No. _____

In The
Supreme Court of the United States

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.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JAN M. BENNETTS
Ada County Prosecuting Attorney

LORNA K. JORGENSEN
Counsel of Record
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Telephone: 208-287-7700
Email: ljorgensen@adacounty.id.gov
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Idaho law incorporates federal constitutional law by prescribing requirements for state legislative districting. Specifically, the Idaho Constitution prohibits a districting plan from dividing counties except when necessary to satisfy the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In this case, the Idaho Supreme Court held that a state administrative body, the Idaho Commission for Reapportionment, makes the final determination on the meaning of the Fourteenth Amendment, as long as its interpretation is "reasonable." The question presented is:

- Whether principles of federal supremacy and due process permit a nonjudicial state entity to reject claims of federal constitutional rights violations subject to review by a state court only for reasonableness.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), Petitioner states that all the parties to the proceeding in this Court are named in the caption of this Petition. Only Ada County petitioned the Idaho Supreme Court for rehearing; however, all parties to the original proceeding are named in both the Idaho Supreme Court's original and substitute opinion (denying rehearing).

Petitioners in the original proceeding before the Idaho Supreme Court were: Branden John Durst, a qualified elector of the State of Idaho; Canyon County, a duly formed and existing county pursuant to the laws and Constitution of the State of Idaho (Intervenor-Petitioner); Ada County, a duly formed and existing county pursuant to the laws and Constitution of the State of Idaho; Spencer Stucki, registered voter pursuant to the laws and Constitution of the State of Idaho; 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 Chairman of the Shoshone-Bannock Tribes. The Idaho Supreme Court granted permission for the City of Eagle, Idaho to file an *Amicus Curiae* Brief.

Respondents in the original case before the Idaho Supreme Court were: Idaho Commission for Reapportionment, and Lawerence Denney, Secretary of State of the State of Idaho, in his official capacity.

LIST OF PROCEEDINGS PURSUANT TO RULE 14.1(b)(iii)

Branden John Durst, et al. v. Idaho Commission for Reapportionment, and Lawerence Denney, Substitute Opinion (denying rehearing), the Idaho Supreme Court's prior opinion dated January 27, 2022 was withdrawn on March 1, 2022; *also Durst v. Idaho Commission for Reapportionment*, 505 P.3d 324 (Idaho 2022).

Branden John Durst and Canyon County v. Idaho Commission for Reapportionment and Lawerence Denney; Ada County v. Idaho Commission for Reapportionment and Lawerence Denney; Spencer Stucki v. Idaho Commission for Reapportionment and Lawerence Denney; Chief J. Allan and Devon Boyer v. Idaho Commission for Reapportionment and Lawerence Denney, Docket Nos. 49261, 49267, 49295, and 49353, Opinion (Idaho Jan. 27, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ada County, respectfully petitions for a writ of certiorari to review the judgment of the Idaho Supreme Court.

OPINIONS BELOW

The original opinion of the Idaho Supreme Court and its substitute opinion denying rehearing are a combined opinion (App. 1-51), reported at *Durst v. Idaho Commission for Reapportionment*, 505 P.3d 324 (Idaho 2022).

STATEMENT OF JURISDICTION

The opinion of the Idaho Supreme Court was issued on January 27, 2022. The opinion was withdrawn and superseded by a substitute opinion that denied rehearing, filed on March 1, 2022. A request for an extension of time was requested from this Court until July 14, 2022. The request was granted on May 19, 2022. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2, of the United States Constitution states in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution.

The Fourteenth Amendment, § 1, of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Article III, § 5, of the Idaho Constitution states in relevant part:

> 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.

STATEMENT OF THE CASE

1. Facts

The Idaho Legislature was responsible for congressional and legislative redistricting in the State of Idaho until 1994. App. 74. That year, the Idaho Legislature proposed constitutional amendments to do two things. First, to establish an Idaho Commission for Reapportionment ("Commission") and second, to articulate that the criteria for redistricting would be established by statute. App. 74-75; IDAHO CONST. art. III, § 2(3) (App. 103). After adoption of the constitutional amendments by the voters, the Idaho Legislature enacted statutes to govern both the plans considered by the Commission and the plans adopted by the Commission. App. 17, 75-76, 91; IDAHO CODE § 72-1506 (App. 106-07). One of the statutes adopted by the Idaho Legislature allowed "any registered voter, incorporated city or county in this state" to appeal a congressional or legislative redistricting plan adopted by the Commission directly to the Idaho Supreme Court. IDAHO CODE § 72-1509 (App. 108).

Pursuant to the Idaho Constitution, after Idaho received the United States Census Bureau results on August 12, 2021, the Idaho Secretary of State established the Commission. App. 5. The Commission was comprised of six members appointed by the leaders of the two largest political parties. IDAHO CONST. art. III, § 2(2) (App. 103). The Commission had its first meeting on September 1, 2021, and filed its Final Report

regarding reapportionment with the Idaho Secretary of State on November 12, 2021. App. 5.

