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IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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WILLIAM M. HICKS; RALPH BOYEA; MADGE SCHAEFER; MICHAELA IKEUCHI;  
KIMEONA KANE; MAKI MORINOUE; ROBERTA MAYOR; DEBORAH WARD;  
JENNIFER LIENHART-TSUJI; LARRY S. VERAY; and PHILIP BARNES,  
Petitioners,

vs.

THE 2021 HAWAI‘I REAPPORTIONMENT COMMISSION AND ITS MEMBERS;  
THE STATE OF HAWAI‘I OFFICE OF ELECTIONS; and SCOTT NAGO, in his  
official capacity as Chief Elections Officer, State of Hawai‘i,  
Respondents.

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SCPW-22-0000078

ORIGINAL PROCEEDING

MAY 9, 2022

CONCURRING & DISSENTING OPINION OF McKENNA, J.,  
IN WHICH WILSON, J., JOINS

### **I. Introduction**

As the ultimate interpreter of the Constitution of the  
State of Hawai‘i ("Hawai‘i Constitution"), AlohaCare v. Dep’t of  
Hum. Services, 127 Hawai‘i 76, 87, 276 P.3d 645, 656 (2012), this

court has been called upon to construe article IV, section 6 regarding reapportionment of state legislative districts. At issue is whether the 2021 Reapportionment Commission ("Commission") properly addressed criterion 6 of article IV, section 6, which provides: "Where practicable, representative districts shall be wholly included within senatorial districts."

For the first time since Hawai'i adopted single-member legislative districts in 1982, it became practicable to effectuate this "district within district" provision for all 51 house and 25 senate seats. Yet, the Commission's 2021 Final Legislative Reapportionment Plan ("the Plan") placed 33 of 51 house districts into two or more senate districts.

Article IV, section 6 provides that the Commission "shall be guided by" eight enumerated criteria; four are mandatory in all circumstances and four, including the "district within district" provision, are to be applied when "practicable." The majority endorses the Commission's approach that all it had to do was "consider" the four non-mandatory criteria and it was not required to effectuate the "district within district" criterion even "where practicable." The majority says:

Our constitution requires that the reapportionment commission consider the district within district guidelines. See supra section II(2). But it does not dictate what that consideration should look like. Decisions about when and how the guidelines ought to be considered are left to the discretion of the reapportionment commission.

The "shall be guided by" preface to the article IV, section 6 criteria, however, applies to all eight criteria, including the four criteria the majority acknowledges are mandatory. And the constitution requires that article IV, section 6 be effectuated "where practicable."

Hence, as more fully discussed below, in ruling that the Commission did not violate constitutional requirements, the majority fails to enforce the constitution's plain language. It also fails to properly apply other well-established principles of constitutional interpretation. I therefore respectfully but firmly dissent.

In this opinion, I set out how I believe future reapportionment commissions should construe and apply article IV, section 6. Nothing in the majority opinion prohibits future commissions from adopting the approach provided. It is my ardent hope that future reapportionment commissions will properly apply article IV, section 6 and more fully give effect to the intent of the people of Hawai'i as expressed in article IV, section 6 of the Hawai'i Constitution.

## **II. Discussion**

### **A. Constitutional interpretation**

#### **1. Governing principles**

In conducting our review, it is axiomatic that issues of constitutional interpretation present questions of law that this

court reviews de novo. League of Women Voters of Honolulu v. State, 150 Hawai'i 182, 189, 499 P.3d 382, 389 (2021) (hereinafter "League").

Because constitutions derive their power and authority from the people who draft and adopt them, 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 provision is to give effect to that intent. This intent is to be found in the instrument itself.

The general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.

Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

Id. (cleaned up; emphases added).

In addition, as we have repeatedly and consistently held, we answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. See, e.g., Alexander & Baldwin, LLC v. Armitage, No. SCWC-16-0000667, 2022 WL 1012958, at \*7 (Haw. Apr. 5, 2022) (quoting Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006)).

## **2. The majority errs in its application of rules of constitutional interpretation**

The majority cites to these fundamental principles, but fails to properly apply them. The majority says that as long as the Commission "considered" application of article IV, section 6

criteria that are to be applied "where practicable," it has discretion to not apply them.

