

NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

MICHAEL J. MATSUKAWA,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF HAWAII 2011 REAPPOR-)
 TIONMENT COMMISSION and SCOTT)
 NAGO, Chief Election Officer,)
 State of Hawaii)
)
 Respondents.)
)
 _____)

MEMORANDUM IN SUPPORT OF PETITION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

I. STATE OF THE CASE

Introduction	1
A. The Hawaii State Constitution	
1. The Reapportionment Commission	2
2. Population Base	4
3. Implementing Legislation	5
B. "Permanent Residents" Only	6
1. The Commission's Original Decision	6
2. The Attorney General Opinion	7
3. Removing "Non-Permanent Residents"	9
C. The Reapportionment Commission's Decision to Employ Extraction Method "A"	11
D. The Petitioner	14
E. Constitutional Remedy	
1. Hawaii State Constitution	15
2. Time for Petition	16

II. STATEMENT OF ISSUES AND RELIEF REQUESTED

A. Questions Presented for Decision	17
B. Relief Requested	
1. As to the Final 2011 Reapportionment Plan	18
2. As to the Respondent Scott Nago, Chief Election Officer, State of Hawaii	18

Table of Contents, cont.

	<u>Page</u>
3. As to the Respondent State of Hawaii 2011 Reapportionment Commission	19
 III. WHY RELIEF SHOULD BE GRANTED	
A. The Commission was Distracted by Past Arguments and Fears and Started Off on the Wrong Foot	19
B. This Court Already Provided a Definition for the Term "Permanent Residents"	21
C. The Commission Ignored its Own Warehouse of Tools and its Staff's Abilities	22
D. The Commission Sought to Avoid Intraisland Complexities	23
E. Technological Changes After "Hickel" Make it Possible to Identify and to Locate "Non-Permanent Residents" and this Court Should Give the Reappor- tionment Commission time to Do What the Commission Should Have Done from the Beginning	23
F. The Commission Did Not Make an Honest and Good Faith Effort to Execute its Constitutional Duty	25
G. The Commission Destroyed the Construct of Article IV	26
H. The Commission is Requesting Judicial Guidance and Direction from this Court	26
IV. CONCLUSION	27

Table of Contents, cont.

Page

Request for Relief

1.	As to the Final 2011 Reapportionment Plan	28
2.	As to the Respondent Scott Nago, Chief Election Officer, State of Hawaii	29
3.	As to the Respondent State of Hawaii 2011 Reapportionment Commission	29

APPENDICES "1" TO "9"

STATEMENT OF RELATED CASES

TABLE OF AUTHORITIES

Page

Primary Sources

(Federal Cases)

Burns v. Gill, 316 F. Supp. 1285 (D. Haw. 1970) 3, 26

Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 12,
86, 16 L.Ed. 2d 376 (1966) 3, 4, 8, 9, 21

Travis v. King, 552 F. Supp. 554 (D. Haw. 1982) 6

(State Cases)

Barnett v. Broderick, 84 Haw. 109, 929 P.2d
1359 (1996) 18

Blair v. Ariyoshi, 55 Haw. 85, 515 P.2d 1253
(1973), cert. denied, 416 U.S. 945, 94
S.Ct. 1954, 40 L.Ed.2d 297 (1974) 1, 3

Citizens for Equitable and Responsible
Government v. County of Hawaii, 108 Haw.
218, 120 P.3d 217 (2005) 7, 21, 25

Hanabusa v. Lingle, 119 Haw. 341, 198 P.3d
604 (2008) 18

Harris v. Cooper, 14 Haw. 145 (1902) 18

Kumulae v. Kalauokalani, 25 Haw. 1 (1919) 18

Table of Authorities, cont.

Page

(Other Cases)

Hickel v. Southeast Conference, 846 P.2d 38
(Alaska 1992) 23

Legislative Sources

Hawaii State Constitution

Article IV

Section 1 19, 29
Section 2 4, 12, 18
Section 4 2, 4, 5, 6, 19, 25, 29
Section 6 2, 4, 5, 6, 19, 25, 29
Section 10 15, 16

Hawaii Revised Statutes

Section 25-1 5
Section 25-2 4
Section 25-2(a) 4, 5, 18
Section 25-3 13, 21
Section 25-4 13
Section 25-9 5, 19, 29

Table of Authorities, cont.

Page

Hawaii Revised Statutes, cont.

Section 602-5(a) (4)	16
Section 602-5(a) (6)	16
Section 602-5(a) (7)	16

Secondary Sources

A. Lee, The Hawaii State Constitution (1993)	2
--	---

I.
STATEMENT OF THE CASE

Introduction

In this case, Petitioner (a registered voter in the County of Hawaii) asks this Court to exercise its supervisory authority over the State of Hawaii 2011 Reapportionment Commission in order to protect his constitutional right and privilege for fair and equal representation in the State Legislature. Petitioner contends that the State of Hawaii 2011 Reapportionment Commission (the "Reapportionment Commission" or the "Commission" hereafter) deliberately diluted his representational interest in the State Legislature when the Reapportionment Commission voted not to execute its constitutional duty either because it felt the applicable law should be changed or because it is too difficult to perform the work it is charged to perform.¹

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¹ Petitioner notes that this case is similar to Blair v. Ariyoshi, 55 Haw. 85, 515 P.2d 1253 (1973), cert. denied, 416 U.S. 945, 94 S.Ct. 1954, 40 L.Ed.2d 297 (1974) dealing with the apportionment of legislative seats in the state house AMONG "basic island units." The State Chief Election Officer maintains material relating to the Reapportionment Commission's activities at <http://hawaii.gov/elections/reapportionment/>.

