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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Petitioner,

v.

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

Respondents.

ADA COUNTY, a duly formed and existing  
county pursuant to the laws and  
Constitution of the State of Idaho,

Petitioner,

v.

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

Respondents.

Supreme Court Docket Nos. 49261-  
2021 and 49267-2021

**PETITIONER BRANDEN DURST'S  
OPENING BRIEF**

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I.

**INTRODUCTION**

Petitioner, Branden John Durst, (hereinafter “Durst”), contends that Plan L03 in the Final Plan the Commission for Reapportionment (“the Commission”) filed with the Secretary of State’s Office violates Article III, § 5 of the Idaho Constitution because (1) it divides more counties externally and (2) with more external divisions than needed to meet standards of equal protection. Specifically, Plan L03 is unconstitutional because it divides eight counties externally with a total of 15 external divisions whereas Plan L084 divides seven counties externally with a total of 11 external divisions. In other words, when compared to Plan L03, Plan L084 has (1) fewer counties divided externally and (2) fewer external county divisions. Both Plans L03 and L084 have population deviations of less than 10%, which satisfies the Federal Constitutional requirement of equal protection. Durst files this brief in support of his claim Plan L03 is unconstitutional.

II.

**STATEMENT OF THE CASE**

A. SUMMARY OF FACTS.

The federal census was officially conducted on April 1, 2020, and census data was transmitted to Idaho on August 14, 2021.<sup>1</sup> As a result, pursuant to Idaho Code § 72-1501, a Commission for Reapportionment was organized upon an order of the Secretary of State.<sup>2</sup> On September 1, 2021, the Commission was called to order and conducted its

<sup>1</sup> See Durst’s Verified Petition for Review, p. 4.

<sup>2</sup> See Durst’s Verified Petition for Review, p. 4.

business through November 10, 2021 when the Commission voted to approve Findings of Fact and Final Report that it subsequently filed with the Secretary of State on November 12, 2021.<sup>3</sup>

Durst resides in Ada County and has been a redistricting map hobbyist since 2001.<sup>4</sup> Durst prepared and submitted Plan L084 to the Commission.<sup>5</sup> Plan L084 divides seven counties externally and has six counties with internal divisions.<sup>6</sup> Plan L084 also contains 11 external divisions.<sup>7</sup> Plan L084 has no external divisions in Ada County.<sup>8</sup> In other words, Plan L084 keeps all legislative districts wholly contained within Ada County.<sup>9</sup> By contrast, Plan L03 divides eight counties externally and has six counties with internal divisions.<sup>10</sup> Plan L03 also contains 15 external divisions, four more than Plan L084.<sup>11</sup> Plan L03 divides Ada County externally three times which is three more than Plan L084.<sup>12</sup> All internal divisions in both Plans L03 and L084 involve the same counties.<sup>13</sup>

On October 8, 2021, Durst appeared before the Commission in Ada County to provide testimony.<sup>14</sup> Durst explained that this Court has been “crystal clear that if you

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<sup>3</sup> See Durst’s Verified Petition for Review, p. 4.

<sup>4</sup> See Testimony of Branden Durst, page 2, lines 15-21 attached as Appendix “A” to Durst’s Verified Petition for Review.

<sup>5</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>6</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>7</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>8</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>9</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>10</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>11</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>12</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>13</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>14</sup> See Testimony of Branden Durst, pages 1-17 attached as Appendix “A” to Durst’s Petition for Review.

don't have to split a county externally, you should not do it."<sup>15</sup> In testifying before the Commission, Durst said, "[w]e're standing in the county [Ada] today that's split externally that does not need to be split externally."<sup>16</sup> Durst concluded his testimony before the Commission with, "in summation, the key is you don't have to split more than seven times. You don't have to split more than seven counties externally."<sup>17</sup> Plan L03 divides eight counties externally and specifically divides Ada County three times externally whereas Plan L084 divides seven counties externally and contains no external divisions in Ada County.<sup>18</sup>

During the October 8, 2021 Commission hearing, Cochair, Bart Davis, made the following statement:

Now the court has yet to speak in a plain and identifiable way as to internal versus external splits. In fact, you can read the *Twin Falls* decision to suggest that they're reading internal and external identically. Now, we don't—***we hope that that's not what they mean based on some language actually in Idaho's constitution***, and that issue doesn't appear to be expressly presented to the court.<sup>19</sup>

Notwithstanding the Commission's "hope," as expressed by Mr. Davis, that the Idaho Supreme Court will follow the Idaho Constitution and treat external and internal divisions differently, the Commission treated the internal and external divisions in Plan L084 exactly the same. Specifically, Plan L03 that the Commission adopted divides eight

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<sup>15</sup> See Testimony of Branden Durst, page 7, lines 3-5 attached as Appendix "A" to Durst's Petition for Review.

<sup>16</sup> See Testimony of Branden Durst, page 7, lines 5-7 attached as Appendix "A" to Durst's Petition for Review.

<sup>17</sup> See Testimony of Branden Durst, page 11, lines 2-5 attached as Appendix "A" to Durst's Petition for Review.

<sup>18</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>19</sup> See Testimony of Branden Durst, page 12, lines 3-11 attached as Appendix "A" to Durst's Petition for Review.

counties externally.<sup>20</sup> Of these eight counties, six have internal divisions.<sup>21</sup> The Commission stated that only five proposed plans divide fewer than eight counties. These five plans are L071, L075, L076, L077, and L079.<sup>22</sup> Each of these plans divides seven counties, and each of the seven counties has multiple external divisions.<sup>23</sup> The Commission's Final Report does not analyze Plan L084 that also divides only seven counties externally just like Plans L071, L075, L076, L077, and L079.<sup>24</sup>

The Commission treated Plan L084 as if it had the same number of counties divided as Plan L03 because the Commission did not differentiate between internal and external divisions in spite of Mr. Davis' assertion that the Idaho Constitution requires otherwise.<sup>25</sup> Specifically, Plan L03 divides eight counties, and all eight counties have external divisions.<sup>26</sup> Plan L084 also divides eight counties.<sup>27</sup> However, only seven of these counties are divided externally, and one county (Ada) is divided wholly internally.<sup>28</sup> In other words, the Commission treated the wholly internal division of Ada County in Plan L084 just like an external division of any county in Plan L03.<sup>29</sup>

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<sup>20</sup> See Declaration of Branden Durst dated December 3, 2021 and Commission Final Report, Page 11.

<sup>21</sup> See County Splits Report for Map L03 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record.

<sup>22</sup> See Commission Final Report, pages 11-13.

<sup>23</sup> See County Splits Reports for Maps L071, L075, L076, L077 and L079 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record.

<sup>24</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>25</sup> See County Splits Reports for Maps L03 and L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>26</sup> See County Splits Reports for Maps L03 and L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>27</sup> See County Splits Report for Map L03 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>28</sup> See County Splits Report for Map L84 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>29</sup> See Declaration of Branden Durst dated December 3, 2021.

Ultimately, the Commission approved Plan L03 that divides one more county externally than Plan L084.<sup>30</sup> Plan L03 also contains four more external divisions than Plan L084.<sup>31</sup> Both Plans L03 and L084 contain six counties that are divided internally.<sup>32</sup>

B. SUMMARY OF PROCEDURE.

On November 10, 2021, the Commission approved the Final Plan and publicly stated that Commissioner Eric Redman would file the Final Plan that day with the Idaho Secretary of State's office.<sup>33</sup> In reliance on the Commission's expressed intent, Durst filed his Petition for Review with this Court on November 10, 2021.<sup>34</sup> For whatever reason, Mr. Redman was unable to file the Final Plan on November 10, 2021.<sup>35</sup> Because November 11, 2021 was a legal holiday, the Final Plan was filed on November 12, 2021.<sup>36</sup>

On November 17, 2021, Ada County filed a Petition for Review.<sup>37</sup> This Court ultimately consolidated the two Petitions for Review by order dated November 23, 2021 and reset the parties' briefing schedule.<sup>38</sup> Durst and Ada County's opening briefs are now due on December 2, 2021 by 5:00 p.m together with any affidavits or declarations.<sup>39</sup>

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<sup>30</sup> See County Splits Reports for Maps L03 and L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>31</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>32</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>33</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>34</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>35</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>36</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>37</sup> See court file.

