IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDEN JOHN DURST, a qualified electorof 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 ofIdaho,

Petitioner,

v.

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

Respondents.

SPENCER STUCKI, registered voter pursuantto 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

CHIEF J. ALLAN, a registered voter of the State of Idaho and Chairman of the Coeur d'Alene, Tribe, and DEVON BOYER, a registered voter of the State of Idaho and the

Supreme Court Docket No. 49261-2021

Consolidated Cases 49261-2021, 49267-2021,49295-2021, and 49353-2021

Shoshone-Bannock Tribes,

Petitioners,

v.

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

Respondents.

PETITIONER BRANDEN DURST'S REPLY BRIEF TO RESPONDENTS' CORRECTED RESPONSE BRIEF

JAN M. BENNETTS
Ada County Prosecuting Attorney

LORNA K. JORGENSEN
LEON J. SAMUELS
Deputy Ada County Prosecuting Attorneys
civipafiles@adacounty.id.gov

Attorneys for Petitioner Ada County

LAWERENCE G. WASDEN
Idaho Attorney General
MEGAN A. LARRONDO
ROBERT A. BERRY
CORY M. CARONE
Deputy Attorneys General
megan.larrondo@ag.idaho.gov
robert.berry@ag.idaho.gov
cory.carone@ag.idaho.gov

BRYAN D. SMITH
BRYAN N. ZOLLINGER
Smith, Driscoll & Associates, PLLC
P.O. Box 50731
Idaho Falls, ID 83405-0731
bds@eidaholaw.com

Attorneys for Petitioner Branden Durst

DEBORAH A. FERGUSON
CRAIG H. DURHAM
Ferguson Durham, PLLC 223 N. 6th Street, Suite 325
Boise, Idaho, 83702
(208) 484-2253
daf@fergusondurham.com
chd@fergusondurham.com

Attorneys for Petitioners Chief Allan and Devon Boyer

Spencer E. Stucki
5046 Independence Ave.
Chubbuck, ID 83202
commffelect@gmail.com

Pro Se Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES: ***Pages***

STATUTES AND RULES:

CONSTITUTIONAL PROVISIONS

I.

INTRODUCTION

The Commission wants broad discretionary power to adopt a reapportionment plan when Art. III, § 5 of the Idaho Constitution and Idaho Code § 72-1506(5) place limits on the Commission's discretionary powers. Specifically, Art. III, § 5 of the Idaho Constitution and Idaho Code § 72-1506(5) require that the Commission adopt a plan that accomplishes the following while also achieving Federal Equal Protection: (1) divides the least number of counties; (2) favors internal over external county divisions; and (3) divides the least number of counties externally.

The Commission complains that these rules "would render the Commission's work a mere computer exercise, nullifying both the Commission's judgment and all public input."[1] The truth is that the Commission has disregarded input from the public, its own legal counsel, and has even thumbed its nose at clear Idaho law to divide more counties than necessary with more external divisions than necessary while also treating wholly internal divisions within a single county with contempt. Now that the Commission faces a legal challenge to Plan L03, the Commission asks this Court, albeit primarily in a tepid footnote, to overturn clear legal precedent that conflicts with the Commission's unbending will.

Reapportionment is a highly political and partisan issue. Art. III, § 5 and Idaho Code § 72-1506(5) were wisely placed in the Idaho Constitution and codified in Idaho

[1] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 38.

statutory law to limit a Commission's broad power in an effort to reduce temptations at gerrymandering and mischief that always accompany highly political and partisan processes.[2]

Notwithstanding Art. III, § 5 and Idaho Code § 72-1506(5), the Commission still retains broad discretion to implement these rules and to adopt a reapportionment plan. If the Commission feels it needs more discretion or if experience teaches that these rules are unwise, the Commission or other interested stakeholders must seek a constitutional amendment to change the People's will regarding reapportionment rather than attempt to supplant the People's will with its own by arguing that the People have unfairly or unwisely limited government power. Until the People have spoken otherwise, the Commission is duty bound as is this Court to implement the People's will as found in Art. III, § 5 of the Idaho Constitution and Idaho Code § 72-1506(5).

