

No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE HON. MALAMA SOLOMON, Ph.D.,)
State Senator, 1st Senatorial District; LOUIS)
HAO; PATRICIA A. COOK; and STEVEN) ORIGINAL PROCEEDING
G. PAVAO,)

Petitioners,)

vs.)

NEIL ABERCROMBIE, in his official)
capacity as Governor and Chief Executive)
Officer of the State of Hawaii; THE STATE)
OF HAWAII OFFICE OF ELECTIONS;)
THE 2011 HAWAII)
REAPPORTIONMENT COMMISSION)
AND ITS MEMBERS: THE HONORABLE)
VICTORIA MARKS, Circuit Court Judge of)
the First Circuit (Ret.), CHAIRMAN;)
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;)
and SCOTT NAGO, in his official capacity)
as Chief Elections Officer, State of Hawai'i,)

Respondents.)

PETITION OF THE HON. MALAMA SOLOMON, Ph.D, State Senator, 1st Senatorial District;
LOUIS HAO; PATRICIA A. COOK and STEVEN G. PAVAO'S FOR

(1) ORIGINAL JUDICIAL REVIEW REGARDING THE CONSTITUTIONALITY
OF THE FINAL REAPPORTIONMENT PLAN APPROVED AND ADOPTED
BY THE 2011 HAWAII REAPPORTIONMENT COMMISSION

- (2) DECLARATORY JUDGMENT THAT THE FINAL LEGISLATIVE REAPPORTIONMENT PLAN FOR THE SENATE OF THE STATE LEGISLATURE ADOPTED BY THE STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION ADOPTED AND FILED ON SEPTEMBER 26, 2011, IS INVALID
- (3) AN ORDER DIRECTED TO SCOTT NAGO, CHIEF ELECTIONS OFFICER, STATE OF HAWAII, THAT RESTRAINS AND ENJOINS HIM FROM PUBLISHING THE FINAL REAPPORTIONMENT PLAN FOR THE STATE LEGISLATURE THAT THE STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION ADOPTED AND FILED ON SEPTEMBER 26, 2011.
- (4) AN ORDER THAT DIRECTS THE RESPONDENT STATE OF HAWAII 2011 REAPPORTIONMENT COMMISSION TO PREPARE AND TO FILE A NEW LEGISLATIVE REAPPORTIONMENT PLAN FOR THE SENATE OF THE STATE LEGISLATURE THAT COMPLIES WITH THE REQUIREMENTS OF ARTICLE 4, §§4, 6 OF THE HAWAII STATE CONSTITUTION.
- (5) AN ORDER THAT RESPONDENT REAPPORTIONMENT COMMISSION PAY PETITIONERS' REASONABLE FEES AND COSTS

MEMORANDUM IN SUPPORT OF PETITION
APPENDICES A THROUGH V
STATEMENT OF RELATED CASES
DECLARATION OF GRETCHEN H. KLUNGNESS
DECLARATION OF STANLEY H. ROHRIG
CERTIFICATE OF SERVICE

STANLEY H. ROHRIG 0664
Attorney At Law
101 Aupuni Street, Ste 124
Hilo Hawaii 96720

ROBERT D.S. KIM 4255
A Law Corporation
P.O. Box 188
Kealahou, Hawaii 96750
Telephone: (808) 329-6611

Attorneys for Petitioners

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COME NOW Petitioners THE HON. MALAMA SOLOMON, Ph.D., State Senator for District 1, State of Hawai'i ; and the following members of the Hawai'i County Democratic Committee, LOUIS HAO, PATRICIA A. COOK, and STEVEN G. PAVAO, all of whom are registered voters in the State and County of Hawai'i , by and through counsel, Stanley H. Roehrig, a Hawai'i Law Corporation, and Robert D. S. Kim, a Hawai'i Law Corporation, and respectfully petition this Honorable Court pursuant to Article 4, §10¹ of the Hawai'i State

¹ **Mandamus and Judicial Review**

Article 4, §10 Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan, 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. Proceedings of the

Constitution; Rules 17 and 21, Hawai`i Rules of Appellate Procedure; Chapter 632-1 Hawai`i Revised Statutes; 42 U.S. Code §§1983, 1988; and Section 602-5(a) (4) (5) (6) Hawai`i Revised Statutes and petitions this Honorable Court in this ORIGINAL PROCEEDING for relief as follows:

Petitioners seek the following remedies and relief:

1. Final 2011 Reapportionment Plan Invalid

That this Honorable Court provide judicial review, including declaratory relief, pursuant to Article 4, §10 of the Hawai`i State Constitution and Chapter 632-1 Hawai`i Revised Statute invalidating the Final Plan, redistricting and reapportionment maps as drafted as unconstitutional. The final Senate plan is based on the Reapportionment Commission's use of the wrong population base and, as a consequence, improperly apportions the seats of the State Senate AMONG the four "basic island units," as mandate by Article 4, §4 of the Hawai`i State Constitution, thereby denying the "basic island unit" of Hawai`i County one additional seat in the state senate. Pursuant to Title 42 U.S. Code § 1983², 1988, Petitioners also be afforded declaratory and injunctive relief as aggrieved voters under the Final Plan, invalidating the Final Plan and maps as drafted as unconstitutional;

2. Restraint of Publication

That this Honorable Court restrain and enjoin the Respondent Scott Nago, Chief Elections Officer, State of Hawai`i (a public officer) by way of an order, from giving public notice of the Final 2011 Reapportionment Plan for the State Senate; and further, to the extent that he may have already given public notice, to rescind the same;

