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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDEN DURST, a qualified elector of the  
State of Idaho,

Petitioner,

v.

IDAHO COMMISSION FOR  
REAPPORTIONMENT, and LAWRENCE  
DENNEY, Secretary of State of the State of  
Idaho, in his official capacity,

Respondents.

Supreme Court Docket No. 49261-2021

**MOTION FOR CLARIFICATION**

COMES NOW, Petitioner, Branden Durst, by and through his attorney of record, Bryan D. Smith, Esq., of the law firm of Smith Driscoll & Associates, PLLC, and moves the Court pursuant to Idaho Appellate Rules 32(c) and 48 for an order clarifying the status of the Petition for review filing.

This Motion is made on the grounds and for the reasons that Petitioner attended a hearing before the Commission for Redistricting ("Commission") held on November 10, 2021. At that hearing, the Commission tasked Commissioner Eric Redman with filing the Final Report with the Secretary of State by the end of the day on November 10, 2021. In reliance on the

Commission's direction, Petitioner authorized his legal counsel to file the Petition for review after 5:00 p.m. on November 10, 2021. Petitioner believes that moving this matter forward as soon as possible is necessary because many candidates across the State of Idaho need certainty regarding the legislative district boundaries to know where they will run for legislative district offices in the state legislature.

An issue has arisen that the Petition for Review may be "premature" because it was filed before the Final Report was filed with the Secretary of State. Petitioner submits he filed the Petition for Review timely. Specifically, Idaho Appellate Rule 5(b) requires that the Petition for Review "shall be filed within 35 days of the filing of the final report with the office of the Secretary of State by the Commission." Here, the Petition for Review was filed on November 10, 2021, and the Final Report was filed on November 12, 2021. Petitioner filed the Petition for Review within two days of the filing of the Final Report, not more than 35 days within the date the Final Report was filed.

Idaho Code Section 72-1509(1) expressly calls a challenge to a legislative redistricting plan an "appeal." Idaho Appellate Rule 21 treats a challenge to a final redistricting plan like a notice of appeal. And Idaho Appellate Rule 17(2) treats a notice of appeal filed from an appealable "judgment or order" before formal written entry of such document as valid, when the appealable document is properly filed, without refiling the notice of appeal.

Accordingly, even if the Petition for Review were technically "premature," this Court should treat it like a prematurely filed notice of appeal that became valid when the Final Report was filed with the Secretary of State. Petitioner understands that Rule 17(2) applies only to appealable "judgments and orders." However, under Idaho Appellate Rule 48, this Court has authority, where no provision is made by statute or by its rules, to adopt the practice usually followed in similar cases in proceedings before this Court. Here, applying the rule applicable to

a prematurely filed notice of appeal to the Petition for Review is consistent with this Court's practice in similar proceedings before this Court. Although Petitioner could refile his Petition for Review if this Court were to dismiss it for being "premature" or otherwise untimely, this Court has a policy of avoiding an "idle exercise" as a waste of judicial resources. *Maynard v. Nguyen*, 152 Idaho 724, 726 (2011).

For all these reasons, Petitioner requests that the Court enter an order clarifying the status of his Petition for Review so that Petitioner will know whether the current pleading is timely or whether Petitioner will need to refile his Petition for Review.

This Motion is based on the Petition for Review with Exhibits, this Motion for Clarification, and on the Court's records and files.

DATED this 18<sup>th</sup> day of November, 2021.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith, Esq.  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of November, 2021, I caused a true and correct copy of the foregoing **MOTION FOR CLARIFICATION** to be served, via Electronic Filing and United States Mail, addressed to the following:

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