The Legal Background

A. THE HAWAII STATE CONSTITUTION²

1. The Reapportionment Commission

Under Article IV of the Hawaii State Constitution, the Reapportionment Commission has a two-fold duty. First, it must apportion the total number of members of each house of the State Legislature among the state's four "basic island units." Second, after so apportioning the legislative seats among the state's four "basic island units," it must then assign the members of each house to specific legislative districts WITHIN each "basic island unit" and, further, redraw legislative district boundary lines for each house if necessary.³

² A brief constitutional history on the apportionment of the State Legislature appears in A. Lee, *The Hawaii State Constitution* 11-15, 97-105 (1993). (Appendix 3)

³ Section 4. The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions; except that no basic island unit shall receive less than one member in each house. (emphasis added) (Appendix 1)

Section 6. Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable (emphasis added) (Appendix 1)

The goal is to achieve statewide interisland proportional representation AMONG island groupings⁴ and at the same time intra-island proportional representation WITHIN each island grouping. In the present case, Petitioner's main concern involves the Reapportionment Commission's first-tier interisland apportionment of legislative seats AMONG the state's four "basic island units" (primarily between the OAHU and HAWAII "basic island units").⁵ However, any decision in this case has implications as to the Commission's intraisland districting of legislative seats for each house WITHIN the "basic island units" as well. (See Appendix 4, Page 15.)

The final legislative reapportionment plan takes effect when the Reapportionment Commission files its plan with the State Chief Election Officer⁶ and after the State Chief Election Officer

⁴ In Burns v. Gill, 316 F. Supp. 1285, 1288-1293 (D. Haw. 1970), the federal court explained Hawaii's history in using "basic island units" to apportion legislative seats and found that method to be constitutional in context of Hawaii's unique island setting. This effort followed Hawaii's earlier reapportionment experience that is described in Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

⁵ Compare with Blair v. Ariyoshi, footnote 1, supra (dispute over the apportionment of a third house seat to the KAUAI "basic island unit" in order to equalize its underrepresentation in the senate, to the loss of a house seat on the part of the OAHU "basic island unit").

⁶ In this case, the State of Hawaii 2011 Reapportionment Commission filed what it characterizes to be its final legislative reapportionment plan with the State Chief Election Officer on September 26, 2011.

gives public notice of that plan within 14 days thereafter.⁷
(Appendices 1 and 2)

2. Population Base

The population base is the key number upon which all reapportionment decisions are made. Article IV, Sections 4 and 6 of the Hawaii State Constitution expressly limit the population base for reapportioning seats in the State Legislature to the "permanent residents" of the state, at both the first-tier (interisland apportionment) and second-tier (intraisland districting) levels. (Footnote 3, supra; Appendix 1) Past reapportionment commissions have implemented this formula in 1991 and 2001 without judicial challenges and without sanction from the United States Department of Justice or from State and Federal courts.⁸

⁷ Section 2. ... Not more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief election officer a reapportionment plan for the state legislature ... which shall become law after publication as provided by law HAW. ST. CONST. art. IV, §2 (Appendix 1)

§25-2. Duties. (a) ... Within fourteen days after filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final legislative reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members of the next five succeeding legislatures. Section 25-2, HRS (Appendix 2)

⁸ Forty-five years ago, in Burns v. Richardson, supra, 384 U.S. at 94-95, 86 S.Ct. at 1297-1298, the United States Supreme Court recognized that adjustments to the census count (reducing the total census count to a different figure for reapportionment purposes) is a legitimate exercise of a state's authority. Specifically, the court held that "This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise

3. Implementing Legislation

In enacting Section 25-2(a), HRS, the State Legislature instructed members of the Reapportionment Commission to

"reapportion the members of each house of the legislature on the basis, method, and criteria prescribed by ... Article IV of the Hawaii Constitution." (emphasis added) (Appendix 2)

The "basis, method and criteria" referred to include the "permanent residents" population base set forth in Article IV, Sections 4 and 6 of the Hawaii State Constitution.