The majority cites to Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (1994), for the proposition that the abuse of discretion standard applies to this court's review of discretionary actions taken by public bodies. (Citing Kawamoto, 75 Haw. at 467, 868 P.2d at 1186.) Kawamoto, however, was an administrative appeal concerning an interpretation of the Revised Charter of Honolulu and rules of the 1991 Council Reapportionment Committee regarding Honolulu city council districts. 75 Haw. at 465-66, 868 P.2d at 1185. Kawamoto did not involve an interpretation of the Hawai'i Constitution. In fact, we clearly stated that although city law governing reapportionment was similar to portions of article IV, sections 3 and 6 requiring contiguous and compact districts, these constitutional provisions did not apply to apportionment of city council districts. 75 Haw. at 468 n.6, 868 P.2d at 1186 n.6. And in referring to the abuse of discretion standard applicable to discretionary acts of public bodies, Kawamoto, 75 Haw. at 468, 868 P.2d at 1186, we referred to other cases involving administrative appeals,<sup>1</sup> for which the abuse of discretion

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<sup>1</sup> Kawamoto, 75 Haw. at 467, 868 P.2d at 1186 (first citing Kaiser Foundation Health Plan, Inc. v. Department of Labor & Indus. Relations, 70 Haw. 72, 762 P.2d 796 (1988); and then citing Hoopii v. Sinclair, 40 Haw. 452 (Haw. Terr. 1954)).

standard of review sometimes applies.<sup>2</sup> But, as further discussed below, the abuse of discretion standard does not apply to this question of constitutional interpretation.

The majority states, "In the context of this case, this means we will not substitute our judgment for that of the Commission with respect to the Commission's exercise of discretion given to it by the Hawai'i Constitution." (Emphasis omitted.) The majority fails to properly apply the well-established precedent, cited above, that "[w]e answer questions of constitutional law [de novo] by exercising our own independent judgment based on the facts of the case."<sup>3</sup>

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<sup>2</sup> See Hawai'i Revised Statutes ("HRS") § 91-14(g) regarding "Judicial review of contested cases," which provides;

(g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g) (2012) (emphasis added).

<sup>3</sup> A Westlaw search reveals more than 80 Hawai'i Supreme Court cases citing to these principles of constitutional interpretation.

The problem is that the Commission and the majority misapprehend the Commission's discretion. As more fully discussed below, if constitutional criteria or considerations existed that rendered effectuation of the "district within district" criterion infeasible, then the Commission had the discretion to determine which criteria would be effectuated. But here, the Commission did not identify any constitutional considerations or criteria that would have rendered effectuation of the "district within district" criterion infeasible.

**3. Article IV, section 6 is self-executing**

The majority also incorrectly holds that article IV, section 6 does not "place[] concrete limits on the Commission's discretion to craft a reapportionment plan" and that "[t]he Commission must *consider* the district within district guidelines when redrawing district lines. But it is not required to give them any particular effect in redistricting."

By so holding, the majority fails to apply another fundamental tenet of constitutional interpretation, cited above, that "a constitutional provision must be construed in connection with other provisions of the instrument." The majority fails to properly apply Hawai'i Constitution, article XVI, section 16, which provides that "[t]he provisions of [our] constitution shall be self-executing to the fullest extent that their respective natures permit."

As explained in Morita v. Gorak, 145 Hawai'i 385, 453 P.3d 205 (2019), a constitutional provision is self-executing if it supplies a sufficient rule by means of which the duty imposed may be enforced. Morita, 145 Hawai'i at 392, 453 P.3d at 212. The hallmark sign of a non-self-executing constitutional provision is inclusion of the phrase that it is to be enforced "as provided by law." See id. Article IV, section 6 does not include such language. Rather, it provides that the Commission must be guided by delineated criteria in making redistricting decisions. See Haw. Const. art. IV, § 6 ("In effecting such redistricting, the commission shall be guided by the following criteria . . . ." (emphasis added)).