Constitutional Convention of Hawai`i of 1968, Journal and Documents, Vol. 1, Paragraph 11 regarding scope of Article 4, §10 of State Constitution: "Mandamus and Judicial Review . . . Judicial review is provided . . . to require the commission to do its work, correct any error or effectuate the purposes of the reapportionment provisions contained in the Constitution. The grant of power to review is designedly broad, permitting the court to fashion its own remedies to fit the exigencies of the situation." [*emphasis added*]

² § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. New Reapportionment Plan

That this Honorable Court draft its own Senate Apportionment Plan or order further drafting by the Reapportionment Commission under guidance by this Court as follows:

To identify and to locate all “nonpermanent residents” and to extract all of them from the 2010 census count, including all nonresident military, dependents and nonresident students. Once these nonresidents are extracted off the top of the statewide census count, the net count of the “permanent residents” of the state be divided by 25 to arrive at the average number of permanent residents per senator; then the 25 senators should be apportioned among the basic island units pursuant to Article 4, §4 of the Hawai`i State Constitution; and finally, appropriate district boundaries should be drawn for these new districts pursuant to Article 4, §6 of the Hawai`i State Constitution;

To file the new final legislative Reapportionment Plan with the Respondent Scott Nago, Chief Elections Officer, State of Hawai`i , no later than January 1, 2012, that properly provides the County of Hawai`i an additional 4th senator;

4. Petitioners’ Fees and Costs

Petitioners’ fees and costs should be awarded pursuant to HRS §632-1 and 42 U.S. Code §§1983, 1988.

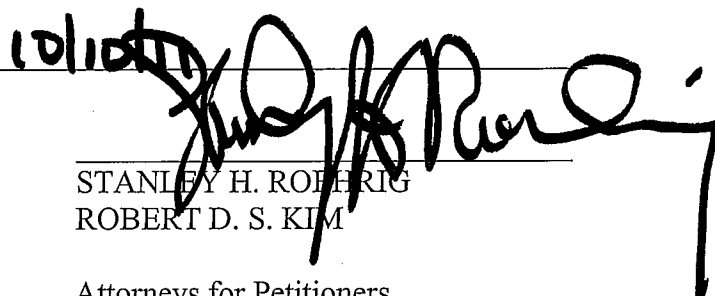
5. Other Relief

Petitioners be provided such other and further relief as may be appropriate, pursuant to Article 4, §10 of the Constitution of the State of Hawai`i “to correct or effectuate the purposes of the reapportionment provisions contained in the Constitution.” Petitioners further request the Court “to [otherwise] fashion its own remedies to fit the exigencies of the situation.” See FN 1, 1968 ConCon comments at pp.1, 2 above.

6. Retention of Jurisdiction

That this Honorable Court retain jurisdiction over this matter until this Court's orders have been fully executed.

Dated: Hilo, Hawai'i, 10/10/11



STANLEY H. ROBERIG
ROBERT D. S. KIM

Attorneys for Petitioners

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COMMISSION AND ITS MEMBERS:)
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MEMORANDUM IN SUPPORT OF PETITION

I. **STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE**
ISSUES PRESENTED

A. Introduction

The 2010 U.S. Census reflected that during the ten year period between the year 2000 and 2010, the population of the County of Hawai'i grew by 24.5%, three times faster than the population base of the Island of O'ahu, which only grew by 8.8%. This entitled Hawai'i County to a 4th senator, which was denied at the discretion of the 2011 Hawai'i

Reapportionment Commission. This Petition involves the fundamental question of whether or not the 2011 Hawai'i State Reapportionment Commission can willfully ignore the Hawai'i State Constitution, Article 4, §4 which mandates reapportionment of the senate of the state legislature utilizing only "permanent residents" as the population base for such reapportionment. Utilization of only "permanent residents" would result in Hawai'i County receiving a 4th senator.

In order to understand the basis for the unique utilization of only "permanent residents" to reapportion the Hawai'i State Legislature every 10 years, a logical starting place is the 1966 United States Supreme Court decision of *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286 (1966). In substantially the same circumstances as those herein, then Governor John A. Burns and others filed three reapportionment suits that were consolidated before the United States District Court for the State of Hawai'i. These three claims eventually were heard in a consolidated fashion by the United States Supreme Court in the *Burns* case above. In that case, Governor Burns was confronted with one of the same questions presented herein, *i.e.*, how do we properly deal with reapportionment of the state legislature in the face of substantial nonresident military, dependents, and out-of-state students having been counted in the most recent census? In addition, the time limit for the reapportionment process to be completed is very short. Justice Brennan for the United States Supreme Court in *Burns, supra*, held at 384 U.S. 90 as follows:

Probably because of uneven distribution of military residents – largely unregistered – the differences among various districts on Oahu are even more striking. For example, on a total population basis, Oahu's ninth and tenth representative districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives, and the fifteenth and sixteenth are entitled to 10. . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include . . . 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 to be 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. . . Hawai'i has become the United States' military bastion for the entire Pacific and the military population in the state fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criterion upon which legislative representation could be based, in Hawai'i, grossly absurd and

disastrous results would flow. *Burns* at 90, 92, 94. [emphasis added]

B. The 1992 Constitutional Reapportionment Amendment Adopted by the Voters of Hawai'i in the 1992 General Election Mandates Extraction of All the Nonresident Military and Their Dependents from the 2010 Census Data Base.

