



**STATE OF HAWAII
OFFICE OF ELECTIONS**

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PEARL CITY, HAWAII 96782
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SCOTT T. NAGO
CHIEF ELECTION OFFICER

TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
ON SENATE BILL NO. 1350, SD 1
RELATING TO STATE GOVERNMENT

March 16, 2021

Chair Nakashima and members of the House Committee on Judiciary & Hawaiian Affairs, thank you for the opportunity to provide comments on Senate Bill No. 1350, SD 1. This bill temporarily amends the start of candidate filing for the 2022 Elections; defines “permanent resident” for legislative reapportionment purposes, to be consistent with the U.S. Census Bureau’s definition of permanent resident; establishes public notice requirements for short form public notices of reapportionment plans; and appropriates an unspecified amount to the Reapportionment Commission for its expenses, which include obtaining outside counsel.

On February 12, 2021, we were notified by the U.S. Census Bureau that the redistricting data to conduct the 2021 Reapportionment would be delayed until September 30, 2021 due to the COVID-19 pandemic. This delay impacts the Reapportionment Commission’s ability to conduct redistricting, which in the past received the data by approximately April following the decennial census, and published the final plan within 150 days of the Commission being constituted, pursuant to the Hawaii State Constitution.

This delay may cause the district lines for U.S. Representative and the State Legislature to not be completed by the first working day of February of the election year when the candidate filing period is scheduled to begin, pursuant to HRS § 12-2.5. We would also note that the candidate filing deadline, on the first Tuesday in June, cannot be extended because of the federal 45-day deadline to mail uniformed and overseas voters their ballot. At the close of candidate filing,

Testimony on SB 1350, SD 1 – Relating to State Government
March 16, 2021
Page 2

election officials proof, print, and prepare the ballots for mailing prior to the 45th day.

Thank you for the opportunity to provide comments on Senate Bill No. 1350, SD 1.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 1350, S.D. 1, RELATING TO STATE GOVERNMENT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, March 16, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Lori N. Tanigawa,
Deputy Attorney General, at 586-0618)

Chair Nakashima and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

The purposes of this bill are to (1) temporarily amend the start of filing nomination papers for the 2022 primary election; (2) define “permanent resident” for legislative reapportionment purposes to be consistent with the U.S. Census Bureau’s definition of permanent resident; (3) establish public notice requirements for short form public notices of reapportionment plans; and (4) appropriate an unspecified amount to the Reapportionment Commission for its expenses, which include obtaining outside legal counsel.

Section 4 amends section 25-2(a), Hawaii Revised Statutes (HRS), on page 6, lines 7-9 of the bill to adopt the recommendation of the 2011 Reapportionment Commission Final Report to clarify the term “permanent resident” by providing that “‘permanent resident’ is as defined by the United States Census Bureau.” The U.S. Census Bureau provided guidance regarding where persons are counted during the 2020 Census in the Final 2020 Census Residence Criteria and Residence Situations (2020 Census Residence Criteria) published in the Federal Register on February 8, 2018. However, the 2020 Census Residence Criteria does not appear to include a definition of “permanent resident.”

Rather, the 2020 Census Residence Criteria confirms that U.S. Census Bureau's enumeration procedures are guided by the concept of "usual residence," which is the place where a person lives and sleeps most of the time. 83 Fed. Reg. 5, 526 (Feb. 8, 2018). Thus, to the extent the bill attempts to define "permanent resident" as any "usual resident" counted by the U.S. Census Bureau, the definition might run afoul of the language in sections 4 and 6 of article IV of the Hawai'i State Constitution, as interpreted by the Hawai'i Supreme Court.

Section 4 of article IV of the Hawai'i State Constitution states:

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).

Section 6 of article IV of the Hawai'i State Constitution states in relevant part:

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).

The term "permanent resident" is not defined in the Hawai'i State Constitution. However, the term appears in both sections 4 and 6 of article IV and therefore restricts the members of Hawaii's population base for purposes of apportioning members of the state legislature and drawing district lines to permanent (as opposed to non-permanent) residents (as opposed to non-residents). Moreover, the Hawai'i Supreme Court has issued two decisions relevant to the meaning of this term in this context: *Citizens for Equitable and Responsible Government v. County of Hawaii*, 108 Haw. 318, 120 P.3d

217 (2005), and *Solomon v. Abercrombie*, 126 Haw. 283, 270 P.3d 1013 (2012). These cases suggest the Hawai'i Supreme Court might find that the federal census count cannot be used as a population base unless nonpermanent residents are first extracted.

Section 3 on page 5, lines 16-21, of the bill proposes to amend section 12-2.5, HRS, to amend the date upon which nomination papers are to be made available from the "first working day of February" to a month that is currently left blank. Section 8 on page 11, lines 1-3, of the bill provides that section 3 "shall be repealed on November 9, 2022." If the Committee fills in the blank in section 3 and proceeds with this bill, the Department recommends that the bill be amended to provide for the reenactment of section 12-2.5 and that section 8 of the bill be amended as follows:

"SECTION 8. This Act shall take effect on July 1, 2021; provided that on November 9, 2022, section 3 of this Act shall be repealed and section 12-2.5, Hawaii Revised Statutes, shall be reenacted in the form in which it read on the day before the effective date of this Act."

Section 5 proposes to amend section 28-8.3, HRS, to allow the Reapportionment Commission to hire its own attorneys without the approval or participation of the Attorney General or the Governor, and section 6 of the bill appropriates funds from the general revenues of the State of Hawai'i for the Reapportionment Commission to support its expenses, including the retention of outside legal counsel. The Attorney General serves as legal counsel to the State of Hawai'i, which legal obligation includes providing legal services to state agencies. Because it is the largest legal entity in the State, with a number of diverse divisions, the Attorney General is best suited to provide legal advice to its state clients on a broad array of matters and therefore, as a general matter, state agencies should be advised by deputy attorneys general.

By locating attorneys representing state agencies within the Department, state agencies benefit from the wide range of experience and expertise in a cost effective and conflict-free manner. Private attorneys retained by the Reapportionment Commission would not possess the necessary breadth of knowledge and experience available within the Department. Additionally, because state agencies are regulated by a variety of laws not applicable in private practice – including the Procurement Code, the Sunshine Law,

and the Uniform Information Practices Act – the Attorney General’s expertise representing state agencies in these areas would be difficult for private attorneys to duplicate, and certainly not without additional expense. Finally, because deputy attorneys general are separate and apart from the agencies they represent, they are insulated from political issues that may arise within an agency. This insulation permits the Department to provide objective and high-quality legal counsel.

