No. 13-456

IN THE

Supreme Court of the United States

JOSEPH KOSTICK, *et al.*,
Appellants,

v.

SCOTT T. NAGO, CHIEF ELECTION OFFICER
OF THE STATE OF HAWAII, *et al.*,
Appellees.

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

MOTION TO AFFIRM

DAVID M. LOUIE
Counsel of Record
ATTORNEY GENERAL
JOHN F. MOLAY
GIRARD D. LAU
CHARLEEN M. AINA
DEPUTY ATTORNEYS
GENERAL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen St.
Honolulu, HI 96813
(808) 586-1360
david.m.louie@hawaii.gov

SETH P. WAXMAN
PAUL R.Q. WOLFSON
KELLY P. DUNBAR
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that the permanent resident population base required by Hawaii's Constitution for apportionment of state legislative seats and used in Hawaii's 2012 reapportionment plan is consistent with the Equal Protection Clause of the Fourteenth Amendment under *Burns* v. *Richardson*, 384 U.S. 73 (1966).

2. Whether appellants, all residents of the basic island unit of Oahu, have standing to challenge Hawaii's decision not to draw district lines that straddle basic island units when there is no evidence that an order requiring Hawaii to draw such lines would redress any underrepresentation they suffer.

3. Whether the three-judge district court correctly held that the maximum deviations in the Senate and House districts of Hawaii's 2012 reapportionment plan do not violate the Equal Protection Clause because Hawaii has sufficiently justified its decision to draw district lines that protect the integrity of its four basic island units (Hawaii, Oahu, Maui, and Kauai) and thereby ensure fair and effective representation.

PARTIES TO THE PROCEEDING

The appellants are Joseph Kostick, Kyle Mark Takai, David P. Brostrom, Larry S. Veray, Andrew Walden, Edwin J. Gayagas, Ernest Laster, and Jennifer Laster.

The appellees are Scott T. Nago in his official capacity as the Chief Election Officer of the State of Hawaii, the State of Hawaii 2011 Reapportionment Commission, and the members of that commission in their official capacities: Victoria Marks, Lorrie Lee Stone, Anthony Takitani, Calvert Chipcase IV, Elizabeth Moore, Clarice Y. Hashimoto, Harold S. Masumoto, Dylan Nonaka, and Terry E. Thomason.

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INTRODUCTION

Hawaii's unique geography, history, and population have long presented challenges to the State's effort to apportion state legislative seats. Hawaii is the only State composed entirely of islands, and its principal islands, with populations separated from each other, developed distinct cultures and communities. The population of Hawaii is, moreover, unequally distributed among the islands. And Hawaii's location in the middle of the Pacific Ocean, which has a significant military importance as well as an attraction to students and visitors, means that substantial numbers of people spend time there without the intent to remain in the State permanently or to participate in the State's institutions of self-government.

In this case, appellants challenge Hawaii's efforts to take account of these significant factors in its 2012 reapportionment plan. Appellants, all residents of Oahu, have challenged the 2012 plan under the Equal Protection Clause. They first argue that the plan employs an allegedly unlawful permanent resident population as a base for drawing district lines. They further contend that the plan, by preserving the integrity of basic island units, results in impermissibly large "maximum deviations" (that is, the numerical difference between the most overrepresented and underrepresented districts) in the size of the State's Senate and House districts.

A three-judge district court unanimously rejected each argument. The district court first ruled that *Burns* v. *Richardson*, 384 U.S. 73 (1966), sustains Hawaii's decision to count only permanent, and not temporary, residents in defining a reapportionment population base. That straightforward application of *Burns* was correct and does not warrant plenary review.

In addition, the district court held that the maximum deviations in the 2012 reapportionment plan do not violate the Equal Protection Clause. Those deviations result from Hawaii's decision not to use "canoe districts," namely, legislative districts that cross any of the four basic island units. The district court's rejection of appellants' second claim should be summarily affirmed for either of two reasons. First, appellants lack standing to pursue it. Each of the appellants resides on the island unit of Oahu, which as a whole is overrepresented under the 2012 reapportionment plan. Indeed, only three of the eight appellants reside in underrepresented legislative districts at all. But none of those three has established that their underrepresentation would be redressed by a judicial ruling that Hawaii must use canoe districts.

Second, the district court correctly decided the issue on the merits. Hawaii's considered judgment not to use canoe districts was based on decades of experience, including a failed experiment with canoe districts that, the people of Hawaii concluded, undermined, rather than advanced, fair and effective representation. The district court's conclusion that Hawaii had powerful reasons to respect the integrity of longstanding political subdivisions and in that way to give voice to the distinct communities of interest on each island unit reflects a correct application of this Court's precedent.

STATEMENT

A. Hawaii's Reapportionment History

1. Hawaii has "special population problems." *Burns* v. *Richardson*, 384 U.S. 73, 94 (1966). Hawaii has long been "unique among all states" because of the presence of a substantial non-permanent population, "[b]y far the largest component" of which is "military personnel and their dependents." Schmitt, *A History of Recent Reapportionment in Hawaii*, 22 Haw. B.J. 171, 172 (1990), Dkt. 65-6. Historically, and continuing to this day, many military servicemembers, the vast majority of whom live on Oahu, claim residency in other States and do not register to vote in Hawaii elections.

Thus, today, just as at the time of *Burns*, reapportionment must account for the "presence in Hawaii of large numbers of the military." 384 U.S. at 94. If non-permanent residents—especially, non-permanent resident military servicemembers and their dependents—were included in the State's reapportionment population base, then "permanent residents living in districts including military bases might have substantially greater voting power than the electors of districts not includ-

ing such bases." *Id.* at 94 n.24. Hawaii is thus confronted with a fundamental "choice about the nature of representation" in choosing a population base. *Id.* at 93.

Hawaii has explored several different responses to this problem in its history as a State, but it has never included temporary residents in its population base. Today, the Hawaii Constitution requires an apportionment base of "permanent residents." Haw. Const. art. IV, § 4. That decision is a consequence of decades of experience and deliberation by legislators, reapportionment experts, and, ultimately, voters.