In Sections 25-1 and 25-9, HRS, the State Legislature anticipated challenges to a reapportionment plan and provided that commissioners will hold office until a general election is held for seats described in the Commission's final legislative reapportionment plan (Appendix 2). The Reapportionment Commission's final legislative reapportionment plan takes effect when the State's Chief Election Officer gives public notice of the plan. Section 25-2(a), HRS. In this case, the Commission filed what it characterizes to be its final reapportionment plan with the State Chief Election Officer on September 26, 2011.

of franchise which is aimed at disenfranchising the military or any other group of citizens. ... No issue was raised in the proceedings before it [the lower court] that military men had been excluded improperly from the apportionment base." Noting the presence of large numbers of military in Hawaii as a result of Hawaii's role as the Pacific staging area for military purposes, the court continued that "If total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawaii, gross absurd and disastrous results would flow." Id.

The Population Base

B. "PERMANENT RESIDENTS" ONLY

As stated above, Hawaii's voters adopted Article IV, Sections 4 and 6 of the Hawaii State Constitution to limit the population base for reapportionment purposes to the "permanent residents" of the state. Since 1991, no judicial challenge has ever been brought against the use of "permanent residents" as the population base to reapportion the State Legislature.⁹

1. The Commission's Original Decision

In June 2011, the Reapportionment Commission started its work by voting 8-1 to ignore the provisions of Article IV and to use total population instead, refusing to use the constitutionally mandated "permanent residents" population base. (See Minutes of June 28, 2011 Meeting, Pages 11-22, Part V; Appendix 5-A, Page 22) The Commission's minutes show how the Commission outright refused to follow Article IV and refused to apply that term in its work on the belief that the Commission can, if it chose to do so, "rewrite" Article IV of the Hawaii State Constitution on its own.

In support of the motion to use total population instead of the constitutionally mandated "permanent residents" population base, the movant stated:

[J]ust because they [the 1991 and 2001 Commissions] didn't do it in the past [use the total census count as

⁹ The "permanent residents" population base differs from the "registered voters" population base discussed in Travis v. King, 552 F. Supp. 554 (D. Haw. 1982).

the population base], that doesn't mean it shouldn't be done differently in the future. I think in a lot of ways it was probably a wrong decision and I think this may be chance for us to, to right a wrong. (Appendix 5-A, Page 13 (emphasis added))

In response to which the lone dissenting commissioner said "I think the prior Commissions had it right for the last 50 years, I think the Supreme Court had it right in the Citizens v. Big Island [sic] case; I think the neighbor island Advisory councils had it right in their recommendations as well." (Id., Pages 20-21) (See also Maui Advisory Council testimony, Appendix 4-A)

In effect, the Commission (eight of whose nine members live in the OAHU "basic island unit") acted to maintain the current apportionment of senate and house seats AMONG the state's four "basic island units."

2. The Attorney General Opinion

On July 19, 2011, the State Attorney General expressed his opinion on the meaning of the term "permanent residents" and how the Reapportionment Commission should implement the same in its work. The Attorney General's letter is directed to Rep. Robert Herkes and was also submitted to the Commission. (Appendix 4) In this letter, the Attorney General referred the Commission to this Court's 2005 opinion in Citizens for Equitable and Responsible Government v. County of Hawaii, 108 Haw. 318, 120 P.3d 217 (2005) and reminded the Commission that it has no discretion to ignore this Court's interpretation of the term "resident":

The term "permanent resident" is not defined in the State Constitution. However, a recent ruling by the Hawaii Supreme Court is instructive in this regard. In Citizens for Equitable and Responsible Government v. County of Hawaii, et al., 108 Haw. 318, 129 P.3d 217 (2005), the Hawaii Supreme Court interpreted the term "resident population" as that term is used in the Hawaii County Charter to decide whether military personnel and college students were properly included in the population base for reapportioning its county council. Relying on Black's Law Dictionary, the court state that the common definition of the word "resident" is:

[a]ny person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature.

... The court then observed that generally speaking, "the transitory nature of military personnel from outside [the State] is apparent" because military personnel are temporarily stationed in Hawaii, have little say in the location of their assignments, are present in Hawaii involuntarily, and "seemingly lack a present intent to remain in the county." (emphasis in original)

To the extent that the Commission may have believed that Federal law overrides Article IV, the Attorney General's letter continued that "[W]e know of no federal constitutional provision that requires states to consider active duty military personnel or military dependents as 'permanent residents' for purpose of reapportionment, or to include or exclude them as a group from a state's reapportionment population base," citing Burns v. Richardson, supra, 384 U.S. at 92, 86 S.Ct. at 1296-1297. (emphasis added)

3. Removing "Non-Permanent Residents"

As the United States Supreme Court held in Burns v. Richardson, supra, the removal of certain individuals from the census count is a valid and constitutional exercise on the part of the state, something that the State of Hawaii may legitimately do in order to achieve proportional representation in the State Legislature. However, as stated above, the Reapportionment Commission openly refused to discharge its constitutional duty under Article IV and used total population (the census count) and not "permanent residents" as the population base.