The Department is also unique in its ability under the law to undertake concurrent representation of multiple state agencies that may have conflicting interests as long as it establishes appropriate firewalls between those attorneys and takes steps to ensure that no prejudice is suffered by the clients, something that private attorneys are not able to do under the Hawaii Rules of Professional Conduct. The Department has done this in past cases to ensure that all client agencies are vigorously, and separately, represented. We have provided, and will continue to provide, vigorous and objective legal representation to the Reapportionment Commission.

Notwithstanding the prohibition against employing or retaining private attorneys, state agencies may submit a waiver request to the Attorney General pursuant to section 28-8.3, HRS. Under this provision, the Attorney General may determine that circumstances exist whereby representation by private attorneys is appropriate. In such circumstances, an agency may retain or employ its own attorney, provided that the Governor also waives section 28-8.3, HRS.

For the foregoing reasons, we respectfully request that the bill be amended to delete Section 5 in its entirety. We further request that page 10, lines 11-15, of the bill be amended as follows:

“SECTION 6. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ _____ or so much thereof as may be necessary for fiscal year 2021-2022 for the reapportionment commission to support its expenses[~~-, including the retention of outside legal counsel~~].”

Thank you for the opportunity to provide comments.

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, March 16, 2021
2:00 PM

Via Video Conference, Conference Room 325

In consideration of
SB 1350, SD1
RELATING TO STATE GOVERNMENT.

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the Judiciary & Hawaiian Affair Committee

Common Cause Hawaii provides comments regarding SB 1350, SD1, which (1) temporarily amends the start of filing nomination papers for the 2022 Election, (2) defines "permanent resident" for legislative reapportionment purposes, to be consistent with the U.S. Census Bureau's definition of permanent resident, (3) establishes public notice requirements for short form public notices of reapportionment plans, and (4) appropriates an unspecified amount to the Reapportionment Commission for its expenses, which include obtaining outside legal counsel.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to upholding the core values of American democracy. We work to promote transparency in our legislative processes and reforms for a more fair and transparent redistricting process.

Common Cause Hawaii has grave concerns over the process by which proposed SD1 of SB 1350 was introduced. It is an entirely different bill from the original SB 1350. The public notice for the hearing on the proposed SD1 of SB 1350 in the joint Senate Government Operations, Ways and Means, and Judiciary Committees was also less than 24 hours. Further, the title of the bill "Relating to State Government" is so vague as not to give a person notice that the proposed SD1 will be addressing reapportionment. In sum, these raise issues of constitutionally questionable gut and replace. With this being stated, Common Cause Hawaii recognizes the need to address the concerns caused by delays in the U.S. Census data being related to the states and the Hawaii State Constitution mandates regarding reapportionment found in Article IV, Reapportionment.

Common Cause Hawaii comments that Section 2 of SB 1350, SD1, at page 4, lines 20-21, and page 5, lines 1-10, provides that notices of the final reapportionment plan, pursuant to Hawaii Revised Statutes § 25-2, may be by short-form with online and physical viewing locations. Common Cause Hawaii notes that the 2011 Reapportionment Commission's final plan provided comprehensive notice to the public with "four to five pages of legal descriptions without maps" in major newspapers. See https://elections.hawaii.gov/wp-content/uploads/2015/03/2012ReapportionmentFinalReport_2012_03_30.pdf at pages 27-28. All maps and legal descriptions were then posted on-line and copies of maps were made available for public inspection at State and County Election Offices and every regional library in every county. *Id.*

Common Cause Hawaii supports the public notice that was provided in 2011, as it allows people without access to computers or who do not have broadband to review the legal descriptions of the maps from newspapers to determine if they should proceed to a government facility to view them. However, Common Cause Hawaii recommends that the public notice provided by the 2021 commission include the reapportionment maps

themselves instead of the legal descriptions of the maps so that the public may decide if they want to view larger maps in more prominent detail on-line or physically at libraries or government facilities, given that not everyone has a computer or broadband.

This recommendation was accepted in Standing Committee Report No. 762 for proposed SD1, “[a]llowing public notice in a short form for proposed, revised, and final versions of the reapportionment plan and reapportionment maps”. Therefore, Common Cause requests that SB 1350, SD1 be amended to specifically include that the maps themselves be published in the short form notice in newspapers.

Common Cause Hawaii comments that Section 4 of SB 1350, SD1, at page 6, lines 7-9 provides that “permanent resident” is defined according to the U.S. Census’s usual residence concept. The Census’s usual residence appears to be more expansive than the Hawaii Supreme Court’s determination of “permanent resident”. Cf. <https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf> #10 College Students and #13 U.S. Military Personnel versus *Solomon v. Abercrombie*, which states that “permanent resident” means 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.” 126 Hawai`i 283, 270 P.3d 1013, 1022 (2012) (citing *Citizens for Equit. & Resp. Gov't v. County*, 108 Hawai`i 318, 322, 120 P.3d 217, 222 (2005) (Domicile means expressing a present intent to remain within Hawaii for more than a transitory period with an intent to establish an abode, make Hawaii the seat of his/her property, and exercise his/her civil and political rights in Hawaii)). Common Cause Hawaii concurs with the more expansive Census Bureau definition to ensure that everyone is fairly represented.

Common Cause Hawaii further notes that Hawaii State Constitution, Article IV, Section 2 (Reapportionment Commission) provides that:

A reapportionment commission shall be constituted on or before May 1 of each reapportionment year [2021] and whenever reapportionment is required by court order. . . .

Not more than one hundred fifty days from the date on which its members are certified, the commission shall file with the chief elections officer a reapportionment plan for the state legislature and a reapportionment plan for the United States congressional districts which shall become law after publication as provided by law. . . .

Given that the U.S. Census data will not be available to states until September 30, 2021, this 150-day requirement after the certification of the reapportionment commission to have reapportionment maps will be difficult to timely satisfy, as the commission will initially be constituted on May 1, 2021. See <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>. It may be necessary to have court intervention to settle when maps are drawn.

Thank you for the opportunity to provide comments on SB 1350, SD1. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii

Testimony re: SB1350, S.D. 1

My name is Stanley H. Roehrig. I am a lawyer in the County of Hawai`i. I have been practicing in Hilo for almost 56 years. In 2010-2011, I was one of the lawyers who represented the Island of Hawaii in the reapportionment of the State Senate.

The principal area of contention regarding reapportionment was the reapportionment of the neighbor islands of Maui, Hawai`i, and Kauai, where the population expanded far more quickly than in the City and County of Honolulu. As a consequence, the State and Federal Census reflected that, Maui, Kauai and the Big Island were underrepresented in both the House and the Senate. In the case of the County of Hawai`i, it was underrepresented in the Senate by more than 100%.