The language of article IV, section 6 also supplies sufficient rules by means of which the duties imposed upon the Commission may be enforced, as further explained in Section II.B.2-3 below. Article IV, section 6 is therefore self-executing. Pursuant to article XVI, section 16, the Commission was duty-bound to effectuate the criteria to "the fullest extent that their respective natures permit."

**B. Because it was practicable to do so, the Commission was required to wholly include house districts within senate districts**

The majority does not properly construe Article IV, section 6 pursuant to governing rules of constitutional interpretation. The provision should be interpreted as follows.



**1. Article IV, section 6 was intended to effectuate the right to vote and to prevent against dilution of the weight of a vote**

By way of background, a fundamental principle of constitutional interpretation is that in this court's exercise of its independent judgment in interpreting the Hawai'i Constitution, we are to construe a provision in light of the circumstances under which it was adopted and the history which preceded it. League, 150 Hawai'i at 189, 499 P.3d at 389.

In this regard, Anne Feder Lee, The Hawaii State Constitution: A Reference Guide 97-105 (Greenwood Press 1993) (hereinafter "Lee"), explains that reapportionment has long been a source of political and legal controversy in Hawai'i; although the Organic Act required periodic reapportionment, the territorial legislature failed to observe the mandate. Lee, at 97. From about 1950, districts for 25 senate seats (increased from 15) were based on geographical balance among the islands while the 51 house seats (increased from 25) were based on population. Id.

After statehood in 1959, the United States Supreme Court held in Reynolds v. Sims, 377 U.S. 533 (1964), that representation in state legislatures must be apportioned equally on the basis of population rather than geographical areas. Lee, at 97. The Hawai'i state attorney general then issued a series of opinions concluding that the legislature was malapportioned.

Id. "A period of complex maneuvers and events within the legislature, executive branch, state supreme court, and federal courts followed . . . . The 1968 convention was born from this struggle . . . ." Id.

The 1968 constitutional convention therefore focused significant attention on reapportionment. Id. Article IV, section 6 was one of the proposed constitutional amendments regarding reapportionment. Lee, at 102-03. The convention proceedings are replete with discussions regarding the need to comply with the requirements of Reynolds. 2 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 56, 121, 123, 126, 130, 135, 197-99, 220, 257, 299-300, 304, 307 (1972).

Thus, based on principles of constitutional interpretation, the issues Reynolds sought to address provide context for this court's de novo interpretation of article IV, section 6. Reynolds was concerned with gerrymandering and providing equal weight to votes. It also focused heavily on the right to vote, and pointed out that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds, 377 U.S. at 554-55.

Thus, the criteria within article IV, section 6 were intended to prevent gerrymandering and ensure equal weight of votes. Such goals are critical to the fundamental right to

vote, which will be further discussed by Justice Wilson in his additional dissent to follow.

I note, however, that the "district within district" criterion is a commonly required neutral redistricting criterion also referred to as "nesting." See Bruce E. Cain & Karin MacDonald, The Implications of Nesting in California Redistricting, at 2 (2007), available at [https://statewidedatabase.org/resources/redistricting\\_research/Nesting\\_&\\_Redistricting.pdf](https://statewidedatabase.org/resources/redistricting_research/Nesting_&_Redistricting.pdf), also available at <https://perma.cc/NY2X-VZTW> ("The term nesting refers to the incorporation of two Assembly districts within the boundaries of a single Senate district.").

As explained in Ethan Weiss, Comment, Partisan Gerrymandering and the Elusive Standard, 53 Santa Clara L. Rev. 693 (2013) (hereinafter "Weiss"):

Sometimes, legislatures adhere to traditional redistricting criteria. These requirements can include, but are not limited to: geographic contiguity, geographic compactness, preserving communities of interest, and nesting. The only redistricting requirement legislatures must adhere to under the Constitution is the "one person, one vote" requirement, though compliance with the above factors is considered normal and preferable.

Weiss, at 697 (cleaned up); see also Robert Colton, Note, Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering, 86 Fordham L. Rev. 1303, 1307 (2017) ("[R]edistricting often includes geographic contiguity,

geographic compactness, preserving communities of interests, and nesting[.]").