On August 17, 2011 (40 days in advance of the September 26, 2011 plan filing deadline), the Reapportionment Commission's staff reminded the Commission that its constitutionally mandated task is "to accomplish the constitutionally required population adjustment in determining permanent resident population." Staff then explained its most current efforts to achieve that goal. (Appendix 5-B, Staff Summary attached, Paragraph 1)

What is very apparent from the record is that the Reapportionment Commission knowingly refused to take serious, good faith and honest action on the question presented and thereby denied itself, and more importantly the public, the opportunity to obtain all available data and means to perform its constitutionally mandated task. The effect of the delay is reflected in the minutes of the Commission's August 17, 2011 meeting (about one month before the September 26, 2011 plan filing deadline) when its staff reported as follows:

"... Mr. Jones stated other techniques could possibly be used if there were more time and data."
(Appendix 5-B, Page 5 (emphasis added))

On September 13, 14 and 19, 2011, nearly three months after the Commission's June 28, 2011 vote and with the September 26, 2011 plan filing deadline looming, the Commission's staff again informed the Commission that it had the ability to remove certain identifiable and locatable "non-permanent residents" from the 2010 census count, using at least three available extraction methods, and explained the results that would follow as to the interisland apportionment of legislative seats AMONG the state's four "basic island units." (Declaration of Petitioner, Paragraph 6; Appendix 5-D, Staff Report)

The Commission's staff report appears in the following power point slide (Declaration of Petitioner, Paragraph 6; Appendix 5-D, Staff Report):

Extraction of Non-Permanent Residents

EXTRACTION A:	extraction	adjusted total
-Oahu	-15,660	937,547
-Hawaii	-793	184,286
-Maui	-4	154,920
-Kauai	-1	67,090

EXTRACTION B:

-Oahu*	-72,609	808,598
-Hawaii*	-796	184,283
-Maui	-4	154,920
-Kauai	-143	66,948

EXTRACTION C:

-Oahu*	-78,524	874,683
-Hawaii*	-921	184,158
-Maui	-178	154,746
-Kauai	-198	66,893

* Under Extractions B or C, Oahu receives 17 and Hawaii receives 4 senate seats. (Appendix 5-D)

The Commission's Action

C. THE REAPPORTIONMENT COMMISSION'S DECISION TO EMPLOY EXTRACTION METHOD "A"

On September 19, 2011, with the September 26, 2011 plan filing deadline only one week away, the Reapportionment Commission re-examined its prior June 2011 vote¹⁰ and then voted 5-3 to remove 15,660 "non-permanent residents" from the census count, employing Extraction Method "A." (Appendix 5-C, Minutes, Page 23) This 5-3 vote removed only some of the identifiable and locatable "non-permanent residents" from the population base (-15,660), but not a sufficient number so as to affect the current apportionment of legislative seats AMONG the state's four "basic island units," a result that could have been achieved if the Reapportionment Commission had employed Extraction Method "B" (-72,609) or Extraction Method "C" (-78,524) or had developed any other methodology in a reasonable time (which it could have done but did not do).

¹⁰ In its prior action, the Reapportionment Commission had voted 8-1 to include "non-permanent residents," i.e., to use the total census count, as the population base, Article IV's "permanent residents" requirement notwithstanding.

The minutes of the September 19, 2011 meeting demonstrate the Commission's disingenuous behavior.¹¹ Although the Reapportionment Commission had from the date of its inception in April-May 2011 ample time to instruct its staff to immediately determine methods to identify and to locate the "permanent residents" of the state (i.e., to remove the "non-permanent residents" from the census count), the Commission instead instructed its staff to do the opposite and to begin the technical apportionment and districting work with total population as the base from the start. The minutes further show how the Commission believed that citizens must accede to the Commission's self-appointed power to rewrite the Hawaii State Constitution.

Then, in response to intense public criticism, the Reapportionment Commission purported to "re-examine" the question of population base, but with only days left before the September 26, 2011 plan filing deadline and with apportionment and district maps that use total population as the base already drawn. Whereupon, the Commission bemoaned the fact that it needed more data or better information that the Commission had actually denied itself from the beginning (when it had refused to acknowledge its constitutional duty and tried to rewrite the Hawaii State Constitution).

¹¹ This Court should note that the staff works at the Commission's direction. "The chief election officer ... under the direction of the commission, shall furnish all technical services." HAW. ST. CONST. art. IV, §2. (Appendix 1)

Confronted by the September 26, 2011 plan filing deadline, one commissioner conceded that "the term permanent hadn't been fully explored." (Appendix 5-C, Page 18, Paragraph 2) The availability of data or statistical methodology had not "been fully explored" because the Commission had not directed its staff to obtain all available data and to develop a methodology as soon as possible from the start.

The Commission at all times had specific powers to compel the attendance of witnesses (experts, military commanders, university personnel) and the production of information, but the record shows that the Commission did not use this authority, choosing instead to bemoan the difficulty of their work rather than to properly manage the reapportionment process.¹²

This Court cannot ignore this important fact -- that the Reapportionment Commission did not use all of the tools that were available to the Commission to execute its constitutional duty

¹² The commission may require all such persons as it deems necessary to appear personally and testify before it and to produce to it all books, records, files, papers, maps and documents as shall appear to be necessary for the purpose of formulating a reapportionment plan. ... [P]ersons may be questioned, under oath, concerning all matters necessary for the due execution of the duties vested in the commission by the Constitution and by this chapter. ... Section 25-3, HRS.