Hawaii originally apportioned state legislative seats on the basis of registered voters. *See* Haw. Const. art. III, § 4 (1959) (House); Haw. Const. art. III, § 4 (1968) (House and Senate).[1] This Court approved that apportionment base in *Burns*. *See* 384 U.S. at 97. In doing so, the Court announced several principles that have guided Hawaii's reapportionment efforts ever since. Most importantly, the Court held that a State is *not* required "to use total population figures derived from the federal census as the standard" for apportionment and that a State *may* exclude from its apportionment base, among others, "transients" and "short-term or temporary residents." *Id.* at 91.[2]

Hawaii's approach to reapportionment changed in the early 1980s as a result of judicial intervention. In 1981, a district court held that, on the record before it,

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[1] Until 1968, the Hawaii Constitution apportioned the "25-member senate among six fixed senatorial districts, assigning a specified number of seats to each." *Burns*, 384 U.S. at 76.

[2] The Census counts a State's "usual residents." JS App. (App.) 7. "Usual residence" means "the place where a person lives and sleeps most of the time," which is "not necessarily the same as the person's voting residence or legal residence." App. 162.

Hawaii could no longer justify a registered voter apportionment base. *See Travis* v. *King*, 552 F. Supp. 554, 568-569 (D. Haw. 1982). The court accepted an interim plan proposed by special masters establishing a base of "total population less non-resident military and dependents, which the Masters felt was the closest approximation of a state citizen base that they could determine." Schmitt, 22 Haw. B.J. at 176 (internal quotations omitted).

After *Travis*, Hawaii's Reapportionment Commission was charged with adopting a permanent plan. The Commission is a bipartisan body composed of nine members, including eight selected by state legislative leaders from Hawaii's major political parties and a chairperson selected by the other members. *See* Haw. Const. art. IV, § 2. The Commission issued a comprehensive report on possible apportionment bases, including total population, state citizens, eligible voters, and registered voters. *See* Office of Lieutenant Governor, *1981 Reapportionment Commission Study* 1-21 (1983), Dkt. 65-8. Recognizing that a total population base "may result in a distortion of representation in certain areas of Hawaii where there may be a high concentration of temporary residents" (*id.* at 7), the Commission ultimately adopted a "state resident" base (Schmitt, 22 Haw. B.J. at 186).

After the 1990 Census, the Reapportionment Commission refined the State's apportionment base, choosing a "permanent resident" base. State of Hawaii 1991 Reapportionment Commission, *Final Report and Reapportionment Plan* (*1991 Plan*) 21 (1992), Dkt. 65-9. Experts retained by the Commission determined at that time that non-resident military personnel were "the only large census-block-identifiable group of nonresidents included in the census and that other groups, such as

nonresident students, [were] statistically insignificant and [could not] be easily placed in specific census blocks." *Solomon* v. *Abercrombie*, 270 P.3d 1013, 1015 (Haw. 2012) (internal quotations omitted). The Commission therefore decided to exclude, from the permanent resident population base, non-resident military personnel and their dependents. *See id.* The 1991 plan served as the foundation for a subsequent amendment to article IV of the Hawaii Constitution "to change the state legislature apportionment base from registered voters to permanent resident population." *Id.*

2. Reapportionment in Hawaii also has had to take account of the fact that the population of the State is unequally distributed among the four basic island units that have distinct histories, cultures, and concerns. Each island unit is "separated from each of the other [units] by wide and deep ocean waters." *Burns*, 384 U.S. at 76. Since 1968, the Hawaii Constitution has provided that "[n]o district shall extend beyond the boundaries of any basic island unit." Haw. Const. art. IV, § 6. That provision was enacted to ensure fair and effective representation for Hawaii's population, and reflects "that these areas are not only basic but are historical, geographical and political units with a strong identity of interest." Standing Comm. Rep. No. 58 (Comm. Rep. No. 58), *in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1968*, at 261 (1973), Dkt. 65-13.

It has long been recognized that residents of Hawaii's basic island units "have developed their own and, in some instances, severable communities of interests," resulting in "an almost personalized identification of the residents of each county—with and as an integral part of that county." *Burns* v. *Gill*, 316 F. Supp. 1285, 1291 (D. Haw. 1970). The independence of island units reaches back centuries. "Because each was insulated

from the other by wide channels and high seas … and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii, and the City and County of Honolulu." *Holt* v. *Richardson*, 238 F. Supp. 468, 470-471 (D. Haw. 1965), *vacated*, *Burns*, 384 U.S. at 1300.

These basic island units, and the distinct communities within these units, have long shaped Hawaii's approach to reapportionment. When the 1968 Constitutional Convention was convened to establish new apportionment standards, the Committee on Legislative Apportionment and Districting emphasized that

> [i]slands or groups of islands in Hawaii have been separate and distinct fundamental units since their first settlement by human beings in antiquity. [After the conquering of Maui, Hawaii, and Oahu in 1795, and the acquiescence of Kauai in 1810,] [t]he first constitution of the nation of Hawaii, granted by King Kamehameha III in 1840, provided that there would be four governors "over these Hawaiian Islands—one for Hawaii—one for Maui and the islands adjacent—one for Oahu, and one for Kauai and the adjacent islands." … Thereafter in every constitution of the nation, the territory and the state, the island units have been recognized as separate political entities.

Comm. Rep. No. 58, at 261-262 (internal footnote omitted). The committee explained that, because of "unique geographic, topographic and climatic conditions which have produced strikingly different patterns of economic progress and occupational pursuit," each island unit "has its own peculiar needs and priorities which in some

instances may be quite different from any other county." *Id.*; *see Gill*, 316 F. Supp. at 1290.

These considerations led to an "obvious and inescapable" conclusion: "[I]f a voter of the State of Hawaii is to have meaningful representation in any kind of government, he must have effective representation from his own island unit in the state legislature." Comm. Rep. No. 58, at 263. For these reasons, in 1968, Hawaii amended its Constitution to prohibit districts "extend[ing] beyond the boundaries of any basic island unit." Haw. Const. art. III, § 4 (1968).

Until 1982, Hawaii recognized its distinct communities of interest and protected basic island unit integrity in reapportionment by not using canoe districts. That policy was supplanted, however, when a district court invalidated the State's reapportionment plan, principally because of insufficient justifications for deviations among districts on Oahu. *Travis*, 552 F. Supp. at 561-562. The court appointed special masters, who reluctantly drafted a plan that, for the first time in Hawaii's history, included legislative districts that straddled basic island units. *See* Schmitt, 22 Haw. B.J. at 176.