II.

A. L084 ADHERES MORE CLOSELY TO IDAHO'S CONSTITUTION THAN L03 BECAUSE L084 DIVIDES SEVEN COUNTIES EXTERNALLY AND ONE WHOLLY INTERNALLY WHEREAS L03 DIVIDES EIGHT COUNTIES EXTERNALLY AND ZERO WHOLLY INTERNALLY.

The Commission wrongly claims the Idaho Constitution treats external county divisions exactly the same as internal divisions creating a legislative district wholly

[2] Brian Kane is a Deputy Attorney General who spoke to the Commission on September 1, 2021 when he told the Commission the Idaho Constitution limits its power: "The statute gives you what appears to be a lot of discretion as a commission but fortunately, or maybe unfortunately depending on how you look at it, the constitution kind of limits some of that discretion at times based on those larger requirements and the way our court has historically interpreted those requirements." His remarks are at 1:49:55 See https://insession.idaho.gov/IIS/2021/interim/Commission%20for%20Reapportionment/210901_cfr_0930AM-Meeting.mp4.

contained within a single county.[3] This is important because although L03 and L084 each divide eight counties, L084 divides one of its eight counties wholly internally whereas L03 divides all of its eight counties externally. If the Idaho Constitution prefers internal divisions over external divisions, then L084 more closely adheres to Idaho's Constitution.

A plain reading of Idaho's Constitution shows that Idaho's constitution prefers internal divisions over external divisions. Art. III, § 5 of the Idaho Constitution states the following:

> 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.*** (Emphasis added).

The language "[a] county may be divided into more than one legislative district when districts are wholly contained within a single county" provides express constitutional authorization for internal divisions wholly contained within a single county. Art. III, § 5 provides no such express authorization for external divisions. In fact, Art. III, § 5 provides no mention of external divisions per se but contemplates them only to the extent they are reasonably determined by statute. Statutes are subordinate to constitutional authority.

The express language of Art. III, § 5, "a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided

[3] Durst will refer to Respondents as "the Commission" throughout this Reply Brief.

to create senatorial and representative districts which comply with the constitution of the United States," applies by its terms to both internal and external divisions. If internal and external divisions were to be treated the same, then no additional language would be necessary. However, Art. III, § 5 contains additional language. This additional language states, "[a] county may be divided into more than one legislative district when districts are wholly contained within a single county." Durst submits this language shows that external and internal divisions are not treated the same and provides a constitutional preference for internally divisions wholly contained in a single county.

Although this Court has not squarely addressed this issue, this Court has interpreted Art. III, § 5 in a way that prefers internal over external division of a county. This Court has said:

> 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.

Bingham County v. Idaho Com'n for Reapportionment, 137 Idaho 870, 874 (2002). This Court's language in *Bingham County* creates a preference for internal county divisions, i.e., divisions wholly contained within a single county, over external county divisions, i.e., dividing a county and aligning it or parsing it out with a neighboring county.

Bart Davis, who served as Cochair to the Commission, agrees that Art. III, § 5 prefers internal over external divisions of a county. During a public hearing, Mr. Davis explained the difference between internal and external divisions:

> **COMMISSIONER DAVIS**: [W]hen you hear the phrase external split and internal split, my understanding of that is that if you take a county and you cut a portion of it and put it with another county, that's an external split. So, if you grab the eastern part of Bonneville County and move it up or down to make southern or northern districts work, well, there's an external split. You grab the northwest corner of that county, then you have split that county externally twice. But you might also have legislative districts that are only contained within a county and when that happens, that's called an internal split.[4]

Speaking for the entire Commission, Mr. Davis then explained that internal and external divisions are not treated the same based on "language actually in Idaho's constitution":

> **[COMMISSIONER DAVIS]**: 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.[5]

Even the Commission recognized Art III, § 5 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."[6] In support of this statement, the Final Report cites to Art III, § 5 and *Bingham County*, 137 Idaho at 874.[7]

---

[4] See Testimony of Branden Durst, page 11, lines 14-21 attached as Appendix "A" to Durst's Petition for Review.