In the 1992 general election, the voters of the State of Hawai'i approved a constitutional amendment for reapportionment of the State of Hawai'i legislature to include only "permanent residents" as the population base. Article 4, §4 of the Hawai'i State Constitution as amended in 1992 provides:

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 Hawai'i ; (2) the islands of Maui, Lanai, Molokai and Kahoolawe; (3) the island of Oahu and all other islands not specifically enumerated; and (4) the islands of Kauai and Niihau, 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[.] [emphasis added]

The "permanent resident" amendment of Article 4, §4 was approved by the Hawai'i State Legislature in the 1992 legislative session as House Bill 2327, HD 1, SD 1 (hereinafter "HB 2327"). The words "permanent residents" in HB 2327 was purposely patterned by the legislature after the express language contained in the State of Hawai'i 1991 Reapportionment Commission Final Report and Reapportionment Plan submitted to the 16th Legislature, Regular Session of 1992. See Appendix A. The 1992 Senate committee report on HB 2327 specifically provides:

The purpose of this bill is to propose a constitutional amendment to change the legislature apportionment base from registered voters to permanent resident population, which was the base selected by the 1991 Reapportionment Commission in the development of its plan. See 1991 Reapportionment Commission's Final Report and Reapportionment Plan 1991

Based on the reasons set forth in Chapter III of the Final Report, your Committee also supports the use of a permanent resident population base and made technical amendments for purposes of clarity and style. [*emphasis added*]

Appendix B.

Chapter III, p. 21, of the 1991 Reapportionment Report and Reapportionment Plan provides in part:

The Commission decided upon a final legislative plan which was based upon a permanent resident population base. The population base was derived by using the April 1, 1991 census figures (from the 1990 census), with an adjustment to subtract the number of nonresident military personnel and dependents. The number of nonresident military personnel and their dependents was supplied by the Social Science Research Institute (SSRI) of the University of Hawai'i . [*emphasis added*]

The Final Report further states at page 23, in part,

The Commission finds that there are persuasive reasons to exclude non-resident military, as transients, from the population base for purposes of legislative reapportionment, in addition to the reasons already stated. Nonresident military constitute about 14% of the population of Hawai'i . About 114,000 nonresident military and their families reside in this state primarily on the Island of Oahu. [*emphasis added*]

Finally, the Final Report states at page 24,

Military personnel have the choice of becoming Hawai'i residents. H.R.S. 11-13 sets forth the law governing residency in this State for purposes of voting. The mere presence or absence of a serviceman in this state does not establish residency so the military are given the same opportunity to register to vote as any other person living in this State. Registration is simple and is accomplished by filing out a form stating one's permanent address is in Hawai'i . Yet, historically, the overwhelming majority of the military population in Hawai'i has demonstrated that they have no intention of becoming residents of this state. Only about 3% of the military stationed here choose to become Hawai'i residents. . . These factors, as well as the information gained from exerts, leads the Commission to conclude that exclusion of nonresident military from the census data will come as close as possible to the desired permanent resident base for legislative reapportionment. [*emphasis added*]

Appendix A.

The information sheet provided to the State of Hawai'i voters at the 1992 general election on this proposed constitutional amendment included a fact sheet that stated as follows:

QUESTION #4: EQUAL REPRESENTATION OF
PERMANENT RESIDENTS.

“Shall the reapportionment commission use the total number of permanent residents instead of the number of registered voters as the reapportionment base?”

During 1991, the Commission held public hearings and it was recommended that the legislature apportionment base be changed from registered voters to permanent residents. Initially, the Commission had intended that the population base would consist of permanent residents, derived from subtracting minors and nonresident military and their dependents from the total population figures provided in the 1990 Census. However, overwhelming testimonies persuaded the Commission to include minors in the count. [*emphasis added*]

See Appendix C.

The Final Report of the 1991 Reapportionment Commission, Appendix A above, also specifically outlined the required Reapportionment Commission extraction procedure for statewide legislative reapportionment as follows at p. 15:

b. The total number of senate seats (25) and house seats (51) must first be allocated among the basic island units computed by the method of equal proportions.

c. The number of seats of each house to which each basic island unit is thus entitled must then be apportioned among the districts in the island unit[.]³ [*emphasis added*]

³ The 1991 Final Report at p. 17 provides the actual figures resulting from this two-step process. This identical constitutionally-mandated two-step process is also spelled out in the 2001 Final Report of the Hawai'i State Reapportionment Commission at p. 14. The 2001 Reapportionment Commission also clearly required this two-step process on page 14 of its Final Report (Appendix D) by explaining, “With respect to State legislative districts, Article 4 of the State Constitution provides for reapportionment to be performed using the following steps. First, the Commission is to allocate the total number of members of each house of the State legislature among the four basic island units (Hawai'i, Maui, Kauai and O'ahu), and computed using the method of equal proportions. Second, the Commission is to draw the district lines within each basic island unit so that for each house the average number of permanent residents per member is nearly as equal to the average for the basic island unit as practicable[.]”

C. Inclusion of the Governor of the State of Hawaii in his Official Capacity as Governor and Chief Executive Officer of the State as an Indispensable Party is Imperative to the Prompt Resolution of this Dispute.

The lessons learned from Governor Burns' efforts to properly reapportion the state legislature shortly after statehood in 1966 (*Burns v. Richardson, supra*) will help us in the face of the serious time constraints we are facing on the eve of the 2012 election year timetable. Joining the Executive Branch of the state government as a party at this time will prevent the multiplicity of suits experienced in *Burns, supra*. The Executive Branch joinder is necessary for a just and prompt adjudication of the issues, as provided in *Burns, supra*, and Rules 19 and 20, HRCP. In the final analysis, the Governor as the Chief Executive Officer of the State of Hawai'i is a necessary party to this case because he has the ultimate responsibility to protect and defend the constitutional right to vote, one man – one vote, for all of us, regarding of where we live.

D. Implementing Legislation Duties of the Reapportionment Commission

Chapter 25, Hawai'i Revises Statutes ("HRS") defines the Reapportionment Commission's duties as noted below. Under Section 25-2(a) HRS, the Reapportionment Commission's duty is to "reapportion the members of each house of the legislature on the basis, method, and criteria prescribed by the Constitution of the United States and Article 4 of the Hawai'i Constitution." (emphasis added).

