment and Districting of the 1968 Constitutional Convention recognized this as a factor in apportioning legislative seats among the basic island units:

In addition, in Hawaii and unlike other states, all of the major taxes are centrally administered and collected by the state government. . . . [T]he neighbor island counties are not self-supporting even for the limited county services they provide, and each county government depends on grants-in-aid from the legislature in order to support its own activities.

Ex. K at 261.

This two-tiered political structure is organically prescribed. Article VIII, section 1 of the State Constitution directs: “The Legislature shall create counties, . . . and provide for the government thereof. Each political subdivision shall have and shall exercise such powers as shall be conferred under general law.” Article VIII, section 2 adds these details: “Charter provisions with respect to a political

subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions."

In *Burns v. Gill*, 316 F. Supp. 1285 (D. Hawaii 1970), the court found the following:

Just as the kings of Hawaii organized the political structure of these islands and ruled thereunder for a hundred years, just as was approved and adopted thereafter by the Congress of the United States when it enacted Hawaii's Organic Act in 1900, and just as was again reaffirmed and adopted by Hawaii's Constitutional Convention of 1950, so too did the Constitutional Convention of 1968 studiously and with due deliberation determine that the best means of apportioning its legislative representatives among its peoples in order to secure practical equality of suffrage was again to divide the State into its four basic political (county) units and use the two-tiered method of equal proportions to distribute its State legislators therein.

\* \* \*

Unique geographic, geological and climatic conditions within each basic island unit have produced markedly different patterns of economic development and occupational pursuits.

\* \* \*

Each of the four basic island units of Hawaii is divided from its nearest counterpart by miles of open ocean channels. . . islands of Hawaii, Maui, Molokai, Oahu, and Kauai are each quite mountainous, with sharp mountain ridges and small valleys with sheer cliff walls, creating geographical areas within each island separated by natural barriers[.]

\* \* \*

No other state has such a simplified and centralized governmental structure as Hawaii. Hawaii has but two levels of government: county and state. The Hawaiian “county” is in fact but a municipality, with the counties having but few of the normal municipal powers[.] . . . Hawaii is the only state giving the State government statewide zoning authority. . . . Capital improvements programs are budgeted by the State with funds allocated to the counties for, e.g., highways, airports, harbors, schools, colleges, hospitals, health facilities, and all facilities for the judiciary.

All welfare programs, prison and correctional programs, and housing authority are exclusively State administered. . . . There are no municipal courts in Hawaii; all are State. All judges are appointed either by the Governor or the Chief Justice of the State Supreme Court.

*Id.* at 1290-92 (internal footnotes and citations omitted). That court was “satisfied that Hawaii’s uniquely centralized governmental structure, together with the other insular factors stated above, justifies the Convention’s conclusion that if its voters are to have functional representation in their State legislature each basic island unit must be given meaningful recognition therein.” *Id.* at 1292. The court further held:

[I]n Hawaii the rigid implementation of the one-man, one-vote principle at the State legislative level, an end which could be achieved only by deliberately and artificially chopping up communities with mutuality of political interest and attaching them to other areas with no basic mutuality between the two whatsoever, would result in a complete loss of meaningful representation to a multitude of island voters. . . . [T]he two-tier apportionment plan adopted by the Constitutional Convention, i.e., initially apportioning all representatives and senators among basic island units and thereafter drawing district lines within the island units themselves, now gives fuller and more meaningful representation to the voters of the several

districts within each basic island unit than they could possibly have under any other scheme of apportionment.

*Id.* at 1293.

D. The Islands Differ in Important and Relevant Ways.

This Court has previously acknowledged the uniqueness of the State of Hawaii. The Court has found that each island has its own identity and the residents identify strongly with the island county in which they reside. Order at 14. The residents take great interest in the problems of their county because of the relative isolation that is a result of the surrounding ocean. *Id.*

This Court has also acknowledged there are socio-economic and cultural differences between the island counties. *Id.* This reality is reflected in the Hawaii State Constitution, which “recognizes the geographic insularity and unique political and socio-economic identities of the basic island units.” Hawaii Constitution, Art. IV, § 6. Order at 15. The Commission recognized this concept and articulated this interest as the justification for the population deviations that resulted from not creating canoe districts. Order at 15. In fact, Plaintiffs have not disputed that Hawaii is unique or each island county has its own unique interests.

There are cultural differences as well. As set forth in her declaration (Ex. KK) Professor Davianna Pomaika‘i McGregor believes there is support in each basic island unit’s history of settlement and development for the proposition that despite their unification by Kamehameha I, each of the basic island units were

previously, and continues to this day to be, separate societies or communities, with aspects and identities unique to themselves and distinct from each other. As a result, each basic island unit has an innate sense of individuality and separateness that is traceable to antiquity because each was organized independent of each other, in response to each island's geography, resources, and how their communities were governed. This is reflected in traditional Hawaiian epithets and sayings about the islands and their special places, our references to areas within each of the islands, and how we are governed today.

