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FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII  
APR 06 2012  
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SUE BEITIA, CLERK

Attorneys for Plaintiffs  
JOSEPH KOSTICK, KYLE MARK TAKAI, DAVID P. BROSTROM,  
LARRY S. VERAY, ANDREW WALDEN, and EDWIN J. GAYAGAS

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

JOSEPH KOSTICK; KYLE ) CIVIL NO. **CV12 00184JMS**  
MARK TAKAI; DAVID P. )  
BROSTROM; LARRY S. VERAY; ) **COMPLAINT FOR**  
ANDREW WALDEN; and ) **DECLARATORY AND**  
EDWIN J. GAYAGAS, ) **INJUNCTIVE RELIEF;**  
) **SUMMONS**  
Plaintiffs, )  
) **REQUEST FOR THREE-**  
v. ) **JUDGE COURT (28 U.S.C. §**  
) **2284)**  
SCOTT T. NAGO, in his official )  
capacity as the Chief Election )

RLP

ATTEST: A True Copy  
SUE BEITIA  
Clerk, United States District  
Court, District of Hawaii  
By adm dm  
Deputy

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

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, and Edwin J. Gayagas bring this action to challenge the constitutionality of the State of Hawaii's legislative apportionment and districting plan on the grounds that it violates the U.S. Constitution and Hawaii law. Plaintiffs, for their complaint against Defendants 2011 Hawaii Reapportionment Commission; Victoria Marks, Lorrie Lee Stone, Anthony Takitani, Calvert Chipchase IV, Elizabeth Moore, Clarice Y. Hashimoto,

Harold S. Matsumoto, Dylan Nonaka, and Terry E. Thomason in their official capacities as members of the State of Hawaii 2011 Reapportionment Commission; Scott T. Nago in his official capacity as the Chief Election Officer State of Hawaii; and Doe Defendants 1-10, allege as follows:

### **PARTIES**

1. Plaintiff Joseph Kostick is a natural person, and a citizen, registered voter, and resident of the State of Hawaii. He resides in Nuuanu, Oahu in what is currently Senate District 11 and House District 26, and what will be Senate District 11 and House District 25 under the legislative apportionment and districting plan at issue. He was a First Lieutenant in the United States Army, and was medically discharged for physical injury on or about January 17, 2011.

2. Plaintiff Kyle Mark Takai is a natural person, and a citizen, registered voter, and resident of the State of Hawaii. He currently resides in and represents the 34th House District in the State of Hawaii House of Representatives, representing Aiea and Pearl City, Oahu. Plaintiff Takai is also a Major in the Hawaii Army National Guard. The 34th House District contains many active duty military

personnel and military families. The 34th House District will become House District 33 under the legislative apportionment and districting plan at issue.

3. Plaintiff David P. Brostrom is a natural person, and a citizen, registered voter, and resident of the State of Hawaii. He resides in Halawa, Oahu in what is currently and will remain Senate District 14 and House District 33 under the legislative apportionment and districting plan at issue. He retired from the United States Army as a Colonel.

4. Plaintiff Larry S. Veray is a natural person, and a citizen, registered voter, and resident of the State of Hawaii. He resides in Pearl City, Oahu in what is currently and will remain Senate District 16 and House District 34 under the legislative apportionment and districting plan at issue herein. He retired from the United States Navy as a Command Master Chief Petty Officer.

5. Plaintiff Andrew Walden is a natural person, and a citizen, registered voter, and resident of the State of Hawaii. He resides in Manoa, Oahu in what is currently the 10th Senate District, and the 24th House District. These districts contain many university students.

They will become the 11th Senate District and the 23rd House District under the legislative apportionment and districting plan at issue.

6. Plaintiff Edwin J. Gayagas is a citizen, registered voter, and resident of the State of Hawaii. He resides in Aiea, Oahu in what is currently and will remain the 16th Senate District, and what is currently the 34th House District, but will become the 33rd House District under the legislative apportionment and districting plan at issue.

7. Defendant Scott Nago (“Nago”) is the Chief Election Officer of the State of Hawaii, and is sued in his official capacity. The duties of the Chief Election Officer include supervising all state elections, and to assist the Commission in its duties. At all times relevant to this action, Defendant Nago was domiciled or otherwise resided in the District of Hawaii.

8. Defendant State of Hawaii 2011 Reapportionment Commission (“Commission”) is a commission of the State of Hawaii, charged with the duty under article IV, section 2 of the Hawaii Constitution to file with the chief election officer a reapportionment plan for the state legislature which shall become law after publication

as provided by law. Pursuant to Haw. Rev. Stat. § 25-9, “[i]n 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.” At all times relevant to this action, the Commission was domiciled or otherwise resided in the District of Hawaii.