Under Section 25-1 HRS, the commissioners' respective terms of office end when a general election is held based on the reapportionment plan. When a challenge is brought against the final legislative reapportionment plan, the commissioners remain in office during the challenge period under Section 25-9 HRS.

The effective date of the final legislative reapportionment plan is described in Section 25-2(a) HRS:

After the last of the public hearings, but in no event later than one hundred fifty days from the date on which all members of the commission are certified, the commission shall determine whether or not the plan is in need of correction or modification, make the correction or modification, if any, and file with the chief elections officer, a final legislative reapportionment plan. Within fourteen days after the filing of the final reapportionment plan, the chief elections 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. (emphasis added)

In this case, the final reapportionment plan was adopted and filed with the State Chief Elections Officer on September 26, 2011. See Appendix E.

E. The Standards and Criteria for Reapportionment Adopted by the 2011 Reapportionment Commission Expressly Mandates Extraction of All Nonresident Military Population to Arrive at the 2011 "Permanent Resident" Reapportionment Population Base.

At its April 11, 2011, meeting, the 2011 Reapportionment Commission published the Reapportionment Standards and Criteria it would follow for the implementation of the Final Reapportionment Plans for the state Senate and House. See Appendix F. Those Standards and Criteria to be followed provide, in part:

Standards and criteria that shall be followed:

The population base used shall be the "permanent resident" population of the State of Hawai'i. The permanent resident population is the total population of the State of Hawai'i as shown in the last U.S. Census less the following: non-resident students and non-resident military sponsors.⁴
[emphasis added]

The permanent resident population in each of the 25 state senate districts shall be as nearly equal as possible. The population difference between the largest and smallest of the senate districts (the "maximum deviation") shall be less than 10%* [emphasis added]

...
*Maximum deviations greater than 10% are prima facie unconstitutional and have to be justified by rational state objectives. Maximum deviations greater than 16% are considered unjustifiable.⁵

F. Notice of Military Extraction Effects.

Commission minutes reflect that on June 9, 2011, nine days before the Commission voted to extract no nonresident military or students, the Commission was informed by Election Reapportionment staff leader David Rosenbrock that:

⁴ Military "sponsors" means members of the military and their dependents, per David Rosenbrock, Staff leader, 2011 Reapportionment Commission, August 17, 2011.

⁵ The Office of Elections website for 2011 Redistricting at <http://Hawai'i.gov/elections/reapportionment/> currently includes the above "Criteria for Reapportionment," including the identical 2011 Reapportionment Standards and Criteria of the State Legislature. See Appendix E.

[I]f there is an extraction [of military] of over 20,000, a senate seat from O`ahu will go to the Big Island. . . . this number only reflects the number needed to create a change.

Appendix G (June 9, 2011, page 6).

On June 9, 2011, the Commission sought feedback from the neighbor island Advisory Councils regarding military extraction. All neighbor island Advisory Councils rejected as unconstitutional inclusion of nonresident military from the population base. Appendices H, I, J and K.

G. June 28, 2011, Vote – Inclusion of Nonresident Military, Dependents, and Nonresident Students in Base

The minutes of the June 28, 2011, meeting of the Reapportionment Commission reflect that the commission voted 8 to 1 to use the U.S. 2010 Census population count as the “permanent resident” population base for state [legislature] redistricting, without extraction of any nonresident U.S. military, dependents, and nonresident students . See June 28, 2011, Minutes at page 22. Appendix L. Commissioner Dylan Nonaka, movant on the 8 to 1 vote stated in part the following, as the basis for his motion:

[T]he U.S. Constitution is clear that it requires us to count everybody for the federal reapportionment and I think that . . . should apply to the State reapportionment also. If . . . it’s ruled . . . that our State Constitution conflicts with that, it should be fixed [.]

Commissioner Harold S. Masumoto gave strong support to this motion. He was a member of both the 1991 and 2001 Reapportionment Commissions that utilized the “permanent resident” criteria that mandated extraction of nonresident military, testifying:

[O]ne of the reasons I’m going to vote to include [the] . . . military at this time is . . . to be consistent. This is the third time I’m voting on this issue, and the last two times I voted to include them[.]

Appendix L at pp. 17, 18.

After this vote, the Commission’s technical committee proceeded to define the boundaries of each Senate and House district . It did not follow the two-step constitutional process, *i.e.*, that it first determine the total number of state senators to which each basic island unit was entitled and then apportion the members among those districts. Instead, the Commission simply redrew the existing senate districts in Hawai`i County. It does not appear

from the minutes that any consideration was given to the reapportioning effect of the 24.5% increase in Hawai`i county's population in the past 10 years, compared to only an 8.8% increase for O`ahu County. Appendix M.

This June 28 vote established that the average "permanent resident" count of the O`ahu senate districts totaled 52,956. The average count in the Hawai`i County senate districts was 61,693. Therefore, the 2011 deviation between O`ahu and Hawai`i County senate seat "permanent residents" established by this vote is 16.5%, was both "unconstitutional" and "unjustifiable" under the Commissioners' own criteria. See Appendices F and N.⁶

H. State of Hawai`i Attorney General David Louie Advised the Reapportionment Commission by Opinion Dated July 19, 2011, That It Was Constitutionally Mandated Under Article 4 of the State Constitution to Extract the Nonresident Military and Their Dependents.

By Opinion dated July 19, 2011, the Attorney General of the State of Hawai`i advised the Reapportionment Commission that the nonresident military and their dependents should be entirely extracted from the statewide reapportionment population base because it was unconstitutional under Article 4, §4, not to do so.