<sup>38</sup> See Order Consolidating Actions and Resetting Briefing Schedule dated November 23, 2021.

<sup>39</sup> See Order Consolidating Actions and Resetting Briefing Schedule dated November 23, 2021.

### III.

#### ISSUES PRESENTED

1. Is the Final Plan the Commission filed with the Secretary of State's Office unconstitutional under Art. III, § 5 of the Idaho Constitution?
2. Does Art. III, § 5 of the Idaho Constitution treat an "external county division" the same as an "internal county division"?
3. Is Durst entitled to recover attorney's fees under Idaho Appellate Rule 41 and costs under Idaho Appellate Rule 40?

### IV.

#### ARGUMENT

A. BOTH PLANS L03 AND L084 HAVE POPULATION DEVIATIONS THAT SATISFY THE FEDERAL CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION.

"The Equal Protection Clause requires states to 'make an honest and good faith effort to construct [legislative] districts ... as nearly of equal population as is practicable.'" *Smith v. Idaho Commission on Redistricting*, 136 Idaho 542, 544 (2001) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506, 536 (1964)). "A redistricting plan that deviates more than 10% in population between the districts constitutes a prima facie case of discrimination under the equal protection clause." *Id.* (citing *Brown v. Thomson*, 462 U.S. 835, 842–43, 103 S.Ct. 2690, 2696, 77 L.Ed.2d 214, 221–22 (1983)). An apportionment plan with a total population deviation of less than 10% is presumptively constitutional. *Hellar v. Cenarrusa*, 104 Idaho 858, (1983) (citing *Connor v. Finch*, 431 U.S. 407, 418, 97 S.Ct. 1828, 1839, 52 L.Ed.2d 465,

475–476 (1977); *White v. Regester*, 412 U.S. 755, 764, 93 S.Ct. 2332, 2338, 37 L.Ed.2d 314, 323 (1973)).

According to the 2020 census, Idaho’s population is 1,839,106 persons.<sup>40</sup> Idaho has 35 legislative districts. Thus, the average district size must be 52,546 persons. To be within a 10% population deviation between the least populated and most populated districts, those districts cannot deviate by more than 5,255 persons. Plan L03 has a deviation of 5.84%,<sup>41</sup> and Plan L084 has a deviation of 9.48%.<sup>42</sup> Accordingly, both plans are presumptively constitutional having satisfied equal protection concerns under the Federal Constitution.

**B. PLAN L03 VIOLATES THE IDAHO CONSTITUTION BECAUSE (1) IT DIVIDES MORE COUNTIES EXTERNALLY AND (2) WITH MORE EXTERNAL DIVISIONS THAN IS NECESSARY TO ACHIEVE EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION.**

**1. In Determining Whether Divisions Are Necessary To Achieve Equal Protection, The Idaho Constitution Treats External Divisions Different From Internal Divisions That The Idaho Constitution Prefers.**

In addition to the federal equal protection requirements of district-drawing, Art.

III, § 5 of the Idaho Constitution prescribes the following stipulations:

***A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county. No floterial district shall be created. Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be***

<sup>40</sup> See County Splits Reports for Maps L03 and L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record.

<sup>41</sup> See L03 Population Summary Document Submitted on file with this Court.

<sup>42</sup> See L084 Population Summary Document Submitted on file with this Court.

elected from a district from which one senator is elected. The provisions of this section shall apply to any apportionment adopted following the 1990 decennial census. (Emphasis added).