Of particular importance and focus in the reapportionment in 2010-2011 was the recognition that the armed services community stationed in the state of Hawaii were not qualified as voters because 98% of them were domiciled elsewhere in the United States and only stationed in Hawaii generally for a period of less than two years. Consequently, the Supreme Court of the State of Hawai`i decision, attached hereto, found in part as follows:

“We conclude that the 2011 Final Reapportionment Plan is constitutionally invalid because: (1) **The Hawai`i Constitution, article IV, section 4, expressly mandates that only permanent residents be counted in the population base for the purpose of reapportionment** and (2) the 2011 Final Reapportionment Plan disregards this constitutional mandate by including non-permanent residents in the population base that the Reapportionment Commission used to allocate the members of the state legislature among the basic island units. We invalidated the 2011 Final Reapportionment Plan and **directed the Reapportionment Commission to prepare and file a new reapportionment plan that: (1) allocates the members of the state legislature among the basic island units by using a permanent resident population base, and then (2) apportions the members among the districts therein as provided by article IV, section 6. We further directed the Chief Election Officer to rescind the publication of the 2011 Final Reapportionment Plan for the state legislature.**”

A close look at SB1350, S.D. 1, before this committee reflects that it is the intention of this bill to comprehensively void the Supreme Court of Hawai`i's decision and to execute the same thing that the Supreme Court states that the legislature cannot do. As a consequence, it would be unwise for the State House of Representatives to endorse this idea of unconstitutionally adding a large group of potential voters that would be in violation of the Supreme Court decision and the Hawai`i Constitution. It would be preferable for the State Reapportionment Commission to accept the Constitutional effect of the Supreme Court decision and attempt to implement it on a state-wide basis, rather than have the City and County of Honolulu engage in a reapportionment

war with the expanding neighbor island communities. If this is attempted, it is going to pit all of the neighbor island legislators against the Oahu legislators. I hope that does not occur. If it does, history will probably repeat itself.

Attachment



Stan Roehrig <stan@roehriglaw.com>

Solomon v. Abercrombie

1 message

Westlaw@westlaw.com <Westlaw@westlaw.com>
To: stan@roehriglaw.com

Mon, Mar 15, 2021 at 11:29 AM

Stanley Roehrig sent you content from Westlaw.
Please see the attached file.

Item: Solomon v. Abercrombie
Citation: 126 Hawai'i 283
Sent On: Monday, March 15, 2021
Sent By: Stanley Roehrig
Client ID: KAI

Note: On January 4, 2012, we issued orders granting the petitions. We concluded that the 2011 Final Reapportionment Plan is constitutionally invalid because: (1) the Hawai'i Constitution, article IV, section 4, expressly mandates that only permanent residents be counted in the population base for the purpose of reapportionment and (2) the 2011 Final Reapportionment Plan disregards this constitutional mandate by including non-permanent residents in the population base that the Reapportionment Commission used to allocate the members of the state legislature among the basic island units. We invalidated the 2011 Final Reapportionment Plan and directed the Reapportionment Commission to prepare and file a new reapportionment plan that: (1) allocates the members of the state legislature among the basic island units by using a permanent resident population base, and then (2) apportions the members among the districts therein as provided by article IV, section 6. We further directed the Chief Election Officer to rescind the publication of the 2011 Final Reapportionment Plan for the state legislature.

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170K



Stan Roehrig <stan@roehriglaw.com>

Solomon v. Abercrombie

1 message

Westlaw@westlaw.com <Westlaw@westlaw.com>
To: stan@roehriglaw.com

Mon, Mar 15, 2021 at 11:32 AM

Stanley Roehrig sent you content from Westlaw.
Please see the attached file.

Item: Solomon v. Abercrombie
Citation: 126 Hawai'i 283
Sent On: Monday, March 15, 2021
Sent By: Stanley Roehrig
Client ID: KAI

Note: "exclusion of nonresident military from the census data will come as close as possible to the desired permanent resident base for legislative reapportionment" because: (1) nonresident military then constituted about 114,000 or 14% of Hawai'i's population; (2) most military personnel considered Hawai'i a temporary home and only 3% opted to become Hawai'i citizens; and (3) 98% of military dependents claimed the same residency as the military member of the family.

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Stan Roehrig <stan@roehriglaw.com>

Solomon v. Abercrombie

1 message

Westlaw@westlaw.com <Westlaw@westlaw.com>
To: stan@roehriglaw.com

Mon, Mar 15, 2021 at 11:34 AM

Stanley Roehrig sent you content from Westlaw.
Please see the attached file.

Item: Solomon v. Abercrombie
Citation: 126 Hawai'i 283
Sent On: Monday, March 15, 2021
Sent By: Stanley Roehrig
Client ID: KAI

Note: The 1991 Reapportionment Commission's final reapportionment plan was the basis, in the 1992 legislative session, for House Bill 2327 to amend article IV of the Hawai'i Constitution to change the state legislature apportionment base from registered voters to permanent resident population "based on the 1991 Reapportionment Commission's Final Reapportionment Plan" and "the reasons set forth in [the] Plan." House Bill 2327 was enacted by the 1992 legislature and article IV of the Hawai'i Constitution was amended by Hawai'i voters in 1992 to its present form.
ARTICLE IV

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126 Hawai'i 283
Supreme Court of Hawai'i.

Malama SOLOMON, State Senator, 1st Senatorial District;
Louis Hao; Patricia A. Cook; And Steven G. Pavao, Petitioners,

v.

Neil ABERCROMBIE, Governor, State of Hawai'i; Scott Nago, Chief Election Officer,
State of Hawai'i; State of Hawai'i 2011 Reapportionment Commission; Victoria Marks;
Lorrie Lee Stone; Anthony Takitani; Calvert Chipchase IV; Elizabeth Moore; Clarice Y.
Hashimoto; Harold S. Masumoto; Dylan Nonaka; and Terry E. Thomason, Respondents.

Michael J. Matsukawa, Petitioner,

v.

State of Hawai'i 2011 Reapportionment Commission; and Scott
Nago, Chief Election Officer, State of Hawai'i, Respondents.

Nos. SCPW-11-0000732, SCPW-11-0000741.

|
Jan. 6, 2012.

Synopsis

Background: Registered voters in an island unit filed petitions challenging Final Reapportionment Plan for the state legislature adopted by the Reapportionment Commission.

[Holding:] The Supreme Court held that Final Reapportionment Plan that included non-permanent residents in the population base was constitutionally invalid.

