No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF HAWAII REAPPORTIONMENT CASE PLAINTIFFS (DAVID P. BROSTROM, ANDREW WALDEN) AS AMICI CURIAE SUPPORTING APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONS AND STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICI CURIAE

Amicus curiae David P. Brostrom is a citizen, registered voter, and resident of the State of Hawaii.[1] He retired from the United States Army as a Colonel. Andrew Walden is also citizen, registered voter, and resident of the State of Hawaii. Amici were part of a coalition of military and civilian plaintiffs who challenged Hawaii's 2012 Supplemental Reapportionment Plan because it "extracted" from its population basis virtually all of the men and women serving in the Armed Forces and their families.[2]

Hawaii is one of the two states—Kansas being the other—which favors voting power over representational equality when reapportioning its state legislature. The Hawaii Constitution requires the Reapportionment Commission to only count "permanent residents"[3] in order to protect their electoral strength from being diluted by non-permanent residents, defined as those who have no intent to remain permanently in Hawaii.[4]

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have filed blanket consent to the filing of amicus briefs.

[2] *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014).

[3] Haw. Const. art. IV, § 4.

[4] *Solomon v. Abercrombie*, 270 P.3d 1013, 1022 (Haw. 2012) (Ordering the Hawaii Reapportionment Commission to "extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population" because they "declare Hawaii not to be their

After this Court's decision in *Davis v. Mann*,[5] Hawaii could not expressly exclude Census-counted usual residents because they serve in the military. Hawaii no longer does so *de jure*,[6] but in the half-century since statehood, Hawaii has always managed to not count them, even though they and their families are counted by the Census only as Hawaii residents, they live and work here, and are an essential part of the fabric of the community. They can be represented in no state legislature but ours.[7] Although

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home state."). The Commission did not ask anyone whether they intended to remain permanently in Hawaii, and made its extractions based on a series of presumptions: (1) it extracted active duty military personnel who indicated on a federal tax form that a state other than Hawaii should withhold state income taxes, (2) it extracted military spouses and children who were simply "associated" with an active duty servicemember, and (3) it extracted university students whose schools reported that they did not qualify for in-state tuition.

[5] *Davis v. Mann*, 377 U.S. 678, 691 (1964) ("We reject appellants' argument that the underrepresentation of Arlington, Fairfax, and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.").

[6] *See Travis v. King*, 552 F. Supp. 554, 558 & n.13 (D. Haw. 1982) (civilian population is not a permissible population base).

[7] The Census counts military servicemembers stationed within the United States as "usual residents" of the state where they are stationed. Those deployed outside the U.S. are counted as "overseas population" and attributed to a state. The Census counts "transients" such as tourists and servicemembers who are in-transit in their states of usual residence. The decennial Census has used the standard of "usual residence" since the first Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 804-05 (1992). Usual residence "can mean more than mere physical

most servicemembers and their families were included in the Commission's first attempt in 2011 to adopt a districting plan, in 2012 the Hawaii Supreme Court voided that effort and ordered the Commission to extract them as "non-permanent military residents,"[8] which resulted in 108,767 Census-counted usual Hawaii residents—nearly 8% of Hawaii's total resident population of 1,360,301—being denied representation in Hawaii's legislature. At the same time, the Commission automatically included other persons whose inclusion diluted voting power, such as undocumented and documented aliens, prisoners, minors, and the hundreds of thousands of Hawaii residents who, although qualified, simply do not register or vote.[9]

In *Kostick*, amici and others who resided in districts with high populations of extracted military residents challenged the 2012 Plan because it denied equal representation. Hawaii had not demonstrated that its intent-to-reside-permanently criteria was both well-defined and uniformly applied, and was not simply a pretextual continuation of Hawaii's decades-long treatment of military personnel as political outland-

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presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. Currently, it is the "the place where a person lives and sleeps most of the time. It is not the same as the person's voting residence or legal residence." *See* U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census* (2010).

[8] *Solomon*, 270 P.3d at 1022.