This experiment with canoe districts was a failure. In 2001, in adopting a new reapportionment plan, the Reapportionment Commission rejected canoe districts, citing "overwhelming" evidence of dissatisfaction with them. State of Hawaii 2001 Reapportionment Commission, *Final Report and Reapportionment Plan* 25 (2001), Dkt. 65-15. Indeed, the record establishes that the people of Hawaii oppose canoe districts, and that this opposition is particularly strong among those who have had to live in such districts. *See*, *e.g.*, Masumoto Decl. ¶¶ 9-11, Apr. 24, 2012, Dkt. 65-24; *see also* JS App. (App.) 74-75 (citing record evidence regarding op-

position of residents of Kauai). The record further demonstrates that legislators who have represented canoe districts agree they undermine, rather than advance, the aim of fair and effective representation. *See, e.g.*, Solomon Decl. ¶¶ 4-11, May 4, 2012, Dkt. 66-3.

B. Hawaii's 2012 Reapportionment Plan

1. This case involves reapportionment in the wake of the 2010 Census. That census determined that Hawaii has a population of 1,360,301 "usual residents." Stipulated Facts ¶ 32, Apr. 20, 2012, Dkt. 26. As required by Hawaii's Constitution, a Reapportionment Commission began the process of apportioning state legislative seats in 2011.

To define a permanent resident population base, the Commission requested data on, among other things, non-permanent residents, specifically "non-permanent resident military, non-permanent resident military dependents, and non-permanent resident students." Rosenbrock Decl. ¶ 16, May 2, 2012, Dkt. 65-16. After difficulties and delay in obtaining that information, the Commission issued a September 2011 plan, which reflected extractions of 16,458 non-permanent residents, consisting of (1) "those persons who the Census reported were in military group quarters (barracks) in Hawaii," and (2) "students identified as non-residents by Hawaii colleges and for whom local addresses were provided." *Id.* ¶ 21.

2. The September 2011 plan was challenged in Hawaii's Supreme Court. *See Solomon*, 270 P.3d at 1014. The challengers contended that the plan was unlawful because the Commission failed to follow the state constitutional requirement to exclude non-

permanent residents from the State's population base. *See id.*

The Hawaii Supreme Court agreed with the challengers, held the 2011 plan invalid, and ordered the Commission to prepare a new plan. *See Solomon*, 270 P.3d at 1014. The court made clear that the permanent resident requirement "mandates that only residents having their domiciliary in the State … may be counted in the population base for the purpose of reapportioning legislative districts." *Id.* at 1022 (internal quotations and alteration omitted). The court concluded that the Commission had sufficient data to make further extractions and that it erred by including non-permanent residents in its population base. *See id.* at 1021-1024.

3. To comply with *Solomon*, the Commission renewed its efforts to obtain all the information it had previously requested. *See* Rosenbrock Decl. ¶¶ 23-24. After receiving and analyzing those data, the Commission extracted the following non-permanent residents from the Census total to calculate a new population base: (1) 42,332 military personnel; (2) 53,115 military dependents; and (3) 13,320 students. *See id.* ¶ 27.

The methods of extraction were straightforward. Military servicemembers on active duty were extracted "based on military records or data denoting the personnel's state of legal residence." Stipulated Facts ¶ 8; *see* State of Hawaii 2011 Reapportionment Commission, *Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting—Addendum* (*2012 Plan Addendum*) 2-2 (Mar. 2012), Dkt. 28-12. Military dependents were extracted if identified as associated with an active duty military sponsor who declared a state of legal residence other than Hawaii. Stipulated Facts ¶ 10; *2012 Plan Addendum* 2-2. Finally, univer-

sity students were extracted on the basis of payment of non-resident tuition or a home address outside of Hawaii. Stipulated Facts ¶ 14; *2012 Plan Addendum* 2-3. The Commission did not extract active duty military personnel identified as legal residents of Hawaii. Rosenbrock Decl. ¶ 27. Nor did it extract military dependents if not associated with a non-permanent resident military sponsor; thus, the Commission included in its apportionment base 52,927 military dependents. *Id.*

After making those extractions, the Commission reapportioned the adjusted population base "by dividing the base by the constitutionally-defined 25 Senate seats and 51 House seats." App. 30. "This resulted in an ideal Senate district of 50,061 permanent residents, and an ideal House district of 24,540 permanent residents." *Id.* The Commission then reapportioned Hawaii's legislative districts among the four basic island units, as required by Hawaii's Constitution.

The Commission acknowledged that the 2012 plan resulted in substantial deviations statewide, due largely to the constitutional mandate not to use canoe districts and the small population of Kauai. State of Hawaii 2011 Reapportionment Commission, *Final Report and Reapportionment Plan—2012 Supplement* (*2012 Plan*) 21 (Mar. 30, 2012), Dkt. 65-22. The Commission attempted to ensure that the population of Kauai was not systematically underrepresented or overrepresented in both houses of the legislature by compensating for that island's underrepresentation in one house with some overrepresentation in the other. The plan thus resulted in underrepresentation in Senate District 8 on Kauai by 33.44% and overrepresentation in House District 15 on Kauai by 11.02%. *Id.* at iii.

C. Proceedings Below

On April 6, 2012, appellants brought this lawsuit against Scott T. Nago, Hawaii's Chief Election Officer, and the Commission and its members (collectively, Hawaii), challenging the 2012 plan. All eight appellants live on the island of Oahu (First Am. Compl. ¶¶ 1-8, Apr. 27, 2012, Dkt. 32), a basic island unit that, as a result of the 2012 plan, has a majority share of both state senators and representatives (*2012 Plan* 13).

As pertinent here, appellants raised two constitutional challenges. In Count I of their complaint, appellants contended that Hawaii's extraction of non-permanent residents from the population base is unconstitutional. In Count II, they argued that the 2012 plan results in maximum deviations that exceed limits acceptable under the Equal Protection Clause. The three-judge district court unanimously rejected each claim.

The district court concluded that at least some of the appellants had standing (App. 34-35), but rejected both claims on the merits (App. 3). First, the court held that Hawaii's use of a permanent resident population base was constitutionally permissible under this Court's decision in *Burns*. App. 36. The court further held that Hawaii had not arbitrarily discriminated among non-permanent residents and that the methods and criteria Hawaii had used in defining its permanent resident population base were lawful. *See* App. 44-55.