Art. III, § 5 of the Idaho Constitution places a limit on the Commission's performing its duties and selecting a Final Plan. *Twin Falls County v. Idaho Com'n on Redistricting*, 152 Idaho 346 (2012). In further defining the limits of the Commission's discretion, this Court has interpreted Art. III, § 5 of the Idaho Constitution to mean that the constitution "prohibits the division of counties, except to meet the constitutional standards of equal protection." *Bingham County v. Comm'n for Reapportionment*, 137 Idaho 870, 874 (2002). This Court has further examined Art. III, § 5 and explained the following:

A county may [not] be divided and aligned with other counties to achieve ideal district size if that ideal district size may be achieved by internal division of the county. Whether desirable or not, that is the meaning of Article. III, § 5. A county may not be divided and parsed out to areas outside the county to achieve the ideal district size, if that goal is attainable without extending the district outside the county.

*Bonneville County v. Ysursa*, 142 Idaho 464, 471 (2005) (citing *Bingham County*, 137 Idaho at 874).

This Court's language in *Bingham County* creates a preference for internal county divisions, i.e., divisions wholly contained within a county, over external county divisions, i.e., dividing a county and aligning it or parsing it out with a neighboring county. When dividing a county for purposes of achieving equal protection, the Commission cannot treat internal county divisions the same as external county divisions. The Idaho Constitution requires that the Commission limit the number of external county divisions to the least amount possible.

Even the Commission recognized the Idaho Constitution favors internal divisions wholly contained within a county over external divisions that combine one part of a county with another county. Specifically, the Final Report says, “[w]hen a county must be divided to create legislative districts, internal divisions, which create districts wholly contained within a county, are favored over external divisions, which create districts that combine part of the county with another county.”<sup>43</sup> In support of this statement, the Final Report cites to Art III, § 5, of the Idaho Constitution and *Bingham County*, 137 Idaho at 874.

Accordingly, the Idaho Constitution requires that the Commission select a plan like Plan L084 that complies with equal protection by dividing seven counties externally and one county internally (for a total of eight counties divided) over a plan like Plan L03 that complies with equal protection by dividing eight counties externally with no counties where all divisions are wholly internal. The reason is that, as this Court has explained, “[a] county may [not] be divided and aligned with other counties to achieve ideal district size if that ideal district size may be achieved by internal division of the county.” *Bingham County*, 137 Idaho at 874. It cannot be said that a plan dividing eight counties externally and no counties where all divisions are wholly internal is necessary to achieve equal protection when another plan achieves equal protection dividing seven counties externally and one county wholly internally.

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<sup>43</sup> See Commission Final Report, page 8.

**a. *Plan L084 Divides Fewer Counties Externally Than Plan L03 Even Though Both Plans Divide The Exact Same Counties.***

Plan L03 divides a total of eight counties that include Bonner, Kootenai, Canyon, Nez Perce, Ada, Twin Falls, Bannock and Bonneville.<sup>44</sup> Plan L03 divides each of these counties externally for a total of eight external divisions and no wholly internal divisions.<sup>45</sup> Plan L084 divides the same eight counties.<sup>46</sup> However, Plan L084 divides Ada County wholly internally.<sup>47</sup> Importantly, although both Plans L03 and L084 divide eight counties, Plan L084 divides only seven of these counties externally and one of them wholly internally.<sup>48</sup> Because Plan L084 achieves equal protection with one less county subject to any external division than Plan L03, Plan L03 does not divide counties ***only to the extent*** that counties must be divided to achieve equal protection and for this reason violates Art. III, § 5 of the Idaho Constitution.

**b. *Plan L084 Has Far Fewer External Divisions Than Plan L03 Even Though Both Plans Divide The Exact Same Counties.***

Plan L03 divides eight counties externally a total of 15 times.<sup>49</sup> Plan L084 divides seven counties externally a total of 11 times.<sup>50</sup> Plan L084 has 36% fewer external divisions than Plan L03.<sup>51</sup> Because Plan L084 achieves equal protection with four less external divisions, Plan L084 does not divide counties externally ***only to the extent*** that

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<sup>44</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>45</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>46</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>47</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>48</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>49</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>50</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>51</sup> See Declaration of Branden Durst dated December 3, 2021.

counties must be divided to achieve equal protection and for this reason violates Art. III, § 5 of the Idaho Constitution.