Because the number of legislative districts in Idaho is set in the Idaho Constitution at 35, the Commission's task was to divide Idaho's population into 35 districts while at the same time dividing as few counties as possible to comply with the United States Constitution. IDAHO CONST. art. III, § 2 (App. 102-04); § 5 (App. 104-05). Based on Idaho's 2020 census population of 1,839,106, the calculated "ideal district size" for the 35 legislative districts would be 52,546 people in each of the 35 districts. App. 12. The Commission determined that a good faith effort to achieve equality had to limit the percentage deviation from the ideal district size to 5%, without addressing the number of counties that would need to be divided. App. 24-25, 96. The Commission "believed" and "suspected" that a greater deviation than 5% would result in preferential treatment, arbitrary application of state policy and the dilution of the vote. App. 25. This appointed Commission made this determination even though the Idaho Supreme Court has previously determined that deviations of 9.71% and 9.70% are good faith efforts (App. 13 n.3), and this Court has found that plans with a maximum population deviation under 10% are presumptively constitutional. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Harris v. Arizona Independent Redistricting Com'n*, 578 U.S. 253, 259 (2016) (unanimous decision).

The public submitted plans through a website and could testify before the Commission if they chose to do

so. App. 22-23. At least 84 public plans were submitted, including a plan submitted by Mr. Durst, numbered L084. App. 5. At least two of the public plans, identified as L075 and L076, were presumptively constitutional with a deviation of 9.97%, and only divided 7 counties. App. 26. The Commission's plan, identified as L03, was also presumptively constitutional with a deviation of 5.84% but it divided eight counties. App. 12. The Commission determined that its plan, identified as L03, with a deviation of 5.84%, was presumptively constitutional from an equal protection standpoint. App. 12. However, the Commission found the public plans "'would likely violate the Equal Protection Clause and that they [were] also inconsistent with other principles applicable to the redistricting process.'" App. 19, 26. The Commission provided no facts for its conclusion that the public plans would "likely" violate the Equal Protection Clause. App. 23. Although the plans identified as L075 and L076 had presumptively constitutional deviations, the Commission, with the limited information of only the submitted plans themselves, found that the public plans had "significant defects and stand on dubious equal protection grounds." App. 23, 26. Without any facts in the record, the Commission speculated that there were bad faith motives associated with the other public plans. App. 27 ("The plain purpose of L075 is to achieve a seven-county-split plan."); App. 32 (believing L076 to be arbitrary because "these boundaries seem to have been manipulated specifically to keep the maximum population deviation just under 10%"). Apparently, these speculative and conclusory findings were necessary because the other

plans were presumptively constitutional, and thus had to be undermined on a different basis. App. 25-33. Although the Commission alluded to the idea that the other plans were not prepared with a good faith motive, it ultimately backed away from that idea concluding: "[T]he Commission does not mean to imply that anyone who submitted a seven-county-split plan [with a deviation that is presumptively constitutional] did so for improper purposes." App. 29.

The Idaho Supreme Court has original jurisdiction over reapportionment challenges. IDAHO CONST. art. III, § 2(5) (App. 104). "Any registered voter, any incorporated city or any county in [Idaho] may file an original action challenging a congressional or legislative redistricting plan adopted by the Commission." IDAHO CODE § 72-1506 (App. 108). When Ada County obtained the Commission's Final Report and calculated the Commission's numbers itself, Ada County learned that not only had too many counties been unnecessarily divided, but also that the urban areas of Ada County and Canyon County had been shortchanged in the redistricting process. App. 80-81. The Commission did not explain a rational purpose anywhere in its Final Report as to why the urban areas were treated differently than all other areas of the state. App. 92-93. Consequently, Ada County challenged the Commission's plan, identified as L03, because the Commission deviated from its stated "ideal district size" when it was applied to the urban counties that comprise nearly 40% of the state's population. App. 79-82. ("Although L03 meets the 10% deviation criteria, L03 does not

serve equal protection because of its treatment of Ada and Canyon Counties."). App. 101. Ada County, prior to the 2021 Commission plan, had nine legislative districts. App. 81. After the Commission adopted its plan, Ada County only had eight districts with 75,859 Ada County citizens distributed to two surrounding rural counties and the rural part of another county. The ideal district size is 52,546. App. 81, 101. Additionally, after the Commission adopted its plan, Canyon County was reduced from four districts to three districts with 70,678 Canyon County citizens distributed to three surrounding counties. *Id*. This distribution of an ideal district to surrounding counties only occurred in the urban counties of Ada and Canyon Counties. App. 80-81.