Reapportionment plan invalidated.

West Headnotes (3)

[1] **Constitutional Law** ☞ Intent in general

Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional principle is to give effect to that intent.

[2] **States** ☞ Population as basis and deviation therefrom

Hawai'i Constitution mandates that only residents having their domiciliary in the State of Hawai'i may be counted in the population base for the purpose of reapportioning state legislative districts. Const. Art. 4, §§ 4, 6.

2 Cases that cite this headnote

[3] States ↵ Population as basis and deviation therefrom

Reapportionment Commission when it adopted Final Reapportionment Plan violated the reapportionment provisions of the Hawai'i Constitution, which required that only permanent residents be counted in the population base for legislative reapportionment, by extracting only non-permanent residents identifiable to particular census blocks when it allocated the members of the state legislature among the basic island units, when the Commission had sufficient data to determine the non-permanent military residents and non-permanent student residents of each of the basic island units, and thereby extracted only 16,458 non-permanent residents from the permanent resident base though it had determined the resident island units for over 100,000 non-permanent residents. *Const.* Art. 4, §§ 4, 6; HRS § 25-2(a).

2 Cases that cite this headnote

Attorneys and Law Firms

Stanley H. Roehrig, Robert D.S. Kim, and Peter Van Name Esser, for petitioners Malama Solomon, Louis Hao, Patricia A. Cook, and Steven G. Pavao.

****1014** Michael J. Matsukawa, petitioner pro se.

Russell A. Suzuki, Diane Erickson, and Robyn B. Chun, Deputy Attorneys General, for respondents Chief Election Officer Scott Nago, State of Hawai'i 2011 Reapportionment Commission, Victoria Marks, Lorrie Lee Stone, Anthony Takitani, Calvert Chipchase IV, Elizabeth Moore, Clarice Y. Hashimoto, Harold S. Masumoto, Dylan Nonaka, and Terry E. Thomason.

Charlene M. Aina and Harvey E. Henderson, Deputy Attorneys General, for respondent Governor Neil Abercrombie.

RECKTENWALD, C.J., NAKAYAMA, ACOBA, DUFFY, and McKENNA, JJ.

Opinion

PER CURIAM.

***284** In these related original proceedings, the petitioners petitioned this court pursuant to the Hawai'i Constitution, article IV, section 10, quoted *infra*, for: (1) a judgment invalidating the 2011 Final Reapportionment Plan for the state legislature adopted and filed on September 26, 2011 by the State of Hawai'i 2011 Reapportionment Commission; (2) a writ of mandamus directing the Reapportionment Commission to prepare and file a new reapportionment plan for the state legislature; and (3) a writ of mandamus directing the Chief Election Officer to rescind the publication of the 2011 Final Reapportionment Plan.

On January 4, 2012, we issued orders granting the petitions. We concluded that the 2011 Final Reapportionment Plan is constitutionally invalid because: (1) the Hawai'i Constitution, article IV, section 4, expressly mandates that only permanent residents be counted in the population base for the purpose of reapportionment and (2) the 2011 Final Reapportionment Plan disregards this constitutional mandate by including non-permanent residents in the population base that the Reapportionment Commission used to allocate the members of the state legislature among the basic island units. We invalidated the 2011 Final Reapportionment Plan and directed the Reapportionment Commission to prepare and file a new reapportionment plan that: (1) allocates the members of the state legislature among the basic island units by using a permanent resident population base, and then (2) apportions the members among the districts therein as provided by article IV, section 6. We further directed the Chief Election Officer to rescind the publication of the 2011 Final Reapportionment Plan for the state legislature.

I. BACKGROUND

A.

The Hawai'i Constitution, article IV (Reapportionment), requires, every tenth year after 1981, reapportionment for the state legislature and congressional districts. Reapportionment is effected by a reapportionment plan filed by a nine-member reapportionment commission constituted in the reapportionment year.

Article IV, as originally enacted in 1978, provided for reapportionment of the state legislature by requiring allocation—among the four basic island units of the 25 senatorial districts and the 51 house of representative districts—“on the basis of the number of voters registered in the last preceding general election.” Though the registered voter basis was upheld as constitutional by the United States Supreme Court because it *285 **1015 approximated a plan based on a permissible population base,¹ the 1991 Reapportionment Commission concluded, after analyzing its data, that use of the voter registration basis would not result in a constitutionally permissible apportionment plan. It selected, as an alternative apportionment base, the permanent resident population, identified as the total population derived from the 1990 census, less transients. It hired a research firm to “determine which transients were counted in the census, how many there were and whether or not they could be located in specific census blocks.” The research firm, upon consultation, reported to the 1991 Reapportionment Commission that “the nonresident military is the only large, census-block-identifiable group of nonresidents included in the census” and that “other groups, such as nonresident students, are statistically insignificant and cannot be easily placed in specific census blocks.” The 1991 Reapportionment Commission thereupon decided to exclude, from the permanent resident population base, nonresident military personnel and their dependents as constituting “the vast majority of transients included in the census counts.” It stated, in its final reapportionment plan, that “exclusion of nonresident military from the census data will come as close as possible to the desired permanent resident base for legislative reapportionment” because: (1) nonresident military then constituted about 114,000 or 14% of Hawaii's population; (2) most military personnel considered Hawai'i a temporary home and only 3% opted to become Hawai'i citizens; and (3) 98% of military dependents claimed the same residency as the military member of the family.

The 1991 Reapportionment Commission's final reapportionment plan was the basis, in the 1992 legislative session, for House Bill 2327 to amend article IV of the Hawai'i Constitution to change the state legislature apportionment base from registered voters to permanent resident population “based on the 1991 Reapportionment Commission's Final Reapportionment Plan” and “the reasons set forth in [the] Plan.” House Bill 2327 was enacted by the 1992 legislature and article IV of the Hawai'i Constitution was amended by Hawai'i voters in 1992 to its present form.

ARTICLE IV

REAPPORTIONMENT

....

APPORTIONMENT AMONG BASIC ISLAND UNITS

Section 4. The [reapportionment] 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.

....

APPORTIONMENT WITHIN BASIC ISLAND UNITS

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.

The apportionment provisions of article IV, sections 4 and 6 are incorporated in the reapportionment statute, HRS Chapter 25, which provides that the reapportionment commission "shall 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 IV of the Hawaii Constitution." HRS § 25-2(a) (2009).