As further explained by Gary Michael Parsons, The Institutional Case for Partisan Gerrymandering Claims, 2017 Cardozo L. Rev. de novo 155 (2017) (hereinafter "Parsons"):

Neutral criteria (such as compactness, adherence to political subdivisions, and nesting) are important in redistricting because they further the neutral and legitimate purposes of a geographic system of representation (accountability, ease of political organization and election administration, etc.). See, e.g., Karcher v. Daggett, 462 U.S. 725, 756 (1983) (Stevens, J., concurring) (noting that "geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation"); id. at 758 (noting that political subdivision boundaries "tend to remain stable over time," adherence to these boundaries make districts "administratively convenient and less likely to confuse the voters," and "[r]esidents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services"); id. at 787 n.3 (Powell, J., dissenting) (noting that "[m]ost voters know what city or county they live in," and adherence to subdivision boundaries "would lead to more informed voting" and would "lead to a representative who knows the needs of his district and is more responsive to them") . . . .

Parsons, at 161 n.41 (emphasis omitted).

Thus, the "district within district" criterion of article IV, section 6 furthers the important purposes of facilitating political organization and developing accountability of senators to communities of common interest. This leads to more informed voting, and provides equal weight to the vote of members of contiguous house districts.

## 2. Article IV, section 6 in general

The most fundamental principle of constitutional interpretation, however, as cited above, is that the intent of a constitutional provision is to be found in the language of the instrument itself.

Article IV, section 6 provides in its entirety:

**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.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.
2. No district shall be so drawn as to unduly favor a person or political faction.
3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
4. Insofar as practicable, districts shall be compact.
5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.
6. Where practicable, representative districts shall be wholly included within senatorial districts.
7. Not more than four members shall be elected from any district.
8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.<sup>4</sup>

As we explained in Solomon v. Abercrombie, 126 Hawai'i 283, 270 P.3d 1013 (2012):

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<sup>4</sup> As explained in Anne Feder Lee, The Hawaii State Constitution: A Reference Guide 102 (Greenwood Press 1993), in 1992, Hawai'i voters ratified an amendment substituting "registered voters" with the "permanent residents" language that now appears.

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).

Abercrombie, 126 Hawai'i at 292, 270 P.3d at 1022.

In other words, "[a]pportionment 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." Id. The 2021 Reapportionment Commission was required to follow the same process.

The language of article IV, section 6 provides that in effecting redistricting, the Commission shall be guided by the eight criteria delineated above. As the majority acknowledges, the criteria numbered 1, 2, 3, and 7 are mandatory and must be

applied in all circumstances. Criterion 7, "Not more than four members shall be elected from any district[,]" no longer has any practical effect, as Hawai'i eliminated multi-member districts in 1982. But in applying article IV, section 6, the Commission was first required to ensure that (1) no district extend beyond the boundaries of any basic island unit; (2) no district be so drawn as to unduly favor a person or political faction; and (3) districts are contiguous, except in the case of districts encompassing more than one island.

Next, article IV, section 6 provides that criteria 4, 5, 6, and 8 be effectuated by the Commission where "practicable."<sup>5</sup> Based on principles of constitutional interpretation, these words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them. League, 150 Hawai'i at 189, 499 P.3d at 389.

The majority continuously refers to the "district within district" criterion as a "guideline," based on the "guided by" preface to article IV, section 6. The "guided by" language, however, applies to all eight criteria within article IV, section 6, including the four criteria the majority acknowledges are mandatory. Thus, this provision is not merely a "guideline" that must be "considered" but can then be disregarded. The

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<sup>5</sup> As noted above, pursuant to article XVI, section 16, constitutional provisions are self-executing.

plain language of the constitution requires that the "district within district" criterion be effectuated "where practicable."

Properly applying rules of constitutional interpretation, in the natural sense, "practicable" means "reasonably capable of being accomplished; feasible in a particular situation."

Black's Law Dictionary (11th ed. 2019) In the context of article IV, section 6, its criteria are "practicable" if (1) they are reasonably capable of being accomplished; and (2) other constitutional criteria or considerations do not render their effectuation infeasible.