The Commission explained its decision by arguing it was appropriate to combine the citizens of Eagle, a wealthy, mostly urban city in Ada County with the citizens of a rural neighboring county, arguing that the two were in the same high school sports division. App. 83. The difference between Ada County and its rural neighbors was illustrated by the testimony of a State of Idaho District Judge before the Idaho Legislature during the 2022 Legislative budget process as follows: "Approximately 40% of the state's population now lives in Ada County . . . and the county has grown 30% just in the past decade." Kelcie Moseley-Morris, *Ada County judge to legislators: We need more judges to decrease Idaho's court backlogs*. IDAHO CAPITAL SUN, Feb. 2, 2022 (App. 84). The district judge further stated: "'Ada County civil cases tend to be

substantially more complex than cases in other counties because it's the home base of large companies, hospitals and government agencies. These entities tend to breed more complex litigation.'" *Id*. As the district court acknowledged, Ada County is not like its rural neighbors.

The Idaho Supreme Court did not conduct an independent review to determine whether the Commission's plan, identified as L03, violated the Equal Protection Clause. ("[W]hen reviewing Petitioners' claims, we must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the Equal Protection Clause."). App. 18. ("The Commission found that Plan L03 had a maximum population deviation of 5.84%, which is presumptively constitutional from an equal protection standpoint."). App. 12. The Idaho Supreme Court also failed to make an independent determination as to whether any of the public plans complied with equal protection, instead deferring to the Commission's legal findings. ("Petitioners have not established that the Commission erred in rejecting Plans L075, L076 and L079. Petitioners have failed to show the Commission unreasonably determined these plans did not comply with equal protection."). App. 22. And finally, the Idaho Supreme Court failed to analyze whether the Commission violated the Equal Protection Clause with an irrational and discriminatory purpose when the two counties comprising nearly 40% of the state's population were treated differently than every other county in the state.

2. Proceedings Below

A. Idaho Supreme Court

The Idaho Supreme Court has "original jurisdiction over actions involving challenges to legislative apportionment." IDAHO. CONST. art. III, § 5 (App. 104). After the Commission released its Final Plan on November 12, 2021, multiple parties filed suit challenging the constitutionality of the Plan, identified as L03. App. 4. Brandon Durst, Ada County, Spencer Stucki, Chief J. Allan of the Coeur d'Alene Tribe and Devon Boyer of the Shoshone-Bannock Tribes all filed petitions while Canyon County intervened. App. 5-6.

On November 12, 2021, the Idaho Constitution stated in relevant part:

> 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*.

Art. III, § 5 (emphasis added) (App. 104-05). The Petitioners argued that L03, the Plan submitted by the Commission, was unconstitutional. Namely, the Petitioners contended that L03 split more counties than necessary, resulting in districts further from their ideal district size. App. 4, 100. In prior apportionment cases, whether the challenged plan was legislatively or

commission drawn, the Idaho Supreme Court made the final determination as to whether the proposed plan was constitutional. *See Twin Falls County v. Idaho Com'n on Redistricting*, 271 P.3d 1202, 1203 (Idaho 2012) (holding plan invalid because it divided "more counties than necessary to comply with the Constitution of the United States"); *Bonneville County v. Ysursa*, 129 P.3d 1213, 1215 (Idaho 2005) ("[W]e hold Plan L97 is not unconstitutional."); *Bingham County v. Idaho Com'n for Reapportionment*, 55 P.3d 863 (Idaho 2002) (Court voided first plan because it "violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution"); *Smith v. Idaho Com'n on Redistricting*, 38 P.3d 121, 124 (Idaho 2001) ("[W]e hold that L66 is in violation of the Equal Protection Clause."); *Hellar v. Cenarrusa*, 682 P.2d 539, 541 (Idaho 1984) ("[T]his court, in determining whether a plan is violative of the United States Constitution, must follow pertinent rulings of the Supreme Court of the United States.").

The Idaho Supreme Court's decision in January 2022 represents a significant departure from its longstanding precedents. The Idaho Supreme Court failed to make an independent, de novo decision as to whether the Commission's plan or any of the other plans were constitutional. *See Zeyen v. Pocatello/Chubbuck School District No. 25*, 451 P.3d 25, 29 (Idaho 2019) ("For questions of law, this Court applies a de novo standard of review."). Instead of a de novo review of the law, the Idaho Supreme Court found: "Petitioners have failed to establish that the Commission

'unreasonably determined' that Plan L03 comported with the federal and state constitutions." App. 11. The Idaho Supreme Court improperly shifted the burden to the Petitioners to prove that the Commission was unreasonable in its determination rather than engaging in the constitutionality analysis itself.