The reapportionment commission, within 150 days from the date that its members are *286 **1016 certified, "shall file with the chief election officer a reapportionment plan for the state legislature ... which shall become law after publication as provided by law." Article IV, section 2; HRS § 25-2(a). "Within fourteen days after the 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." HRS § 25-2(a). "In the event of a successful court challenge of a reapportionment plan, the reapportionment commission shall continue in operation and may assist the court in formulating a new reapportionment plan." HRS § 25-9 (2009).

B.

2011 being a reapportionment year, the State of Hawai'i 2011 Reapportionment Commission ("the Commission") was certified on April 29, 2011² and tasked with adopting and filing a final reapportionment plan by September 26, 2011.

The Commission, at its initial organizational meetings, adopted "Standards and Criteria" that it would follow for the 2011 reapportionment of the congressional and state legislative districts. The "Standards and Criteria" for the state legislative districts stated:

Standards and criteria that shall be followed:

The population base used shall be the "permanent resident" population of the State of Hawaii. The permanent resident population is the total population of the State of Hawaii as shown in the last U.S. census less the following: non-resident students and non-resident military sponsors.

At meetings on May 11 and 24, 2011, the Commission was briefed on Hawaii's population growth since the 2001 reapportionment, the history of Hawaii's reapportionment, and the constitutional and statutory provisions governing reapportionment. It was provided with data from the 2010 Census showing a 12% increase in the state's total population consisting of increases of 24% in Hawai'i County, 21% in Maui County, 15% in Kauai County, and 9% in Oahu County. It was informed of article IV, section 4 and 6's permanent resident basis for apportioning the state legislature and informed—by counsel to the 2001 Reapportionment Commission—that the 2001 Commission computed the permanent residence base by excluding nonresident military personnel and their dependents, and nonresident college students. It was informed by Commission staff that data on Hawaii's nonresident military population had been requested from the Defense Manpower Data Center (DMDC) through the U.S. Pacific Command (USPACOM) and that Hawaii's nonresident student population would be identified by their local addresses and assigned to specific census blocks. The Commission, at the conclusion of the May meetings, solicited advice from the apportionment advisory councils³ as to whether nonresident military and nonresident students should be excluded from the permanent resident base.

The Maui and Kauai advisory councils recommended, at the Commission's June 9, 2011 meeting, to exclude nonresident military and nonresident students.⁴ Commissioner Takitani thereupon asked Commission staff whether the current apportionment of

the state legislature would change if apportionment were computed on the total resident population, without exclusion of nonresidents. Commission staff indicated that there would be no change in apportionment without exclusion *287 **1017 of nonresidents, but that Oahu County's senate seats would be reduced from 18 to 17 and Hawai'i County's senate seats would be increased from 3 to 4 with an extraction of nonresidents of over 20,000.

The Commission, at its June 28, 2011 meeting, voted 8–1 to apportion the state legislature by using the 2010 Census count—without exclusion of nonresident military and dependents and nonresident students—as the permanent resident base.

The Commission's June 28, 2011 decision came to the attention of Hawai'i County legislator Robert Herkes, who immediately sought an opinion from the Attorney General on whether the Commission acted lawfully in deciding to include nonresident military and dependents and nonresident students in the permanent resident base.

The Attorney General, by letter to Herkes of July 19, 2011, opined that “the Hawai'i Supreme Court would likely hold that to the extent they are identifiable, nonresident college students and nonresident military members and their families *cannot* properly be included in the reapportionment population base the Commission uses to draw the legislative district lines this year.” (Original underscoring). The opinion was based on the legislative history of the 1992 “permanent resident” amendment to article IV, section 4, and the Hawai'i Supreme Court's interpretation of “resident population,” as used the Hawai'i County Charter, as excluding nonresident college students and nonresident military personnel and their dependents from the population base for purposes of apportioning county council districts.⁵ The opinion was forwarded to the Commission.

The Commission, at its August 17, 2011 meeting, was provided by Commission staff with the following summary of data requested and received from DMDC and USPACOM on Hawaii's non-permanent military resident population and from Hawai'i universities on non-permanent student resident population.

STAFF SUMMARY OF DATA SUBMITTED FROM THE MILITARY AND UNIVERSITIES FOR USE IN THE NON-PERMANENT POPULATION ADJUSTMENT TO THE 2010 CENSUS DATA

The 2011 reapportionment project staff asked for non-permanent population data from the historical data sources to accomplish its 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 Hawaii as their home state. The data was provided segregated by U.S. Postal Zip Codes.

USPACOM provided the following counts:

Active Duty:

Declares state other than Hawaii as home state	47,082
Declares Hawaii as their home state	933
Active Duty dependents in Hawaii	58,949

We are in the process of evaluating the data to determine where these people live. We are then trying to place them in Group Quarters on base, base housing on base, or off-base housing through the reported U.S. Zip Code. We are trying to accomplish this in a reasonable and appropriate process.

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:

Hawaii Pacific University international and mainland students by address. Some of these addresses are associated with military bases or commands. 3,203

Brigham Young University Hawaii international and non-international students by address 627

University of Hawaii System students by U.S. Zip Codes 10,493

Chaminade University did not report. From their website total enrollment 2,781 59% Hawaii resident 41% other than Hawaii

****1018 *288** Commission staff provided the following explanation as to “permanent and non-permanent military residents.”

The non-permanent resident extraction model used in 1991 and 2001 [reapportionments] relied on receiving location specific (address or Zip Code) residence information for the specific non-permanent residents to be extracted.

In 2011, the data received from DMDC does not provide residence information for military sponsors nor does it provide specific breakdowns of permanent and non-permanent residents by location.

This lack of specific data from DMDC does not allow the model used previously to be used at this time.

Commission staff further noted that the DMDC data reported the location of active duty military by the zip codes of their duty stations, not their residences, and that the data did not designate the military dependents as residents or nonresidents. For these reasons, the Commission decided that the DMDC data did not provide an accurate basis for determining Hawaii's non-permanent military resident population and it decided to use data from the 2010 Census for this purpose.

Commission staff thereafter developed its own “model” for the “extraction of non-permanent residents” for the 2011 reapportionment. Commission staff operated on the premise that non-permanent residents—active duty military who declare Hawai'i not to be their home state and their dependents, and out-of-state university students—were to be identified according to the specific location of their residences within each of the four counties. Because the 2010 Census data and the university data did not include the residence addresses for all of the non-permanent active duty military residents and their dependents and the out-of-state university students, Commission staff identified three groups of non-permanent residents: Extraction A, Extraction B, and Extraction C. The groups were based on the level of “certainty in determining [the residents'] non-permanency and location.” Extraction A were residents whose specific locations were certain and included out-of-state university students with known addresses and active duty military, with “fairly certain non-permanent status,” living in military barracks. Extraction B included all residents in Extraction A, plus active duty military and their dependents, with “less certain non-permanent status,” living in on-base military housing. Extraction C included all residents in Extraction A and Extraction B, plus out-of-state university students with addresses identified only by zip code.