Second, "[c]rediting the strength of the Commission's rationales and the uncontradicted evidentiary support in the record" (App. 86), the court concluded that the State's "justifications [for the deviations in the 2012 plan] embody rational, legitimate, and substantial State policies," and that the 2012 plan "reasonably ad-

vances those policies in a neutral and nondiscriminatory manner" (App. 64). The court cautioned that it was "not suggest[ing] that any other state could justify deviations of this magnitude," and it noted that "it is possible that no other state could do so." *Id.*

ARGUMENT

The three-judge district court correctly upheld Hawaii's 2012 reapportionment plan. With respect to Count I, the district court properly held that Hawaii's use of a permanent resident base and its methods and criteria for establishing that base were permissible under this Court's decision in *Burns* v. *Richardson*, 384 U.S. 73 (1966). With respect to Count II, on the merits, the court correctly held that Hawaii sufficiently justified the maximum deviations in district size that resulted from the State's decision to advance the goal of fair and effective representation by protecting basic island unit integrity. But there is no basis even to reach the merits of Count II, as appellants lack standing to pursue it: only three of the appellants reside in underrepresented legislative districts but none of them has established that their injury would be remedied by a judicial requirement to use canoe districts.

The district court's unanimous holding on the merits of each count reflected a straightforward application of settled legal principles to the unique circumstances of Hawaii's reapportionment. This case does not present any occasion for the Court to address principles about apportionment that might be applicable more broadly, to States other than Hawaii. Nor have appellants identified any conflict in the circuits that would be resolved by plenary review in this case. The judgment of the district court should therefore be summarily affirmed.

I. THE DISTRICT COURT PROPERLY UPHELD HAWAII'S USE OF A PERMANENT RESIDENT POPULATION BASE

Hawaii's decision to apportion state legislative seats based on permanent residents is controlled by, and constitutional under, *Burns*. Appellants' contrary arguments—that the district court applied the wrong standard, that the 2012 plan contradicts *Burns*, and that the methods and criteria used to define the apportionment base were irrational—were carefully considered and properly rejected by the district court. Plenary review is unnecessary to address those questions or the supposed circuit conflict cited by appellants.

A. The District Court Correctly Held That Hawaii's Permanent Resident Base Is Constitutional Under *Burns*

In *Burns*, this Court upheld Hawaii's decision to "use … registered voters as a basis for Hawaiian apportionment." 384 U.S. at 90. In doing so, the Court held that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census" as the apportionment base. *Id.* at 91. Indeed, the Court made clear that a State may exclude, among others, "aliens, transients, [or] short-term or temporary residents" from its apportionment base. *Id.* at 92. The Court explained that, unless a State's choice reflects invidious discrimination, the decision whether to "include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* *Burns* controls this case.

The 2012 plan apportions Hawaii's legislative seats based on the State's permanent residents, a standard that excludes temporary residents. This Court in *Burns* recognized the prerogative of a State to exclude

"temporary," that is, non-permanent, "residents" from its apportionment base. 384 U.S. at 92. Even more to the point, the Court explained that it would be "constitutionally permissible" to exclude "military and military-related personnel" who do not "meet[]" the State's residency requirements. *Id.* at 92 n.21. Hawaii has done just that here in the 2012 plan. Hawaii's considered judgment not to count those who lack a present intent to remain permanently in the State is a "choice about the nature of representation" that falls comfortably within the ambit of *Burns*, as the district court correctly held. *See* App. 38-44.[3]

B. Appellants' Challenges To The District Court's Application Of *Burns* Are Wrong

1. The district court applied the correct standard of review

Appellants principally argue that the district court failed "to apply the 'close constitutional scrutiny' test" drawn from *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). JS 20. In appellants' view, "[b]ecause Hawaii did not include everyone" in its apportionment base, "its choice must pass 'close constitutional scrutiny.'" JS 23. This argument finds no support in precedent. App. 36-38.

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[3] Appellants suggest *Burns* turned on "vastly different" factual conditions (JS 26 n.10) that, they insist, no longer exist. The district court rightly rejected this argument. App. 40-41 n.12. *Burns* did not rely on conditions unique to Hawaii in 1966 when it concluded that "[t]he decision to include or exclude [persons such as temporary residents] involves choices about the nature of representation" that are for the State to decide. 384 U.S. at 92. Although the opinion later referred to the state military population "fluctuat[ing] violently" (*id.* at 94), it nowhere suggested that the permissibility of Hawaii's decision to exclude non-resident military personnel from the population base was dependent on that fact.

First, to the extent appellants argue that Hawaii's *threshold decision* to exclude non-permanent residents from its apportionment base is subject to heightened scrutiny, that argument is foreclosed by *Burns*. *Burns* is clear that States are not "required to include … short-term or temporary residents … in the apportionment base," and that "decision[s]" on which groups to "include or exclude" are "choices about the nature of representation" committed to the prerogative of States, not federal courts. 384 U.S. at 92; *see Gaffney* v. *Cummings*, 412 U.S. 735, 746 (1973) ("the apportionment task, dealing as it must with fundamental choices about the nature of representation, … is primarily a political and legislative process" (internal quotations omitted)).

Second, to the extent appellants argue that the specific *methods* or *criteria* that Hawaii uses to extract non-permanent residents from its population base are subject to heightened scrutiny, that also misreads this Court's precedent. In the apportionment context, the Court has applied a standard that "approximates rational-basis review." App. 38; *see Brown* v. *Thomson*, 462 U.S. 835, 843 (1983) (focusing inquiry on "whether the legislature's plan may reasonably be said to advance [a] rational state policy" (quoting *Mahan* v. *Howell*, 410 U.S. 315, 328 (1973) (internal quotations omitted; alteration in original)); *see also Mahan*, 410 U.S. at 326 ("the proper equal protection test is … framed … in terms of a claim that a State may rationally consider") (internal quotations omitted). That deferential standard appropriately governs a State's choices about the composition of its population base for apportionment purposes.

Appellants argue for a stricter standard of review (JS 20), but they conflate challenges to direct restrictions on the right to vote with challenges to apportionment. The latter are governed by the standard of

review discussed above. The former are subject to heightened scrutiny because they involve restrictions on "the exercise of a fundamental right," *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976)—namely, the right to vote. For example, in *Dunn*, on which appellants heavily rely, the Court applied "close" scrutiny to a durational residency requirement that restricted the right to vote. 405 U.S. at 331. That standard does not, and should not, apply here, where Hawaii "does not place any impediment to the right of servicemembers, their dependents, or students to vote in state elections." App. 38 n.11.

