FOR PUBLICATION

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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CITIZENS FOR EQUITABLE AND RESPONSIBLE GOVERNMENT, a Hawai'i nonprofit corporation; BRENDA J. FORD; STANLEY A. BOREN; FLOYD H. LUNDQUIST; MARLENE E. LUNDQUIST; RONALD C. PHILLIPS, Plaintiffs-Appellants

and

BEVERLY BYOUK and SANDRA W. SCARR, Plaintiffs-Appellees

vs.

COUNTY OF HAWAI'I; COUNTY CLERK, COUNTY OF HAWAI'I; LLOYD VAN DE CAR, CHAIRMAN, COUNTY OF HAWAI'I 2001 REAPPORTIONMENT COMMISSION, Defendants-Appellees

NO. 25614

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 01-1-0092)

JULY 22, 2005

LEVINSON, ACOBA, AND DUFFY, JJ.;
WITH NAKAYAMA, J., CONCURRING SEPARATELY AND
DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that (1) the phrase "equal resident populations" in section 3-17(f)(4) of the Charter of the County of Hawaii (the Charter) excludes nonresident college students and nonresident military personnel and their dependents from the

population base for purposes of reapportioning county council districts of the County of Hawai'i, (2) a total deviation in excess of 10% in an electoral reapportionment plan presents a prima facie case of discrimination in violation of the equal protection clause of the United States Constitution, (3) a rational government policy will justify a total deviation that slightly exceeds the 10% threshold, and (4) assuming, in excluding nonresident students and nonresident military personnel and their dependents from the population base, the plan of the County of Hawaii 2001 Reapportionment Commission (the Commission) resulted in a total deviation of 10.89%, such a deviation in this unique instance (a) was minimal, (b) apparently included the Commission's consideration of other valid criteria under section 3-17 of the Charter, (c) resulted from the commission's intent to achieve inclusiveness and equal representation, and (d) was, therefore, constitutional.

I.

Pursuant to the Charter, Defendant-Appellee County of Hawai'i initiated a reapportionment of its county council districts in 2001. The Commission was appointed and confirmed in accordance with a provision in the Charter requiring that in 1991, and every tenth year thereafter, a commission be established to determine the boundaries of council districts, and

to file a reapportionment plan by December 31 of those years.[1] A

[1] Section 3-17 of the Charter under which the Commission acted states as follows:

> (a) There shall be a county reapportionment commission which shall establish the boundaries of the council districts.
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> (b) The initial reapportionment commission shall consist of seven members, two of whom shall be residents of the combined judicial districts of North and South Hilo, one from the judicial district of Puna, one from the judicial district of Kau, one from the combined judicial districts of North and South Kona, one from the combined judicial districts of North and South Kohala, and one from the judicial district of Hamakua. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.
>
> (c) Each subsequent reapportionment commission shall consist of nine members. One member shall be a resident of each council district as established by the previous reapportionment commission. The members shall be appointed by the mayor and confirmed by the council in the manner prescribed in section 13-4.
>
> (d) <u>The year 1991 and every tenth year thereafter shall be reapportionment years</u>. The reapportionment commission shall be appointed and confirmed by March 1 of the reapportionment year, and shall file a reapportionment plan with the county clerk by December 31 of the reapportionment year.
>
> (e) The county clerk shall furnish all necessary technical and secretarial services for the reapportionment commission. The council shall appropriate necessary funds to enable the commission to carry out its duties.
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> (f) The reapportionment commission shall be guided by the following criteria in establishing the boundaries of the council districts:
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> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
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> (2) Insofar as possible, districts should be contiguous and compact;
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> (3) District lines shall, where possible, follow permanent and easily recognizable features;
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> (4) <u>Districts shall have approximately equal resident populations as required by applicable constitutional provisions</u>.
>
> (g) The district boundaries as established by the reapportionment commission shall be in effect at the first regularly scheduled council election following the filing of the plan and for any subsequent council election. The district boundaries in effect prior to the filing of the reapportionment plan shall remain in effect during the duration of the term of all councilmembers elected or appointed to represent such districts until the expiration of the full term of such councilmembers, including any election held to fill an unexpired term under section 3-4.