2. The Commission Failed To Consider The Total Number Of Counties Divided, The Total Number Of External Divisions, And Followed An Analysis That Ignores These Requirements Of The Idaho Constitution.

The Commission stated that Plan L03 divides eight counties and further acknowledged that five plans submitted by the public did, in fact, divide only seven counties.<sup>52</sup> These include Plans L071, L075, L076, L077, and L079.<sup>53</sup> The Commission summarily rejected Plans L071 and L077 because they both had population deviations of 12.72%.<sup>54</sup> The Commission also rejected Plans L075, L076, and L079 because of under population of North Idaho districts at the expense of much of the rest of the state.<sup>55</sup> The Commission said that this under population does not serve the cause of equal protection even though Plans L075, L076 and L079 all had populations deviations under 10% and are therefore presumptively constitutional under the Federal Constitution.<sup>56</sup>

Conspicuously absent from the Commission's analysis is a discussion of the number of counties divided and external divisions in Plans L075, L076 and L079 as required by this Court's prior case law and Art. III, § 5 of the Idaho Constitution. This Court has said, "[i]f one plan complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that

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<sup>52</sup> See Commission Final Report, pages 11-13.

<sup>53</sup> See Commission Final Report, pages 11-13.

<sup>54</sup> See Commission Final Report, pages 11-12.

<sup>55</sup> See Commission Final Report, pages 11-19.

<sup>56</sup> See Population Summary Reports for Maps L075, L076 and L079 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record.

counties must be divided to comply with the federal constitution is only eight counties.”

*Twin Falls County*, 152 Idaho at 346.

Here, Plans L075, L076 and L079 each divide seven counties, which is one less county division than Plan L03 that has eight. Plans L076 and L079 have 14 external divisions, which is one less external division than Plan L03 that has 15. Under *Twin Falls County*, the extent that counties must be divided to comply with the Federal Constitution is only seven, not eight. Likewise, the extent that counties must be divided externally is 14, not 15. But instead of analyzing these plans under the Idaho Constitution for the number of divisions, the Commission skipped that part of the analysis and went right to a “nuanced analysis” of equal protection under the Federal Constitution.

The Commission also totally ignored Plan L084, which just like Plans L075, L076 and L079, divides only seven counties externally.<sup>57</sup> Importantly, Plan L084 has only 11 external divisions whereas Plans L076 and L079 have 14 external divisions and Plans L075 and L03 have 15 external divisions.<sup>58</sup> Accordingly, under *Twin Falls County*, the extent that counties must be divided to comply with the Federal Constitution is seven under Plan L084, not eight under Plan L03. Moreover, the extent that counties must be divided externally is 11 under Plan L084, not 14 under Plans L075 or L076 and not 15 under Plan L03.

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<sup>57</sup> See County Splits Reports for Maps L75, 76, 79 and L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record.

<sup>58</sup> See Declaration of Branden Durst dated December 3, 2021.

The reason the Commission's Final Report ignores Plan L084 is that the Commission treated Plan L084 as if it had the same number of counties divided as Plan L03.<sup>59</sup> Specifically, Plan L03 divides eight counties, and all eight counties have external divisions.<sup>60</sup> Plan L084 also divides eight counties.<sup>61</sup> However, only seven of these counties are divided externally, and one county (Ada) is divided wholly internally.<sup>62</sup> In other words, the Commission treated the wholly internal division of Ada County in Plan L084 just like an external division of any county in Plan L03.<sup>63</sup> But the fact is that Plan L084 divides seven counties externally just like Plans L075, L076 and L079 the Commission considered.

The Commission's refusal to consider Plan L084 because it divides Ada County wholly internally ignores the preference Art. III, § 5 of the Idaho Constitution expressly and as interpreted by this Court gives to internal divisions over external divisions. *See Bingham County*, 137 Idaho at 874) ("A county may not be divided and parsed out to areas outside the county to achieve the ideal district size, if that goal is attainable without extending the district outside the county"). Accordingly, the Commission acted outside the bounds of the Idaho Constitution when it ignored Plan L084 and approved Plan L03.