Any person who, having been summoned under section 25-3 to give testimony or to produce any books, records, files, papers, maps and documents, wilfully makes default, or who, having appeared, refuses to answer any questions or wilfully gives false evidence shall be fined not more than \$1,000, or imprisoned not more than twelve months or both. Section 25-4, HRS.

because the Commission had voted at the start not to use those tools. What the Commission did not do (not use its lawful authority to determine the "permanent residents" population base) is as important as what the Commission did do (use total population).

On September 26, 2011, the Reapportionment Commission adopted and filed its final legislative reapportionment plan that is based on what it describes to be the "permanent residents" of the state, using Extraction Method "A" (called the "Final 2011 Reapportionment Plan" hereafter). As stated, the effect is to deny the HAWAII "basic island unit" one additional senate seat (Declaration of Petitioner, Paragraph 11; Appendix 5-D) and possibly another house seat (Appendix 4-A, Page 15).

The Petitioner

D. THE PETITIONER

Petitioner resides in the HAWAII "basic island unit" and is registered to vote in that island unit. He testified before the Reapportionment Commission on September 14, 2011 on the subject of the "permanent residents" population base. (Declaration of Petitioner, Paragraphs 1, 2 and 3; Appendix 6) His complaint is obvious. The Reapportionment Commission's first-tier apportionment action to exclude only some, but not all, of the "non-permanent residents" using Extraction Method "A" (-15,660) rather than Extraction Method "B" (-72,609) or Extraction Method "C" (-78,524), or any other method, denies the HAWAII "basic island unit" in which

he and other Hawaii Island residents live an additional one seat in the state senate (and possibly another house seat).

Petitioner argues that the Reapportionment Commission offers no compelling reason, no analysis, no substantive explanation and no articulated reason to support its collective action or to otherwise demonstrate that the Commission took a "hard look" at the issue and made an "honest" and "good faith" effort to execute its constitutional duty under the Hawaii State Constitution. As a result, Petitioner complains that the Reapportionment Commission violated his interests under the Hawaii State Constitution as well as under the Equal Protection Clause of the United States Constitution.

Remedy

E. CONSTITUTIONAL REMEDY

1. Hawaii State Constitution

Under Article IV, Section 10 of the Hawaii State Constitution, an aggrieved person may pursue a broad array of remedies to correct the Reapportionment Commission's errors. The remedies are inherently broad and unlimited in scope and character. This Court can appoint a master, can instruct the Commission, can establish the 2011 reapportionment plan by itself and can employ any other tool it deems necessary to protect Petitioner's interest and in aid

of this Court's jurisdiction.¹³

Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan, or it may take such other action to effectuate the purposes of this section as it may deem appropriate. Any such petition shall be filed within forty-five days of the date specified for any duty or within forty-five days after the filing of a reapportionment plan. (emphasis added) (Appendix 1)

Sections 602-5(a)(4), (6) and (7), HRS also confer broad powers upon this Court to give an aggrieved person full and complete relief as the circumstances may warrant. (Appendix 2)

2. Time for Petition

Under Article IV, Section 10 of the Hawaii State Constitution, a registered voter must file his or her petition for relief "within forty-five days after the filing of a reapportionment plan." A petition that is filed within 45 days after September 26, 2011 (the date when the Reapportionment Commission filed its final 2011 Reapportionment Plan in this case) is a timely filed petition.

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¹³ For example, this Court can command the Reapportionment Commission to publish findings, can take "live" testimony from witnesses and can hold evidentiary hearings en banc.

II.
STATEMENT OF ISSUES AND RELIEF REQUESTED

A. QUESTIONS PRESENTED FOR DECISION

1. Question One:

WHO ARE THE "PERMANENT RESIDENTS" OF THE STATE OF HAWAII FOR THE PURPOSE OF REAPPORTIONING THE STATE LEGISLATURE?

2. Question Two:

DID THE REAPPORTIONMENT COMMISSION HAVE THE ABILITY TO REMOVE IDENTIFIABLE AND LOCATABLE "NON-PERMANENT RESIDENTS" FROM THE 2010 CENSUS COUNT?

3. Question Three:

WOULD THE REAPPORTIONMENT COMMISSION'S EMPLOYMENT OF EXTRACTION METHOD "B," EXTRACTION METHOD "C" OR OTHER STATISTICAL METHODOLOGY HAVE PRODUCED A POPULATION BASE THAT IS CONSISTENT WITH THE "PERMANENT RESIDENTS" MANDATE OF ARTICLE IV?

4. Question Four:

DID THE REAPPORTIONMENT COMMISSION ERR WHEN IT REFUSED TO USE A "PERMANENT RESIDENTS" POPULATION BASE AT THE START OF ITS WORK AND FAILED TO GIVE IT AND ITS STAFF SUFFICIENT TIME TO DETERMINE THAT POPULATION BASE FROM THE START OF ITS WORK?