From the 2010 Census data and the university data, Commission Staff “extracted” the following numbers of active duty military and their dependents and out-of-state university students for purposes of computing the permanent residence base for the 2011 apportionment.

<i>Extraction A</i>		<i>Extraction B</i>		<i>Extraction C</i>	
Oahu	15,660	Oahu	72,609	Oahu	78,524
Hawaii	793	Hawaii	796	Hawaii	921
Maui	4	Maui	4	Maui	178

Kauai	1	Kauai	143	Kauai	198
	16,458		73,552		79,821

The above numbers were presented to the Commission in an "Extraction of Non-Permanent Residents" wherein Commission staff noted that "under Extractions B or C, Oahu receives 17 and Hawaii receives 4 senate seats."

The Commission was scheduled to meet at its final meeting on September 19, 2011 to adopt a final reapportionment plan. It held a public hearing⁶ in Hilo on September 13, *289 **1019 2011 wherein attorney Stanley Roehrig testified on behalf of Hawai'i County Senator Malama Solomon and three members of the Hawai'i County Democratic Committee⁷ on the "extraction" of nonresidents for the apportionment of senate seats. Roehrig cited to the Commission's August 17, 2011 "Staff Summary" showing a state population of 47,082 non-permanent active duty military residents, 58,949 military dependents, and 15,463 out-of-state university students. He testified that this total population of 121,494 must be "extracted" from the total resident population of 1,330,301 to compute the permanent resident base for the 2011 apportionment of senate seats and that such computation resulted in an increase of Hawai'i County's senate seats from 3 to 4.

Senator Solomon, at the September 13, 2011 public hearing, read into the record the following September 12, 2011 letter to the Commission from Governor Abercrombie.

I want to register my strong support for drawing the [legislative district] 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 nonresidents 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 nonresidents 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.

Eight of the nine members of the Commission met as scheduled on September 19, 2011 to vote on a final reapportionment plan. Commission staff briefed the Commission on the "extraction of non-permanent residents" presented in Extractions A, B and C.

After briefing and discussion, it was moved by Chairperson Marks and seconded by Commissioner Thomason that the Commission compute the permanent resident base for the 2011 legislative apportionment by excluding, from the 2010 census population, the 16,458 residents identified in Extraction A.

Commissioners Nonaka and Moore voted "no" as to any exclusion of nonresidents as discriminatory. Commissioners Thomason, Chipchase, Stone, and Hashimoto voted "yes" to Extraction A as providing a "precise," "certain," and "identifiable" base of

non-permanent residents. Commissioner Takitani voted “no” to Extraction A because the Commission’s data on active duty military, military dependents, and out-of-state university students showed a non-permanent resident population of “at least” 61,411 and “potentially” 120,360. Chairperson Marks stated a “preference” for Extraction B of 73,552 non-permanent residents because, according to the Commission’s data, 47,082 active duty military declare Hawai‘i as not their home and, “on a numbers basis,” “73,552 [Extraction B] is closer to 47,082 than 16,4[58] [Extraction A] is to 47,082.” The vote for Extraction A standing at 4 “yes” votes and 3 “no” votes, Marks—stating that “some extraction has to occur” and “we need a majority to have some extraction take place”—“reluctantly” voted “yes” for Extraction A, *290 **1020 even though it “didn’t represent everything [she] would like.”

The Commission adopted a final reapportionment plan that computed the permanent resident base by excluding 16,458 active duty military and out-of-state university students from the 2010 census population of 1,330,301 and apportioned each house of the legislature by allocating and maintaining, as to the senate, 18 seats for Oahu County, 3 seats for Hawai‘i County, 3 seats for Maui County, and 1 seat for Kauai County. The Commission filed its 2011 Final Reapportionment Plan with Chief Election Officer Scott Nago on September 26, 2011. Nago gave public notice of the final reapportionment plan sometime thereafter.

C.

On October 10, 2011, a petition challenging the 2011 Final Reapportionment Plan was filed with this court by Hawai‘i County Senator Solomon and Hawai‘i County Democratic Committee members Hao, Cook and Pavao (collectively “Solomon”). They asserted that: (1) the concept of “permanent residents” in article IV, section 4 was “designed to extract *all*, not some of the nonresident military, [nonresident military] dependents and nonresident students from the entire population base” for apportionment of the state legislature; (2) the Commission was provided by its own expert staff with “a reasonably accurate statewide count” of approximately 121,494 nonresident military, nonresident military dependents, and nonresident students, but the Commission extracted from this count “only a modest portion” of some 16,000 nonresident military and nonresident students and “willfully refused” to follow its own Standards and Criteria requiring extraction of nonresident students and nonresident military from the permanent resident population base; (3) the Commission was not required to have extraction information that was “neighborhood specific” “to perform the article IV, section 4 statewide extraction of non-permanent residents” and it improperly extracted nonresidents “island by island from specific locations” rather than “off the top of the statewide census base;” and (4) the Commission “knew that extraction in excess of 20,000 would trigger the loss of an Oahu-based senator from [a nonresident military and nonresident student] neighborhood,” “the fear of Oahu’s loss of this senate seat was the driving force for the Commission’s 5–3 vote that effectively denied Hawai‘i County a 4th senate seat,” and “there can be no other rational explanation for the Commission’s action.”

A second petition challenging the 2011 Final Reapportionment Plan was filed with this court on October 11, 2011 by Hawai‘i County resident Michael Matsukawa. Matsukawa had testified at the Commission’s September 14, 2011 public hearing in Kona and had urged the Commission to abide by article IV, section 4’s requirement of apportioning the state legislature on a permanent resident base that excluded nonresident military. He asserted in his petition that: (1) the Commission—by employing Extraction A—“removed only *some* of the identifiable and locatable non-permanent residents from the population base, 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 Commission employed Extraction B or Extraction C or had developed any other methodology within a reasonable time;” (2) the Commission failed to make an honest and good faith effort to execute its duty to apportion the state legislature in accordance with article IV, section 4 by using its statutory power to gather information necessary to identify and locate non-permanent residents, but instead “bemoaned the difficulty of its work” and acted out of “convenience” to adopt a final reapportionment plan by the September 26, 2011 statutory deadline; and (3) the 2011 Final Reapportionment Plan dilutes the representational interest of Hawai‘i County in the state legislature by denying Hawai‘i County an additional seat in the senate.