E. Canoe Districts Do Not Provide Meaningful Representation.

The evidence shows that avoiding canoe districts that include parts of two or more basic island units serves to promote meaningful representation in the legislature.<sup>13</sup>

For example, Commissioner Masumoto explains in his Declaration (Ex. V) that his experience on the 2001 Reapportionment Commission was that people in Hawaii are against the idea of “canoe districts” – particularly those who would be in a canoe district. The 2001 Commission’s advisory councils that represented the

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<sup>13</sup> Plaintiffs have further argued that the Plan does not rigidly adhere to the anti-canoe-district policy, as shown by Senate 7 and House 13, both of which are multi-island canoe districts encompassing Molokai, Lanai (and uninhabited Kahoolawe) along with the distant east side of Maui. However, Molokai, Lanai, and Maui all belong to the same basic island unit and the same county. The smaller islands within the BIU were kept intact to the maximum extent practicable, in accordance with the requirements of Article IV, sec. 6, of the Hawaii Constitution.

basic island units affected were against the use of canoe districts; a large number of people from the affected districts testified against the use of canoe districts. Prior to 2001, there were canoe districts that included the Hanalei or northern area of the island of Kauai and the Hana or eastern area of the island of Maui; those two areas are in different counties, are far apart in terms of distance, and electorates of each appeared to be significantly different; and that it was difficult and expensive for legislators to campaign and represent the disparate areas. Among the reasons expressed as to why people do not like canoe districts are (a) they don't feel they are or would be well represented by a legislator who came from or resided on a different island than they do; (b) they feel the legislator has or would favor the basic island unit that he or she resides on or that has the most voters in the district; and (c) their interests aren't or won't be well represented since their legislator is or would be trying to represent multiple differing and perhaps conflicting interests from two separate communities.

The Hawaii Advisory Council, at its June 9, 2011, meeting, voted against the use of canoe districts for redistricting purposes, after public testimony and discussion. (Ex. W, at 2). Similarly, the Kauai Advisory Council, after public testimony and discussion, voted against the use of canoe districts. (Ex. X, at 2).

The legislators who represented canoe districts in the past had difficulty representing all of their constituents to the best of their abilities, due to the cultural

and political differences among basic island units. For example, Senator Malama Solomon (who formerly represented a “canoe district” comprised of portions of the islands of Maui and Hawaii) states that Capital Improvement Project (CIP) funds are awarded to legislators; however, those representing canoe districts had to split the funds among two islands. (Ex. Y) As another example, two islands in her “canoe district,” Maui and Hawaii, both wanted an astronomy super-computer, which led to a difficult choice as to which island to lobby in favor of; another example was the airport expansion project, funded by the State, that both the islands of Maui and Hawaii wanted. *Id.* Senator Solomon also states that constituents approached her to express their disappointment that she was unable to fully represent *them*. *Id.*

Similarly, former Representative Hermina Morita (who represented a “canoe district” comprised of portions of the islands of Kauai and Maui), states that it is difficult to create a presence on, or foster strong community ties to, an island other than your primary residence. (Ex, Z) During each legislative session, Representative Morita was able to visit her non-residential island no more frequently than once every four weeks; additionally, she represented remote areas of her non-residential island, which were especially difficult to visit due to limited visitor accommodations. *Id.* Similar to Senator Solomon’s, Ms. Morita’s experience was that she was forced to split CIP funds among two separate and

distinct communities, and that she received approximately 25 letters or phone calls per week from disappointed constituents. *Id.* Ms. Morita further explains the difficulties caused by having to split her time, resources, and loyalty among two different county communities. *Id.* As specific examples, Ms. Morita points to the differing views among basic island units regarding such important issues as wind farms, water allocation, and GMO taro. *Id.*

In addition to the experience of state senators who were elected to represent more than one island county, current State Senator Ronald D. Kouchi of Kauai explains why canoe districts would be a disservice to his constituents. Kouchi Declaration. He is the sitting Hawaii State Senator for current Senate District 7, which encompasses the County of Kauai. On September 7, 2010, he was appointed by former Governor Linda Lingle to complete the term of the vacant Seventh Senatorial District and was elected to this office in November 2010. *Id.* The County of Kauai is comprised of the islands of Kauai and Niihau. *Id.* at 2. Senate District 7 does not extend beyond the County of Kauai, and is the only Senate District in the County. *Id.* Prior to serving as the Senator for the Seventh Senate District, he was a Kauai County Council Member for the years 1982-2002, 2006-2008, and the Council Chair for twelve of those years. *Id.* at 3. From 2003 through 2006, he was elected and served as a director of Kauai's electric utility cooperative, Kauai Island Utility Cooperative. *Id.*

The Senator does not recall receiving any input in support of canoe districts.