5. Question Five:

DID THE REAPPORTIONMENT COMMISSION ERR WHEN IT FAILED TO REMOVE ALL IDENTIFIABLE AND LOCATABLE "NON-PERMANENT RESIDENTS" FROM THE CENSUS COUNT FOR THE PURPOSE OF APPORTIONING STATE LEGISLATIVE SEATS AMONG THE STATE'S FOUR "BASIC ISLAND UNITS"?

B. RELIEF REQUESTED

Petitioner requests the following determinations, writs or orders:

1. As to the Final 2011 Reapportionment Plan

That this Court determine that the Final 2011 Reapportionment Plan for the State Legislature is constitutionally defective and invalid.

2. As to the Respondent Scott Nago, Chief Election Officer, State of Hawaii

That this Court compel Respondent Scott Nago, Chief Election Officer, State of Hawaii (a public official) to rescind any public notice that he may have given of the Final 2011 Reapportionment Plan for the State Legislature.¹⁴

¹⁴ Respondent Scott Nago's duty in this instance is limited to giving public notice of the Final 2011 Reapportionment Plan, which is a purely ministerial duty. Article IV, Section 2 and Section 25-2(a), HRS. He exercises no discretion; he makes no decisions; and he casts no vote as to that plan. Compare with Barnett v. Broderick, 84 Haw. 109, 111, 929 P.2d 1359, 1361 (1996) (duty of court clerk to conform action to court's order is ministerial); Kumulae v. Kalauokalani, 25 Haw. 1, 8-9, 11 (1919) (duty of an election official to issue election certificate is ministerial); Harris v. Cooper, 14 Haw. 145, 148 (1902) (duty of election official to put candidate's name on ballot is ministerial). See also Hanabusa v. Lingle, 119 Haw. 341, 346-347, 198 P.3d 604, 609-610 (2008) (mandamus relief available to compel an official to perform a ministerial duty no other remedy is available). The legislative reapportionment plan that Petitioner contends is constitutionally defective and invalid will govern all elections for seats in the State Legislature for the next five legislative sessions.

3. As to the Respondent State of Hawaii 2011 Reapportionment Commission

That this Court direct the Reapportionment Commission, and its individual members, to prepare and file a new legislative reapportionment plan for the State Legislature that uses "permanent residents" of the state as the population base and that otherwise complies with Article IV, Sections 4 and 6 of the Hawaii State Constitution no later than December 1, 2011¹⁵ and, further, that this Court compel the Reapportionment Commission to file with this Court complete findings that explain the rationale for its plan.

**III.
WHY RELIEF SHOULD BE GRANTED**

A fundamental basic constitutional right is at stake and this Court can and must protect Petitioner's right against the government's arbitrary action that infringes on that right and dilutes Petitioner's representational interest in the State Legislature.

A. THE COMMISSION WAS DISTRACTED BY PAST ARGUMENTS AND FEARS AND STARTED OFF ON THE WRONG FOOT.

From the beginning of its work, the Reapportionment Commission acted to destroy, not implement, Article IV of the Hawaii State Constitution. (See Part I.B and Part I.C., above.)

¹⁵ The members of the Reapportionment Commission remain in office when their plan is challenged and are also required to assist this Court. HAW. ST. CONST. art. IV, § 1; Section 25-9, HRS. (Appendices 1 and 2)

The 1991 and 2001 reapportionment commissions applied the "permanent residents" population base without judicial challenge in State or Federal courts or from the United States Department of Justice. Yet, the current 2011 Reapportionment Commission allowed past fears and arguments to interfere with its faithful execution of its constitutional duty, action that is so deliberate that its members may be exposed to liability under civil rights laws.¹⁶

The Reapportionment Commission then waited to September 19, 2011 (one week prior to the September 26, 2011 plan filing deadline) to "accommodate" the Hawaii State Constitution but had, by then, denied itself (and the public) the reasonable opportunity to conduct a thorough, "good faith" and "honest" analysis of the issue presented -- to remove "non-permanent residents" from the census count.

The Reapportionment Commission gravely erred by precluding its staff and itself from fully investigating all available data and methodology to identify and locate all "non-

¹⁶ The Department of Attorney General's letter (Appendix 4) refers to Burns v. Richardson, supra, a well-known Hawaii case, in which the United States Supreme Court held that

"Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is measured. 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."

permanent residents" and by corrupting the population base. More importantly, the Commission did not use its authority under Section 25-3, HRS to establish a specific methodology by which it could identify and locate the "non-permanent residents." Instead, the Commission looked for ways not to do so and then complained that it lacked tools to execute its constitutional duty when the September 26, 2011 plan filing deadline neared.

B. THIS COURT HAS ALREADY PROVIDED A DEFINITION FOR THE TERM "PERMANENT RESIDENTS."

In the Citizens case, supra, this Court explained the significance of the term "resident populations" as that term is used for redistricting council seats in Hawaii County. This Court found that the term "resident populations" rightfully excludes "those who live in the county temporarily for educational purposes or those who live in the county involuntarily because ordered to do so." 108 Haw. at 323, 120 P.3d at 222. This is consistent with Burns v. Richardson, supra.