9. Defendant Victoria Marks is sued in her official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

10. Defendant Lorrie Lee Stone is sued in her official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

11. Defendant Anthony Takitani is sued in his official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

12. Defendant Calvert Chipchase IV is sued in his official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

13. Defendant Elizabeth Moore is sued in her official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

14. Defendant Clarice Y. Hashimoto is sued in her official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

15. Defendant Harold S. Matsumoto is sued in his official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

16. Defendant Dylan Nonaka is sued in his official capacity as a member of the, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

17. Defendant Terry E. Thomason is sued in his official capacity as a member of the Commission, and at all times relevant to this action was domiciled or otherwise resided in the District of Hawaii.

18. Defendants Doe Defendants 1-10 are persons, entities, or units of government of the State of Hawaii. They are or may be liable for the claims for relief set forth in this complaint, and are named herein under fictitious names for the reason that their true identities

and capacities are presently unknown to the Plaintiffs, despite a diligent and good faith effort to ascertain the names and identities of these Defendants. The Plaintiffs will amend the complaint as soon as they are ascertained.

### **JURISDICTION AND VENUE**

19. This action arises under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and under the laws of the United States (42 U.S.C. § 1983). This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (redress of deprivation under color of State law of any right, privilege or immunity secured by the U.S. Constitution), and over the supplemental state law claims pursuant to 28 U.S.C. § 1367. Declaratory and injunctive relief may be granted by this court as authorized by 28 U.S.C. §§ 2201 and 2202.

20. Venue is proper in this district pursuant to 28 U.S.C. § 1391 since at least one of the Defendants resides in the District of Hawaii, or a substantial part of the events or omissions giving rise to the claims asserted occurred in the District of Hawaii.



## THREE-JUDGE DISTRICT COURT REQUESTED

21. This is an action challenging the constitutionality of the apportionment of a statewide legislative body, and Plaintiffs request a three-judge court be convened to hear and determine this action pursuant to 28 U.S.C. § 2284(a).

## FACTS COMMON TO ALL COUNTS

22. The State of Hawaii has a bicameral legislative body consisting of a Senate (“Senate”), and a House of Representatives (“House”).

23. In *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982), this court held that Hawaii’s legislative redistricting plan which used registered voters as the population basis was unconstitutional because it did not substantially approximate the result of a plan based on a permissible population basis.

24. In 1992, the State of Hawaii ceased use of registered voters as the population basis by amending article IV, section 4 of the Hawaii Constitution to use “permanent residents” as the population basis. Article IV, section 4 of the Hawaii Constitution presently 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.”

25. After allocation of legislative seats among the four basic island units, Article IV, section 6 of the Hawaii Constitution 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.”

26. In or about April 2010, the U.S. Census Bureau conducted the decennial census (“Census”). The Census counted persons who “usually reside” in the State of Hawaii, including military personnel, their families, university students, children, legal and illegal aliens, and prisoners incarcerated in Hawaii, regardless of their eligibility to vote, or actual registration to vote in Hawaii. Also included in the 2010 Census resident population were military personnel

stationed overseas whose “home of record” (the State declared by the person upon entry into military service, and where he or she will be moved after military service is complete) is Hawaii, and all overseas federal employees who declare Hawaii to be their usual residence. The Census does not count transients.

27. Persons counted as usual residents of Hawaii by the U.S. Census were not counted as usual residents in any other state at the time the Census was taken.

28. Applying the above-referenced standards, the Census reported the total population of persons usually residing in the State of Hawaii as 1,360,301 (“2010 Census resident population”).

29. On or about August 3, 2011, the Commission proposed a reapportionment and redistricting plan that used as the population basis the count of all persons determined to be usual residents of Hawaii by the 2010 Census resident population.

30. On or about September 26, 2011, the Commission adopted and filed the 2011 Final Report and Reapportionment Plan (“2011 Final Reapportionment Plan”) that “extracted” 16,458 active duty military and university students from the 2010 Census resident

population of 1,360,301 who were deemed not to be “permanent residents” under Hawaii law, resulting in a “permanent resident” population basis of 1,343,843.

31. There are 25 seats in the Senate, and 51 seats in the House.

32. Using the count of 1,343,843 “permanent residents” as the population basis, the Commission allocated the total number of members of each house of the state legislature being reapportioned among the four basic island units. The Oahu basic island unit was allocated 18 Senate seats and 35 House seats. The Hawaii basic island unit was allocated 3 Senate seats and 7 House seats. The Maui basic island unit was allocated 3 Senate seats and 6 House seats. The Kauai basic island unit was allocated 1 Senate seat and 3 House seats.