*Id.* It is his understanding that residents of Kauai County oppose canoe districts because *inter alia*, there are numerous issues facing residents of Kauai County that are unique to Kauai County, or are ones on which Kauai residents have taken positions diametrically opposed to that of residents from one or more of the other three counties. *Id.* Additionally, there is the impression that the Kauai residents' needs would not be adequately addressed and/or protected by a canoe district legislator as it is very difficult for one legislator to spend significant amounts of time on three different islands (i.e., Kauai, Maui, and Oahu) during the year or, more particularly, during each legislative session. *Id.* at 4.

As a Kauai County Council Member and Council Chair, he ~~has~~ appeared at the Hawaii State Legislature address issues of interest to or that affected residents of Kauai vis-à-vis other state counties. *Id.* During these appearances, it was clear to him that while each county was seeking to have its issues addressed by the legislature, each county issue differed greatly from county to county and these differences were sometimes in direct opposition to one another. *Id.*

Another example of Kauai residents' direct opposition to other counties' interests was the State's failed Superferry. *Id.* at 4-5. Kauai residents physically prevented the Superferry from docking on Kauai on its inaugural run to Kauai. *Id.* The islands of Oahu and Maui had very different views of the Superferry. Senator

Kouchi believes the protesters who prevented the Superferry from docking on Kauai viewed the Superferry as *inter alia*, a potential threat to their island's natural resources, while Honolulu and Maui residents viewed the Superferry as *inter alia*, an alternative means of interisland transportation to air travel. *Id.* If there had been a canoe district that included Kauai and either a portion of Oahu or Maui, the legislator representing this canoe district would be in ~~an~~ the untenable situation of having to represent constituents who were vehemently opposed to the Superferry and others who were at least partially in favor of it. *Id.*

The Hawaii State legislature is in session for only 60 days each year. The session runs from mid-January until early May. *Id.* There are many times during the legislative session that he has to choose between attending meetings, hearings, and/or votes on legislative matters in Honolulu and attending events and meetings with constituents on Kauai. *Id.* at 5-6. If his senatorial district becomes a canoe district, this problem would be exacerbated as he would be required to choose between two islands in his district to meet with constituents to discuss their concerns and attend required events, and simultaneously be in Honolulu to conduct his responsibilities as a legislator. *Id.* at 6. With the rising cost of air travel and lodging, it would put an additional burden on limited state financial resources to work in Honolulu and travel to two islands that comprised his district. *Id.*

In addition to one senatorial seat, the islands of Kauai and Niihau are represented by three members of the House of Representatives. Roughly speaking, the island of Kauai is cut into thirds, with each Representative representing one-third of the island. *Id.* He believes he has a close working relationship with all three members of the Kauai House of Representatives and between the four of them, he believes they are able to provide independent and collective coverage for all of their constituents in the legislature. *Id.*

While he currently resides in Lihue, he graduated from Kauai's Waimea High School in 1975. *Id.* As a result being a full time resident of the island, he is accessible to his constituents. *Id.* He constantly runs into them at the grocery store, church, social events, and the like. *Id.* He is a point of contact for constituents to express themselves to me, because he is physically available on the island. *Id.* It is primarily because of his physical presence and availability to his constituents that he is familiar with the issues they believe are important and am therefore he is able to adequately and effectively represent them. *Id.* His constituents' personal access to him would be severely reduced if he was required to represent constituents in a canoe district on two different islands with completely divergent island interests. *Id.*

F. The Reapportionment Commission Minimized Deviations Within Basic Island Units Subject To Other Legitimate Criteria For Redistricting.

The disparities in population among districts in the 2012 Plan reflect legitimate and substantial state interests rooted in the history and geography of this State.

First, as to the basic island unit of Kauai, the reality is given its population, Kauai would be over- or under- represented by nearly identical percentages. If two senate seats were apportioned to it, it would be overrepresented by -33.28; providing one senate seat would result in underrepresentation by +33.44% (Ex, T). Mindful of this, the Commission created just one Senate seat but assigned three House seats to Kauai for an overrepresentation of -10.20% in the House, to balance the underrepresentation in the Senate by +33.44%. *See Reynolds*, 377 U.S. at 577 (“apportionment in one house [of a bicameral legislature] could be arranged so as to balance off minor inequities in the representation of certain areas in the other house”); *Burns*, 316 F. Supp. at 1298. Using the method of measuring legislative representation used in *Burns*, the maximum statewide percentage deviation in the apportionment among basic island units is 5.62%. Ex. T at 22-23.

Speaking more generally, as explained below, the districts were drawn to serve the rational State policy of recognizing the geographic insularity and unique political and socio-economic identities of the basic island units, the public’s consistent opposition to canoe districts since it was imposed by the district court in

*Travis v. Davis*, in 1983, and the overall fairness in representation of each basic island unit when measured by the Huntington-Hill Method of Equal Proportions, and U.S. Supreme Court decisions to date. *Id.* at 23.