The expressed intent of the framers, another principle of constitutional interpretation, is consistent with this approach. The Committee on Legislative Apportionment and Districting ("Committee") stated:

It is not intended that these guidelines be absolute restrictions upon the commission excepting for numbers 1, 2, 3 and 7 which are stated in mandatory terms. The remainder [including the district within district guideline] are standards which are not intended to be ranked in any particular order. Rather, your Committee believes that they are matters that should be considered in any decision concerning districting and that the balance to be struck among them is a matter for case-by-case determination. The inclusion of these guidelines is intended to aid the reapportionment commission in maintaining impartiality and objectivity in its own reapportionment plan and to provide the courts with a standard for review of claims of gerrymandering or other unfair or partial result in the apportionment plan.

Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 265 (1973) (hereinafter "Committee Report").



The Committee stated that although criteria 4, 5, 6, and 8 are not mandatory, the "balance to be struck among them" was to be determined on a "case-by-case" basis. A case-by-case determination is required because applying criteria 4, 5, 6, and 8 may not always be "practicable" because (1) their application may not be reasonably capable of being accomplished; and (2) other constitutional criteria or considerations may render their effectuation infeasible. But "striking a balance" among these criteria indicates the framers thought they were to be applied, if practicable. The Committee also indicated the guidelines were intended to aid reapportionment commissions to avoid challenges to reapportionment plans and to provide courts with a standard of review. If the criteria were not intended to be applied where practicable, they would not be helpful in this regard. Thus, the framers' intent, also relevant to constitutional interpretation, further indicates the criteria were intended to be applied to the extent practicable.

If the Committee Report created ambiguity as to whether the criteria must be applied where practicable, another principle of constitutional interpretation renders the constitutional language controlling. As stated in United Public Workers Local 646 v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002), constitutional intent "is to be found in the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in

construing it, is not at liberty to search for its meaning beyond the instrument." 101 Hawai'i at 50, 62 P.3d at 193 (quoting State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981)).<sup>6</sup>

But all in all, the language of article IV, section 6 is not ambiguous. Criteria 4, 5, 6, and 8 must be applied where "practicable."

**3. Application of steps to the "district within district" provision**

Thus, criteria 4, 5, 6, and 8 of article IV, section 6 must be applied where practicable. With respect to criterion 6, the "district within district" provision, application of this criterion is "practicable" if (1) it is reasonably capable of being accomplished; and (2) other constitutional criteria or considerations do not render its effectuation infeasible.

To effectuate this criterion to the fullest extent as its nature permits, the Commission was first required to draw the lines for house districts, then "wholly include" those house districts within senatorial districts, if practicable. With

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<sup>6</sup> In this regard, the majority also states that "[e]lsewhere in the same report, the Committee observed that the reapportionment plan it proposed substantially complied with the district within district guideline; but, it remarked, it adopted that criterion 'in a more general, less restrictive manner for future reapportionment.'" (Quoting Supp. Stand. Comm. Rep. No. 58, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 247 (1973)). The Committee, however, calls for "striking a balance," not ignoring criteria that can be effectuated, as the majority would allow.

respect to the first prong of the "practicability" analysis, the Commission was reasonably capable of wholly including house districts within senate districts. The issue is whether "constitutional criteria or considerations" rendered this effectuation infeasible.

From Hawai'i's 1982 adoption of single-member house and senate districts, Lee, at 100-01, until the 2021 reapportionment, it was never "practicable" to completely effectuate the "district within district" criterion of article IV, section 6, subsection 6 because it was "infeasible" to do so. This was because Reynolds v. Sims, 377 U.S. 533 (1964), held that the Fourteenth Amendment's Equal Protection Clause requires states to establish legislative electoral districts roughly equal in population, while subsection 1 of article IV, section 6 prohibits senatorial districts extending beyond basic island units.