33. On October 10, 2011 and October 11, 2011, two original proceedings were filed in the Hawaii Supreme Court challenging the 2011 Final Reapportionment Plan, seeking judgments compelling the Commission to “extract” all military personnel, their families, and university students who pay nonresident tuition from the population basis. *Solomon, et al. v. Abercombie, et al.*, No. SCPW-11-0000732;

*Matsukawa v. State of Hawaii 2011 Reapportionment Comm'n, et al.*,  
No. SCPW-11-0000741.

34. On or about December 29, 2011, the Commission submitted its 2011 Final Reapportionment Plan to the State of Hawaii Legislature.

35. On or about January 4, 2012, the Hawaii Supreme Court issued a writ of mandamus and concluded that the 2011 Final Reapportionment Plan was constitutionally invalid under the Hawaii Constitution. The court required the Commission to “extract” from the 2010 Census resident population count active duty military, military families, and university students who pay non-resident tuition, to arrive at the count of “permanent residents.” The court did not require “extraction” of illegal and legal aliens, institutionalized persons, civilians and their families who may not be deemed to be “permanently” in the State, federal civilian workers whose usual residence is Hawaii, or others who are similarly situated to military personnel, their families, and university students who were “extracted.” The court ordered the Commission to prepare and file a new reapportionment

plan, and ordered Defendant Nago to rescind the publication of the 2011 Final Reapportionment Plan.

36. On January 6, 2012, the Hawaii Supreme Court issued an opinion in *Solomon* and *Matsukawa* which held:

“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.

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 Hawaii 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 Hawaii not to be their home state.”

37. On or about March 8, 2012, the Commission adopted the Final Report and Reapportionment Plan (2012 Supplement) (“2012 Reapportionment Plan”) that, in conformity with the Hawaii Supreme Court’s rulings in *Solomon* and *Matsukawa*, “extracted” 108,767 usual residents of Hawaii from the population basis, nearly 8% of the 2010 Census resident population.

38. The population used to reapportion the members of each house of the legislature was thus 1,251,534. By this measurement, the statewide ideal population for a Senate district was 50,061. The statewide ideal population for a House district was 24,540.

39. Under the 2012 Reapportionment Plan, the largest Senate district (Senate District 8; Kauai basic island unit) contains 66,805 “permanent residents,” which is a deviation of +16,744 “permanent residents,” or +33.44%, more than the statewide ideal; the

smallest Senate district (Senate District 1; Hawaii basic island unit) contains 44,666 “permanent residents,” which is a deviation of -5,395 “permanent residents,” or -10.78%, less than statewide the ideal. The sum of those deviations, that is, the overall range of the plan, is 44.22%.

40. Under the 2012 Reapportionment Plan, the largest House district (House District 5; Hawaii basic island unit) contains 27,129 “permanent residents,” which is a deviation of +2,589 “permanent residents,” or +10.55%, more than the statewide ideal; the smallest House district (House District 15; Kauai basic island unit) contains 21,835 “permanent residents,” which is a deviation of -2,705 “permanent residents,” or -11.02%, less than the statewide ideal. The sum of those deviations, that is, the overall range of the plan, is 21.57%.

41. The 2012 Reapportionment Plan placed various incumbent members of the Legislature in districts with unequal proportions of new voters.

42. The 2012 Reapportionment Plan resulted in one Senate seat moving from the Oahu basic island unit to the Hawaii basic island unit.



43. On or about March 30, 2012, the State of Hawaii Office of Elections submitted the 2012 Reapportionment Plan to the State of Hawaii Legislature.

**COUNT I: EQUAL PROTECTION (EQUAL REPRESENTATION)**

44. Plaintiffs hereby reallege and incorporate by reference the allegations in all of the previous paragraphs.

45. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides in part:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

46. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that both houses of a bicameral state legislature be apportioned substantially on a population basis.

47. All usual residents of the State of Hawaii as determined by the Census in the 2010 Census resident population—including military personnel, their families, university students who

pay nonresident tuition, and all persons “extracted” by the Commission from the 2010 Census resident population—are “persons” within the jurisdiction of the State of Hawaii entitled to the equal protection of the laws.

48. All persons within the jurisdiction of the State of Hawaii are entitled to be represented in the Hawaii legislature.

49. The 108,767 military personnel, military family members, and university students who were “extracted” from the 2010 Census resident population by the Commission in accordance with the Hawaii Supreme Court’s rulings in *Solomon* and *Matsukawa* were not counted by the Census in any other state and are not represented in any other state.

50. By discriminating against military personnel, military family members, and university students who were “extracted” from the 2010 Census resident population, the 2012 Reapportionment Plan violates the right to equal representation secured to Plaintiffs by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

## COUNT II: EQUAL PROTECTION (MALAPPORTIONMENT)

51. Plaintiffs hereby reallege and incorporate by reference the allegations in all of the previous paragraph.

52. A violation of the Equal Protection Clause's substantial equality of population requirement is presumed when an apportionment or districting plan results in a population deviation or overall range (the difference between the largest and the smallest deviation from the ideal district population) of more than 10%.