Charter of the County of Hawaii § 3-17 (1990) (emphases added).

series of public meetings and hearings was held throughout Hawai'i County, during which private speakers argued that the Commission was using the wrong population base and should exclude therefrom nonresident college students and nonresident military personnel and their dependents. The Commission adopted a reapportionment plan (the Commission's plan) and filed it as required with the County Clerk. The Commission's plan provided for a total resident population base that included nonresident college students and nonresident military personnel and their dependents.

Subsequent to the filing of the Commission's plan, Plaintiffs-Appellants Citizens for Equitable and Responsible Government, Brenda J. Ford, Stanley A. Boren, Floyd H. Lundquist, Marlene E. Lundquist, Ronald C. Phillips, (collectively, Appellants) and Plaintiffs-Appellees Beverly Byouk and Sandra W. Scarr filed a Complaint and First Amended Complaint against County of Hawai'i and other Defendants-Appellees, the County Clerk, Hawai'i County and Llyod Van De Car, Chairman of the Commission (collectively, County Appellees) in the third circuit court (the court)[2] requesting, inter alia, a declaratory ruling that the Commission's plan was invalid.

Appellants moved for partial summary judgment on the ground the Commission used the wrong population base and that, therefore, the Commission's plan was unconstitutional because its

[2] The Honorable Riki May Amano presided.

total deviation from the ideal mean exceeded 10%. Appellants appended to their motion for summary judgment a letter dated October 25, 1989, written by Christopher J. Yuen (Yuen), the attorney representing the Commission during the drafting of the reapportionment plan, for the proposition that the Commission was advised to use the same population base as used by the State Reapportionment Commission. On June 20, 2002, County Appellees filed an affidavit by Yuen to rebut Appellants' proposition. Appellants moved to strike the affidavit.

Following a hearing, the court denied Appellants' motion and sua sponte granted partial summary judgment in favor of County Appellees. The court did not issue findings of fact or conclusions of law, but in its July 19, 2002 order stated, inter alia, as follows:

> The [c]ourt finds that the adoption by the . . . Commission of a resident population base which did not exclude non-resident military personnel and their dependents and did not exclude non-resident university students in the 2001 council redistricting plan was proper.
>
> The [c]ourt also finds that there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission.

Following the court's ruling, the parties agreed to withdraw all remaining counts so that final judgment could be entered in the case.[3] The court entered final judgment in favor of County

[3] The effect of the parties' stipulation to amend the first amended complaint and for entry of judgment, was "to withdraw [Appellants'] allegations that the . . . Commission failed to use a 'rational or objective methodology'. . . and wrongfully submerged communities of interest into larger districts but not [Appellants'] allegations as to the population base that the . . . Commission used."

Appellees and against Appellants on January 24, 2003. Appellants filed their notice of appeal on January 31, 2003.

II.

On appeal, Appellants maintain that the court erred in (1) refusing to strike the affidavit of the Commission's counsel, (2) concluding that the Commission could include nonresident university students and nonresident military personnel and their dependents in the population base, (3) deciding that the total deviation between county council districts in the redistricting plan did not exceed constitutional limits, and (4) ruling that the redistricting plan is valid. They request an order (1) invalidating the Commission's plan, (2) appointing a master to prepare a new redistricting plan using the correct population base, and (3) granting such other appropriate relief.

III.

"Unlike other appellate matters, in reviewing summary judgment decisions[,] an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied. Beamer v. Nishiki, 66 Haw. 572, 577, 670 P.2d 1264, 1270 (1983). "Summary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Pac. Int'l Serv. Corp. v. Hurip, 76 Hawai'i 209, 213, 873 P.2d 88, 92

(1994). A trial court's conclusions of law are reviewed de novo under the right/wrong standard. Fujimoto v. Au, 95 Hawai'i 116, 137, 19 P.3d 669, 720 (2001). Under this standard, the trial court's conclusions of law are not binding upon the appellate court and are freely reviewable for its correctness. Id.

IV.

As to point (1), the court did not rule on Appellants' request to strike an affidavit of the Commission's attorney. Appellants assert that the affidavit of the Commission's attorney is not part of the Commission's records and contains the opinion and recollection of the attorney ten years after-the-fact. County Appellees maintain that they offered the affidavit of the Commission's attorney to clarify that the letter in Appellants' motion stated only that there was a difference in reapportionment between using residents, as opposed to registered voters, in determining the population base and that the affidavit was not introduced to reflect the intent of the charter commission.[4] Inasmuch as the affidavit was not offered with respect to the intent of the charter commission and is not necessary to our interpretation of the phrase "resident populations," see infra, we do not address Appellants' point (1).