From 1982, the number of O'ahu house seats to which O'ahu was entitled based on its population never doubled its appropriately allocated number of senate seats.<sup>7</sup> Thus, until the

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<sup>7</sup> Article IV, section 1 was amended in 1978 to read, "The year 1973, the year 1981, and every tenth year thereafter shall be reapportionment years." Lee, at 98. Thus, the 1988, 1998, 2008, and 2018 legislatures reflect the number of house and senate seats for each basic island unit as determined by the 1981, 1991, 2001, and 2011 Reapportionment Commissions, after any constitutional challenges. In 1988, 1998, 2008, and 2018, O'ahu had the following numbers of house to senate seats, respectively: 39 to 14, 37 to 18, 35 to 18, 35 to 17. See 1988, 1998, 2008, and 2018 House and Senate Journals' List(s) of Members.

2021 reapportionment, it was infeasible to have house districts wholly included in senate districts. In order to have senate districts roughly equal in population to satisfy the United States Constitution, they would have had to contain house districts from more than one basic island unit, which would violate the Hawai'i Constitution. Thus, the second prong of the "practicability" requirement could not be met, as other constitutional criteria or considerations rendered effectuation of criterion 6 infeasible.

But this situation changed as of the 2021 reapportionment. Unfortunately, this reality did not become clear until the Commission received data on December 31, 2021, which significantly changed the number of military personnel to be extracted for state legislative reapportionment purposes.<sup>8</sup> The new military personnel numbers reduced O'ahu's legislative population and required the Commission to reallocate one state house seat from O'ahu to Hawai'i Island. Until the new military numbers were received, O'ahu had been allocated 35 house seats and Hawai'i Island seven. But based on the revised military numbers, O'ahu ended up with 34 house seats and 17 senate seats;

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<sup>8</sup> See Solomon v. Abercrombie, 126 Hawai'i 283, 270 P.3d 1013 (2012) (holding 2011 reapportionment plan for the state legislature invalid because it disregarded the express mandate of article IV, section 4 that only permanent residents be counted in the population base for the state legislature).

Hawai'i Island with eight house seats and four senate seats; Maui with six house seats and three senate seats; and Kaua'i with three house seats and one senate seat.<sup>9</sup>

Hence, for the first time since the 1968 adoption of what is now article IV, section 6 and the 1982 advent of single-member state legislative districts, the numbers of house and senate seats allocated to basic island units made it practicable for representative districts to be wholly included in senatorial districts by combining contiguous house districts to form senate districts. This was because (1) the Commission was reasonably capable of combining two house districts from each basic island unit to form senate districts;<sup>10</sup> and (2) no other constitutional criteria or considerations were identified that rendered this effectuation infeasible, as in past reapportionments.

With respect to the "district within district" provision at issue, the Commission never stated whether it attempted to

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<sup>9</sup> Blair v. Ariyoshi, 55 Haw. 85, 515 P.2d 1253 (1973), upheld the distribution of three House seats to Kaua'i in order to minimize Kaua'i's underrepresentation in the state legislature.

<sup>10</sup> The exception would be Kaua'i, for which the three house districts would be combined into one senate district. See supra note 9.

effectuate it.<sup>11</sup> The Commission did not state it attempted to follow criterion 6 by combining contiguous house districts within basic island units to form senate districts, but that other constitutional considerations or criteria rendered it infeasible to do so.<sup>12</sup> With respect to article IV, section 6 criteria, after the December 13, 2021 receipt of the revised military personnel numbers, Commission Chair Mugiishi stated on January 13, 2022:

So commissioners, at our last meeting, including those from the technical committee spoke to the constitutional guidelines. In my, to what I heard, there were two important points made which I would like to reiterate here.

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<sup>11</sup> On January 13, 2022, the following statement was made by a Commissioner with respect to Maui:

So here on Maui, as an example, shifts in population and differing rates of growth in population between Central Maui and West Maui have necessitated the movement of a house district lines across large expanses of unpopulated lands essentially connecting Wailuku with Lahaina. And that said, the public in central Maui, which of course is our population center, has expressed an interest in at least, at minimum having representation by a central Maui house member or a central Maui senator. So in order to meet this goal on Maui, it became infeasible to neatly and nicely align two house districts with one senate district as has been the case in the past and still meet the mandate of balancing populations between districts. So I would just submit on that it's not practicable or even preferable necessarily to be hamstrung with the idea of you know aligning two house districts and one senate district in every instance throughout the state of Hawai'i.