2. The district court committed no error in applying *Burns*

Appellants separately fault the district court for failing to apply a "[t]hree-[p]art *Burns* [a]nalysis." JS 24. To satisfy *Burns*, appellants maintain, Hawaii must "(1) identify the permissible population basis to which permanent residents is comparable, (2) demonstrate that counting permanent residents resulted in a plan that is a 'substantial duplicate' of one based on a permissible population basis, and (3) show the classification is not 'one the Constitution forbids.'" JS 23. According to appellants, the 2012 plan fails that test. This argument is wrong at each step, as the district court held. *See* App. 38-44.

a. There is no requirement to compare the results of the 2012 plan with any other permissible population base

The first two parts of appellants' "three-part *Burns* analysis" misread *Burns*. *Burns* recognizes a State's right to exclude from its apportionment base, among others, "short-term or temporary residents." 384 U.S. at 92. Unless the exclusion "is one the Constitution

forbids" because it is invidiously discriminatory, "the resulting apportionment base offends no constitutional bar." *Id.* Thus, under *Burns*, a reapportionment base that excludes non-permanent residents from a census count is itself a permissible population basis. *See id.* at 91-92; *see also Carpenter* v. *Hammond*, 667 P.2d 1204, 1213-1214 (Alaska 1983) (holding that, under *Burns*, Alaska had a "legitimate interest in limiting its apportionment base to bona fide residents," and that the "exclusion of non-resident military members and dependents from the apportionment population base did not violate equal protection"), *appeal dismissed for want of a substantial federal question*, 464 U.S. 801 (1983); *cf. Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964) (suggesting States may apportion based on "residents, or citizens, or voters").[4]

The passages from *Burns* on which appellants rely discussing a comparative population base (JS 23-24), reflect unique concerns with the particular population base at issue in *Burns*, namely, registered voters. After making clear that a State may exclude temporary residents from its apportionment base, the Court explained that use of "a registered voter or actual voter basis" posed "an *additional* problem." 384 U.S. at 92 (emphasis added). Because those criteria depended on the "extent of political activity of those eligible to register and vote," they were "susceptible to improper influences" and subject to "fluctuations … caused by fortuitous factors," such as bad weather or a controversial

[4] The plaintiff's argument in *Carpenter* was essentially identical to appellants' argument here. *See, e.g.*, 667 P.2d at 1205. The Alaska Supreme Court rejected that constitutional challenge (*id.* at 1212-1213), and this Court's dismissal of the appeal for want of a substantial federal question is a merits disposition (*see Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975)).

election. *Id.* at 93. Despite those concerns, this Court approved Hawaii's plan because, "on th[e] record," the plan "produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.*

Here, there is no need to compare Hawaii's 2012 plan to a "permissible population basis." *Burns* makes clear a permanent resident base is *itself* a permissible population base. The district court therefore correctly held "[t]he State need not demonstrate that its plan under the 'permanent residents' standard is a duplicate of a plan made on another permissible basis." App. 41-42.

b. The 2012 plan does not discriminate against military servicemembers

Appellants also contend that the 2012 plan flunks the third part of their *Burns* test because, they argue, the plan impermissibly "target[s]," or discriminates against, servicemembers. JS 28. That contention is meritless. The Hawaii Constitution requires apportionment based on "permanent residents." Appellants concede the permanent resident standard is "facially-neutral." *Id.* And as the district court found, there is "no evidence that Hawaii's exclusion … was carried out with any aim other than to create a population basis that reflects Hawaii's permanent residents." App. 44.

Those points should be dispositive. Appellants nonetheless insist that Hawaii nefariously sought to "target[] … servicemembers and their families, and students." JS 28. But Hawaii's 2012 plan does not exclude military personnel as an undifferentiated whole; it excludes only those who have elected not to identify themselves as permanent residents of Hawaii, thus declining to participate in the State's institutions of self-

government and demonstrating an intent not to remain permanently in Hawaii. Servicemembers are free to change their legal residence by filing a Certificate of State of Legal Residence form. *See* DD Form 2058, State of Legal Residence Certificate, Dkt. 66-9. Such a tailored "exclusion" of military personnel from an apportionment base as a result of a neutral state "residence requirement[]" is a "constitutionally permissible classification." *Burns*, 384 U.S. at 92 n.21.

Appellants' position that Hawaii did not go far enough in extracting *other* groups, such as "aliens, prisoners, [and] minors" (JS 2), is wide of the mark. The record establishes "the State extracted *all* nonpermanent populations that exist in sufficient numbers to affect the apportionment of districts *and* about which it could obtain relevant, reliable data." App. 36 (emphases added). For example, Hawaii tried—but was unable—to find reliable information regarding aliens. App. 46. And as the district court concluded, Hawaii could reasonably presume that prisoners and minors presently intend to remain in the State. *See id.* & n.14.[5]

3. The district court correctly held that Hawaii's methods of defining its permanent resident base were reasonable

Finally, appellants raise a handful of challenges to Hawaii's means of carrying out the extractions. *See* JS 29-30. The district court was right to reject these threadbare arguments (*see* App. 36), and they offer no basis for plenary review.

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[5] Appellants argue that the extracted non-permanent residents may not be counted in any State for the purposes of representation (*see* JS 3, 9, 19), but that possibility is a necessary consequence of this Court's recognition that a State may exclude temporary residents from its population base.

Appellants first object to use of a tax form to determine a servicemember's permanent residence. JS 29. They contend the State "could not show that a servicemembers' declaration on a tax form about 'legal residence' has any relation to where she intended to remain permanently." *Id.* That is plainly wrong. Hawaii law requires payment of state income taxes by a military servicemember who "establishes domicile in Hawaii" (Haw. Code. R. § 18-235-1.09(b)), and domicile requires an intent to make Hawaii a "permanent home" (*id.* § 18-235-1.03(a)(1)). By determining which servicemembers elect to pay Hawaii income taxes, Hawaii learned whether a servicemember "inten[ds] to remain in Hawaii" permanently (App. 50): "[b]y indicating a different state for the purposes of taxation, a servicemember declares that he or she has no present intention of establishing his 'permanent dwelling place' in Hawaii" (App. 49).