[4] Yuen's affidavit states that "in drafting the charter language which provides that districts should have 'approximately equal resident populations as required by applicable constitutional provision' the intent was that the degree of equality only be as constitutionally mandated." (Emphasis added.) This reference to the charter commission's "intent" merely confirms what is stated in the criteria in Charter section 3-17(f).

V.

The primary issue on appeal, Appellants' point (2), is whether nonresident college students and nonresident military personnel and their dependents should be excluded from the population base of Hawai'i County's reapportionment of city council districts. The Charter mandates that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions[,]" Charter § 3-17(f)(4) (emphasis added), see supra note 1, but fails to define the phrase "resident populations."

Appellants first argue that "resident populations" should be interpreted in the same manner as that term is applied in the apportionment of state representative districts, that is, by using a permanent resident population base. Appellants refer to an amendment made to Article IV of the Constitution of the State of Hawaii in 1992, when voters statewide voted to use a "permanent resident" population base for apportioning legislative districts. The amendment mandated that only residents having their domiciliary in the State of Hawai'i may be counted in the population base for the purpose of reapportioning legislative districts. Article IV of the Constitution of the State of Hawaii states in relevant part as follows:

> The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (2) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, using the total number of permanent residents in

> each of the basic island units and computed by the method known as the method of equal proportions; except that no basic island unit shall receive less than one member in each house.

Haw. Const. art. IV, § 4 (amended 1992) (emphasis added). However, the amendment to Article IV only applies to state legislative redistricting, not county council redistricting.

The Commission interpreted the Charter phrase "resident populations" to encompass all persons who "reside within the county" as reflected in the federal census and, accordingly, did not exclude nonresident university students and nonresident military personnel and their dependents in the population base for the reapportionment plans. County Appellees argue that the Commission's interpretation of the phrase was a discretionary act, and, thus, under Kawamoto v. Okata, 75 Haw. 463, 868 P.2d 1183 (1994), the actions of the Commission should be accepted unless an abuse of discretion is shown.

"The interpretation of the charter is similar to the interpretation of a statute." Maui County Council v. Thompson, 84 Hawai'i 105, 106, 929 P.2d 1355, 1356 (1996). When interpreting a statute,

> our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

Id. (quoting State v. Baron, 80 Hawai'i 107, 113, 905 P.2d 613, 619 (1995) (emphasis added). In this regard, a common definition of "resident" is

> [a]ny person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature.

Black's Law Dictionary 1309 (6th ed. 1990) (emphases added). See In re Irving, 13 Haw. 22, 24 (1900) ("[T]he primary significance of the word 'residence' as used in the constitution is the same as domicil[e] -- a word which means the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights." (Quoting Chase v. Miller, 41 Pa. 403, 420 (Pa. 1862))). This definition of "resident" would exclude any person who did not exhibit a present intent to remain within Hawai'i County for more than a transitory period.

Generally, college students from outside Hawai'i County who lack a present intent to remain in the county for a period of time beyond their date of graduation would not be considered residents. Their presence in Hawai'i County is primarily for educational purposes, which is "transitory in nature." Likewise, ordinarily the transitory nature of military personnel from outside Hawai'i County is apparent. Normally, military personnel and their dependents are temporarily stationed in the county by the United States military. Military personnel may have little say in deciding the location of their assignment. As a result, generally speaking, members of the military are in Hawai'i County involuntarily, as opposed to persons who choose to live in the

county. See Carpenter v. Hammond, 667 P.2d 1204, 1211 (Alaska 1983) (recognizing the "involuntary nature of the military member's assignment to [a] state").

The Charter employs the phrase "resident populations" which indicates that the drafters of the Charter intended to limit the population base to residents of Hawai'i County. Those who live in the county temporarily for educational purposes or those who live in the county involuntarily because ordered to do so would seemingly lack a present intent to remain in the county, rendering their stay "transitory in nature."[5] Logically, the drafters of the Charter would not have modified the word "population" by the adjective "resident" or, on the other hand, would have employed the phrase "total population" had they intended to include nonresident college students and nonresident military personnel and their dependents in the population base.