Solomon’s and Matsukawa’s petitions both sought: (1) a judgment invalidating the 2011 Final Reapportionment Plan for the state legislature; (2) a writ of mandamus directing the Commission to prepare and file a new reapportionment plan for the state

legislature, and (3) a writ of mandamus directing Chief Election Officer Nago to rescind the *291 **1021 publication of the 2011 Final Reapportionment Plan.

The Commission and the Chief Election Officer, as respondents to Solomon's and Matsukawa's petitions, were directed to answer the petitions and they answered on November 18, 2011. They argued that the Commission "properly followed the mandate of article IV, section 4" because the Commission determined the total resident population of each county by "identify[ing] and locat[ing] (by census block) the non-permanent residents to be excluded or extracted (active duty military members living in group quarters on base and non-resident students attending a university in Hawaii)."

Governor Abercrombie, as respondent to Solomon's petition, was also directed to answer the petition and he answered on November 21, 2011. He argued that the Commission, "by its own admission," "did not extract all of the non-resident university students and active military personnel and their dependents who declared themselves to be residents of other states, from the population base it used to develop the Final 2011 Reapportionment Plan." He "agree[d] with [Solomon] that the [Commission] did not use the correct population base to allocate the seats of the State Senate (and the State House) under article IV, section 4 and that the Commission must be compelled to correct this error and prepare a revised Final Reapportionment Plan."

On January 4, 2012, we heard oral argument on Solomon's and Matsukawa's petitions. That day, we issued orders granting the petitions. We concluded that the 2011 Final Reapportionment Plan is constitutionally invalid because it includes non-permanent residents in the population base that the Commission used to allocate the members of the state legislature among the basic island units. We invalidated the 2011 Final Reapportionment Plan and directed the Commission to prepare and file a new reapportionment plan that: (1) allocates the members of the state legislature among the basic island units by using a permanent resident population base, and then (2) apportions the members among the districts therein as provided by article IV, section 6. We further directed the Chief Election Officer to rescind the publication of the 2011 Final Reapportionment Plan for the state legislature.

II. JURISDICTION

"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." Hawai'i Constitution, article IV, section 10.

Petitioners Solomon, Hao, Cook and Pavao filed their petition on October 10, 2011, fourteen days after the September 26, 2011 filing of the 2011 Final Reapportionment Plan. They state that they are registered voters in Hawai'i County. Petitioner Matsukawa filed his petition on October 11, 2011, fifteen days after the September 26, 2011 filing of the 2011 Final Reapportionment Plan. He states that he is a Hawai'i County registered voter.

Solomon's and Matsukawa's petitions are petitions by registered voters, filed within forty-five days after the filing of the 2011 Final Reapportionment Plan, that seek writs of mandamus from this court compelling the Commission to correct an error made in the 2011 Final Reapportionment Plan. We have jurisdiction to consider the petitions under article IV, section 10.

III. DISCUSSION

The Inclusion Of Non-Permanent Residents In The Population Base For The 2011 Reapportionment Of The State Legislature Is An Error In The 2011 Final Reapportionment Plan That Renders The Plan Constitutionally Invalid.

[1] “We have long recognized that the Hawai‘i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional principle is to give effect to that intent.” *Save *292 **1022 Sunset Beach Coalition v. Honolulu*, 102 Hawai‘i 465, 474, 78 P.3d 1, 10 (2003), quoting *Convention Center Auth. v. Anzai*, 78 Hawai‘i 157, 167, 890 P.2d 1197, 1207 (1995).

[2] Article IV, sections 4 and 6 provide for apportionment of the state legislature by using a “permanent resident” base. This “mandate[s] 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.” *Citizens for Equit. & Resp. Gov’t v. County*, 108 Hawai‘i at 322, 120 P.3d at 221.

Article IV, sections 4 and 6 provide a two-step process for apportionment of the state legislature: apportionment *among* the four counties, followed by apportionment *within* the four counties. Article IV, section 4 first requires the Commission to “allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, ... using the total number of permanent residents in each of the basic units and computed by the method known as the method of equal proportions [.]” Upon such allocation, article IV, section 6 then requires the Commission to “apportion the members among the districts therein” and “redraw district lines where necessary in such manner that for each house the average number of permanent residents per member of each district is as nearly equal to the average for the basic island unit as practicable.”

As explained at the constitutional convention proceeding on apportionment of the state legislature, “[a]pportionment [under article III, section 4, now article IV, section 4] is the process of allocating numbers of representatives or senators to various districts within the State. Districting [under article III, section 4, now article IV, section 6] is the process of making those districts. These are quite different activities.” Debates in Committee of the Whole on THE LEGISLATURE—Apportionment and Districting, II *Proceedings of the Constitutional Convention of Hawaii of 1968*, at 204 (1972).

Apportionment of the state legislature in 2011 required the Commission, in step one, to allocate the 25 members of the senate and 51 members of the house of representatives among the four counties. The Commission was then required, in step two, to apportion the senate and house members within county districts.

[3] Allocation under step one required the Commission to: (1) determine the total number of permanent residents in the state; (2) divide the total number of permanent residents by 25 and 51 to determine the average number of permanent residents per member of each senate and house district; and (3) divide the total number of permanent residents in each county by the average number of permanent residents per member of each senate and house district. Such allocation required the Commission, as an initial step, to determine the total number of permanent residents in the state and in each county.

Determining the total number of permanent residents in the state and in each county required the Commission, in step one, to extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population. Apportioning the senate and house members among nearly equal numbers of permanent residents required the Commission, in step two, to identify the specific locations of non-permanent military residents and non-permanent university student residents.

The Commission acknowledged a 2010 statewide population of at least 62,545 out-of-state university students and active duty military who declare Hawai‘i not to be their home state. The Commission further acknowledged a 2010 statewide population of 58,949 military dependents, the majority of whom are presumably the dependents of 47,082 active duty military—out of 48,015 active duty military—who declare Hawai‘i not to be their home state. From these numbers, the Commission extracted, as non-permanent residents, only 16,458 student and military residents with identifiable residence addresses. Identification of the residence addresses for the non-permanent residents was necessary for apportionment of the senate and house members within the county districts under step two, but was not necessary for allocation of the senate and house members among the four counties under step one.

****1023 *293** The Commission's data identified, by zip codes, the 47,082 active duty military who declare Hawai'i not to be their home state and the 58,949 military dependents. The data identified 3,203 out-of-state students at Hawaii Pacific University, 627 out-of-state students at Brigham Young University, 1,140 out-of-state students at Chaminade University, and 10,493 out-of-state students at the University of Hawaii (UH) Manoa and Hilo. The UH out-of-state student population of 10,493 consists of 1,233 out-of-state students at UH–Hilo, according to public information provided by Solomon to the Commission.