This Court's decision in Citizens gave the Commission the ability to distinguish a "resident" from a "non-resident" and gave the Commission the means, in addition to that given by the legislature in Section 25-3, HRS, to identify and to locate those individuals and to remove them from the population base. However, the Reapportionment Commission was not satisfied with this Court's decision and assumed that it had the "discretion" to use its own meaning of the term "resident" and "permanent residents."

C. THE COMMISSION IGNORED ITS OWN WAREHOUSE OF TOOLS AND ITS STAFF'S ABILITIES.

After the Reapportionment Commission's own staff again reported on September 13, 14 and 19, 2011 that it can remove identifiable and locatable "non-permanent residents" from the census count, using Extraction Methods "A," "B" and "C," the Reapportionment Commission nonetheless voted on September 19, 2011 to remove only some of the identifiable and locatable "non-permanent residents" but only in such numbers using Extraction Method "A" (-15,660). In so doing, the Commission in essence conceded that it had erred in its earlier June 28, 2011 vote and that it had denied itself the opportunity to establish appropriate methodology to identify and locate the "non-permanent residents."

As stated in Part I.B. and Part I.C, above, the Reapportionment Commission denied itself (and the public) the opportunity to explore, in an "honest" and "good faith" manner, the use of Extraction Methods "B" and "C," as well as any other available methodology, as rational tools that it could use from the beginning to remove identifiable and locatable "non-permanent residents" from the census count, which is its obligation to do under the law, and to ensure that it had the correct population base ("permanent residents") before it started to develop preliminary apportionment and districting maps no less adopt the Final 2011 Reapportionment Plan. The Reapportionment Commission erred in this regard.

D. THE COMMISSION SOUGHT TO AVOID INTRAISLAND COMPLEXITIES.

It is fairly clear to see that the Reapportionment Commission's decision to use Extraction Method "A" at the last minute also reflects a desire on the Commission's part to avoid the difficulty it would face in redrawing legislative district lines WITHIN the OAHU "basic island unit" where most of the "non-permanent residents" in the state are located. The extraction of "non-permanent residents," vis-a-vis the OAHU and HAWAII "basic island units," is a simple calculation, as the Reapportionment Commission's staff demonstrated. (Appendix 5-D)

However, apportioning (and redistricting) seats WITHIN the OAHU "basic island unit" would become a difficult (but achievable) task, particularly with the September 26, 2011 plan filing deadline only one week away. Put bluntly, the Reapportionment Commission acted as it did for its convenience (and not for any compelling reason). The Reapportionment Commission erred in this regard.

E. TECHNOLOGICAL CHANGES AFTER "HICKEL" MAKE IT POSSIBLE TO IDENTIFY AND TO LOCATE "NON-PERMANENT RESIDENTS" AND THIS COURT SHOULD GIVE THE REAPPOR-TIONMENT COMMISSION TIME TO DO WHAT THE COMMISSION SHOULD HAVE DONE FROM THE BEGINNING.

This Court should look at Hickel v. Southeast Conference, 846 P.2d 38 (Alaska 1992), a case in which the Alaska Supreme Court addressed the good faith efforts that the Alaska redistricting board made to determine if non-resident military personnel could be removed from the 1990 census count. In that case, the

reapportioning board's expert stated that "an accurate survey was methodologically impossible" and that the extraction of such persons "would be impossible." 846 P.2d at 56. (emphasis added) The court therefore concluded that the reapportionment board had taken a "hard look" at the question raised and found that the reapportioning body's decision to include (rather than to exclude) non-resident military personnel in the population base was not erroneous.

In stark contrast, in this case, the Reapportionment Commission made no effort to establish a methodology or to direct its staff to do so from the beginning, even though it had the authority to do so. When its staff eventually informed the Commission that "non-permanent residents" can be removed from the census count through at least three reliable methods, the Commission by then had run out of time to perform its constitutional duty and had put itself in the awkward position of having to resolve a critical issue with the September 26, 2011 plan filing deadline looming and proposed final legislative district maps already drawn and published.

Thus, instead of taking a "hard look" at what was possible, the Reapportionment Commission took but "one quick look" at the last moment and chose the "safest" extraction method to "save" the final plan that it was inclined to adopt, which was to maintain the current apportionment of legislative seats AMONG the four "basic island units" (which is Extraction Method "A"), and without justification.

This Court can give the Reapportionment Commission the additional time that the Commission needs (and had originally denied itself) to faithfully execute the Commission's duty under the law and to correct the Commission's error.

F. THE COMMISSION DID NOT MAKE AN HONEST AND GOOD FAITH EFFORT TO EXECUTE ITS CONSTITUTIONAL DUTY.

For Equal Protection purposes, this Court must also determine whether the Reapportionment Commission made an honest and good faith effort to carry out its duty. Citizens for Equitable and Responsible Government v. County of Hawaii, supra. The record demonstrates that in this case, Commission members consumed much of their time in the exchange of philosophical ideas in their attempt to rewrite the Hawaii State Constitution to mean "total population" instead of "permanent residents" as provided in Article IV, Sections 4 and 6 of the Hawaii State Constitution.