The expressed desire of certain voters to be represented by someone who lives near them is not a constitutional consideration that can override article IV, section 6 requirements.

<sup>12</sup> The Commission was not required to enter written findings as HRS Chapter 91, the Hawai'i Administrative Procedure Act, does not apply to it. HRS § 91-1 (2012) defines an "agency" to which the chapter applies to include commissions "authorized by law" to make rules or adjudicate contested cases. "Authorized by law" means authorized by statute. Thus, Chapter 91 requirements do not apply to the Commission. This contrasts with the discussion of Chapter 92 in Section II.D.2 *infra*.

I tried to summarize it then, but I want to reiterate it again here today. The first is that there has been consideration by the technical committee of all the constitutional guidelines. The commissioners verbalized at that meeting that they did not pick and choose among their criteria. They considered them all. Consideration is required and due consideration is being given. The second is that after due consideration the members of the technical committee believed that the modified proposed plans represent what they the technical committee deemed to be the best, best complies with the constitutional guidelines. The point is that the need to balance the eight requirements of the constitution is why many of the guidelines are modified by the phrases where possible and where practicable. That is what I heard the commissioners speak to at our last meeting. . . . .

This statement indicates the Commission believed it merely needed to "consider" the constitutional criteria of article IV, section 6. But these self-executing provisions must be effectuated where practicable. There is nothing in the record to indicate why it was not completely practicable to effectuate the "district within district" criterion while also effectuating the other criteria. If constitutional criteria or considerations existed that rendered effectuation of the "district within district" criterion infeasible, then the Commission had the discretion to determine which criteria would be effectuated. But here, the Commission did not identify any constitutional considerations or criteria that would have rendered effectuation of the "district within district" criterion infeasible, and I see none in the record.

Thus, pursuant to article XVI, section 16 the Commission was required to give effect to article IV, section 6 to the

fullest extent possible. It did not do so. The Commission did not meet its constitutional obligation.

**C. Other issues in the majority's analysis**

**1. The majority undermines the Hawai'i Constitution**

In direct contravention of the language of article IV, section 6, which expresses the intent of Hawai'i's people, as confirmed by the expressed intent of the framers, the majority rules that criteria 4, 5, 6, and 8 need not be enforced as long as they were "considered" by the Commission. The majority indicates that the court need only address a failure to effectuate these provisions if there is a specific "claim that a reapportionment plan was unconstitutionally gerrymandered, biased, or otherwise contrary to the equal protection principles that animate article IV, section 6 and article I, section 5."

The majority states that Burns v. Richardson, 384 U.S. 73 (1966) is instructive in this regard, and provides a lengthy analysis of that case. The majority states that "Burns makes clear[ that] absent a showing that a reapportionment plan is unconstitutional or illegal we should not second-guess the reapportionment commission's exercise of its discretion to redistrict based on speculation."

But Burns was a 1966 opinion construing a reapportionment plan before the major 1968 Hawai'i constitutional amendments governing reapportionment. Burns did not address the specific



criteria delineated in article IV, section 6. As explained in Section II.B.1 above, article IV, section 6 was specially promulgated by the people of Hawai'i to reduce the possibility of gerrymandering or inequality in the weight of votes. And, to the extent Burns counsels against second-guessing a reapportionment commission's discretionary decisions, the majority acknowledges its holding only applies "absent a showing that a reapportionment plan is unconstitutional or illegal . . . ." (Emphasis added.)

As explained, "[t]he 1968 convention was born from th[e] struggle[s]" resulting from the "discretion" previously exercised by reapportionment commissions, which led to "complex maneuvers and events within the legislature, executive branch, state supreme court, and federal courts[,] " including the Burns opinion. See Lee, at 97. As indicated by the Committee, article IV, section 6 was promulgated to eliminate or at least minimize the possibility of claims of gerrymandering or unfair representation. Article XVI, section 16 renders the provision self-executing. Burns specifically notes that a commission's discretion is limited by constitutional requirements. Thus, Burns, which preceded article IV, section 6, recognizes that a reapportionment commission's failure to effectuate a criterion by which it was required to be guided and to apply, where practicable, can be unconstitutional and not within a

commission's discretion.