In addition, appellants criticize Hawaii for extracting military *dependents* based on a servicemember's tax status. JS 29. But, contrary to appellants' description, Hawaii did not indulge "outdated assumptions that spouses have no independent intent or identity." *Id.* Instead, Hawaii reasonably relied on record evidence establishing that, historically, an overwhelming majority—98%—of military dependents have had the same residency status as that of the relevant servicemember. App. 52-53. Moreover, as the district court recognized, a 2012 Department of Defense paper concluded that servicemember spouses are much more likely to relocate than civilian spouses. App. 53. That paper also emphasized that servicemembers and their families are subject to "frequent and disruptive moves." U.S. Department of Defense, *Supporting Our Military Families: Best Practices for Streamlining Occupational Li-*

censing Across State Lines 6 (Feb. 2012), Dkt. 66-16 (internal quotations omitted).

Finally, appellants maintain that the criteria Hawaii used for identifying students who are not permanent residents—namely, payment of *non-resident* tuition or a home address *outside* of Hawaii—are unjustified. JS 29-30. Those criteria, as the district court explained, are highly relevant to determining whether an individual has a present intent of making Hawaii a permanent home. App. 54-55. Appellants offer no basis to question the soundness of that reasoning.

C. The Purported Conflict Among Courts Of Appeals Does Not Warrant Plenary Review

Finally, the purported conflict among the courts of appeals described by appellants (JS 21) does not weigh against summary affirmance. According to appellants, "the Ninth Circuit [has] held that states *must* use total population, while the Fourth and Fifth Circuit [have] held they merely *may*." *Id.* Appellants inaccurately describe the case law and, in any event, this case would afford no opportunity to harmonize those decisions.

Each of the decisions cited by appellants upheld use of a total population base, but each recognized that, at least in some circumstances, States may elect not to use a total population base. In *Garza* v. *County of Los Angeles*, 918 F.2d 763, 773 (9th Cir. 1990), a county objected to a district court's use of a total population rather than citizen voting-age population base in fashioning a remedy for a Voting Rights Act violation, arguing that use of total population "is erroneous as a matter of law." The panel rejected that argument. In doing so, it recognized that *Burns* "*permit[s]* states to consider the distribution of the voting population *as well as* that of

total population," but it concluded that *Burns* "does not *require* states to do so." *Id.* at 774 (first two emphases added). Based on the record before it, the court held that total "population is an appropriate basis," in large part because California law required that result. *Id.*

The decision below does not conflict with *Garza*. *Garza* did not consider any issue relating to use of a facially neutral population base of permanent residents; rather, that case concerned the alternative of citizen voting-age population in the specific context of a jurisdiction where a large number of residents are neither citizens nor of voting age and where that jurisdiction had been found to have engaged in intentional discrimination. In addition, the district court correctly held that *Garza* is inapposite because Hawaii law requires excluding non-permanent residents from its apportionment base whereas California required the opposite—use of total population. App. 43-44.

Nor does *Garza* conflict with later decisions of the Fourth and Fifth Circuits. In *Daly* v. *Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996), the Fourth Circuit held that the choice between total population and voting-age population was "quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment." Recognizing that, under *Burns*, "the decision to use an apportionment base other than total population is up to the state" (*id.* at 1225), the court of appeals held that the district court erred in second-guessing North Carolina's choice of a total population base (*id.*).

Chen v. *City of Houston*, 206 F.3d 502 (5th Cir. 2000), is to the same effect. There, the court rejected the claim that a city acted unlawfully in apportioning based on "total population rather than citizen voting

age population." *Id.* at 522. The court recognized that, under *Burns*, there is no "mandate [to] use … total population." *Id.* at 528. But, the court explained, the question of which base to use is an "eminently political question … best left to the political process." *Id.*

Thus, there is no relevant conflict between *Garza*, on the one hand, and *Daly* and *Chen*, on the other. Each court upheld use of a total population base, and each recognized there are some circumstances in which a State may choose not to use total population. To the extent the opinions differ at all about when the Constitution permits use of a citizen voting-age base, this case does not present that question, and thus is an ill-suited vehicle to address any such disagreement.

II. THE DISTRICT COURT PROPERLY UPHELD HAWAII'S DECISION TO AVOID DISTRICT LINES STRADDLING BASIC ISLAND UNITS

Hawaii has long given voice to its distinct communities of interest and protected its political subdivisions in reapportionment by not using canoe districts that straddle the four basic island units. That fundamental policy judgment—which is mandated by Hawaii's Constitution and informed by Hawaii's failed experiment with canoe districts—led to the maximum deviations appellants challenged below. Applying this Court's decisions permitting States to adhere to longstanding political subdivisions in reapportionment but insisting upon sufficient justification for resulting deviations, the district court held that Hawaii's decision not to use canoe districts was "not only rational—it is substantial and has considerable force." App. 82.

The judgment of the district court should be summarily affirmed. First, appellants, all of whom live on Oahu, lack Article III standing because it is speculative

whether the remedy they seek, a judicial order mandating the use of canoe districts, would redress any injury they may suffer. Second, the district court's decision on the merits reflects a proper application of settled precedent.

A. Appellants Lack Standing

To establish Article III standing, a party must establish, among other things, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (internal quotations omitted). To do so, a party may not rely on "pure speculation" or "conjecture[]," particularly where "redressability depends on premises as to which there remains considerable doubt." *Id.* at 1444. Appellants, moreover, bear the burden of proof on this question. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998). Appellants lack standing because they have not established that the relief they seek—the use of cross-island districts—would remedy any injury they suffer.

Each of the eight appellants resides on Oahu. But only three reside in districts that are underrepresented—namely, Senate District 11, which is underrepresented by 3.67%, and House District 34, which is underrepresented by 2.29%. App. 35, 90. The district court held that those three appellants have standing to challenge the 2012 plan as whole. App. 35. Whether or not such modest deviations amount to constitutional injury, appellants lack standing even under the district court's theory because it is entirely speculative whether the remedy they seek would redress underrepresentation in either Senate District 11 or House District 34.

Although Hawaii's decision not to use canoe districts is responsible for the bulk of the maximum deviations in the Senate and House due to deviations based on Kauai's Senate District 8 and House District 15 (App. 67-68), that decision does not directly affect deviations among districts on Oahu, nor is there any evidence that it is responsible at all for the underrepresentation in Senate District 11 or House District 34. As a whole, in fact, Oahu is overrepresented under Hawaii's 2012 plan: Oahu has an average population per seat of 16,281, the smallest average district size of any basic island unit. *See 2012 Plan* 22. *Within* Oahu, there is variation in legislative district size, with some districts overrepresented and others underrepresented. *See id.* at 19-20 (Tables 9-10). The differences in the sizes of Oahu's districts are the result of Hawaii's effort to account for Oahu-specific factors, such as population shifts. *See* App. 83-84. Although appellants separately challenged the justifications for those intra-Oahu disparities below, that challenge was rejected, and they do not appeal that aspect of the district court's decision. Instead, this appeal is limited to whether the maximum deviations resulting from Hawaii's decision not to use "canoe districts" are constitutional. JS ii (second question presented).