Further, its staff's abilities notwithstanding, the Reapportionment Commission did not use its authority (and in fact refused to exercise its authority) to identify and locate the "non-permanent residents" from the start of its work and, when pressed and after its proposed final legislative district maps had already been drawn and published, selected the "safe" option (Extraction Method "A") as an accommodation to Article IV (and the voters who adopted Article IV), a choice that in the long run would have no impact on the apportionment of legislative seats AMONG the "basic island units."

This Court must conclude that this action does not reflect the exercise of an honest and good faith effort on the part of the Reapportionment Commission to execute its constitutional duty under the law. The Commission erred in this regard.

G. THE COMMISSION DESTROYED THE CONSTRUCT OF ARTICLE IV.

In Burns v. Gill, supra, the federal court approved Hawaii's two-tiered apportionment formula, holding:

This court is satisfied that Hawaii's uniquely centralized government 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 representation therein 316 F. Supp. at 1292. (emphasis added)

However, by its action, the Reapportionment Commission decided that the time had come for it (not the electorate) to destroy the construct of Article IV and to rewrite Article IV on its own. This Court need only look to the Commission's June 28, 2011 minutes discussed in Part I.B, above, as proof that the Commission intended to destroy the construct of Article IV and to rewrite Article IV on its own. The Commission erred in this regard.

H. THE COMMISSION IS REQUESTING JUDICIAL GUIDANCE AND DIRECTION FROM THIS COURT.

A recent account of the Reapportionment Commission's final action suggests that the Commission is actually looking to this Court for advice and direction. On September 24, 2011, a reporter for the "Honolulu City Beat" (Appendix 9) stated that the

Reapportionment Commission's staff "will continue working on additional maps based on other extraction models that ultimately were not adopted." The Commission's chair is noted to have explained that work is continuing because such ongoing work "would prove helpful if the commission ends up being sued." The chair continued, "We've done the best we can, but if the court decides that we're not correct, then the court will have some alternatives to consider." The Commission continues to conduct business as noted by its agenda for a meeting on October 13, 2011. (Appendix 8)

The Commission erred because it tried to rewrite rather than execute the Hawaii State Constitution. When the Commission eventually admitted to its error on September 19, 2011, it had run out of time to do its work properly and then filed a plan that lacks a rational basis and that is constitutionally defective. This Court can and should set aside that constitutionally invalid plan and direct the Reapportionment Commission to prepare a plan that complies with the Hawaii State Constitution.

IV. CONCLUSION

Believing that it has the discretion to ignore and to rewrite the "permanent residents" provision of Article IV of the Hawaii State Constitution, the Reapportionment Commission started off and ended on the wrong foot. This is clear and obvious from the record.

1. The "permanent residents" of the state are those who have the present intent to remain in the state and whose presence are not transitory in nature. Citizens, supra.

2. The Reapportionment Commission had the ability at all times to identify and to locate the "non-permanent residents" and to remove them from the 2010 census count.

3. The removal of "non-permanent residents" is consistent with and mandated by the Hawaii State Constitution.

4. The Reapportionment Commission erred when it failed to take a "hard look" at the issue presented and failed to make a "good faith" and "honest" effort to execute its constitutional duty.

5. The Reapportionment Commission erred when it apportioned seats in the State Legislature as it did among the four "basic island units."

Request for Relief

Petitioner requests this Court for relief as follows:

1. As to the Final 2011 Reapportionment Plan

That this Court determine that the Final 2011 Reapportionment Plan for the State Legislature is constitutionally defective and invalid.

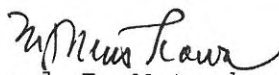
2. As to the Respondent Scott Nago, Chief
Election Officer, State of Hawaii

That this Court compel Respondent Scott Nago, Chief Election Officer, State of Hawaii (a public official) to rescind any public notice that he may have given of the Final 2011 Reapportionment Plan for the State Legislature.

3. As to the Respondent State of Hawaii 2011
Reapportionment Commission

That this Court direct the Reapportionment Commission, and its individual members, to prepare and file a new legislative reapportionment plan for the State Legislature that uses the "permanent residents" of the state as the population base and that otherwise complies with Article IV, Sections 4 and 6 of the Hawaii State Constitution no later than December 1, 2011¹⁷ and, further, that this Court compel the Reapportionment Commission to file with this Court complete findings that explain the rationale for its plan.

DATED: Kailua-Kona, Hawaii, October 11, 2011.



/s/ Michael J. Matsukawa
MICHAEL J. MATSUKAWA
Petitioner, Pro Se

¹⁷ The members of the Reapportionment Commission remain in office when their plan is challenged and are also required to assist this Court. HAW. ST. CONST. art. IV, § 1; Section 25-9, HRS. (Appendices 1 and 2)