Accordingly, we hold that the phrase "resident populations" found in the Charter excludes nonresident university students and nonresident military personnel and their dependents from the population base of the county council reapportionment plan. The court, therefore, was wrong to conclude that the Commission's inclusion of these nonresidents was proper.[6]

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[5] Obviously, a person who otherwise ostensibly falls within such categories but establishes a present intent to remain in the county and exhibits indicia that his or her presence is something other than merely transitory may establish resident status. See Black's Law Dictionary at 1309.

[6] Inasmuch as we determine the phrase "resident populations" to be plain and unambiguous, we need not examine the 1990 charter commission's

(continued...)

VI.

While we must interpret the term "resident populations," we note that no dispute is raised by the parties as to whether the persons designated as residents or nonresidents were properly denominated as such. Appellants note that "in 2001, State officials had access to an improved database and software program and had the ability to collect data that enabled state officials to identify and locate nonresident students, nonresident military personnel and nonresident military dependents with reasonable accuracy." (Emphases omitted.) Thus, argue Appellants, "[i]t was also possible to identify these same individuals for the purpose of establishing county council seats for the County of Hawaii County Council."

County Appellees do not deny the availability of such technology nor challenge its feasibility. In fact, they apparently relied on the State's database and computer program to support their motion for partial summary judgment. In an affidavit attached as "Exhibit D" to County Appellees' motion for partial summary judgment, David J. Rosenbrock, data processing coordinator for the State of Hawai'i Office of Elections, stated

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[6](...continued)
records to ascertain the county electors' intent in adopting the phrase. In any event, Appellants maintain that aside from evidence that the charter commission "clearly rejected the use of 'registered voters' as a base because that provision was already under [legal] attack[,] . . . [t]he rest of the charter commission's records is silent." County Appellees do not cite to the charter commission's records to support the Commission's interpretation. Hence, there is no instructive "legislative" history concerning the term "resident populations."

that "his office provided population data to the County of Hawaii Reapportionment Commission," derived from "the federal census, the United States Military and from the University of Hawaii at Hilo." Attached as "Exhibit 1" to the affidavit were three charts showing (1) total population with no extractions, (2) total population with nonresident students and nonresident military personnel extracted, and (3) total population with nonresident students, nonresident military personnel and their dependents extracted. The third chart expressed a deviation of 10.893%. The difference in population bases between the first chart, showing a total population of 148,677, and the third chart, showing a total population minus nonresidents of 147,806, confirms Appellants' calculation in their opening brief that using information from the Commission's computer database, 871 "nonresidents . . . should have been excluded from the population base." County Appellees do not raise any objection to this.

VII.

We observe further that the exclusion of identifiable nonresidents from the population base is consistent with the rules for determining "residency" for election purposes under Hawaii's state election law, Hawai'i Revised Statutes (HRS) chapter 11. HRS chapter 11 governs "all elections, primary, special primary, general, special general, special, or county." HRS § 11-3 (1993) (emphasis added). Pursuant to HRS § 11-11 (1993), the "county clerk shall be responsible for voter

registration in the respective counties and the keeping of the general register and precinct lists within the county." HRS § 11-13 (1993) provides seven rules for determining a person's "residency" for voter registration purposes. The statute references students as well as military personnel as follows:

> (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
> (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in this State[.]

HRS § 11-13. The Commission, by relying on "the census-counted population," included persons in the population base "solely by reason of the person's presence" in Hawai'i County "while employed in the service" or "while a student of an institution of learning[.]" This counting of students and military personnel and their dependents based on mere presence alone conflicted with the statutorily mandated process for determining who may register to vote among the counties. The plain reading of "resident populations" avoids the anomalous result of counting nonresidents in the reapportionment plan when those nonresidents, pursuant to HRS § 11-13, cannot register to vote.

VIII.

A.