CONCLUSION. Given the 1992 legislative history of Article IV, section 4 of the State Constitution summarized and quoted above, as well as what the Supreme Court has already said in *Citizens* with respect to what constituted the County of Hawai`i's "resident population" base for purposes of reapportioning its council districts, it does not appear that the Hawaii Supreme Court would conclude that including all military personnel stationed in Hawaii and their families, irrespective of whether they are residents of Hawaii, in the "permanent resident" population base that is used to reapportion the State's legislative districts in 2011, satisfies article IV, section 4.

Appendix O. ⁷

⁶ The Supreme Court of Hawai`i held in *Citizens for Equitable and Responsible Government v. County of Hawai`i*, 108 Hawai`i 318, 120 P.3d 217 (As Corrected July 28, 2005) at 225, 326: "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate."

⁷ The Attorney General also cited the Hawai`i Supreme Court's decision of *Citizens, supra* (at fn 6 above), which held in part that "(1) 'equal resident populations' in section 3-17(4) of the Charter of the County of Hawai`i (the Charter) excludes nonresident college students and nonresident military personnel and their dependents from the population base for purposes of reapportioning county council districts of the County of Hawai`i, (2) a total

I. **On August 17, 2011, Commission Staff Published the Total Statewide Count of Nonresident Military, Dependents and Nonresident Students Constitutionally Required to Be Extracted.**

At the August 17, 2011, Commission meeting, the Office of Elections Reapportionment staff leader David Rosenbrock published a report from the military for use in providing constitutionally-required extraction of non-permanent military, dependents, and nonresident student. See Appendix P. That report provides, in part, as follows:

The 2011 reapportionment project staff asked for non-permanent population data from the historical data sources to accomplish the constitutionally required population adjustment in determining the permanent resident population.

The staff requested the military through USPACOM to provide a data set of Active Duty personnel and dependents who declare a state other than Hawai'i as their home state. The data was provided segregated by U.S. Postal Zip Codes. [emphasis added]

USPACOM provided the following counts:

Active Duty:

- | | |
|--|--------|
| • Declares state other than Hawai'i as home state. | 47,082 |
| • Declares Hawai'i as their home state | 933 |
| • Active Duty dependents in Hawai'i | 58,949 |

The staff requested the universities throughout the state to provide data of students who pay out of state tuition. The universities provided the following counts:

- Hawai'i Pacific University international and mainland students by address. Some of these

deviation in excess of 10% in an electoral reapportionment plan presents a prima facie case of discrimination in violation of the equal protection clause of the United States Constitution. . . Appellants first argue that 'resident populations' should be interpreted in the same manner as that term is applied in the apportionment of state representative districts, that is, by using a permanent resident population base. Appellants refer to an amendment made to Article 4 of the Constitution of the State of Hawai'i in 1992, when voters statewide voted to use a 'permanent resident' population base for apportioning legislative districts. The amendment mandated that only residents having their domiciliary in the State of Hawai'i may be counted in the population base for the purpose of reapportioning legislative districts. . . . Generally, college students from outside Hawai'i County who lack a present intent to remain in the county for a period of time beyond their date of graduation would not be considered residents. Their presence in Hawai'i County is primarily for educational purposes which is 'transitory in nature.' Likewise, ordinarily the transitory nature of military personnel from outside Hawai'i County is apparent. Normally, military personnel and their dependents are temporarily stationed in the county by the United States military. . . As a result, generally speaking, members of the military are in Hawai'i County involuntarily, as opposed to persons who choose to live in the county. *Citizens* at 222.

- | | |
|---|--------|
| addresses are associated with military bases or commands | 3,203 |
| • Brigham Young University Hawai'i international and non-international students by address | 627 |
| • University of Hawai'i System students by U.S. zip codes | 10,493 |
| • Chaminade University did not report From their website total enrollment 2,781 59% Hawai'i resident 41% other than Hawai'i [emphasis added] | |

J. Public Hearing – Reapportionment Commission, September 13, 2011, Hilo, Hawaii

Petitioners' counsel, Stanley H. Roehrig, testified at the September 13, 2011, Hilo public hearing on behalf of Petitioners. That testimony included the following: (1) The Commissioners' vote on June 28, 2011, not to exclude the nonresident military and dependents and students paying out-of-state tuition violated Article 4, §§4, 6 of the Hawai'i State Constitution. (2) The vote violated the Commissioners' own Standards and Criteria for reapportionment. (3) The Commission should have extracted all the nonresidents pursuant to the Commission's own standards, and Article 4, §4 of the Hawai'i State Constitution and then redraw the district lines. Instead, the Commission did the opposite. (4) The Commission should pay Petitioners' fees and costs since their conduct went beyond the boundaries of HRS §26-35.5 commission duties. See Appendix Q and Declaration of Stanley H. Roehrig.

At the same meeting, Petitioner, Senator Malama Solomon, also read into the record the statement of Governor Neil Abercrombie, requesting the Commission to extract all these nonresidents from the population base, because to do otherwise discriminated against the fast-growing neighbor island counties, as follows:

I want to register my strong support for drawing the lines on the basis of residency. The alternative of including non-residents in the count severely distorts the actual population shifts which have taken place across Hawaii over the last 10 years.

In particular, the population growth on the Big Island will literally be ignored and in effect non-residents substituted for them in the guise of phantom voters. The likelihood of non-residents

registering in any numbers remotely reflecting the population changes I've cited is highly unlikely.

Arguments have been made that formulating districts absent a non-resident count would be challenging. Such an observation is entirely beside the point. One does not fail to implement one's duty under the law because doing so presents difficulties, logistical or otherwise.

On the contrary, our obligation is to adhere to policies that reflect the legislative intent of the law regardless of whatever obstacles may appear.