[5] See Testimony of Branden Durst, page 12, lines 3-11 attached as Appendix "A" to Durst's Petition for Review.

[6] See Commission Final Report, page 8.

[7] See Commission Final Report, page 8.

In addressing the Commission and giving legal guidance, Deputy Attorney General, Brian Kane, provided the Commission the following input reflecting a preference for internal divisions over external divisions:

> A county can be divided into more than one legislative district when districts are wholly contained within the county. And so, you do have more latitude to split counties if you're keeping districts within the county. The perfect example of that is Ada County. You divide Ada because it has enough people that it encompasses multiple districts.[8]

Mr. Kane also told the Commission that "one of the things to always think about is not all splits are equal."[9] (This is now the exact opposite of what the Attorney General's Office argues in this case).

Legislative districts wholly contained in a single county are preferred because they are much less likely the result of gerrymandering or mischief. For example, if a particular county can be divided wholly internally into two legislative districts, simple math is the predominant factor used to determine the dividing line rather than dividing a county to protect a particular political party or a particular incumbent. Idaho Code § 72-1506(8). Perhaps this factor alone gave rise to Mr. Davis' hope that this Court would not treat internal and external divisions the same.

Counties have also historically served as a traditional local community of interest. The policy of this state is that "[t]o the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest." Idaho Code §

[8] Mr. Kane made his statement on September 1, 2021 where it appears online at 1:43:14. See https://insession.idaho.gov/IIS/2021/interim/Commission%20for%20Reapportionment/210901_cfr_0930AM-Meeting.mp4.

[9] Mr. Kane made his statement on September 1, 2021 where it appears online at 1:59:46. See https://insession.idaho.gov/IIS/2021/interim/Commission%20for%20Reapportionment/210901_cfr_0930AM-Meeting.mp4.

72-1506(8). Fairs, school districts, county commissions, community events, etc. are often done at a county level. For example, for 93 years on the third Saturday of every September, the residents of Bingham County have gathered for "spud day" to recognize our state's pride and joy—the venerable potato. Counties simply form natural and traditional communities of interest, and therefore Art. III, § 5 prefers legislative districts wholly contained in a single county.

L03 and L084 divide the very same eight counties. Whereas L03 divides all eight counties externally, L084 divides only seven counties externally and divides one county (Ada) wholly internally. Art. III, § 5 prefers L084 over L03 because L084 has one county (Ada) in which all its legislative districts are wholly contained within Ada County. Assuming L084 satisfies Federal Equal Protection, L03 is unconstitutional because L03 unnecessarily divides one county externally when that county could be wholly divided internally.

B. LO84 SATISFIES FEDERAL EQUAL PROTECTION.

"[A]n apportionment plan with a total population deviation of less than 10% is presumptively constitutional." *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 544 (citing *Hellar v. Cenarrusa*, 104 Idaho 858, 589 (1984)). "If the maximum population deviation is less than ten percent, we say the plan is presumptively constitutional under the Federal Constitution." *Bonneville County v. Ysursa*, 142 Idaho 464, 467 (2005). "We say 'presumptively' constitutional because a plan whose maximum population is less than ten percent may nonetheless be found unconstitutional if a challenger can

demonstrate that the deviation results from some unconstitutional or irrational state purpose." *Id.*

Here, the Commission acknowledges L084 has a population deviation of 9.48%.[10] Accordingly, L084 is presumptively constitutional. Nonetheless, the Commission argues that Plan L084 does not comply with Federal Equal Protection once Plan L084 is evaluated for the "hallmarks" of compliance.[11]