[9] Hawaii has among the worst voter participation statistics in the country. By the time of the 2010 Census, Hawaii's record-high voter participation levels at statehood had plummeted to a dismal 48.3%. U.S. Census Bureau, *Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010* (2010).

ers. The District Court drew an unsupportable distinction between individual voting rights and the right to equal representation, and as a consequence refused to apply close constitutional scrutiny.[10] The court concluded Hawaii's "permanent resident" population basis was another way of saying "state citizen," and thus was subject to no more scrutiny than rational basis. The court concluded that Hawaii's assumptions about the intent of servicemembers, their families, and university students was rational, and designed to protect state citizens' voting power, which superseded the extracted persons' right to equal representation. To reach this conclusion, the District Court misread *Burns v. Richardson*,[11] in which this Court upheld Hawaii's first post-statehood reapportionment plan which counted registered voters and excluded military.

Today, nearly a half-century since *Burns*, Hawaii continues to exclude servicemembers, even though the facts which supported the case's conclusions have changed dramatically. Amici file this brief for a concurrent current view of how the case fares in the jurisdiction that spawned it, and to give a better understanding of the facts which supported this Court's analysis.

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[10] *Kostick*, 960 F. Supp. 2d at 1091 ("The Supreme Court applies this higher standard to cases alleging infringement of the fundamental right to vote, in contrast to equal representation or equal voting power challenges in the context of reapportionment. In practice, the standard for this latter category approximates rational-basis review.").

[11] *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966).

SUMMARY OF ARGUMENT

The parties in this case suggest answers to a deceptively simple question: who constitutes the body politic in the states? This question is one the Court has avoided answering explicitly for nearly half a century.[12] Amici respectfully suggest that the Court may continue to do so, but at the same time should provide guidance to state legislatures and reapportionment commissions by holding that it is always *permissible* under the Equal Protection Clause for states—like Texas and 47 others—to include all Census-counted usual residents in their reapportionment populations, even when this means that non-citizens and non-voters are represented in state legislatures as equally as citizens of voting age. Doing so upholds the first and overriding principle of the Equal Protection Clause, representational equality.[13] At first blush, it may seem odd to conclude that those who are not United States citizens and those who are not eligible to vote, are deserving of representation in our state legislatures—at least until one reads the text of the Equal Protection Clause and studies its subsequent history and understands that elected officials represent all "persons," not only citizens or those who can elevate them to office.

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[12] *See id. at* 73, 91-92; *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of certiorari) ("We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

[13] Congressional apportionment requires use of total population. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1984) ("the People" means everyone).

But this Court has never required states to apportion their legislatures using total population, although it is "the de facto national policy."[14] Thus, amici also note that the Equal Protection Clause and the "one-person, one-vote" principle do not *require* that a state include non-citizens and non-voters in the reapportionment population, if a state chooses to favor the voting equality principle instead of representational equality. What the Equal Protection Clause requires is that if a state decides to do so, it must meet a more exacting standard than the "rational basis" test. Thus, if a state bases reapportionment on some population other than total Census-counted usual residents, it must under *Burns* demonstrate that the resulting plan is "substantially similar" to one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens.[15] It does so by employing "[a]n appropriately defined and uniformly applied requirement"[16] when deciding whom to count and whom to exclude.

This issue has been addressed in various ways by the lower courts. The Ninth Circuit favors representational equality over voting power and requires use of total population,[17] while the Fourth and Fifth Cir-

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[14] Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1891 (2012).

[15] *Burns*, 384 U.S. at 93.

[16] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

[17] *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). In that case, the Ninth Circuit held total population is required if counting a lesser population results in dilution of representational equality, "because equal representation for all persons more accurately embodies the meaning of the fourteenth amendment." John Man-

cuits, allow states to freely choose whom to count and whom, or whether, to exclude.[18] In other words, the Ninth Circuit held that states *must* use total population, while the Fourth and Fifth Circuit held they merely *may*. Amici do not suggest that states must use one or the other, but urge a more pragmatic rule: they ask this Court to hold that if a state chooses to include less than all of its Census-counted usual residents, then a reviewing court must apply heightened scrutiny and the state should be required to show a well-defined and uniformly applied standard supporting its choice and prove that it approximates a plan that is based on a "permissible population basis" such as total population or U.S. or state citizens, before it may to deprive any person—voter or not, citizen or not—of representational equality. In the absence of such a compelling showing, states must use the total Census-counted population as their reapportionment population basis.

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ning, *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*, 25 Suffolk U. L. Rev. 1243, 1244 (1991) (footnote omitted).