The Commission had sufficient data to determine the non-permanent military resident populations of each of the counties. The Commission also had data to determine—by the site of Hawaii's universities—the non-permanent student resident populations of each of the counties. As to Hawai'i County, Solomon used the Commission's data and identified for the Commission—by the zip codes of the active duty military and their dependents—28 active duty military and 201 military dependents in Hawai'i County. Solomon also identified for the Commission the 1,233 out-of-state students in Hawai'i County at UH–Hilo. The Commission rejected Solomon's method of identifying the non-permanent resident population of Hawai'i County and identified and excluded only 793 residents from Hawai'i County's permanent population.

The Commission contends that it apportioned the state legislature in accordance with article IV, section 4 because it excluded, from the counties' permanent resident populations, only non-permanent residents identifiable to particular census blocks. However, HRS § 25–2(a) requires the Commission to apportion the state legislature on the “basis, method and criteria” prescribed by article IV, which provides, in section 4, for apportionment “using the total number of permanent residents in each of the basic island units.” Nothing in article IV, section 4 requires apportionment based on the total number of permanent residents identified by census block. The 1991 Reapportionment Commission used census blocks to identify, count and locate non-permanent residents, but such method of determining the permanent resident population base was not incorporated in article IV, section 4.

The Commission's method of apportioning the state legislature did not properly separate the step one process of allocating the legislative members among the four counties from the step two process of apportioning the members within county districts. Identifying the non-permanent resident population for step one and identifying the non-permanent resident population for step two were separate processes. The Commission acknowledged at oral argument that it did not differentiate the step one process from the step two process.

The Commission's military data, university data and census data on the state's non-permanent residents identified, for step one, the resident counties for over 100,000 non-permanent residents, but identified, for step two, the residence addresses for only 16,458 non-permanent residents. The Commission undertook its reapportionment task by focusing solely on identification of non-permanent residents for step two and using the results for step two to identify the non-permanent resident population for step one. The result is a Final Reapportionment Plan that includes—in the population base that the Commission used to allocate the 25 members of the senate and 51 members of the house of representatives among the basic island units—at least 45,996 non-permanent university student residents and non-permanent active duty military residents, as well as thousands of other non-permanent residents who are the dependents of the 47,082 non-permanent active duty military residents. The Final Reapportionment Plan disregards the express mandate of article IV, section 4 that only permanent residents be counted in the population base for the purpose of reapportionment of the state legislature. The inclusion of non-permanent residents in the population base for the 2011 reapportionment of the state legislature is an error in the Final Reapportionment Plan. The error renders the Final Reapportionment Plan constitutionally invalid under article IV, section 4.

We invoke our power under article IV, section 10 to correct the error in the Final Reapportionment Plan. The Commission ***294**
****1024** must prepare and file a new plan for the 2011 reapportionment of the state legislature. In preparing a new plan, the Commission must first—pursuant to article IV, section 4—determine the total number of permanent residents in the state and in each county and use those numbers to allocate the 25 members of the senate and 51 members of the house of representatives among the four counties. Upon such allocation, the Commission must then—pursuant to article IV, section 6—apportion the senate and house members among nearly equal numbers of permanent residents within each of the four counties.⁸

All Citations

126 Hawai'i 283, 270 P.3d 1013

Footnotes

- 1 *Burns v. Richardson*, 384 U.S. 73, 96, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966)
- 2 The Commission members are Victoria Marks, Chairperson, Calvert Chipchase IV, Clarice Hashimoto, Harold Masumoto, Elizabeth Moore, Dylan Nonaka, Lorrie Lee Stone, Anthony Takitani and Terry Thomason. Marks was appointed by this court as the ninth member and Chairperson on April 29, 2011, pursuant to article IV, section 2, after the eight Commission members were unable to select the ninth member.
- 3 HRS § 25-7 (2009) (apportionment advisory councils) (“The apportionment advisory councils for the respective basic island units shall be constituted at the same time as the reapportionment commission[.] Each advisory council shall serve in an advisory capacity to the reapportionment commission as to matters affecting its basic island unit.”).
- 4 The Hawaii advisory council later recommended exclusion only of nonresident military. The Oahu advisory council’s recommendation is not reflected in the Commission’s proceedings.
- 5 *Citizens for Equit. & Resp. Gov’t v. County*, 108 Hawai’i 318, 120 P.3d 217 (2005).
- 6 HRS § 25-2(a) (“[T]he commission shall conduct public hearings [on legislative reapportionment].... At least one public hearing on the proposed reapportionment plan shall be held in each basic island unit after initial public notice of the plan.”).
- 7 Louis Hao, Patricia A. Cook and Steven G. Pavao
- 8 Apportionment under article IV, section 6 requires the Commission to “make an honest and good faith effort to construct districts as nearly of equal population as is practicable.... [M]athematical exactness or precision [is not a] constitutional requirement.” *Citizens for Equit. & Resp. Gov’t v. County*, 108 Hawai’i at 325, 120 P.3d at 224 (citations omitted).

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SB-1350-SD-1

Submitted on: 3/16/2021 10:04:28 AM

Testimony for JHA on 3/16/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Patricia (Patti) Cook	Individual	Oppose	No

Comments:

TO: The Joint Hearing of the State House Judiciary and Hawaiian Affairs Committee and House Finance Committee - Tuesday, March 16, 2021 @ 2 p.m.

I apologize that this is late but have only come to understand that revisions made to this bill attempt to contradict the findings of the Hawai'i State Supreme Court in the Solomon v. Abercrombie case in 2012, which invalidated the then proposed State Reapportionment Plan that was based on virtually the same language and concept now proposed in this bill.

With respect for the concerns of Senators and Legislators about having to deal with shifting island population numbers, the neighbor islands, most notably Hawai'i Island and Maui have experienced substantial population growth over the past 20 years and this bill would potentially eliminate a 4th Senatorial seat for Hawai'i Island, and perhaps push us back to the "dark ages" of having a "canoe district" for one of our State House seats.

I was proud to have been one of the petitioners in that 2012 State Supreme Court Solomon v. Abercrombie case, and was extremely grateful that the justices agreed that the proposed Reapportionment Plan misinterpreted the law and instead, found in favor of the US Constitutional protection of one man, one vote. I am sad and alarmed to see this renewed effort to strip Hawai'i Island residents of fair and equitable representation.

Thank you for your time. Please defer action on this measure.

Patti Cook - Waimea, Island of Hawai'i (808-937-2833) cookshi@aol.com