In line with our holding, the Commission should have excluded the said nonresidents from the redistricting population base. However, Appellants do not argue that the use of the wrong

population base alone invalidates the Commission's plan, but, rather, that the use of the wrong population base created an unconstitutional deviation. Even if Appellants had argued that the plan was void for being based on the wrong population, we observe that the language of Charter section 3-17(f)(4) would bring us back to the constitutional question. Section 3-17(f)(4) states that "[d]istricts shall have approximately equal resident populations as required by applicable constitutional provisions." (Emphases added.) Thus, assuming Appellants' calculations, infra, are correct, we address Appellants' argument in points (3) and (4) that when nonresident military personnel, their dependents, and university students are excluded from the population base, "deviations emerge in the [r]edistricting [p]lan that exceed constitutional limits." We do not believe that that is the case, however.

B.

The United States Supreme Court has held that the equal protection clause of the United States Constitution requires that electoral representation "be apportioned on a population basis." Reynolds v. Sims, 377 U.S. 533, 568 (1964).[7] This requirement means "that a [s]tate [must] make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." Kawamoto, 75 Haw. at 470, 868 P.2d at 1187

[7] Reynolds is the "seminal decision in defining the 'one man, one vote' doctrine[.]" Calderon v. Los Angeles, 481 P.2d 489, 491 (Cal. 1971).

(quoting Reynolds, 377 U.S. at 577 (emphases added)). The Court recognized, however, that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Reynolds, 377 U.S. at 533. See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189. Accordingly, it adopted a flexible, "case-by-case" approach to assessing redistricting plans, providing "general considerations" as follows:

> A [s]tate may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designating a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one [s]tate, while another [s]tate might desire to achieve some flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the [s]tate.
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> . . . .
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> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Reynolds, 377 U.S. at 578-79 (emphases added). See Swann v. Adams, 385 U.S. 440, 443-44 (1967) (reversing a decision upholding a reapportionment plan where the state failed to present, and the district court failed to articulate, "acceptable reasons for the variations" of 30% among senate districts and 40% among house districts).

The "general principle of population equality . . . applies to state and local elections[.]" Abate v. Mundt, 403

U.S. 182, 185 (1971). The Supreme Court has intimated that "slightly greater percentage deviations may be tolerable for local government apportionment schemes" and that "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality." Id. See id. at 186-88 (upholding a county reapportionment plan with a total deviation of 11.9% and districts that exactly correspond to the county's five towns "based on the long tradition of overlapping functions and dual personnel" in the county government and "on the fact that the plan . . . [did] not contain a built-in bias tending to favor particular political interests or geographic areas").

> In view of these considerations, . . . minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. [Supreme Court] decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the [s]tate.

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (internal quotation marks and citations omitted). See Kawamoto, 75 Haw. at 474, 868 P.2d at 1189.

At issue in Brown was a Wyoming reapportionment plan that allocated one of sixty-four seats in the state's house of representatives to a county with a deviation of 60% below the mean. Id. at 837, 843. Nevertheless, the Supreme Court upheld the plan on the following bases: (1) it was "undisputed" that

Wyoming's policy of ensuring that each county had one representative was "free from any taint of arbitrariness or discrimination"; (2) "population equality [was] the sole other criterion used"; and (3) "there [was] no built-in bias tending to favor particular political interests or geographic areas." Id. at 843-44. The Brown majority approved of the Wyoming plan as "an unusually strong example of an apportionment plan the population variations of which [were] entirely the result of the consistent and nondiscriminatory application of a legitimate state policy."[8] Id. at 844. Thus, the "ultimate inquiry" is to determine "whether the legislature's plan may reasonably be said to advance a rational state policy and, if so, whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." Id. at 843 (internal quotation marks, brackets, and citation omitted) (emphasis added).

[8] The Brown majority noted that the appellants "limited their challenge to the alleged dilution of their voting power resulting from the one representative given to" the subject county and, therefore, the issue was "not whether a 16% average deviation and an 89% maximum deviation . . . [was] constitutionally permissible." 462 U.S. at 846. Hence, the Brown majority believed it was "not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifie[d] the population deviations," id., which is the second prong of the two-part "ultimate inquiry" -- whether the population disparities among the districts exceed constitutional limits. However, Justice Brennan, authoring the dissenting opinion in Brown, in which three justices joined, agreed that "Wyoming's long-standing policy of using counties as the basic units of representation [was] a rational one," but maintained that the deviations in Wyoming's plan, "even if justified by state policy, [were not] within the constitutionally tolerable range of size." Id. at 853 (Brennan, J., dissenting, joined by White, Marshall, and Blackmun, JJ.).