[18] *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011) (equal protection does not prohibit use of total population and does not require counting citizen voting-age population), *cert. denied*, 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (counting total population is rational), *cert. denied*, 532 U.S. 1046 (2001); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (electoral equality not necessarily superior to representational equality).

ARGUMENT

I. REPRESENTATIONAL EQUALITY IS THE OVERRIDING GOAL

A. Equal Protection—And Equal Representation—For "Persons"

Choosing whom to count when reapportioning state legislatures goes to the very heart of representative government because it determines who is included in "We the People." From the Preamble to the Fourteenth Amendment's Equal Protection Clause, our traditions and this Court's rulings have viewed "person" expansively, culminating with *Reynolds v. Sims*, which held that state reapportionment must be accomplished so that districts are "as nearly of equal population as is practicable."[19]

The Equal Protection Clause provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws."[20] This is "not confined to the protection of citizens."[21] This Court has long held that the Equal Protection Clause's protections are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, of nationality;

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[19] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

[20] U.S. Const. amend. XIV, § 1.

[21] *Plyler v. Doe*, 457 U.S. 202, 212 (1982).

and the protection of the laws is a pledge of the protection of equal laws."[22]

This Court maintains that the Fourteenth Amendment was drafted to include "aliens unlawfully present," as it was "designed to afford its protection to all within the boundaries of a State."[23] The Court holds that "[s]ince an alien[,] as well as a citizen is a 'person,' for equal protection purposes," both are "entitled to the equal protection of the laws of the State in which they reside."[24] There are "literally millions of aliens within the jurisdiction of the United States," and the Fifth and Fourteenth Amendments protect "every one of those persons from deprivation of life, liberty, or property without due process of law."[25] The Court reasons that aliens are entitled to protections because they, like citizens, "pay taxes, support the economy, serve in the Armed Forces, and contribute in a myriad of other ways to our society."[26] The same rationale supports representational equality for all persons regardless of their eligibility to vote, since "each [state] legislator ought to be responsible for

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[22] *Id*. (quoting *Yick Wo v. Hopkins*, 118 U.S 356, 369 (1886)). "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 212 (citing *Yick Wo*, 118 U.S. at 369; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953)).

[23] *Id*. (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

[24] *Graham v. Richardson*, 403 U.S. at 371-75 (citing *Yick Wo*, 118 U.S. at 369; *Truax v. Raich*, 239 U.S. 33, 39 (1915)).

[25] *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

[26] *In re Griffiths*, 413 U.S. 717, 722 (1973).

bringing resources home to roughly the same number of persons. Children—and for that matter resident aliens—need roads, bridges, schools, and Teapot Museums as much as the rest of us do, if not more."[27]

B. Representational Equality Rules, Unless The State Meets A High Burden Of Justifying Electoral Equality

This Court should affirm the primary place of representational equality in the Equal Protection canon. Although "one-person, one-vote" suggests that equality of voting power is the goal, the text of the Equal Protection Clause itself ("any person"), and this Court's decisions reveal the representational equality principle is its indispensable purpose.[28] As one commentator noted:

> The court-ordered apportionment plan showed how two prized American values, electoral equality and equal representation, can conflict in areas with large noncitizen populations. Electoral equality rests on the principle that the voting power of all eligible voters should be weighted equally and requires drawing voting districts to include equal numbers of citizens. The slightly different concept of equal representation means ensuring that everyone—citizens and noncitizens alike—is represented

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[27] Fishkin, *Weightless Votes*, 121 Yale L. J. at 1907 (footnote omitted).

[28] *See, e.g.*, *Reynolds* 377 U.S. at 560-61 ("the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *Yick Wo*, 118 U.S. at 359 (aliens guaranteed equal protection).

> equally and requires drawing districts with equal numbers of residents. Equal representation is animated by the ideal that all persons, voters and nonvoters alike, are entitled to a political voice, however indirect or muted.[29]

This means that *persons*—not "permanent residents," "voters," or the "citizen voting age population"—are presumptively entitled to be represented equally in every state's legislature.

This is especially important in districts such as those in which amici reside which contain large populations of residents who are not counted in reapportionment. Hawaii's extraction of military personnel forces amici to compete with more people to gain the attention of their representative than those in other districts. Every person residing in a state has a right to be represented in the legislature regardless of their citizenship or voting status, and "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[30]

Appellants' theory's unjustifiable defect is that it takes little account of the guarantee that all residents of state are entitled to be represented equally in the legislature, and if voting power conflicts with repre-

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[29] Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 Yale L. J. 1441, 1446-47 (1995) (footnotes omitted).