The problem for appellants is that it is entirely speculative whether a judicial order mandating the use of canoe districts would redress underrepresentation in Senate District 11 or House District 34. First, it is unclear that canoe districts would involve Oahu at all: Hawaii's experience with canoe districts reveals that the State need not—and, indeed, after 1991, did not—draw combined Senate or House districts including Oahu. *See, e.g.*, Masumoto Decl. ¶ 10 (discussing combined Senate and House districts of Kauai and Maui—not Oa-

hu). Second, as noted above, Oahu as a whole is overrepresented under the 2012 plan, and the differences in the size of districts within Oahu are the result of Oahu-specific factors unrelated to canoe districts. For those reasons, appellants simply cannot demonstrate that the use of canoe districts would have any effect on apportionment of Senate District 11 or House District 34.

Because appellants have not carried their burden of showing redressability, they lack Article III standing. *See Kaplan* v. *County of Sullivan*, 74 F.3d 398, 400 (2d Cir. 1996) (plaintiff lacked standing to challenge reapportionment plan where no "plan" that would redress plaintiff's claimed vote dilution "has even been proposed" and "possibility" that striking down existing plan would lead to a new plan benefitting plaintiff "is too speculative to give [plaintiff] standing"). This does not immunize Hawaii's reapportionment from judicial review; instead, it is up to residents of underrepresented districts who have an actual stake in the potential use of canoe districts and might arguably benefit from them (for example, residents of Kauai) to sue.

The judgment of the district court should be summarily affirmed on this ground. *See Pressler* v. *Blumenthal*, 434 U.S. 1028, 1029 (1978) (Rehnquist, J., concurring) (summary affirmance "could rest as readily on [the] conclusion that appellant lacked standing" as on agreement with the district court on the merits).

B. The Decision Of The District Court Should Be Summarily Affirmed On The Merits

If the Court reaches the merits, it should summarily affirm. The district court correctly applied settled precedent to the unique circumstances here.

1. The district court correctly held that Hawaii had substantial reasons for the deviations

a. The "basic aim of legislative apportionment" is "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565-566. The aspirational ideal is legislative districts equal in size. But this Court has long recognized that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.* at 577. Moreover, "the character as well as the degree of deviations from a strict population basis" must be considered in evaluating a State's district lines. *Id.* at 581. A State must "make an honest and good faith effort to construct districts … as nearly of equal population as is practicable," but deviations from the mathematical ideal "may be necessary to permit the States to pursue … legitimate objectives such as maintain[ing] the integrity of various political subdivisions." *Brown*, 462 U.S. at 842 (internal quotations omitted). The Court repeatedly has cautioned against "a mere nose count" that could "submerge" legitimate state interests and "furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Id.* (internal quotations omitted).

The Court has adopted a general framework for evaluating deviations from mathematical equality in apportionment cases. "[A]n apportionment plan with a maximum population deviation under 10%" is "insufficient to make out a prima face case of invidious discrimination … so as to require justification by the State." *Brown*, 462 U.S. at 842 (internal quotations omitted). By contrast, "[a] plan with larger disparities … creates a prima facie case of discrimination and therefore must

be justified by the State." *Id.* at 842-843. Apart from that framework, however, this Court has never adopted a strict mathematical rule regarding the size of maximum deviations. Although the Court has suggested there may be an upper limit on maximum deviations (*see, e.g.*, *Board of Estimate of N.Y.* v. *Morris*, 489 U.S. 688, 702 (1989)), it has resolutely adhered to the principle that "each case must be evaluated on its own facts" (*Chapman* v. *Meier*, 420 U.S. 1, 22 (1975); *see Swann* v. *Adams*, 385 U.S. 440, 445 (1967); *Reynolds*, 337 U.S. at 578).

b. The three-judge district court properly applied those principles here. Based on its review of a substantial factual record, the court held that the maximum deviations at issue, although "significant," result from a State policy judgment that is "rational, legitimate, and substantial" in light of Hawaii's unique "geography, history, culture, and political structure" (App. 64), and that the magnitude of the deviations does not violate the Equal Protection Clause (App. 85-86).

It is common ground that "the policy that drove the bulk of the deviations was maintaining the integrity of the basic island units." App. 64. The maximum deviations in the 2012 plan were "driven by a single and unalterable fact: the permanent resident population of Kauai is 66,805." App. 66. "Given a mathematically ideal population for a State Senate district of 50,061," Kauai, without being part of a canoe district, would be either underrepresented or overrepresented in the State Senate. App. 66-67. The choice for Hawaii was therefore binary: "Either keep Kauai as a single Senate district (with correspondingly large deviations) or require canoe districts (to balance populations more equally)." App. 69.

The State's decision to avoid canoe districts was entirely reasonable. The "preservation of political subdivisions" reflecting longstanding communities of interest such as Hawaii's basic island units (which are also Hawaii's principal counties) is "a clearly legitimate policy." *Brown*, 462 U.S. at 843; *see Tennant* v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8 (2012) (per curiam) ("not splitting political subdivisions [is a] valid, neutral state districting polic[y]"); *Shaw* v. *Reno*, 509 U.S. 630, 646 (1993) ("maintain[ing] the integrity of political subdivisions" is a "legitimate state interest[]"); *see also Abrams* v. *Johnson*, 521 U.S. 74, 92 (1997) (recognizing "traditional districting principles such as maintaining communities of interest and traditional boundaries") (internal quotations omitted). Ensuring sufficient voice for communities within traditional political subdivisions is not "local parochialism" (JS 34), but, as this Court has explained, a "substantial and legitimate" state interest. *Brown*, 462 U.S. at 853 (holding that Wyoming's decision to apportion based on counties, a policy "based on the State Constitution" and "followed since statehood," is "supported by substantial and legitimate state concerns").