In this instance my understanding is that sufficient information exists to reasonably account for the whereabouts of non-residents enough so that any contention that adequate knowledge is not available is essentially moot.

I believe the Attorney General has already presented a preliminary view that counting non-residents is not warranted in law and it certainly is not the present practice. I believe that to undermine or deny Neighbor Island population growth for redistricting purposes is discriminatory on its face.

See Appendix R and Declaration of Stanley H. Roehrig.

In addition, at the September 13, 2011, Hilo hearing the Commissioner's staff published an additional set of refined O`ahu neighborhood military and student extraction scenarios based on zip codes. These extractions to great extent were made from O`ahu military installations and university sites. Examination of this document reveals that the purpose for preparing these three additional analyses was an attempt to identify the exact senatorial and house districts on O`ahu that will potentially lose a senate or house seat due to the mandated Article 4, §6 extraction that takes place after a statewide apportionment between the Hawai`i counties as occurred under Article 4, §4. Examination of the satellite maps of these neighborhoods contained at pages 4, 6, and 10 of Appendix S demonstrates that except for the location of the University of Hawai`i at Manoa, the remainder of the neighborhoods in question are adjacent to O`ahu military installations. The Commission's staff summarized their report in the following PowerPoint presentation. See Appendix S.

Extraction of Non-Permanent Residents

| EXTRACTION A: | extraction | | adjusted total |
|---------------|------------|-----|----------------|
| -Oahu | -15,660 | | 937,547 |
| -Hawai'i | - | 793 | 184,286 |
| -Maui | - | 4 | 154,920 |
| -Kauai | - | 1 | 67,090 |
| EXTRACTION B: | | | |
| -Oahu* | -72,609 | | 880,598 |
| -Hawai'i * | - | 796 | 184,283 |
| -Maui | - | 4 | 154,920 |
| -Kauai | - | 143 | 66,948 |
| EXTRACTION C: | | | |
| -Oahu* | -78,524 | | 874,683 |
| -Hawai'i * | - | 921 | 184,158 |
| -Maui | - | 178 | 154,746 |
| -Kauai | - | 198 | 66,893 |

* Under Extractions B or C, Oahu receives 17 and Hawai'i receives 4 senate seats. (Appendix T at page 8)⁸ [emphasis added]

K. Meeting of September 19, 2011.

At the Commissioners' O'ahu meeting on September 19, 2011, Petitioners' counsel, Stanley H. Roehrig, provided additional written testimony read into the record before the Commission voted on the final extraction plan. See Appendix U and Declaration of Stanley H. Roehrig. In the last paragraph at page 3, counsel's testimony reiterated to the Commission that the Commission needed to extract off the top of the statewide census base counsel's total tally of 121,494 nonresident military, dependents and out-of-state students added up from the Commission staff's own data from August 17, 2011 (See Appendix U) before apportioning the number of senators between the island counties as mandated by Article 4, §4 of the Hawai'i State Constitution.

As reflected in the September 19, 2011, Commission minutes, there was considerable testimony by State Representatives and other civic leaders from the districts and neighborhoods affected by the potential neighborhood extractions identified on Appendix S. These witnesses pleaded with the Commissioners not to extract any military and their dependents that lived in those neighborhoods. The Commission went into executive session with its attorney. When it finally returned, it voted 5-3 to extract only a portion of the constitutionally

⁸ The same information was presented to the Commission at the September 19, 2011, meeting of the Commission, showing that under Extraction B or Extraction C, Hawai'i Island would be entitled to a 4th senator.

mandated extraction published by its staff on August 17, 2011, *i.e.*, a total of 16,458 nonresident military, dependents and students mostly from specific O`ahu neighborhoods in arriving at its version of “permanent residents.” Because this total was less than 20,094, the resulting final plan for the Hawai`i Island senatorial districts ended up with only 3 senators, the same as it was 10 years before. Appendix E. Likewise, as a consequence of that vote, the Island of O`ahu retained its existing 18 senate seats for another 10 years.

The Commission adopted Extraction Plan A above (See Appendix S), whereby only a modest portion of all the nonresidents primarily from specific O`ahu sites were extracted. A total of 15,660 nonresidents were extracted from the City and County of Honolulu and 793 extracted from the County of Hawai`i. Instead of extracting all nonresidents off the top of the population base state-wide pursuant to Article 4, §4 of the Hawai`i State Constitution, the extractions were made directly from the totals of the individual counties and then netted out by county. This vote had the effect of increasing the maximum deviation between the average permanent resident count per senator on the Island of O`ahu versus the Island of Hawai`i. Deviation between O`ahu and the County of Hawai`i increased from 16.5% to 17.9%. See calculations at Appendix V and Declaration of Stanley H. Roehrig. This 17.9% deviation is well outside the Commission’s own maximum of 16% set in its Standards and Criteria; the *Citizens* case, *supra*, constitutional standards; and the Equal Protection clauses of the U.S. and State Constitutions.

At the September 19, 2011, vote, there was an exchange between Maui Commissioner Anthony Takitani and Project Manager David Rosenbrock, as follows:

Commissioner Anthony Takitani:

“It’s my understanding that there are 47,082 active duty military personnel assigned to Hawai`i that are not legal residents of Hawai`i.”

David Rosenbrock – Office of Elections/Technical Committee

“Yeah, that’s what the military have provided.

Takitani:

“We got that from the military?”

Rosenbrock:

“Yes.

Takitani:

“Okay. My question was where did we get that from. And, did you say that this aggregation is a valid method of doing this?”

Rosenbrock:

“That’s correct.

Takitani:

“Um, do we know where any of the military live?

Rosenbrock:

“Yes we do.

Takitani:

How do we know that?

Rosenbrock:

“Because the census blocks are on military installations and the census blocks contain population.