In addition, the Idaho Supreme Court determined: "Petitioners have not established that the Commission erred in rejecting Plans L075, L076 and L079. Petitioners have failed to show the Commission unreasonably determined these plans did not comply with equal protection." App. 22. The Idaho Supreme Court also stated that population deviations under 10% that "are tainted by arbitrariness or discrimination cannot withstand constitutional scrutiny" and then stated that "the Commission must evaluate each plan for arbitrariness or discrimination." App. 22-23. The Idaho Supreme Court deferred to the Commission's analysis of constitutionality regarding arbitrariness or discrimination even though the Idaho Supreme Court noted that the Commission was using the limited information of the plans themselves. App. 23. Further, the Idaho Supreme Court did not conduct an independent, de novo review of whether the Commission's treatment of the largest urban areas of the state was constitutional. This new standard, articulated for the first time in the Idaho Supreme Court's January 2022 Opinion, determined that it was for the Commission, rather than the Idaho Supreme Court to decide whether a plan violated the United States Constitution. App. 18. That decision prompted Ada County to seek rehearing on the issue of

whether the Idaho Supreme Court could delegate its judicial function of determining whether reapportionment plans complied with the Equal Protection Clause to the Commission, which is essentially an administrative agency. App. 65.

B. Petition for Rehearing, Idaho Supreme Court

In previous reapportionment cases, *supra* Section 2.A., the Idaho Supreme Court made independent, de novo decisions regarding whether the proposed plans complied with the federal and state constitutions. This was in keeping with the Idaho Supreme Court's de novo review of questions of law. *Valiant Idaho, LLC v. JV L.L.C.*, 429 P.3d 168, 174 (Idaho 2018). Because of the well-settled case law, it was unprecedented that the Idaho Supreme Court would defer to the Commission's equal protection determinations rather than conducting its own equal protection analysis and making its own equal protection determination. "We must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the Equal Protection Clause." App. 39. "We hold that the Commission's determination that plans put forth by Petitioners did not satisfy equal protection was reasonable." App. 38. There was no opportunity prior to the Petition for Rehearing for Ada County to raise the question of whether the United States Constitution allows the Idaho Supreme Court to delegate to an administrative body, the Commission, the responsibility for interpreting the Equal Protection

Clause of the Fourteenth Amendment. App. 65. The Idaho Supreme Court did not address the constitutional question raised in Ada County's Petition for Rehearing; therefore, in such circumstance, review by this Court is not barred. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 712 n.4 (2010).

The federal question presented here, whether principles of federal supremacy and due process permit a nonjudicial state entity to reject claims of federal constitutional rights subject to state court review only for reasonableness, was timely raised in Ada County's Petition for Rehearing and supports this Court's jurisdiction.[1]

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[1] Although the question for this Court is whether principles of federal supremacy and due process permit a nonjudicial state entity to reject claims of federal constitutional rights subject to state court review only for reasonableness, it is important to clarify a point from the Idaho Supreme Court's Denial of Ada County's Request for Rehearing. The Court's Denial of Ada County's Request for Rehearing indicates that Ada County did not meet its burden to demonstrate that the Commission's plan, identified as L03, violated the Equal Protection Clause and as evidence, cites to a partial heading on page 4 of Ada County's Opening Brief. App. 95. The entire heading in Ada County's Opening Brief states in full "Plans L03, L075, L076 and L079 all meet the equal protection standard." *Id*. The content under the heading is explicit that the argument is related to the presumptively constitutional 10% deviation standard. App. 95-96. The content under the heading also includes the statement that "[t]he mathematical deviations in Plans L03, L075, L076 and L079 are insufficient to make a prima facie case that they are unconstitutional." App. 101. Ada County then states: "Although L03 meets the 10% deviation

REASONS FOR GRANTING THE PETITION

The decision of the Idaho Supreme Court, to defer to an administrative body on a question of constitutional law, is in conflict with this Court's decisions. Administrative bodies are not vested with the authority to make constitutional decisions. That authority rests solely with the judiciary as set forth in both the United States and Idaho Constitutions. In this case, that judicial authority has been delegated to a state administrative body. Thus, it is important for the Court to grant this petition and reaffirm that state administrative bodies cannot make federal constitutional decisions. Such a confirmation would set the precedent necessary for uniformity in federal law as more and more states move to administrative bodies making congressional and legislative redistricting decisions.

Further, this case provides a vehicle for this Court to confirm that equal protection rights cannot be denied without the due process of independent judicial review.

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criteria, *L03 does not serve equal protection* because of its treatment of Ada and Canyon Counties. There are 105,092 citizens that should have had their own legislative districts" (emphasis added). App. 101. Ada County asserts that it did meet its equal protection burden in the proceedings before the Idaho Supreme Court with evidence submitted in its Petition (App. 100) and in its Request for Rehearing. App. 89.

I. THE DECISION BY THE IDAHO SUPREME COURT ERODES UNIFORMITY IN FEDERAL LAW BY ALLOWING A STATE ADMINISTRATIVE BODY TO MAKE UNITED STATES CONSTITUTIONAL DECISIONS.