In support of its position, the Commission cites *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Georgia 2004) *aff'd*, *Cox v. Larios*, 542 U.S. 947 (2004). In *Larios*, the United States Supreme Court affirmed the judgment of the district court that held the Georgia state legislative reapportionment plan violated one person one vote even though the plan deviated from population equality by a total of 9.98%. The district court found that the plan was "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." *Id.* at 947. Also, the plan followed "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically under populating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.*

In *Larios*, the State of Georgia failed to advance any legitimate state interest in support of its legislative reapportionment plan other than to argue its plan, which

[10] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 34.
[11] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 34.

deviated from population equality by a total of 9.98%, was barely within the 10% population deviation equality standard. Here, the Commission similarly claims Durst's plan fails equal protection standards even though Durst's plan has a population deviation of 9.48%. Importantly, in Idaho any reapportionment plan must also consider the provisions of Art. III, § 5 of the Idaho Constitution, a compelling state interest not at issue in *Larios*. These State of Idaho constitutional provisions are not just legitimate state interests, but rather, compelling state interests.

Therefore, when the Commission claims "Plan L084 appears to have been drawn simply to get under the 10% deviation threshold,"[12] the Commission ignores the facts that Plan L084 achieves compelling state interests because Plan L084 (1) divides one less county externally than Plan L03 in favor of having one district wholly contained in a single county (Ada) and (2) has four less external divisions than Plan L03. Art. III, § 5 prefers "district[s] wholly contained in a single county." Similarly, Idaho Code § 72-1506(5) states, "[d]ivision of counties shall be avoided whenever possible. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum." This statute expresses the legitimate state interest of keeping the number of external divisions to a minimum.

Durst appeared before the Commission and said, "the key is you don't have to split more than seven times. You don't have to split more than seven counties

[12] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 34.

externally."[13] Durst even referenced this Court's prior precedent saying, "[t]he Supreme Court in 2011 was crystal clear that if you don't have to split a county externally, you should not do it."[14] Durst even identified Ada County as the county the Commission unnecessarily sought to divide externally: "We're standing in the county today [Ada] that's split externally that does not need to be split externally."[15]

Durst did not draw Plan L084 simply to get under the 10% deviation threshold. Durst drew Plan L084 because Plan L084 was under the 10% deviation threshold while also satisfying (1) Art. III, § 5's preference for divisions wholly contained within a single county; and (2) satisfying Idaho Code § 72-1506(5)'s requirement to keep external divisions to a minimum.

Similarly, the Commission claims "Plan L084 significantly and impermissibly overpopulates districts in Ada County compared to the rest of the districts."[16] In support of its argument, the Commission notes each Ada County district in Plan L084 "has a deviation above the ideal district size between 4.12% and 4.94%."[17] However, "[t]he Commissioners agreed that in no instance would they craft a district that deviated more than 5% over or under the ideal district size, unless the district was an outlier and there was an extraordinary compelling reason for the larger deviation."[18] The

---

[13] See Testimony of Branden Durst, page 11, lines 3-5 attached as Appendix "A" to Durst's Petition for Review.
[14] See Testimony of Branden Durst, page 7, lines 3-5 attached as Appendix "A" to Durst's Petition for Review.
[15] See Testimony of Branden Durst, page 7, lines 5-11 attached as Appendix "A" to Durst's Petition for Review.
[16] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 34.
[17] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 34.
[18] See Commission Final Report, page 11.

Commission arrived at 5% because it believed that any deviation over 5% of the ideal district size "would represent significant overpopulation" of a district."[19] In other words, even by the Commission's own directive, a deviation under 5% would not represent overpopulation. Yet, the Commission now argues to this Court that deviations between 4.12% and 4.94% represent "significant and impermissible" overpopulation. By the Commission's own agreement, the Ada County deviations between 4.12% and 4.94% do not represent overpopulation.

In short, based on the standard the Commission set for itself, Plan L084 does not overpopulate let alone "significantly and impermissibly" overpopulate as the Commission argues. It appears the Commission argues with itself.