The record here leaves no doubt that Hawaii has substantial reasons to protect the integrity of basic island units. *See* Statement A.2, above. This policy is not an end in itself, but a means for protecting the distinctive political voices of Hawaii's communities and, ultimately, ensuring "fair and effective representation." *Reynolds*, 377 U.S. at 565-566; *see* App. 86. As the Committee on Apportionment and Districting recognized during Hawaii's 1968 Constitutional Convention, "[I]f a voter of the State of Hawaii is to have meaningful representation in any kind of government, he must have effective representation from his own island unit in the state legislature." Comm. Rep. No. 58, at 263.

The committee's conclusion is even more "obvious and inescapable" (Comm. Rep. No. 58, at 263) today in the light shed by Hawaii's failed experience with canoe districts. As the district court found, the record supports "one conclusion—Hawaii's two-decade canoe-district experience was perceived as a failure by constituents and representatives alike." App. 72.

The failure of canoe districts to ensure effective representation can be explained in part by Hawaii's history. "Hawaii's basic island units … predate statehood. Culturally and historically, the island units are stand-alone geographic and physical units and were distinct Kingdoms at the time of Western Contact in 1778, having been ruled by different chiefs and possessing distinct language variations and traditions." App. 77 (citing McGregor Decl. ¶¶ 5-10, May 10, 2012, Dkt. 66-14). There are also serious practical concerns with canoe districts that serve as an obstacle to fair and effective representation. For example, the district court cited record evidence that the use of canoe districts had made it exceptionally challenging for representatives "to spend as much time on their non-home islands as on their home islands." App. 78 (citing Kouchi Decl. ¶ 14, Oct. 2012, Dkt. 72-13).

Thus, as the district court found, "Hawaii's choice of basic island unit autonomy … is grounded in the Hawaii Constitution, Hawaii's unique geography, cultural history … , government organization, and a two-decade failed experiment with canoe districts." App. 81-82. The district court correctly determined that Hawaii's "choice is not only rational—it is substantial and has considerable force" (App. 82), and that the resulting maximum deviations do not violate the Equal Protection Clause (App. 85-86).

2. Appellants' criticisms of the district court's decision are misplaced

On appeal, appellants first argue that the district court rendered the "10% threshold" of maximum deviation among districts used for identifying a *prima facie* equal protection violation "virtually meaningless in Hawaii," and that the court "immunize[d]" Hawaii from judicial review of its reapportionment plan. JS 32. Those are not remotely plausible characterizations of what the district court did. The district court recognized that, because the maximum deviations were above 10%, Hawaii was required to justify them (App. 64), and it recognized that "the greater the deviation, the stronger the justification required" (App. 63). The court then engaged in a searching review of the record, with the burden squarely on Hawaii to justify its 2012 plan. *See* App. 63-82.

Appellants also misstate Hawaii's position in arguing that it is based on "the mere fact that islands are involved." JS 32. To be sure, Hawaii's unique geography as a volcanic archipelago was the reason, centuries ago, for the emergence of Hawaii's four autonomous political units and for their separate economic, political, and cultural development. *See* App. 82. But Hawaii's two-decade failed experiment with canoe districts demonstrated that differences among the distinct communities on the basic island units persist and that those differences frustrate the goal of fair and effective representation when district lines straddle those communities.[6]

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[6] Appellants assert the canoe district rule is "not inviolate," observing that the island unit of Maui is composed of islands. JS 34. But the four islands that form the unit (and county) of Maui have been unified for centuries, linking them together in culture, history, and identity. *See, e.g.*, Comm. Rep. No. 58, at 262.

In addition, appellants point to other States that, they assert, could "easily claim to have *more* pronounced geographical and cultural differences than the supposed differences between Hawaii's islands." JS 32. But there is no other State in the nation composed entirely of islands. And appellants do not even attempt to establish that any other State has political subdivisions, dating back centuries, that have developed along distinct economic, political, and cultural paths owing in part to separation from each other by "30 to 70 miles of ocean." App. 78. In any event, the only question before the district court was whether *Hawaii's* 2012 plan reasonably advances a rational state policy. The constitutionality of deviations in other States would turn on the strength of the justifications offered, not on what Hawaii does. Approval of deviations in "one State has little bearing on the validity of similar variation in another State." *Swann*, 385 U.S. 445; *see Reynolds*, 377 U.S. at 578.

Finally, appellants argue that, whatever the merits of Hawaii's decision not to use canoe districts, deviations of 44.22% and 21.57% are too large to ever be justified. JS 35-36. This categorical argument—which functionally reduces to the proposition that the Equal Protection Clause requires Hawaii to use canoe districts—runs contrary to this Court's precedent.

This Court has declined, quite appropriately, to reduce complex questions of political representation to a math problem. "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause … the mathematical formula that establishes what range of percentage deviations is permissible, and what is not." *Mahan*, 410 U.S. at 329. Thus, in analyzing maximum deviations of 30% and 40%, this Court

has *not* held that such deviations are *per se* unconstitutional, but rather that they be justified with a "satisfactory explanation grounded on acceptable state policy." *Swann*, 385 U.S. at 444; *see Kilgarlin* v. *Hill*, 386 U.S. 120, 122 (1967) (per curiam) ("[U]nless satisfactorily justified …, population variances [of 26.48%] are sufficient to invalidate an apportionment plan."). Here, Hawaii has supplied a "satisfactory explanation," as the district court held. *See* App. 85-86.

Nothing in the opinion below establishes a "new national high water mark" for maximum deviations. JS 5. The district court's decision was narrow, cautious, and limited to Hawaii. The court was clear that it was not suggesting that Hawaii's policy choice "could justify any deviation, no matter how large" (App. 86) or that "any other state could justify deviations of this magnitude" (App. 64). Rather, its holding was "specific to the facts before [it]." App. 86. The district court's assessment of the adequacy of Hawaii's justifications was correct and raises no issue worthy of plenary review.

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted.

DAVID M. LOUIE
Counsel of Record
ATTORNEY GENERAL
JOHN F. MOLAY
GIRARD D. LAU
CHARLEEN M. AINA
DEPUTY ATTORNEYS GENERAL
OFFICE OF THE ATTORNEY GENERAL
STATE OF HAWAII
425 Queen St.
Honolulu, HI 96813
(808) 586-1360
david.m.louie@hawaii.gov

SETH P. WAXMAN
PAUL R.Q. WOLFSON
KELLY P. DUNBAR
ALBINAS J. PRIZGINTAS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

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