The 2012 Supplement describes the Commission's process in developing the Plan, including the Technical Committee's recommended proposed plan of February 15, 2012, which transferred one Senate seat from Oahu basic island unit to the Hawaii basic island unit; shifts in the House district boundaries on Oahu due to a revised distribution of population growth around that island; the public hearings that were held; the Technical Committee's revision of the proposed plan in response to public testimony concentrated on the particular areas of Newtown communities, Makakilo/North Shore, Kahaluu/Waikane, Ewa/Ewa Beach/Ocean Pointe, Moiliili/Makiki/Tantalus, and Akilua/Maunawili/Olomana; further tweaking of the proposed plan; and the Commission's adoption of the revised final Plan. *Id.* at 5-9.

David Rosenbrock's Declaration provides additional explanation as to how the district boundary maps were drawn. As the Project Manager for the 2011 Commission, he coordinated the process and provided logistical support. *Id.* at 2. As he notes, the Technical Committee was tasked with preparing drafts of the reapportionment maps, starting with the 2001 districts and making changes using the following criteria:

- (a) The population base used shall be the “permanent resident” population of the State of Hawaii. The permanent resident population is the total population of the State of Hawaii as shown in the last U.S. census less non-permanent resident students and non-permanent resident military;
- (b) The permanent resident population in each of the senate districts of each Basic Island Unit shall be as nearly equal as possible to its average senate and house district population;
- (c) No state legislative district shall be drawn so as to unduly favor a person or political party;
- (d) Except in the case of districts encompassing more than one island, each state legislative district shall be “contiguous”. Put another way, no district should be divided into two or more discrete pieces;
- (e) In drawing the state legislative districts, no census blocks shall be split. In other words, district lines shall not be drawn so that a census block lies partly in one district and partly in another district; and
- (f) The state legislative districts shall not be drawn so as to: (1) deny or abridge a citizen’s right to vote based on race, color or membership in a language minority group; or (2) discriminate against voters on the basis of race, color or membership in a language minority group. *Id.* at 3-4.

Other criteria the Commission used included:

- (a) The state legislative districts should be geographically “compact”.
- (b) The state legislative district boundaries should follow permanent and easily recognized features such as streets, streams, and clear geographic features;
- (c) The state legislative district boundaries should coincide with census block boundaries. (This should automatically follow from the requirement that census blocks not be split.);
- (d) The state legislative districts should be wholly included within the congressional districts. In other words, all proposed state senate and representative districts should wholly fit within one of the two proposed congressional districts. They should not cross the congressional district borders and lie partly within both congressional districts;
- (e) The state house of representative districts should be wholly included within the state senate districts. In other words, a representative district should not lie partly in one senate district and partly within another senate district; and
- (f) Submergence of an area in a larger district wherein substantially different socio-economic interests predominate should be avoided. For example, if there are two groups of people with differing socio-economic interests residing in areas close to each other, if practicable, the state legislative districts should not be drawn so that the voting power of one of the groups is submerged or outweighed by the voting power of the other group. *Id.* at 4-5.

The drawing and placement of boundary lines is complicated by the unique geography of the State. Declaration of Dylan Nonaka (Ex. AA) at 2. The State is made up of islands, was formed by volcanic activity, and has mountain ranges that divide areas of each island. *Id.* There are valleys, streams, and a complicated coastline. The drawing and placement of district lines is also complicated by the unusual sizes, shapes, and populations of census blocks and by the demands or requests of communities to be kept together. *Id.* at 2-3. The Commission heard testimony from communities who complained about being divided. *Id.* at 3.

Because the smallest unit of U.S. Census data short of individual street addresses is a census block, state typically draw districts lines using the boundaries and population totals of census blocks, unless they possess information in addition to census data relating to the distribution of population. They are of varying sizes and shapes, and contain widely varying numbers of people. Occasionally a census block could be embedded in or surrounded by another census block. *Id.* Many census blocks on Oahu consist of more than 2000 residents, which is approximately 10% of the number of permanent residents in the average State House District. *Id.* Moving a single census block can, in itself, cause the variances to easily exceed the 10% target. *Id.*

To minimize disruption to existing community boundaries, the starting points on Oahu were the district boundary lines from the 2001 Reapportionment.

*Id.* Then two “anchors” were created: Ka’ena Point and Makapu’u. *Id.* at 7-8.

The maps were drawn along the coasts between those points. *Id.*

The maps went through numerous revisions, prior to being presented to the public. *Id.* After reviewing comments and written testimony, changes were made to the maps to address concerns expressed. *Id.* Every effort was made to accommodate the expressed desire of the residents to preserve historic neighborhoods. *Id.*

A decision was made to not cross the mountain ranges that run though the center of each island, as communities on opposite sides of the mountain ranges were dissimilar and did not historically consider themselves to be part of the same neighborhood (e.g. Manoa and Waimanalo). *Id.*

Dylan Nonaka was intimately involved in the drawing and placement of district lines for the reapportionment and redistricting plans and maps that the Technical Committee prepared for the Commission’s review and adoption. (Ex. AA).