The United States Constitution is incorporated into the Idaho Constitution which states in relevant part: "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." Art. III, § 5 (App. 104-05). The Equal Protection Clause is the crucial element in determining whether a state redistricting plan is constitutional. The provision that counties must only be divided to comply with the Constitution of the United States necessarily requires a determination of whether any redistricting plan comports with the Equal Protection Clause of the United States Constitution. *Twin Falls County*, 271 P.3d at 1205 (overruled on other grounds) ("We have interpreted this provision to mean that the constitution 'prohibits the division of counties, except to meet the constitutional standards of equal protection.'"). Because the Equal Protection Clause is at issue, Ada County and its citizens are entitled to an independent judicial review of federal law to ensure uniformity in the application of federal law. That independent judicial review of federal constitutional law did not occur.

The reason that Ada County did not receive independent judicial review is based on the Idaho Supreme

Court's interpretation of the Idaho Constitution and its ultimate decision that "reasonably determined by statute" actually means "reasonably determined by the Commission." App. 14, 18. Consequently, in reviewing Ada County's claims, the Idaho Supreme Court stated it "must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the Equal Protection Clause." App. 18. In addition, the Idaho Supreme Court found: "Petitioners have failed to show the Commission unreasonably determined these plans did not comply with equal protection" rather than conducting independent judicial review of whether any of the plans complied with equal protection. App. 22. In essence, a State of Idaho administrative body is now the final decision-maker on whether the division of counties in a redistricting plan complies with the Fourteenth Amendment, as long as the administrative body's interpretation is deemed reasonable. This is in direct conflict with the United States Constitution which gives the judiciary the power over all cases arising under the Constitution. U.S. CONST. art. III, § 2. It has been argued that such deference to an administrative body on legal interpretations is a grant of unconstitutional power. *See Baldwin v. United States*, 140 S.Ct. 690, 691 (Mem.) (2020) (Thomas, J., dissenting from denial of certiorari). The Idaho Legislature does not have the power to make final determinations of the law on constitutional issues. It follows that an unelected, unaccountable administrative body should not be elevated to the level of the judiciary with judicial decision-making power.

In 1936, the St. Joseph Stock Yards Company brought suit to stop the United States Secretary of Agriculture's order regarding reasonableness of St. Joseph's rates. *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 45 (1936). The Court found there were extensive findings to support the Secretary of Agriculture's order of reasonable rates. *Id*. at 46-47. However, the Court also held that the findings of legislative agencies are "*necessarily subject to independent judicial review* upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of land may be maintained." *Id*. at 51-52 (emphasis added). Although *St. Joseph Stock Yards* revolved around the decision of a federal agency, the holding is similarly applicable here where there is a state commission now determining the supreme law of the land rather than the Idaho Supreme Court. Both *St. Joseph Stock Yards* and this case involve unelected entities making decisions that impact the supreme law of the land. It would follow that the Commission's reasonable determinations of equal protection should be reviewed by a court to assure that the Equal Protection Clause, as part of the supreme law of the United States, can be maintained uniformly at all levels of redistricting. Without such a review by a judicial body, this Court cannot ensure uniformity in how the Equal Protection Clause is applied across the nation. In addition, when nonjudicial bodies make federal constitutional decisions, those decisions are not subject to review under 28 U.S.C. § 1257(a). *See Staten Island Rapid Transit Ry. v. Transit Comm'n of State of N.Y.*, 276 U.S. 603, 603 (1928) ("The writs of error are

dismissed for lack of jurisdiction in that the writs herein are not directed to a court, but to an administrative commission."), *cited in* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 3-41 (11th ed. 2019). Thus, if nonjudicial bodies make federal constitutional decisions, there is no review by the entities actually charged by the Constitution with determining the law of the land.

II. THE DECISION BY THE IDAHO SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT BECAUSE IT DENIES DUE PROCESS THROUGH JUDICIAL REVIEW REGARDING CONSTITUTIONALITY.

Due process requires judicial review of legal decisions by an unbiased decision-maker. *See*, *e.g., Withrow v. Larkin*, 421 U.S. 35, 47 (1975); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 311 (2017) ("bedrock requirement of due process: that there be a neutral, independent decision-maker"). "When dealing with constitutional rights [citation omitted] there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." *St. Joseph Stock Yards*, 298 U.S. at 77 (Brandeis, J., concurring); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (holding that petitioners were entitled as a matter of due process to judicial determination of whether they were

citizens or were instead noncitizens subject to deportation, as had been held by immigration agency; Court relied upon "the difference in security of judicial over administrative action"). Yet, when dealing with the constitutional right of equal protection for the 75,859 citizens of Ada County, judicial review of the constitutional questions raised was declined by the Idaho Supreme Court. The due process rights of Ada County and its citizens were violated when an unelected, administrative body was allowed to determine their constitutional rights with a review only for "reasonableness."