The Commission claims Plan L084 appears to deviate from equal protection to minimize the number of counties divided externally, which the Commission says is not a legitimate state consideration in Idaho. However, Art. III, § 5 of the Idaho Constitution states, "a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided." In this regard, Idaho Code § 72-1506(5) provides, "Division of counties shall be avoided whenever possible. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum." Minimizing the number of counties divided externally is not only a legitimate state interest, but also an expressly declared state policy.

[19] See Commission Final Report, page 11.

The Commission argues Plan L084 "was applied in an arbitrary or discriminatory manner."[20] The Commission argues "Plan L084 avoids dividing Ada County externally at the expense of dividing Bonneville County externally one more time than is necessary."[21] Although the Commission is correct that Plan L084 has one more external division in Bonneville County than Plan L03, the Commission ignores that Plan L03 has three additional divisions in Ada County, one additional division in Canyon County, and one additional division in Bannock County for a total of five additional divisions that do not appear in Plan L084. By the Commission's standards, Plan L03 is far more arbitrary and discriminatory than Plan L084.[22]

In short, as compared to Plan L03, Plan L084 divides fewer counties externally, has fewer external divisions, and keeps Ada County divided wholly internally all while achieving equal protection. A plan that accomplishes these things is the product of deliberate and thoughtful reapportionment in compliance with Art. III, § 5 and Idaho Code § 72-1506(5). It is not the product of anything arbitrary or discriminatory.

[20] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 35.

[21] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 35.

[22] If the Commission is allowed now to "exercise its discretion," as the Commission requests, and use Ada and Canyon Counties for parts by dividing them externally unnecessarily multiple times, nothing will stop future Commissions "in the name of discretion after public input" from dividing Ada and Canyon Counties into as many parts as it feels is necessary to achieve some goal other than the fewest number of internal and external county divisions.

C. ART. III, § 5 EXPRESSLY INCORPORATES STATUTORY PROVISIONS THAT REQUIRE A PLAN TO KEEP THE NUMBER OF COUNTY DIVISIONS TO A MINIMUM.

The Commission claims Durst relies on the "a county may be divided" language in Art. III, § 5 to limit the total number of times a county is divided into districts.[23] The Commission next argues, "[t]he total number of times that Plan L03 divides counties externally compared to other plans is irrelevant to determining whether the Commission complied with the Idaho Constitution."[24] Durst actually relies on the following language from Art. III, § 5 to limit the number of times a county can be divided externally: "[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." (Emphasis added.) Art. III, § 5 expressly contemplates dividing counties to create districts but only to the extent a statute reasonably determines a county must be divided.

Moreover, Art. III, § 5 expressly incorporates Idaho statute in reasonably limiting the circumstances under which a county may be divided. In this regard, the legislature enacted Idaho Code § 72-1506(5), which states, "[d]ivision of counties shall be avoided whenever possible. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum." This statute drills down even

[23] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 36.
[24] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 36.

farther than Art. III, § 5 because it expresses the legitimate state interest of keeping the number of divisions to a minimum.

The Commission points out that this Court in prior cases has determined only the extent to which the total number of counties may be divided under a plan, not the extent to which the plan may contain a total number of external divisions. Durst believes Art. III, § 5 and Idaho Code § 72-1506(5) clearly and unequivocally require the Commission to select a plan with the least number of external divisions just like the Commission must select the plan with the least number of counties divided. Accordingly, Durst specifically presents this issue to this Court and requests that this Court answer this question in this case.

The Commission also improperly treats the "ideal district size" as the standard for achieving equal protection. As justification to divide Ada County externally when such division is not required, the Commission claims, "[i]t is impossible to divide Ada County only internally to create districts with the ***ideal district size***."[25] However, ideal district size is not the standard for Federal Equal Protection. The standard under Federal Equal Protection is to create districts below a population deviation of 10%.