The deviations in the reapportionment plan that the 2011 Commission adopted are due to the Technical Committee and 2011 Commission seeking to comply with the criteria in Art. IV, § 6 of the Hawaii Constitution and HRS § 25-2 and seeking to keep intra-island communities intact. *Id.* This was particularly true with respect to Oahu in which population growth from 2000 to 2010 shifted

dramatically to west and central Oahu, requiring two State House seats and one State Senate seat to be shifted from urban Honolulu to west Oahu. *Id.* Due to geographic features, census block characteristics, and to minimize disruption to existing community boundaries, the Technical Committee and 2011 Commission in certain circumstances needed to deviate from the target district population per district. *Id.* The Technical Committee tried to keep deviations from the target population as low as reasonably possible but in places like Ewa Beach where residents have a strong community identity, they needed to increase the number of residents per district to keep as much of those communities together as possible. *Id.* at 3-4. Conversely there are areas like Waikiki where leaving the district with a population lower than the target district population better kept the community together. *Id.* at 4.

It was the opinion of the Commission that the district boundary lines contained in the 2012 Supplemental Report were the best lines that could be drawn, given the dual goals of providing appropriate representation to the residents of the State of Hawaii and minimizing the population variance between the various State legislative districts. *Id.*

**G. The Resulting Population Disparities Are Constitutional.**

When one looks closely at the districts as drawn, it is apparent that the population disparities were the product of honoring the State's unique and long-

standing interest in preserving its basic island units, and a careful effort to balance competing and important state objectives. Far from hurting fair representation, they reflect a good faith effort to promote better representation.

The evidence shows the following about the districts that were drawn in each basic island unit:

1. Kauai Basic Island Unit<sup>14</sup>

In the first instance, the deviations on Kauai are what they are because of the constitutional mandate that seats in the State Legislature be apportioned to the basic island units by the method of equal proportions. Given the population of Kauai, providing Kauai with two senate seats would have resulted in overrepresentation by -33.28%, and one senate seat resulted in the 2012 Plan's underrepresentation of +33.44%.

2. Hawaii Basic Island Unit-Senate Districts<sup>15</sup>

In the first instance, for both the Senate and House districts of the Big Island, the deviations are what they are because of the two constitutional mandates that (1) only permanent residents be included in the population base for the 2012 Plan, and (2) that seats in the State Legislature be apportioned to the basic island units by the method of equal proportions.

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<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> *Id.* at 6-8.

All In addition, all of the Hawaii Senate Districts are separate areas with distinct characteristics, needs, and socio-economic interests. Senate District 1 is comprised of the Hilo area. It abuts Senate District 4 to the north, and Senate District 2 to the south. Hilo is more urbanized than the neighboring districts. It is the county seat and the major urban, commercial, and industrial area of east Hawaii. It deviates from the statewide average by -10.78%. As a practical matter, the only way of increasing the population of Hawaii Senate District 1 would be to take population away from the adjacent Hawaii Senate District 2, which is the Puna/Volcano area. The characteristics and socio-economic interests of Puna are different from Hilo. The socio-economic interests of any area split off from the Puna area would be submerged into the larger population of Hilo. At public hearings Puna residents made it clear that they did not want their community split. Also, it would be hard to find permanent and easily recognized geographic features for a new southern boundary of Senate District 1 if that district had to be increased in population at the expense of Senate District 2.

Senate District 2 is comprised of the Puna area. Puna is a unique district containing relatively underdeveloped communities where infrastructure is lacking in many areas. The Committee felt there would have been substantial community opposition if it had carved out blocks from Puna to add to the Hilo district.

Senate District 3 is the Kona area which has larger developments than its neighboring districts. The Committee chose to keep the Kona area intact rather than parcel out blocks to combine with neighboring districts.

Senate District 4 is comprised of the Kohala and northern area of the island of Hawaii. There is a natural stream boundary separating Districts 1 and 4 in the Hamakua area. District 4 is less developed and much more rural than the Hilo or Kona areas, with distinct concerns and culture. It is a rural area and deviates from the statewide average by -10.30%.

As a practical matter, the only way of increasing the population of Hawaii Senate District 4 would be to take population away from the adjacent Hawaii Senate District 3, which contains the urban and commercial areas of Kailua-Kona. The socio-economic interests of the area split off from Kailua-Kona would be submerged in the larger population of the Kohala/North Hawaii area. Also, it would be difficult to find permanent and easily recognized geographic features for the new boundary line between Senate Districts 3 and 4.

### 3. Hawaii Basic Island Unit-House Districts<sup>16</sup>

All of the Hawaii House Districts are separate areas with distinct characteristics, needs, and socio-economic interests.

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<sup>16</sup> *Id.* at 8-12.