In its original January decision, the Idaho Supreme Court stated: "[W]e must initially determine whether [the Commission's Plan, identified as L03] complies with the Equal Protection Clause of the Federal Constitution." App. 11. However, the Idaho Supreme Court failed to make that independent finding in its decision. ("[W]hen reviewing Petitioners' claims, we must determine whether the Commission 'reasonably determined' the number of counties that must be divided to comply with the Equal Protection Clause."). App. 18. The Idaho Supreme Court also failed to make an independent determination about whether any of the public plans submitted complied with equal protection. ("Petitioners have not established that the Commission erred in rejecting [the publicly submitted] Plans L075, L076 and L079. Petitioners have failed to show the Commission unreasonably determined these plans did not comply with equal protection."). App. 22. Finally, the Idaho Supreme Court failed to determine

whether the Commission had an irrational and discriminatory purpose, which violates the Equal Protection Clause, when the two counties comprising nearly 40% of the state's population were treated differently in their division than every other county in the state.

Because the Idaho Supreme Court did not provide an independent review, Ada County's Petition for Rehearing requested a de novo determination of whether the division of counties by the Commission violated the Equal Protection Clause. App. 65. The Idaho Supreme Court again rejected independent review and deferred to the Commission. ("Petitioners have failed to show the Commission unreasonably determined [that the plans dividing seven counties] did not comply with equal protection."). App. 65.

This deference to the constitutional determinations of an unelected Commission is inapposite to holdings of this Court. As early as 1932, this Court recognized that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (extent of administrative authority to determine injury on navigable waters); *St. Joseph Stock Yards*, 298 U.S. at 84 (Brandeis, J., concurring) (there should be "independent judgment of a court on the ultimate question of constitutionality"); *see also* Louis Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 800-01 (1958) (arguing that there is a right to judicial review of administrative

action when there has been a deprivation of a constitutional right); Louis Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 405 (1958) (arguing that the United States "with nearly all Western counties, have concluded that the maintenance of legitimacy requires a judicial body independent of the active administration").

As time passed, the Court included the independent review of determinations of jury and trial judges when an important constitutional issue was at stake. "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Where constitutional questions are at issue, *Bose Corp.* highlights the importance of this Court not permitting the delegation of constitutional authority to a jury, trial judge or, as in this case, an administrative body. This Court's precedent requiring independent judicial review is necessary to ensure the constitutional rights of the citizens are preserved. Here, there was no due process provided because an independent, de novo review was not conducted to ensure that over 70,000 Ada County citizens had their rights protected under the Equal Protection Clause.

If deference is not given to trial courts and juries when a constitutional issue is at stake, it certainly should not be given to a state administrative body. On questions of constitutional law, the trial judge is a lawyer with experience interpreting this Court's law

and making decisions regarding constitutional law, while an administrative body has little or no experience making constitutional law decisions. Yet, the Idaho Supreme Court deferred to a nonjudicial Commission's determination, and placed great weight on the decision of the administrative body regarding its interpretation of the United States Constitution.

The Idaho Supreme Court's decision is in contrast to a decision by this Court. A state public service commission in Pennsylvania determined the fair market value of a water company's property and the Supreme Court of Pennsylvania deferred to the commission's determination. *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 288-89 (1920). It appeared from the record that the "power to determine the question of confiscation according to their own independent judgment" was being withheld from the Pennsylvania Supreme Court. *Id*. at 289. The water company argued that the law, as interpreted by the Pennsylvania Supreme Court, denied the water company the right to be heard and that the water company had not succeeded in obtaining review which the Fourteenth Amendment requires. *Id*. This Court determined that the decision must be "intrusted to some court in order that there may be due process of law." *Id.* at 291. Similarly, the decision of the Commission must be subject to independent review before a court to protect the due process rights of Ada County and its citizens.

Although the *Bose Corp.* decision focused on independent appellate review because of the First Amendment, there was nothing in the opinion

indicating that independent review did not apply to other United States Constitutional principles. This Court has noted that "[u]sually but not always in the constitutional realm, for example, the calculus changes. There we have often held that the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors de novo review even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank Nat. Ass'n ex rel. CWC Capital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 973 n.4 (2018) (quoting *Bose Corp.* 466 U.S. at 503). In the *U.S. Bank* decision, this Court also cited to *Ornelas v. United States*, 517 U.S. 690, 697, (1996) (reasonable suspicion and probable cause under the Fourth Amendment); *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (expression under the First Amendment); *Miller v. Fenton*, 474 U.S. 104, 115-16 (1985) (voluntariness of confession under the Fourteenth Amendment's Due Process Clause) as examples where de novo review is appropriate when answering a mixed question.

Typically, administrative agencies are limited to fact finding. However in the case of constitutional law, when the facts and law are intertwined, it is a mixed question of law and fact that should be reviewed de novo by the judiciary.

> [W]here what purports to be a finding upon a question of fact is so involved with and

> dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a state.