[30] *Garza*, 918 F.2d at 775 (quoting *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). *See also* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269, 1281 (2002) (each representative should have equal numbers of constituents).

sentation, the Equal Protection principle that "government should represent *all* the people"[31] should predominate unless the state can demonstrates a compelling reason to favor voting equality.

II. HAWAII REAPPORTIONMENT AND *BURNS*

Burns, like all reapportionment cases, was a decision driven by the circumstances existing at the time, and the Court's conclusion was based on a factual situation vastly different than that presented today. Thus, to aid the Court in better understanding how the case should be considered, this portion of the brief provides an overview of *Burns*' background facts, and how it is interpreted in the jurisdiction where it originated.

Fifty years ago, this Court agreed that Hawaii's military was mostly transient.[32] There was no dispute then that Hawaii at the time had a "special population problem" due to large concentrations of military and "other transient populations," and "the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear."[33] The preceding 25 years had witnessed massive population swings as draftees flowed in and out of Hawaii during World War II, the Korean conflict, and the early days of Vietnam. For example, at the peak of World War II, 400,000 servicemembers comprised nearly 50% of Hawaii's population.[34] By 1950 that number had

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[31] *Garza*, 918 F.2d at 774.

[32] *Burns*, 384 U.S. at 94.

[33] *Id*.

[34] *Id*. at 94 n.24.

shriveled nearly twenty-fold to 21,000. It then swelled again during the Korean conflict.[35]

But Hawaii's "special population problem" of fifty years ago no longer exists, and today's servicemembers and their families cannot be so casually presumed to be "transients." The military is vastly different, and our all-volunteer force has served worldwide with no violent swings in Hawaii's military population even remotely comparable to the twenty-fold surge confronting the Court in *Burns*.[36] The military is no longer separate from the community. Servicemembers own and rent homes and apartments offbase. Many pay property taxes. They patronize businesses in the community and pay Hawaii General Excise Tax. Their families work in the community and pay Hawaii income taxes. Their children attend Hawaii public and private schools, and their families use and pay for roads and other services. They serve as elected officials on Neighborhood Boards. Their presence brings an additional seat to Hawaii in the U.S. House of Representatives. Hawaii politicians aggressively pursue the massive economic benefits their presence brings, and campaign on the promise of maintaining the flow of federal dollars from Washington that come with it. A study prepared for the Secretary of Defense estimated the military's presence in-

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[35] *See* Thomas Kemper Hitch, *Islands in Transition: The Past, Present and Future of Hawaii's Economy* 199 (Robert M. Kamins ed., 1993).

[36] *See* James Hosek, *et al.*, *How Much Does Military Spending Add to Hawaii's Economy* 28 (2011) (http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf).

jects $12 billion into the state, comprising nearly 18% of Hawaii's economy.[37]

Kostick was merely the latest chapter in a long-standing and continuous reapportionment controversy that began in 1959 when Hawaii joined the Union. The ink was barely dry on the Admissions Act when the new state began excluding servicemembers from its reapportionment population, and since that time, Hawaii has always found a way to avoid including military personnel as part of its state apportionment population.[38]

Initially, it counted registered voters, which excluded most servicemembers because generally, they did not register to vote in Hawaii.[39] In *Burns*, this Court upheld that count, but only because there was no showing that counting registered voters resulted in a plan different than one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens.[40] The Court held there was no proof the plan based on registered voters was different than a plan based on "state citizens," or total population.[41] If it satisfies that burden, the state's decision about whom to count "involves choices about the nature of representation."[42] The Court identified several

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[37] *Id*. at 21.

[38] Servicemembers are counted as part of Hawaii's population for purposes of Congressional apportionment, and the military's presence aids Hawaii in achieving an additional seat in the House of Representatives. *Travis*, 552 F. Supp. at 571.

[39] *Holt v. Richardson*, 238 F. Supp. 468, 470-71 (D. Haw. 1965).

[40] *Burns*, 284 U.S. at 93.

[41] *Id.* at 94-95.