The starting point for drawing the House District boundary lines was the north edge of House District 1, Waipio Valley. The drawing of district boundary lines progressed around the island in a counter-clockwise direction. The district boundary lines from the 2001 Reapportionment were adjusted to reflect the change in population distribution. The intent was to keep the House District boundary lines as similar as possible to the 2001 district boundary lines.

With respect to the House seats, the district lines were drawn for similar reasons. House District 1 is comprised of the north-east portions of Hawaii which are rural communities. It is the outskirts of urban Hilo and deviates from the statewide average by +8.2%. As a practical matter, the only way of reducing the population of this district would be to transfer some of its area to either House District 2 or 3. Both of these areas are also overpopulated - District 2 (+4.53%) and District 3 (+5.68%).

House District 2 is comprised of the compact urban district of Hilo. It was not feasible to reduce the deviation in House District 1 by taking population away from House District 1 and adding to House District 2, because that population would be disenfranchised by becoming a minority in an urban district.

As to House District 3, the new boundary line did not change significantly from the 2001 boundary lines. House District 3 is sparsely populated and large.

House District 4 is comprised of the Puna area. The Committee felt that the area should remain intact, for the reasons set forth above. It deviates from the statewide average by +9.98%. The only practical way of reducing the population of House District 4 would be to transfer some areas of Puna to the only adjacent district, Hawaii House District No. 3, which contains Volcano and the populations on the main road from Hilo to Volcano. The Puna community made it clear to they did not want their community split up. It would be hard to find permanent and easily recognized geographic features to bound House District 4 if that district had to be reduced in population and size. Finally, House District 3 is already over the statewide average by +5.68%.

Hawaii House District 5 is the area that is south of the major urban and commercial areas of Kailua-Kona, stretching down to the more rural area of South Hawaii - an area that contains many of the Kona coffee farms. It deviates from the statewide average by +10.55%.

House District 6 is comprised of Kailua-Kona, a compact, well-defined urban area, which experienced significant population growth between 2000 and 2010. House Districts 5 and 6 have very different socio-economic interests, and a population shift would result would disenfranchise the rural population being added to the Kailua-Kona district.

As a practical matter, the only way to decrease Hawaii House District 5 would be to transfer some of its population to Hawaii House District 6, which is the main part of Kailua-Kona. The boundary line between House Districts 5 and 6 was established to follow highly traveled and easily recognized main streets below or makai of Mamaloa Highway. The 2011 Commission heard testimony asking that boundaries be established so that they would not have to travel outside of their district to vote. It would be difficult to establish an easily recognized boundary line for a reduced House District 5 that met this request, given the streets.

House District 7 is comprised of the north and north-west areas of Hawaii, including Waimea. These are geographically distant communities that are isolated and distinct (for example, Waipio Valley separates House District 1 from House District 7).

In summary, the deviations on Hawaii are the result of following the Hawaii Constitution's criteria favoring contiguous districts, compact districts, and drawing district lines to follow recognized features such as streets, streams and clear geographical features, and not submerging an area into a larger district that has substantially different socio-economic interests.

4. Maui Basic Island Unit<sup>17</sup>

Residents of the island of Maui are traditionally identified as being a resident of one of the following geographic areas: Upcountry; South Maui; Central Maui; East Maui; and West Maui. With respect to the basic island unit of Maui, the bulk of the population growth since the 2001 census occurred Wailuku and Kahului. (Ex. LL)

House District 8 is comprised primarily of the Wailuku area of Maui (“Central Maui”). House District 9 is comprised primarily of the Kahului area of Maui (“Central Maui”). House District 10 is comprised primarily of the Lahaina, Kaanapali, Kapalua and Maalaea areas (“West Maui”). It is separated from House District 8 by the West Maui mountains, and from House District 9 by a main road, Waiko Rd/E.Waiko Rd. House District 11 is comprised primarily of the Kihei and Wailea areas (“South Maui”). House District 12 is comprised primarily of the areas of Pukalani, Makawao, Olinda, Pulehu, Kula, Ulupalakua, and Keokea areas (“Upcountry”). House District 13 is comprised primarily of the Paia and rural Hana areas of Maui, as well as the islands of Molokai, Lanai, and Kahoolawe (“East Maui”). These areas have a rural character in common. *Id.*

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<sup>17</sup> *Id.* at 12-16.

In deciding where the district lines should be drawn, the Commission used permanent and easily recognizable features and tried to keep the overall deviation within the State at 10% or less.

Some of the deviations between the House Districts in Maui, are due to keeping the Maui representative districts wholly within the Maui senatorial districts. The Commission understood that the benefits of this are to have communities represented by the same core group of legislators, thereby concentrating and improving representation.

All of the Maui Senate Districts are separate areas with distinct characteristics, needs, and socio-economic interests.

Maui Senate District 5 is composed of the Wailuku and Kahului areas. These are urban and commercial areas with few hotels and no major tourist resort areas. Wailuku is the county seat with all the county government offices, courts, and health facilities. Kahului contains most of the island's commercial and industrial areas, including Maui's major airport.