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<sup>59</sup> See County Splits Report for Map L084 transmitted to Idaho Supreme Court on November 23, 2021 as part of the final record and the Declaration of Branden Durst dated December 3, 2021.

<sup>60</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>61</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>62</sup> See Declaration of Branden Durst dated December 3, 2021.

<sup>63</sup> See Declaration of Branden Durst dated December 3, 2021.

V.

**CLAIM FOR RELIEF**

For all the reasons set forth above, this Court should declare that the final legislative redistricting plan adopted by the Commission is unconstitutional and issue a Writ of Prohibition restraining the Secretary of State from transmitting a copy of the report to the president of the senate and the speaker of the house.

This Court should further adopt Plan L084 with instructions to the Secretary of State to transmit a copy of Plan L084 to the president of the senate and the speaker of the house. Durst makes this claim for relief based on the exigent circumstances due to the need for clerks to prepare new precinct boundaries in conformity with the new adopted plan and other pressing duties as well as due to the need for potential legislative candidates to file in February/March 2022 for the May primary.

Durst also appeared before the Commission and explained this Court's prior case law and the requirements of Art. III, § 5 of the Idaho Constitution that the Commission does not have discretion to select a plan that divides more counties than necessary to achieve equal protection under the Federal Constitution. Notwithstanding this testimony, the Commission approved Plan L03 that divides one county more externally than Plan L084 and that has four more external divisions than Plan L084. The facts are not in dispute that Plan L084 has the fewest number of external divisions of any plan presented to the Commission that divides seven counties externally.<sup>64</sup>

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<sup>64</sup> See Declaration of Branden Durst dated December 3, 2021.

Alternatively, Durst requests that this Court remand this matter back to the Commission for further consideration with due regard for the Idaho State Constitution, Article III, § 5.

## VI.

### REQUEST FOR ATTORNEY'S FEES

Durst seeks attorney's fees under Idaho Appellate Rule 41 and under the private attorney general doctrine where, attorney's fees are justified when (1) the litigation vindicates an important or strong public policy; (2) private enforcement is necessary to vindicate the policy and Petitioner pursues the matter at a significant burden to the Petitioner; and (3) a significant number of people stand to benefit from the decision. *Smith v. Idaho Com'n on Redistricting*, 136 Idaho 542 (2001). Durst also seeks an award of costs under Idaho Appellate Rule 40.

This Court has previously awarded attorney's fees to a Petitioner prevailing on a Petition for Review in the context of a constitutional challenge to a Final Map filed by a Commission for Reapportionment. *Id.* As this Court said in *Smith*, "[t]here are few rights that a free society holds in higher regard than the right to cast a meaningful vote. Moreover, Petitioners Smith pursued the vindication of this right vigorously and the pursuit of such benefited a large number of Idahoans. Finally, this case, as decided, presented little, if any, issues of fact that would require the unique fact-finding ability of a trial court to determine if attorney's fees were appropriate." *Smith*, 136 Idaho at 545-546.

Here, Durst has pursued the vindication of the right to vote vigorously and his pursuit benefits a large number of Idahoans. Also, this case presents little, if any, issues of fact requiring any unique fact-finding ability of a trial court to determine if attorney's fees are appropriate. Accordingly, this Court should award reasonable Durst attorney's fees under the private attorney general doctrine.

VII.

**CONCLUSION**

For all the reasons set forth above, Petitioner requests that the Idaho Supreme Court declare Plan L03 unconstitutional. This Court should also order the Commission adopt Plan L084 especially where Plan L084 has the fewest number of external divisions of any plan presented to the Commission that divides seven counties externally. Alternatively, this Court should remand this matter back to the Commission for further consideration with due regard for the Idaho State Constitution, Article III, § 5. This Court should also award Durst his attorney's fees and costs.

DATED this 2<sup>nd</sup> day of December, 2021.

RESPECTFULLY SUBMITTED,

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith, Esq.  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of December, 2021, I caused to be served a true copy of the foregoing **PETITIONER BRANDEN DURST'S OPENING BRIEF** by the method indicated below, and addressed to those parties marked served below:

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Bryan D. Smith