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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
capacity as the Chief Election Officer
State of Hawaii; STATE OF HAWAII
2011 REAPPORTIONMENT

CIVIL NO. 12-00184 JMS-LEK-
MMM

REPLY TO PLAINTIFF'S
MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [DKT.
NO. 64]; CERTIFICATE OF
SERVICE

COMMISSION; VICTORIA MARKS, LORRIE LEE STONE, ANTHONY TAKITANI, CALVERT CHIPCHASE IV, ELIZABETH MOORE, CLARICE Y. HASHIMOTO, HAROLD S. MATSUMOTO, 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.

REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Introduction

Defendants believe Plaintiffs have failed to show they are entitled to summary judgment on either of the first two causes of action, for the reasons set forth in Defendants' Memoranda in Support of their Motion, in Opposition to Plaintiffs' Motion, and below. Plaintiffs have failed to show that the State's extraction of non-permanent residents from the reapportionment population base violates their equal protection rights. Likewise, Plaintiffs have also failed to show that the drawing of the district legislative boundaries fails to comply with the requirements of the United States Constitution. Defendants have presented this Court with a detailed record explaining how both the selection of the reapportionment population base

and drawing of the legislative boundary lines furthers rational state interests, and complies with Supreme Court teachings. Plaintiffs have failed to produce any admissible evidence that refutes or undermines the record presented to this Court by Defendants. This Court should, therefore, grant Defendants' Motion and deny Plaintiffs' Motion.

II. Argument

1. The Rational Basis Standard of Review Applies -- Extraction of Non-Permanent Residents from the Population Base the State Used to Redistrict its Legislature Does Not Burden the Right to Vote.

Plaintiffs argue that the extraction of nonpermanent resident university students, and military service members and their dependents from the population base Hawaii used to reapportion and redistrict the State's Legislature in 2012, burdens the students' and military members' and their spouses right to vote, and thus must satisfy the compelling state interest, rather than the rational basis test.

They make this argument even though two of them, Ernest and Jennifer Lester (the only plaintiffs who were actually extracted from the population base by this criteria) are respectively registered voters in Colorado and Hawaii, and the rest of the plaintiffs have not, and cannot show that their fundamental right to vote has been burdened by this extraction.

As the Sixth Circuit Court recently reminded in *Obama For America v. Husted*, 2012 WL 4753397 at 6 (C.A.6 (Ohio)), the "precise character of the state's

action and the nature of the burden on voters will determine the appropriate equal protection standard,” so that “[i]f a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard or review should be used, *See McDonald v. Bd. Of Election Comm’rs*, 394 U.S. 802, 807-09, . . . [o]n the other extreme, when a state’s classification ‘severely’ burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard,” emphases added, citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Moreover, they make this argument even though the Court has **not** rescinded or contracted its allowance that “where substantial population shifts over . . . [the ten years between redistricting] can be . . . predicted with a high degree of accuracy, States that are redistricting may properly consider them,” *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969), or its ruling that “the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which substantial population equivalency is to be measured,” *Burns v. Richardson*, 84 U.S. 73, 91 (1966). *See also Senate of State of California v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992)(albeit in dicta “[i]f the State knows that the census data is unrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process.”) While the Court has said quoting from *Kirkpatrick*, that “the census count represents the ‘best population data

available,’’ *Karcher v. Daggett*, 462 U.S. 725, 738 (1983), as the three judge court in *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D.Md. 2011); aff’d 2012 WL 1130482, recently pointed out, “[a]lthough *Karcher* and *Kirkpatrick* do require states to use census data as a starting point, they do not hold . . . that states may not modify this data to correct perceived flaws. A more complete reading of the opinion in *Karcher* makes this point clear. The Court . . . cautioned, however, that ‘[i]f a State does attempt to use a measure other than total population or to ‘correct’ the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner.’”

Plaintiffs' argument fails because a citizen's right to vote, and the right to equal voting power are not the same thing. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), which Plaintiffs incorrectly rely on as the basis for their argument that strict scrutiny applies in this case, talks about equalizing voting power and equal representation, but not a citizens right to vote.

Right to vote cases are different from equal representation and equal voting power challenges to redistricting plans. Voting cases involve attempts by a state to deny or restrict a citizen's right to vote¹ for instance by imposing a durational residency requirement² or a poll tax³ or by requiring a government-issued photo

¹ *Reynolds v. Sims*, 377 U.S. at 554-555.

² *Dunn v. Blumstein*, 405 U.S. 330, 335-336 (1972).

³ *Harper v. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

identification in order to vote.⁴ When the right to vote is denied completely or burdened substantially, courts demand a strong justification. All the cases Plaintiffs cite in support of their assertion that the extraction must be reviewed as against the compelling state interest test are right to vote cases, or voting rights cases; they are not applicable to this case.⁵

⁴ *Crawford v. Marison Cty Election Bd.*, 553 U.S. 181, 190 (2008).

⁵ Plaintiffs cite the following voting rights cases in support of their argument that a strict scrutiny standard of review applies in this case. Since voting rights cases involve an infringement of a person's right to vote, *not* equal representation or equal voting power challenges in the context of reapportionment, the standard of review suggested in them is not helpful in this case: *Dunn v. Blumstein*, 405 U.S. at 335-336 (where the Court struck down Tennessee's durational residency law which prohibited bona fide residents from voting); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (where the Court found that residents living on the grounds of a federal enclave in Maryland were entitled to vote in state elections); *Obama for America v. Husted*, F.3d , 2012 WL 4753397 at p. 4 (C.A.6 Ohio) (where the Court struck down Ohio's law setting different deadlines for early voting for military voters and non-military voters); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (where the Court upheld Hawai'i's prohibition against write-in voting); *Harper v. State Bd. of Elections*, 383 U.S. at 667 (where the Court held that Virginia's poll tax was unconstitutional); and *Crawford v. Marison Cty Election Bd.*, 553 U.S. at 190 (where the Court upheld Indiana's law requiring a government issued photo identification in order to vote).