Senate District 5 is comprised of Wailuku and Kahului. Senate District 6 is comprised of the Lahaina and Kihei areas. There is a large, natural separation between the two districts in the "Maui Plains" lowland area in the middle of the island of Maui. Additionally, there is a main road, East Waikoo Road, separating the districts. The Committee felt that the area of Wailuku was much closer in

District 5 than District 6 in terms of character, in that Wailuku is an older community, unlike Kihei or Lahaina, which are newer or “resort” communities with generally higher incomes.

Maui Senate District 5 deviates from the statewide average by +7.53%. This cannot be reduced without splitting some of the urban, commercial and/or industrial parts of Senate District 5 off to either the tourist-oriented Senate District 6 or the rural-oriented Senate District 7. This would result in a submergence of the socio-economic interests of the split-off parts of the current Senate District 5. Currently, it is bounded by the West Maui mountains, Waikapu stream, and major Maui highways and roads. It would be hard to find permanent and easily recognized geographic features to bound Senate District 5 if the district had to be reduced in population and size.

Maui Senate District 6 is composed of the Lahaina/Kaanapali and Kihei/Waimea areas. These areas are largely tourist oriented areas, containing all of Maui’s major resort areas and most of its tourist-oriented businesses.

Maui Senate District 7 is composed of the “upcountry” Maui communities, the Hana area, and the islands of Molokai, Lanai, and Kahoolawe. While these areas contain some tourist facilities, they are primarily natural or rural areas, with agricultural and local business concerns.

The Maui House Districts are also separate areas with distinct characteristics, needs, and socio-economic interests.

Maui House District 8 is composed of the Wailuku area, the island's government center; it deviates from the statewide average by +9.44%. As a practical matter, the only way to reduce the population of Maui House District 8 would be to transfer some of its population to the neighboring Maui House District No. 10, which is the tourist-oriented area of Lahaina/Kaanapali. This would result in a splitting of the Wailuku community and submergence of the socio-economic interests of the part of House District 8 split off to House District No. 10. It would also be difficult to find permanent and easily recognized geographic features for the new border of a reduced House District 8.

Maui House District 9 is composed of the Kahului area, the island's commercial/industrial center; it deviates from the statewide average by +9.93%. As a practical matter, the only way to reduce the population of Maui House District 9 would be to transfer some of its population to either the adjacent Maui House District 11, which is the tourist-oriented area of Kihei/Wailea, or Maui House District 12, which is the rural area of upcountry Maui. Either would result in a splitting of the Kahului community and submergence of the socio-economic interests of the part of House District 9 that was split off. It would also be difficult

to find permanent and easily recognized geographic features for the new border of a reduced House District 9.

To address the population growth in Wailuku and Kahului, House district lines were revised to shift portions of the Kahului area population to House District 12 and House District 13. The boundary between the districts is major highway Haleakala Hwy on the north-east border of House District 9, and Lowrie Ditch on the south-east border of House District 9. Ex. LL

Within House Districts 10 and 11 are resort areas with different socio-economic interests from Kahului and Wailuku. Additionally, House District 12, comprised of “upcountry” Maui has a very distinct character and socio-economic interests from the rest of Maui. *Id.*

One guiding principle followed by the Commission was that the district lines should be drawn to give meaningful representation to the residents of each district. The interests of the residents of the Upcountry, South Maui, Central Maui, East Maui, West Maui, districts are different. To simply move a small census block located on the edge of a district to another for the purpose of achieving numerical equality, would have been a disservice to the residents placed into a district with which they historically identified. Doing so would have had the practical effect of disenfranchising the residents of that census block. *Id.*

5. Oahu Basic Island Unit<sup>18</sup>

Like Kauai's and the Big Island's, Oahu's deviations are what they are, in the first instance, because of the two mandates of Article IV, section 4 of the State Constitution that (1) the seats of the State Legislature be apportioned by the State's permanent resident population, and (2) and apportioned to the basic island units by the method of equal proportion.

Otherwise, the deviations in the legislative districts on the Oahu essentially attributable to the Commission drawing district boundaries that adhere to permanent and easily recognized geographical features, census tract boundaries, and avoiding the submergence of areas in larger districts with different socio-economic interests. Some of the deviations also resulted from trying to maintain existing district boundaries. Maintaining existing district boundary lines avoids disruption and confusion by keeping voters and candidates within districts that are familiar to them and by keeping historical communities with the same interests together.

It made sense to follow permanent and easily recognized geographical features (mountain ridge lines, streams, highways, and major streets) because they in fact have also historically defined the boundaries of long-established neighborhoods and communities including Palolo (House District 20), Manoa

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<sup>18</sup> *Id.* at 16-20.

(House District 23), and Makiki (House District 24). These districts are smaller than average in population, but it would have been difficult to increase their population without ignoring geographical features such as mountain ridge lines or the H-1 freeway, and encroaching into other well-defined and firmly established communities and neighborhoods. The foregoing is also true for House Districts 25, 27, and 28.