[42] *Id*. at 92.

permissible population bases, but noted it "carefully left open the question what population was being referred to" when it required substantial "population" equality.[43] This was a time when 87.1% of Hawaii's voting-age population registered to vote, the highest percentage in the nation, so there was a high correlation among registered voters, total population, and state citizens.

By 1982, however, voter registration and participation numbers had declined so precipitously that the registered voter population no longer was a valid proxy for either state citizens or total population, and plans based on registered voters and "civilians" were invalidated.[44] *Burns* also noted that states need not include "aliens, transients, short-term or temporary residents, or persons denied the vote."[45] As a consequence, in 1992 Hawaii amended its constitution to count "permanent residents."[46]

Therefore, a state may choose to count nearly any population, provided it proves the resulting plan advances equal protection principles. However, the more the alternative basis strays from one that is "appropriately defined and uniformly applied,"[47] and the more subject to manipulation it is, the more scrutiny a court should apply. *Burns* established a three-

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[43] *Id.*

[44] *Travis*, 552 F. Supp. at 558. The District Court's opinion details the multiple challenges to Hawaii's reapportionment over the years. *Id.* at 556 & n.2 (noting "numerous attacks in both state and federal courts").

[45] *Burns*, 284 U.S. at 92.

[46] Haw. Const. art. IV, § 4.

[47] *Dunn*, 405 U.S. at 343.

part test a state must meet if it chooses to count less than its entire Census usual resident population.

First, it must identify the permissible population basis to which its reapportionment population is to be compared. *Burns* identified total population, U.S. citizens, and state citizens as permissible population bases, noting that the 1950 Hawaii constitutional convention discussed total population, state citizens, and registered voters as possible baselines.[48] The 1950 convention concluded that counting registered voters would be "a reasonable approximation of both citizen and total population."[49] Registering to vote after all, is certainly strong indicia of state citizenship, however that term might be defined.[50]

Second, the state must demonstrate that using its alternative population basis results in a plan that is a "substantial duplicate" of one based on the identified permissible population basis.

Finally, it must show that the classification is not "one the Constitution forbids."[51] For example, a count of "civilians" is prohibited.[52] In *Kostick*, Hawaii's rejection of the extracted classes' personhood was more subtle: lurking behind the facially-neutral test of "permanent resident" was Hawaii's exclusionary his-

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[48] *Burns*, 284 U.S. at 93.

[49] *Id*.

[50] *Id*. Hawaii has never been able to define "state citizen." Despite this, the District Court in *Kostick* concluded that "permanent resident" was an approximation of "Hawaii citizen," a classification which *Burns* held was subject only to rational basis review.

[51] *Id.* at 93-94.

[52] *Davis*, 377 U.S. at 691; *Travis*, 552 F. Supp. at 558 & n.13.

tory, which, if heightened scrutiny were applied, would have revealed that the 2012 Plan was not the product of a disinterested search for transients, but was targeted at servicemembers and their families, and students. Similar concerns may animate the case at bar, where an apparently facially-neutral standard could be employed to favor one group over another if a higher standard of review were not applicable if the states are permitted to count less than everyone. A population basis that on its face may be neutral invites heightened scrutiny when, like Hawaii, it somehow always results in a narrow class being excluded. In *Evans v. Cornman*,[53] this Court explained how courts should evaluate claims of nondiscrimination, holding that Maryland could not prohibit residents of a federal enclave from registering to vote in Maryland as residents; the Court rejected the state's claim that the enclave residents lacked an interest in state politics simply because they resided on federal property. The same holds true for non-citizens, those ineligible to vote, and the military in Hawaii.

Under the Equal Protection test of *Dunn v. Blumstein*,[54] these factors are evaluated by reviewing the classification by placing the burden squarely on the state to prove a "substantial and compelling reason"[55] for a less-than-Census-count, which supports "[a]n appropriately defined and uniformly applied requirement."[56] When fundamental rights such as the right to equal representation and the right to petition

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[53] 398 U.S. 419 (1970).

[54] 405 U.S. 330, 335 (1972).

[55] *Id*. at 336.

[56] *Id*. at 342.

on an equal basis are impacted, the courts should apply "close constitutional scrutiny," and not mere rational basis.

The purpose of the *Burns* test is to protect equal protection principles by forcing the state to justify its choice of population basis if it counts less than all residents and does so by applying vague and underinclusive standards which are based on assumptions. Appellants' preference for voting equality over representational equality should be subject to these standards.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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