St. Joseph Stock Yards, 298 U.S. at 74 (Brandeis, J., concurring). For example, the Equal Protection Clause requires the legislature or a redistricting commission "to make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The facts of what constitutes an honest and good faith effort that complies with the Equal Protection Clause is a mixed question of law and fact. The Commission determined that only the Commission made a good faith effort because it settled on a deviation of 5.84%. But this forced deviation was not a good faith effort because it ultimately required more counties than necessary to be divided in order to comply with the federal constitution. App. 24-26. The Commission speculated that the citizens who prepared the other plans were not making a good faith effort, and summarily dismissed the other plans on that basis. The mixed question of law and fact should have been analyzed by the judiciary, independently, because of the constitutional law involved.

Along with the facts that support a good faith analysis, facts are also intertwined with determining whether the population deviations are "tainted by arbitrariness or discrimination, [so] they cannot

withstand constitutional scrutiny." *Durst*, 505 P.3d 324, 334 App. 22 (quoting *Larios v. Cox*, 300 F.Supp.2d 1320, 1337 (N.D. Ga. 2004) (three judge panel), *aff'd by Cox v. Larios*, 542 U.S. 947 (2004)) (App. 22). The Idaho Supreme Court found it was for the Commission to evaluate whether each submitted plan's population deviations were tainted by arbitrariness or discrimination. The facts that support whether a plan is arbitrary and discriminatory is again intertwined with the legal determination of whether it violates the Equal Protection Clause, and it should be the province of the Court to make an independent and neutral decision. Instead, the Commission was allowed to make the determination, finding other plans were arbitrary and discriminatory, and violated the United States Constitution based on scant evidence and conclusory statements. At the same time, the Commission promoted its own plan that discriminated against the urban voters of Ada County with no explanation.

All of the Commission's actions were done without any judicial review of the Commission's actions which violated the due process rights of Ada County and its citizens. It is unconstitutional to grant the Commission the authority to make constitutional decisions. Ada County and its citizens were entitled to a full and fair review of the Commission's decisions by the judiciary regarding how the Equal Protection Clause was applied.

III. ADA COUNTY AND ITS RESIDENTS ARE ENTITLED TO DUE PROCESS AND THE UNIFORM APPLICATION OF FEDERAL LAW.

This Court has determined that counties are persons for purposes of § 1983 civil rights actions. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) ("Any person who, under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities by the Constitution of the United States."). If counties are deemed a person for allegations of depriving a person of that person's rights, privileges or immunities secured by the Constitution, the converse should be true that counties can sue on behalf of themselves and their citizens when they are deprived of rights, privileges and immunities under the United States Constitution. It is unreasonable to believe that counties can be sued because of a deprivation of rights but are not allowed to file suit when thousands of its citizens are deprived of their rights to urban representation in the Idaho Legislature, and are denied due process. In this instance, 75,859 Ada County residents were deprived of their due process rights by an administrative body without any independent judicial review. App. 81. Canyon County's 70,678 residents were also deprived of their due process rights without any judicial review. App. 81. This was in stark contrast to the Commission ensuring that every other county with populations that exceeded

52,913, the "ideal" population size, retained its ideal districts. *Id*. " 'The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of representative government.' " *Bush v. Gore*, 531 U.S. 98, 107 (2000) (quoting *Moore v. Ogilvie*, 394 U.S. 814 (1969)). Ada County is entitled to represent itself and its citizens to ensure that their representation in the Idaho Legislature reflects the urban needs of those who live in the fastest growing area of the state with a huge percentage of the population.

Current law indicates that counties do not have "privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). In this instance, the Idaho Legislature specifically allowed counties to sue over redistricting. Therefore, such a suit is not in opposition to the will of the state. *Cf. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11-12 (1979) (interpreting state law to create liberty interest for procedural due process purposes). In addition, the Idaho Constitution gives counties rights because the division of counties is the standard for determining equal protection. The counties are in the best position to defend their own federal constitutional rights and the rights of its citizens. Counties have defended these rights in previous redistricting lawsuits in Idaho. *See Twin Falls County*, 271 P.3d 1202 (included Twin Falls, Teton, Owyhee, and Kootenai Counties); *Bonneville County*, 129 P.3d 1213; *Bingham County*, 55 P.3d 863;

Smith 38 P.3d 121 (included Bingham County); *Hellar*, 682 P.2d 539 (included Benewah County).

There is division in the circuits regarding whether Supremacy Clause claims can be brought by political subdivisions. *Ocean City Board of Commissioners v. Attorney General of the State of New Jersey*, 8 F.4th 176, 180-81 (3d Cir. 2021) ("We agree with the reasoning of the Second Circuit and hold that a political subdivision may sue its creator state in federal court under the Supremacy Clause."). *But see City of San Juan Capistrano v. California Public Utilities Commission*, 937 F.3d 1278, 1282 (9th Cir. 2019) (noting its *per se* standing bar on political subdivisions but recognizing the division in the circuits). Ada County is also asserting that in order to assure uniformity in the application of constitutional law, the Supremacy Clause requires that constitutional decisions be made by the judiciary and not administrative bodies.