The majority errs in ruling that criteria 4, 5, 6, and 8 need not be implemented as long as they were "considered" and unless gerrymandering or unfair representation are alleged. The majority in effect says Burns permits provisions within our constitution to be ignored. But this court is the ultimate arbiter of the Hawai'i Constitution. The Commission and this court must give effect to this self-executing provision. The majority undermines the Hawai'i Constitution.

**2. Save Sunset Beach did not involve constitutional interpretation**

The majority also cites to Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 78 P.3d 1 (2003), as justification for its opinion that "shall be guided by" merely means that the criteria provide "direction or guidance" to the Commission and that as long as the Commission "considers" the "district within district" criterion, it is not required to follow it.

Save Sunset Beach, however, involved interpretation of guidelines within a county ordinance. 102 Hawai'i at 468, 78 P.3d at 4. The ordinance at issue concerned zoning of "country" designated lands, and specifically stated: "The following guidelines shall be used to identify lands which may be considered for this [country] district[.]" 102 Hawai'i at 469

n.5, 78 P.3d at 5 n.5 (quoting Revised Ordinances of Honolulu § 21-5.30(c)). Thus, Save Sunset Beach did not involve an issue of constitutional interpretation. Ordinances are not self-executing. Moreover, the ordinance at issue specifically provided "[t]he following guidelines shall be used to identify lands which may be considered" and specifically uses the word "considered." Id.

Additionally, as noted, the majority gives too much weight to "guided by" when it is clear the "practicable" language is determinative here. The "guided by" language applies to all eight of the criteria in article IV, section 6, including the four criteria the majority acknowledges are mandatory. Taking the majority's interpretation of Save Sunset Beach at face value, it would appear none of the eight criteria should be mandatory. Thus, the difference between criteria 1, 2, 3, and 7, on the one hand, and 4, 5, 6, and 8, on the other, must be derived solely from the "practicable" language, not the "guided by" language.

In sum, principles of constitutional interpretation provide that the intent of a provision is to be gleaned from its own language and article XVI, section 16 requires that constitutional provisions be effectuated to "the fullest extent that their respective natures permit." Article IV, section 6 provides that the Commission shall be guided by the criteria

contained therein; the Commission was required to effectuate the language to the fullest extent possible.

**D. Other issues raised by petitioners**

**1. Petitioners' claim regarding congressional reapportionment was properly dismissed**

I concur with the majority's denial of the petition with respect to congressional reapportionment. Hawai'i Revised Statutes ("HRS") § 25-2(b)(5) (2009) provides that, "[w]here practicable, state legislative [representative and senatorial] districts shall be wholly included within [U.S.] congressional districts." The Plan places four O'ahu house districts and five O'ahu senate districts into both U.S. congressional districts. HRS § 25-2(b) required the Commission to use a "total population" basis in determining reapportionment for congressional seats, which differs from the "permanent resident" basis used for state legislative seats.

**2. "Permitted interaction groups"**

I also concur with the majority that the Commission did not unconstitutionally delegate its redistricting work to a committee of four of its members. Article IV, section 2 provides that the Commission shall establish its own procedures, except as may be provided by law. "As may be provided by law" means as provided by the legislature. See, e.g., Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 189, 277 P.3d 279, 283

(2012). The "permitted interaction group" was authorized by HRS § 92-2.5(b) (2012).

### **III. Conclusion**

For the reasons above, I respectfully dissent from the majority opinion with respect to whether the Commission was required to wholly include state house districts within senatorial districts. I would have required the Commission to file a new reapportionment plan for the state senate by combining contiguous house districts within each basic island unit to form the 25 senate districts.

In this opinion, I have set out how future reapportionment commissions should construe and apply article IV, section 6. Nothing in the majority opinion prohibits future commissions from adopting the approach provided. It is my hope that future reapportionment commissions will give effect to the intent of the people of Hawai'i as expressed by the language of article IV, section 6 of the Hawai'i Constitution.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