IX.

A.

The Commission's plan divides Hawai'i County into nine districts. Using the "resident population" base (excluding nonresident military personnel, their dependents, and university students) of 147,806, propounded by Appellants, the ideal mean is 16,423 (147,806 divided by nine). According to Appellants' briefs and the record, the difference between the ideal mean and the actual "resident population" of each district represents that district's "deviation," which is translated into a deviation percentage. The difference between the district with the resident population that exceeded the ideal mean by the greatest percentage and the district with the resident population that fell below the ideal mean by the greatest percentage constitutes the redistricting plan's "total deviation." According to Appellants' calculations, the resident population of District 2 was 6.20% below the ideal mean (the latter category) and the resident population of District 8 was 4.69% above the ideal mean (the former category), thereby resulting in a total deviation of 10.89%.[9] County Appellees do not concede that there is such a

[9] In their opening brief, Appellants list the nine "Land Districts" as "North Hilo, South Hilo, Puna, Kau, South Kona, North Kona, South Kohala, North Kohala, and Hamakua." They calculate the differences between total population and total population less nonresidents as follows: -11 in North Hilo, -810 in South Hilo, -28 in Puna, -6 in Kau, -6 in South Kona, -5 in North Kona, -5 in South Kohala, and no change in North Kohala and Hamakua.

Appellants also contend that "the 'permanent residents' population base for State legislative districts on the island is 147,806 persons . . . and the 'resident populations' base for county council districts on the island is 148,677 . . . , a difference of 871 persons." (Emphases in original.)

(continued...)

deviation, maintaining that "[a]ny deviation is the result of the artificial construct of the Appellants in determining that the numbers they believe should have been used are the only correct numbers, when it was clearly within the discretion of the [C]ommission to use the numbers which it did use."[10] However, as stated supra, to support their motion for partial summary judgment, County Appellees submitted the Rosenbrock affidavit, which arrives at the same 10.89% figure as the total deviation when nonresident students and nonresident military and their dependents are excluded from the total population.

B.

Using Appellants' deviation figure for our analysis, a total deviation of 10.89% exceeds the Supreme Court's threshold and, therefore, creates a prima facie case of discrimination in violation of the equal protection clause. The Supreme Court of Arkansas has addressed a county plan with a total deviation similar to the deviation of the Commission's plan here. In Riley

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[9](...continued)
They argue that "871 is a statistically significant number in this case because most of these individuals reside in a single council district."

> In contrast, County Appellees point out the following:
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> For [D]istrict 8, the .286% above 5% is equivalent to about 47 persons. For [D]istrict 2, the difference of .607% above 5% is equivalent to 100 persons. Thus, even if Appellants' population base were accepted as the only required base, the presumption of constitutionality could be achieved by shifting this small number of persons -- less than 200 persons in a population of over 147,000.

[10] Using County Appellees' "total" population base, the deviation between District 6, with the lowest population, and District 9, with the highest population, is 8.62%.

v. Baxter County Election, 843 S.W.2d 831, 832-33 (Ark. 1992), all parties stipulated that the Baxter County redistricting plan varied among the districts by 10.149%. In assessing whether a "rational policy to justify a variance over 10%" existed, id. at 833, the Arkansas Supreme Court acknowledged the "systematic approach" taken by the election commission. The commission had divided "the total population" of Baxter County by eleven, the number of districts to be apportioned.

"The districts with population already closest to that number were kept the same, and the others were slightly modified, taking geography into account, to reach parity." Id. At the hearing before the trial court, a commission member testified that "the overriding principle" followed by the commission in redistricting "was equal representation." Id. The Arkansas Supreme Court concluded that the commission's "systematic approach . . . reveal[ed] a rational policy of redistricting in Baxter County" and that "the 10.149% variance [was] only slightly over the acceptable 10% variation." Id. Thus, it was held that the trial court did not err in finding that the commission overcame the prima facie case of discrimination. Id.