See Appendix W.⁹

At that same September 19, 2011, Commission meeting, Chairperson Marks stated just before the vote:

The state Constitution requires us to look at permanent residents. . . My preference would be to vote for extraction B [instructs staff to show slide of all three extraction options]¹⁰ and my preference is sort of an amalgamation of items. . . The first is that the military has informed us that there are active military members who have stated that Hawai`i is not their home state and that number is 47,000. . . extraction A has located roughly 15,000 individuals including students. But that number is below the 47,000. With extraction B, you’re up to 72,000 so you’ve included people living in base housing who may be civilians or dependents. . . And my preference would have been to with B, simply because on a numbers basis, 72,000 is closer to the 47,000 than 15,000 is to the 47,000. But I think some extraction has to occur rather than no extraction and we need a majority to have some extraction take place. . . reluctantly, I’ll go with extraction A.

See Appendix T.¹¹

⁹ Commissioner Takitani reported the total potential nonresident extraction at the September 19, 2011, hearing at 120,360. See Appendix T at p. 21. Petitioners calculate it at 121,494, which includes 1,233 out-of-state students at University of Hawaii at Hilo. The net difference between Commissioner Takitani’s extraction and Petitioners’ is 99.

¹⁰ See Extraction B at p. 12 above.

¹¹ The *Citizen*’s case provides that constitutional redistricting extraction is not to be based on the discretion of the commission, *i.e.*, “what they can agree on.” It requires extraction of all non “permanent residents’ based on statutory construction as follows: “Appellees argue that the Commission’s interpretation of the phrase was a

L. Commissioners' Final Plan Filing -- September 26, 2011.

On September 26, 2011, the Commission submitted its Final Plan. See Appendix D. This plan includes only three single-member senatorial districts for the Island of Hawai'i. The Island of O'ahu still has 18 single-member senatorial districts.

II. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

A. Issues Presented

1. Regardless of where they live in the State of Hawai'i, are all the nonresident military, their dependents, and students paying out-of-state tuition in Hawai'i non "permanent residents" within the meaning of Article 4, §4 of the Hawai'i State Constitution?
2. Should all nonresident military, their dependents and students paying out-of-state tuition be extracted off the top of the 2010 Hawai'i census count before Article 4, §4 apportionment of the State Legislature is made between the basic island units?
3. Based on Issues (1) and (2) above, is the County of Hawai'i entitled to a fourth senator?
4. Does the Commission's willful departure from its own Standards and Criteria and its constitutional duty justify the award of reasonable attorneys' fees and costs?

B. Relief Sought

1. As to the Final 2011 Reapportionment Plan

First, Petitioners request a judicial determination that the Final 2011 Reapportionment Plan for the Senate of the State Legislature is constitutionally defective and invalid because that plan is based on the Reapportionment Commission's use of the wrong population base and, as a consequence, improperly apportions the legislative seats AMONG the four "basic island units,"

discretionary act, and, thus, under *Kawamoto v. Okata*, 75 Haw.463, 868 P.2d 1183 (1994), the actions of the Commission should be accepted unless an abuse of discretion is shown. [4] 'The interpretation of the charter is similar to the interpretation of a statute.' *Maui County Council v. Thompson*, 84 Hawai'i 105, 106, 929 P.2d 1355, 1356 (1996). When interpreting a statute [in this case HB 2327 1992], our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be primarily obtained from the language contained in the statute itself. *And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.*

specifically denying the HAWAII "basic island unit" a constitutionally mandated 4th seat in the State Senate.

2. As to the Respondent Scott Nago, Chief Elections Officer, State of Hawai'i

Second, Petitioners request an Article 4, §10 order directed to Respondent Scott Nago, Chief Elections Officer, State of Hawai'i (a public official) that restrains and enjoins him from giving public notice of the Final 2011 Reapportionment Plan for the State Legislature; and, further, to the extent that he may have already given public notice, to rescind the same.

Such an order is proper because the 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. Under Article 4, §2 and Section 25-2(a) HRS, the Respondent Scott Nago's duty, as the State Elections Officer, is to give public notice of the Final 2011 Reapportionment Plan that the Reapportionment Commission filed with this office on September 26, 2011.

He exercises no discretion; he makes no decisions; and he casts no vote as to the plan. Compare with *Barnett v. Broderick*, 84 Haw. 109, 111, 1929 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 elections official to issue election certificate is ministerial); *Harris v. Cooper*, 14 Haw. 145, 148 (1902) (duty of elections official to put candidate's name on ballot is ministerial).

3. Further Reapportionment

Third, Petitioners request either this Court properly reapportion the state senate or enter an order directing the Reapportionment Commission and its individual members under this Court's direct supervision "to correct any error made in ... [its] reapportionment plan" and to prepare and file a new legislative reapportionment plan that uses a mandatory extracted population base limited to just "permanent residents" of the State of Hawai'i no later than January 1, 2012.¹²

4. As to Attorneys' Fees and Costs

Fourth, enter an order that Petitioners are entitled to reasonable attorneys' fees and costs from Respondent Commissions, (not including Commissioner Takitani) for bringing this matter before the Court.

¹² As stated above, the members of the Reapportionment Commission remain in office when their plan is challenged and are also required to assist this Court. Hawai'i State Constitution, Article 4, §1; Section 25-9 HRS.

III. STATEMENT OF REASONS FOR ISSUING ORDER FOR RELIEF SOUGHT

The Commission's actions have fundamental and serious statewide election representation and governance problems for all the Petitioners and Respondents over the next 10 years. Its mistakes must be corrected. They affect everyone in Hawai'i. The historical data from 1992 demonstrates with clarity that the legislature intended by its express words in its committee reports for HB 2327 that the concept of "permanent residents" was designed to constitutionally extract all, not "some" of the nonresident military, dependents, and nonresident students from the entire population base in Hawai'i when reapportionment of the State Legislature took place every 10 years. The voters at the 1992 general election, who adopted the concept of "permanent resident," understood this before they voted for this principle.