The Commission explains that ideal district size is 52,546. From this ideal district size, the Commission argues, "[i]f Ada County were divided only internally, it would have to be divided into 9 districts with a population of 54,996 each. That is 2,450 or 4.70%

[25] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 38. (Emphasis added.)

greater than the ideal district size."[26] However, as explained previously, "[t]he Commissioners agreed that in no instance would they craft a district that deviated more than 5% over or under the ideal district size, unless the district was an outlier and there was an extraordinary compelling reason for the larger deviation."[27] The Commission arrived at 5% because it believed that any deviation over 5% of the ideal district size "would represent significant overpopulation" of a district."[28] In other words, even by the Commission's own directive, a deviation of over 5% of the ideal district size was acceptable to the Commission. Yet, the Commission now argues that a deviation of 4.7% is impermissible and so excessive that it justifies more external divisions than are necessary to achieve Federal Equal Protection.

Finally, the Commission wants this Court to interpret Art. III, § 5, Idaho Code § 72-1506(5), and this Court's prior case law to give the Commission broad discretion in adopting a reapportionment plan. Similarly, in adopting a reapportionment plan, the Commission wants to place greater emphasis on "public input" than on Art. III, § 5, Idaho Code § 72-1506(5), and this Court's prior case law. Otherwise, the Commission is concerned that its work becomes "a mere computer exercise."[29]

Nothing is more political than reapportionment. At the same time, nothing should be less political than protecting the peoples' right to vote. To a large extent, the people of Idaho through Art. III, § 5 and through their legislature with the enactment of

---

[26] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 38.
[27] See Commission Final Report, page 11.
[28] See Commission Final Report, page 11.
[29] See Respondents Idaho Commission for Reapportionment and Lawerence Denney's Response Brief, p. 38.

Idaho Code § 72-1506 have taken much of the politics, gamesmanship, and gerrymandering out of reapportionment. The reasons are that (1) under Art. III, § 5, the Commission must divide as few counties as possible; (2) Art. III, § 5 also gives a preference to internal divisions; and (3) Art. III, § 5 together with Idaho Code § 72-1506(5) forces the Commission to avoid divisions of counties keeping them to a minimum when counties must be divided. These three rules remove much of the politics and gamesmanship from reapportionment.

Even the Attorney General's office agrees. In speaking to the Commission about applying Art. III, § 5 and Idaho Code § 72-1506, Deputy Attorney General, Brian Kane, told the Commission, "the map . . . draws itself [when] minimizing county splits."[30] And that is exactly what Art. III, § 5 together with Idaho Code § 72-1506 are designed to do.

III.

DURST'S PETITION FOR REVIEW IS NOT UNTIMELY

Durst attended a hearing before the Commission held on November 10, 2021.[31] 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.[32] In reliance on the Commission's direction, Durst authorized his legal counsel to file the Petition for review after 5:00 p.m. on November 10, 2021.[33]

---

[30] Mr. Kane made his statement on September 1, 2021 where it appears online at 1:48:38 See https://insession.idaho.gov/IIS/2021/interim/Commission%20for%20Reapportionment/210901_cfr_0930AM-Meeting.mp4.

[31] See Declaration of Branden John Durst.

[32] See Declaration of Branden John Durst.

[33] See Declaration of Branden John Durst.

The Commission makes a fleeting reference that the Petition for Review may be "premature" because it was filed before the Final Report was filed with the Secretary of State. Durst 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. Durst 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.

IV.

RELIEF SOUGHT

If this Court were to remand this matter back to the Commission, this Court should order that the Commission select from one of the proposed plans already submitted and commented on by the public. There is no reason to have the Commission start from scratch especially where time is of the essence given the great need to have a reapportionment plan in place as soon as possible.

V.

REQUEST FOR ATTORNEY'S FEES

The Commission objects to Durst's request for attorney's fees because Durst's Petition for Review did not specifically request attorney's fees under the private attorney general doctrine. However, Durst's Petition for Review did request attorney's fees as provided by law. More important, failure to include a claim for attorney's fees in a pleading is not fatal to recovering attorney's fees. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 721 (2005).