Similarly here, the 10.89% total deviation of the Commission's plan is "only slightly over the acceptable 10% variation." Id. It is true, as Appellants posit, that the Commission did not address the deviation question because it was working from the "total" as opposed to "resident" population

base, which presented only an 8.62% deviation. However, we cannot say that no rational basis underlay the 10.89% deviation because, akin to the approach exemplified by the commission member's testimony in Riley, the Commission in the instant case, by using "total" population, evidenced an intent to achieve inclusiveness and equal representation. Cf. Calderon v. Los Angeles, 481 P.2d 489, 493 (Cal. 1971) ("Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." (Emphasis added.)).

For at the second meeting of the Commission, Hawai'i County Councilmember Julie Jacobson testified in favor of "using the population as the basis for the districting," stating that,

> each human being has needs for the government serves [sic] and it doesn't matter if you're one day old, if you're 99 years old, if you vote or don't vote, or any other of those variables . . . each person needs to be considered and I think especially with the complexity of infrastructure issues, that we deal with, that's why it's important.

Commissioner Mark Van Pernis then made a motion to "include all people": "[A]ll the people that the census counted is included because, whether they vote or not, or whether they're young or old, or military or not, they all use county services, they all pay taxes in some form or shape and they all need representations." The motion was put to a vote and carried, evidencing that the Commission was motivated by inclusiveness as opposed to a discriminatory purpose.

Importantly, the Charter required the Commission to consider three additional factors in redistricting. In addition to the "approximately equal resident populations" requirement at issue here, Charter section 3-17(f) required the Commission to consider the following criteria:

> (1) No district shall be drawn to unduly favor or penalize a person or political faction;
> (2) Insofar as possible, districts should be contiguous and compact;
> (3) District lines shall, where possible, follow permanent and easily recognizable features; . . . .

These considerations governed the Commission's determination. The statements supra at the second meeting of the Commission evidenced the Commission's commitment against favoring or penalizing a person or political faction in consonance with Charter Section 3-17(f)(1).

Ultimately, the deviation stemming from a "pure population" standard resulted from the Commission's commitment to an inclusive model rather a discriminatory one. Appellants do not contend that the Commission failed to consider other redistricting criteria under the Charter or that such criteria would not support a slightly greater deviation than the 10% prima facie threshold. It should be noted that related objections were apparently waived when Appellants stipulated to withdraw the claims that the Commission failed to use a "rational or objective methodology" and "wrongfully submerged communities of interest into larger districts," see supra note 3, thereby abandoning any

claim that the Commission incorrectly applied the other three criteria in Charter section 3-17(f).

Finally, we observe that Appellants do not argue, nor point to evidence in the record, that the Commission did not "make an honest and good faith effort to construct districts . . . of equal population as is practicable[,]" Reynolds, 377 U.S. at 577, that the plan has "'a built-in bias tending to favor particular political interests or geographic areas[,]'" Brown, 462 U.S. at 844 (quoting Abate, 403 U.S. at 187), or that the Commission's redistricting process was "taint[ed]" with "arbitrariness," id. at 843. What remains is Appellants' conclusory statement that the "Commission's records do not reflect any evidence that justifies the [C]ommission's action to adopt a [r]edistricting [p]lan that has deviations that exceed the ideal mean by more than 10%." Therefore, on the foregoing bases and under the specific circumstances of this case, we hold that, ultimately, the court did not err in concluding that "there was no unconstitutional deviation in the population count in the county council districts as set forth in the 2001 council redistricting plan adopted by the . . . Commission."

X.

Based on the foregoing, the Commission's erroneous inclusion of nonresident students and military personnel and their dependents in the population base for reapportionment of Hawai'i County council districts did not ultimately result in an

unconstitutional deviation under its reapportionment plan. Although we do not agree with the court that the Commission's population base was correct, we affirm the court's decision upholding the Commission's plan because the plan complies with the mandate of Charter section 3-17(f)(4) that the districts be comprised of "approximately equal resident populations as required by applicable constitutional provisions." (Emphases added.) See Hawaii Provider's Network, Inc. v. AIG Hawaii Ins. Co., 105 Hawai'i 362, 368 n.14, 98 P.3d 233, 239 n.14 (2004) ("[W]here the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave the wrong reason for its action." (Quoting Agsalud v. Lee, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983).)); Poe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998) ("Where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." (Quotation marks and citation omitted.)). Accordingly, the court's January 24, 2003 final judgment is affirmed.

On the briefs:

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