Again, Plaintiffs' right to vote has not been infringed upon: Kostick, Walden, Brostrom, Takai, Gayagas, Veray, and Jennifer Laster are registered and able to vote in the state of Hawai'i; Ernest Laster is registered and able to vote in the state of Colorado. *See* First Amended Complaint for Declaratory and Injunctive Relief, paragraphs 1-8.

Cases like this one involving equal representation and/or equal voting power challenges involve claims of vote dilution which result when unequal districts made up of either persons or citizens are created. The standards that apply to these cases when state legislative districts are involved are more relaxed. In *Reynolds v. Sims* the Court held states are only required to put forth an honest and good faith effort to construct districts as nearly equal in population as possible, noting that mathematical exactness was neither practical nor constitutionally required.⁶ Moreover, states are generally permitted greater flexibility when it comes to attempting to achieve "equality of population amongst the districts".⁷

In keeping with the more relaxed standards applicable in these cases the standard of review in legislative reapportionment cases is less stringent than the standard of review in voting rights cases. This more relaxed standard is set forth in *Brown v. Thompson* and *Mahan v. Howell*.

In *Brown v. Thompson* the Court found a Wyoming reapportionment plan passed constitutional muster stating the plan was consistent, nondiscriminatory, and

⁶ *Brown v. Thompson*, 462 U.S. 835, 842 (1983) citing *Reynolds v. Sims*, 377 U.S. at 577; *see also* and *Gaffney v. Cummings*, 412 U.S. 735, 743 (1973).

⁷ *Mahan v. Howell*, 401 U.S. 315, 321 (1973) ("... it suggested that in the implementation of the basic constitutional principle-equality of population amongst the districts-more flexibility was constitutionally permissible with respect to state... reapportionment than in congressional redistricting.") (citations omitted).

furthered a legitimate state policy, i.e. preserving county boundaries.⁸ The ultimate inquiry, said the Court, is "... whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' ..." ⁹ In *Mahan v. Howell* the Court upheld a Virginia reapportionment plan since it reasonably advanced the rational state policy of respecting political subdivision boundaries.¹⁰

Thus, the test as to the constitutionality of Hawaii's extraction of nonpermanent resident student and military service members and their families is not the compelling state interest test, but rather the rational basis test.

2. The State's Extraction of Nonpermanent Residents Was Not Done Arbitrarily and Does Not Discriminate Against Voters or Otherwise Burden the Right to Vote.

Plaintiffs repeatedly argue the right to be counted for reapportionment purposes is a fundamental right under the Constitution, but they cite no legal support for this argument. To date, the Supreme Court has not answered the question of "what population" must be equally distributed among the state's voting districts, i.e., total population or state citizen population.

⁸ See *Brown v. Thompson*, 462 U.S. 835, 847-848 (1983) (where the Court upheld a Wyoming's reapportionment plan based on the state's "... longstanding and legitimate policy of preserving county boundaries ... Particularly where there is no 'taint' of arbitrariness or discrimination substantial deference is to be accorded the political decisions of the elected representatives.") (citation omitted).

⁹ *Brown v. Thompson*, 462 U.S. at 843 citing *Mahan v. Howell*, 410 U.S. 315, 328 (1973).

¹⁰ See *Mahan v. Howell*, 410 U.S. at 328.

The longstanding trend has been for the courts to defer to the states regarding what population to choose for the reapportionment base. This trend spans almost a half of a century and has substantial support. In 1966 the Court held: "The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids the resulting apportionment base offends no constitutional bar .." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). A few years later the Court warned the federal courts against "becom[ing] bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so". *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973).

Some forty-five years after *Burns*, the question of what population base to use has not been prescribed by the Court, *Burns* is still good law, and courts that have had to address the issue have acknowledged that the questions "is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment," *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996), and "is a choice left to the political process" and "eminently [a] political question [that] has been left to the political process." *Chen v. City of Houston*, 206 F.3d 502, 523, 528 (5th Cir. 2000). *See also Fletcher*, 831 F.Supp. 887.

In sum, there is ample evidence in the record that is already before the Court that the method the State used to extract nonpermanent residents from the 2010 Census data was well-reasoned, not arbitrary and does not discriminate. There is no reason for this Court to revisit its earlier finding that the State's use of a permanent resident population base is an approximation of the *Burns*-sanctioned state citizen population base; instead use of the permanent resident population base by the State should be affirmed by this Court. Nothing in Plaintiffs' Opposition Memorandum warrants a change of course. The approach adopted here by the State was not unreasonable or arbitrary, did not discriminate against the military, or deprive anyone, let alone Plaintiffs, of a constitutionally protected right.

III. Conclusion

Defendants request this Court deny Plaintiffs' Motion and Grant Defendants' Motion on the first two causes of action, for the reasons set forth in their Memoranda.

DATED: HONOLULU, HAWAII, NOVEMBER 19, 2012

/s/John F. Molay
JOHN F. MOLAY
Deputy Attorney General

Attorneys for Defendants