IV. THE QUESTION PRESENTED HAS EXCEPTIONAL NATIONAL IMPORTANCE.

The use of redistricting commissions, rather than state legislatures, to draw the lines for congressional and legislative districts is increasing. *See generally*, David Garner, *Arizona State Legislature v. Arizona Independent Redistricting Commission and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551 (2019). Litigation involving redistricting commissions occurred in 2020 in California, in 2021 in Colorado and

Washington and continued into 2022 with Michigan, Hawaii, and Idaho.

Although the redistricting function has been found to be a legislative function,[3] the standard of review for judicial review of a separate branch of government's actions in redistricting has not been consistent among the states. Now, added to the mix is judicial review of the decisions of redistricting commissions, which are often unelected, partisan appointments that are not accountable to any of the three branches of government. The precise question before this Court, whether principles of federal supremacy and due process permit a nonjudicial state entity to reject claims of federal constitutional rights violations, with the only review being reasonableness, has not yet been addressed.

With the increased use of redistricting commissions, it is not surprising that the question of which entity has the authority to review whether federal constitutional rights have been violated is being raised. At the same time that the Idaho Supreme Court delegated its authority to the Idaho Commission for Reapportionment to make reasonable equal protection decisions, the Hawaii Supreme Court stated unequivocally: "We give no deference to the constitutional interpretations the Commission implicitly

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[3] *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.*, 576 U.S. 787, 808 (2015) (however, the dissent argued that in the case of congressional redistricting, "the unelected Commission is not 'the Legislature' of Arizona" (C.J., Roberts, JJ., Scalia, Thomas and Alito dissenting)).

operationalized in developing the Plan." *Hicks v. 2021 Hawai'i Reapportionment Commission*, 511 P.3d 216 (Haw. 2022).[4] The Hawaii Supreme Court further noted: "We have intervened and will continue to intervene, when necessary to ensure that Hawai'i's reapportionment commission creates reapportionment plans that comply with the Equal Protection Clause." *Id*. *See also Detroit Caucus v. Independent Citizens Redistricting Commission*, 969 N.W.2d 331, 334 (Mich. 2022) (Court has original jurisdiction and stated: "We are bound to follow the precedent of the United States Supreme Court when considering whether the Commission's adopted plans violate federal law."); *Order Regarding the Washington State Redistricting Commission's Letter to the Supreme Court*, 504 P.3d 795, 796 (Wash. 2021) ("Redistricting raises largely political questions best addressed in the first instance by commissioners appointed by the legislative caucuses where negotiation and compromise is necessary for agreement."); *In re Colorado Independent Legislative Redistricting Commission*, 2021 WL 5294962, at *3 (Colo. 2021) (subject to withdrawal); (standard of review set in Colorado Constitution that "Commission abuses its discretion if it 'applies an erroneous legal standard' "); *Legislature v. Padilla*, 469 P.3d 405 (Cal.

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[4] Due to a publishing error and reprinting, page numbers are currently not available.

[5] *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (finding reapportionment is not a political question and general assembly does not have unlimited power to draw electoral maps) (*cert. granted*, *Moore v. Harper*, 2022 WL 2347621 (June 30, 2022) (No. 21-1271)).

2020) (If Commission does not approve final map or voters disapprove of a map via referendum, the California Supreme Court appoints special masters to adjust boundaries).

During prior rounds of redistricting, redistricting commissions were involved in litigation in Alaska, *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012) (review plan in same light as regulation of administrative agency under delegation of authority from legislature, review for reasonableness and constitutionality); Arizona, *Arizona Minority Coalition for Fair Redistricting v. Arizona*, 208 P.3d 676, 684-85 (Ariz. 2009) (finding Arizona Commission acting as a legislative body, and entitled to deference except when considering equal protection principles); and Colorado, *In re Colorado General Assembly*, 332 P.3d 108, 110 (Colo. 2011) (court's role is to measure Commission plan "against the constitutional standards, according to the hierarchy of federal and state criteria").

This case is in a proper posture for further review. The judgment from the Idaho Supreme Court is final. Further review by this Court is necessary to define the role of administrative bodies when a federal constitutional question is at issue. Without a decision by this Court, the various states with redistricting commissions will continue to apply inconsistent standards when important equal protection questions are at issue. It is important at this early stage of redistricting by independent commissions that the states have clear direction regarding the role and authority of commissions when federal rights are at issue. Finally, there

is a need to provide a clear directive that only the judicial branch of government is authorized to make constitutional law determinations, and the judiciary's role in making those constitutional law decisions cannot be delegated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAN M. BENNETTS
Ada County Prosecuting Attorney

LORNA K. JORGENSEN
Counsel of Record
Deputy Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, Idaho 83702
Telephone: 208-287-7700
Email: ljorgensen@adacounty.id.gov
Counsel for Petitioner

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