This concept has been the Constitutional law of Hawai'i ever since. It has not been changed by the legislature or the voters. The concept was expressly embraced by the 2011 Reapportionment Commission itself when it adopted the "Standards and Criteria" to guide it in carrying out its constitutional duties.

Yet, when it voted on June 28, 2011, to include all nonresident military, dependents and nonresident students as "permanent residents" for reapportionment purposes, it willfully disregarded its own standards and criteria and the mandate of the Hawaii Constitution in doing so. The maker of the motion stated that the Hawai'i Constitution needed to be changed. Pure and simple, that was neither his nor the Commission's role.

But it gets worse. The Commission was provided by its own expert staff on August 17, 2011, a reasonably accurate statewide count of nonresident military, dependents, and the total number of students statewide who paid out-of-state tuition. Under the constitution and the Commission's own guidelines, this entire block was mandated to be extracted off the top of the 2010 census population base. Next, the net population base of "permanent residents" was to be divided by 25 to arrive at the average "permanent resident" population count per senator for each of the basic island units under Article 4, §4 of the Hawai'i State Constitution. This total extraction was approximately 121,494. The mandated extraction was never made.

The Commission was then advised by the State Attorney General to do so. It was also advised in the strongest terms by the Governor to do so. Finally, witnesses statewide, including counsel herein, urged the Commissioners to do so. The Commission was represented

by counsel. Yet it never did its constitutional extraction duty properly. Now time is short before the next election, and the problem has to be fixed.

In the first step of reapportionment, it was not necessary to have extraction information that was neighborhood specific to perform the Article 4, §4 statewide extraction of nonpermanent residents. It could have been done on August 27, 2011, when the Commission received the statewide totals to be extracted, *i.e.*, approximately 121,494. However, the Commission on June 19, 2011, proceeded to amend its June 28, 2011, vote of no extraction to a vote to extract only a modest portion of the constitutionally required military and students from specific locations on O`ahu, just enough so Hawai`i County would not get a constitutionally required 4th senator, and O`ahu would still have 18 senators for the next 10 years.

The 16,000+ extraction was not made off the top of the statewide census base and then divided by 25 to arrive at the proper apportionment of senators in each of the basic island units. Instead, it was extracted island by island from specific locations. The result of this error was enhancement of the unconstitutional maximum deviation between the average population count per senator on O`ahu as compared to Hawai`i Island. The deviation went from 16.5 to 17.9%; both deviation figures are in direct contravention of the Commission's own adopted Standards and Criteria and the Equal Protection Clauses of the U.S. and State Constitutions. See calculations at Appendix U, pp. 1 and 2.

A review of the Commission's September 19, 2011, minutes reflects the professed difficulty the Commissioners were having in accurately extracting the pockets of active duty nonresident military, dependents and students from specific neighborhoods in O`ahu senatorial districts adjacent to the principal military installations. This professed difficulty in making the constitutional extraction is disingenuous. As the Governor testified,

Arguments have been made that formulating districts absent a non-resident count would be challenging. Such an observation is entirely beside the point. One does not fail to implement one's duty under the law because doing so presents difficulties, logistical or otherwise.

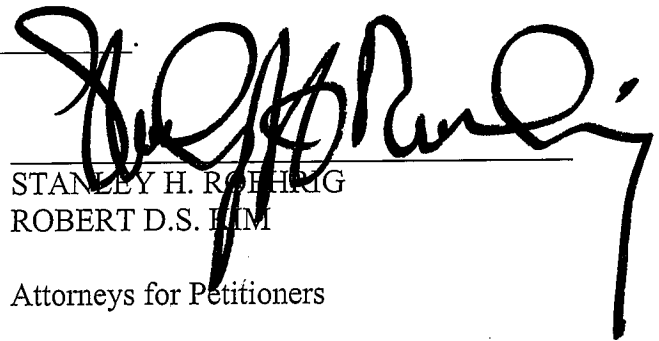
On the contrary, our obligation is to adhere to policies that reflect the legislative intent of the law regardless of whatever obstacles may appear.

In this instance my understanding is that sufficient information exists to reasonably account for the whereabouts of non-residents

enough so that any contention that adequate knowledge is not available is essentially moot.

The Commission's action was apparently motivated at the hearing in part by strong political forces in attendance at the meeting and not the constitutional mandate of the Commission. As stated above, the minutes reflect considerable testimony from legislators and other civic leaders from those very neighborhoods, urging the Commissioners not to extract the military. The Commissioners knew that extraction of "some" of the nonresident military, dependents and students in excess of 20,094 would trigger the loss of an O'ahu-based senator from one of those very neighborhoods. The fear of O'ahu's loss of this senate seat was a driving force for the Commission's 5-3 vote that effectively denied the Island of Hawai'i a 4th senate seat. There can be no other rational explanation for the Commission's action. The Commission's own Standards and Criteria prepared with the hindsight of 20 years of experience in refining the constitutional reapportionment extraction process, extracting non "permanent residents" in Hawai'i demonstrates that the Commission understood exactly what its statutory and constitutional duty entailed and then willfully refused to follow it. With the exception of Commissioner Takitani, it should pay reasonable fees and costs for its willful failures which were unnecessary, time-consuming, and costly to the state government and the taxpayers of the State of Hawai'i, who have to fix the problem well before the 2012 legislative election timetable.

DATED Hilo, Hawaii, 10/10/11



STANLEY H. ROTHBERG
ROBERT D.S. LIM
Attorneys for Petitioners