The Commission claims Durst has not proved private enforcement was necessary because Ada County is arguing a "substantially similar challenge." However, Ada County does not even argue anything about Durst's Plan L084 or that Durst's plan is superior to Plan L03.

The Commission also argues that Durst presented no argument that he has pursued this challenge at significant burden to himself. Durst has undergone the very same burden the petitioner underwent in *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542 (2001) where this Court awarded the petitioner attorney's fees under the private attorney general doctrine.

If Durst prevails in this case, petitioners like Durst who hire attorneys should be compensated for having helped protect the right that a free society holds to cast a meaningful vote and having benefited a large number of Idahoans.

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, if 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 order the Commission to select a plan already presented to the Commission and considered by the Commission to expedite getting a plan in place. This Court should also award Durst his attorney's fees and costs.

DATED this 23rd 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 23rd day of December, 2021, I caused to be served a true copy of the foregoing **PETITIONER BRANDEN DURST'S REPLY BRIEF** by the method indicated below, and addressed to those parties marked served below:

Megan A. Larrondo, Esq.
Robert A. Berry, Esq.
Cory M. Carone, Esq.
Idaho Attorney General's Office
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83702 -0010
megan.larrondo@ag.idaho.gov
robert.berry@ag.idaho.gov
cory.carone@ag.idaho.gov
Attorneys for Respondent

- ☐ U.S. Mail, Postage Paid
- ☐ Hand Delivered
- ☐ Fax Transmittal
- ☑ iCourt/Efile/Serve

Jan M. Bennetts
Lorna K. Jorgensen
Leon Samuels
Deputy Prosecuting Attorneys
Civil Division
200 W. Front Street, Room 3191
Boise, ID 83702
civilpafiles@adaweb.net
Attorneys for Petitioner Ada County

- ☐ U.S. Mail, Postage Paid
- ☐ Hand Delivered
- ☐ Fax Transmittal
- ☑ iCourt/Efile/Serve

Deborah A. Ferguson
Craig H. Durham
Ferguson Durham, PLLC
223 N. 6th Street, Suite 325
Boise, Idaho 83702
daf@fergusondurham.com
chd@fergusondurham.com

- ☐ U.S. Mail, Postage Paid
- ☐ Hand Delivered
- ☐ Fax Transmittal
- ☑ iCourt/Efile/Serve

Spencer E. Stucki
5046 Independence Ave.
Chubbuck, ID 83202
commffelect@gmail.com

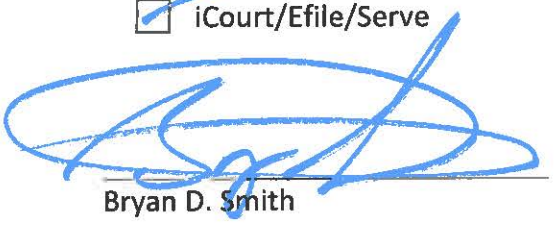
- [ ] U.S. Mail, Postage Paid
- [ ] Hand Delivered
- [ ] Fax Transmittal
- [ ] iCourt/Efile/Serve
- [x] Email

Bryan F. Taylor
Canyon County Prosecuting Attorney
Alexis Klempel
Deputy Prosecuting Attorney
1115 Albany Street
Caldwell, ID 83605
civilefile@canyoncounty.id.gov

- [ ] U.S. Mail, Postage Paid
- [ ] Hand Delivered
- [ ] Fax Transmittal
- [x] iCourt/Efile/Serve

Victor S. Villegas
Borton-Lakey Law Policy
141 E. Carlton Ave.
Meridian, ID 83642
victor@borton-lakey.com

- [ ] U.S. Mail, Postage Paid
- [ ] Hand Delivered
- [ ] Fax Transmittal
- [x] iCourt/Efile/Serve



Bryan D. Smith