Some of the deviations in East and urban Honolulu are also due to the drastic population shifts in the last 10 years from East and Urban Oahu, to West and Central Oahu. Since the 2000 Census, the population has grown dramatically in some of the legislative districts of West Oahu while the districts of East and urban Honolulu did not grow very much. Recognizing this growth required shifting districts to West Oahu from East and urban Honolulu. Thus, one House District between Makapu'u Point and Kaimuki, and another from Moilili and downtown Honolulu were relocated in West Oahu. Losing these districts while trying to keep existing district boundaries caused the remaining districts in East and urban Honolulu to be somewhat smaller than average in population.

The deviations in some Oahu House Districts were caused by trying to keep communities together. For example, House District 32 is composed of two communities (Salt Lake and Moanalua) that historically have been together in one district. While the district is smaller than average in population, increasing its size

would have required taking population from a third neighboring district with a different community. Such a transfer of population would be complicated by: (a) the highly populated census blocks in this area (condominiums) which make it difficult to transfer just the right amount of population to avoid over-population or under-population; and (b) the fact that the surrounding districts, House Districts 31 and 33, are also both smaller than average in population already.

Similarly, House District 42 is composed of two isolated communities (Kapolei and Makakilo) that have been kept together in one district. While House District 42 is somewhat larger than average, reducing its populations would require transferring part of the Kapolei/Makakilo communities to a district where they would be submerged. Further, the surrounding districts, House Districts 39 and 43, are larger than average in population already.

As with the Oahu House Districts, some of the deviations in Oahu Senate Districts were caused by trying to maintain existing district lines. For example, the Commission followed the existing district boundaries for Senate Districts 25, 9, and 10.

As with the Oahu House Districts, some of the deviations among the Oahu Senate Districts was due to keeping communities together that historically been in one district. For example, Senate District 17 is composed of Pearl City and Waipahu. It is somewhat smaller in population than average. However, trying to

increase its size would require taking population from the Waipio/Mililani community (Senate District 18), submerging the population taken in the larger Pearl City/Waipahu community. The other neighboring district (Senate District 16) is smaller than average in population and could not provide the population needed to increase the size of Senate District 17.

Similarly, Senate District 19 (Ewa Beach) is somewhat smaller than average in population. Increasing its size would require taking part of the neighboring Kapolei/Makakilo community (Senate District 20). Senate District 20 is already smaller than average in population and taking population away from it would result in further under-population.

As noted above, Senate District 20 (Kapolei/Makakilo) is smaller than average in population. The surrounding districts are similarly small in population except Senate District 18 (Royal Kunia/Mililani). Taking population from Senate District 18 would require splitting part of the Royal Kunia development off and submerging it into the Kapolei/Makakilo community. It would also require crossing the current easily recognized district boundary line of Kunia Road/Fort Weaver Road. It is not clear that we could find another easily recognized boundary line in Royal Kunia were we to enlarge Senate District 20.

Some deviations in Oahu Senate Districts were caused by using easily recognized geographic features as boundary lines. For example, we used the H-1

freeway as the boundary line between Senate Districts 15 and 14. The H-1 freeway is one of the main geographic features of urban Honolulu and is a natural boundary between communities. Senate District 15 is larger than average in population, while Senate District 14 is smaller than average in population. To even them out would require having Senate District 14 go past the freeway into Senate District 15.

As shown above, the drawing of district lines on Oahu was complicated and required a constant balancing of many factors including: dealing with population changes that had occurred on Oahu since 2000 while trying to keep population deviations low; trying to maintain existing district lines where possible; trying to have district boundaries follow easily recognized geographic features such as mountain ridges, streams, and major streets; and trying to keep communities together that had historically been together or asked to be kept together.

### III. Conclusion

For all the reasons set forth here, the Court should reaffirm its rejection of the Plaintiffs' claim that the State's decision to use a permanent resident population base for apportionment, and the claim that the population deviations in the the 2012 Plan exceed constitutional bounds. The State has ample justification for apportioning the seats of the State Legislature to its basic island units, and drawing districts within each of the basic island units. The resulting deviations

among the districts statewide, and within the basic island units are directly attributable to the long-standing and fundamental state interest, and are permissible under *Reynolds*' one-person/one vote principles. Summary judgment should be entered in the State's favor, and Plaintiffs' Motion should be denied.

DATED: Honolulu, Hawaii, October 29, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), counsel for Defendants hereby certifies the Memorandum is Opposition to Plaintiffs' Motion for Summary Judgment, submitted pursuant to Local Rule 7.5(b), complies with the word limit set for memoranda submitted in opposition to this Motion. Pursuant to the "word count utility" program of Word 2003, the word count for this Opposition is 12,770 words.

DATED: Honolulu, Hawaii, October 29, 2012.

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