53. Even if it is permissible to "extract" persons who were counted as usual residents of Hawaii in the 2010 Census resident population, who are deemed by the Commission not to be "permanent residents" of Hawaii, the 2012 Reapportionment Plan resulted in a statewide population deviation or overall range in Senate districts of approximately 44.22%, and a statewide population deviation or overall range in House districts of approximately 21.57%.

54. The Hawaii Constitution's requirement that the Commission "allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units" and requires population equality only within each basic island unit,

does not apportion seats in the state legislature on the basis of population, and violates the Equal Protection Clause.

55. The 2012 Reapportionment Plan violates the Equal Protection Clause because it results in districts that are not substantially equal in population statewide.

**COUNT III: CIVIL RIGHTS (42 U.S.C. § 1983)**

56. Plaintiffs hereby reallege and incorporate by reference the allegations in all of the previous paragraphs.

57. Section 1983 of Title 42 of the United States Code provides:

“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.”

58. Defendants at all times relevant herein were persons who acted under color of statute, ordinance, regulation, custom, or usage, of the State of Hawaii.

59. Defendants, by their above-described actions, subjected or caused to be subjected, Plaintiffs to a deprivation of their rights, privileges, or immunities secured by the Constitution and laws.

#### **COUNT IV: CIVIL RIGHTS ATTORNEY'S FEES**

60. Plaintiffs hereby reallege and incorporate by reference the allegations in all of the previous paragraphs.

61. Section 1988 of Title 42 of the United States Code provides, "In any action or proceeding to enforce a provision of sections ... 1983 ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]"

62. If Plaintiffs prevail in this action, they will be entitled to recover a reasonable attorney's fee from Defendants.

#### **COUNT V: STATE LAW CLAIMS**

63. Plaintiffs hereby reallege and incorporate by reference the allegations in all of the previous paragraphs.

64. Article I, section 2 of the Hawaii Constitution provides in part: “All persons are free by nature and are equal in their inherent and inalienable rights.”

65. Article IV, section 6 of the Hawaii Constitution requires that the Commission, in effecting redistricting, to be guided by, *inter alia*, the following criteria: “No district shall be so drawn as to unduly favor a person or political faction.”

66. Section 25-2 of the Hawaii Revised Statutes requires the Commission 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 IV of the Hawaii Constitution.”

67. Defendants, by their above-described actions, subjected Plaintiffs to unequal treatment in the exercise of their inherent and inalienable rights, drew districts that unduly favored persons or political factions, and did not apportion the members of each house of the legislature on the basis, method, and criteria prescribed by the U.S. Constitution.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the Court grant the following relief:

A. Convene a three-judge district court pursuant to 28 U.S.C. § 2284.

B. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and 2202 that the 2012 Reapportionment Plan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Hawaii law, and that the State of Hawaii must include all persons in the 2010 Census resident population in the population basis for reapportionment and redistricting, including military personnel, military families, and university students “extracted” by the Commission in the 2012 Reapportionment Plan.

C. Declare that the Hawaii Constitution’s apportionment and districting process, which requires the Commission “allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units” with the requirement that “no basic island unit shall receive less than one member in each

house,” and requires population equality only within each basic island unit, violates the Equal Protection Clause.

D. Declare that the 2012 Reapportionment Plan violates the Equal Protection Clause because it results in districts that are not substantially equal in population statewide.

E. Declare that under color of state law, Defendants have violated rights, privileges, or immunities secured to Plaintiffs by the Constitution and laws.

F. Declare that the 2012 Reapportionment Plan violates state law because it subjects Plaintiffs to unequal treatment in the exercise of their inherent and inalienable rights, draws districts that unduly favored persons or political factions, and does not apportion the members of each house of the legislature on the basis, method, and criteria prescribed by the U.S. Constitution

G. Preliminarily and permanently enjoin Defendants and all those acting in concert with them from implementing the 2012 Reapportionment Plan, including but not limited to conducting elections, and order Defendants to formulate and implement a reapportionment plan that is based upon a count of all persons included



in the 2010 Census resident population as the population basis, and results in Senate and House districts that are substantially equal in population statewide.

H. Award Plaintiffs the cost of this action, including reasonable attorneys' fees as provided in 42 U.S.C. § 1988.

I. Provide such other and further relief as the Court may deem proper and appropriate.

DATED: Honolulu, Hawaii, April 6, 2012.

DAMON KEY LEONG KUPCHAK HASTERT

A handwritten signature in black ink, appearing to read 'Robert H. Thomas', written over a horizontal line.

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